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West Virginia

REGULATORY LIMITS ON CLAIMS HANDLING

Timing for Responses and Determinations

W.Va. Code § 33-11-1, *et seq.*, is the West Virginia Unfair Trade Practices Act ("UTPA," or the "Act"). Regulations regarding Unfair Trade Practices are found in W.Va. Code St. R. § 114-14, *et seq.* The Act defines "failing to acknowledge and act reasonably promptly upon communications with respect to claims arising under insurance policies" and "failing to affirm or deny coverage of claims within a reasonable time after proof of loss statements have been completed" as "unfair claim settlement practices." W.Va. Code § 33-11-4.

Accordingly, the Unfair Trade Practices regulations state that an insurer must, within fifteen (15) working days upon receiving notification of a claim, do the following:

- acknowledge the receipt of such notice unless full payment is made within such period of time, § 114-14-5.1; and
- provide to every first-party claimant, or the claimant's authorized representative, a notification of all items, statements, and forms that the insurer reasonably believes will be required from the claimant, § 114-14-6.2(b).

The term "working days" is meant to exclude all weekends and observed holidays. *See e.g. Aluise v. Nationwide Mut. Fire Ins. Co.*, 218 W.Va. 498, 509 (2005); *see also e.g.* W.Va. Code § 6-C-2(2)(c). Upon receiving notification of a claim, the insurer must promptly and diligently pursue a thorough, fair, and objective investigation, and may not unreasonably delay resolution by persisting in seeking information not reasonably required for o material to the resolution of a claim dispute, § 114-14-6.1. To ensure that this occurs, the insurer must establish procedures to commence an investigation of any claim filed by the complainant within fifteen (15) working days of receipt of notice of claim. § 114-14-6.2(c). Failure to establish procedures to commence investigations timely is evidence of unfair claim settlement practices under W.Va. Code § 33-11-4(9)(c); the Courts have not ruled on whether these procedures absolutely must be in writing, though they have indicated that it seems unlikely that procedures could be implemented in accordance with the Act without being in writing. *Cornett Mgmt. Co., LLC v. Lexington Ins. Co.*, 2007 U.S. Distr. LEXIS 58284, *16–18 (N.D.W.Va. 2007).

The acknowledgement of receipt of notice of claim, referenced above, may be in writing; if not in writing, the insurer must make a notation dating and acknowledging the claim in the claim file. § 114-14-5.1. However, if the insurer needs more than thirty (30) calendar days from the date that a notice of claim is received to determine whether the claim should be accepted or denied, it must notify the claimant in writing within fifteen (15) working days after the thirty-day period expires. The insurer must provide written notification to the claimant every forty-five (45) calendar days thereafter until the investigation is complete. Each of these notifications must set forth the reason or reasons why additional time is needed for investigation. § 114-14-6.7. This timing is shortened in the case of automobile-related physical damage claims: if any element of such a claim remains unresolved more than fifteen (15) working days from the date of receipt of proofs of loss by the insurer, the insurer must provide written explanation of the specific reasons for delay (unless reasonable grounds exist to suspect fraud or arson). In that case, an updated explanation letter is required every thirty (30) days thereafter until all elements of the claim are either honored or rejected. § 114-14-7.5.

With respect to paying claims agreed upon in settlement of all or part of any claim, the insurer must make such payment no later than fifteen (15) working days from the insurer's receipt of such agreement or from the date of the performance by the claimant of any condition set by such agreement, whichever is later. § 114-14-6.11.

When dealing with a non-represented or non-attorney first-party claimant, the insurer must notify the first-party claimant of any applicable statute of limitations, policy time limit, or contract time limit that could be affected no less than thirty (30) days before the date on which such limit expires. In the case of non-represented or non-attorney third-party claimants, that notification must occur no less than sixty (60) days before expiration. § 114-14-6.12.

Standards for Determination and Settlements

Unfair settlement practices relating to determination and settlement of claims, exclusive of those referenced in the above section on timing, are set forth in the Act at § 33-11-4(9)(d),(f)–(n). The regulations for fair settlement practices, applicable to all insurers, are set forth in W.Va. Code R. § 114-14-6, with similar regulations specific for automobile insurers set forth in W.Va. Code R. § 114-14-7. An inexhaustive list of requirements for fair and equitable settlements, as prescribed in the Act and its accordant regulations, includes:

- Misrepresenting a material fact or policy provision relating to coverage at issue;
- Failing within a reasonable time to affirm or deny coverage, including failing to settle claims under one portion of a policy in order to influence settlements under other portions;
- Refusing to pay a claim without conducting a reasonable investigation;
- Failing to provide a reasonable, policy-based explanation for a denial or offer of settlement; and
- Compelling insureds to institute litigation to recover amounts due under a policy by offering substantially less than the amounts ultimately recovered in litigation.

West Virginia recognizes private causes of action for damages arising from unfair trade settlement practices (*i.e.*, subdivision (9), *supra*). *See Maher v. Continental Casualty Co.*, 76 F.3d 535, 542–43 (4th Cir. Ct. App. 1996) (citing *Jenkins v. J.C. Penney Casualty Ins. Co.*, 167 W.Va. 597 (1981). It should be noted, however, that *Jenkins* ruled third-party claims cannot be permitted before the underlying claim is ultimately resolved. *Jenkins* at 608–609. This rule was partly overturned in *State ex rel. State Farm Fire & Casualty Co. v. Madden*, 192 W.Va. 155 (1994), which allowed for joinder of insurers along with insureds in the same case.

