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KENTUCKY

I. REGULATORY LIMITS ON CLAIMS HANDLING

A. Timing for Responses and Determinations

In Kentucky, the time requirements for handling claims that arise under "health benefit plans," which include HMOs, health service contracts, self- insured plans, and hospital or medical expense policies or certificates, are set forth in KY. REV. STAT. ANN. § 304.17A-702. *See also* KY. REV. STAT. ANN. § 304.17A-005 (defining "health benefit plan" for insurance purposes). Within 30 calendar days from the date an insurer receives a "clean claim," it must either pay or issue a notice denying or contesting the claim. *Id*.

B. Standards for Determination and Settlements

The Kentucky Administrative Regulations ("KAR") establish minimum standards for the investigation and disposition of health insurance claims. 806 KAR 12:092 § 2(1).

The Unfair Life and Health Insurance Claims Settlement Practices Regulation mandates that, within 15 days of receiving notification of a claim, an insurer must provide the insured with the necessary claim forms, instructions, and reasonable assistance so the insured can properly comply with the insurer's filing requirements. *Id*. at § 3(1). Once an insurer receives proof of loss, it must begin investigating the claim within 15 days. *Id.* at § 3(2). Additionally, an insurer must, within a reasonable time, affirm or deny any liability on claims, as well as offer payment within 30 calendar days of receipt of due proof of loss. *Id.* at § 3(4). Conversely, if a claim is denied, insurers must send written notice of denial within 15 calendar days of the determination. *Id.* at § 3(9). The notice shall refer to the policy provision, condition, or exclusion upon which the denial is based. *Id.*

If the parties to an insurance contract wish to settle a disputed claim, the settlement must be supported by sufficient consideration. *Posey v. Lambert-Grisham Hardware Co.*, 247 S.W. 30, 33 (Ky. 1923). In the insurance context, however, it is well settled in Kentucky that sufficient consideration exists "where it is in settlement of a claim which is unliquidated, where it is in settlement of a claim which is disputed, or where it is in settlement of a claim which is doubtful." *Id.* at 34. Claims made on behalf of a minor, though, may only be settled by the legal guardian or representative of the minor who is legally authorized to act on his or her behalf. *Branham v.* Stewart, 307 S.W.3d 94, 98 (Ky. 2010). Moreover, a court must approve all settlements in excess of $10,000 involving minors. KY. REV. STAT. ANN. §387.280. A release signed by an unemancipated minor, though, may be set aside after she becomes an adult.

Mitchell by & Through Fee v. Mitchell, 963 S.W.2d 222, 223(Ky. Ct. App. 1998) (internal citation omitted).

II. PRINCIPLES OF CONTRACT INTERPRETATION

The rules of contract interpretation in Kentucky are well established. Questions of contract interpretation are questions of law to be decided by the presiding court. *Stilger v. Flint*, 391 S.W.3d 751, 753 (Ky. 2013) ("[I]t is well established that the construction as well as the meaning and legal effect of a written instrument ... is a matter of law for the court.") (internal quotations omitted); *see also Ky. Shakespeare Festival, Inc. v. Dunaway*, 490 S.W.3d 691, 695 (Ky. 2016) ("The interpretation of a contract, including determining whether a contract is ambiguous, is a question of law to be determined de novo on appellate review."). A contract is construed in its entirety, jointly with all writings that are part of the same transaction. *Citizens Fidelity Bank & Trust Co. v. United States*, 209 F. Supp. 254, 256 (W.D. Ky. 1962); *see also Acro-Bramer, Inc. v. Markel Ins. Co.*, 55 S.W.3d 841, 845 (Ky. Ct. App. 2000) ("Under Kentucky law, a contract must be construed as a whole, and all writings that are part of the same agreement are construed together."); *City of Louisa v. Newland*, 705 S.W. 2d 916, 919 (Ky. 1986) ("Any contract or agreement must be construed as a whole, giving effect to all parts and every word in it if possible.").

Repugnant provisions—clauses that run contrary to a contract's obvious or essential purpose—should be disregarded. *Int'l Union of Operating Eng'rs v. J.A. Jones Const. Co.*, 240 S.W.2d 49, 56 (Ky. 1951). "The whole agreement should, if possible, be construed so as to conform to an evident consistent purpose." *Id*.; *see also Eastham v. Church*, 219 S.W.2d 406, 409 (Ky. 1949) ("Fairness, justice[,] and common understanding must enter into the interpretation of any instrument, and an apparent mistake in the use of words will not be permitted to impair what was the real intention of the parties or to defeat their obvious purpose."). Furthermore, definite, unambiguous provisions prevail over less-definite provisions. *Id*.

The interpretation of a fully integrated agreement is "directed to the meaning of the terms of the writing in light of the circumstances." *Cook United, Inc. v. Waits*, 512 S.W.2d 493, 495 (Ky. 1974). Additionally, the primary consideration during such interpretation is the intent of the parties to the contract, which is deduced from the language of the instrument. *Reynolds Metal Co. v. Glass*, 195 S.W.2d 280, 283 (Ky. 1946) (citing *Dep't of Revenue v. McIlvain*, 195 S.W.2d 63 (Ky. 1946)); *Wilcox v. Wilcox*, 406 S.W.2d 152, 153 (Ky. 1966). "When no ambiguity exists in the contract, [the court will] look only as far as the four corners of the document to determine the parties' intentions." *Hoheimer v. Hoheimer*, 30 S.W.3d 176, 178 (Ky. 2000). If that language is plain and unambiguous, then its meaning should be upheld as expressed. *Reynolds*, 195 S.W.2d at 284; *O'Bryan v. Massey-Ferguson, Inc.*, 413 S.W.2d 891, 893 (Ky. 1966) ("In the absence of ambiguity[,] a written instrument will be enforced strictly according to its terms."). Indeed, courts are instructed to give the words in a contract their "ordinary meaning as persons with the ordinary and usual understanding would construe them." *City of Louisville v. McDonald*,

819 S.W.2d 319, 320 (Ky. Ct. App. 1991). A court will enforce the plain and unambiguous language even if such enforcement will lead to an unusual result. *Reynolds*, 195 S.W.2d at 284. Where the parties reduce their agreement to a clear and definite writing which makes a complete contract, their rights and obligations are controlled by the contract language. *Bullock v. Young*, 67 S.W.2d 941, 946 (Ky. 1934). The contract must stand as written, absent a plea of fraud or mutual mistake. *Id*.

