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Maryland

REGULATORY LIMITS ON CLAIMS HANDLING

Timing for Responses and Determinations

An insurer must acknowledge its receipt of notice of a claim within 15 working days of such receipt, unless payment is made within that time (*see* Code of Maryland Regulations ("COMAR") 31.15.07.03(B)(10)), and must provide appropriate replies to claimants or their representatives within 15 working days of receiving written communications "which suggest that a response is expected." COMAR 31.15.07.03(B)(15). If an insurer has not completed its investigation of a first party claim within 45 days of notification, the insurer must notify the first-party claimant, in writing, of "the actual reason that additional time is necessary to complete the investigation," and must send notice to the first-party claimant after each additional 45-day period until the insurer either affirms or denies coverage and damages. *See* COMAR 31.15.07.04(B). Additionally, failing "to provide promptly on request a reasonable explanation of the basis for a denial of a claim" constitutes an unfair claim settlement practice. *See, e.g.,* Md. Code Ann., Insurance Article ("Ins."), § 27-303(6).

Standards for Determination and Settlements

In Maryland, an insurer must adopt and implement reasonable standards for the prompt investigation of claims that arise under insurance policies. Further, Maryland law makes it an unfair claim settlement practice to, *inter alia*:

- misrepresent pertinent facts or policy provisions that relate to the claim or coverage at issue;
- refuse to pay a claim for an arbitrary or capricious reason based on all available information;
- attempt to settle a claim based on an application that is altered without notice to, or the knowledge or consent of, the insured;
- fail to include with each claim paid to an insured or beneficiary a statement of the coverage under which payment is being made;
- fail to settle a claim promptly whenever liability is reasonably clear under one part of a policy, in order to influence settlements under other parts of the policy;
- fail to provide promptly on request a reasonable explanation of the basis for a denial of a claim;
- fail to meet the requirements of Title 15, Subtitle 10B of [the Insurance Article] for preauthorization for a health care service;[i]

- fail to comply with the provisions of Title 15, Subtitle 10A of [the Insurance Article];
- fail to act in good faith, as defined under § 27-1001 of this title, in settling a first-party claim under a policy of property and casualty insurance; or
- fail to comply with the provisions of § 16-118 of this article.[ii]

Md. Code Ann., Ins. § 27-303. Additionally, insurers must investigate claims in good faith. *See, e.g., Snyder v. Chester Cty. Mut. Ins. Co.,* 264 F. Supp. 2d 332 (D. Md. 2003). The burden of proof is generally on a claimant to prove, by a preponderance of the evidence, that an insurer acted arbitrarily and capriciously in refusing to pay a claim. *See, e.g., People's Ins. Counsel Div. v. State Farm Fire & Cas. Ins. Co.,* 214 Md. App. 438, 448, 76 A.3d 517, 523 (2013); *Chicago Title Ins. Co. v. Jen*, 249 Md. App. 246, 266, 245 A.3d 150, 162 (2021); *Berkshire Life Ins. Co. v. Maryland Ins. Admin.,* 142 Md. App. 628, 791 A.2d 942 (2002). *See also* discussion below regarding bad faith claims against insurers.

PRINCIPLES OF CONTRACT INTERPRETATION

Under Maryland law, an insurance contract is generally interpreted like any other contract, with Maryland courts applying the objective theory of contracts with equal force to insurance policies. *See, e.g., 100 Inv. Ltd. P'ship v. Columbia Town Ctr. Title Co.,* 430 Md. 197, 233, 60 A.3d 1, 22 (2013) (citing *Ocean Petroleum, Co., Inc. v. Yanek,* 416 Md. 74, 86, 5 A.3d 683, 690 (2010); *Clendenin Bros., Inc. v. U.S. Fire Ins. Co.,* 390 Md. 449, 458–59, 889 A.2d 387, 393 (2006)). Like other contracts, an insurance contract is generally "measured by its terms unless a statute, a regulation, or public policy is violated thereby." *Pacific Indem. Co. v. Interstate Fire & Cas. Co.*, 302 Md. 383, 388, 488 A.2d 486, 488 (1985).

Maryland courts give the words of insurance contracts their customary, ordinary, and accepted meaning, as determined by a "reasonably prudent lay person." *Beale v. Am. Nat'l Lawyers Ins. Reciprocal*, 379 Md. 643, 660, 843 A.2d 78, 89 (2004). When the language of a contract is plain and unambiguous, the court must presume that the parties meant what they expressed. *See, e.g., Brethren Mut. Ins. Co. v. Buckley,* 437 Md. 332, 341, 86 A.3d 665, 670 (2014); *Lerner Corp. v. Three Winthrop Props., Inc.*, 124 Md. App. 679, 685, 723 A.2d 560, 563 (1999). As in any contract, words and phrases are to be accorded "their ordinary and accepted meanings as defined by what a reasonably prudent lay person would understand them to mean." *Kendall v. Nationwide Ins. Co.,* 348 Md. 157, 166, 702 A.2d 767, 771 (1997); *see also Nat'l Union Fire Ins. Co. of Pittsburgh v. David A. Bramble, Inc.,* 388 Md. 195, 208, 879 A.2d 101, 109 (2005). Maryland generally does not follow the rule that an insurance contract is to be construed most strongly against the insurer. *See Clendenin Bros., Inc. v. U.S. Fire Ins. Co.,* 390 Md. 449, 459-60, 889 A.2d 387, 393 (2006). If there is ambiguity in the contract, however, it may be resolved against the party who drafted the contract. *See Clendenin Bros., Inc.*, 390 Md. at 460, 889 A.2d at 394.

CHOICE OF LAW

Maryland follows the rule of *lex loci contractus*, "which requires that the construction and validity of a contract be determined by the law of the state where the contract was made." *Commercial Union Ins. Co. v. Porter Hayden Co.*, 97 Md. App. 442, 451, 630 A.2d 261, 266 (1993), *vacated on other grounds*, 339 Md. 150, 661 A.2d 691 (1995); *see also, e.g., Erie Ins. Exch. v. Heffernan*, 399 Md. 598, 618, 925 A.2d 636, 648 (2007); *Allstate Ins. Co. v. Hart,* 327 Md. 526, 529, 611 A.2d 100, 101 (1992) (noting Maryland courts ordinarily should apply the law of the jurisdiction where the contract was made.). "Typically, '[t]he *locus contractus* of an insurance policy is the state in which the policy is delivered and the premiums are paid.'" *Porter Hayden,* 97 Md. App. at 451-52, 630 A.2d at 266

(quoting *Aetna Cas. & Sur. Co. v. Souras,* 78 Md. App. 71, 77, 552 A.2d 908, 911 (1989)); *see also, e.g., Cigna Prop. & Cas. Cos. v. Zeitler*, 126 Md. App. 444, 480, 730 A.2d 248, 268 (1999).

With respect to causes of action sounding in tort, Maryland generally adheres to the *lex loci delicti* rule in analyzing choice of law problems. *See*, *e.g., B-Line Med., LLC v. Interactive Digital Sols., Inc.,* 209 Md. App. 22, 49, 57 A.3d 1041, 1057 (2012); *Heffernan*, 399 Md. at 618, 925 A.2d at 648-49; *Lab. Corp. of Am. v. Hood,* 395 Md. 608, 911 A.2d 841, 844 (2006). Under *lex loci delicti*, the law of the state where the tort or wrong was committed applies. *See, e.g., Hood,* 395 Md. at 613, 911 A.2d at 844. Where the events giving rise to a tort action occur in more than one state, Maryland courts generally apply "the law of the State where the injury—the last event required to constitute the tort—occurred." *Heffernan,* 399 Md. at 618, 925 A.2d at 649; *see also, e.g., Hood*, 395 Md. 608, 911 A.2d at 845. Maryland courts, however, have recognized exceptions to the general *lex loci delicti* rule, including a public policy exception under which the law of Maryland will be applied if application of the law of the place of the injury violates a "clear, strong, and important Maryland public policy." *Hood*, 395 Md. at 625, 911 A.2d at 850-51 (citing *Reed v. Campagnolo,* 332 Md. 226, 630 A.2d 1145 (1993)).

