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REGULATORY LIMITS ON CLAIMS HANDLING

Timing for Responses and Determinations

Rule 43 of the Rules and Regulations of the Arkansas Insurance Department, effective December 1, 2015, defines "certain minimum standards which, if violated with such frequency as to indicate a general business practice, will be deemed to constitute unfair claims settlement practices." The Rule is promulgated pursuant to the authority granted by Arkansas Code Annotated sections 23-66-201 *et seq.*, 23-76-103, 23-76-119, and 23-94-204. Rule 43 generally requires acknowledgement of a claim within 15 working days and a complete investigation within 45 calendar days. Any prolonged negotiation over settlement must be accompanied by notice that the statute of limitations may be running. Releases should not extend beyond the claim that gives rise to the settlement payment. There are numerous other requirements that should be consulted and incorporated into claims handling procedures.

Standards for Determination and Settlements

Claims handling standards are set forth in the above Rule 43 of the Rules and Regulations of the Arkansas Insurance Department. Standards for prompt investigation of claims are set forth in Section 8 of Rule 43. Standards for prompt, fair and equitable settlements applicable to insurers are set forth in Section 9 of Rule 43. Standards for prompt, fair and equitable settlements applicable to private passenger automobile insurance are set forth in Section 10 of Rule 43. Sections 8 to 10 do not apply to persons that are defined as Health Carriers under Section 5(m) of Rule 43. In addition, Section 9 does not apply to surety and fidelity insurance, or mortgage guaranty, or other forms of insurance offering protection against investment risks. Rule 85 addresses recoupment of overpayments. As of May 1, 2006, in the absence of fraud, health insurers can recoup the overpayments made to providers for only eighteen months after the payment.

PRINCIPLES OF CONTRACT INTERPRETATION

The general principles of insurance policy construction are well-settled under Arkansas law. Construing a contract requires that a court give effect to every sentence, clause, and word in the contract. *Carter v. Four Seasons Funding Corp*., 351 Ark. 637, 663, 97 S.W.3d 387, 401 (2003). Contract provisions should be expressed in clear and unambiguous terms. *Baskette v. Union Life Ins*. Co., 9 Ark. App. 34, 36, 652 S.W.2d 635, 637 (1983). If an ambiguity exists, the courts strictly construe the provision against the insurer and liberally in favor of the insured. *Smith v. Prudential Property & Cas. Ins*., 340 Ark. 335, 340-41, 10 S.W.3d 846, 850 (2000); *Nationwide Mut. Ins. Co. v. Worthey*, 314 Ark. 185, 190, 861 S.W.2d 307, 310 (1993). A provision is ambiguous only if it is susceptible to more than one interpretation. *Watts v. Life Ins. Co. of Ark*., 30 Ark. App. 39, 43, 782 S.W.2d 47, 49 (1990).

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If the provisions are unambiguous, it is unnecessary to resort to the rules of construction. Instead, the court must interpret the contract "in accordance with the plain meaning of its words . . . [and] insurance coverage should not be extended to cover a risk for which a premium has not been collected." *General Agents Ins. Co. of Am. v. People's Bank & Trust Co.*, 42 Ark. App. 95, 96, 854 S.W.2d 368, 369 (1993).

CONTRACT INTERPRETATION

Common Issues

1. Faulty Workmanship as an "Occurrence"

Arkansas Code Ann. § 23-79-155 states "(a) A commercial general liability insurance policy offered for sale in this state shall contain a definition of 'occurrence' that includes: (1) Accidents, including continuous or repeated exposure to substantially the same general harmful conditions; and (2) Property damage or bodily injury resulting from faulty workmanship. (b) This section is not intended to restrict or limit the nature or types of exclusions from coverage that an insurer may include in a commercial general liability insurance policy." In *S.E. Arnold & Co., Inc. v. Cincinnati Ins. Co.*, 2016 Ark. App. 587, 9, 507 S.W.3d 553, 558 (2016), the Arkansas Court of Appeals concluded that faulty workmanship is an "occurrence," as contemplated under Arkansas Code Ann. § 23-79-155.