Where the language of a contract is adjudged ambiguous, courts will review materials extrinsic to the agreement. *Gibson v. Sellars*, 252 S.W.2d 911, 913 (Ky. 1952). Specifically, parole evidence is admissible to clarify obscure or ambiguous terms. *Id.* A contract is ambiguous only "if a reasonable person would find it susceptible to a different or inconsistent interpretation." *Cantrell Supply, Inc. v. Liberty Mut. Ins. Co.*, 94 S.W.3d 381, 385 (Ky. App. 2002). Where it is possible to interpret the language of the contract in more than one way, the interpretation which is consistent with the document as a whole prevails. *Frear v. P.T.A Indus., Inc.*, 103 S.W. 3d 99, 106 (Ky. 2003). Moreover, "if an ambiguity exists, 'the court will gather, if possible, the intention of the parties from the contract as a whole, and in doing so will consider the subject matter of the contract, the situation of the parties and the conditions under which the contract was written,' by evaluating extrinsic evidence as to the parties' intentions." *Id*. (quoting *Whitlow v. Whitlow*, 267 S.W.2d 739, 740 (Ky. 1954)).

In Kentucky, the "ordinary meaning" and "construction against drafter" rules are enforced. *Cook United, Inc. v. Waits*, 512 S.W.2d 493, 495 (Ky. 1974); *Pulliam v. Wiggins*, 580 S.W.2d 228, 231 (Ky. Ct. App. 1978). The former accords the words of a contract their ordinary meaning unless the context indicates that the parties to the agreement intended to assign a different meaning to the terms at issue. *Waits*, 512 S.W.2d at 495 (Ky. 1974). The latter requires a contract be construed strictly against the party who prepared it. *Pulliam*, 580 S.W.2d at 231 (Ky. Ct. App. 1978) ("[I]t is axiomatic that a contract must be construed more strongly against the party who prepared it."). Further, "in cases of doubtful construction, [courts] will resolve the doubt against the maker of the instrument in favor of the party thereto who did not take part in its preparation." *Fid. & Deposit Co. of Md. v. Lyon*, 124 S.W.2d 74, 77 (Ky. 1939); *see also B. Perini & Sons v. S. Ry. Co.*, 239 S.W.2d 964, 966 (Ky. 1951) ("No rule is better established than that, when a contract is susceptible of two meanings, it will be construed strongest against the party who drafted and prepared it."); *Krausgill Piano Co. v. Fed. Elec. Co.*, 287 S.W. 962, 963 (Ky. 1927); *Home Folks Mobile Homes, Inc. v. Meridian Mut. Ins. Co.*, 744 S.W.2d 749, 750 (Ky. Ct. App. 1987) ("Generally, ambiguities in insurance policies, as with other contracts, are construed against the drafter.");

A contract of adhesion is one in which the party to the contract with inferior bargaining power is relegated to either adhere to the contract as draft or reject it. *Conseco Fin. Serv. Corp. v. Wilder*, 47 S.W.3d 335, 342 (Ky. Ct. App. 2001). With adhesion contracts, courts have held, "[i]f the contract has two constructions, the one most favorable to the [non-drafter] must be adopted[,]" and "[i]f the contract language is ambiguous, it must be liberally construed to resolve any doubts in favor of the [non-drafter]." *Wolford v. Wolford*, 662 S.W.2d 835, 838 (Ky. 1984).

"Uniformly, contracts of adhesion...are construed against the party who formulated the terms and any doubt resolved in favor of the other party." *Ky. Lottery Corp. v. Casey*, 862 S.W.2d 888, 889 (Ky. 1993).

III. CHOICE OF LAW

As applied to contract disputes, Kentucky courts apply the law of the state which has the most significant relationship to the transaction and parties. *Lewis v. Am. Family Ins. Grp.*, 555 S.W.2d 579, 582 (Ky. 1977) (citing with favor the "most significant relationship test" of the §188 of the Restatement (Second) of Conflict of Laws and, more specifically, that section of the Second Restatement applicable to insurance contracts); *Grange Prop. & Cas. Co. v. Tenn. Farmers Mut. Ins. Co.*, 445 S.W.3d 51, 54 (Ky. Ct. App. 2014).

Nonetheless, Kentucky courts tend to be "egocentric or protective" concerning choice of law questions. *Paine v. La Quinta Motor Inns, Inc.*, 736 S.W.2d 355, 357 (Ky. Ct. App. 1987) (overruled on other grounds). Thus, even if the parties to a contract have agreed to apply the law of another state, Kentucky will apply its own laws if there are "sufficient contacts [with Kentucky] and no overwhelming interests to the contrary [.]" *Harris Corp. v. Comair, Inc.*, 712 F.2d 1069, 1071 (6th Cir. 1983); *e.g., Breeding v. Mass. Indem. and Life Ins. Co.*, 633 S.W.2d 717, 719 (Ky. 1982) (applying Kentucky substantive law despite the insurance contract's express provision that Delaware law would govern).

With regard to forum-selection clauses, Kentucky courts have held that these provisions are *prima facie* valid, and the burden rests on the movant to prove that enforcement is unreasonable. *Ky. Farm Bureau Mut. Ins. Cos. V. Henshaw*, 95 S.W.3d 866, 867 (Ky. 2003) (internal citation omitted). In this regard, Kentucky has adopted Section 80 of the Restatement (Second) of Conflicts of law, which provides: "[t]he parties' agreement as to the place of the action cannot oust a state of judicial jurisdiction, but such an agreement will be given effect unless it is unfair or unreasonable." *Prudential Res. Corp. v. Plunkett.*, 583 S.W.2d 97, 99 (Ky. Ct. App. 1979).

When the reasonableness of a forum-selection provision is challenged, Kentucky court consider several factors, including disparity of bargaining power, inconvenience of holding trial in the specified forum, law governing formation of contract, place of execution of contract, and the location of parties and witnesses. *Id.*; *Aries Entm't, LLV v. Puerto Rican Ass'n for Hispanic Affairs, Inc.*, 591 S.W.3d 850, 856 (Ky. Ct. App. 2019); *see also Perzocki*, 938 S.W.2d at 889.

