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# Wyoming

## REGULATORY LIMITS ON CLAIMS HANDLING

### Timing for Responses and Determinations

For health and life insurers, Wyoming Statute § 26-15-124(a) requires they reject or accept claims for benefits and to pay the same within 45 days after receipt of the proofs of loss and supporting evidence. An exception made for health and accident claims if there is any question as to the validity or amount of the claim and the question is referred to the Wyoming state medical peer review committee for adjudication. Additional exceptions in the case of life insurance policies are set forth in Wyoming Statute § 26-16-112.

Wyoming Statute § 26-15-124(b) requires property and casualty insurers to reject or accept claims for benefits and to pay the same within 45 days after receipt of the claim and supporting bills.

### Standards for Determination and Settlements

General Standards for handling claims are set forth in Wyoming Statute § 26-13-124. That statute states:

W.S. § 26-13-124. Unfair claims settlement practices.

- A person is considered to be engaging in an unfair method of competition and unfair and deceptive act or practice in the business of insurance if that person commits or performs with such frequency as to indicate a general business practice any of the following unfair claims settlement practices:
    - Misrepresenting pertinent facts or insurance policy provisions relating to coverages at issue;
    - Failing to acknowledge and act reasonably promptly upon communications with respect to claims arising under insurance policies;
    - Failing to adopt and implement reasonable standards for the prompt investigation of claims arising under insurance policies;
    - Refusing to pay claims without conducting a reasonable investigation based upon all available information;
    - Failing to affirm or deny coverage of claims within a reasonable time after proof of loss statements have been completed;
    - Not attempting in good faith to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear;
    - 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;

- Attempting to settle a claim for less than the amount to which a reasonable person would have believed he was entitled by reference to written or printed advertising material accompanying or made part of an application;
- Attempting to settle claims on the basis of an application which was altered without notice to, or knowledge or consent of, the insured;
- Making claims payments to insureds or beneficiaries not accompanied by a statement setting forth the coverage under which the payments are being made;
- 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;
- 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;
- 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;
- 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;
- Denying or failing to timely pay disability insurance claims for medically necessary services, procedures or supplies as required by W.S. 26-40-201;
- Failing to comply with the external review procedures required by W.S. 26-40-201; or
- Failing to pay a claim after an external review organization has declared such claim to be a benefit covered under the terms of the insurance policy.

No private right of action exists under the above statute. Herrig v. Herrig, 844 P.2d 487, 494 (Wyo. 1992). The conduct proscribed by W.S. § 26-13-124, however, is often alleged by insureds as evidence supporting bad faith claims.

## PRINCIPLES OF CONTRACT INTERPRETATION

Under Wyoming law an insurance policy is a contract and should be construed in accordance with general principles of contractual interpretation. Squillace v. Wyoming State Employees' & Officials' Group Ins. Bd. of Admin., 933 P.2d 488, 491 (Wyo. 1997).

Based on Wyoming's established standards for interpretation of contracts, the words used in the contract are afforded the plain meaning that a reasonable person would give to them. When the provisions in the contract are clear and unambiguous, the court looks only to the "four corners" of the document in arriving at the intent of the parties. In the absence of any ambiguity, the contract will be enforced according to its terms. Hickman v. Groves, 71 P.3d 256, 258 (Wyo. 2003). If the language of the contract is unambiguous, extrinsic evidence is not admitted to contradict the plain meaning of the agreement. Prudential Preferred Properties v. J & J Ventures, Inc., 859 P.2d 1267 (Wyo. 1993).

If the contract is ambiguous, the intent of the parties may be determined by looking at extrinsic evidence. An ambiguous contract is one which is obscure in its meaning because of indefiniteness of expression or the

presence of a double meaning. Wadi Petroleum, Inc. v. Ultra Res., Inc., 65 P.3d 703, 708 (Wyo. 2003). Whether a contract is ambiguous is a matter of law for the court to decide, and disagreement among the parties to a contract as to the contract's meaning does not mean that contract is ambiguous. Claman v. Popp, 279 P.3d 1003, 1013 (Wyo. 2012). Ambiguities in an insurance contract are strictly construed against the insurance company that drafted the contract. State Farm v. Paulson, 756 P.2d 764, 765 (Wyo. 1988).

## CHOICE OF LAW

Absent a choice of law provision in the contract, under Wyoming law contracts are to be construed according to the law of the place where made, except where the contract is made in one state to be performed in another, in which case the law of the state of performance will govern unless it clearly appears the parties intended otherwise. J. W. Denio Milling, Co. v. Malin, 165 P. 1113 (Wyo. 1917). This also applies to insurance policies. Peterson v. Meritain Health, Inc., 2022 WY 54, ¶ 19, 508 P.3d 696, 705 (Wyo. 2022) (Court will generally enforce a policy's choice of law provisions, but issued waived for appeal).

As to tort claims, the general rule in Wyoming is "the lex loci delicti, or the law of the place where the tort or wrong has been committed, is the law that governs and is to be applied with respect to the substantive phases of torts or the actions therefor, and determines the question of whether or not an act or omission gives rise to a right of action or civil liability for tort." Duke v. Housen, 589 P.2d 334, 342 (Wyo. 1979).