2. Does Your State Have an Anti-Indemnity Statute?

Yes. Ark. Code Ann. § 23-79-155(b) (Unenforceable provisions in construction agreements and construction contracts) provides:

> (b) A provision in a construction agreement or construction contract is void and unenforceable as against public policy if it requires an entity or that entity's insurer to indemnify, defend, or hold harmless another entity against liability for damage arising out of the death of or bodily injury to a person or persons or damage to property, which arises out of the negligence or fault of the indemnitee, its agents, representatives, subcontractors, or suppliers.

Similarly, Ark. Code Ann. § 22-9-214(b) (Unenforceable provisions in public construction agreements and public construction contracts) provides:

> (b) A provision in a public construction agreement or public construction contract is void and unenforceable as against public policy if it requires an entity or that entity's insurer to indemnify, insure, defend, or hold harmless another entity against liability for damage arising out of the death of or bodily injury to a person or persons or damage to property, which arises out of negligence or fault of the indemnitee, its agents, representatives, subcontractors, or suppliers.

CHOICE OF LAW

If there is no choice of law provision or there is a question about the law applicable to a policy, it is resolved using Arkansas conflicts-of-law principles. Under Arkansas law, "[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 with respect

to the particular issue, some other state has a more significant relationship[.]" *Hoosier v. Interinsurance Exch. of the Auto. Club*, 2014 Ark. 524, at 4, 451 S.W.3d 206, 209. "The principal location of the risk is the state where the 'insured risk, namely the object or activity which is the subject matter of the insurance, has its principal location,' meaning 'the state where it will be during at least the major portion of the insurance period.'" *Chandler v. TransGuard Ins. Co.*, No. 4:14-CV-475 KGB, 2016 WL 1273198, at *6 (E.D. Ark. Mar. 31, 2016) (*quoting Restatement (Second) of Conflict of Laws* § 193 cmt. b (1971)).

"In cases not involving an effective choice of law by the parties, the following factors are relevant to the determination of which state has the most significant relationship to a particular case: (1) the place of contracting; (2) the place of negotiation of the contract; (3) the place of performance; (4) the location of the subject matter of the contract; (5) the domicile, residence, nationality, place of incorporation and place of business of the parties." *Crisler v. Unum Ins. Co. of Am.*, 366 Ark. 130, 133, 233 S.W.3d 658, 660 (2006) (*citing Restatement (Second) of Conflict of Laws* § 188 (1971)). In the insurance context, the result of these factors often favors the place where the policy was issued. *See id.* (balancing factors and applying Arkansas law to case involving Arkansas insured).

DUTIES IMPOSED BY STATE LAW

Duty to Defend

1. Standard for Determining Duty to Defend

Arkansas law imposes a distinct duty on insurers to defend. An insurance company's duty to defend is broader than its duty to indemnify. *Southern Farm Bureau Cas. Ins. Co. v. Watkins*, 2011 Ark. App. 388, at 8, 386 S.W.3d 6, 12 (citation omitted). The duty to defend arises when it is possible that the alleged injury or damage may fall within the policy coverage. *Ibid*. Generally, the allegations of the complaint determine the duty to defend. But when there is no possibility that the damage alleged in the complaint may fall within the policy coverage, there is no duty to defend. *Kolbek v. Truck Ins. Exchange*, 2014 Ark. 108, at 6, 431 S.W.3d 900, 905-06.

2. Issues with Reserving Rights

Reservation of rights letters are valid under Arkansas law. *Bituminous Cas. Corp. v. Zadeck Energy Grp., Inc.*, 416 F. Supp. 2d 654, 659 (W.D. Ark. 2005). A reservation of rights is a process by which an insurer avoids breaching its duty to defend and seeks by agreement to suspend operation of the doctrine of waiver and estoppel prior to a determination of the insured's liability. *Bull v. Federated Mutual Ins. Co.*, 2017 WL 11285592, at *3 (E.D. Ark. Mar. 16, 2017) (citation omitted). When an insurer issues a reservation of rights letter it can engage in settlement negotiations on the insured's behalf without abandoning its claim that no coverage exists. *Ibid.* (citing *City of Carter Lake v. Aetna Cas. & Sur. Co.*, 604 F.2d 1052, 1060 n.7 (8th Cir. 1979)). An insurer defending under a reservation of rights, however, has no right to recoup those defense costs if it is later judicially determined that there was no duty to defend. *Med. Liab. Mut. Ins. Co. v. Alan Curtis Enterprises, Inc.*, 373 Ark. 525, 530, 285 S.W.3d 233, 237 (2008).