DUTIES IMPOSED BY STATE LAW

Duty to Defend

1. Standard for Determining Duty to Defend

The obligation of an insurer to defend its insured under a contract provision is generally determined by the allegations in the tort action. *See, e.g., Brohawn v. Transamerica Ins. Co.,* 276 Md. 396, 407, 347 A.2d 842, 850 (1975). If the plaintiff in a tort suit alleges a claim covered by the policy, the insurer has a duty to defend. *Brohawn*, 276 Md. at 407, 347 A.2d at 850. Phrased differently, the court engages in a two-part inquiry to determine an insurer's duty to defend an insured: (1) what is the coverage and what are the defenses under the terms and requirements of the insurance policy? (2) do the allegations in the tort action [underlying action] potentially bring the tort claim within the policy's coverage? *See Aetna Cas. & Sur. Co. v. Cochran*, 337 Md. 98, 103-04, 651 A.2d 859, 862 (1995).

In permitting the use of extrinsic evidence to establish a potentiality of coverage, Maryland courts have expressed that an insured cannot assert a frivolous defense to establish an insurer's duty to defend. *See, e.g., Cochran*, 337 Md. at 111-12, 651 A.2d at 866. "Only if an insured demonstrates that there is a reasonable potential that the issue triggering coverage will be generated at trial can evidence to support the insured's assertion be used to establish a potentiality of coverage under an insurance policy." *Id.* Even if a tort plaintiff does not allege facts which clearly bring the claim within or without the policy coverage, the insurer still must defend if there is a potentiality that the claim could be covered by the policy. *See, e.g., Brohawn*, 276 Md. at 407, 347 A.2d at 850. Thus, if there is any doubt as to whether there is a duty to defend, it is resolved in favor of the insured. *See, e.g., Springer v. Erie Ins. Exch.,* 439 Md. 142, 94 A.3d 75 (2014); *Cochran,* 337 Md. at 107, 651 A.2d at 864.

2. Limiting an Insurer's Duty to Defend

Generally, a conflict of interest does not relieve an insurer of its responsibility to defend the insured. *See, e.g., Brohawn,* 276 Md. at 412, 347 A.2d at 852. The insurer must either provide an independent attorney to represent the insured, or pay for the cost of defense incurred by the insured hiring an attorney of their choice. *See, e.g., Allstate Insurance Co. v. Campbell*, 334 Md. 381, 392, 639 A.2d 652, 657 (1994); *Bankers & Ship. Ins. v. Electro Enter.*, 287 Md. 641, 647-48, 415 A.2d 278, 282 (1980). The contractual duty to defend cannot be removed by the insurer's simply creating its own conflict of interest, however, an insurer may include a provision in the policy limiting its duty to defend the insured when a conflict of interests arises. *See, e.g., Brohawn,* 276 Md. at 410, 347 A.2d at 851. Further, an insurer may avoid its duty to defend on the ground of delayed notice, provided that the insurer establishes by a preponderance of affirmative evidence that the delay in giving notice has resulted in actual prejudice to the insurer. *Sherwood Brands, Inc. v. Hartford Acc. And Indem. Co.*, 347 Md. 32, 42, 698 A.2d 1078, 1083 (1997); *see also Maynard v. Westport Ins. Corp.,* 208 F. Supp. 2d 568, 574 (D. Md. 2002), *aff'd*, 55 Fed. Appx. 667 (4th Cir. 2003).

State Privacy Laws; Insurance Regulatory Issues; Arbitration/Mediation

1. Criminal Sanctions

In Maryland, it is unlawful for any person to:

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

Md. Code Ann., Courts & Judicial Proceedings Article ("Cts. & Jud. Proc."), § 10-402(a). Violating this statute is a felony that carries a penalty of imprisonment for up to 5 years and/or a fine of up to $10,000. Md. Code Ann., Cts. & Jud. Proc. § 10-402(b).

Maryland law also protects a state resident's privacy and personal information, and includes employees and job applicants. To protect personal information from unauthorized access, use, modification, or disclosure, Maryland law requires that a business that owns, maintains, or licenses personal information of an individual residing in Maryland must implement and maintain reasonable security procedures and practices "that are appropriate to the nature of the personal information owned, maintained, or licensed and the nature and size of the business and its operations." Md. Code Ann., Commercial Law Article ("Com. Law"), § 14-3503(a). When destroying a customer's, an employee's, or a former employee's records that contain personal information, a business must take reasonable steps to protect against unauthorized access to or use of the personal information, taking into account:

- The sensitivity of the records;
- The nature and size of the business and its operations;
- The costs and benefits of different destruction methods; and
- Available technology.

See Md. Code Ann., Com. Law § 14-3502(b). A violation of this statute constitutes an unfair or deceptive trade practice as defined under the Maryland Consumer Protection Act, codified in Title 13 of the Commercial Law Article. *See* Md. Code Ann., Com. Law § 14-3508. As a consequence, violating this statute is a misdemeanor and on conviction carries a fine up to $1,000 and/or imprisonment for up to one year, in addition to any civil penalties. *See* Md. Code Ann., Com. Law § 13-411(a).

2. Standards for Compensatory and Punitive Damages

Compensatory damages are "awarded to a person as compensation, indemnity or restitution for harm sustained by him," and include economic and non-economic damages. *Eastern Shore Title Company v. Ochse*, 453 Md. 303, 334, 160 A.3 1238, 1256 (2017). Maryland has statutory caps on non-economic damages, including related to personal injury and wrongful death cases, *see* Md. Code Ann., Cts. & Jud. Proc. § 11-108, and healthcare malpractice claims. *See, e.g.,* Md. Code Ann., Cts. & Jud. Proc. § 3-2A-09. Any of the plaintiff's reasonable costs and expenses "resulting from the defendant's malicious and tortious conduct, including the expenses of the litigation, which are not covered by the award of compensatory damages," are matters which may be considered in an award of punitive damages. *Bowden v. Caldor, Inc.,* 350 Md. 4, 36, 710 A.2d 267, 283 (1998).

The United States Supreme Court has held that the United States Constitution imposes limits upon awards of punitive damages, and that such an award cannot be "grossly excessive" in relation to "the State's legitimate interests in punishment and deterrence." *BMW of North America, Inc. v. Gore,* 517 U.S. 559, 568 (1996). In Maryland, punitive damages may only be awarded when "the plaintiff has established that the defendant's conduct was characterized by evil motive, intent to injure, ill will, or fraud," and must bear a reasonable relationship to any compensatory damages. *Bowden*, 350 Md. at 23, 710 A.2d at 276 (quoting *Owens–Illinois v. Zenobia,* 325 Md. 420, 460 (1992)). "Awarding punitive damages based upon the heinous nature of the defendant's tortuous conduct furthers the historical purposes of punitive damages—punishment and deterrence." *Id.* at 22-23 (citing *Owens–Illinois,* 325 Md. at 454). However, "substantial expenses incurred by the plaintiff will not justify a punitive damages award which is disproportionate to the gravity of the defendant's tortious conduct or which is disproportionate to the defendant's ability to pay." *Id.* at 37. The burden is on the plaintiff to establish the basis for an award of punitive damages by clear and convincing evidence. *See, e.g., Owens–Illinois,* 325 Md. at 469.

