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Hawaii

REGULATORY LIMITS ON CLAIMS HANDLING

Timing for Responses and Determinations

An insurer must respond with reasonable promptness, in no more than fifteen working days, and adequately address the concerns of any communications. Hawaii Revised Statutes ("H.R.S.") § 431:13-103(11)(B). While failure to do so constitutes an unfair claims settlement practice, Chapter 431 is only enforceable by the insurance commissioner and is not a statute granting private remedies to individuals. *Genovia v. Jackson Nat'l Life Ins. Co.*, 795 F. Supp. 1036 (Haw. 1992).

Affirming or denying coverage of claims must be done within a reasonable time after proof of loss statements have been completed. H.R.S. § 431:13-103(11)(E). Within 30 calendar days of affirmation of liability, an offer of payment should be made if the amount of the claim has been determined and is not in dispute. H.R.S. § 431:13-103(11)(F). There is no timeframe specified when an insured or insured's beneficiary must be provided with a reasonable written explanation for any delay on every claim remaining unresolved for 30 calendar days from the date it was reported. H.R.S. § 431:13-103(11)(G). A reasonable explanation of the basis in the insurance policy in relation to the facts or applicable law for denial of a claim or for the offer of a compromise settlement must be provided promptly. H.R.S. § 431:13-103(11)(P).

For accident and health or sickness insurance providers, uncontested claims should be reimbursed not more than thirty days after receiving the claim. H.R.S. § 431:13-108(c). An uncontested claim filed electronically must be reimbursed within fifteen days. *Id.* The insurer contesting, denying, or reviewing claims, shall notify the insured within fifteen days or seven days after receipt of an electronically filed claim. *Id.*

For Personal Injury Protection (PIP) benefits under motor vehicle policies, payments must generally be made within thirty days after receipt of reasonable proof of the benefits accrued. H.R.S. § 431:10C-304(3). Full or partial denial of claims must be made in writing within thirty days. *Genovia, 795 F. Supp. 1036.*

Standards for Determination and Settlements

According to H.R.S. § 431:13-103(11), an insurer commits unfair claims settlement or determination practices by committing the following:

- Failing to adopt and implement reasonable standards for the prompt investigation of claims arising under insurance policies;
- Refusing to pay claims without conducting a reasonable investigation based upon all available information;
- Failing to affirm or deny coverage of claims within a reasonable time after proof of loss statements have been completed;
- Failing to offer payment within thirty calendar days of affirmation of liability, if

the amount of the claim has been determined and is not in dispute;

- Failing to provide the insured, or when applicable the insured's beneficiary, with a reasonable written explanation for any delay, on every claim remaining unresolved for thirty calendar days from the date it was reported;
- Not attempting in good faith to effectuate prompt, fair, and equitable settlements of claims in which liability has become reasonably clear;
- Compelling insureds to institute litigation to recover amounts due under an insurance policy by offering substantially less than the amounts ultimately recovered in actions brought by the insureds;
- Attempting to settle a claim for less than the amount to which a reasonable person would have believed the person was entitled by reference to written or printed advertising material accompanying or made part of an application.
- Attempting to settle claims on the basis of an application which was altered without notice, knowledge, or consent of the insured;
- Making claims payments to insureds or beneficiaries not accompanied by a statement setting forth the coverage under which the payments are being made;
- Making known to insureds or claimants a policy of appealing from arbitration awards in favor of insureds or claimants for the purpose of compelling them to accept settlements or compromises less than the amount awarded in arbitration;
- Delaying the investigation or payment of claims by requiring an insured, claimant, or the physician or advanced practice registered nurse of either to submit a preliminary claim report and then requiring the subsequent submission of formal proof of loss forms, both of which submissions contain substantially the same information;
- Failing to promptly settle claims, where liability has become reasonably clear, under one portion of the insurance policy coverage to influence settlements under other portions of the insurance policy coverage;
- Failing to promptly provide a reasonable explanation of the basis in the insurance policy in relation to the facts or applicable law for denial of a claim or for the offer of a compromise settlement; and
- Indicating to the insured on any payment draft, check, or in any accompanying letter that the payment is "final" or is "a release" of any claim if additional benefits relating to the claim are probable under coverages afforded by the policy; unless the policy limit has been paid or there is a bona fide dispute over either the coverage or the amount payable under the policy;

PRINCIPLES OF CONTRACT INTERPRETATION

Because an insurer's duty to defend its insureds is contractual in nature, one must look to the language of the policy involved to determine the scope of that duty. *Hawaiian Holiday Macadamia Nut Co. v. Industrial Indemnity Co.,* 76 Haw. 166, 873 P.2d 230 (1994).