## DUTIES IMPOSED BY STATE LAW

### Duty to Defend

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

The duty to defend is an independent consideration in liability policies and it is invoked by any claim set forth in the complaint that is potentially covered under the policy. Shoshone First Bank v. Pacific Employers Insurance Company, 2 P.3d 510 (Wyo. 2000). The duty to defend is broader than the duty to indemnify. Id. The insurer is obligated to defend if the claim falls rationally within the policy coverage. Matlack v. Mountain West Farm Bureau Mutual Insurance Company, 44 P.3d 73 (Wyo. 2002). The determination of whether a claim is rationally covered is made by examination of the facts alleged in the complaint. Id. If the policy potentially covers one or more claims, the insurer has a duty to defend all claims and any doubts about coverage are resolved against insurer. Id.

#### 2. Issues with Reserving Rights

A notice of a reservation of rights must make a specific reference to the policy defense which the insurer may assert. Doctors' Co. v. Ins. Corp. of Am., 864 P.2d 1018, 1030 (Wyo. 1993). A bare notice of reservations of rights is insufficient. Id. An insurer who defends an insured without issuing a reservation of rights is estopped from asserting coverage defenses later in the litigation. Cornhusker Cas. Co. v. Skaj, 786 F.3d 842, 852-83 (10th Cir. 2015). Some litigants and state district courts rely on Cornhusker to assert an insurer is estopped from asserting any coverage defense not mentioned in a reservation of rights letter, though neither the Wyoming Supreme Court, the Tenth Circuit, or the Wyoming federal district court have addressed the issue in any reported case.

An insurer who reserves the right to deny coverage loses the right to control the litigation. Insurance Company of North America v. Spangler, 881 F.Supp. 539, 544 (D. Wyo. 1995); see also, Marathon Ashland Pipe Line LLC v. Maryland Cas. Co., 243 F.3d 1232, 1249 (D. Wyo. 2001) (declining to extend the holding in Spangler to any other factual situations). This can have substantial consequences in regard to an insured's right to settle, as discussed later in this chapter.

## State Privacy Laws; Insurance Regulatory Issues; Arbitration/Mediation

Wyoming Statute § 26-2-133 provides as follows:

- The [Insurance] commissioner is authorized to adopt rules necessary to govern the practices of all persons licensed under this code with respect to the disclosure of nonpublic personal financial and health information of insurance consumers and customers. The rules shall prohibit the disclosure of any nonpublic personal information contrary to the provisions of title V of the Gramm-Leach-Bliley Act of 1999, P.L. 106-102. (Title V of the Gramm-Leach Bliley Act of 1999, P.L. 106-102, is codified as 15 U.S.C.S. § 6801 et seq.)

Chapter 54 of the Wyoming Insurance Regulations addresses, in considerable detail, the privacy and disclosure rules. Wyoming Statute §26-54-106 provides in pertinent part:

- Documents, materials or other information, including the CGAD, in the possession or control of the department that are obtained by, created by or disclosed to the commissioner or any other person under this act, are recognized by this state as being proprietary and to contain trade secrets. All the documents, materials or other information shall be confidential by law and privileged, shall not be considered public records pursuant to W.S. 16-4-201 through 16-4-205, shall not be subject to subpoena and shall not be subject to discovery or admissible as evidence in any private civil action.

### 1. Criminal Sanctions

Wyoming Statute § 26-1-107 provides for criminal and civil penalties for violations of the Wyoming Insurance Regulations.

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

Punitive damages are recoverable in tort actions for bad faith, but only if the insured proves willful and wanton misconduct on behalf of the insurer. The insured may recover attorney fees under Wyoming Statute § 26-15-124(c) if the insurer refuses unreasonably and without cause to defend a liability claim or pay a loss covered by the policy. Section 26-15-124(c) affords a private right of action in favor of the insured. Stewart Title Guaranty Company v. Tilden, 110 P.3d 865 (Wyo. 2005); Herrig v. Herrig, 844 P.2d 487 (Wyo. 1992).

### 3. Insurance Regulations to Watch

Nothing as of publication in 2023.

### 4. State Arbitration and Mediation Procedures

Wyoming law provides for Mediation under the state's Code of Civil Procedure (W.S. 1-43-101

through 1-43-104), which outlines the general rules of confidentiality, privilege, and immunity.

Wyoming has adopted the Uniform Arbitration Act under the state's Code of Civil Procedure (W.S. 1-36-101 through 1-36-119), which outlines the generally recognized conditions and procedures to arbitration overseen by the state district court system. "Arbitration is strongly embedded in the public policy of this state and is favored by this court as a voluntary method to settle disputes in an inexpensive and expeditious manner without resort to strict rules of law and rigid formality of a tribunal." Jackson State Bank v. Homar, 837 P.2d 1081 (Wyo. 1992).

Arbitration may be used when there is a dispute arising from an audit by an independent auditor and an insurer (W.S. 26-3-306).