In *Hayseeds, Inc. v. State Farm Fire & Cas.*, 177 W.Va. 323 (1986), which involved a property insurance claim, the Supreme Court of Appeals approved damages for "aggravation and inconvenience," which is in place: (i) to compensate fully for damages; and (ii) to encourage quick settlements and trials. *See Hayseeds* at 330–31. Also in *Hayseeds*, West Virginia established the rule that punitive damages are generally unavailable against insurance companies for refusal to pay on a claim "unless such refusal is accompanied by a malicious intention to injure or defraud." *Id.* at 331.

PRINCIPLES OF CONTRACT INTERPRETATION

In *Motorists Mut. Ins. Co. v. Zukoff*, 244 W. Va. 33, 37 (2020), the Supreme Court of Appeals stated:

> In West Virginia, insurance policies are controlled by the rules of construction that are applicable to contracts generally. We recognize the well-settled principle of law that this Court will apply, and not interpret, the plain and ordinary meaning of an insurance contract in the absence of

> ambiguity or some other compelling reason. Our primary concern is to give effect to the plain meaning of the policy and, in doing so, we construe all parts of the document together.

Ambiguity exists "when the language of the insurance policy is of such doubtful meaning that reasonable minds might be uncertain or disagree as to its meaning." *Change, Inc. v. Westfield Ins. Co.*, 208 W.Va. 654, 657 (2000). In the instance where ambiguity exists, the contract is to "strictly construed against the insurance company and in favor of the insured." Syl. pt. 4, *National Mutual Ins. Co. v. McMahon & Sons, Inc.*, 177 W.Va. 734 (1987). The Supreme Court of Appeals has also specifically applied the general interpretive doctrines of *ejusdem generis* and *noscitur a sociis* to insurance contracts, to show that general words in insurance policies are not to be construed broadly, but are to be "restricted to a sense analogous to the specific words." *Murray v. State Farm Fire & Casualty Co.*, 203 W.Va. 477, 485.

For example, in construing an ambiguous insurance contract against the insurer, the Supreme Court of Appeals applied *noscitur a sociis* to determine that a rupture of the municipal water main—a "manmade structure"—fell within the covered damages of the insurance policy, where damages that were covered included damages from sprinkler leakage (a manmade structure), but not from flood, surface water, waves, tides, tidal waves, etc. *See Change, Inc.* at 658.

Consistent with typical tenets of contractual interpretation, "An insurance policy should never be interpreted so as to create an absurd result, but instead should receive a reasonable interpretation, consistent with the intent of the parties." Syl. pt. 2, D'Annunzio v. Security-Connecticut Life Ins. Co., 186 W. Va. 39 (1991).

Importantly, as a matter of West Virginia law governing coverage disputes, "[a]ny person who shall solicit within [West Virginia] an application for insurance shall . . . be regarded as an agent of the insurer and not the agent of the insured." W. Va. Code § 33-12-22. Accordingly, the insurance agent is deemed the agent of the insurance company and, therefore, the agent's knowledge and actions can arguably be attributed to the insurance company.

CONTRACT INTERPRETATION

Common Issues

1. Faulty Workmanship as an "Occurrence" [What is the state of the common law in your state on this subject?]

According to *Cherrington v. Erie Ins. Prop. & Cas. Co.*, 231 W.Va. 470, 745 S.E.2d 508 (2013), "Defective workmanship causing bodily injury or property damage is an 'occurrence' under a policy of commercial general liability insurance." *Id.* at Syl. pt. 1. It should be noted that this decision overruled past Court decisions; accordingly, one should be cautioned against reliance on any pre-*Cherrington* case in analyzing this issue.

2. Does Your State Have an Anti-Indemnity Statute? [And if so, does it have any notable peculiarities?]

West Virginia does have an anti-indemnity statute—W.Va. Code § 55-8-14—which applies in general construction settings (except in the case of construction bonds or insurance contracts or agreements). "This statute," the West Virginia Supreme Court of Appeals has held,

> requires courts to void a broad indemnity agreement only if the indemnitee is found by the trier-of-fact to be solely (100 percent) negligent in causing the harm and the contract that allowed the indemnity for sole negligence was not, in substance, a contract allocating the duty to purchase insurance for the benefit of all parties to

the contract.

Dalton v. Childress Serv. Corp., 189 W. Va. 428, 432 S.E.2d 98 (1993).

CHOICE OF LAW

Choice-of-law provisions, including those in insurance policies, are *prima facie* valid and should be enforced unless enforcement is shown by a resisting party to be unreasonable under the circumstances. A choice of law provision in a contract is not given effect when the contact bears no substantial relationship with the jurisdiction whose laws the parties have chosen to govern the agreement, or when the application of that law would offend the public policy of the State. *See Cannelton Indus. v. Aetna Casualty & Sur. Co. of Am.*, 194 W.Va. 186 (1994). Contracts that provide for the substantive laws of West Virginia to apply to disputes arising thereunder do not exclude the procedural laws of West Virginia from applying. *See State ex rel. Airsquid Ventures, Inc. v. Hummel*, 236 W.Va. 142 (2015).

The law of the State where the insurance contract was entered into generally controls; though the two exceptions to this general rule are: (i) where there exists in another State a "more significant relationship to the transaction and the parties"; and (ii) where application of the law of the State will result in a conflict of public policy. *See Liberty Mut. Ins. Co. v. Triangle Indus.*, 182 W.Va. 580, 583 (1990).

