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CONNECTICUT

I. REGULATORY LIMITS ON CLAIMS HANDLING

A. Timing for Responses and Determinations

Connecticut General Statutes § 38a-816, Connecticut's Unfair Insurance Practices Act ("CUIPA"), defines unfair methods of competition and unfair and deceptive acts or practices in the business of insurance to include: the "[f]ailure by an insurer … to pay accident … claims … within the time periods set forth in subparagraph (B) of this subdivision, unless the Insurance Commissioner determines that a legitimate dispute exists as to coverage, liability or damages or that the claimant has fraudulently caused or contributed to the loss." CONN. GEN. STAT. § 38a-816(15). The time periods set forth in subparagraph (B) of Section 38a-816(15) are not later than sixty days after receipt by the insurer of the claimant's proof of loss form for claims filed in paper format, or not later than twenty days after receipt by the insurer of the claimant's proof of loss form for claims filed in electronic format. *Id*.

B. Standards for Determination and Settlements

Connecticut's Unfair Insurance Practices Act ("CUIPA") and Unfair Trade Practices Act ("CUTPA") govern an insurer's liability "based on its conduct in settling or failing to settle the insured's claim and on its claims settlement policies in general." *See Heyman Assocs. No. 1 v. Ins. Co. of Pa.*, 231 Conn. 756, 790, 653 A.2d 122 (1995) (internal quotation marks omitted); *see also* CONN. GEN. STAT. §§ 38a-816, *et seq*. (CUIPA); CONN. GEN. STAT. §§ 42-110a, *et seq*. (CUTPA). "The factual inquiry focuses, not on the nature of the loss and the terms of the insurance contract, but on the conduct of the insurer." *Heyman*, 231 Conn. at 790.

An "insurer's duty stems not from the private insurance agreement but from a duty imposed by statute." *Id*. However, "the existence of a contract between the parties is a necessary antecedent to any claim of breach of the duty of good faith and fair dealing." *Macomber v. Travelers Prop. & Cas. Corp.*, 261 Conn. 620, 638, 804 A.2d 180 (2002) (emphasis in original). Thus, an insurer does not owe a duty to a third-party claimant under the unfair settlement practices provisions of CUIPA. *See Hipsky v. Allstate Ins. Co.*, 304 F.Supp. 2d 284, 291-92 (D. Conn. 2004); *see also Carford v. Empire Fire & Marine Ins. Co.*, 94 Conn. App. 41, 52-53, 891 A.2d 55, 62 (2006) (concluding that the right to assert claims under CUIPA does not extend to third party claimants absent subrogation or a judicial determination of the insured's liability). Nevertheless, where it is plausibly alleged that the claimant is a third-party beneficiary to the insurance contract, he should be able to assert a CUIPA-through-CUTPA claim against the insurer

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for unfair settlement practices. *Ensign Yachts, Inc. v. Arrigoni*, 2010 WL 918107, at *15 (D. Conn. Mar. 11, 2010); *see Mead v. Burns*, 199 Conn. 651, 662-63 (1986).

II. PRINCIPLES OF CONTRACT INTERPRETATION

Although contract interpretation typically involves a question of fact bearing on the parties' intent, interpretation of an insurance policy presents a question of law. *See Tallmadge Bros., Inc. v. Iroquois Gas Trans. Sys. LP*, 252 Conn. 479, 495, 746 A.2d 1277 (2000) (citations omitted); *see also Travelers Ins. Co. v. Namerow*, 257 Conn. 812, 827, 778 A.2d 168 (2001); *QSP, Inc. v. Aetna Cas. and Sur. Co.*, 256 Conn. 343, 351-52, 773 A.2d 906 (2001). The "contract of insurance must be viewed in its entirety, and the intent of the parties for entering it derived from the four corners of the policy." *Cmty. Action for Greater Middlesex Cty., Inc. v. Am. Alliance Ins. Co.*, 254 Conn. 387, 399, 757 A.2d 1074 (2000) (internal quotations and citations omitted). In construing policy provisions, the policy language must be accorded its natural and ordinary meaning. *Id.*; *QSP, Inc.*, 256 Conn. at 351-52. "A court cannot rewrite the policy of insurance or read into the insurance contract that which is not there." *Hammer v. Lumberman's Mutual Cas. Co.*, 214 Conn. 573, 591, 573 A.2d 699 (1990).

Deciding the scope of an exclusionary clause specifically "involves a determination of what coverage the insured expected to receive and what coverage the insurer expected to provide as disclosed by the language of the policy." *Kelly v. Figueiredo*, 223 Conn. 31, 35, 610 A.2d 1296 (1992) (internal quotations and citations omitted). As with the body of an insurance contract, the words comprising the exclusion must be afforded their natural and ordinary meaning. *Kelly*, 223 Conn at 35. "There is no presumption that language in insurance contracts is inherently ambiguous." *Buell Industries, Inc. v. Greater New York Mutual Ins. Co.*, 259 Conn. 527, 545, 791 A.2d 489 (2002).

III. CHOICE OF LAW

Connecticut has abandoned the *lex loci contractus* approach, which looks to the law of the state where the contract was made, and in its place, it has adopted the "most significant relationship" test of the Restatement (Second) Conflict of Laws. *See Reichhold Chem., Inc. v. Hartford Accident & Indem. Co.*, 243 Conn. 401, 408, 703 A.2d 1132 (1997). Pursuant to Section 193 of the Restatement (Second), "[t]he validity of a contract of fire, surety or casualty insurance and the rights created thereby are determined by the local law of the state which the parties understood was to be the principal location of the insured risk during the term of the policy," unless there is some overriding interest to the contrary. Thus, Section 193 "establishes a *special presumption* in favor of application, in liability insurance coverage cases, of the law of the jurisdiction that is the principal location of the insured risk." *Am. States Ins. Co. v. Allstate Ins. Co.*, 282 Conn. 454, 462, 922 A.2d 1043 (2007) (citations omitted)(emphasis in original).

To overcome the foregoing presumption, "another state's interest must outweigh those of the state where the insured risk is located and be sufficiently compelling to trump" the

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presumption. *Id*. at 468. Section 6(2) of the Restatement (Second) sets forth seven factors to determine which state has the most significant relationship: "(a) the needs of the interstate and international systems, (b) the relevant policies of the forum, (c) the relevant policies of other interested states and the relative interests of those states in determination of the particular issue, (d) the protection of justified expectations, (e) the basic policies underlying the particular field of law, (f) certainty, predictability and uniformity of result, and (g) ease in the determination and application of the law to be applied." *Id*. Additionally, Section 188(2) of the Restatement (Second) lists five contacts in the consideration of the above factors: "(a) the place of contracting, (b) the place of negotiation of the contract, (c) the place of performance, (d) the location of the subject matter of the contract, and (e) the domicile, residence, nationality, place of incorporation and place of business of the parties." *Id*.