State Privacy Laws; Insurance Regulatory Issues; Arbitration/Mediation

1. Criminal Sanctions

Rule and Regulation 77 (Standards for Safeguarding Customer Information) of the Arkansas Insurance Department establishes standards for developing and protecting insurance customer information. The Rule is promulgated pursuant to the authority granted by Arkansas Code Annotated sections 23-61-108, 23-61-113, 23-66-207, 25-15-203–04 and other applicable laws of rules. This rule was enacted in compliance with the federally-mandated Gramm-Leach-Bliley Act passed by the United States Congress (15 U.S.C. 6801, 6805(b) and 6807).

2. The Standards for Compensatory and Punitive Damages

Bad-faith claims against insurers arise out of breach of the duty of good faith and fair dealing inherent in any contract. So, a plaintiff would be entitled to recover under tort law all damages proximately caused by the insurer’s conduct, including punitive damages. The public policy underlying punitive damages in bad-faith cases stems from the fact that “[c]ompensatory damages for bad faith in an occasional lawsuit would not deter the wrongdoing insurance company, or others, from seeking a wrongful gain by similarly victimizing hundreds of other policyholders.” *Emp'rs Equitable Life Ins. Co. v. Williams*, 282 Ark. 29,30, 665 S.W.2d 873, 873-74 (1984). To recover punitive damages, a plaintiff must prove by clear and convincing evidence that the insurer knew or ought to have known, in light of the circumstances, that its conduct would naturally and probably cause damages to the insured and that the insurer continued the conduct in reckless disregard of the consequences. Ark. Model Jury Instr., Civil AMI 2218 (2022). The plaintiff can also show that the insurer intentionally pursued a course of conduct for the purpose of injuring the insured. *Id.*

3. Insurance Regulations to Watch

The Arkansas Insurance Trade Practices Act, Ark. Code Ann. § 23-66-201 to 215, regulates trade practices in the business of insurances, and forbids misrepresentation as to benefits, terms, dividends, or shares of surplus, unfair ethnic or gender discrimination, and unfair claims settlement practices. Unfair settlement practices include misrepresenting facts and failure to acknowledge and respond promptly to communication. Arkansas Insurance Department Rule 43 provides specific guidance, in the form of standards for prompt, fair and equitable settlement. It is an unfair trade practice to refer an individual to the state comprehensive health insurance pool for the purpose of separating that person from group coverage. Ark. Code Ann. § 23-79-513.

4. State Arbitration and Mediation Procedures

Arkansas courts have the authority to encourage settlement. The general assembly has vested Arkansas circuit courts with the authority to order any civil case before it to mediation. Ark. Code Ann. § 16-7-202. If a case is ordered to mediation, the parties must select a mediator from the Arkansas Alternative Dispute Resolution Commission or obtain approval from the court. As to arbitration, motions to compel must be served in a manner provided by law for the service of a summons in a civil action. Ark. Code Ann. § 16-108-205. When a party in an arbitration proceeding receives an award, it may enforce it in an Arkansas Court under Ark. Code Ann. § 16-108-222.

5. State Administrative Entity Rule-Making Authority

Under § 23-61-103 of the Arkansas Code, the Insurance Commissioner is tasked with enforcing the provisions of the Arkansas Insurance Code and shall execute the duties imposed upon him or her by the code. Subsection (b) grants the commissioner the powers and authority expressly conferred upon him or her. And subsection (d) requires the commissioner examine and investigate insurance matters that affect the state of Arkansas.