IV. DUTIES IMPOSED BY STATE LAW

A. Duty to Defend

1. Standard for Determining Duty to Defend

Under Kentucky law, "an insurer has a duty to defend if there is any allegation which potentially, possibly or might come within the coverage terms of the insurance policy." *Aetna Cas. & Sur. Co. v. Commonwealth*, 179 S.W.3d 830, 841 (Ky. 2005) (citing *James Graham Brown Foundation, Inc. v. St. Paul Fire & Marine Ins. Co.*, 814 S.W.2d 273, 279 (Ky. 1991)). While an insurer has a duty to defend if an allegation "might come within the coverage terms of the insurance policy,[. . .]this duty to defend ends once the insurer establishes that the liability is in fact not covered by the policy." *Ky. Ass'n of Counties All Lines Fund Trust v. McClendon*, 157 S.W.3d 626, 635 (Ky. 2005). The duty to defend, however, is separate and distinct from the obligation to pay any claim. *St. Paul Fire & Marine Ins. Co*., 814 S.W.2d at 279.

2. Issues with Reserving Rights

If the insurer believes there is no coverage, it has several options. *See generally* 806 KAR 12:092. First, it may defend the claim and preserve its right to challenge the coverage by way of a reservation of rights letter. *Id*. Alternatively, an insurer might elect not to defend. Where an insurer elects not to defend, however, and coverage is later found, the insurer is liable for "all damages naturally flowing from" its failure to provide a defense. *Eskridge v. Educator and Executive Insurers, Inc.*, 677 S.W.2d 887, 889 (Ky. 1984). Such damages include reimbursement of defense costs and expenses, if the insured retains an attorney, and the amount of a default judgment, if the insured does not. *See Grimes v. Nationwide Mut. Ins. Company*, 705 S.W.2d 926, 932 (Ky. Ct. App. 1985).

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

1. Criminal Sanctions

Nearly every state has a "Slayer Statute." Per the statute, a beneficiary that takes the life of the decedent forfeits his or her right to the property, including the proceeds of any policy, of the decedent. Kentucky Revised Statute § 381.280(1) states:

> If the husband, wife, heir-at-law, beneficiary under a will, joint tenant with the right of survivorship or the beneficiary under any insurance policy takes the life of the decedent or victimizes the decedent by the commission of any felony under KRS Chapter 209 and in either circumstance is convicted therefor, the person so convicted forfeits all interest in and to the property of the decedent, including any interest he or she would receive as surviving joint tenant, and the property interest or insurable interest so forfeited descends to the decedent's other heirs-at-law, beneficiaries, or joint tenants, unless otherwise disposed of by the decedent. A judge sentencing a person for an offense that triggers a forfeiture under this section shall inform the defendant of the provisions of this section at sentencing.

2. The Standards for Compensatory and Punitive Damages

An insured may recover consequential and punitive damages in tort when an insurance company acts in bad faith. *Wittmer v. Jones*, 864 S.W.2d 885, 890 (Ky. 1993). To successfully prosecute a bad-faith claim, the plaintiff must adduce evidence of intentional misconduct or reckless disregard of the plaintiff's rights sufficient for a jury to award punitive damages. *Id*. If there is such evidence, the jury should award consequential damages and may award punitive damages. *Id.* The jury's decision as to whether to award punitive damages is always a matter within the jury's discretion. *Id*.

3. Insurance Regulations to Watch

Regulations addressing the privacy of health information are codified in 806 KAR 3:210 - 3:230 and serve as Kentucky's version of the Gramm-Leach-Bliley Act. Pursuant to this regulation, insurers must "implement a comprehensive written information security program that includes administrative, technical, and physical safeguards for the protection of customer information. 806 KAR 3:230 § 2. These safeguards are not uniform, however, and "shall be appropriate to the size and complexity of the [insurer] and the nature and scope of its activities." *Id.*

4. State Arbitration and Mediation Procedures

The Kentucky Uniform Arbitration Act covers arbitration agreements between insurers. *See* KY. REV. STAT. ANN. § 417.200, *et. seq*. When parties enter an insurance agreement which provides for arbitration in Kentucky, such agreement confers jurisdiction on any court of competent jurisdiction in this state to enforce the agreement and enter judgment on an award. *Id.*

Insurance policies requiring arbitration of a dispute are subject to the same revocation standards as found elsewhere in Kentucky law. KY. REV. STAT. ANN. § 417.050. An insurance policy providing for "voluntary arbitration" will be enforceable, subject to disapproval if it contract contains misleading or ambiguous language or headings. KY. REV. STAT. ANN. § 304.14-130.

Non-binding arbitration is not recognized under the Kentucky Uniform Arbitration act, and policies providing for the same may be subject to disapproval. *Id*.

Surety contracts that contain arbitration provisions are enforceable. *See Buck Run Baptist Church, Inc. v. Cumberland Sur. Ins. Co.*, 983 S.W.2d 501, 501 (Ky. 1998).

5. State Administrative Entity Rule-Making Authority

The Commissioner of Insurance "may make reasonable rules and regulations necessary for or as an aid to the effectuation of any provision of [the Insurance Code]. No such rule or

regulation shall extend, modify, or conflict with any law of this state or the reasonable implications thereof." KY. REV. STAT. ANN. § 304.2-110.

V. EXTRACONTRACTUAL CLAIMS AGAINST INSURERS: ELEMENTS AND REMEDIES

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

All insurance companies owe their insureds a duty of good faith and fair dealing. *O'Bannon v. Aetna Cas. & Sur. Co.*, 678 S.W.2d 390, 392 (Ky. 1994) (internal citation omitted). Violation of the duty is actionable. *See id*. Kentucky law provides for both common-law and statutory bad-faith claims. *See Guar. Nat'l Ins. Co. v. George*, 953 S.W.2d 946, 950 (Ky. 1997).

Policy coverage is a prerequisite to maintaining a bad-faith claim. *See Curry v. Fireman's Fund Ins. Co.*, 784 S.W.2d 176, 177-78 (Ky. 1989). A self-insured tortfeasor is not subject to the Kentucky Unfair Claims Settlement Practices Act ("UCSPA") or to a suit for bad faith, because it is not engaged in the business of insurance. *Davidson v. Am. Freightways*, 25 S.W.3d 94, 102 (Ky. 2000).

Regardless of the theory or the type of claimant, plaintiff asserting a bad-faith claim must prove by clear and convincing evidence: (1) the insurer is obligated to pay the claim under the terms of the policy; (2) the insurer lacks a reasonable basis in law or fact for denying the claim; and, (3) the insurer knowingly or recklessly denied the claim without a reasonable basis. *Hollaway v. Direct Gen. Ins. Co. of Miss.*, 497 S.W.3d 733, 737-738 (Ky. 2016); *see also Wittmer v. Jones*, 864 S.W.2d 885, 890 (Ky. 1993); *Shepherd v. UnumProvident Corp.*, 381 F. Supp. 2d 608, 612 (E.D. Ky. 2005). Element one is judged by an objective standard, and elements two and three are judged by a subjective standard. *Id.*

Under Kentucky law, a first-party claimant and a third-party claimant are both entitled to bring bad-faith claims under common law or statute as set forth below. *Feathers v. State Farm Fire & Cas. Co.*, 667 S.W.2d 693, 696 (Ky. Ct. App. 1983), *overruled on other grounds by Federal Kemper Ins. Co. v. Hornback*, 711 S.W.2d 844 (Ky. 1986); *Manchester Ins. Co. & Indem. Co. v. Grundy*, 531 S.W.2d 493, 501 (Ky. 1975).