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

Wyoming Statute § 26-2-110 provides as follows:

- Subject to the requirements of the Wyoming Administrative Procedure Act, the commissioner may make reasonable rules and regulations necessary to carry out any provision of this code. No rule or regulation shall extend, modify or conflict with any law of this state or the reasonable implications thereof.
- Any interested person may petition the commissioner requesting the promulgation, amendment or repeal of any rule or regulation, under the applicable procedures of the Wyoming Administrative Procedure Act.
- In addition to any other penalty under this code, willful violation of any provision of this code or any rule or regulation promulgated pursuant thereto subjects the violator to suspension or revocation of a certificate of authority or license as may be applicable. No penalty applies to any act done or omitted in good faith in conformity with the rule or regulation, notwithstanding that after the act or omission the rule or regulation may be amended or rescinded or determined by judicial or other authority to be invalid.
- In addition to all other rulemaking authority granted to the commissioner, the commissioner may promulgate necessary and appropriate rules to satisfy NAIC accreditation requirements, provided that
    - The commissioner has determined promulgation of the rules is in the interest of the state and the rules are otherwise appropriate;
    - The rules shall not be in effect for longer than three (3) years; and
    - commissioner has requested a waiver, if determined appropriate, to the applicable NAIC accreditation requirement pursuant to W.S. 26-2-109(e).
- The commissioner may promulgate rules to identify procedures for conducting examinations of the Wyoming state employees' and officials' group insurance program in accordance with W.S. 9-3-205(c).

## EXTRACONTRACTUAL CLAIMS AGAINST INSURERS: ELEMENTS AND REMEDIES

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

### 1. First Party

The Wyoming Supreme Court recognized the tort of first-party bad faith in McCullough v. Golden Rule Insurance Co., 789 P.2d 855 (Wyo. 1990). The standard for first-party bad faith under McCullough is whether or not the validity of the denied claim is fairly debatable. In order to prevail on a claim of first-party bad faith, the insured must establish the following two elements: (1) the absence of a reasonable basis for the insurance company to deny the policy benefits sought and (2) the insurer's knowledge or reckless disregard of the lack of a reasonable basis for denying the claim. Darlow, 822 P.2d at 824. The fairly debatable standard is an objective standard. McCullough, 789 P.2d at 860.

Wyoming also recognizes a "claims handling" or procedural first-party bad faith cause of action. In Hatch v. State Farm Casualty Company, 842 P.2d 1089 (Wyo. 1992), the Wyoming Supreme Court held that, even if an insurance company is able to demonstrate that its denial of the claim is protected by the fairly debatable defense, it may still be subject to liability if the manner in which it investigated, handled or denied the claim violated the implied covenant of good faith and fair dealing. The Court observed that this variant of the first-party bad faith tort is closely related to the tort of intentional infliction of emotional distress. Id. at 1097. The conduct that will give rise to a Hatch-type claim is outrageous conduct and/or oppressive and intimidating claim handling practices. Meyer v. Conlon, 162 F.3d 1264, 1273 (10th Cir. 1998). Wyoming insurers are always interested to know that on remand, a jury found that the insurer in Hatch did not engage in the alleged conduct that gave rise to this decision.

### 2. Third-Party

Under Wyoming law, third-party claimants have no direct cause of action against an insurer for bad faith, either in contract or tort. Herrig, 844 P.2d 487 (Wyo. 1992).

However, the failure to settle a third-party claim within policy limits will expose the insurer to tort liability for bad faith if the insured is exposed to a judgment in excess of policy limits. Jarvis v. Farmers Insurance Exchange, 948 P.2d 898 (Wyo. 1997); see also Crawford v. Infinity Ins. Co., 64 Fed. 146, 151 (10th Cir. 2003). The liability is to the insured, not a third-party claimant.

In Western Casualty Surety Co. v. Fowler, 390 P.2d 602 (Wyo. 1964), the Wyoming Supreme Court first recognized a tort cause of action for third-party bad faith. This cause of action arises out of the duty of liability insurers to defend and settle claims asserted against their insureds by third parties. Darlow v. Farmer's Insurance Exchange, 822 P.2d 820, 827 (Wyo. 1991). A cause of action for third-party bad faith will lie when an insurer fails in bad faith to settle a third-party claim against its insured within policy limits. Herrig v. Herrig, 844 P.2d 487, 490 (Wyo. 1992). The insurer's duty to the insured in this context is to exercise intelligence, good faith and honest and conscientious fidelity to the interest of the insured as well as its own interest, giving at least equal consideration to the interest of the insured. Fowler, 390 P.2d at 606. Entry of a judgment in excess of policy limits is a prerequisite to a cause of action for third-party bad faith. Jarvis v. Farmers Insurance Exchange, 948 P.2d 898 (Wyo. 1997). A claim of third-party bad faith may lie where the insured voluntarily stipulates to a judgment in excess of policy limits without the insurer's consent. Gainsco Insurance Company v. Amoco Production Company, 53 P.3d 1051 (Wyo. 2002).

In a recent case, the Wyoming Supreme Court held that a third party administrator could be liable for bad faith if the third party administrator "acts sufficiently like and insurer." Peterson v. Meritain Health, Inc., 2022 WY 54, ¶ 77. Some factors that may show that the third party administrator acted sufficiently like an insurer are 1) whether it provides a list of participating providers; 2) whether it has a role in investigating and servicing claims; and 3) whether it is responsible for benefit determinations. Id., ¶ 80. This is not an exhaustive list, with the paramount inquiry being whether the third party administrator engaged in functions usually handled by an insurer.