All doubts as to whether a duty to defend exists are resolved against the insurer and in favor of the insured. *Sentinel Insurance Company, Ltd. v. First Insurance Company of Hawaii, Ltd.,* 76 Haw. 277, 875 P.2d 894 (1994).

However, this rule of construction is not for application whenever the insurer and the insured simply disagree over the interpretation of the policy terms. *Hawaii Ins. & Guar. Co., Ltd. v. Chief Clerk,* 68 Haw. 336, 341, 713 P.2d 427, 431 (1986), citing *Sturla, Inc. v. Fireman's Fund Ins. Co.,* 67 Haw. 203, 684 P.2d 960 (1984).

When ambiguity exists, the rule of construction is applied only when the policy taken as a whole is reasonably subject to differing interpretation. *Hawaiian Ins & Guar., supra* 68 Haw. at 341. This was most recently upheld in *Sakal v. Assn. of Apt. Owners of Hawaiian Monarch*, 143 Haw. 219, 426 P.3d 443, 2018 Haw. App. LEXIS 356, 2018 WL 3583580.

Absent an ambiguity, the terms of the policy should be interpreted according to their plain, ordinary, and accepted sense in common speech. *Hawaiian Ins. & Guar., supra* 68 Haw at 342.

Exclusion clauses found in insurance policies are narrowly construed against the insurer. *Retherford v. Kama,* 52 Haw. 91, 470 P. 2d 517 (1970). *First Insurance Co. of Hawaii v. Continental Casualty Co.,* 466 F. 2d 807 (9th Cir. 1972).

The insurer bears the burden of proof that the exclusionary clause applies. *Sentinel Insurance Company, Ltd. v. First Insurance Company of Hawaii, Ltd.,* 76 Haw. 277, 875 P.2d 894 (1994).

Lastly, the Hawaii Supreme Court recently held in *Willis v. Swain,* 2013 WL 2459880 (Hawaii) that an insurer's extracontractual duty of good faith is owed even to a person to whom it did not issue an insurance policy.

CHOICE OF LAW

Choice of law in Hawaii requires a two-part inquiry. "The first part of the choice of law inquiry is best understood as determining if there is an *actual* or real conflict between the potentially applicable laws." *Hammersmith v. TIG Ins. Co.,* 480 F.3d220, 230(3d Cir.2007). "If two jurisdictions' laws are the same, then there is no conflict at all, and a choice of law analysis is unnecessary." *Id. See also, Hawaiian Telecom Comm'n, v. Tata Am. Int'l. Corp,* 2010 WL 2594482, at *5 (D. Haw. May 24, 2010).

"Hawaii resolves its conflict of laws issues by deciding which State has the strongest interest in seeing its law applied to a particular case." *Lemen v. Allstate Ins. Co.,* 938 F. Supp. 640, 643(D. Haw. 1995). *See also, Mikelson v. United Servs. Auto. Ass'n,* 107 Haw. 192, 111 P.3d 601, 2005 Haw. LEXIS 257. ("This court has 'moved away from the traditional and rigid conflicts-of-laws rules in favor of the modern trend towards a more flexible approach looking to the state with the most significant relationship to the parties and subject matter.")

"The interests of the states and applicable public policy reasons should determine whether Hawaii law or another state's law should apply." *Id*. In making this determination, courts "look to factors such as (1) where relevant events occurred, (2) the residence of the parties, and (3) whether any of the parties had any particular ties to one jurisdiction or the other." *Kukui Gardens Corp.* v. *Holco Cap. Grp,* 2010 WL 145284, at *5(D. Haw. Jan. 12, 2010). "Hawaii's choice-of-law approach creates a presumption that Hawaii law applies unless another state's law would best serve the interests of the states and persons involved." *Abrahamson v. Aetna Cas.& Sur. Co.,* 76 F.3d 304, 305(9th Cir 1996).

Federal courts sitting in diversity must apply "the forum state's choice of law rules to determine the controlling substantive law." *Patton v. Cox,* 276 F.3d 493, 495 (9th Cir. 2002).