1. Common-Law Bad Faith

Common-law bad faith may arise under a number of scenarios, including bad faith by a carrier for refusal to defend, settle, or indemnify a claim. *Id.*

The standard for determining whether an insurer has acted in bad faith for failing to tender policy limits to a third party is whether the insurer's failure to settle exposed the insured to an unreasonable risk of having a judgment rendered against him in excess of the policy limits, by considering the following factors: (1) whether the claimant offered to settle the case within the policy limits; (2) whether the insured requested that the insurer settle; and (3) what the

probability of recovery in excess of the policy limits is, examining how clear liability is and how extensive damages are. *See Grundy*, 531 S.W.2d at 500.

2. Statutory Bad Faith

The UCSPA applies to persons or entities engaged in the business of insurance by entering into contracts of insurance. *Davidson*, 25 S.W.3d at 99-100. The UCSPA does not create a cause of action for damages for violation of its provisions; a cause of action arises, however, under the doctrine of negligence *per se*, which is codified at KY. REV. STAT. ANN. § 446.070. *State Farm Mut. Auto. Ins. Co. v. Reeder*, 763 S.W.2d. 116, 116 (Ky. 1988); *cf. Phoenix Healthcare of Ky., L.L.C. v. Ky. Farm Bureau Ins. Co.*, 120 S.W.3d 726, 727 (Ky. 2003) ("KRS § 446.070 does not authorize a private cause of action for the violation of a statute if the statute itself specifies a civil remedy available to the aggrieved party.").

The root of the UCSPA is that an insurance company is required to deal in good faith with a claimant with respect to a claim that the company is legally obligated to pay. *Davidson*, 25 S.W.3d at 100. The UCSPA provides that the following acts constitute unfair claims settlement practice:

> (1) Misrepresenting pertinent facts or insurance policy provisions relating to coverages at issue;
>
> (2) Failing to acknowledge and act reasonably promptly upon communications with respect to claims arising under insurance policies;
>
> (3) Failing to adopt and implement reasonable standards for the prompt investigation of claims arising under insurance policies;
>
> (4) Refusing to pay claims without conducting a reasonable investigation based upon all available information;
>
> (5) Failing to affirm or deny coverage of claims within a reasonable time after proof of loss statements have been completed;
>
> (6) Not attempting in good faith to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear;
>
> (7) Compelling insureds to institute litigation to recover amounts due under an insurance policy by offering substantially less

than the amounts ultimately recovered in actions brought by such insureds;

(8) Attempting to settle a claim for less than the amount to which a reasonable man would have believed he was entitled by reference to written or printed advertising material accompanying or made part of an application;

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

(10) Making claims payments to insureds or beneficiaries not accompanied by statement setting forth the coverage under which the payments are being made;

(11) Making known to insureds or claimants a policy of appealing from arbitration awards in favor of insureds or claimants for the purpose of compelling them to accept settlements or compromises less than the amount awarded in arbitration;

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

(13) Failing to promptly settle claims, where liability has become reasonably clear, under one (1) portion of the insurance policy coverage in order to influence settlements under other portions of the insurance policy coverage;

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

(15) Failing to comply with the decision of an independent review entity to provide coverage for a covered person as a result of an external review in accordance with KRS §§ 304.17A-621, 304.17A-623, and 304.17A-625.

> (16) Knowingly and willfully failing to comply with the provisions of KRS 304.17A-714 when collecting claim overpayments from providers; or
>
> (17) Knowingly and willfully failing to comply with the provisions of KRS 304.17A-708 on resolution of payment errors and retroactive denial of claims.

KY. REV. STAT ANN. §304.12-230. To prevail on a statutory bad-faith claim premised on a violation of the UCSPA, a claimant must demonstrate that an insurer's conduct was outrageous because of reckless indifference to the victim's rights. *See Wittmer*, 864 S.W.2d at 885; *Hollaway*, 497 S.W.3d at 737-738. The UCSPA applies to the insurer's conduct both before and during litigation. *Knotts v. Zurich Ins. Co.*, 197 S.W.3d 512, 517 (Ky. 2006). Only settlement conduct is admissible, however, not litigation conduct. *Id*.

B. Fraud

In Kentucky, a contract induced by fraud is voidable. *Baxter v. Davis*, 67 S.W.2d 678, 681 (1934). To prevail, a claimant must prove the following six elements by clear and convincing evidence: (1) material representation, (2) which is false, (3) known to be false or made recklessly, (4) made with inducement to be acted upon, (5) acted in reliance thereon and (6) causing injury. *Ross v. Powell*, 206 S.W.3d 327, 330 (Ky. 2006); *United Parcel Service Co. v. Rickert*, 996 S.W.2d 464, 468 (Ky. 1999). Fraud may be established through circumstantial evidence; such evidence, however, must, through "the character of the testimony ... as well as the documents, circumstances and facts presented[,]" provide a consistent picture of the case. *Rickert*, 996 S.W.2d at 468.[,]

A material fact must be "substantial or vital enough" as to place a duty on a party to disclose it. *Kaze v. Compton*, 283 S.W.2d 204, 208 (Ky. 1955); *see also Faulkner Drilling Co., Inc. v. Gross*, 943 S.W.2d 634, 638 (Ky. Ct. App. 1997) ("As to what constitutes a material fact, the question is whether it is likely to affect the conduct of a reasonable man and be an inducement of the contract."). The determination of materiality necessarily folds into the duty analysis. The duty to disclose is dependent upon several variable factors including the "intelligence of the parties," "the nature of the contract," and the "nature of the fact not disclosed." William S. Haynes, Kentucky Jurisprudence, Torts, § 10-4 (1987) (citing *Prosser and Keeton on Torts*, 5th ed., ch. 18, § 106 (1984)). Simply put, the more material the information, the greater the likelihood that there is a duty to disclose it.