IV. DUTIES IMPOSED BY STATE LAW

A. Duty to Defend

1. Standard for Determining Duty to Defend

The duty to defend arises solely under contract. *Security Ins. Co. of Hartford v. Lumbermens Mutual Cas. Co.*, 264 Conn. 688, 713, 826 A.2d 107 (2003). The duty to defend is broader than the duty to indemnify and rests solely on whether the allegations of the complaint bring the claim within the scope of the policy. *DaCruz v. State Farm Fire & Cas. Co.,* 268 Conn. 675, 687-88, 846 A.2d 849 (2004). The insurer may not refuse to defend unless a comparison of the policy with the complaint shows on its face that there is no potential for coverage. *See id*. Moreover, in determining the duty to defend, the insurer may not look beyond the four-corners of the complaint to the underlying facts in order to avoid its duty to defend. *Hartford Cas. Ins. Co. v. Litchfield Mutual Fire Ins. Co.*, 274 Conn. 457, 464, 876 A.2d 1139 (2005). This rule applies even where the suit is meritless or lacks factual basis. *Wentland v. Am. Equity Ins. Co.,* 267 Conn. 592, 600, 840 A.2d 1158 (2004). If the complaint alleges liability which the policy does not cover, the insurer is not required to defend. *QSP, Inc. v. Aetna Cas. & Sur. Co.*, 256 Conn. 343, 354, 773 A.2d 906, 915 (2001).

However, the four-corners rule does not apply to the insurer's determination whether one qualifies as an insured under a liability policy. In that context, the insurer is required to provide a defense where it has actual knowledge of facts establishing a reasonable possibility of coverage. *Hartford Cas. Ins. Co.,* 274 Conn. 457, 876 A.2d 1139 (2005). This case may support a claim that a "fifth corner" exists in every duty to defend analysis.

If an insurer breaches the duty to defend, the insurer will be liable for the total amount of any judgment rendered, up to the limits of the applicable policy, in addition to costs reasonably incurred in the defense of the action. *Keithan v. Mass. Bonding & Indem. Co.,* 159 Conn. 128, 139-40, 267 A.2d 660 (1970). Or, the insurer is liable to pay to the insured the amount of a reasonable settlement entered into by the insured with the injured party in good faith and

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without fraud. *Black v. Goodwin, Loomis and Britton, Inc*., 239 Conn. 144, 153-54, 681 A.2d 293 (1996). The breach will be considered a waiver of the insurer's right to defend under a reservation of rights, and, thus, a waiver of the insurer's opportunity to lodge a post-verdict challenge to the duty to indemnify. *Missionaries of Co. of Mary, Inc. v. Aetna Cas. & Sur. Co.,* 155 Conn. 104, 113-14, 230 A.2d 21 (1967).

2. Issues with Reserving Rights

In *Missionaries of Co. of Mary, Inc. v. Aetna Cas. & Sur. Co*., the Connecticut Supreme Court stated that when an insurer is "called upon to exercise its judgment as to what [is] required of it under its contractual obligation to [an insured]…, [i]t [can] either refuse to defend or it [can] defend under a reservation of its right to contest coverage under the various avenues which would subsequently be open to it for that purpose." 155 Conn. at 113. Should the insurer choose to refuse to defend and subsequently be determined wrong in its coverage analysis, the insurer may be in breach of its contract with the insured, entitling the insured to recovery. *Id.* "The defendant having, in effect, waived the opportunity which was open to it to perform its contractual duty to defend under a reservation of its right to contest the obligation to indemnify the plaintiff, reason dictates that the defendant should reimburse the plaintiff for the full amount of the obligation reasonably incurred by it." *Id*. at 113-14.

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

1. Criminal Sanctions

The Connecticut Insurance Information and Privacy Protection Act provides, in relevant part that: "an insurance institution, agent or insurance-support organization shall not disclose any personal or privilege information concerning an individual collected or received in connection with an insurance transaction" except in certain circumstances defined in subsections of the Act. CONN. GEN. STAT. §§ 38a-988. The penalties for a negligent violation of the Act include a cease and desist order from the Insurance Commissioner and a penalty of up to $2,000.00 for each violation, not to exceed $20,000.00 in the aggregate for multiple violations. at CONN. GEN. STAT. § 38a-993(a). Penalties for a finding of an intentional violation, in addition to a cease and desist order, include fines up to $5,000.00 per violation, not to exceed an aggregate of up to $50,000.00 for multiple violations. CONN. GEN. STAT. §38a-993(b)(1). If the intentional violation relates to the sale of individually identifiable medical record information, the fines issued are up to $20,000.00 per violation, not to exceed an aggregate of $100,000.00 for multiple violations. CONN. GEN. STAT. §38a-993(b)(2). Any person that violates a cease and desist order may be subject to one or more of the following, at the discretion of the commissioner: (1) A penalty of up to $20,000.00 per violation; or (2) a penalty of up to $100,000.00 if the commissioner finds that violations have occurred with such frequency to indicate a general business practice; or (3) suspension or revocation of an insurance institution or agent's license. CONN. GEN. STAT. § 38a-993(c).

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2. The Standards for Compensatory and Punitive Damages

The purpose of compensatory damages "is to restore an injured party to the position he or should would have been in if the wrong had not been committed." *Rizzuto v. Davidson Ladders, Inc.*, 280 Conn. 225, 248, 905 A.2d 1165 (2006). A plaintiff who establishes liability for a tort action is entitled to "fair, just and reasonable compensation for his injuries." *Leabo v. Leninski*, 2 Conn. App. 715, 726, 484 A.2d 239 (1984). For personal injury cases, damages "cannot be computed mathematically, nor does the law furnish any precise, definite rule for their assessment." *Sadonis v. Govan*, 132 Conn. 668, 670, 46 A.2d 895 (1946). The court has wide discretion in the amount of damages for personal injuries and the amount awarded in each case largely depends on the judgment of the trier. *Johnson v. Flammia*, 169 Conn. 491, 500, 363 A.2d 1048 (1975).

Punitive damages may be awarded if the evidence reveals a reckless indifference to the rights of others or an intentional and wanton violation of those rights. *Gargano v. Heyman*, 203 Conn. 616, 622, 525 A.2d 1343 (1987). "In fact, the flavor of the basic requirement to justify an award of punitive damages is described in terms of wanton and malicious injury, evil motive, and violence." *Id*.

3. Insurance Regulations to Watch

Effective January 1, 2018, Connecticut increased the minimum liability limits of automobile insurance coverage to $25,000.00 per person, $50,000.00 per accident and $25,000.00 per accident for property damage. CONN. GEN. STAT. § 14-112.

Effective January 1, 2019 through December 31, 2029, a surcharge of $12.00 shall be imposed on the named insured under each homeowners insurance policy delivered, issued, renewed, amended, or endorsed on or after January 1, 2019, for personal risk insurance policy on dwellings with four or fewer units or on condominiums. CONN. GEN. STAT. § 38a-331. Under this Act, 85% of the surcharges collected must be deposited into the Crumbling Foundations Assistance Fund to assist Connecticut homeowners with concrete foundations damaged by the presence of pyrrhotite. The remaining 15% must be used by the Department of Housing for specific purposes.