Further, "Hawai'i recognizes the enforceability of choice of law provisions in contracts." *Century Campus Hous. Mgmt., L.P. v. Elda Hana, LLC*, 2018 Haw. App. LEXIS 32, 141 Haw. 383, 409 P.3d 787, 2018 WL 637373. *See also*, *Airgo, Inc. v. Horizon Cargo Transp., Inc.*, 66 Haw. 590, 595, 670 P.2d 1277, 1281 (1983) ("When the parties choose the law of a particular state to govern their contractual relationship and the chosen law has some nexus with the parties or the contract, that law will generally be applied.").

CONTRACT INTERPRETATION

Common Issues

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

In Hawaii, an occurrence "cannot be the expected or reasonably foreseeable result of the insured's own intentional acts or omissions." *Hawaiian Holiday Macadamia Nut Co. v. Indus. Indem. Co.,* 76 Haw. 166, 872 P.2d 230, 234 (Haw. 1994), citing *AIG Hawaii Ins. Co. v. Caraang,* 74 Haw. 620, 851 P.2d 321, 329 (Haw. 1993). Also, general liability policies are not designed to provide contractors and developers with coverage against claims their work is inferior or defective. *Anthem Elec., Inc. v. Pac. Employers Ins. Co.*, 302 F.3d 1049, 1057 (9th Cir. 2002). The risk of replacing and repairing defective materials or poor workmanship has generally been considered a commercial risk that is not passed on to the liability insurer. *Id.* Rather liability coverage comes into play when the insured's defective materials or work cause injury to property other than the insured's own work or products. *Id*.

Two seminal Hawaii cases illustrate this principle. The first is *Burlington Ins. Co. v. Oceanic Design & Constr., Inc.*, 383 F.3d 940 (9th Cir. 2004). In *Burlington,* homeowners failed to pay the balance due on their construction contract because the house was not completed to their satisfaction. In the underlying suit, the homeowners counterclaimed for breach of contract and negligent and/or intentional infliction of emotional distress. The district court granted summary judgment to the insurer after concluding that the counterclaims were contract or contract-based tort claims not within the scope of coverage of the CGL policy. The 9th Circuit Court of Appeals affirmed the judgment, holding that under Hawaii law none of the homeowners' allegations presented the possibility that their damages were caused by an "occurrence," which was defined under the policy as an accident. Although certain allegations in the counterclaims were couched in terms of negligence, the court agreed with the district court that contract and contract-based tort claims were not within the scope of CGL policies under Hawaii law.

The second case is *Grp. Builders, Inc. v. Admiral Ins. Co.*, 123 Haw. 142, 231 P.3d 67 (Haw. App. 2010). In *Grp. Builders*, The Hawaii Intermediate Court of Appeals held that because construction defect claims did not constitute an occurrence under the builders' commercial general liability policy, breach of contract claims based on allegations of shoddy performance were not covered under the policy. *Id.* Further, an occurrence cannot be the expected or reasonably foreseeable result of the insured's own intentional acts or omissions. *Id.* Thus, if builders breach a contract by their substandard construction, then a lawsuit is a reasonably foreseeable result. *Id.*

The Hawaii State Legislature criticized *Grp. Builders* as "creat[ing] a public policy crisis that only the State is in a position to remedy." H.B. 924 § 1. The bill also stated that *Grp. Builders* "creates uncertainty in the construction industry, and invalidates insurance coverage that was understood to exist and that was already paid for by construction professionals." *Id*.

In response to *Grp. Builders*, the Hawaii State Legislature in 2011 enacted Act 83, which resulted in Hawaii Revised Statutes ("HRS") § 431-1-217. The statute states:

> (a) For purposes of a liability insurance policy that covers occurrences of damage or injury during the policy period and that insures a construction professional for liability arising from construction-related work, the meaning of the term "occurrence" shall be construed in accordance with the law as it existed at the time that the insurance policy was issued.
> (b) Notwithstanding any other provision to the contrary, this section shall apply to surplus lines insurance as defined by section 431:8-102.
> (c) Any provision of an insurance policy issued in violation of this section shall be void and unenforceable as against public policy.
> (d) This section shall apply to all liability insurance policies issued and in effect as of [June 3, 2011].
> (e) For purposes of this section:
>
> "Construction professional" means a person, sole proprietorship, partnership, corporation, limited liability corporation, or other entity that engages in an activity intended to assist in the development, construction, or repair of an improvement to real property, including a contractor licensed pursuant to chapter 444, a building owner, or a developer of a project regardless of whether the person or entity maintains a professional license.
>
> "Liability insurance policy" means a contract of insurance including an owner-controlled, contractor-controlled, or other similar pooled insurance program that covers occurrences of damage or injury during the policy period and that insures a construction professional for liability arising from construction-related work.