3. State Arbitration and Mediation Procedures

Maryland arbitration procedures are governed by Section 3-201, *et seq.*, of the Courts & Judicial Proceedings Article of the Maryland Code. To initiate arbitration proceedings, notice of the initial petition for an order shall be served in the manner provided by law or rule of court for the service of summons in an action. *See* Md. Code Ann., Cts. & Jud. Proc. § 3-205. A written agreement between parties to submit any existing controversy to arbitration or a provision in a written

contract to submit any future controversy to arbitration is valid and enforceable, and is irrevocable, except upon grounds that exist at law or in equity for the revocation of a contract. *See* Md. Code Ann., Cts. & Jud. Proc. § 3-206.

Arbitrators are appointed pursuant to the method of appointment in the arbitration agreement. *See* Md. Code Ann., Cts. & Jud. Proc. § 3-211(a). If the agreement is silent as to appointing arbitrators, then a party may petition the court to appoint one or more arbitrators. *See* Md. Code Ann., Cts. & Jud. Proc. § 3-211(b). The powers of the arbitrators may be exercised by a majority, unless provided otherwise by the agreement or by statute, including rendering a final decision. *See* Md. Code Ann., Cts. & Jud. Proc. §§ 3-212; 3-215(a). The arbitration award must be finalized in writing and signed by the arbitrators who joined in the award. *See* Md. Code Ann., Cts. & Jud. Proc. § 3-219(a). Once an award is made, a copy must be delivered or mailed to each party. *See* Md. Code Ann., Cts. & Jud. Proc. § 3-219(c). A party must raise any objections within the time required, otherwise, that objection is waived. *See* Md. Code Ann., Cts. & Jud. Proc. § 3-219(d). Any party may petition the court to confirm the award. Md. Code Ann., Cts. & Jud. Proc. § 3-227. The court must confirm the award unless the other party has filed an application to vacate, modify, or correct the award within the time set by statute. *See* Md. Code Ann., Cts. & Jud. Proc. § 3-227.

A court must modify or correct an arbitration award if: there was an evident miscalculation of figures or an evident mistake in the description of any person, thing, or property referred to in the award; the arbitrators have awarded upon a matter not submitted to them and the award may be corrected without affecting the merits of the decision upon the issues submitted; or the award is imperfect in a matter of form, not affecting the merits of the controversy. *See* Md. Code Ann., Cts. & Jud. Proc. § 3-223(b). A court must vacate an arbitration award if the award was procured by corruption, fraud, or other undue means; there was evident partiality by an arbitrator appointed as a neutral, corruption in any arbitrator, or misconduct prejudicing the rights of any party; the arbitrators exceeded their powers; the arbitrators refused to postpone the hearing upon sufficient cause being shown for the postponement, refused to hear evidence material to the controversy, or otherwise so conducted the hearing, contrary to the provisions of Section 3-213 the Courts & Judicial Proceedings Article, as to prejudice substantially the rights of a party; or there was no arbitration agreement, the issue was not adversely determined in an arbitration hearing, and the party did not participate in the arbitration hearing without raising the objection. *See* Md. Code Ann., Cts. & Jud. Proc. § 3-224(b).

The Maryland Mediation Confidentiality Act, codified at Md. Code Ann., Cts. & Jud. Proc. § 3-1801, *et seq.*, mandates that any person participating in a mediation, including the mediator, maintain the confidentiality of all mediation communications, and protects such communications from disclosure in any judicial, administrative, or other proceeding. *See* Md. Code Ann., Cts. & Jud. Proc. § 3-1803(a). This requirement applies to mediations in which:

- The parties are required to mediate by law;
- The parties are referred to mediation by an administrative agency or arbitrator; or
- The mediator states in writing to any and all parties to the mediation and persons with whom the mediator has engaged in mediation communications that:
    - The mediation communications will remain confidential in accordance with this subtitle; and

- The mediator has read and, consistent with State law, will abide by the Maryland Standards of Conduct for Mediators during the mediation.

See Md. Code Ann., Cts. & Jud. Proc. § 3-1802(a).

4. State Administrative Entity Rule-Making Authority

The Maryland Administrative Procedure Act, codified in Title 10, Subtitles 1, 2 and 3 of the Maryland Code, State Government Article ("State Gov't."), applies to branches of the Executive branch. *See* Md. Code Ann., State Gov't. § 10-102. In order to be effective, a regulation must contain the citation to the statutory authority for the regulation, and be submitted to the Attorney General or unit counsel for legality. *See* Md. Code Ann., State Gov't. §§ 10-106; 10-107(b). Generally, a proposed regulation must be submitted to the Joint Committee on Administrative, Executive, and Legislative Review, the Department of Legislative Services, and the Administrator of the Division of State Documents at least fifteen (15) days before the date a proposed regulation is submitted to the Maryland Register for publication. *See* Md. Code Ann., State Gov't. § 10-110(c). Then, an administrative agency may only adopt a proposed regulation after at least forty-five (45) days have elapsed after the regulation's publication to the Maryland Register. *See* Md. Code Ann., State Gov't. § 10-111. Before the expiration of the 45-day review period, *inter alia*, the Joint Committee may, by majority vote, oppose the adoption of any proposed regulation. *See* Md. Code Ann., State Gov't. § 10-111.1(a). When reviewing a proposed regulation, the Joint Committee considers whether the proposed regulation is in conformity with the statutory authority of the promulgating agency, and reasonably complies with the legislative intent of the statute under which the regulation was promulgated. Md. Code Ann., State Gov't. § 10-111.1(b). If an agency changes the text of a proposed regulation that differs substantively from the text previously published in the Maryland Register, the agency cannot adopt the proposed regulation without proposing it anew and adopting in accordance with all statutory requirements. *See* Md. Code Ann., State Gov't. § 10-113(b).

After adopting a regulation, the agency submits a notice of adoption for publication in the Maryland Register. *See* Md. Code Ann., State Gov't. § 10-114. Any time before a proposed regulation's adoption, an agency may withdraw the regulation. Md. Code Ann., State Gov't. § 10-116(a). Further, an agency's failure to adopt a proposed regulation within one (1) year after its last publication in the Register constitutes withdrawal of regulation. *See* Md. Code Ann., State Gov't. § 10-116(b).

The Administrative Procedure Act also authorizes an interested person to petition an agency to adopt a regulation. *See, e.g.,* Md. Code Ann., State Gov't. § 10-123(a). Within 60 days after the receipt of the petition, the agency can either initiate the procedures for adoption of the regulation, or deny the petition and state the reasons in writing. *See* Md. Code Ann., State Gov't. § 10-123(b).

Further, any person may file a petition for a declaratory judgment on the validity of any regulation in the circuit court for the county where the petitioner resides or has a principal place of business. *See* Md. Code Ann., State Gov't. § 10-125(a). The court can determine the validity of the regulation, if it finds that the regulation or its threatened application interferes or threatened to interfere with or impair the legal rights and privileges of the petitioner. *See* Md. Code Ann., State Gov't. § 10-125(b). The court may declare a regulation invalid if: the provision violates any provision of the United States or Maryland Constitution; the provision exceeds the statutory authority of the agency; or the agency failed to comply with statutory requirements for adoption of the provision.