4. State Arbitration and Mediation Procedures

Connecticut courts have "for many years wholeheartedly endorsed arbitration as an effective alternative method of settling disputes intended to avoid the formalities, delay, expense, and vexation of ordinary litigation." *Stutz v. Shepard*, 279 Conn. 115, 124, 901 A.2d 33 (2006); *see also Town of Stratford v. Int.l Ass'n of Firefighters, Local 998*, 248 Conn. 108, 115, 728 A.2d 1063 (1999) ("Because we favor arbitration as a means of settling private disputes, we undertake judicial review of arbitration awards in a manner designed to minimize interference with an efficient and economical system of alternative dispute resolution."); *Metro. Dist.*

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Comm'n v. Local 184, 237 Conn. 114, 118, 676 A.2d 825 (1996)("Courts favor arbitration as a means of settling differences…" (citation omitted)); CONN. GEN. STAT. §§ 52-408 to 424.

With regard to appellate review of arbitration decisions, if the arbitration is compulsory, the court must undertake a de novo review of the arbitrator's interpretation and application of the law and apply the substantial evidence test to his facts. *Stephan v. Pennsylvania Gen. Ins. Co*., 224 Conn. 758, 763, 621 A.2d 258 (1993). On the other hand, judicial review of a voluntary arbitration is, in general terms, limited to a determination of whether the award conforms to the submission. *Am. Universal Ins. Co. v. DelGreco*, 205 Conn. 178, 186, 530 A.2d 171 (1987). In either case, only arbitration of issues related to *coverage* is considered "compulsory" under Connecticut law, while arbitration of issues related to damages, for example, is considered "voluntary" and thus not subject to de novo review upon appeal. CONN. GEN. STAT. § 38a-336(c); *Quigley-Dodd v. Gen. Acc. Ins. Co. of Am.*, 256 Conn. 225, 234, 772 A.2d 577 (2001) ("[T]he expressed intent and effect of the aforesaid [statute] is to remove from the court and to transfer to the arbitration panel the function of determining, in the first instance, all issues as to *coverage* under automobile liability insurance policies containing uninsured motorist clauses providing for arbitration." (emphasis added) (citations omitted)).

5. State Administrative Entity Rule-Making Authority

In Connecticut, the insurance commissioner is required, among other things, to "see that all laws respecting insurance companies … are faithfully executed and shall administer and enforce the provisions of this title. The commissioner shall have all powers specifically granted, and all further powers that are reasonable and necessary to enable the commissioner to protect the public interest in accordance with the duties imposed by this title." CONN. GEN. STAT. § 38a-8(a). Additionally, the commissioner may make recommendations to the General Assembly for changes that, in the commissioner's opinion, should be made in the laws relating to insurance. *Id.* at § 38a-8(b). "In addition to the specific regulations that the commissioner is required to adopt, the commissioner may adopt such further regulations … as a reasonable and necessary to implement the provisions of this title." *Id*. at § 38a-8(c). The commissioner is permitted to supervise the activities of insurance companies only so far as to see that they fulfil the obligations imposed upon them by law. *Allyn v. Hull*, 140 Conn. 222, 226, 99 A.2d 128 (1953). The commissioner has no power over the directors of insurance companies in their individual capacities. *Id*.

V. EXTRACONTRACTUAL CLAIMS AGAINST INSURERS: ELEMENTS AND REMEDIES

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

1. First Party

A claim of bad faith is based upon the implied covenant of good faith and fair dealing applicable to contracts of insurance. *Verrastro v. Middlesex Ins. Co.*, 207 Conn. 179, 190, 540

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A.2d 693 (1988). "It is manifest that … in every insurance contract there is an implied covenant of good faith and fair dealing. The duty to so act is imminent in the contract…" *L.F. Pace & Sons. Inc. v. Travelers Indem. Co.*, 9 Conn. App. 30, 46, 514 A.2d 766, cert. denied, 201 Conn. 811 (1986) (citation omitted). In order to establish a breach of the implied covenant of good faith and fair dealing, "the acts by which a [insurer] allegedly impedes the plaintiff's right to receive benefits that he or she reasonably expected to receive under the contract must have been taken in bad faith." *De La Concha of Hartford, Inc. v. Aetna Life Ins. Co.,* 269 Conn. 424, 433, 849 A.2d 382 (2004)(citations omitted); *see also Eis v. Meyer*, 213 Conn. 29, 36-37, 566 A.2d 422 (1989) (finding the implied covenant cannot be used to vary the expressed terms of the agreement).

"Bad faith in general implies both actual or constructive fraud, or a design to mislead or deceive another, or a neglect or refusal to fulfill some duty or some contractual obligation, not prompted by an honest mistake as to one's rights or duties, but by some interested or sinister motive…. Bad faith means more than mere negligence; it involves a dishonest purpose." *De La Concha of Hartford, Inc.*, 269 Conn. at 433, *citing Habetz v. Condon*, 224 Conn. 231, 237, 618 A.2d 501 (1992). Furthermore, "[a] party to a contract is entitled to take reasonable positions to protect its interests and to resist efforts that would compromise its legal rights." *Jones v. Standard Fire Ins. Co*., 55 Conn. L. Rptr. 340, *2 (Conn. Super. Ct. Jan. 11, 2013) (Sferrazza, J.)(Citations omitted). "Reasonable measures may include the refusal to pay benefits to an insured." *Jones*, 55 Conn. L. Rptr. 340 at *2., *citing Sansone v. Nationwide Mut. Fire Ins. Co.*, 62 Conn. App. 526, 771 A.2d 243(2001).

2. Third-Party

An injured claimant must be a party to an insurance contract or be subrogated to the rights of the insured in order to assert a claim for bad faith before the liability of the insured has been established. *Carford v. Empire Fire and Marine Ins. Co.,* 94 Conn. App. 41, 46, 891 A.2d 55 (2006) ("no claim of breach of the duty of good faith and fair dealing will lie for conduct that is outside of a contractual relationship").

3. Damages – Common Law Bad Faith

In Connecticut, common law punitive damages may be awarded in a bad faith action upon a showing of a reckless indifference by the defendant to the rights of others or an intentional and wanton violation of those rights. *Berry v. Loiseau,* 223 Conn. 786, 811, 614 A.2d 414 (1992); *Collens v. New Canaan Water Co.*, 155 Conn. 477, 489, 234 A.2d 825 (1967). A plaintiff need not prove actual intention to do harm by the defendant in order to be awarded punitive damages as long as the plaintiff proves defendant's reckless indifference to the consequences. *Berry*, 233 Conn. at 811; *Collens*, 155 Conn. at 490. Notably, common law punitive damages in Connecticut are limited to reasonable costs incurred in an action, including attorney's fees and nontaxable costs. *Berry*, 233 Conn. at 827; *Bodner v. United Servs. Auto. Assoc.,* 222 Conn. 480, 492, 610 A.2d 1212 (1992).

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B. Fraud

In order to prevail upon a claim of fraud, a plaintiff must establish that: (1) a false representation was made [by the defendant] as to a statement of fact; (2) the statement was untrue and known to be untrue by the party making it; (3) the statement was made to with the intent of inducing reliance thereon; and (4) the other party relied on the statement to his or her detriment. *Nazami v. Patrons Mut. Ins. Co*., 280 Conn. 619, 628, 910 A.2d 209 (2006). In order to succeed in a common law fraud action, the plaintiff must prove damages – the fourth element – by a preponderance of the evidence and must prove all other elements by a higher standard, defined as "clear and satisfactory evidence." *Weisman v. Kaspar*, 233 Conn. 531, 539, 661 A.2d 530 (1995); *Rego v. Connecticut Ins. Placement Facility*, 219 Conn. 339, 343, 593 A.2d 491 (1991).