DUTIES IMPOSED BY STATE LAW

In *Honaker v. Mahon*, 210 W.Va. 53, 62, n.8 (2001), the West Virginia Supreme Court of Appeals stated:

> [T]his Court has held that an insurance company owes its own policyholders a duty of good faith and fair dealing, *see Shamblin v. Nationwide Mut. Ins. Co.*, 183 W. Va. 585, 396 S.E.2d 766 (1990); *Elmore v. State Farm Mut. Auto. Ins. Co.*, 202 W. Va. 430, 504 S.E.2d 893 (1998), and a duty to refrain from statutory unfair claim settlement practices, *see Jenkins v. J.C. Penney Cas. Ins. Co.*, 167 W. Va. 597, 280 S.E.2d 252 (1981); *State ex rel. State Farm Fire & Cas. Co. v. Madden,* 192 W. Va. 155, 451 S.E.2d 721 (1994). These duties exist regardless of whether the policyholder "substantially prevails." More importantly, these duties are not delegable, and insurance companies are therefore responsible for the actions of the attorneys they employ. *See, e.g., Kohlstedt v. Farm Bureau Mut. Ins. Co.*, 258 Iowa 337, 340, 139 N.W.2d 184, 185 (1965) ("The duty case on the insurer is to conduct good faith investigation of all aspects of the case . . . This means its employees and agents, including doctors and lawyers, must act in good faith."); *Kooyman v. Farm Bureau Mut. Ins. Co.*, 315 N.W.2d 30 (Iowa 1982); *Cooper v. National Union Fire Ins. Co. of Pittsburgh*, Pa., 921 P.2d 1297 (Okla. App. 1996); *Schimizzi v. Illinois Farmers Ins. Co.*, 928 F. Supp. 760 (N.D.Ind. 1996); *Majorowicz v. Allied Mut. Ins*. Co., 212 Wis. 2d 513, 569 N.W.2d 472 (1997).

Also, as referenced above, W. Va. Code § 33-12-22 deems the insurance agent to be the agent of the insurer, and not the insured; thus, these duties, to the extent they apply, implicate the agent in the conduct of its business, and the actions of the agent can bind or be attributed to the insurer.

Duty to Defend

1. Standard for Determining Duty to Defend

An insurer's duty to defend is broader than its duty to indemnify. When a policy contains a provision invoking a duty to defend, West Virginia law ordinarily imposes upon an insurer a duty to defend its insured fully, even where some claims may not be covered by the terms of the policy. *Camden-Clark Mem. Hosp. Ass'n v. St. Paul Fire & Marine Ins. Co.*, 224 W.Va. 228, 237 (2009).

The standard for determining the duty to defend is

> tested by whether the allegations in the plaintiff's complaint are reasonably susceptible of interpretation that the claim may be covered by the terms of the insurance policy. There is no requirement that the facts alleged in the complaint specifically and unequivocally make out a claim within the coverage. Furthermore, it is generally recognized that the duty to defend an insured may be broader than the obligation to pay under a particular policy. This ordinarily arises by virtue of language in the ordinary liability policy that obligates the insurer to defend even though the suit is groundless, false, or fraudulent.
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> *Aetna Casualty & Property Company v. Pitrolo*, 176 W.Va. 190, 194 (1986).

An article in the West Virginia State Bar Practice Handbook summarizes "the principles that govern the coverage analysis" as follows:

> (1) ambiguity is construed in favor of the insured;
> (2) the duty to defend is broader than the duty to pay;
> (3) the allegations in the complaint normally control the coverage analysis;
> (4) the insurer must defend all allegations whether covered or not;
> (5) the insured's right to a defense will not be foreclosed unless such a result is inescapably necessary; and
> (6) the insurer need not defend if the alleged conduct is entirely foreign to the risk insured against.

Jason P. Foster, "Insurance Law," W.VA. STATE BAR PRACTICE HANDBOOK, ch. 39 (citing *Horace Mann Ins. Co. v. Leeber*, 180 W. Va. 375 (1988)).

2. Issues with Reserving Rights

The West Virginia Supreme Court of Appeals has adopted the Black's Law Dictionary (9th ed. 2009) definition of a reservation of rights: "[a] notice of an insurer's intention not to waive its contractual rights to contest coverage or to apply an exclusion that negates an insured's claim." *State ex rel. Nationwide Mut. Ins. Co. v. Wilson*, 236 W.Va. 228, 232, n.5 (2015). This extends also to the right to object to consent judgments to which the insurer is not privy. *See Horkulic v. Galloway*, 222 W.Va. 450 (2008). A defense under a reservation of rights letter does not constitute waiver of an exclusion that is discovered later. *See Farm Fam. Mut. Ins. Co. v. Bobo*, 199 W. Va. 598 (1997).

While not specifically commented on in the Courts, it would appear that submission of reservation of rights must be done as soon as reasonably possible, under the unfair settlement practices provision (subdivision (9)) of the Act.

Recently, the Supreme Court has refused to hold that an insured is entitled to reimbursement for retention of separate counsel (in addition to counsel provided by the insurer) simply because a defense is provided

under a reservation of rights. *Soaring Eagle Dev. Co., LLC v. Travelers Idem. Co. of Am. & Travelers Prop.*, 2020 W.Va. LEXIS 688, *13–14 (2020).

State Privacy Laws; Insurance Regulatory Issues; Arbitration/Mediation

West Virginia protects an "inviolate" right to privacy. *See Roach v. Harper*, 143 W.Va. 869 (1958). Accordingly, the State recognizes a cause of action in tort for invasion of privacy, or intrusion. The State furthermore recognizes common law tort claims for wrongful disclosure of medical or personal health information. *See e.g. R.K. v. St. Mary's Med. Ctr., Inc.*, 229 W.Va. 712 (2012). Insurers should be cognizant, therefore, of their obligations to protect the private information, and particularly medical or health information, of their insureds. Furthermore, they should be aware that publication of personal information or intrusion of privacy in any way in connection with collection efforts is likely to implicate the West Virginia Consumer Credit Protection Act, W.Va. Code § 46A-2-126. West Virginia places more stringent restrictions than federal law on the disclosure of certain kinds of medical information.