Md. Code Ann., State Gov't. § 10-125(d). Notice, that complies with statutory requirements, must be sent to the parties in contested cases. *See* Md. Code Ann., State Gov't. § 10-208. If not prohibited by any other law, an agency can dispose of a contested case by stipulation, settlement, consent order, default, withdrawal, summary disposition or dismissal. Md. Code Ann., State Gov't. § 10-210.

An agency's final decision or order adverse to a party in an adjudication proceeding must be in writing or stated in the record. Md. Code Ann., State Gov't. § 10-221(a). The final decision must include findings of fact, conclusions of law, and the order, and the parties or their attorneys must be notified about the decision or order either personally or by mail. *See* Md. Code Ann., State Gov't. § 10-221(b)-(c).

Any person aggrieved by the final decision of the agency in a contested case may seek judicial review in the circuit court for the county where any party resides or has a principal place of business. *See* Md. Code Ann., State Gov't. § 10-222(a)-(c). Additionally, any agency that was a party before the agency is entitled to seek judicial review of a decision. *See* Md. Code Ann., State Gov't. § 10-222(a)(2). The court may remand the case for further proceedings, affirm the decision, or reverse or modify the decision if any substantial right of the petitioner is prejudiced. *See* Md. Code Ann., State Gov't. § 10-222(h). It should be noted that filing a petition for judicial review will not automatically stay enforcement of the agency's final decision. *See* Md. Code Ann., State Gov't. § 10-222(e)(1).

Any party to a contested case can timely seek civil enforcement of an administrative order by filing a petition for civil enforcement in an appropriate circuit court for the county where any party resides or has a principal place of business. *See* Md. Code Ann., State Gov't. § 10-222.1(a)-(b). In an action for civil enforcement, the court can provide any of the following: declaratory relief; temporary or permanent injunctive relief; a writ of mandamus; or any other civil remedy provided by law. Md. Code Ann., State Gov't. § 10-222.1(e). Then, any party or an agency aggrieved by the final decision of the circuit court can appeal to the Appellate Court of Maryland. *See* Md. Code Ann., State Gov't. § 10-223.

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

EXTRACONTRACTUAL CLAIMS AGAINST INSURERS: ELEMENTS AND REMEDIES

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

1. First Party

In 2007, the Maryland General Assembly amended the Unfair Claims Settlement Practices Act and created a new cause of action that an insured may bring against an insurer after exhausting administrative procedures before the Maryland Insurance Administration ("MIA"). *See* Md. Code

Ann., Ins. § 27-301, *et seq*.; Md. Code Ann., Cts. & Jud. Proc. § 3-1701. Significantly, this statute applies only to first-party claims under property and casualty insurance policies, or individual disability insurance policies, issued, sold, or delivered in Maryland. *See* Md. Code Ann., Cts. & Jud. Proc. § 3-1701(b). Thus, it does not apply to, *e.g.,* life insurance policies, and many other types of insurance. The statute applies in a civil action by an insured either to determine the coverage that exists under the insurer's insurance policy, or to determine the extent to which the insured is entitled to receive payment from the insurer for a covered loss, in which the insured alleges the insurer failed to act in good faith, to permit an insured to recover, in addition to any actual damages (up to the limits of the applicable policy), expenses and litigation costs incurred by the insured (including attorneys' fees up to one-third of the actual damages recovered), and interest on those expenses or costs. *See* Md. Code Ann., Cts. & Jud. Proc. § 3-1701(d)-(g). The amendment makes an insurer's failure to settle a claim in good faith a violation of the Unfair Claims Settlement Practices Act, allowing for enhanced administrative sanctions, and defines "Good faith" to mean "an informed judgment based on honesty and diligence supported by evidence the insurer knew or should have known at the time the insurer made a decision on a claim." Md. Code Ann., Cts. & Jud. Proc. § 3-1701(a). However, an insurer may not be found to have failed to act in good faith "solely on the basis of delay in determining coverage or the extent of payment to which the insured is entitled if the insurer acted within the time period specified by statute or regulation for investigation of a claim by an insurer." Md. Code Ann., Cts. & Jud. Proc. § 3-1701(f).

2. Third Party

It is well established in Maryland that there is a significant difference between a first-party claim and a third-party claim against the insured. *See, e.g., McCauley v. Suls*, 123 Md. App. 179, 187, 716 A.2d 1129, 1133 (1998). In the third-party claim situation, the standard "liability policy gives the insurer exclusive control over the investigation, litigation, and settlement of claims against the insured." *Johnson v. Fed. Kemper Ins. Co.,* 74 Md. App. 243, 247, 536 A.2d 1211 (1988). Thus, the insurer owes a duty to the third-party insured "to attempt to settle the claim within the limits of the policy since the insured has surrendered the right to do so itself." *Johnson*, 74 Md. App. at 247, 536 A.2d at 1213. A liability insurer may be sued for bad faith if it unjustifiably refuses to settle a claim within the policy limits, and thereby exposes the insured to an "excess" judgment. *See, e.g., Wolfe v. Anne Arundel Cty.,* 135 Md. App. 1, 17, 761 A.2d 935 (2000), *aff'd,* 374 Md. 20, 821 A.2d 52 (2003). A recovery on a bad faith claim is "for the amount of judgment obtained against the insured which is in excess of the policy limits." *Allstate Ins. Co. v. Campbell,* 334 Md. 381,394, 639 A.2d 652 (1994).

A liability insurer's mistaken refusal to provide any defense whatsoever, on the grounds that there is no valid insurance contract or that there is no coverage under an insurance contract, gives rise to a breach of contract action against the insurer. *See, e.g., Mesmer v. Maryland Auto. Ins. Fund,* 353 Md. 241, 252, 725 A.2d 1053, 1058 (1999). Such a mistaken refusal, however, does not give rise to the tort action for an alleged bad faith failure to settle a third-party claim against the insured. *See, e.g., Mesmer*, 353 Md. at 252, 725 A.2d 1058.

Fraud

In order to recover damages for fraud under Maryland law, a plaintiff must prove the following elements, by clear and convincing evidence:

- the defendant made a false representation to the plaintiff;
- the defendant knew that the representation was false or made the representation with reckless indifference as to its truth;
- the misrepresentation was made for the purpose of defrauding the plaintiff;
- the plaintiff relied on the misrepresentation and had the right to rely on it; and
- the plaintiff suffered compensable injury resulting from the misrepresentation.

Hoffman v. Stamper, 385 Md. 1, 29, 867 A.2d 276, 293 (2005); *see also Hoffman*, 385 Md. at 16, 867 A.2d at 285; *Nails v. S & R*, 334 Md. 398, 415, 639 A.2d 660, 668 (1994); *Environmental Trust v. Gaynor*, 370 Md. 89, 97, 803 A.2d 512, 516 (2002).

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

Intentional or Negligent Infliction of Emotional Distress

In *Harris v. Jones*, the Maryland Supreme Court recognized the tort of intentional infliction of emotional distress. 281 Md. 560, 566, 380 A.2d 611, 614 (1977). The elements of intentional infliction of emotional distress are:

- The conduct must be reckless;
- The conduct must be extreme and outrageous;
- There must be a causal connection between the wrongful conduct and the emotional distress; and
- The emotional distress must be severe.

Lasater v. Guttman, 194 Md. App. 431, 448, 5 A.3d 79, 89 (2010). Since *Harris*, Maryland courts have limited recovery for intentional infliction of emotional distress to "extreme and outrageous conduct." *See Khalifa v. Shannon,* 404 Md. 107, 945 A.2d 1244 (2008). Extreme and outrageous conduct has been described as conduct that is "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." *Lasater*, 194 Md. App. at 448, 5 A.3d at 89.