## Fraud

In Wyoming, fraud is established when the plaintiff demonstrates that the defendant made a false representation intended to induce action by the plaintiff, the plaintiff reasonably believed the representation was true and relied on the false representation, suffering damages. Jurkovich v. Tomlinson, 905 P.2d 409 (Wyo. 1995). Wyoming Rule of Civil Procedure 9(b) requires that the circumstances constituting fraud must be stated with particularity. Fraud must be proven by clear and convincing evidence and will never be presumed. McKenney v. Pacific First Federal Savings of Tacoma, 887 P.2d 927 (Wyo. 1994).

An insurer can be held liable for negligent misrepresentation when its agent incorrectly describes coverages that may be available to the insured or even a third-party. Verschoor v. Mountain West Farm Bureau Mut. Ins. Co., 907 P.2d 1293 (Wyo. 1995).

## Intentional or Negligent Infliction of Emotional Distress

Wyoming recognizes the torts of intentional and negligent infliction of emotional distress, but only under limited circumstances. Larsen v. Banner Health Sys. 81 P.3d 196, 199 (Wyo. 2003). However, claims for negligent infliction of emotional distress are limited to family members who witness the infliction of serious injury or death of a family member or the immediate aftermath of the death or serious injury without material change in the condition or location of the victim. Gates v. Richardson, 719 P.2d 193 (Wyo. 1986).

In Leithead v. American Colloid Co., 721 P.2d 1059 (Wyo. 1986) the Wyoming Supreme Court adopted the Restatement (Second) of Torts § 46 (1977), which provides:

Outrageous Conduct Causing Severe Emotional Distress

- One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.
- Where such conduct is directed at a third person, the actor is subject to liability if he intentionally or recklessly causes severe emotional distress
    - to a member of such person's immediate family who is present at the time, whether or not such distress results in bodily harm, or
    - to any other person who is present at the time, if such distress results in bodily harm.

Comment (d) to the above Section defines outrageous conduct as "conduct which goes beyond all possible bounds of decency, is regarded as atrocious, and is utterly intolerable in a civilized society." Leithead at 1066. It is a question of law for the court in the first instance whether the defendant's conduct may reasonably be regarded

as so extreme and outrageous as to permit recovery. Id. Only where reasonable persons may differ does the matter become a jury question. Id. The court must also decide, as a question of law, whether evidence exists of severe emotional distress sufficient to create a jury question. Id. at 1067.

In the context of the relationship between and insured and insurer, the tort of intentional infliction of emotional distress may more appropriately be considered a procedural bad faith claim under Hatch v. State Farm Casualty Company, 842 P.2d 1089 (Wyo. 1992).

### State Consumer Protection Laws, Rules and Regulations

The Wyoming Consumer Protection Act, W.S. § 40-12-101 et seq. prohibits deceptive trade practices in connection with consumer transactions, primarily focusing on sales of merchandise. The Act generally contemplates an action by the Wyoming Attorney General on behalf of the State. W.S. § 40-12-106 & W.S. § 40-12-102(a)(vii). An individual may bring an action under the Consumer Protection Act for damages he or she has actually sustained as a consumer as a result of unlawful or deceptive trade practices. W.S. § 40-12-108. A class action suit may be commenced as well. W.S. § 40-12-108(b). An individual must comply with the notice requirements provided in W.S. § 40-12-109.

The Consumer Protection Act seemingly could be utilized in a claim against an insurer. See, W.S. § 40-12-102(a)(ii) and (vi) (including "any service," "commodity" or "article of value" in the definition of merchandise). The Wyoming Supreme Court, however, has noted that the Consumer Protection Act was drafted primarily to protect consumers from unscrupulous marketing practices while the remedies for unfair insurance claim practices are addressed in the Wyoming Insurance Code. Herrig v. Herrig, 844 P.2d 487, 495 (Wyo. 1992).

## DISCOVERY ISSUES IN ACTIONS AGAINST INSURERS

### Discoverability of Claims Files Generally

Claim files are generally treated as discoverable in direct actions against insurers, although in the only reported cases on the issue arising in Wyoming, the Tenth Circuit Court of Appeals upheld the trial courts' limitations as to this discovery. Marathon Ashland Pipe Line LLC v. Maryland Casualty Company, 243 F.3d 1232 (10th Cir. 2001); International Surplus Lines Insurance Company, 52 F.3d 901 (10th Cir. 1995). Those cases, however, do not provide clear guidance on the issue. In Marathon Ashland Pipe Line, the Tenth Circuit stated that the date when an insurer seeks a coverage opinion is discoverable, but the coverage opinion itself will not be discoverable unless the insurer is relying on advice of counsel as a defense.

### Discoverability of Reserves

No reported cases arising in Wyoming state or federal courts have addressed the discoverability of reserves.

### Discoverability of Existence of Reinsurance and Communications with Reinsurers

No reported cases arising in Wyoming state or federal courts have addressed the discoverability of reinsurance or communication with reinsurers.