It is not clear what effect Act 83 and HRS § 431-1-217 will ultimately have. However, no court has criticized or overturned *Grp. Builders* or *Burlington* in the 13 years since Act 83 and HRS § 431-1-217 were enacted. In fact, one month after HRS § 431-1-217 went into effect, the U.S. District Court for the District of Hawaii issued an opinion in *State Farm Fire & Cas. Co. v. Vogelgesang*, 834 F. Supp. 2d 1026 (D. Haw. 2011). In that case, the court held that § 431:1-217 did not impact its holding because even if the new statute invalidated *Grp. Builders,* pre-existing law provided an adequate basis for the court's conclusion.

In addition, the U.S. District Court for the District of Hawaii left no doubt where it stands in *Ill. Nat'l Ins. Co. v. Nordic PCL Constr., Inc.*, 870 F. Supp. 2d 1015 (D. Haw. 2012):

> With respect to hierarchy, this court is clearly bound by Burlington, in which the Ninth Circuit construed Hawaii law as not providing for insurance coverage for contract-related claims. While Nordic and Marsh say the Ninth Circuit misconstrued Hawaii law, it is futile for them to seek this court's departure from the Ninth Circuit's analysis. The "law of the circuit" rule is "the rule that a published decision of this court constitutes binding authority which 'must be followed unless and until overruled by a body

competent to do so.'" *Gonzalez v. Arizona,* Nos. 08-17094, 08-17115, 677 F.3d 383, 2012 U.S. App. LEXIS 7645, 2012 WL 1293149, at *2 n.4 (9th Cir. April 17, 2012) (en banc) (quoting *Hart v. Massanari*, 266 F3d 1155, 1170 (9th Cir. 2001). This court is obligated to follow the Ninth Circuit's decision in Burlington and may not choose to ignore the law of the circuit.

With respect to chronology, Nordic and Marsh are relying on Hawaii Supreme Court cases that preceded Burlington and Group Builders. Thus, it is fair for this court to assume that the Ninth Circuit and the ICA took those Hawaii Supreme Court cases into account.

Id. at 1030-31.

Separately, in *State Farm Fire & Cas. Co. v. GP W., Inc.*, 190 F. Supp. 3d 1003 (D. Haw 2016), the court noted that the District of Hawaii has already recognized that "nothing in Act 83 purports to nullify any of the decisions preceding Group Builders, and that Group Builders is consistent with prior case law." The court in *State Farm v. GP W.* also emphasized that *Grp. Builders* and *Burlington* remain good law and "stipulate the rule that CGL policies do not provide coverage for contract or contract-based tort claims." *Id.*

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

Yes. HRS § 431:10-222 states: Any covenant, promise, agreement or understanding in, or in connection with or collateral to, a contract or agreement relative to the construction, alteration, repair or maintenance of a building, structure, appurtenance or appliance, including moving, demolition or excavation connected therewith, purporting to indemnify the promisee against liability for bodily injury to persons or damage to property caused by or resulting from the sole negligence or willful misconduct of the promisee, the promisee's agents or employees, or indemnitee, is invalid as against public policy, and is void and unenforceable.

Note that this section shall not affect any valid workers' compensation claim under chapter 386 or any other insurance contract or agreement issued by an admitted insurer upon any insurable interest under this code.

DUTIES IMPOSED BY STATE LAW

Duty to Defend

The insurer's duty to defend is broader than the duty to pay and arises whenever there is the mere potential for coverage, such as indemnification liability of insurer to insured under the terms of the policy. *Sentinel Insurance Company, Ltd., v. First Insurance Company of Hawaii, Ltd.,* 76 Haw. 277, 875 P.2d 894 (1994).

1. Standard for Determining Duty to Defend

The duty to defend rests primarily on the possibility that coverage exists. The possibility may be remote, but if it exists, the insurer owes the insured a defense. Id. The possibility of coverage must be determined by a good faith analysis of all information known to the insurer or all

information reasonably ascertainable by inquiry and investigation. Standard Oil Co. of California v. Hawaiian Insurance Guaranty Company, 65 Haw. 521 (1982), citing Spruill Motors, Inc. v. Universal Under Ins. Co., 512 P.2d 168 (1968). "All doubts as to whether a duty to defend exists are resolved against the insurer and in favor of the insured[.]" Trizec Properties, Inc. v. Biltmore Constr. Co., 767 F.2d 810, 812 (11th Cir.1985) (citing 7C Appleman, Insurance Law & Practice, 99-100 (Berdal ed.1979)).