C. Intentional or Negligent Infliction of Emotional Distress

In order to prevail on a claim of intentional infliction of emotional distress, a plaintiff must establish that: (1) the actor intended to inflict emotional distress or that he or she knew or should have known emotional distress was the likely result of his or her conduct; (2) the conduct was extreme and outrageous; (3) the defendant's conduct was the cause of the plaintiff's distress; and (4) the emotional distress sustained by the plaintiff was severe. *Appleton v. Board of Educ.,* 254 Conn. 205, 210, 757 A.2d 1059 (2000). "Liability for intentional infliction of emotional distress requires conduct that exceeds all bounds usually tolerated by decent society…." *Appleton v. Bd. of Ed. of Town of Stonington*, 254 Conn. 205, 212, 757 A.2d 1059 (2000). Liability for intentional infliction of emotional distress requires conduct that is so outrageous in character and extreme in degree, that it is regarded as atrocious and utterly intolerable in a civilized society. *Carrol v. Allstate Ins. Co.*, 262 Conn. 433, 443, 815 A.2d 119 (2003).

Several Connecticut Superior Courts have found allegations that an insurer purposely withheld payment on a claim for an extended period of time to be a sufficient allegation of outrageous conduct and, thus, able to withstand a motion to strike. *See, e.g.*, *Almada v. Wausau Bus. Ins. Co.,* 2002 WL 31256154 (Conn. Super. Ct. Sept. 3, 2002) (Foley, J.)(allegations that the defendant intentionally withheld workers' compensation benefits); *Carameta v. Allstate Ins. Co.,* 2001 WL 58016 (Conn. Super. Ct. Jan. 8, 2001) (Grogins, J.)(allegations that the defendant failed to tender payment for the plaintiff's loss as covered by the insurance policy when the defendant knew the plaintiff was entitled to such payment); *Palmer v. Allstate Indem. Co.*, 2000 WL 157924 (Conn. Super. Ct. Jan. 27, 2000) (Skolnick, J.)(allegations that the defendant purposely withheld payment on a claim for more than a year).

A claim for negligent infliction of emotional distress, on the other hand, requires the plaintiff to establish that: (1) the defendant's conduct created an unreasonable risk of causing the plaintiff emotional distress; (2) the plaintiff's distress was foreseeable; (3) the emotional distress was severe enough that it might result in illness or bodily harm; and (4) the defendant's

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conduct was the cause of the plaintiff's emotional distress. *Carrol v. Allstate Ins. Co.*, 262 Conn. at 444. In *Carrol*, the plaintiff filed a claim for fire damage and following an investigation, the defendant concluded that the fire was the result of arson and refused to pay the plaintiff's claim. *Id*. at 437. The jury found that the defendant breached the insurance contract and was liable for both intentional and negligent infliction of emotional distress. *Id*. The Connecticut Supreme Court held that evidence that the defendant did not conduct a thorough or reasonable investigation did not support a claim for *intentional* infliction of emotional distress because the conduct was not so atrocious to trigger liability. *Id*. at 443-44. However, the evidence did support a claim for *negligent* infliction of emotional distress. In this regard, the Court concluded that "there was sufficient evidence to support a finding that the defendant's conduct created an unreasonable risk of causing the plaintiff's emotional distress and that the plaintiff's distress was foreseeable." *Id*. at 447-48.

"[A] pivotal difference between claims for emotional distress based on intentional conduct and those based on negligent conduct is that an essential component of an intentional infliction claim is that the defendant's alleged behavior must be extreme and outrageous. A claim based on the negligent infliction of emotional distress requires only that the actor's conduct be unreasonable and create an unreasonable risk of foreseeable emotional harm. Thus, to survive a motion to strike, a complaint alleging negligent infliction of emotional distress need not include allegations of extreme and outrageous behavior." *Olson v. Bristol-Burlington Health Dist.,* 87 Conn. App. 1, 7, 863 A.2d 748 (2005).

D. State Consumer Protection Laws, Rules and Regulations

Generally, an insured may bring a cause of action against an insurer for violation of the Connecticut Unfair Trade Practices Act ("CUTPA"), CONN. GEN. STAT. §§ 42-110a, *et seq.*, where that claim is predicated upon an alleged violation of the Connecticut Unfair Insurance Practices Act ("CUIPA"), CONN. GEN. STAT. §§ 38a-815, *et seq*.; *Mead v. Burns*, 199 Conn. 651, 509 A.2d 11 (1986); *see State v. Acordia, Inc.*, 310 Conn. 1, 27, 73 A.3d 711 (2013)("conduct by an insurance broker or insurance company that is related to the business of providing insurance can violate CUTPA only if it violates CUIPA…").

A claim for violation of CUIPA requires proof that the defendant has engaged in unfair claim settlement practices with such frequency as to indicate a "general business practice." CONN. GEN. STAT. § 38a-816 (6); *Lees v. Middlesex Ins. Co.,* 229 Conn. 842, 643 A.2d 1282 (1994). In instituting the "general business practice" requirement, "the legislature has manifested a clear intent to exempt from coverage under CUIPA isolated instances of insurer misconduct." *Lees*, 229 Conn. at 849 (citations omitted). Thus, the "alleged improper conduct in the handling of a single insurance claim, without any evidence of misconduct by the defendant in the processing of any other claim" is insufficient to establish a general business practice as required by CUIPA. *Id*.

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There is a split in authority in the Connecticut Superior Courts as to the degree of the factual detail required when alleging an insurer's unfair claim settlement practices with respect to other insureds. The majority of Superior Court cases have held that allegations of specific instances of unfair settlement practices by the insurer are necessary to survive a motion to strike. *See, e.g., Seven Oaks Ptnrs, LP v. Vigilant Ins. Co.,* 2010 WL 3038435 (Conn. Super. Ct. July 7, 2010) (Adams, J.)(finding that the plaintiff's blanket contention that the defendant's actions constituted a general business practice was merely a legal conclusion and insufficient to withstand a motion to strike); *Asmus Elec., Inc. v. G.M.K. Contractors, LLC,* 2005 WL 758126 (Conn. Super. Ct. Feb. 25, 2005) (Lopez, J.) (the plaintiff did not allege facts constituting improper conduct as to any other insurance claim and without such evidence, the allegations do not constitute a general business practice); *Algiere v. Utica Nat'l Ins. Co.,* 2005 WL 647808 (Conn. Super. Ct. Feb. 7, 2005) (Jones, J.)(allegation that "upon information and belief the defendant has engaged in similar conduct" is insufficient to withstand a motion to strike); *Currie v. Aetna Cas. & Sur. Co.*, 1999 WL 682041 (Conn. Super. Ct. Aug. 4, 1999) (Mulcahy, J.)(conclusory statements devoid of any facts demonstrating a general business practice did not withstand a motion to strike). *Compare Southridge Capital Mgmt., LLC v. Twin City Fire Ins. Co.,* 39 Conn. L. Rptr. 635 (Conn. Super. Ct. June 3, 2005) (Quinn, J.)(references of specific cases were sufficient to withstand a motion to strike); *Herbert v. Assurance Co. of America*, 38 Conn. L. Rptr. 670 (Conn. Super. Ct., Feb. 9, 2005) (Stevens, J.)(finding that allegations including specific cases in which the plaintiff alleged that the defendant engaged in unfair conduct were sufficient).