The West Virginia legislature passed § 33-6F-1 to require the Insurance Commissioner to propound rules regarding the disclosure of nonpublic personal information. Accordingly, W.Va. Code St. R. § 114-57-1, *et seq.*, generally prohibiting the disclosure of nonpublic personal health information, and containing other regulations relating, *inter alia*, to authorizations and notice requirements.

1. Criminal Sanctions

While civil and criminal sanctions apply for violations of the statute relating to insurance fraud (§ 33-41-1, *et seq.*), failure to notify commissioner of the impairment of the insurer (§ 33-35-1), or other crimes committed in connection with the operation of an insurance business (§ 33-41-4(a)), there is no West Virginia criminal statute dealing directly with disclosure of nonpublic personal information in the context of insurance.

2. The Standards for Compensatory and Punitive Damages

Compensatory damages for invasion of privacy are available in West Virginia for: (i) the harm to the plaintiff's interest in privacy from the invasion; (ii) the plaintiff's mental distress proved to have been suffered if it is of a kind that normally results from such an invasion; (iii) special damages of which the invasion is a legal cause; and (iv) if none of the former damages is proven, nominal compensatory damages are to be awarded. *See Rohrbaugh v. Wal-Mart Stores*, 212 W.Va. 358 (2002).

3. Insurance Regulations to Watch

An inexhaustive list of pending bills that bear mentioning here include:

SB 175: which would require medical insurance providers to include infertility services in their policies;

SB 334: which would authorize the Department of Health and Human Services (DHHR) and the Insurance Commissioner to promulgate legislative rules relating to the "All-Payers Claims Database, Submission Manual";

SB 346: which would authorize the Insurance Commissioner to promulgate legislative rules relating to suitability in annuity transactions;

SB 479: which would expand certain insurance coverages for pregnant women;

SB 480: which would modify group accident and sickness insurance requirements;

SB 657: which would modify the West Virginia Long-Term Care Insurance Act to include new and additional requirements for policies;

HB 2162: which would require medical malpractice insurers to establish a separate insurance pool for doctors who conduct abortions;

HB 2192: which would prohibit or limit denial of coverage, increase in premiums, cancellation, etc. for living organ donors;

HB 2317: which would prohibit use of an applicant's or insured's credit history for certain insurance policies;

HB 2517: the Medical Insurance Policy Owner's Notification Act, which would require that all medical insurance property owners be notified of controlled substances that prescribed to beneficiaries under their policies;

HB 2960: which would prohibit policy limits from being accessed prior to initiation of a lawsuit; and

HB 3474: which would increase mandatory insurance coverage limits in vehicle insurance policies.

4. State Arbitration and Mediation Procedures

West Virginia has adopted the Revised Uniform Arbitration Act, W.Va. Code § 55-10-1, *et seq.*. Under this statute and case law addressing it, arbitration agreements are generally deemed enforceable, subject to general rules about contractual interpretation (*e.g.* unconscionability, oppression). As stated by the Supreme Court of Appeals:

> As a written understanding between parties to resolve future disputes through arbitration, the validity of an arbitration agreement is determined in the same manner that the validity of other written agreements is determined—through the application of well-established contract principles. "Nothing in the Federal Arbitration Act, 9 U.S.C. § 2, overrides normal rules of contract interpretation." Rather,
>
> > [t]he purpose of the Federal Arbitration Act, 9 U.S.C. § 2, is for courts to treat arbitration agreements like any other contract. The Act does not favor or elevate arbitration agreements to a level of importance above all other contracts; it simply ensures that private agreements to arbitrate are enforced according to their terms.

State ex re. AMFM, LLC v. King, 230 W.Va. 471, 477–478 (2013) (citations omitted).

As for mediation, West Virginia recognizes that "the mediation process will only work where the parties are ensured that the process is fair to both sides and where the attainment of settlement is viewed as non-compulsory." *Riner v. Newbraugh*, 211 W.Va. 137, 145 (2002) (citing W.Va. T.C.R. 25.11 (stating that "no party may be compelled by these rules, the court, or the mediator to settle a case involuntarily or against the party's own judgment or interest")). Courts nonetheless often compel parties to attend mediation.

5. State Administrative Entity Rule-Making Authority

W.Va. Code § 33-2-1, *et seq.*, establishes the state agency "Insurance Commissioner of West Virginia," which agency consists of an Insurance Commissioner and such employees thereof as may be authorized by law. The duties of the Insurance Commissioner are to enforce the provisions of W.Va. Code chapter 33 (Insurance) and to perform the duties required thereunder. W.Va. Code § 33-2-3(a). The rules and regulations promulgated by the Insurance Commissioner are contained in W.Va. Code St. R. § 114-1-1, *et seq.*

EXTRACONTRACTUAL CLAIMS AGAINST INSURERS: ELEMENTS AND REMEDIES

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

West Virginia prescribes a duty of good faith and fair dealing in all contracts, including insurance contracts. *See Miller v. WesBanco Bank, Inc.*, 245 W.Va. 363, 386 (2021), Syl. pt. 4, *Shamblin*. Breach of this duty is a separate cause of action than breach of the underlying insurance contract, and is also a separate cause of action from one arising from violations of the Unfair Trade Practices Act, though these claims often overlap. Bad faith and UTPA cases sound in tort. *See Wilt v. State Auto. Mut. Ins. Co.*, 203 W.Va. 165 (1998).