Maryland does not recognize the separate and distinct tort of negligent infliction of emotional distress. *See, e.g., Alban v. Fiels*, 210 Md. App. 1, 16, 61 A.3d 867, 876 (2013); *Lapides v. Trabbic,* 134 Md. App. 51, 66, 758 A.2d 1114, 1122 (2000). A plaintiff may, however, recover for emotional distress arising out of tortious conduct as an element of damages. *See, e.g., Alban*, 210 Md. App. at 16, 61 A.3d at 876.

State Consumer Protection Laws, Rules and Regulations

The Maryland Consumer Protection Act ("MCPA"), codified in the Commercial Law Article ("Com. Law.") of the Maryland Code, prohibits certain unfair and deceptive trade practices, as defined in Com. Law. § 13-301, in the sale, lease, rental, loan, or bailment of any consumer goods, consumer realty, or consumer services; the offer for sale, lease, rental, loan, or bailment of consumer goods, consumer realty, or consumer services; the offer for sale of course credit or other educational services; the extension of consumer credit; or the collection of consumer debts. *See* Md. Code Ann., Com. Law § 13-303. The MCPA authorizes a private cause of action for recovery of damages, and authorizes attorney's fees at the discretion of the court. *See* Md. Code Ann., Com. Law § 13-408. Significantly, the MCPA does not apply to "the professional services of . . . [an] insurance company authorized to do business in the State, [or an] insurance producer licensed by the State." Md. Code Ann., Com. Law § 13-104.

DISCOVERY ISSUES IN ACTIONS AGAINST INSURERS

Discoverability of Claims Files Generally

The Maryland Supreme Court has held that, where the issue is one of contract interpretation, discovery of claims files of other insureds "would be only contingently and marginally relevant" to that issue. *North River Insurance Co. v. Mayor and City Council of Baltimore City*, 343 Md. 34, 66, 680 A.2d 480, 496 (1996).

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

Discoverability of Reserves

Although Maryland appellate courts do not appear to have directly addressed the discoverability of loss reserves in reported decisions, other jurisdictions have held that loss reserves may be discoverable and admissible on any number of issues which commonly are presented in bad faith actions. *See, e.g., Grange Mut. Ins. Co. v. Trude*, 151 S.W.3d 803, 813 (Ky. 2004) (finding evidence of reserve settling procedures was relevant to bad faith claim because it would help to show whether insurer followed statutory and regulatory requirements and whether system for setting reserves was aimed at achieving unfairly low values); *CIGNA Ins. Co. v. Cooper Tire & Rubber, Inc.,* 180 F. Supp. 2d 933, 936 (N.D. Ohio 2001) (finding reserves discoverable, relevant to issues of mistake and intent); *Kirchoff v. American Cas. Co. of Reading, Pennsylvania*, 997 F.2d 401 (8th Cir. 1993); *Samson v. Transamerica Ins. Co.,* 30 Cal. 3d. 220, 240, 178 Cal. Rptr. 343, 636 P. 2d. 32 (1981). As these cases indicate, loss reserves information may lead to admissible evidence regarding whether an insurance company adjusted a claim in good faith or made a prompt investigation, assessment or settlement of a claim.

Discoverability of Existence of Reinsurance and Communications with Reinsurers

Maryland appellate courts do not appear to have directly addressed the discoverability of existence of reinsurance and communications with reinsurers in reported decisions.

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 – a relationship that involves potential conflicts of interest. *See, e.g., Roussos v. Allstate Insurance Co.*, 104 Md. App. 80, 89, 655 A.2d 40, 44 (1995) (citing *Allstate Ins. Co. v. Campbell,* 334 Md. 381, 395, 639 A.2d 652 (1994) ("A common conflict of interest is where coverage is at issue; for example, where a plaintiff raises both covered and uncovered claims in a suit.")). Further, a conflict of interest may arise where the claim exceeds the amount of coverage. *See, e.g., Campbell*, 334 Md. at 395–96, 639 A.2d 652.

From defense counsel's perspective, with potential conflicts of interest come potential malpractice claims, and a malpractice danger posed by conflicts of interest is that the insured (the client) will allege that defense counsel protected the insurer's interest at the insured's expense, and to the insured's ultimate detriment. *See, e.g., Nat'l Union Fire Ins. Co. of Pittsburgh v. Wadsworth Golf Const. Co. of Midwest,* 160 Md. App. 257, 863 A.2d 347 (2004); *Fidelity & Cas. Co. v. McConnaughy,* 179 A.2d 117, 121 (Md. 1962) (stating that an attorney can represent insured and insurer unless a conflict develops). Maryland ethics opinions have also pointed out that defense attorneys assuming they represent only the insured conflicts with substantive law and could jeopardize some of the insured's rights, including regarding the attorney-client privilege, when necessary information must be disclosed to the insurer.

DEFENSES IN ACTIONS AGAINST INSURERS

Misrepresentations/Omissions: During Underwriting or During Claim

Maryland decisions interpreting Section 12-207 of the Insurance Article and its statutory predecessors have held that an insurance policy issued in reliance upon an incomplete or false statement or an omission as to a matter which is material to the risk being assumed is avoidable and may be rescinded by the insurer. *See, e.g., Jackson v. Hartford Life & Annuity Ins. Co.,* 201 F. Supp. 2d 506, 511-12 (D. Md. 2002) (citations omitted). This right to rescission is available simply by virtue of the material misrepresentation—the insurer is under no duty to investigate the applicant's medical history or go any further than the four corners of the insurance application. *See, e.g., Chawla v. Transamerica Occidental Life Ins. Co.,* 440 F.3d 639, 647 (4th Cir. 2006). It is also irrelevant whether the material misrepresentation was made in good faith. *See, e.g., Calomiris v. Woods*, 353 Md. 425, 438, 727 A.2d 358, 364 (1999); *Fitzgerald v. Franklin Life Ins. Co.,* 465 F. Supp. 527, 537 (D. Md. 1979), *aff'd,* 634 F.2d 622 (4th Cir. 1980); *Stumpf v. State Farm Mut. Auto. Ins. Co.,* 252 Md. 696, 711, 251 A.2d 362, 369 (1969). As an alternative to rescission, the insurer may use the applicant's misrepresentation as a complete defense to an action on the policy. *See id.*; *Hofmann v. John Hancock Mut. Life Ins. Co.,* 400 F. Supp. 827, 829 (D. Md. 1975); *Nationwide Ins. Co. v. McBriety*, 246 Md. 738, 744-45, 230 A.2d 81, 84-85 (1967); *Globe Reserve Mut. Life Ins. Co. v. Duffy*, 76 Md. 293, 301-02, 15 A. 227, 228-29 (1892).

Regarding materiality: "A false representation in an application for insurance is material to the risk if it is such as

would reasonably influence the insurers decision as to whether or not it should issue the policy requested." *Bryant v. Provident Life & Acc. Ins. Co.,* 22 F. Supp. 2d 495 (D. Md. 1998); *see also Fitzgerald*, 465 F. Supp. at 527; *Jackson,* 201 F. Supp. 2d at 512-13; *Silberstein v. Massachusetts Mut. Life Ins. Co.,* 189 Md. 182, 190, 55 A.2d 334, 338-39 (1947). Generally, the question of materiality is one of fact for the jury to decide. *See, e.g., John Hancock Mut. Life Ins. Co. of Boston, Mass. v. Adams*, 205 Md. 213, 220, 107 A.2d 111, 113 (1954). "Where, however, bad faith or falsity or materiality is shown by uncontradicted or clear and convincing evidence the question may be one of law." *Adams*, 205 Md. at 220, 107 A.2d at 114; *see also Myrick v. Prime Ins. Syndicate Inc.,* 395 F.3d 485, 492 (4th Cir. 2005); *Bryant,* 22 F. Supp. 2d at 498; *Fitzgerald,* 465 F. Supp. at 536.