Although some "trial court decisions that have concluded that a CUTPA claim based on insurance related conduct can be raised independently of any CUIPA claim," the Connecticut Supreme Court has found them to be unconvincing. *State v. Acordia, Inc.*, 310 Conn. 1, 33, 73 A.3d 711 (2013). Notwithstanding, the Court explicitly stated that it did not decide that particular issue, noting that "whether a business transaction by a commercial entity must be in the conduct of that entity's main business to be in the conduct of trade or commerce for purposes of CUTPA… has not been addressed by an appellate court in Connecticut," and instead, determined that "the sole question before us is whether conduct by an insurance company that is related to its insurance business can be found to violate CUTPA when it does not violate CUIPA," answering that question in the negative. *Id*. at 27, n. 7.

1. Third Party Claimants

Under CUTPA, a third-party claimant may not assert a claim for violation of CUIPA against the insurer alleging unfair claim settlement practices prior to obtaining a judgment against the tortfeasor. *Carford v. Empire Fire and Marine Ins. Co.,* 94 Conn. App. 41, 48-53, 891 A.2d 55 (2006). The Court explained that "[t]o hold otherwise would create confusion, increased and multiple litigation both generally and within specific cases, the potential coercion of settlements when the insured's liability has not been and may never be established, and an inherent conflict of interest. The judicial creation of such a right would not further the policy underlying CUIPA and CUTPA. Rather, it is the province of the legislature to create new rights and remedies contained within the highly regulated industry of insurance." *Id*. at 53 (footnote omitted).

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2. Damages – Statutory Bad Faith

Both traditional punitive damages and common law punitive damages are available by statute for violations of the Connecticut Unfair Trade Practices Act ("CUTPA"). CONN. GEN. STAT. § 42-110g (a) ("[T]he court may, in its discretion, award punitive damages and may provide such equitable relief as it deems necessary or proper."). Section 42-110g (d) states that the court may award "costs and reasonable attorneys' fees based on the work reasonably performed by an attorney and not on the amount of recovery." In order to recovery punitive or exemplary damages, "evidence must reveal a reckless indifference to the rights of others or an intentional and wanton violation of those rights." *Gargano v. Heyman*, 203 Conn. 616, 622, 525 A.2d 1343 (1987); *Votto v. Am. Car Rental, Inc.*, 273 Conn. 478, 486, 871 A.2d 981 (2005). A trial court's award of punitive damages and attorney's fees is discretionary and will not be interfered with on appeal unless there was an abuse of discretion that was manifest, or injustice has been done. *Votto*, 273 Conn. at 486 (holding that the trial court did not abuse its discretion in awarding the plaintiff punitive damages equal to three times the amount of unauthorized charges to the plaintiff's credit card).

VI. DISCOVERY ISSUES IN ACTIONS AGAINST INSURERS

A. Discoverability of Claims Files Generally

In actions against an insurer based on a claim of bad faith, courts may require disclosure of the claims file, excluding privileged information. *Hutchinson v. Farm Family Cas. Ins. Co.,* 273 Conn. 33, 56, 867 A.2d 1 (2005) (in bad faith action, insurer may be compelled to produce claims file, but not privileged materials); *O'Leary v. Travelers Prop. Cas. Co*., 29 Conn. L. Rptr. 521 (Conn. Super. Ct. Apr. 5, 2001) (Koletsky, J.) (granting motion to compel and ordering the production of the insurer's claim file document designated as work product, other than statement consisting of the mental impressions, opinions, conclusions, or legal theories of the attorney or insurer concerning litigation); *Marello v. Nationwide Mut. Fire Ins. Co.,* 2000 WL 38168 (Conn. Super. Ct. Jan. 7, 2000) (Devlin, J.) (ordering the insurer to produce the complete claims file in an action for bad faith). An insurer may also be required to produce other insureds' claims files where it is alleged that insurer omitted unfair claim settlement practices as a "general business practice" as proscribed by the Connecticut Unfair Insurance Practices Act. *See Young v. Liberty Mut. Ins. Co.*, 1999 WL 301688 (D. Conn. Feb. 16, 1999) (Burns, J.) (where an insurance policy is susceptible to more than one reasonable interpretation, an insurance company's interpretation of its policy provisions, as evidenced by other claims, is relevant to construction of the same provisions in a coverage dispute); CONN. GEN. STAT. § 38a-816(6).

B. Discoverability of Reserves

In Connecticut, the discovery of insurance reserve information is based on relevance and privilege. *U.S. Bank Nat'l Ass'n v. Lawyers Title Ins. Corp.*, 49 Conn. L. Rptr. 686, *3-4 (Conn.

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Super. Ct. Mar. 22, 2010). Although discovery of reserve information is often denied by courts because it is not relevant to the underlying cause of action, "[m]ost courts … are willing to permit discovery [of reserves] if the underlying action involves allegations of bad faith because the mindset of the insurer then becomes relevant to the underlying cause of action." *Id*. at 4 (citation omitted); *see Esposito v. Culter*, 60 Conn. L. Rptr. 576, *3 (Conn. Super. Ct. June 30, 2015) (Danaher, J.) (holding that insurance reserves were not discoverable because there was no claim for bad faith).

C. Discoverability of Existence of Reinsurance and Communications with Reinsurers

Reinsurance information has been found to be discoverable where the court determined that the information was relevant to the action. For example, in *North Am. Philips Corp. v. Aetna Casualty & Sur. Co.*, 9 Conn. L. Rptr. 230 (Conn. Super. Ct. June 7, 1993) (O'Neill, J.), the plaintiff sought discovery related to reinsurance information in an action seeking coverage for three separate underlying actions against it. The court agreed with the plaintiff that communications between the defendant insurers and their reinsurers were relevant because such communications may indicate the defendants' own interpretations of the policies in question. *Id.* at *3. Because the defendants denied liability, the court opined that the reinsurance information may show whether the types of claims made by the plaintiff were anticipated by the defendants. *Id*. This information could rise to the level of admissions. *Id*. at *2-4. Additionally, the court found that attorney-client privilege and work product did not apply. *Id.* at *4-6. To this end, although the court concluded that communications made after the final judgments in the underlying actions or after the plaintiff commenced its action against the defendants were made in anticipation of litigation, the defendant failed to demonstrate attorney involvement in the procurement of the information at issue, as required for the work-product principle to apply. *Id*. at *9.

D. Attorney/Client Communications

In Connecticut, the attorney-client privilege protects the confidential advice provided by an attorney acting in the capacity as a legal advisor to those that can act on it as well as the information provided to the attorney to enable counsel to give sound and informed advice. *Metropolitan Life Ins. Co. v. Aetna Cas. and Sur. Co.,* 249 Conn. 36, 52, 730 A.2d 51 (1999). Exceptions to the attorney-client privilege should only be made when the reason for disclosure outweighs the potential effect of disclosure. *Id*. at 52. "Because of the important public policy considerations that necessitated the creation of the attorney-client privilege, the 'at issue,' or implied waiver exception is invoked only when the contents of the legal advice is integral to the outcome of the legal claims in the action. *Id*. at 52-53. Implied waiver generally applies where a party specifically pleads reliance on legal advice as an element of a claim or defense, voluntarily testifies regarding portions of the attorney-client communication, or specifically places the attorney-client relationship at issue in some other manner. *Id*. at 53. In these circumstances, the party has waived the right to confidentiality because it placed the content of the attorney's advice directly at issue because the issue cannot be determined without reviewing that advice.