## Attorney/Client Communications

Under Wyoming law, communications between a liability insurer and its insured are protected by the attorney-client privilege. Thomas v. Harrison, 634 P.2d 328 (Wyo. 1981). Likewise, a liability insurer's investigation of a claim is protected as attorney-work product. Id. Wyoming federal courts apply Thomas to communications, but do not recognize a blanket work product protection for an insurer's investigation. Hanson v. Swainston, 2018 U.S. Dist. LEXIS 142739 (D. Wyo. Aug. 20, 2018).

The Tenth Circuit Court of Appeals, applying Wyoming law, recognized that an advice of counsel defense exists in bad faith actions and held that a coverage opinion is discoverable if the insured is relying on advice of counsel as a defense. Marathon Ashland Pipe Line LLC v. Maryland Casualty Company, 243 F.3d 1232 (10th Cir. 2001). The Tenth Circuit held that the district court did not abuse its discretion by accepting a liability insurer's assertion that it was not relying on advice of counsel as a defense to the insured's allegations of bad faith and by ruling, therefore, that the insurer had not waived the attorney-client privilege.

# DEFENSES IN ACTIONS AGAINST INSURERS

## Misrepresentations/Omissions: During Underwriting or During Claim

Wyoming Statute § 26-15-109 provides:

- Any statements and descriptions in any application for an insurance policy or annuity contract, by or in behalf of the insured or annuitant, are representations and not warranties. Misrepresentations, omissions, concealment of facts and incorrect statements do not prevent a recovery under the policy or contract unless either:
    - Fraudulent; or
    - Material either to the acceptance of the risk, or to the hazard the insurer assumes; or
    - The insurer in good faith, if it knew the true facts as required by the application for the policy or contract or otherwise, would not have:
        - Issued the policy or contract;
        - Issued it at the same premium rate;
        - Issued a policy or contract in as large an amount; or
        - Provided coverage with respect to the hazard resulting in the loss.

The insurer generally has no duty to investigate an application and is entitled to rely on the applicant's representations. White v. Continental General Insurance Company, 831 F. Supp. 1545, 1553 (D. Wyo. 1993). An insurer may rescind a policy if a misrepresentation or nondisclosure was material to the risk, even if made inadvertently or by mistake. Id. A material misrepresentation is one that would have influenced the prudent insurer in determining whether to accept the risk in the first place. Id. Materiality is a jury question unless there can be no dispute as to the materiality of the misrepresentation. White, 831 F. Supp. at 1554.

## Failure to Comply with Conditions

In Insurance Company of North America v. Spangler, 881 F.Supp. 539 (D. Wyo. 1995) the federal district court, predicting how the Wyoming Supreme Court would rule, held that a cooperation clause prohibition against settling without the insurer's consent forbids an insured from settling only claims for which the insurer unconditionally assumes liability under the policy. Thus, an insured being defended under a reservation of rights may enter into a so-called Damron agreement by which the insured stipulates to a judgment and assigns his rights under the policy without breaching the cooperation clause. An insured does not breach the cooperation clause by settling a claim being defended under a reservation of rights, as long as the insurer is provided adequate prior notice of the settlement. Gainsco Insurance Company v. Amoco Production Company, 53 P.3d 1051, 1067 (Wyo. 2002). In addition, for the insurer to be bound by the settlement, it must be reasonable, in good faith, without collusion and must not prejudice the rights of the insurer. Id. The insured and a third-party assignee/claimant bear the burden of proving that the settlement was reasonable. Id.

Under Wyoming law, late notice of a claim (the definition of late notice depends on the facts and the policy language) may provide a defense to a claim for policy benefits. This determination involves a two-step approach. Century Sur. Co. v. Jim Hipner, LLC, 2016 WY 81, ¶ 18. The first question is whether the insured's notice was in fact untimely. Id. The question of whether an insured's notice of claim will revolve around a variety of factors, including the insured's knowledge of the underlying facts, the policy's requirements for making the claim, sophistication of the parties, the type of insurance at issue, and the reasonableness of any delay. Id. If the insured's notice is deemed to be untimely, then next inquiry is whether the insurer was prejudiced by the delay. Id. Without prejudice, untimely notice of a claim will not relieve an insurer of its obligation to provide coverage. Id.

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

The United States District Court for the District of Wyoming held in Insurance Company of North America v. Spangler, 881 F.Supp 539 (D.Wyo. 1995), that an insurer who reserves the right to deny coverage loses the right to control the litigation. The court concluded that where the insurer was defending under a reservation of rights and had filed a declaratory judgment action contesting coverage, the insured's assignee was not barred from recovery from the insurer for a stipulated liability to which the insurer did not consent and for which the insured is not personally liable.

In Compass Insurance Company v. Cravens, Dargan & Company, 748 P.2d 724 (Wyo. 1988) the Wyoming Supreme Court found a duty to pay notwithstanding the absence of a formal claim or suit against the insured or a finding of legal liability. The case arose out of an oil spill caused by vandals on the insured's property causing damage to neighboring property. The Court said there was no question that the insured had legal liability to clean up the spill based on state environmental statutes. The Court held that the statutory obligation upon the insured to clean up the spill required the insurer to "acquiesce" to the insured's clean-up efforts even though the insured's liability had not been finally determined by either a judgment or a written agreement between the insured, the claimant and the insurer in compliance with the "no action" clause.