EXTRACONTRACTUAL CLAIMS AGAINST INSURERS: ELEMENTS AND REMEDIES

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

3. First Party

For a first party bad faith claim, plaintiff has the burden of proving three essential propositions: (1) plaintiff sustained damages; (2) the insurance carrier acted in bad faith in an attempt to avoid liability under the policy issued to plaintiff; and (3) the conduct proximately caused damage to plaintiff. *See* AMI 2304. "Bad faith" is not the mere failure or refusal to pay a claim. "Bad faith" requires affirmative misconduct, without a good faith defense. The affirmative misconduct must be dishonest, oppressive, or carried out with a state of mind characterized by hatred, ill will, or a spirit of revenge. *Id.* Examples of cases where the Arkansas Supreme Court has found substantial evidence of bad faith include: (1) an insurance agent lying that there was no insurance coverage; (2) aggressive, abusive or coercive conduct by a claims representative; and (3) intentionally altering records to avoid a bad risk. *See Southern Farm v. Allen*, 326 Ark. 1023, 934 S.W.2d 527 (1996); *Viking Insurance Co. v. Jester*, 310 Ark. 317, 836 S.W.2d 371 (1992); *Employers Equitable Life Ins. Co. v. Williams*, 282 Ark. 29, 665 S.W.2d 873 (1984).

By statute, if the insurer fails to timely pay a claim, the insured is required to sue or the insurer brings a declaratory judgment action, and the insured recovers at least 80% of its demand at trial, then the insurer is subject to a penalty of pay 12% interest on the amount due and the insured's attorneys' fees. Ark. Code Ann. § 23-79-208.

4. Third-Party

In *S. Farm Bureau Cas. Ins. Co. v. Parker*, 232 Ark. 841, 341 S.W.2d 36 (1960), the Arkansas Supreme Court approved a set of jury instructions that set out the elements of a claim of third party bad faith: (1) that the underlying claim could have been settled within the policy limits; (2) that the insured demanded that the insurance company settle the case and the insurance company refused; (3) that a verdict in the underlying case resulted in the insured being forced to pay the portion of the verdict which exceeded the policy limits; and (4) that the refusal to settle was negligence. *Id.* at 845. The court also held that there may be liability when an insured proves either negligence or bad faith. *Id.* at 847. Moreover, the court held that, under a standard duty to defend clause, the insurance company becomes "a fiduciary to act, not only for its own interest, but also for the best interest of [the insured]." *Id.* at 849.

Note, however, that a claim of third-party bad faith is held only by the insured. The third party

allegedly injured by the insured cannot bring a bad-faith claim against the insurer or seek to recover an excess judgment against the insurer based on an allegation that the insurer tortiously failed to settle the claim within policy limits. *Greer v. Mid-W. Nat. Fire & Cas. Ins. Co.*, 434 F.2d 215, 218 (8th Cir. 1970); *Bell v. Kansas City Fire & Marine Ins. Co.*, 616 F. Supp. 1305, 1309 (W.D. Ark. 1985).

Fraud

The elements for a fraud claim are: (1) plaintiff sustained damages; (2) a false representation of a material fact was made by the defendant; (3) the defendant knew or believed that the representation was false; (4) the defendant intended to induce plaintiff to act or refrain from acting in reliance upon the misrepresentation; and (5) plaintiff justifiably relied upon the representation in acting or refraining from acting and, as a result, sustained damages. AMI 402. A fact or statement is material if it was a substantial factor in influencing plaintiff's decision. It is not necessary, however, that it be the paramount or decisive factor, but only one that a reasonable person would attach importance to when making a decision. *Id.*

Intentional or Negligent Infliction of Emotional Distress

Arkansas does not recognize the tort of negligent infliction of emotional distress. *Dowty v. Riggs*, 2010 Ark. 465, at 6, 385 S.W.3d 117, 120.

However, intentional infliction of emotional distress ("IIED"), or outrage, is a recognized cause of action, although it is a "disfavored claim." *Sawada v. Walmart Stores, Inc.,* 2015 Ark. App. 549, at 15, 473 S.W.3d 60, 69. In order to establish IIED, plaintiff must prove: (1) the actor intended to inflict emotional distress or knew or should have known that emotional distress was the likely result of his or her conduct; (2) the conduct was extreme and outrageous, was beyond all possible bounds of decency, and was utterly intolerable in a civilized community; (3) the actions of the defendant were the cause of plaintiff's distress; and (4) the emotional distress sustained by the plaintiff was so severe that no reasonable person could be expected to endure it. *Id.*.