Where a suit raises a potential for indemnification liability of the insurer to the insured, the insurer has the duty to accept the defense of the entire suit even though other claims of the complaint fall outside of the policy's coverage. Commerce & Industry Insurance Company v. Bank of Hawaii, 73 Haw. 322 (1992).

2. Issues with Reserving Rights

Once the insurer receives information concerning the possible absence of coverage, the insurer must promptly serve upon the insured a reservation of rights. *AIG Insurance Co., Inc. v. Smith,* 78 Haw. 174, 891 P.2d 261 (1995).

"A reservation of rights agreement is notice by the insurer to the insured that the insurer will defend the insured but that the insurer is not waiving any defenses it may have under the policy." *First Ins. Co. of Hawaii v. State,* 66 Haw. 413, 665 P.2d 648 (1983). "[A]ffording an insured a defense under a reservation of rights agreement merely retains any defenses the insurer has under its policy; it does not relieve the insurer of the costs incurred in defending its insured where the insurer was obligated, in the first instance, to provide such a defense." *Id.*

When the insurer begins the defense of its insured and then determines that it is not obligated to do so, it cannot withdraw if that action would prejudice the insured unless the insurer has expressly reserved its right to withdraw. *Commerce & Industry Insurance Company v. Bank of Hawaii,* 73 Haw. 322 (1992).

State Privacy Laws; Insurance Regulatory Issues; Arbitration/Mediation

The treatment of nonpublic personal financial information by insurers is governed by H.R.S. § 431:3A. The law describes the treatment of nonpublic personal financial information about individuals by all insurance licensees. It requires insurance licensees to provide notice to individuals about their privacy policies and practices, establishes the conditions under which licensees may disclose nonpublic personal financial information about individuals to affiliates and nonaffiliated third parties, and provides methods to allow individuals to prevent a licensee from disclosing such information. H.R.S. § 431:3A-101(a).

The law applies "to nonpublic personal financial information about individuals who obtain or are claimants or beneficiaries of products or services primarily for personal, family, or household purposes" and not to "information about companies or individuals who obtain products or services for business, commercial, or agricultural purposes, and to all nonpublic personal health information." H.R.S. § 431:3A-101(b). The law defines "licensees" to include all "licensed insurers, producers, and other persons who are licensed or required to be licensed, authorized or required to be authorized, or registered or required to be registered" under Hawaii insurance law. H.R.S. § § 431:3A-102.

"Nonpublic personal financial information" is "personally identifiable financial information and any list, description, or other grouping of consumers derived using any personally identifiable financial information that is

not publicly available." *Id.* In addition, it includes a list of individuals' names and addresses that is derived in whole or part from using personally identifiable information that is not publicly available, such as account numbers. *Id.* It does not include health information or specified publicly available information. *Id.*

1. The Standards for Compensatory and Punitive Damages

"[T]he general rule in measuring damages is to give a 'sum of money to the person wronged which as nearly as possible, will restore [her] to the position [she] would be in if the wrong had not been committed.'" Nobriga v. Raybestos-Manhattan, Inc., 67 Haw. 157, 162, 683 P.2d 389, 393 (1984) (citation omitted).

General damages "are those damages which fairly and adequately compensate [a Plaintiff] for any past, present, and reasonably probable future disability, pain, and emotional distress caused by the injuries/damages sustained." Haw. Civil Jury Instr. No. 8.3; see also In re Haw. Fed. Asbestos Cases, 734 F. Supp. 1563, 1567 (D. Haw. 1990) ("General damages provide compensation for pain, suffering and emotional distress."); Dunbar v. Thompson, 79 Haw. 306, 315, 901 P.2d 1285, 1294 (Haw. App. 1995) ("General damages encompass all the damages which naturally and necessarily result from a legal wrong done. Such damages follow by implication of law upon proof of a wrong." (citation and internal quotations omitted)).

Non-economic damages are capped at $375,000. Hawaii law also provides for the recovery of the "reasonable value" of medical expenses. See Bynum v. Magno, 101 P.3d 1149, 1155–57 (2004).