The Tenth Circuit Court of Appeals later applied a narrow reading to the Compass decision. In State of Wyoming ex rel. Department. of Environmental Quality v. Federated Service Insurance Company, 211 F.3d 1279 (10th Cir. 2000) the State of Wyoming, as subrogee of the polluting company, sought indemnification from Federated Service Insurance Company on a comprehensive general liability policy and an umbrella policy for the clean-up costs. The Tenth Circuit upheld the district court's grant of summary judgment in favor of the insurer, holding that

the State was not entitled to coverage under the policies because neither the insured nor the insured's subrogee has a right to sue the insurance carrier for coverage until the insurer denied a claim for which its insured had been found legally liable. In reaching its conclusion, the district court relied primarily on the policies' "no action" clauses. The Court distinguished this case from the Wyoming Supreme Court's holding in Compass, stating that Compass "establishes a narrow public policy exception to the rule, permitting an action for coverage under a policy with a "no action" clause when the insured's obligation to pay was clear as a matter of law and the amount of that obligation has been established by stipulation instead of judgment or agreement."

## Preexisting Illness or Disease Clauses

The Wyoming Insurance Code limits preexisting condition clauses in several places. Wyoming Statute § 26-18-106, which concerns disability policies, is illustrative of these statutory limitations. That Section provides, in relevant part:

- Except for the preexisting condition provision stated in this subsection, no claim for loss incurred or disability, as defined in the policy, shall be reduced or denied due to a preexisting condition not excluded from coverage by name or specific description effective on the date of loss. This preexisting condition provision shall not exclude coverage for a period beyond twelve (12) months following the individual's effective date of coverage and shall only relate to conditions for which medical advice, diagnosis, care or treatment was recommended or received during the six (6) months immediately preceding the effective date of coverage or as to a pregnancy existing on the effective date of coverage.
- In determining whether a preexisting condition provision applies to an insured or dependent, all private or public health benefit plans shall credit the time the person was previously covered by a private or public health benefit plan if the previous coverage was continuous to a date not more than ninety (90) days prior to the effective date of the new coverage. In the case of a preexisting conditions limitation allowable in the succeeding carrier=s plan, the level of benefits applicable to preexisting conditions or persons becoming covered by the succeeding carrier=s plan during the period of time this limitation applies under the new plan shall be the lesser of:
    - The benefits of the new plan determined without application of the preexisting conditions limitation; or
    - The benefits of the prior plan.

Similar limitations are found at W.S. § 26-19-107(a)(xi) concerning group disability plans; at W.S. § 26-19-306(c) concerning health benefit plans for small employers; at W.S. § 26-38-105 concerning long-term care insurance; and at W.S. § 26-43-108 concerning health insurance pool coverage.

A waiver signed by the insured as to coverage for a particular condition at the time of applying for health insurance will be enforced. In O'Donnell v. Blue Cross Blue Shield of Wyoming, 76 P.3d 308, 313 (Wyo. 2003), the plaintiff signed a waiver excluding coverage of a cervical spine condition. The policy also included a standard clause on the coverage of preexisting conditions. A later endorsement to the policy amended the definition of a preexisting condition to track the language found in HIPAA at 42 U.S.C. § 300gg(a). The plaintiff argued that the endorsement superseded the waiver. The Wyoming Supreme Court held that the structure of the policy clearly indicated the intent of the parties to treat the cervical spine condition differently from any other preexisting conditions and to conclude that the preexisting conditions clause in the policy had any relation to the cervical spine condition would render the existence of the waiver superfluous in clear contravention of the parties' explicit intent otherwise. The Court held that the preexisting conditions clause of the Plaintiff's policy was separate from the waiver and had no effect on the waiver.

The United States District Court for the District of Wyoming upheld a 15 day exclusionary period in a health policy which stated that the policy covered "sickness manifesting more than 15 days after the Policy Effective Date" where the insured was diagnosed with a brain tumor within fifteen days of the effective date of the policy. White v. Continental General Insurance Company, 831 F.Supp. 1545 (D. Wyo. 1993).

In Miles v. Continental Casualty Company, 386 P.2d 720 (Wyo. 1963), the Wyoming Supreme Court addressed a claim under a health and accident policy which provided payment for "death from bodily injury caused by accident and resulting directly and independently of all other causes." The Court identified the following principles from an earlier case:

- That a policy of insurance should not be so strictly construed as to thwart the general object of the insurance, and provision for loss by accident would not be construed to apply only in case the insured was in perfect health at the time of the accident.
- That in considering the problem, the difference between proximate cause on the one hand and remote cause or condition on the other, as recognized in law, cannot be overlooked and even though a disease, bodily infirmity, or predisposing cause exists at the time of accident, it will not defeat recovery unless it is a proximate cause rather than a remote cause or condition.
- A dormant or latent disease or infirmity which could not reasonably be expected to cause such a trauma is a remote case or condition that cannot reasonably be said to be a proximate cause.
- It is sometimes difficult to determine whether an existing factor should be considered as a condition or remote cause rather than a proximate cause, and in case of doubt the question must be left to the jury.