State Consumer Protection Laws, Rules and Regulations

The Arkansas Deceptive Trade Practices Act ("ADTPA") sets out prohibited deceptive and unconscionable trade practices and provides a private cause of action to recover damages. Ark. Code Ann. § 4-88-101, *et. seq.* The ADTPA was substantively modified in 2017 and redefined the ADTPA's private cause of action as available to persons suffering "an actual financial loss proximately caused by his or her reliance on the use of a practice declared unlawful under this chapter." Ark. Code Ann. § 4-88-113(f)(2). The term "actual financial loss" is defined as "an ascertainable amount of money that is equal to the difference between the amount paid by a person for goods and services and the actual market value of the good or services provided." Ark. Code Ann. § 4-88-102(9). The deceptive and unconscionable trade practices made unlawful under the ADTPA include, for example, taking advantage of someone due to physical or mental infirmity; bait-and-switch advertising; selling flood-damaged goods without identifying them as such; and using a false caller-identification name. Ark. Code Ann. § 4-88-107.

DISCOVERY ISSUES IN ACTIONS AGAINST INSURERS

Discoverability of Claims Files Generally

The objections most commonly asserted in opposition to the production of a claims file is that the information was prepared in anticipation of litigation. Pursuant to Ark. R. Civ. P. 26(b)(3), a party may obtain discovery of documents or tangible things otherwise discoverable under Ark. R. Civ. P. 26(b)(1) and prepared in anticipation of

litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. When allowing discovery of materials prepared in anticipation of litigation after the required showing has been made, the court must protect against disclosure of the mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party concerning litigation. Ark. R. Civ. P. 26(b)(3). This provision recognizes and protects materials which constitute work product.

A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request was refused, the person may move for a court order. In general, in claims brought by third parties against the insured, the insurer's claims file will not be discoverable, at least as of the time when the insurer first anticipated litigation against its insured. *Schipp v. Gen. Motors Corp.*, 457 F. Supp. 2d 917, 923 (E.D. Ark. 2006)

On the other hand, a claims file is discoverable in a first party direct action against the insurance company. *Marrow v. State Farm Insurance Co*, 264 Ark. 227, 236, 520 S.W.2d 607, 613 (1978). In addition, all papers and records of any nature are discoverable by the insurance commissioner in an unfair or deceptive trade practices action. Ark. Code Ann. § 23-66-209(d)(1).

Further, pursuant to Ark. R. Civ. P. 34(a), any party may request to have produced or to permit the inspection of any designated documents (including writings, drawings, graphs, charts, photographs, phono-records, or any other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form), or to inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of Ark. R. Civ. P. 26(b) and which are in the possession, custody, or control of the party upon whom the request is made. Rule 26(b) of the Ark. R. Civ. P. limits discovery to those matters which are not privileged, which are relevant to the issues in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition, identify and location of persons who have knowledge of any discoverable matter or who will or who may be called as a witness at the trial. However, trial preparation or work product materials may be discovered only upon a showing of substantial need and undue hardship by the requesting party. *See* discussion of Ark. R. Civ. P. 26(b)(3) above. One must assume that any and all materials in a claims file up to the point that a first party action is filed is discoverable and will be seen by counsel for the insured and, possibly, a jury.

Discoverability of Reserves

Pursuant to Ark. R. Civ. P. 26(b)(2), any party may obtain discovery of the existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment. There are no Arkansas cases that address the further issue of whether the amount of reserves must be disclosed.

Discoverability of Existence of Reinsurance and Communications with Reinsurers

Pursuant to Ark. R. Civ. P. 26(b)(2), the party may discover the existence of <u>any</u> insurance agreement, including

excess and reinsurance coverage. Communications between carriers may be discoverable in a bad faith action to the extent it addresses liability.

Attorney/Client Communications

The attorney/client privilege is recognized in Arkansas through Rule 502 of the Arkansas Rules of Evidence. Generally, the privilege allows the client to refuse to disclose, and to prevent others from disclosing, "confidential communications." A communication is "confidential" if "not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication." Ark. R. Evid. 502.