The damaged party must also have relied upon the misrepresentation to his or her detriment. *Rickert*, 996 S.W.2d at 469. In particular, the false statement must cause the plaintiff's detrimental action or inaction. *Id*. "The mere fact that one of the parties is less astute than the other does not justify him in relying on the other's opinion." Restatement (Second) of Contracts § 169 cmt. b (1979). To this end, when parties "have roughly equal skill and judgment

each must form his own opinion and neither is justified in relying on the other's." *Id*. In fact, praise and mere "puffery" cannot form the basis for reliance. *Id*.; *see also Osborne v. Howard*, 242 S.W. 852, 853 (Ky. 1922). Finally, the non-disclosure of the material information must have induced the Plaintiffs to enter into the sales contract. *See* Restatement (2d) of Contracts § 164 cmt. c (1979) ("No legal effect flows from either a non-fraudulent or a fraudulent misrepresentation unless it induces action by the recipient, that is, unless he manifests his assent to the contract in reliance on it.").

Finally, the non-disclosure of the material information must have induced the Plaintiffs to enter into the contract. *See* Restatement (2d) of Contracts § 164 cmt. c (1979) ("No legal effect flows from either a non-fraudulent or a fraudulent misrepresentation unless it induces action by the recipient, that is, unless he manifests his assent to the contract in reliance on it.") To establish an actionable case of fraud based upon suppression of a fact, the plaintiff must demonstrate (1) that defendant had a duty to disclose a material fact, (2) that defendant failed to disclose same, (3) that defendant's failure to disclose the material fact induced plaintiff to act, and (4) that plaintiff suffered actual damages therefrom. *Smith v. GMC.*, 979 S.W.2d 127, 129 (Ky. Ct. App. 1998) (internal citations omitted). It is well established that mere silence is not fraudulent, absent a duty to disclose. *Hall v. Carter*, 324 S.W.2d 410, 412 (Ky. 1959). A duty to disclose may arise from a fiduciary relationship, from a partial disclosure of information, or from particular circumstances, such as where one party to a contract has superior knowledge and is relied upon to disclose same. *See GMC* 979 S.W.2d at 129.

C. Intentional or Negligent Infliction of Emotional Distress

Kentucky has adopted a strict standard for intentional infliction of emotional distress "aimed at limiting frivolous suits and avoid[ing] litigation in situations where only bad manners and mere hurt feelings are involved." *Craft v. Rice*, 671 S.W.2d 247, 249 (Ky. 1984). To set forth a *prima facie* case, the following elements must be established: (1) the defendant's conduct must be intentional or reckless, (2) there must be a causal connection between the defendant's conduct and the emotional distress, (3) the emotional distress must be severe, and (4) the conduct must be outrageous and intolerable in that it offends the generally accepted standards of decency and morality. *Id*. at 251. The defendant must have acted with "the specific purpose of inflicting emotional distress" or "intended his specific conduct and knew or should have known that emotional distress would likely result." *Id.* at 249. In addition, the conduct must be "so extreme in degree. . .as to be regarded as atrocious." *Humana of Ky., Inc. v. Seitz*, 796 S.W.2d 1, 3 (Ky. 1990).

Kentucky also recognizes a cause of action for negligent infliction of emotional distress. Claims for negligent infliction of emotional distress should be "analyzed under general negligence principles." *Osborne v. Keeney*, 399 S.W.3d 1, 17 (Ky. 2012). Stated differently, to prevail, a plaintiff must first present evidence of the recognized elements of a common law negligence claim: (1) the defendant owed a duty of care to the plaintiff, (2) breach of that duty, (3) injury to the plaintiff, and (4) legal causation between the defendant's breach and the

plaintiff's injury." *Id*. Recovery in cases of negligent infliction of emotional distress, however, is proper only where the plaintiff suffers a "severe" or "serious" emotional injury which is supported by expert medical or scientific proof. *Id*.

D. State Consumer Protection Laws, Rules and Regulations

Kentucky's Consumer Protection Act ("KCPA") declares unlawful: "[u]nfair, false, misleading or deceptive acts or practices in the conduct of any trade or commerce. KY. REV. STAT. ANN. § 367.170(1). Under the KCPA, "unfair shall be construed to mean unconscionable." KY. REV. STAT. ANN. § 367.170(2). "The terms 'false, misleading, and deceptive' has sufficient meaning to be understood by a reasonably prudent person of common intelligence." *Stevens v. Motorist Mut. Ins. Co.*, 759 S.W.2d 819, 820 (Ky. 1988). The statute is broadly construed in order to protect Kentucky consumers for allegedly illegal acts. *See generally id.*

The purchase of an insurance policy is covered by the KCPA. *Id*. at 820; *see also Morton v. Bank of the Bluegrass*, 18 S.W.3d 353, 360 (Ky. Ct. App. 1999) (internal citation omitted). Coverage under the KCPA, however, does not extend to third-party claims. *See Anderson v. Nat'l Sec. Fire & Cas. Co.*, 870 S.W.2d 432, 435-36 (Ky. Ct. App. 1993); *Skilcraft Sheetmetal, Inc. v. Ky. Machinery, Inc.*, 836 S.W.2d 907, 909 (Ky. App. 1992) ("The language of the statute plainly contemplates an action by a purchaser against his immediate seller….The legislature intended that privity of contract exist between the parties in a suit alleging a violation of the [KCPA].").

VI. DISCOVERY ISSUES IN ACTIONS AGAINST INSURERS

A. Discoverability of Claims Files Generally

The Kentucky work-product privilege applies where a party demonstrates that it had a reasonable expectation of litigation, and the document was prepared or obtained because of the anticipated litigation. *Haney v. Yates*, 40 S.W.3d 352, 356 (Ky. 2000). Generally, Kentucky courts permit discovery of opinion work product only where the mental impressions are at issue in the case, and the need for the material is compelling. *See Morrow v. Brown, Todd & Heyburn*, 957 S.W.2d 722, 726 (Ky. 1997). Accordingly, claims files may be discoverable in a bad faith action in Kentucky state and federal courts:

> The Court of Appeals for the Sixth Circuit has observed that "[t]he fact that [the defendant insurer] reasonably anticipate[s] litigation…does not answer whether it prepared the disputed documents 'because of' litigation or not." *In re Professionals Direct*, 578 F.3d 432, 439 (6th. Cir. 2009). "Making coverage decisions is part of the ordinary business of insurance[,] and if the 'driving force' behind the preparation of these documents was to assist [the insurer] in deciding coverage, then they are not protected by the work-product doctrine." *Id*. at 439; *see also Cardinal Aluminum Co. v. Cont'l Cas. Co.*, 2015 U.S. Dist. LEXIS 95361, *10 (W.D. Ky. July 22, 2015) ("Documents prepared as part of the ordinary business functions of an insurance broker are not prepared as a result of

anticipated litigation."); *Flagstar Bank v. Fed. Ins. Co.*, 2006 U.S. Dist. LEXIS 58559, *13 (E.D. Mich. Aug. 21, 2006) ("A factual investigation of an insurance claim by an insurance company is within the ordinary course of an insurance company's business. Because an insurance company has a duty in the ordinary course of business to investigate and evaluate claims made by its insured, the claims files containing such documents usually cannot be entitled to work product protection.") (internal citation and quotation omitted).