3. First Party

A claim for breach of the duty of good faith and fair dealing in the insurance contract is brought under the standards set forth in *Hayseeds, supra*. Separately, a claim for breach of the Unfair Trade Practices Act—or, for unfair settlement practices—is brought under the standards set forth in *Jenkins, supra.* Where a claim under *Hayseeds* requires that the policyholder substantially prevail on an underlying contract action in order to recover enhanced damages, a claim under *Jenkins* does not require that the policyholder substantially prevail. *Jenkins* instead predicates entitlement to relief solely upon violation of the Act, where such violation arises from a "general business practice" on the part of the insurer. *See Lemasters v. Nationwide Mut. Ins. Co.*, 232 W.Va. 215, 221 (2013).

Under a *Hayseeds* claim, the substantially prevailing plaintiff is entitled to damages under the underlying contract, reasonable attorney fees incurred, net economic loss caused by the delay in settlement, and damages for aggravation and inconvenience, as well as punitive damages upon showing of "actual malice." *See McCormick v. Allstate Ins. Co.*, 197 W.Va. 415, 421–22 (1996). Bad faith is not required to recover fees, economic loss damages, and aggravation and inconvenience damages. Unlike other cases involving property, *Hayseeds* claims do not limit aggravation and inconvenience damages to those relating to loss of use; these damages can extend as well to those that related to the aggravation and inconvenience shown in the entire claims process. *Id.* As it regards attorney's fees, there is a presumption that reasonable attorneys' fees are one-third the face amount of the policy. *Id.*

As for *Jenkins* claims, the plaintiff must essentially prove that there has been a violation or multiple violations of the Act in the management of the plaintiff's claim which entailed a "general business practice" of the insurer. *See* Syl. pt. 2, *Jenkins*; *see also Madden*, *supra*. More than a single isolated violation of the Act must be shown in order to meet the statutory requirement of "general business practice." *See* Syl. pt. 3, *Jenkins*. A prevailing plaintiff in a *Jenkins* claim may recover his increased costs and expenses, including increased attorney fees, resulting from the insurance company's use of an unfair business practice in the settlement or failure to settle fairly the underlying claim. *See McCormick*, 197 W.Va. at 422–23.

In the context of insurance, as stated above, punitive damages are generally unavailable against insurance companies for refusal to pay on a claim "unless such refusal is accompanied by a malicious intention to injure or defraud." *Hayseeds*, at 331, *see also Shamblin v. Nationwide Mut. Ins. Co.*, 183 W.Va. 585 (1990).

A unique rule exists in West Virginia under *Shamblin*, *supra*, which holds that

> wherever there is a failure on the part of an insurer to settle within policy limits where there exists the opportunity to so settle and where such settlement within policy limits would release the insured from any and all personal liability, that the insurer has prima facie failed to act in its insured's best interest and that such failure to so settle prima facie constitutes bad faith towards its insured.

Id. at 595. The Court considers a variety of factors in determining whether the insurer has failed to settle within the policy limits, as described above, including "whether the reasonably prudent insurer would have refused to settle within policy limits under the facts and circumstances of the case, bearing in mind always its duty of good faith and fair dealing[.]" *Id.* In the event the insurer does fail to settle within the policy limits "where there exists an opportunity to so settle," the insurer will be liable for the entirety of a verdict in excess of the policy limits.

4.

5. Third-Party

In 2005, the West Virginia legislature made it no longer possible for third parties to bring claims in court against insurers for unfair claim settlement practices under the Act. The only remedy now available to third parties in such circumstances is to file a claim in administrative court, as set forth in W.Va. Code § 33-1-1-4a.

Fraud

The essential elements in an action for fraud are: (1) that the act claimed to be fraudulent was the act of the defendant or induced by him; (2) that it was material and false; that plaintiff relied on it and was justified under the circumstances in relying upon it; and (3) that he was damaged because he relied on it. Syl. Pt. 1, *Lengyel v. Lint*, 167 W. Va. 272, 280 S.E.2d 66 (1981).

West Virginia also recognizes constructive fraud, which "does not require scienter or intent to mislead; it can be established whether the representation is innocently or knowingly made." *Gum v. Dudley*, 202 W. Va. 477, 488, 505 S.E.2d 391, 402 (1998). To establish constructive fraud it must be shown that: (i) there was a material false representation, (ii) the hearer believed it to be true, (iii) that it was meant to be acted on, (iv) that it was acted on, and (v) that damage was sustained. *See Spence-Parker v. Maryland Ins. Group*, 937 F. Supp. 551, 561 (E.D.Va. 1996) (quoting *Webb v. Webb*, 16 Va. App. 486, 431 S.E.2d 55, 59 (1993)).

Intentional or Negligent Infliction of Emotional Distress

West Virginia's standard for negligent infliction of emotional distress is strictly limited to only certain situations. The Supreme Court of Appeals has ruled that:

> A plaintiff's right to recover for the negligent infliction of emotional distress, after witnessing a person closely related to the plaintiff suffer critical injury or death as a result of defendant's negligent conduct, is premised upon the traditional negligence test of foreseeability. A plaintiff is required to prove under this test that his or her serious emotional distress was reasonably foreseeable, that the defendant's negligent conduct caused the victim to suffer critical injury or death, and that the plaintiff suffered serious emotional distress as a direct result of witnessing the victim's critical injury or death. In determining whether the serious emotional injury suffered by a plaintiff in a negligent infliction of emotional distress action was reasonably foreseeable to the defendant, the following factors must be evaluated: (1) whether the plaintiff was closely related to the injury victim; (2) whether the plaintiff was located at the scene of the accident and is aware that it is causing injury to the victim; (3) whether the victim is critically injured or killed; and (4) whether the plaintiff suffers serious emotional distress.