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Id. However, merely because the attorney-client communication is relevant to an issue does not place the communication at issue in an action. *Id*. at *54.

The Connecticut Supreme Court has also recognized a crime-fraud exception to the attorney-client privilege that extends to civil fraud. *Hutchinson v. Farm Family Cas. Ins. Co.*, 273 Conn. 33, 39, 867 A.2d 1 (2005); *Olson v. Accessory Controls & Equipment Corp.,* 254 Conn. 145, 169, 757 A.2d 14 (2000). "Under the civil fraud exception, the party seeking disclosure of privileged materials must establish both that there is probable cause to believe that the client intended to perpetrate a fraud … and that the communications sought in discovery were made in furtherance of the fraud." *Hutchinson*, 273 Conn. at 39 (internal quotations and citations omitted).

VII. DEFENSES IN ACTIONS AGAINST INSURERS

A. Misrepresentations/Omissions: During Underwriting or During Claim

Under Connecticut law, rescission of a contract requires an insurer to prove that the insured knowingly made a material misrepresentation, however, the insurer does not need to prove conscious intent to deceive. *Middlesex Mutual Assur. Co. v. Walsh,* 218 Conn. 681, 691, 590 A.2d 957 (1991); *Munroe v. Great Am. Ins. Co.,* 234 Conn. 182, 187-88, 661 A.2d 581 (1995). A representation is material when a reasonably careful and intelligent person would find that the misrepresented information increases the degree or character of the risk so as to substantially influence the issuance of the policy or the applicable rate of premium. *Davis-Scofield Co. v. Agric.l Ins. Co.*, 109 Conn. 673, 145 A. 38 (1929). Information in an insurance application that becomes a part of the policy is material. *Mt. Airy Ins. Co. v. Millstein*, 928 F.Supp. 171, 176 (D. Conn. 1996); *State Bank & Trust Co. v. Connecticut Gen. Life Ins. Co.,* 109 Conn. 67, 145 A. 565 (1929).

In determining whether a response on an application for insurance is false, the court will evaluate the question asked. *Walsh*, 218 Conn. 681 at 693. Similar to the principles of contract construction, if there is room for two or more reasonable constructions, the question will be interpreted against the insurer. *Id.* Additionally, the insurer must prove reliance on a material misrepresentation. *Id*. In the instance of an insurance policy issued without a medical examination, misrepresentations made on a medical questionnaire or insurance application are deemed material. *State Bank & Trust Co.,* 109 Conn. at 70-71. However, in automobile liability insurance cases involving injured third parties, the insurer cannot rescind based upon application misrepresentations of the insured. *Munroe v. Great Am. Ins. Co.,* 234 Conn. 182, 661 A.2d 581 (1995).

B. Failure to Comply with Conditions

In the absence of waiver or other excuse, cooperation by the insured is a condition the breach of which brings an end to the insurer's obligation. *Arton v. Liberty Mut. Ins. Co.*, 163

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Conn. 127, 135, 302 A.2d 284 (1972). Lack of cooperation must be substantial or material. *Double G.G. Leasing, LLC v. Underwriters at Lloyd's London*, 116 Conn. App. 417, 432, 978 A.2d 83 (2009) (*citing Curran v. Connecticut Indem. Co.*, 127 Conn. 692, 696, 20 A.2d 87 (1941)). "In the absence of estoppel, waiver or other excuse, cooperation by the insured in accordance with the provisions of the policy is a condition the breach of which puts an end to the insurer's obligation …. The lack of cooperation, however, must be substantial or material." *Double G.G. Leasing, LLC*, 116 Conn. App. at 432-33 (internal quotations and citations omitted). The failure to comply with the conditions of an insurance policy must prejudice the insurer. *Id*. However, the insured has the duty to establish that lack of cooperation did not prejudice the insurer. *Taricani v. Nationwide Mut. Ins. Co*., 77 Conn. App. 139, 150, 822 A.2d 341 (2003).

A breach of the policy's notice condition may result in a forfeiture of coverage provided the insurer has been prejudiced by the late notice. *See Arrowood Indem. Co. v. King*, 304 Conn. 179, 39 A.3d 712 (2012). The requirement for prompt notice is to give the insurer a fair opportunity to investigate the claim. *Taricani*, 77 Conn. App. at 150. The insurer has the burden to prove prejudice to disclaim its obligation to provide coverage based upon untimely notice. *King*, 304 Conn. at 184. However, in circumstances where an insured goes beyond delay and fully *fails* to file a notice of claim, the burden shifts back to the insured to demonstrate that the insurer was not prejudiced. *Palkimas v. State Farm Fire & Cas. Co.*, 150 Conn. App. 655, 660, 91 A.3d 532 (2014).

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

"The general rule, absent statutory or policy provisions to the contrary, is that an injured party has no cause of action against the responsible party's insurer…. In Connecticut, this rule was stated as where an insurer provide indemnity against loss, as opposed to indemnity against liability, the injured party could not recover against the insurer." *O'Donnell v. U.S. Fid. & Guar. Co.*, 6 Conn. L. Rptr. 111, at *1 (Conn. Super. Ct. Mar. 3, 1992) (Meadow, J.) *citing Morehouse v. Employer's Liability Assurance Corp.*, 119 Conn. 416, 424-27, 177 A. 568 (1995). Policies containing no-action clauses, stating that the insured shall have no action against the insurer until judgment has been entered against the insured, have generally been considered to be policy provisions providing indemnity against loss. *Shea v. U.S. Fid. Co.*, 98 Conn. 447, 451, 120 A. 286 (1923).

The Connecticut legislature changed this general rule with the direct action statute, Connecticut General Statutes Section 38a-321, which provides in pertinent part:

> Upon the recovery of a *final judgment* against any person, firm or corporation by any person … for loss or damage on account of bodily injury or death or damage to property, if the defendant in such action was insured against such loss or damage at the time when the right of action arose and if such judgment is not satisfied within thirty days after the date that it was rendered, such judgment creditor shall be subrogated to all the rights of the defendant and shall have a

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> right of action against the insurer to the same extent that the defendant in such action could have enforced his claim against such insurer had such defendant paid such judgment.

CONN. GEN. STAT. § 38a-321. "The three requisites of a cause of action under this statute are (1) that the plaintiff has recovered a final judgment; (2) that the judgment is against a person who was insured by the defendant against liability on it; and (3) that the judgment remains unsatisfied." *Skut v. Hartford Accident & Indem. Co.*, 142 Conn. 388, 393, 114 A.2d 681 (1955).

In cases where "an insured alleges than an insurer improperly has failed to defend and provide coverage for underlying claims that the insured has settled the insured has the burden of proving that the claims were within the policy's coverage…" *Metropolitan Life Ins. Co. v. Aetna Cas. & Sur. Co.*, 249 Conn. 36, 55, 730 A.2d 51 (1999). "The burden of proving an exception to a risk is on the insurer." *O'Brien v. John Hancock Mutual Life Ins. Co.*, 143 Conn. 25, 29, 119 A.2d 329 (1955).