DEFENSES IN ACTIONS AGAINST INSURERS

Misrepresentations/Omissions: During Underwriting or During Claim

Ark. Code Ann. § 23-79-107(a) provides in part as follows:

Misrepresentations, omissions, concealment of facts, and incorrect statements shall not prevent a recovery under the policy or contract unless either:

- Fraudulent; or
- Material either to the acceptance of the risk or the hazard assumed by the insurer.

Under the "material" prong, there must be a "causal relationship between the misrepresentation and the hazard resulting in a loss under the policy or contract." Ark. Code Ann. § 23-79-107(c); *McQuay v. Arkansas Blue Cross & Blue Shield*, 81 Ark. App. 77, 86, 98 S.W.3d 454, 460 (2003). The wording on the application matters, and if the application requests inquires as to the insured's "information and belief," then what the insured actually knew and believed at the time of the application is relevant to the issue of whether the insured made a misrepresentation. *McQuay*, 81 Ark. App. at 86, 98 S.W.3d at 460.

Failure to Comply with Conditions

Arkansas requires that the insured strictly comply with all conditions precedent to coverage, and the insurer need not show that it was prejudiced due to the failure of a condition precedent. *Fireman's Fund Ins. Co. v. Care Mgmt., Inc.*, 2010 Ark. 110, at 6, 361 S.W.3d 800, 803 . Some provisions, like a provision requiring timely notice of an incident giving rise to a claim, may be expressed in a policy as either a condition precedent to coverage or simply a contractual obligation of the insured. *Id.* If notice is simply a contractual obligation of the insured, then the insurer must prove prejudice to warrant denying a claim based on that failure. *Id.*

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

The enforceability of a provision requiring the insurer's consent to any settlement or a "no action" clause depends on whether the insurer acted in bad faith in refusing to settle the claim itself. If the insurer is liable for negligent or bad-faith refusal to settle, then the insurer cannot rely on a consent clause as a defense to the insured's suit to

recoup the amounts spent in settlement. *Home Indem. Co. v. Snowden*, 223 Ark. 64, 70, 264 S.W.2d 642, 645 (1954). However, when there is no bad faith or negligent refusal to settle, then consent or “no action” clauses are enforceable, and an insured who chooses to settle without the insurer’s consent will not be able to recover against the insurer. *Vincent Soybean & Grain Co. v. Lloyd's Underwriters of London*, 246 F.3d 1129, 1131 (8th Cir. 2001); *Willett's Plumbing Co. v. Nw. Nat. Cas. Co.*, 261 Ark. 447, 448, 548 S.W.2d 830, 831 (1977).

Different rules apply, however, when the insurer wrongfully denies coverage for the claim before settlement. In that case, as long as the insurer was kept informed of the progress of the case and continued to deny coverage, it can be liable for amounts its insured expended in good-faith settlement of the claim, notwithstanding any consent or “no action” provisions in the policy. *St. Paul Fire & Marine Ins. Co. v. Crittenden Abstract & Title Co.*, 255 Ark. 706, 716, 502 S.W.2d 100, 106 (1973)

Preexisting Illness or Disease Clauses

Under Arkansas law, a policy of insurance is nothing more than a contract and is to be governed by the ordinary rules for contract interpretation. A common sense approach should be used, and courts are required to strictly interpret exclusions to insurance coverage and to resolve all reasonable doubts in favor of the insured. *Entertainment Innovators v. Scottsdale Ins.*, 839 F.Supp. 654, 658 (W.D. Ark. 1993).

Before an illness or condition can be said to be excluded for the reason that it pre-existed the policy, there must at least have been sufficient manifestation of it to make the insured seek a diagnosis, and it must be of such a nature that a reasonably accurate diagnosis could have been made with reasonable medical certainty. *Old Equity Life Insurance Co. v. Crumby*, 241 Ark. 982, 990, 411 S.W.2d 292, 296 (1967).

The cases in which the insured's right to protection have been upheld have been cases in which “the insured had some supposedly trivial infirmity or abnormality when the policy took effect. Later on, however, the condition changed for the worse and for the first time either actually became, or became diagnosable as, a sickness or disease falling within the coverage of the policy.” *Lincoln Income Life Ins. Co. v. Milton*, 242 Ark. 124, 126, 412 S.W.2d 291, 292 (1967).