Maryland courts have found that an applicant or beneficiary may not be relieved of an error or omission in an application by contending that the omission was innocent or was the fault of the agent, and Maryland law places upon an insured a heavy burden to examine an application attached to a policy delivered to him or her to verify its accuracy. *See, e.g., Parker v. Prudential Ins. Co. of Am.,* 900 F.2d 772, 777-78 (4th Cir. 1990); *Fitzgerald*, 465 F. Supp. at 534-41; *Serdenes v. Aetna Life Ins. Co.,* 21 Md. App. 453, 459-62, 319 A.2d 858, 862-63 (1974).

In order to sustain a defense to a claim on a policy or rescission on the basis of a material misrepresentation, an insurer is not required to establish any causal connection between the condition misrepresented or omitted from the application and the condition giving rise to the claim on the policy. *See, e.g., Parker,* 900 F.2d at 777; *Hofmann,* 400 F. Supp. at 831-33; *Fitzgerald,* 465 F. Supp. at 535; *Loving v. Mutual Life Ins. Co.,* 140 Md. 173, 179-80, 117 A. 323, 326 (1922). In order to obtain a decree rescinding a policy, an insurer must prove that it has fully and promptly tendered to the insured the return of all premiums paid plus interest to the date of tender. *See Hofmann,* 400 F. Supp. at 828; *Silberstein*, 189 Md. at 187-88, 55 A.2d at 337-38; *Steigler v. Eureka Life Ins. Co.,* 146 Md. 629, 650, 127 A. 397, 405 (1925).

Failure to Comply with Conditions

Section 19-110 of the Insurance Article provides:

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

Md. Code Ann., Ins. § 19-110. Further, "Insurance companies frequently assert noncompliance with contractual duties as grounds to disclaim liability." *Snyder v. Chester Cty. Mut. Ins. Co.,* 264 F. Supp. 2d 332, 337 (D. Md. 2003) (citing *Allstate Ins. Co. v. State Farm Mut. Auto. Ins. Co.*, 363 Md. 106, 118-19, 767 A.2d 831 (2001)). Provisions requiring the submission of information upon request, or "cooperation clauses," may be an express condition or a covenant. *Snyder*, 26 F. Supp.2d at 337 (citing *Hartford Fire Ins. Co. v. Himelfarb*, 355 Md. 671, 680, 736 A.2d 295 (1999)). "Strict compliance with an express condition is required to maintain the insurer's payment obligation," but "mere substantial compliance with a covenant is sufficient." *Id*. Substantial compliance is founded when the insured: (1) supplies reasonably requested information to a reasonable extent, and (2) undertakes to submit the balance when it is reasonably possible. *Id.*

A policy may also include a provision requiring the insured to provide written notice to the insurer of the proof of loss. If an insured fails to give an insurer a sworn statement in proof of loss or a written notice as required by an insurance contract, the insured is not prevented from recovering under the insurance contract unless the insured fails to provide the sworn statement in proof of loss or written notice required by the insurance contract within 15 days after receiving the insurer's written request for the statement or notice. *See* Md. Code Ann., Ins. § 19-111.

Further, the insurer must establish by a preponderance of affirmative evidence that the delay in giving notice resulted in actual prejudice to the insurer. *See, e.g., Pac. Emp'rs Ins. Co. v. Eig,* 160 Md. App. 416, 438, 864 A.2d 240, 254 (2004). An insurer may not, therefore, disclaim coverage for either lack of notice or failure to cooperate unless it demonstrates that the deficiency has resulted in actual prejudice to the insurer. *See, e.g., Prince George's Cty. v. Local Gov't Ins. Trust*, 388 Md. 162, 180, 879 A.2d 81, 92 (2005).

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

An insurer, under some circumstances, may be estopped from asserting the viability of a no-action clause. *See, e.g., Nationwide Mut. Ins. Co. v. Regional Elec. Contractors, Inc.,* 111 Md. App. 80, 92-94, 680 A.2d 547 (1996). But, as the *Nationwide* case demonstrates, in order for the doctrine of estoppel to bar an insurer from raising a defense, the insured must produce evidence of some "prejudicial reliance" upon "some act, conduct, or non-action of the insurer." 111 Md. App. at 93 (citing *Beard v. Am. Agency Life Ins. Co.,* 314 Md. 235, 258, 550 A.2d 677 (1988)). Moreover, although Section 19-110 of the Insurance Article permits a liability insurer to disclaim coverage based on an insured's failure to cooperate or give timely notice only if the insurer was prejudiced, the statute is inapplicable when an insurer defends on the basis that its insured failed to meet the condition precedent in a no-action clause requiring a final judgment against the insured or a settlement with the written consent of the insurer. *See, e.g., Phillips Way, Inc. v. Am. Equity Ins. Co*., 143 Md. App. 515, 795 A.2d 216 (2002).

Preexisting Illness or Disease Clauses

1. Statutes

Under the Maryland Health Insurance Portability and Accountability Act, codified at Md. Code Ann., Ins. §§ 15-1301, *et seq.*, "preexisting condition" means a condition that was present before the date of enrollment for coverage, whether or not any medical advice, diagnosis, care, or treatment was recommended or received before that date. *See* Md. Code Ann., Ins. § 15-1301(q). *See also* Md. Code Ann., Ins. § 15-1201(q); § 15-1201(r) (defining a "preexisting condition provision" as any provision in a health benefit plan that denies, excludes, or limits benefits for an enrollee for expenses or services related to a preexisting condition).

Generally, an insurer is prohibited from attaching an exclusionary rider to an individual health benefit plan unless the insurer obtains the prior written consent of the policyholder. *See* Md. Code Ann., Ins. § 15-508.1(c). An insurer may, however, impose a preexisting condition exclusion or limitation on an individual for a condition that was not discovered during the underwriting process for an individual health benefit plan but only if the exclusion or limitation: (i) relates to a condition of the individual, regardless of its cause, for which medical advice, diagnosis, care, or treatment was recommended or received within the 12-month period immediately preceding the effective date of the individual's coverage; and (ii) extends for a period of not more than 12 months after the effective date of the individual's coverage. *See* Md. Code Ann., Ins. § 15-508.1(d).

2. Case Law

Courts in Maryland have ruled that pre-existing condition clauses must be strictly construed and that a pre-existing condition will ordinarily be deemed to have arisen when it was first manifest or active or could be diagnosed by a person with medical knowledge. *See, e.g., Lawrence v. Nat'l Life Ins. Co.,* 716 F. Supp. 883, 885 (D. Md. 1989); *Mutual of Omaha v. Goldfinger*, 254 Md. 272, 278-

79, 254 A.2d 683, 686-87 (1969). It has been held, however, that a policy's incontestability clause applies to bar use of a pre-existing condition exclusion when such condition was first manifest prior to the issuance of the policy. *See Mutual Life Ins. Co. of N.Y. v. Insurance Comm'r,* 352 Md. 561, 573-74, 723 A.2d 891, 897-98 (1999).