With respect to punitive damages, according to Bright v. Quinn, 20 Haw. 504, 511–12 (1911):

> [Actions] of tort punitive damages may, under certain circumstances, be awarded in addition to such sum as the plaintiff may be found entitled to purely by way of compensation for his injuries and suffering. Such damages may be awarded in cases where the defendant "has acted wantonly or oppressively or with such malice as implies a spirit of mischief or criminal indifference to civil obligations"; or where there has been "some willful misconduct or that entire want of care which would raise the presumption of a conscious indifference to consequences". In such cases a reckless indifference to the rights of others is equivalent to an intentional violation of them (citations omitted).
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> The court in Kaopuiki went on to state:
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> [the] proper measure of punitive damages is (1) the degree of intentional, willful, wanton, oppressive, malicious or grossly negligent conduct that formed the basis for [the] prior award of damages against [the tortfeasor] and (2) the amount of money required to punish [the tortfeasor] considering [his or her] financial condition. Kaopuiki v. Kealoha, 104 Hawai'i 241, 256, 87 P.3d 910, 925 (App, 2003).

The primary consideration when determining whether an award of punitive damages is appropriate is the defendant's mental state. Masaki v. Gen. Motors Corp., 71 Haw. 1, 7, 780 P.2d 566, 570-71. (1989). An award of punitive damages always requires a "positive element of conscious wrongdoing." Id. (citing RESTATEMENT (SECOND) OF TORTS § 908 cmt. b).

According to Jury Instruction No. 14, nominal damages can be awarded: "If you find for the plaintiff but you find that the plaintiff has failed to prove damages as defined in these instructions, you must

award nominal damages. Nominal damages may not exceed one dollar."

2. Insurance Regulations to Watch

On May 27, 2022, the legislature enacted Act 028 (H.B. 2112) which "[a]mends the provisions in the insurance code relating to bilateral agreements on insurance and reinsurance for consistency with the agreements between the United States and European Union and the United States and United Kingdom."

On June 16, 2022, the legislature enacted Act 039 (H.B. 2405) which "[p]rohibits health insurers, mutual benefit societies, and health maintenance organizations from applying categorical cosmetic or blanket exclusions to gender affirming treatments or procedures when determined to be medically necessary pursuant to applicable law and specifies a process for appealing a claim denied on the basis of medical necessity. Requires those entities to provide applicants and insured persons with clear information about the coverage of gender transition services, including the process for appealing a claim denied on the basis of medical necessity."

On July 1, 2022, the legislature enacted Act 077 (H.B. 1971) which "[a]uthorizes and regulates peer-to-peer car-sharing programs. Imposes the general excise tax and rental motor vehicle surcharge tax on peer-to-peer car-sharing programs. Requires those persons engaging or continuing in a peer-to-peer car-sharing program to register with the department of taxation."

On January 1, 2023, the legislature enacted Act 056 (H.B. 1619) which "[e]stablishes peer-to-peer car-sharing insurance requirements."

On January 1, 2023, the legislature enacted Act 057 (H.B. 1681) which "[e]stablishes requirements and permitting procedures for transportation network companies operating in the State. Makes permanent insurance requirements for transportation network companies and transportation network company drivers."

On January 1, 2023, the legislature enacted Act 058 (H.B. 2111) which "[a]mends the limited lines producer license to include all aspects of travel insurance. Removes references to outdated and obsolete limited lines product offerings. Excludes dental insurers and dental service corporations as third party administrators. Requires renewal certificates and audited financial statements in the annual reports of third party administrators. Beginning 1/1/2023, adopts the revised National Association of Insurance Commissioners' Suitability in Annuity Transactions Model Regulation."

In addition, the 2022 legislature resolved to commission research to determine whether the state of Hawaii should propose mandatory health insurance coverage for fertility preservation procedures for cancer patients. S. Con. Res. 241. The resulting report to the 2023 legislature stated that it did not have enough information to make a recommendation. S. REP. NO. 22-16 (2023).

The 2022 legislature further resolved to commission research to determine whether the state of Hawaii should propose mandatory health insurance coverage for early access breast cancer screening. H.R. Con. Res. 33. The resulting report to the 2023 legislature is that mandatory health insurance coverage would not be beneficial as it would only affect a minute section of the population. S. REP. NO. 23-03 (2023).