State ex rel. Maxxim Shared Servs., Ltd. Liab. Co. v. McGraw, 242 W. Va. 346, 348, (2019). As for claims for intentional infliction of emotional distress, also referred to as "tort of outrage" or "tort of outrageous conduct," the Court has held that, to prevail on such a claim, the plaintiff must demonstrate that it suffered "severe emotional distress" that was caused by "extreme and outrageous" intentional or reckless conduct. *See* Syl. pt. 6, *Harless v. First National Bank in Fairmont*, 169 W. Va. 673 (1982). The Court has adopted the Restatement (Second) of Torts, § 46, in saying that, to prevail, the causative intentional or reckless conduct must be "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community." *See also Hines v. Hills Dep't Stores Inc.*, 193 W.Va. 91, 95 (1994).

State Consumer Protection Laws, Rules and Regulations

West Virginia's statutory consumer protection laws are generally set forth in the West Virginia Consumer Credit and Protection Act, W.Va. Code § 46A-1-101, *et seq*. Other consumer-related laws in the Code include, but are not limited to, laws relating to antitrust (§ 47-18-1, *et seq.*); insurance fraud (§ 33-41-1, *et seq*.); interest rates (§ 47-6-5); Ponzi and pyramid schemes (§ 47-15-1, *et seq.*); and general trade practices (§ 47-11-1, *et seq.*; § 47-11A-1, *et seq*.). The rules and regulations promulgated by the Attorney General applicable to consumer protection are contained at W.Va. Code St. R. § 142-1-1, *et seq.*

DISCOVERY ISSUES IN ACTIONS AGAINST INSURERS

Discoverability of Claims Files Generally

Claim files are generally discoverable, except to the extent they contain attorney opinion work product. Opinion work product consists of "the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation." W.Va. R. Civ. P. 26(b)(3). It "is even more scrupulously protected as it represents the actual thoughts and impressions of the attorney[.]" *In re Grand Jury Proceedings*, 33 F.3d 342, 348 (4th Cir. 1994). "Opinion work product enjoys a nearly absolute immunity and can be discovered in only very rare and extraordinary circumstances." *State ex rel. United Hosp. v. Bedell*, 199 W.Va. at 328, 484 S.E.2d at 211, *quoting Republican Party of North Carolina v. Martin*, 136 F.R.D. 421, 429 (E.D.N.C. 1991), *aff'd in part, rev'd in part* and *remanded on other grounds*, 980 F.2d 943 (4th Cir. 1992) (quoting *In re Doe*, 662 F.2d 1073, 1080 (4th Cir. 1981). This differentiates from what the Court has called the "attorneys' *fact* work product," as opposed to the attorneys' "*opinion* work product," which is generated for the attorneys, but not by the attorneys, and which can

be discovered "upon the proper showing of need." *State ex rel. Med. Assur. of W.Va., Inc. v. Recht*, 213 W.Va. 457, 467 (2003).

That said, the *Recht* case does clarify that the purpose of Rule 26(b)(3) work product protection "is to narrow the ability to obtain trial preparation material by expanding the coverage of the work product rule to include persons other than an attorney." *Id.* at 468 (quoting Syl. pt. 6, *In re Markle*, 174 W.Va. 550 (1984)). Thus, a report from the insured to the insurer is within the immunity as also are statements obtained by investigators for the insurer. *Id.* (quoting *Markle*, at 556).

In a bad faith, or *Jenkins*, claim, the evidentiary demonstration of a "general business practice" in violation of the Act is necessary; thus, information regarding past claims other than the underlying claim of the plaintiff are deemed discoverable, subject to the privilege and work product doctrines, and other discovery-related objections that are managed on a case-by-case basis, such as ones applying to burdensomeness.

Discoverability of Reserves

By statute, insurers are supposed to set aside reserves reflecting preliminary estimates of potential liability, though the statute does not impose a methodology as to how these reserves are to be calculated or determined. W.Va. Code § 33-2-9; § 33-7-5; § 33-8-22. Because of the variableness with which reserves may be calculated, and because their determination may involve disclosing opinions or impressions of attorneys in anticipation of litigation, the relevancy of reserve information to a given litigation cannot be fully ascertained without first knowing the context in which the reserves are calculated. By the relevance rules of W.Va. R. Civ. P. 26(b)(1), the Supreme Court of Appeals has therefore held that:

> when presented with a challenge to discovery of insurance reserves information, the trial court is required under the provisions of Rule 26(b)(1) of the West Virginia Rules of Civil Procedure to make a preliminary determination of whether the requested information is relevant in that it is admissible or is reasonably calculated to lead to the discovery of admissible evidence. In making a determination in the context of discovery about the relevancy of insurance reserves information, the trial [court] should take into account the nature of the case, the methods used by the insurer to set the reserves and the purpose for which the information is sought, and only grant requests for disclosure when its findings of fact and conclusions of law support a determination that the specific facts of the claim in the case before it directly and primarily influenced the setting of the reserves in question.

State ex rel. Erie Ins. Prop. & Cas. Co. v. Mazzone, 218 W. Va. 593, 598 (2005).

Discoverability of Existence of Reinsurance and Communications with Reinsurers

The West Virginia Supreme Court of Appeals has not addressed specifically a rule dealing with discoverability of reinsurance information, though in *Mazzone, supra*, it relied in part on *Rhone-Poulenc Rorer, Inc. v. Home Indemnity Company*, 139 F.R.D. 609 (E.D. Pa. 1991), which discussed both reserve and reinsurance information, in determining that this information must first be shown to be relevant to the claim, and not fall under the protections of the work product doctrine, in order to be discoverable. In *Rhone-Poulenc*, the determination was that this information was not discoverable. Thus, the focus in determining discoverability would be on whether there was some nexus of relevance between the information sought and the facts of the claim, in a vein similar to that addressed above regarding reserve information.