B. Discoverability of Reserves

The Kentucky Supreme Court has held that the procedures for setting reserves is generally discoverable, even if a Plaintiff already knows the reserve amount in his or her particular case. *Grange Mut. Ins. Co. v. Trude*, 151 S.W.3d 803, 813-14 (Ky. 2004)

> The relevance of procedures for setting reserves to a bad faith claim seems obvious. Reserve setting procedures are controlled in part by statute. Evidence of [an insurer'] reserve setting procedures would help show whether [the insurer] is following the statutory and regulatory requirement and whether the specific system for setting reserves is aimed at achieving unfairly low values. We find that this evidence is relevant to the bad faith claim.

Id. Of note, the issue of discoverability is distinct from admissibility at trial. *Id*. at 812.

C. Discoverability of Existence of Reinsurance and Communications with Reinsurers

"'Reinsurance' is a contract under which an originating insurer (called the 'ceding' insurer) procures insurance for itself in another insurer (called the 'assuming' insurer or the 'reinsurer') with respect to part or all of an insurance risk of the originating insurer." KY. REV. STAT. ANN. § 304.5-130. In Kentucky there are no cases directly addressing the discoverability of the existence of a reinsurance and/or communications with a reinsurer.

Generally, Kentucky Rule of Civil Procedure 62.02(1) provides,

> Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the

information sought appears reasonably calculated to lead to the discovery of admissible evidence.

D. Attorney-Client Communications

Kentucky Rule of Evidence 503 codifies the attorney-client privilege. In *Asbury v. Beerbower*, the Kentucky Supreme Court extended the scope of attorney-client privilege to communications between "an insured and a representative of his insurer" in situations where the insurer defends the insured and selects the insured's attorney. 589 S.W.2d 216, 217 (Ky. 1979). Further, in *Commonwealth v. Melear*, the Kentucky Court of Appeals expanded the scope of the attorney-client privilege, finding that "communications between an insured and his or her insurer are privileged under the attorney-client relationship." 638 S.W.2d 290, 291 (Ky. Ct. App. 1982).

VII. DEFENSES IN ACTIONS AGAINST INSURERS

A. Misrepresentations/Omissions: During Underwriting or During Claim

"All statements and descriptions in any application for an insurance policy...shall be deemed to be representations and not warranties." KY. REV. STAT ANN. § 304.14-110. An insured's misrepresentation, omission, or incorrect statements in an application, however, may prevent recovery from the insurance policy. *Id.*

A material misrepresentation is one that affects the decision to accept or reject the application. KY. REV. STAT ANN. § 304.14-110(3); *Progressive N. Ins. v. Corder*, 15 S.W.3d 381, 383 (Ky. 2000). An action for rescission "must be established by clear and convincing evidence." *Nat'l Life Co. v. Wilkerson's Adm'r*, 71 S.W.2d 1034, 1036 (Ky. 1934) (internal citations omitted).

An insured's misrepresentations may preclude recovery under an applicable insurance policy when the misrepresentations are fraudulent or material to the risk of the underwriters, or if an underwriter, acting in conformity with the general custom of business, would have rejected the risk if the falsity or misrepresentation had been. *John Hancock Mut. Life Ins. Co. v. Conway,* 240 S.W.2d 644, 646 (Ky. 1951); *State Farm Mut. Auto. Ins. Co. v. Crouch*, 706 S.W.2d 203, 207 (Ky. Ct. App. 1986); KY. REV. STAT. ANN. § 304.14-110. This rule reflects the public policy that "those who apply for insurance [must] be honest and forthright in their representations." *Crouch*, 706 S.W.2d at 207.

B. Failure to Comply with Conditions

Under Kentucky law, insurance contracts are "subject to the application of the doctrine of reasonable expectations and must be interpreted so as to provide the insured entity with all coverage that it may reasonably expect under the policy." *Deerfield Ins. Co. v. Warren County Fiscal Court*, 88 S.W.3d 867, 873 (Ky. Ct. App. 2002) (citing *Simon v. Cont'l Ins. Co.*, 724 S.W.2d

210, 212 (Ky. 1986)). Insurers have the right to impose reasonable conditions on insurance coverage. *See Jones v. Bituminous Cas. Corp.*, 821 S.W.2d 798, 802 (Ky. 1991). Further, a clear manifestation of the insurance company's intent to exclude coverage will defeat an insured's reasonable expectations concerning a policy's coverage. *Brown v. Ind. Ins. Co.*, 184 S.W.3d 528, 540 (Ky. 2005).

Following the "modern trend," however, the Kentucky Supreme Court has held that an insurance company may not rely on noncompliance be the insured with a condition of the policy, if the company has sustained no prejudice by reason of the noncompliance. *Newark Ins. Co. v. Ezell*, 520 S.W.2d 318, 321 (Ky. 1975); *See also Jones*, 821 S.W.2d at 801 ("An insurer cannot withdraw coverage on the ground of a notice condition unless the insurer demonstrates that it was prejudiced by the act of its insured.").

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

An insurer cannot defeat an insured's judgment by relying upon the insured's noncompliance with a consent clause unless it first demonstrates that it was prejudiced by the noncompliance. *Ezell*, 520 S.W.2d at 321.

Further, "[a] settlement which includes a covenant to forebear execution in exchange for an assignment of a claim against the tortfeasor's agent or broker is neither intrinsically collusive nor illusory for lack of damages." *Associated Ins. Serv. v. Garcia*, 307 S.W.3d 58, 66 (Ky. 2010). There is inherently a risk of collusion in stipulated judgments that bind parties who were not parties to the judgment. *Id*. at 68-69. Yet, in Kentucky, "a stipulated judgment or prejudgment settlement should not be summarily upheld or rejected when reached in conjunction with an assignment of claims and agreement to forebear execution." *Id*. Accordingly, a Kentucky court will enforce a prejudgment settlement after assessing the reasonableness of the award. *Id*. at 69.