3. State Arbitration and Mediation Procedures

Hawaii Revised Statutes § 658A - Uniform Arbitration Act outlines the basic procedures for arbitration.

In Hawaii, all tort cases worth a probable jury award value of $150,000 or less are automatically assigned to the Court Annexed Arbitration Program ("CAAP") in the interest of saving time and costs. A volunteer arbitrator presides at a hearing and any decision made by the arbitrator is non-binding. However, the arbitration award becomes the judgement if a Notice of Appeal and Request for Trial de Novo is not filed in a timely manner. Rules governing CAAP can be found here.

Outside arbitration and mediation is almost exclusively handled by Dispute Prevention & Resolution, Inc. ("DPR"). The American Arbitration Association ("AAA") has no presence in Hawaii. Rules and procedures for mediation can be found here. DPR's rules and procedures for arbitration can be found here.

4. State Administrative Entity Rule-Making Authority

The Department of Commerce & Consumer Affairs, Insurance Division ("INS") is responsible for overseeing the insurance industry in the State of Hawaii. This includes insurance companies, insurance agents, self-insurers and captives. The division ensures that consumers are provided with insurance services meeting acceptable standards of quality, equity and dependability at fair rates by establishing and enforcing appropriate service standards. The division provides for the licensing, supervision and regulation of all insurance transactions in the State. Prepaid Legal Services also falls within the division duties.

The Office of Administrative Hearings ("OAH") is responsible for conducting administrative hearings and issuing recommended or final decisions for all divisions within the Department of Commerce and Consumer Affairs that are required to provide contested case hearings pursuant to the provisions of H.R.S. Chapter 91 and H.R.S. § 92.

The Office of Consumer Protection ("OCP") was created in 1969 to protect the interests of consumers and legitimate businesses. The primary purpose of the office is to promote fair and honest business practices by investigating alleged violations of consumer protection laws, by taking legal action to stop unfair or deceptive practices in the marketplace, and by educating the consumer public and businesses regarding their respective rights and obligations.

EXTRACONTRACTUAL CLAIMS AGAINST INSURERS: ELEMENTS AND REMEDIES

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

3. First Party

Hawaii recognizes a cause of action for bad faith against a first-party insurer. Best Place, Inc. v. Penn America Ins. Co., 920 P. 2d 334 (Haw. 1996). "Every contract contains an implied covenant of good faith and fair dealings (bad faith) that neither party will do anything that will deprive the other of the benefit of the agreement." Id. While a breach of good faith results in a cause of action under contract principles, "[w]hether a breach of this duty will give rise to a cause of action in tort, depends on the duty or duties inherent in a contract." Id.

An insured must show two things in order to maintain a bad faith claim under Hawaii law: (1) benefits due under the policy were withheld; and (2) the reason for withholding the benefits was unreasonable or without proper cause. Id. at 347 (adopting California's bad faith test articulated in Gruenberg v. Aetna Ins. Co., 510 P.2d 1032 (Cal. 1973)).

An unreasonable delay in payment of benefits constitutes bad faith. Id. However, an insurer's denial of benefits based on a reasonable interpretation of the insurance policy does not constitute bad faith. Id. Nor does an erroneous decision not to pay benefits constitute bad faith. Id. See also, Enoka v. AIG Hawaii Insurance Company, Inc., 128 P.3d 850 (Haw. 2006). The determinative factor is whether the decision not to pay the claim was made in bad faith, i.e., based on unfair dealing rather than mistaken judgment. Best Place, Inc., 920 P.2d 334.

An insured may recover compensatory damages in a bad faith action. An insured may also recover punitive damages if he/she establishes by clear and convincing evidence that the insurer acted "wantonly or oppressively," "with such malice as implies a spirit of mischief or criminal indifference to civil obligations," with "willful misconduct," or with a "conscious indifference to consequences." Id. at 348. See also, H.R.S. § 663-1.2 regarding tort liability for breach of contract; punitive damages, which states that no person may recover damages, including punitive damages, in tort for a breach of contract in the absence of conduct that: (1) violated a duty that is independently recognized by principles of tort law; and (2) transcended the breach of the contract.

However, punitive damages are not covered by insurance policies. See Francis v. Lee Enterprises, Inc., 971 P.2d 707 (Haw. 1999). See also, H.R.S. § 431:10-240, which states that "coverage under any policy of insurance issued in this State shall not be construed to provide coverage for punitive or exemplary damages unless specifically included."