Attorney/Client Communications

Attorney/client communications are privileged and strenuously protected from disclosure. In the context of insurance bad-faith claims, the question arises as to whether such communications are discoverable to the extent that they show bad faith practices during the course of a litigation or in general business practice. The Supreme Court of Appeals has stated that, in such instances, there is a proper procedure for determining whether otherwise privileged material is nonetheless discoverable:

> In an action for bad faith against an insurer, the general procedure involved with discovery of documents contained in an insurer's litigation or claim file is as follows: (1) The party seeking the documents must do so in accordance with the reasonable particularity requirement of Rule 34(b) of the West Virginia Rules of Civil Procedure; (2) If the responding party asserts a privilege to any of the specific documents requested, the responding party shall file a privilege log that identifies the document for which a privilege is claimed by name, date, custodian, source and the basis for the claim of privilege; (3) The privilege log should be provided to the requesting party and the trial court; and (4) If the party seeking documents for which a privilege is claimed files a motion to compel, or the responding party files a motion for a protective order, the trial court must hold an in camera proceeding and make an independent determination of the status of each communication the responding party seeks to shield from discovery.

State ex rel. Westfield Ins. Co. v. Madden, 216 W. Va. 16, 21, 602 S.E.2d 459, 464 (2004)

DEFENSES IN ACTIONS AGAINST INSURERS

Misrepresentations/Omissions: During Underwriting or During Claim

W.Va. Code § 33-6-7 states that misrepresentations, omissions, concealment of facts, and incorrect statements cannot bar recovery unless "(a) Fraudulent; or (b) Material either to the acceptance of the risk, or to the hazard assumed by the insurer; or (c) The insurer in good faith would either not have issued the policy, or would not have issued a policy in as large an amount, or would not have provided coverage with respect to the hazard resulting in the loss, if the true facts had been made known to the insurer as required either by the application for the policy or otherwise."

The Supreme Court of Appeals has held that materiality is based on a determination of "whether a reasonably prudent insurer would consider a misrepresentation material to the contract." Syl. pt. 6, *Powell v. Time Ins. Co.*, 181 W. Va. 289 (1989). "Even innocent misrepresentations, if material, are sufficient to allow an insurer to rescind an insurance policy." *McDowell v. Allstate Vehicle & Prop. Ins. Co.,* 881 S.E.2d 447 (W. Va. 2022) (citing Syl. pt. 6, *Mass. Mut. Life Ins. Co. v. Thompson*, 194 W. Va. 473 (1995) ("[N]either West Virginia Code § 33-6-7(b) nor (c) requires that an insurer prove the subjective element that an insured specifically intended to place misrepresentations, omissions, concealments of fact, or incorrect statements on an application in order for the insurer to avoid the policy.").

Failure to Comply with Conditions

W.Va. Code § 56-4-2 gives a defendant insurance company the right to defend against a claim on the basis that the plaintiff failed to comply with any provision or condition of the underlying policy. As set forth in the statute, and discussed in *Shaffer v. Calvert Fire Ins. Co.*, 135 W.Va. 153 (1950), to raise this defense, the defendant "must file a verified statement in writing specifying by reference, or otherwise, the particular clause, condition or warranty in respect to which such failure or violation is claimed to have occurred." *Id.* at 161.

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

> A consent or confessed judgment against an insured party is not binding on that party's insurer in subsequent litigation against the insurer where the insurer was not a party to the proceeding in which the consent or confessed judgment was entered, unless the insurer expressly agreed to be bound by the judgment. Therefore, an attack on the consent or confessed judgment in the subsequent litigation by an insurer who did not expressly agree to such judgment is a permissible direct, not collateral, attack on the consent or confessed judgment.

Horkulic v. Galloway, 222 W. Va. 450, 461, 665 S.E.2d 284, 295 (2008).

Preexisting Illness or Disease Clauses

Asserting the presence of a preexisting condition is an available defense to sued insurers. However, the West Virginia legislature has restricted insurers from applying or asserting any definition of "preexisting condition" (or similar terminology) beyond the following statutory definition: "a condition for which medical advice or treatment was recommended by, or received from, a provider of health care services within six months preceding the effective date of coverage of an insured person." W. Va. Code § 33-15A-6(c)(1). This definition does not include symptoms of a preexisting condition. *See Wickland v. American Travelers Life Ins. Co.*, 204 W.Va. 430 (1998).

Statutes of Limitations and Repose

Applying W.Va. Code § 55-2-12, the Supreme Court of Appeals has held that the statute of limitations for bad faith and UTPA cases against insurers is one year. *See Wilt v. State Auto. Mut. Ins. Co.*, 203 W.Va. 165 (1998).

The statute of limitations on duty to defend cases begins to run when the insured "knows or reasonably should have known that the insurer refused to defend him or her in an action." *Noland v. Va. Ins. Reciprocal*, 224 W. Va. 372, 389 (2009). This holding has been limited only to duty to defend cases, and not to other bad faith or unfair claim settlement practices claims. *Id.*

TRIGGER AND ALLOCATION ISSUES FOR LONG-TAIL CLAIMS

Trigger of Coverage

West Virginia mandates insurers to offer "tail" coverage—which is defined as "insurance which covers a professional insured once a claims made malpractice insurance policy is cancelled, not renewed or terminated and covers claims made after such cancellation or termination for acts occurring during the period the prior malpractice insurance was in effect"—to insureds after termination, cancellation, or nonrenewal of a medical malpractice policy. W.Va. Code § 33-20D-1, *et seq.* The Insurance Commissioner has promulgated rules under authority of this statute, which are found in W.Va. Code St. R. § 114-30-1, *et seq.*

Commentary by the West Virginia Supreme Court of Appeals on tail coverage is extremely limited. In *W.Va. Mut. Ins. Co. v. Adkins*, 234 W.Va. 226 (2014), the Court ruled that a surgeon's medical corporation could not share in the coverage afforded under his tail coverage, because the corporation and surgeon had separate limits of insurance under the policy at issue in the case. Elsewhere, the United States District Court for the Southern District of West Virginia has held that W.Va. Code § 33-20D-1, *et seq.* is preempted under federal law as it regards risk-retention groups.