A divided Court of Appeals for the Fourth Circuit has issued a *per curiam* decision reinstating a decision by the district court holding that an insured receiving treatment for fibrocystic breast disease during the pre-existing period was not a pre-existing condition under a group health insurance plan, which would bar coverage for the expenses of removing the tumor, because the record reflected that the carcinoma was merely present but had not yet been diagnosed or treated, it was luckily coincident with the large fibrocystic mass so it could be treated, but there was no causal or associative relationship between the fibrocystic tissue and the carcinoma. *See Hardester v. Lincoln Nat'l Life Ins. Co.*, 52 F.3d 70 (4th Cir. 1995) (*per curiam*), *cert. denied*, 516 U.S. 864 (1995). Consequently, successful use of the defense of a pre-existing condition clause in the Fourth Circuit may be limited to situations in which it can be shown that an insured received care, consultation or treatment for the same condition as that which gives rise to a present claim. *See id.*

3. Statutes of Limitations

Under Md. Code Ann., Ins. § 15-217, each covered policy of health insurance must contain the following provision:

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

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

Statutes of Limitations and Repose

Generally, civil actions must be filed within three years from the date the claim accrues. *See* Md. Code Ann., Cts. & Jud. Proc. § 5-101. If an action against an insurer sounds in contract, the relevant date from which the limitations period runs is generally the date the insurer breaches the contract. *See, e.g., Nationwide Mut. Ins. Co. v. Shilling*, 468 Md. 239, 260, 227 A.3d 171, 183 (2020). The limitations period, however, does not begin to run on an insured's claim that the insurer breached its duty to defend the insured in a tort suit brought by a third party until the underlying action is completed, because while the underlying tort action is continuing, the insurer can always step in and cure its breach. *See Vigilant Ins. Co. v. Luppino,* 352 Md. 481, 492, 723 A.2d 14, 19 (1999).

The primary provisions in Maryland's statute of repose, codified at Md. Code Ann., Cts. & Jud. Proc. § 5-108 (entitled, "Injuries after improvements to property"), include a 20-year general provision in § 5-108(a) that is not limited to any particular defendant, and a more protective 10-year provision in § 5-108(b) that is limited to architects, professional engineers, and contractors:

In general

> (a) Except as provided by this section, no cause of action for damages accrues and a person may not seek contribution or indemnity for damages incurred when wrongful death, personal injury, or injury to real or personal property resulting from the defective and unsafe condition of an improvement to real property occurs more than 20 years after the date the entire improvement first becomes available for its intended use.

Contribution or indemnification from architects, professional engineers, or contractors

> (b) Except as provided by this section, a cause of action for damages does not accrue and a person may not seek contribution or indemnity from any architect, professional engineer, or contractor for damages incurred when wrongful death, personal injury, or injury to real or personal property, resulting from the defective and unsafe condition of an improvement to real property, occurs more than 10 years after the date the entire improvement first became available for its intended use. …

Md. Code Ann., Cts. & Jud. Proc. § 5-108(a)-(b). Note that the Maryland statute of repose provisions above expressly include claims seeking "contribution or indemnity," unlike some other state statutes, in describing the claims that are barred. *See id.* Maryland's statute of repose also includes exemptions, stating that it does not apply to a defendant that "was in actual possession and control of the property" when the injury occurred, or to certain manufacturers and suppliers of asbestos. *See* Md. Code Ann., Cts. & Jud. Proc. § 5-108(d). In *Rose v. Fox Pool Corp.,* the Maryland Supreme Court discussed the operation of the statute of repose, explaining as follows:

> The specific statutory language of § 5–108(a) precludes all actions which meet two requirements: (1) the plaintiff's injuries must have resulted from the alleged defective and unsafe condition of "an improvement to real property"; and (2) 20 years must have passed since the "entire improvement first bec[ame] available for its intended use." … it creates a blanket prohibition against all suits that meet the statutory criteria. … the defendant's identity is irrelevant in determining whether § 5–108(a) bars a particular cause of action.
>
> Unlike subsection (b), which specifically names architects, professional engineers, and contractors as persons entitled to greater protection from liability than that afforded by subsection (a), and unlike subsections (d)(2)(i) (defendant in possession and control) and (d)(2)(ii), (iii), and (iv) (all relating to the exclusion of manufacturers and suppliers of asbestos), subsection (a) does not

> identify the class of persons to which it applies. … Here, the express exclusion of certain persons in the various provisions of subsection (d), and the singling out of other persons for special protection in subsection (b), gives rise to the inference that subsection (a) provides immunity from liability to all other persons, including, necessarily, product manufacturers. …

Rose v. Fox Pool Corp., 335 Md. 351, 360-61, 643 A.2d 906, 910 (1994).

TRIGGER AND ALLOCATION ISSUES FOR LONG-TAIL CLAIMS

Trigger of Coverage

The most frequently offered theories for the trigger of coverage are (1) the exposure theory, (2) the manifestation theory, and (3) the continuous-trigger theory. *See Mayor and City Council of Baltimore v. Utica Mut. Ins. Co.*, 145 Md. App. 256, 297-98, 802 A.2d 1070 (2002). As the *Utica* Court observed, however:

> At least two other less-frequently followed theories exist. One is the "injury-in-fact" (or "damages-in-fact") approach, which holds that coverage is triggered by a showing of actual injury or damage-producing event; and the other is the "double-trigger" theory, which holds that injury occurs at the time of exposure and the time of manifestation, but not necessarily during the intervening period.

145 Md. App. at 297-98 (citation omitted). In environmental pollution and toxic tort cases, however, "manifestation is not the sole trigger of coverage" but rather "coverage under the policies may be triggered during the policy period at a time earlier than the discovery or manifestation of the damage." *Harford Cnty. v. Harford Mut. Ins. Co.*, 327 Md. 418, 435-36, 610 A.2d 286, 294-95 (1992).

Allocation Among Insurers

In *Pennsylvania Nat. Mut. Cas. Ins. Co. v. Roberts*, the United States Court of Appeals for the Fourth Circuit reaffirmed the application of *pro rata*, time-on-the-risk, allocation of liability coverage under Maryland law. 668 F.3d 106, 113 (4th Cir. 2012), *cert. denied*, 133 S. Ct. 191 (2012). In that case, the underlying plaintiffs had presented claims of bodily injury to a minor arising from exposure to lead-based paint in a residential property owned by the policyholder. The insurer acknowledged coverage and agreed to provide a defense to the policyholder but maintained that it would be responsible for no more than its *pro rata* share of any damages awarded—as measured by the length of the period of coverage compared to the length of the period of alleged exposure. *Id.* at 110. Following a jury trial and entry of an $850,000 judgment in favor of the minor plaintiff, Pennsylvania National brought a declaratory judgment action asserting that it was contractually liable to pay no more than forty percent of the judgment. *Id.* The minor plaintiff disagreed, contending that the insurer must pay the entire judgment in light of the joint and several liability of its policyholder with other tortfeasors. The district court, relying primarily on *Utica,* 145 Md. App. 256, 802 A.2d 1070, noted that Maryland courts had settled law concerning allocation of insurance coverage for long-tail claims and held in favor of Pennsylvania National that the *pro rata* allocation by time on the risk method would control. *Id.* at 111. On review, the Fourth Circuit largely agreed with the district court, holding that under Maryland law, and its own precedent in *In re Wallace & Gale Co.,* 385 F.3d 820 (4th Cir. 2004), *pro rata* allocation would apply without regard to the number of insureds or tortfeasors. *Id.* at 114. The Court noted that this conclusion was further consistent with the public policy of encouraging parties to obtain liability insurance to cover risks. *Id.*

CONTRIBUTION ACTIONS

Claim in Equity vs. Statutory

Under the common law, a right to contribution is based on principles of equity, where one person discharges more than his or her just share of a common burden. *See Wallace v. Jones*, 110 Md. 143, 146-47, 72 A. 769, 770-71 (1909). However, there was no right of contribution among joint tortfeasors. *See Hashmi v. Bennett*, 416 Md. 707, 720, 7 A.3d 1059, 1067 (2010).