Miles v. Continental Casualty. Company., 386 P.2d 720, 722-23 citing Equitable life Assr. Soc. of United States v. Gratiot, 14 P.2d 438 (Wyo.1932). The Court further stated that:

> latent or dormant bodily weakness in itself, on the part of a claimant, is insufficient to be regarded as the proximate cause of a death or injury where the accident sets in motion consequences which otherwise would not have ensued if such latent or dormant condition had not existed. Miles, 386 P.2d at 723.

The plaintiff in the Miles case fell and broke his left femur. X-rays revealed that cancer was present in some five inches of the left femur, with an irregular, transverse fracture line running through the affected area. In an effort to stop the spread of cancer, the left leg was amputated. The plaintiff died approximately two months later. The death certificate indicated "Respiratory Failure" as the immediate cause due to a Metastatic Osteogenic Sarcoma due to the Osteogenic Sarcoma Femur. The insurance policy covered death caused directly by accident and independently of all other causes. The Wyoming Supreme Court held that the medical testimony was undisputed that the cancer in the left femur was not dormant but on the contrary was active and virulent and that while the accident was a substantial contributing cause of death so was the cancer. Id. The Court opined that there was no factual question to be determined by the jury and the matter was purely a question of law and affirmed the trial court's determination that the plaintiff did not demonstrate a bodily injury resulting in death from accident and thus failed to bring the loss within the coverage of the policy.

## Statutes of Limitations and Repose

The statute of limitations for actions based on breach of contract is ten years. W.S. § 1-3-105(a)(i). Actions based in tort, such as bad faith, are subject to a four-year limitation period. W.S. § 1-3-105(a)(iv)(C).

## TRIGGER AND ALLOCATION ISSUES FOR LONG-TAIL CLAIMS

### Trigger of Coverage

No reported cases arising in Wyoming state or federal courts have addressed the issue of which policies provide coverage where the injury or damage is continuous through several policy periods.

### Allocation Among Insurers

No reported cases arising in Wyoming state or federal courts have addressed the issue of allocation of a loss among multiple insurers in the context of long-tail claims

## CONTRIBUTION ACTIONS

### Claim in Equity vs. Statutory

No statutory right of contribution exists. In Aetna Casualty and Surety Company v. St. Paul Fire and Marine Insurance Company, 236 F.Supp. 289 (D.Wyo. 1964) the United States District Court for the District of Wyoming ruled in a declaratory judgment action that Aetna was entitled to a judgment declaring that St. Paul was obligated to contribute its proportionate share of the insured's loss. The Tenth Circuit affirmed, holding that "[t]he duties and rights of the insurers as to the insured's indemnity against loss created an actual controversy within the meaning of 28 U.S.C. § 2201 which could appropriately be adjudicated by a declaratory judgment action." St. Paul Fire and Marine Insurance v. Aetna Casualty and Surety Company, 357 F.2d 315,316 (10th Cir. 1966). In Compass Insurance Company v. Cravens, Dargan and Company, 748 P.2d 724 (Wyo. 1988) property insurer Cravens Dargan and Company brought a subrogation action in the name of the insured, the State of Wyoming, seeking reimbursement from liability insurer Compass Insurance Company for costs of environmental cleanup caused by an oil spill. The trial court ordered that the case caption be amended substituting Cravens as the real party in interest and ruled that Compass must pay the cost of cleanup of the oil on the property of the insured's neighbor. On appeal, the Wyoming Supreme Court held that no right of subrogation exists in favor of one insurer against another insurer of the same insured. Id. at p. 728. The Court, however, characterized the action as one for reimbursement without articulating the legal basis for such a claim. Although not so articulated, the Compass case is authority for an equitable right of contribution.

In cases in which two policies arguably provide coverage for the same loss, the Court first looks to the language of both policies to determine if either policy has addressed that situation. Farmers Ins. Exch. v. Fidelity & Casualty Co, 374 P.2d 754, 757 (Wyo. 1962). If all policies contain provisions stating that coverage is in excess of any other valid and collectible insurance, then each insurer shall be liable to provide coverage in proportion to its share of the total liability limits available from all insurers. *Id*. at 760; *See also* Wyo. Farm Bureau Mut. Ins. Co. v. American Hardware Mut. Ins. Co., 487 P.2d 320, 323 (Wyo. 1971). The language of each policy, however, controls. For example, in St. Paul Mercury Ins. Co. v. Pennsylvania Casualty Co., 642 F.Supp. 180, 185 (D.Wyo. 1986), to insurers covered a particular loss. On insurer's policy stated that its coverage was excess to other valid and collectible insurance. The other insurer's policy, however, stated that in the event of other valid and collectible insurance, it would cover the loss pro rata in proportion to its share of available insurance. The Court held that the insurer with the excess clause did not have a duty to indemnify because its excess clause was not mutually repugnant to

the other insurer's pro rata clause. *Id.* at 185. In such a situation, however, the excess insurer may be liable for their share of defense costs if both policies impose a duty to defend on the insurers. *Id*. at 187.

## Elements

As the Wyoming Supreme Court has not specifically recognized a contribution action between or among insurers, no specific elements can be stated. In Northland Insurance Company v. Miles, 446 P.2d 160, 162 (Wyo. 1968), however, the Wyoming Supreme Court noted that, "for a proportionate recovery clause to operate in the insurer's favor, or for the enforcement of contribution between insurers, there must be identity of risk." In Northland, the Court held that an automobile insurer could not offset medical expense payments to its insured for coverage under the insured's other policies providing insurance for disability or loss of earnings.