Allocation Among Insurers

The Fourth Circuit has held that the equal share method is the more reasonable and equitable method of apportionment between insurers, as opposed to the *pro rata* method. *See Reliance Ins. Co. v. St. Paul Surplus Lines*

Ins. Co., 753 F.2d 1288 (1985). This case was cited favorably in *Noland v. Va. Ins. Reciprocal* in determining that an insurer that was a party to the litigation had a duty to defend, even though the benefits covered by another insurer (which was not a party) had not yet been exhausted. 224 W.Va. 372 (2009).

CONTRIBUTION ACTIONS

Claim in Equity vs. Statutory

In West Virginia, there is a claim in equity for contribution. The claim "arises when persons having a common obligation, either in contract or tort, are sued on that obligation and one party is forced to pay more than his pro tanto share of the obligation." *Dunn v. Kanawha Cty. Bd. of Educ.*, 194 W. Va. 40, 45 (1995). The difference between contribution and indemnification is that indemnification allows the plaintiff to recover its entire payment, rather than merely the excess over its *pro tanto* share. *See id.* Importantly, the right to contribution has been substantially limited by the passage of W.Va. Code § 55-7-13a, *et seq.*, which established strict comparative and several fault in West Virginia. Statutory contribution, therefore, exists only for defendants who have been deemed jointly liable for deliberately pursuing "a common plan or design to commit a tortious act or omission." W.Va. Code § 55-7-13c(a).

Elements

As referenced above, statutory contribution exists only between joint tortfeasors in a "deliberate," "common plan or design to commit a tortious act or omission." W.Va. Code § 55-7-13c(a). To the extent that there remains an equitable claim for contribution that has not been done away with by the comparative fault statute, the elements would be as set forth in *Dunn, supra*.

DUTY TO SETTLE

Insurers are instructed to settle within the policy limits, when such an opportunity presents itself, as part of their duty of good faith and fair dealing. As set forth in *Shamblin, supra*, if a reasonable insurer would have so settled, but the defendant insurer refused or failed to do so "where there existed an opportunity," the insurer is liable for any verdict in excess of the policy limits.

LH&D BENEFICIARY ISSUES

Change of Beneficiary

West Virginia affords life insurers the right to provide that "no designation or change of beneficiary shall be binding on the insurer unless endorsed on the policy by the insurer, and that the insurer may refuse to endorse the name of any proposed beneficiary who does not appear to the insured to have an insurable interest in the life of the insured." W.Va. Code § 33-13-40.

The default rule is that changes in beneficiary designation must follow established policy procedures to be effective. However, the Courts have held that exceptions are recognized in the following circumstances:

> (1) Where the insurer has waived compliance with the prescribed regulations, or estopped itself to assert noncompliance therewith;
>
> (2) Where it is beyond the power of the insured to comply literally with the regulations; and
>
> (3) Where the insured has done all that he is required to do and only formal ministerial acts on the part of the insurer remain to be done in order to complete the change, equity will treat them as having been made.

Harmon v. Coyle, 209 F.2d 200 (1953) (citing *Gill v. Provident Life and Accident Ins. Co.*, 131 W.Va. 465 (1948).

Effect of Divorce on Beneficiary Designation

"It is well settled respecting such contracts that the designation of a beneficiary, valid in its inception remains so, and it is not to be disturbed by changed relationships of marriage or divorce unless otherwise stipulated in the contract or controlled by the laws of the state." *Hamilton v. McLain*, 83 W. Va. 433, 438, 98 S.E. 445, 447 (1919).

INTERPLEADER ACTIONS

Availability of Fee Recovery

Insurers are often faced with the possibility of double or multiple liability from multiple claimants, whether listed as beneficiaries or others. West Virginia Rule of Civil Procedure 22 allows insurers (or other similarly situated parties) to join these potential claimants and require them to interplead to determine the party which is entitled to the claimed funds. Through this vehicle, the party seeking interpleader (referred to often as a "stakeholder") can deposit funds with the Court pending the interpleader. *See e.g. Nationwide Life Ins. Co. v. Compton*, 2018 W.Va. LEXIS 194 (March 13, 2018).

The statute allowing interpleader, W.Va. Code § 56-10-1, permits the court in connection with an interpleader action to enter "judgment as to costs as may be just and proper." Fees and costs are therefore recoverable, within the Court's discretion. In the event that such fees and costs are determined to be awarded to the party which sought interpleader, these are paid from the funds deposited into the Court. The remainder is distributed to the party determined in the interpleading to be the recipient of the funds, and the receiving party "is entitled to a decree for the costs so taken out of the fund as well as his own costs." *Union Mut. Life Ins. Co. v. Lindamood*, 108 W.Va. 594, 598 (1930) (quoting Syl. pt. 2, *Swiger v. Hayman*, 56 W.Va. 123 (1904).

Differences in State vs. Federal

Similarly, Fed. R. Civ. P. 22 authorizes interpleader. This is based on 28 U.S.C. § 1335, the federal counterpart to W.Va. Code § 56-10-1. The former—"rule" interpleader—permits interpleader in any action that meets the normal federal jurisdictional requirements . The latter—"statutory" interpleader—contains special provisions for jurisdiction, amount in controversy, citizenship, venue, and service of process. *See Oak Cas. Ins. Co. v. Lechliter*, 206 W.Va. 349, 353 (1999). "Rule" interpleader is virtually identical in language with its West Virginia counterpart.