When an insurer improperly fails to defend an insured who subsequently enters into a settlement agreement with the injured party, the insurer is estopped from raising the issue of the insured's liability as a defense, however, the injured party is required to prove that the stipulated judgment was reasonable. *Black v. Goodwin, Loomis & Britton, Inc.*, 239 Conn. 144, 160, 681 A.2d 293 (1996).

D. Preexisting Illness or Disease Clauses

To recover for insured's death under an accident policy, the beneficiary is required to prove by a preponderance of the evidence that the insured was the victim of an accident and that the accident was the sole proximate cause of death and not merely the dominant cause or concurrent proximate cause. *Ellice v. INA Life Ins. Co. of New York*, 208 Conn. 218, 227, 544 A.2d 623 (1988). The insurer carries the burden of proving an exception to coverage under a policy. *Souper Spud, Inc. v. Aetna Cas. & Sur. Co.,* 5 Conn. App. 579, 585 (1985) cert. denied, 198 Conn. 803, 503 A.2d 172 (1986); *O'Brien v. John Hancock Mut. Life Ins. Co.*, 143 Conn. 25, 29, 119 A.2d 329 (1955). The claimant under the policy must prove that the insured was the victim of an accident and that accident was the sole cause or sole proximate cause of the insured's death or bodily injury, independent of all other causes. Where pre-existing bodily disease or infirmity, independent of the accidental injury, concurred, cooperated or contributed to produce the resulting injury, death or loss, no liability exists under an accident policy. *Ellice*, 208 Conn. at 226-27.

E. Statutes of Limitations and Repose

The Connecticut Unfair Insurance Practices Act (CUIPA), CONN. GEN. STAT. §§ 38a-815, *et seq.*, itself does not contain a statute of limitations. Therefore, the applicable statute of limitations necessarily depends on whether the action is based in tort or contract. In a claim

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under the Connecticut Unfair Trade Practices Act (CUTPA), that is based upon allegations of violations of CUIPA, the CUTPA statute of limitations of three years is applied. *Lees v. Middlesex Ins. Co.*, 219 Conn. 644, 654, 594 A.2d 952 (1991); CONN. GEN. STAT. §§ 42-110g(f).

Pursuant to Connecticut General Statutes § 38a-336(g), an insured has three years from the date of an accident to bring a claim for underinsured motorist benefits. However, that may be tolled by notifying the insurer in writing within three years and bringing suit within 180-days from exhaustion of the applicable liability policies.

VIII. TRIGGER AND ALLOCATION ISSUES FOR LONG-TAIL CLAIMS

A. Trigger of Coverage

In occurrence-based policies, an action seeking damages against the insured is covered if it results from an occurrence and causes damage during the policy period. *Security Ins. Co. of Hartford v. Lumbermens Mut. Cas. Co*., 264 Conn. 688, 692 n.5, 826 A.2d 107 (2003). Once triggered, the insurer remains at risk even if the injury continues into a subsequent policy period. *Lumbermens*, 264 Conn. at 692 n.5.

B. Allocation Among Insurers

In Connecticut, defense and indemnity costs for long latency loss claims that implicate multiple insurance policies are allocated on a pro rata basis. *Security Ins. Co. of Hartford*, 264 Conn. at 710.

IX. CONTRIBUTION ACTIONS

A. Claim in Equity vs. Statutory

Connecticut recognizes an equitable basis for contribution. "The right of action for contribution, which is equitable in origin, arises when, as between multiple parties jointly bound to pay a sum of money, one party is compelled to pay the entire sum. That party may then assert a right of contribution against the others for a proportionate share of the common obligation." *Hanover Ins. Co. v. Fireman's Fund Ins. Co.*, 217 Conn. 340, 353, 586 A.2d 567 (1991) (citations omitted).

B. Elements

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The element of common liability of both tortfeasors to the injured person is essential to the right of contribution. *Crotta v. Home Depot, Inc.*, 249 Conn. 634, 640, 732 A.2d 767 (1999). In this regard, the party from which contribution is sought must be a tortfeasor and originally liable to the plaintiff. *Id.* If there was never any such liability, then there is no liability for contribution. *Id*.

X. DUTY TO SETTLE

The insurer has the sole right to settle claims against the insured within the limits of the policy, and it is obligated to exercise that right in a reasonable and prudent manner. *General Acc. Group v. Gagliardi*, 593 F.Supp. 1080, 1088 (1984), *aff'd*, 767 F.2d 907 (2d Cir. 1984). "An insurer which fails to exercise due care or good faith with respect to opportunities to settle a claim or claims within the policy limits is subject to a direct statutory right of action by a judgment creditor of insured." *General Acc. Group*, 593 F.Supp. at 1088. An insurer may be found to have breached its duty and to have acted in bad faith if it fails to settle a claim fairly. CONN. GEN. STAT. §38a-816; *Zamary v. Allstate Ins. Co.*, 22 Conn. L. Rptr. 317 (Conn. Super. Ct. June 10, 1998) (Corradino, J.); *see also Mead v. Burns*, 199 Conn. 651, 509 A.2d 11 (1986).

Connecticut has also long recognized a cause of action in negligence for the failure to settle a claim. "In situations analogous to that presented by this case, courts have applied varying standards by which to determine whether or not an insurer is liable to an insured for failing to settle a claim. These may be generally summarized as a requirement of good faith and honest judgment on the part of the insurer or one that the insurer should use that care and diligence which a person of ordinary prudence would exercise in the management of his own business." *Hoyt v. Factory Mut. Liability Ins. Co. of America*, 120 Conn. 156, 159, 179 A.2d 842 (1936); *see also Capitol Fuel Co. Inc. v. New York Casualty Co.,* 16 Conn. Supp. 155, 158 (1948) ("From all the pertinent literature enjoyed by the court, it is concluded that the trend of judicial and text opinion favors the more just and modern theory of holding an insurer accountable for want of due care in handling a case against its assured."); *Bourget v. Gov't Emp. Ins. Co.*, 456 F.2d 282, 285 (2d Cir. 1972); *Windmill Distrib. Co. v. Hartford Fire Ins. Co.,* 742 F.Supp. 2d 247, 263 (D. Conn. 2010); *Carford v. Empire Fire & Marine Ins. Co.*, 2012 WL 4040337 (Conn. Super. Ct. Aug. 21, 2012)(Tyma, J.). "The basis for judicial imposition on liability insurers of a duty to exercise good faith or due care with respect to opportunities to settle within the policy limits is that the company has exclusive control over the decision concerning settlement within policy coverage, and company and insured often have conflicting interests as to whether settlement should be made…whether one considers the insured's claim to sound in tort, as most of the cases have… or as based on an expansive reading of the contractual obligation to protect up to the agreed limits…what gives rise to the duty and measures its extent is the conflict between the insurer's interest to pay less than the policy limits and the insured's interest not to suffer liability for any judgment exceeding them." *Bourget,* 456 F.2d 282, 285 (internal quotations and citations omitted).