D. Preexisting Illness or Disease Clauses

An insurer may contest a clean claim where "[t]he insurer has reasonable documented grounds to believe that the claim involves a preexisting condition." KY. REV. STAT. ANN. § 304.17A-706; *see also* KY. REV. STAT. ANN. § 304.17A-200(9) (providing that an insurer must inform a small employer regarding the provision of a health benefit plan relating to any preexisting condition exclusion.).

At trial, when an insurer defends its denial of an insured's claim for health insurance benefits by asserting that the insured's covered disease first manifested itself within a special exclusion, "the insurer has the burden of providing that sufficient symptoms of the disease were present within the specified time period that a physician would be led to diagnose the disease." *Inter-Ocean Ins. Co. v. Engler*, 632 S.W.2d 459, 461 (Ky. Ct. App. 1982).

Under a disability policy requiring that a covered injury occur directly and independently of all other causes, and be caused by an accident during the effective period, a preexisting infirmity or disease may be considered the cause of a subsequent disability only when it substantially contributes to the disability or loss. *Cont'l Cas. Co. v. Freeman*, 481 S.W.2d 309, 314 (Ky. 1972). A "predisposition" or "susceptibility to injury," whether stemming from weakness or a previous illness or injury, does not necessarily amount to a substantial contributing cause because of a "mere" relationship of undetermined degree. *Id*. Further, when a policy defines a preexisting condition as an "injury or disease," pregnancy does not constitute a pre-existing condition. *Aubrey v. Aetna Life Ins. Co.*, 886 F.2d 119, 123 (6th Cir. 1989).

E. Statutes of Limitations and Repose

In Kentucky, the statute of limitations for causes of action based on written contracts executed before July 15, 2014 is 15 years. KY. REV. STAT. ANN. § 413.090(2). For those written contracts executed after July 15, 2014, the statute of limitations is 10 years. KY. REV. STAT. ANN. § 413.160. If the contract being sued upon is not in writing, the limitation is 5 years. KY. REV. STAT. ANN. § 413.120(1). An insurance company may contract with their insureds for another filing period for a contractual claim, however, so long as the term is "reasonable." *Gordon v. Ky. Farm Bureau Ins. Co.*, 914 S.W.2d 331, 333 (Ky. 1995); *see also Elkins v. Ky. Farm Bureau Mut. Ins. Co.,* 844 S.W.2d 423, 425 (Ky. Ct. App. 1992). A "reasonable" contract limiting the statute of limitations for causes of action under contract law must provide for at least 2 years. *See Elkins*, 884 S.W.2d at 425 (finding a one-year limitation unreasonable). "Contracts undertaking to fix a longer period of limitation than that established by statute are against public policy and are void." *Ky. River Coals & Feed Co. v. McConkey*, 111 S.W.2d 418, 419 (Ky. 1937) (internal citations omitted).

VIII. TRIGGER AND ALLOCATION ISSUES FOR LONG-TAIL CLAIMS

A. Trigger of Coverage

"Long-tail" exposure claims, also called continuous exposure cases "occur when a plaintiff's injuries manifesting at present are the result of exposure to a harmful agent across some previous period of time. *Ky. League of Cities Ins. Serv. Assn' v. Argonaut Great Cent. Ins.*, 2013 U.S. Dist. LEXIS 2663, *7 (W.D. Ky. Jan. 7, 2013). Kentucky courts have held that the "cause approach" is appropriate when determining the number of "occurrences" under an insurance policy. *See Davis v. Ky. Farm Bureau Mut. Ins. Co.*, 495 S.W.3d 159, 165 (Ky. Ct. App. 2016) (citing *Cont'l Ins. Co. v. Hancock*, 507 S.W.2d 146, 148 (Ky. 1973)).

B. Allocation Among Insurers

In Kentucky, no cases have been decided addressing the manner in which defense costs should be apportioned to consecutive insurers in long-tail actions. *See generally Ky. League of Cities*, 2013 U.S. Dist. LEXIS 263; *but see Aetna Cas. & Sur. Co. v. Commonwealth.*, 179 S.W.3d

830 (Ky. 2005) (arguably applying pro-rata apportionment); *Ins. Co. of N. Am. v. Forty-eight Insulations Inc.*, 633 F.2d 1212 (6th Cir. 1980) (finding each policy responsible for the pro-rata share of the total damage that occurred during the policy period).

IX. CONTRIBUTION ACTIONS

A. Claim in Equity vs. Statutory

Contribution is based upon two or more parties' common liability to an injured party. *Emp'r Mut. Liability Ins. Co. v. Griffin Constr. Co.*, 280 S.W.2d 179, 179 (Ky. 1955). In Kentucky, the right to contribution is statutory. KY. REV. STAT. ANN. § 412.030 ("Contribution among wrongdoers may be enforced where the wrong is a mere act of negligence and involves no moral turpitude."); *see* also *Leitner v. Hawkins*, 223 S.W.2d 988, 988 (Ky. 1949) (holding that after settlement, an insurance carrier of one joint tortfeasor may seek contribution from another tortfeasor).

B. Elements

A claimant seeking contribution must show that the "injuries for which he paid damages were proximately caused by the combined negligence of himself and the defendant against whom the right of contribution is claimed, and that he has satisfied a judgment or made reasonable payment in bona fide compromise." *Brown Hotel Co. v. Pittsburgh Fuel Co.*, 244 S.W.2d 165, 167 (Ky. 1949); *see also Se. Greyhound Lines v. Myers*, 156 S. W. 2d 161, 161 (Ky. 1941).

X. DUTY TO SETTLE

Generally, an insurer owes an insured the duty of good faith and fair dealing. *See* KY. REV. STAT. ANN. § 304.12-230. The statute sets out what constitutes unfair claims and settlement practice. In pertinent part,

> It is an unfair claims settlement practice for any person to commit or perform any of the following acts or omissions:
>
> (8) Attempting to settle a claim for less than the amount to which a reasonable man would have believed he was entitled by reference to written or printed advertising material accompanying or made part of an application;
>
> (9) Attempting to settle claims on the basis of an application which was altered without notice to, or knowledge or consent of the insured; [or]

> (13) Failing to promptly settle claims, where liability has become reasonably clear, under one (1) portion of the insurance policy coverage in order to influence settlements under other portions of the insurance policy coverage….