However, it has been stated that the relevant inquiry is when the illness begins, not the point of diagnosis. *Kirk v. Provident Life and Acc. Ins. Co.*, 942 F.2d 504, 505 (8th Cir. 1991). The Court in *Kirk* held that a condition was excluded under a pre-existing condition exclusion, even though the symptoms were allegedly insufficient to allow a reasonably accurate diagnosis prior to the policy's effective date. *Id*.

Statutes of Limitations and Repose

There is a five-year statute of limitations applicable under Arkansas law to claims for breach of a written contract. Ark. Code Ann. § 16-56-111. There is a three-year statute of limitations under Arkansas law for causes of action based upon oral contract or tort theories. *See* Ark. Code Ann. § 16-56-105. Limitation against action by excess liability insurance carrier against primary insurer did not begin to run until settlement payment was made. *Trinity Universal Ins. Co. v. State Farm Mut. Auto Ins. Co.*, 246 Ark. 1021, 1024-25, 441 S.W.2d 95,97 (1969). Where no time limit for making proof of disability is contained in insurance policy, proof of disability may be made at any time within this statute. *National Reserve Life Ins. Co. v. Cook*, 194 Ark. 433, 108 S.W.2d 471 (1937).

TRIGGER AND ALLOCATION ISSUES FOR LONG-TAIL CLAIMS

Trigger of Coverage

With regard to claims-made policies, the insurance contract will, of course, set out the "trigger" date for coverage. For other policies, the trigger of coverage is less clear. There are no Arkansas cases addressing this issue. Some lower court litigation has evolved to address this issue by way of declaratory judgment actions.

Allocation Among Insurers

See subsection above.

CONTRIBUTION ACTIONS

Claim in Equity vs. Statutory

"Equitable contribution occurs when two or more valid insurance policies cover a particular risk of loss and a particular accident." *Columbia Mut. Ins. Co. v. Home Mut. Fire Ins. Co.*, 74 Ark. App. 166, 176, 47 S.W.3d 909, 915 (2001). In cases where two insurers covered the same insured for a given loss, the manner of sharing depends on the terms of each policy. Under Arkansas law, when one policy has a "pro rata" sharing clause and the other has an excess clause, then the policy with the "pro rata" sharing clause pays the full liability, up to its limit, and the excess carrier incurs no liability until the primary carrier's limits are exhausted. *See Calvert Fire Ins. Co. v. Francis*, 259 Ark. 291, 292, 532 S.W.2d 429, 430 (1976). When all of the insured's policies, however, have only excess clauses, those excess clauses are deemed to be mutually repugnant, and all of the insurers share liability on a pro rata basis. *Id.*

In claims where two insurers covered different tortfeasors who injured the same person, Arkansas's statutory contribution scheme applies. *Redland Ins. Co. v. Shelter Mut. Ins. Co.*, 193 F.3d 1021, 1023 (8th Cir. 1999). The Uniform Contribution Among Tortfeasors Act (UCATA) is codified at Ark. Code Ann. §§ 16–61–201 through 16–61–212 (Repl.2005). Under the UCATA, the right of contribution among joint tortfeasors is expressly provided. *See* Ark .Code Ann. § 16–61–202(1) (Repl.2005).

The Uniform Contribution Among Joint Tortfeasors Act gives a defendant sued by an injured person the right to seek contribution from fellow joint tortfeasors, thereby holding each wrongdoer responsible for his or her pro rata share of fault. The procedural section of the act allows a defendant to assert a third party claim against one "who is or may be liable" to the defendant. Ark. Code Ann. § 16–61–207(1). As the Arkansas Supreme Court has explained, a claim for contribution is "conditional," and the defendant "is not required to wait until he has paid the judgment to implead in the primary action other persons who are or may be jointly liable for the tort." *Martin Farm Enterprises, Inc. v. Hayes*, 320 Ark. 205, 208, 895 S.W.2d 535, 537 (1995).

Elements

Ark. Code Ann. § 16–61–202, the statute governing contribution, provides:

- The right of contribution exists among joint tortfeasors.
- A joint tortfeasor is not entitled to a money judgment for contribution until he or she has by payment discharged the common liability or has paid more than his or her pro rata share of the common liability.