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XI. LH&D BENEFICIARY ISSUES

A. Change of Beneficiary

As a general rule, a change of a beneficiary of an insurance policy can only be achieved by following the procedure set forth by the policy. *Aetna Life Ins. Co. v. Hartford Nat. Bank & Trust Co.*, 146 Conn. 537, 541, 153 A.2d 448 (1959). However, a well-recognized exception to this rule is that a change of beneficiary is effective when the insured has done everything in his power to comply with the procedure set forth in the policy but has failed because of some circumstance beyond his control. *Aetna Life Ins. Co.* 146 Conn. at 541; *see Engelman v. Connecticut Gen. Life Ins. Co.*, 240 Conn. 287, 295, 690 A.2d 882 (1997)("The substantial compliance doctrine has its genesis in Connecticut as a narrow exception to the requirement that the owner of an insurance policy could change the beneficiary only by strictly complying with the terms of the policy."). To this end, "[p]roof of intention alone is not sufficient, but where the intention is manifest and substantial affirmative action has been taken by the insured to effectuate a change of beneficiary the courts generally will make the change effective even though there has not been a strict compliance with the terms of the contract." *Aetna Life Ins. Co. v. Hartford Nat. Bank & Trust Co.*, 146 Conn. at 543 (citations omitted).

B. Effect of Divorce on Beneficiary Designation

An agreement or divorce decree that includes a requirement for an insured to maintain life insurance for a beneficiary, including for the benefit of a child, can limit the insured's ability to change the beneficiary in the future. "If sufficient consideration appears to support the insured's promise to make the claimant the beneficiary or not to change the designation as to deprive the named beneficiary of his interest therein, the claimant takes a vested interest in the proceeds. And this is true regardless of the fact that the policy gives the insured the right to change the designation." *Kulmacz v. New York Life Ins. Co.,* 39 Conn. Supp. 470, 475-76, 466 A.2d 808 (1983) (citation omitted). "A settlement of property rights arising from a contemplated divorce is satisfactory condition for the acquisition of such a vested interest in a policy designation." *Kulmacz* 39 Conn. Supp. at 475-76 (citation omitted).

If the insurer did not receive notice of an agreement or divorce decree restricting the insured's right to change the policy beneficiary, payment to a different designated insured may discharge the insurer. *Id*. In that circumstance, the person would should have been named the beneficiary in accordance with such an agreement or decree would have a claim against the insured's estate for the amount of insurance proceeds that he or she should have received. *Id*. In *Kulmacz*, the court held that the failure to notify the insurer did not discharge the insured from his legal duty under a divorce property settlement agreement restricting his ability to change the beneficiaries of his life insurance policy. *Id*.

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XII. INTERPLEADER ACTIONS

Connecticut statutory law provides for interpleader actions. CONN. GEN. STAT. § 52-484. The statute also allows for the recovery of fees and costs, provided that they are claimed in the interpleader action. *Id*. One common cause for bringing such an action is when an insurer needs to determine the rights of beneficiaries to proceeds under a policy. *See Engelman v. Connecticut Gen. Life Ins. Co.*, 240 Conn. 287, 690 A.2d 882 (1997); *Travelers Ins. Co. v. Selinger*, 31 Conn. Supp. 528, 324 A.2d 925 (1974).

Additionally, although "an interpleader claim is most commonly raised in an independent action …[i]t can be raised … by counterclaim or cross claim" as well. *Yankee Millwork Sash & Door Co. v. Bienkowski*, 43 Conn. App. 471, 473, 683 A.2d 743 (1996). Additionally, "[a] complaint in an interpleader action should allege only such facts as show that there are adverse claims to the fund or property [in question] and need not, in fact, should not, allege the basis upon which any claimant relies to justify his claim; the latter allegations are to be made in the statement of claim following the interlocutory judgment of interpleader." *Id*. at 473 (internal quotations and citations omitted).

A. Availability of Fee Recovery

Connecticut General Statutes § 52-484, provides that the trial court "may tax costs at its discretion and, under the rules applicable to an action of interpleader, may allow one or more of the parties a reasonable sum or sums for counsel fees and disbursements, payable out of such fund or property; but no such allowance shall be made unless it has been claimed by the party in his complaint or answer." CONN. GEN. STAT. § 52-484. The trial court has wide discretion in making its awards, subject to review only for an abuse of discretion. *Tuxis-Ohr's, Inc. v. Gherlone*, 76 Conn. App. 34, cert. denied, 264 Conn. 907, 826 A.2d 179 (2003) ("The determination of what equity requires in a particular case, the balancing of equities, is a matter for the discretion of the trial court"); *Driscoll v. Norwich Sav. Soc.*, 139 Conn. 346, 351, 93 A.2d 925 (1952) (the trial court has wide discretion).

B. Differences in State vs. Federal

On the federal level, the Second Circuit characterizers an interpleader action as "a procedural device, now incorporated by statute and rule into federal practice whereby one holding money or property may join in a single suit two or more persons who assert mutually exclusive or adverse claims to the money or property." *Gen'l. Acc. Grp. v. Gagliardi*, 593 F.Supp. 1080, 1086 (D. Conn. 1984) *aff'd sub nom.*, 767 F.2d 907 (2d Cir. 1985). The classic case where interpleader is permitted is where "[an] insurer of the liability of an alleged tortfeasor is or may be faced with claims aggregating more than its liability on the policy face." *Gen'l. Acc. Grp.*, 593 F.Supp at 1086; *State Farm & Cas. Co. v. Tashire*, 386 U.S. 523, 87 S.Ct. 1199, 18 L.Ed.2d 270 (1967).

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Federal statutory interpleader actions are governed by 28 U.S.C. § 1335, while "rule interpleader" actions are governed by Fed.R.Civ.P. 22(a)(1). *Gagliardi,* 593 F.Supp. at 1086-87. There are significant differences between the two. *Id*. Actions under the Federal Rules of Civil Procedure require that the plaintiff/stakeholder be diverse from all defendants/claimants, although the claimants need not be citizens of different states. *Id*. The amount in controversy must also exceed $75,000.00, independent of interest and costs. *Id*.

In statutory interpleader action, diversity of citizenship between two or more adverse claimants is sufficient; citizenship of the stakeholder is irrelevant and the amount in controversy need only be $500.00. *Id*. Additionally, the stakeholder must deposit with the registry of the court the money or proceeds that is exposed to multiple claims or give appropriate bond. *Id*.; 28 U.S.C. § 1335(a)(2). This is a jurisdictional requirement and the court generally will give the stakeholder an opportunity to comply before dismissing the action. *Gagliardi*, 593 F.Supp. at 1087.

Rule interpleader has no jurisdictional requirement for a deposit with the court, but the general equitable powers of the court permit, "if not invite," the court to receive a deposit and thereafter discharge the stakeholder. *Id*.; *United States v. Henry's Bay View Inn, Inc.,* 191 F.Supp. 632 (S.D.N.Y.1960).

Finally, the Second Circuit in *Gagliardi* held that, "[t]o secure a prompt and inclusive determination in a single action of the rights of all parties claiming an interest in the stake, courts should not hesitate to allow interpleader when some or all of the claims are *prospective* even though not already asserted." *Gagliardi*, 593 F.Supp. at 1087 (emphasis added).

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