Id. Further, an insurer's duty to settle continues through the litigation. *Knotts v. Zurich Ins. Co.*, 197 S.W.3d 512, 523 (Ky. 2006) (*citing* Stephen S. Ashley, *Bad Faith Actions Liability and Damages* § 5A:6 (2005)).

XI. LH&D BENEFICIARY ISSUES

A. Change of Beneficiary

A change in beneficiary designation is governed by the plan documents, and consequently must satisfy the plan requirements. *Zurich Am. Ins. Co. v. Blevins*, 2008 U.S. Dist. LEXIS 3350, *13 (E.D. Ky. Jan. 16, 2008). Further, "[c]laims touching on the designation of a beneficiary of an ERISA benefit plan fall under ERISA's broad preemptive reach and are consequently governed by federal law*." Blevins*, 2008 U.S. Dist. LEXIS at *11 (citing *Metro. Life. Ins. Co. v. Marsch*, 119 F.3d 415, 420 (6th Cir. 1997); *Metro. Life Ins. Co. v. Pressley*, 82 F.3d 126, 129 (6th Cir. 1996); *McMillan v. Parrott*, 913 F.2d 310, 311 (6th Cir. 1990)).

Any change in beneficiary must be made by a plan participant capable of executing the necessary change in beneficiary forms. *Webb v. W. & S. Life Ins. Co.*, 2009 U.S. Dist. LEXIS 54622, *8 (W.D. Ky. June 26, 2009) (*citing Daugherty v. Daugherty*, 154 S.W. 9 (Ky. 1913)) ("[A]s with provisions of other contracts, the change of a beneficiary designation on an insurance contract can be voided by undue influence or lack of capacity, in which case the original beneficiary is entitled to the insurance money as against the new beneficiary."). Similarly, while an individual with valid power of attorney may change the beneficiary designation, the document granting power of attorney must specifically grant the attorney in fact the authority to change the beneficiary designation. *Ping v. Beverly Enters.*, 376 S.W.3d 581, 591 (Ky. 2012) (holding no statute addresses what authority may be granted by a durable power of attorney, therefore, it is left to the principal to expressly declare the authority of the attorney in fact).

B. Effect of Divorce on Beneficiary Designation

Generally, the Employee Retirement Income Security Act ("ERISA") prohibits the distribution, assignment, or garnishment of plan benefits. 29 U.S.C. § 1056(d)(1). A recognized exception, however, is a Qualified Domestic Relations Order ("QDRO"), which allows payment to a payee other than the participant himself. *See* 29 U.S.C. § 1056(d)(2)-(3).

For a divorce decree to be deemed a QDRO, it must substantially comply with ERISA's requirements for QDRO. *See* 29 U.S.C. § 1056(d)(3); *see also generally Aetna Life Ins. Co. v.*

Montgomery, 286 F. Supp. 2d 832 (E.D. Mich. 2003). A "domestic relations order" is defined as follows:

> [A]ny judgment, decree, or other order (including approval of a property settlement agreement) which (I) relates to the provision of child support, alimony payments, or marital property rights to a spouse, former spouse, child or other dependent of a participant, and (II) is made pursuant to a State domestic relations law (including a community property law).

29 U.S.C. §1056(d)(3)(B)(ii). A QDRO is an order or decree that acknowledges the existence of an alternate payee's right to receive all or a portion of the participant's benefits that are payable under an ERISA plan. *Id.* A valid QDRO overrides a beneficiary designation. *See generally Metro. Life Ins. Co. v. Marsh*, 119 F.3d 415 (6th Cir. 1997); *Mattingly v. Hoge*, 2008 U.S. App. LEXIS 937 (6th Cir. Jan. 8, 2008); *Metro. Life Ins. Co. v. Moore*, 2005 U.S. App. LEXIS 27781 (6th Cir. Dec. 14, 2005). Not all domestic relations orders, however, are QDROs:

> A domestic relations order meets the requirements of this subparagraph only if such order clearly specified (i) the name and last known mailing address (if any) of the participant and the name and mailing address of each alternate payee covered by the order, (ii) the amount or percentage of the participant's benefits to be paid by the plan to each alternate payee, or the manner in which such amount or percentage is to be determined, (iii) the number of payments or period to which such order applies, and (iv) each plan to which such order applies.

29 U.S.C. §1056(d)(3)(C); *Marsh*, 119 F.3d 415; *Mattingly*, 2008 U.S. App. LEXIS 937; *Moore*, 2005 U.S. App. LEXIS 27781. Thus, any "pension plan," as defined 29 U.S.C. §1002(2), that attempts to allocate a retirement/pension plan participant's retirement/pension plan benefits between the participant and anyone else is prohibited, unless the division is effected through a "domestic relations order" that satisfies the requirements for a "qualified domestic relations order." *Id.*

ERISA's narrow exception for qualified domestic relations orders only applies to a "pension plan," as defined in 29 U.S.C. §1002(2). The definition does not include group life insurance or group disability benefit plans. *See id*. Further, district courts in the Sixth Circuit have concluded that a state court order may be enforced against an ERISA welfare plan if the order qualifies as a QDRO. *See generally March*, 119 F.3d 415.

XII. INTERPLEADER ACTIONS

A. Availability of Fee Recovery

An insurer or claim administrator for a plan should move for interpleader when there is a conflict between the claims of beneficiaries. *Marsh*, 119 F.3d at 418 (6th Cir. 1997) (citing *Com. Union Ins. Co. v. U.S.*, 999 F.2d 581, 583 (D.C. Cir. 1993)). Moreover, an insurance company forced to file an interpleader action in order to avoid multiple liabilities is entitled to reasonable attorney's fees. *See e.g., Mut. Life Ins. Co. of N.Y. v. Bondurant*, 27 F.2d 464, 465-66 (6th Cir. 1928); *Stitzel-Weller Distillery, Inc. v. Norman*, 39 F. Supp. 182, 188 (W.D. Ky. 1941). Once the funds subject to the interpleader action have been paid, the insurer or claim administrator is discharged from liability. KY. REV. STAT. ANN. §304.14-260.

B. Differences in State vs. Federal

"The Kentucky civil rules closely follow the federal rules and are cut from the federal cloth." *Newsome v. Love*, 699 S.W.2d 748, 749 (Ky. Ct. App. 1985) (discussing Federal Rule of Civil Procedure 26(b) and its Kentucky counterpart). Thus, the Kentucky and Federal interpleader standards are virtually identical. *Bhd. Mut. Ins. Co. v. United Apostolic Lighthouse, Inc.*, 200 F. Supp. 2d 689, 697 (E.D. Ky. 2002).