- The right of contribution is not limited to money damages but also includes the right to an allocation of fault as among all joint tortfeasors and the rights provided for in § 16–61–204.
- A joint tortfeasor who enters into a settlement with the injured person is not entitled to recover contribution from another joint tortfeasor whose liability to the injured person is not extinguished by the settlement.

DUTY TO SETTLE

In *Southern Farm Bureau Cas. Ins. Co. v. Parker,* 232 Ark. 841, 341 S.W.2d 36 (1960), the Arkansas Supreme Court approved a set of jury instructions that set out the elements of a claim of third party bad faith for breach of a duty to settle: (1) that the underlying claim could have been settled within the policy limits; (2) that the insured demanded that the insurance company settle the case and the insurance company refused; (3) that a verdict in the underlying case resulted in the insured being forced to pay the portion of the verdict which exceeded the policy limits; and (4) that the refusal to settle was negligence. *Id.* at 845. The Court also held that there may be liability when an insured proves either negligence or bad faith. *Id.* at 847. Moreover, the Court held that, under a standard duty to defend clause, the insurance company becomes "a fiduciary to act, not only for its own interest, but also for the best interest of [the insured]." *Id.* at 849.

LH&D BENEFICIARY ISSUES

Change of Beneficiary

Arkansas follows the majority rule that substantial compliance with the policy's relevant provisions is sufficient to change a beneficiary. *Tibbels v. Tibbels*, 232 Ark. 857, 859, 340 S.W.2d 590, 592 (1960). Specifically, the insured must have "done everything reasonably possible to effectuate a change in beneficiary." *Id.* However, Arkansas is one of the very small minority of states which hold that a change of beneficiary can be accomplished in a will "so long as the language of the will is sufficient to identify the insurance policy involved and an intent to change the beneficiary." *Nunnenman v. Est. of Grubbs*, 2010 Ark. App. 75, at 3–4, 374 S.W.3d 75, 78 (citing *Pedron v. Olds*, 193 Ark. 1026, 105 S.W.2d 70 (1937)).

Effect of Divorce on Beneficiary Designation

A divorce does not constitute a de facto or constructive change of beneficiary, and when insurance policies are not addressed in a divorce decree, the rights of the designated beneficiaries in the insurance contract are determined in accordance with contractual law, without regard to the effect of a divorce between the insured and the beneficiary. *See Allen v. First Nat. Bank of Fort Smith*, 261 Ark. 230, 235, 547 S.W.2d 118, 120 (1977); *Kent v. USAble Life,* 84 Ark. App. 359, 361 141 S.W.3d 895 (2004).

INTERPLEADER ACTIONS

Availability of Fee Recovery

Interpleader actions are governed by Rule 22 of the Arkansas Rules of Civil Procedure, which contains an express provision regarding the award of attorney's fees. Under Arkansas law, such a fee award is discretionary, not

mandatory. Rule 22(b) provides that "the court *may* make an award of reasonable litigation expenses, including attorneys' fees," to an interpleader plaintiff. Ark. R. Civ. P. 22(b) (emphasis added). Generally speaking, the greater extent to which an interpleader plaintiff is disinterested from the underlying dispute, the more likely a court will be to award attorney's fees associated with bringing the claim in interpleader.

Differences in State vs. Federal

Differences between the Arkansas and Federal procedural rules governing interpleader are more stylistic than substantive. This is by design, as the Reporter's Notes to the Arkansas version make clear. *See* Ark. R. Civ. P. 22, reporter's notes, n. 1 ("Rule 22 is identical to FRCP 22"). This is no longer literally true, as the Federal Rule 22 has since been amended, though this amendment was intended to be merely stylistic. *See* Fed. R. Civ. P. 22 advisory committee's note, 2007 Amendment. That said, there is no substantive deviation between ARCP 22 and FRCP 22.

The most notable textual difference is that, unlike its Federal counterpart, ARCP 22 contains an express provision for the availability of attorney's fees to an interpleader plaintiff. However, this is something of a distinction without a difference. In the Federal context, such fees are still available as part of the federal trial court's authority conferred by 28 U.S.C. § 2361. Practically speaking, the Arkansas and Federal rules each require a similar analysis to determine whether to award fees to an interpleader plaintiff.