# DUTY TO SETTLE

Under Wyoming law, the failure to settle a third-party claim within policy limits will expose the insurer to tort liability for bad faith if the insured is exposed to a judgment in excess of policy limits. Jarvis v. Farmers Insurance Exchange, 948 P.2d 898 (Wyo. 1997); see also Crawford v. Infinity Ins. Co., 64 Fed. 146, 151 (10th Cir. 2003).

Wyoming law recognizes the independent tort cause of action for first-party bad faith claims. McCullough v. Golden Rule Ins. Co., 789 P.2d 855 (Wyo. 1990). Different from third-party bad faith claims, both the insured and insurer are parties to the policy (contract) in a first-party bad faith claim, and thus their individual rights should be controlled only by the insurance policy. Id. at 856. Thus, a first-party bad faith claim will lie when an insurer in bad faith refuses to pay its insured's direct claim for policy benefits. Gainsco Ins. Co. v. Amoco Production Co., 53 P.3d 1051, 1058 (Wyo. 2002). The Wyoming Supreme Court has laid out an objective standard to determine whether an insurer has committed first-party bad faith. Id. First, a court must determine whether the denied claim is fairly debatable. Id. The "claim is fairly debatable if a reasonable insurer would have denied or delayed payment of benefits under the facts and circumstances." Id. In the end, for a plaintiff to show first-party bad faith it must establish the following: (1) the absence of any reasonable basis for denying the claim, and (2) the insurer's knowledge or reckless disregard of the lack of a reasonable basis for denying the claim. Id.; see also McCullough, 789 P.2d at 860.

# LH&D BENEFICIARY ISSUES

## Change of Beneficiary

Under Wyoming law, where a policy holder has performed all things required of him or her to change the beneficiary of a life insurance policy, the failure of the insurer to endorse the change on the policy does not prevent the operation of the change of beneficiary. Novosel v. Sun Life Assurance Co. of Canada, 55 P.2d 302 (Wyo. 1936), on rehearing, 57 P.2d 110 (Wyo. 1936).

## Effect of Divorce on Beneficiary Designation

When a husband names his wife as a beneficiary in a life insurance policy, and thereafter they are divorced with no change made in the beneficiary, the mere fact of the divorce does not affect the right of the named

beneficiary to the proceeds of the insurance policy. Costello v. Costello, 379 F.Supp. 630 (D. Wyo. 1974). That result is not affected by a property settlement agreement which did not specifically mention the insurance policy. *Id.*

Wyoming Statute § 2-14-101 provides that a beneficiary of a life or accident insurance policy who "feloniously" takes, causes or procures the death of a policy holder shall not take the proceeds of the policy. In Dowdell v. Bell, 477 P.2d 170 (Wyo. 1970), however, the Wyoming Supreme Court imported the word "intentional" into the statute and held that, where the husband unlawfully caused the death of his wife and was convicted of involuntary manslaughter, a felony, the husband did not forfeit his right to receive benefits on his wife's life insurance policy. The Court reasoned that the only reasonable interpretation of the statute required that the taking of the policy holder's life must be intentional in order for the beneficiary to be deprived of the proceeds.

## INTERPLEADER ACTIONS

Rule 22 of Wyoming Rules of Civil Procedure states:

Persons having claims against the plaintiff may be joined as defendants and required to interplead when their claims are such that the plaintiff is or may be exposed to double or multiple liability. It is not ground for objection to the joinder that the claims of the several claimants or the titles on which their claims depend do not have a common origin or are not identical but are adverse to and independent of one another, or that the plaintiff avers that the plaintiff is not liable in whole or in part to any or all of the claimants. A defendant exposed to similar liability may obtain such interpleader by way of cross-claim or counterclaim. The provisions of this rule supplement and do not in any way limit the joinder of parties permitted in Rule 20 [permissive joinder of parties].

### Availability of Fee Recovery

Wyoming law does not provide for the recovery of attorney fees in an interpleader action.

### Differences in State vs. Federal

Wyoming procedure for interpleader is substantially similar to the federal procedure. Federal Rule of Civil Procedure 22 states:

- Grounds.
    - *By a Plaintiff.* Persons with claims that may expose a plaintiff to double or multiple liability may be joined as defendants and required to interplead. Joinder for interpleader is proper even though:
        - the claims of the several claimants, or the titles on which their claims depend, lack a common origin or are adverse and independent rather than identical; or
        - the plaintiff denies liability in whole or in part to any or all of the claimants.
    - *By a Defendant.* A defendant exposed to similar liability may seek interpleader through a crossclaim or counterclaim.
- Relation to Other Rules and Statutes. This rule supplements--and does not limit--the joinder of parties allowed by Rule 20. The remedy this rule provides is in addition to--and does not supersede or limit--the remedy provided by 28 U.S.C. §§ 1335, 1397, and 2361. An action under those statutes must be

conducted under these rules.

Attorneys in Wyoming should be careful with interpleader actions as they raise significant conflict of interest issues for attorneys retained by an insurer to defend an insured – particularly if there are multiple claimants and not enough coverage to satisfy all claims.