The Maryland Uniform Contribution Among Joint Tortfeasors Act, codified at Md. Code Ann., Cts. & Jud. Proc. §§ 3-1401, *et seq*. ("UCATA"), was developed to promote "some common policy" to legislatively establish contribution among joint tortfeasors. *Hashmi*, 416 Md. at 721, 7 A.3d at 1067. The statute provides a right to contribution among joint tortfeasors on a *pro rata* basis even if there has been no joint judgment against them. *See, e.g., Wassel v. Eglowsky*, 399 F. Supp. 1330, 1366, *aff'd*, 542 F.2d 1235 (4th Cir. 1976) (*overruled in part on other grounds by Baker, Watts & Co. v. Miles & Stockbridge*, 876 F.2d 1101 (4th Cir. 1989)). Thus, each defendant may be liable to the plaintiff for the full amount of damages. *See* Md. Code Ann., Cts. & Jud. Proc. § 3-1401(c). Yet, the Maryland Supreme Court has held that "a defendant cannot be liable for contribution as a joint tortfeasor under the UCATA if that party is not liable to the injured party in the first instance." *Gables Construction, Inc. v. Red Coats, Inc.*, 468 Md. 632, 645 A.3d 736, 744 (2020).

A release by the injured person of one joint tortfeasor, whether before or after judgment, does not discharge the other tortfeasors unless the release so provides, but it will reduce the claim against the other tortfeasors in the amount of the consideration paid for the release. *See* Md. Code Ann., Cts. & Jud. Proc. § 3-1404. A joint tortfeasor who has paid more than his *pro rata* share of the judgment may enforce the right of contribution by making a post-trial motion for Judgment of Contribution or Recovery Over pursuant to Maryland Rule 2-614 (Circuit Court) or 3-614 (District Court), even if they did not file a cross-claim against their joint tortfeasors. *Lerman,* 347 Md. at 444-48, 701 A.2d at 429-31. The statute of limitations is generally three years from the date of payment or judgment. *See* Md. Code Ann., Cts. & Jud. Proc. § 5-101; *Tadjer v. Montgomery Cty.*, 61 Md. App. 492, 496-97, 487 A.2d 658, 660 (1985).

Elements

To recover for contribution under the Maryland Uniform Contribution Among Joint Tortfeasors Act, the plaintiff joint tortfeasor must show that there is a common liability to an injured person in tort (in fact, where an original plaintiff has no right of action against a third party, there can be no contribution entitling the defendant to join a third party as a defendant under the Maryland Uniform Contribution Among Joint Tortfeasors Act). *See, e.g., Richards v. Freeman*, 179 F. Supp. 2d 556, 560-61 (D. Md. 2002). "'Common liability exists when two or more actors are liable to an injured party for the same damages, even though their liability may rest on different grounds.'" *Richards*, 179 F.Supp.2d at 560-61 (quoting *Parler & Wobber v. Miles & Stockbridge, P.C.*, 359 Md. 671, 756 A.2d 526, 534 (2000)). Further, the plaintiff tortfeasor must show that he "has by payment discharged the common liability or has paid more than a *pro rata* share of the common liability." *See* Md. Code Ann., Cts. & Jud. Proc. § 3-1402(b).

DUTY TO SETTLE

An insurer has a duty to enter into good faith negotiations "where reasonable and feasible" to settle a claim within policy limits, but there is no requirement that it "rush to the settlement of a claim" against the insured to avoid an excess judgment. *Allstate Ins. Co. v. Campbell*, 334 Md. 381, 396, 639 A.2d 652, 659 (1994). Although an

insurer does not have an absolute duty to settle a claim within policy limits, it may not refuse to do so in bad faith. *Campbell*, 334 Md. at 396, 639 A.2d at 659.

In determining whether an insurer has acted in good faith, courts have looked to one or more factors including the following:

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

See, e.g., State Farm Mut. Auto. Ins. Co. v. White, 248 Md. 324, 332, 236 A.2d 269, 273 (1967).

A liability insurer's bad faith failure to settle a claim within policy limits gives rise only to a tort action. *See, e.g., Mesmer*, 353 Md. at 257, 725 A.2d at 1061; *see also Sweeten, Adm'r. v. Nat'l. Mutual*, 233 Md. 52, 55, 194 A.2d 817 (1963) (recognizing that a liability insurer's wrongful failure to settle a claim against its insured within policy limits gives rise to an action in tort). The basis for the tort duty is "because the insurer has the exclusive control, under the standard policy, of investigation, settlement and defense of any claim or suit against the insured, and there is a potential, if not actual, conflict of interest giving rise to a fiduciary duty." *Sweeten, Adm'r*, 233 Md. at 55; *see also Mesmer*, 353 Md. at 260. An insurer is not liable for bad faith failure to settle a claim where the insurer disclaims coverage for a claim, even if the insurer's denial of coverage is erroneous. *Mesmer*, 353 Md. at 263. In such a situation, the insurer remains liable only for breach of contract. *Id.*

LH&D BENEFICIARY ISSUES

Change of Beneficiary

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

Effect of Divorce on Beneficiary Designation

Maryland has no statute that operates to automatically revoke a beneficiary designation in favor of a spouse upon divorce. See East v. PaineWebber, Inc., 131 Md. App. 302, 311 (2000), *aff'd,* 363 Md. 408, 768 A.2d 1029 (2001). A former spouse may continue to be entitled to the asset if the insured fails to give notice of a change of beneficiary to the insurer due to divorce. Nor, for that matter, does a provision in a separation agreement waiving a spouse's right to proceeds under a life insurance policy exclude that spouse from those proceeds, absent an actual change of the beneficiary on the policy. *See PaineWebber v. East*, 363 Md. 408, 415-17, 768 A.2d 1029, 1032-35 (2001).

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

INTERPLEADER ACTIONS

Availability of Fee Recovery

Maryland Rules 2-221 (Circuit Court) and 3-221 (District Court) authorize an interpleader action to be brought against two or more adverse claimants who claim or may claim to be entitled to property. The court's order in an interpleader action "*may* award the original plaintiff costs and reasonable attorney's fees from the property if that plaintiff brought the action in good faith as an impartial stakeholder." Md. Rules 2-221(b)(6); 3-221(b)(6) (emphasis added). An award of attorney's fees is within the sound discretion of the trial court, and is not to be disturbed on appeal unless its discretion is exercised arbitrarily or its judgment is clearly wrong. *Sody v. Sody*, 32 Md. App. 644, 660, 363 A.2d 568, 578 (1975).

Differences in State vs. Federal

In contrast to Maryland Rules 2-221 and 3-221, Federal Rule of Civil Procedure 22 and the federal interpleader statute does not expressly authorize the court to award attorney's fees. *See, e.g., Trustees of Plumbers & Pipefitters Nat. Pension Fund v. Sprague*, 251 F. App'x 155, 156 (4th Cir. 2007) (discussing "the lack of an express reference in the federal interpleader statute to costs or attorney's fees").

[i] Title 15 of the Insurance Article concerns health insurance.
[ii] Title 16 of the Insurance Article concerns life insurance and annuities.