Emotional distress damages are available. Young v. Allstate Ins. Co., 119 Haw. 403, 406, 198 P.3d 666, 669 (2008).

A policyholder may be entitled to reasonable attorneys' fees and the cost of suit. H.R.S. § 431:10-242.

An insured's claim against liability insurer for general damages base on bad faith is not assignable. Sprague v. California Pacific Bankers & Ins. Ltd., 74 P.3d 12 (Haw. 2003).

An insurer's potential liability is not restricted to common-law bad faith tort actions. Statutory restrictions on an insurer also serve as a source for potential liability. As previously set forth, H.R.S. § 431:13-103 outlines numerous specific examples that constitute unfair claims handling practices by an insurer. These include the failure to respond to a communication from an insured within 15 business days, misrepresenting the benefits of an insurance policy in advertising, and not attempting in good faith to effectuate prompt, fair, and equitable settlement of claims in which liability has become relatively clear, among others.

4. Third-Party

Third parties cannot sue for bad faith on statutory grounds in Hawaii. However, there is a common law judicially created bad faith cause of action (i.e., the implied covenant of good faith) which is set forth in Best Place, which states that "there is a legal duty, implied in a first-and third-party

insurance contract, that the insurer must act in good faith with its insured, and a breach of that duty gives rise to an independent tort cause of action." "We note that that in the context of suits against an insurer for bad faith refusal to settle a third-party claim, courts [of other jurisdictions] have concluded that the plaintiff must show that the third-party claimant extended a reasonable settlement offer which the insurer then rejected." Wittig v. Allianz, A.G., 145 P.3d 738 (Haw. App. 2006).

A liability insurer does not owe a duty of good faith and fair dealing to the tort claimant. Young v. Allstate Ins. Co., 198 P.3d 666, 691 (Haw. 2008))("Absent a contract and because Young's claim [for bad faith against Allstate] was premised upon the existence of a contract, her claim for breach of the assumed duty of good faith and fair dealing must fail.")

Fraud

Guajardo v. AIG Haw. Ins. Co., 118 Haw. 196, 187 P.3d 580, 2008 Haw. LEXIS 149 quotes *Zanakis-Pico v. Cutter Dodge, Inc.*, 98 Hawai'i 309, 320, 47 P.3d 1222, 1233 (2002) that "in order to maintain a claim for relief grounded in fraud or deceit, the plaintiff must have suffered substantial actual damage, not nominal or speculative." Punitive damages, in addition to nominal damages, can be awarded in relation to a fraud claim. *Id.*

Intentional or Negligent Infliction of Emotional Distress

Under H.R.S. § 663-8.5(a) "[n]oneconomic damages which are recoverable in tort actions include damages for pain and suffering, mental anguish, disfigurement, loss of enjoyment of life, loss of consortium, and all other non-pecuniary losses or claims."

Tort damages, including emotional distress from a financial loss are recoverable in Hawaii pursuant to the California case of *Gruenburg v. Aetna Insurance Co.,* 9 Cal 3d 566 (1973). The court in *Gruenburg* determined that mental suffering constitutes an aggravation of damages when it naturally ensues from the act complained of. The seminal case regarding an emotional distress claim arising from a bad faith action against an insurer is *Young v. Allstate Ins. Co.,* 119 Haw. 403, 406, 198 P.3d 666, 669 (2008).

The tort of intentional infliction of emotional distress consists of four elements: "1) that the act allegedly causing the harm was intentional or reckless, 2) that the act was outrageous, and 3) that the act caused (4) extreme emotional distress to another." The term "outrageous" has been construed to mean without just cause or excuse and beyond all bounds of decency. *Enoka v. AIG Hawaii Ins. Co., Inc.,* 109 Haw 537, 559, 128 P.3d 850 872 (2006).

In Hawaii, if a first-party insurer commits bad faith, an insured need not prove that the insured suffered economic or physical loss caused by the bad faith in order to recover emotional distress damages caused by the bad faith. *Miller v. Hartford Life Insurance Company,* 126 Haw. 165, 268 P.3d 418 (2011).

The Hawaii Supreme Court held in *Miller* that *"*our subsequent case law evidence an intent to provide the insured with a vehicle for all damages incurred as a result of the insurer's misconduct, including damages for emotional distress, without imposing a threshold requirement of economic or physical loss." *Id. at* 430.

State Consumer Protection Laws, Rules and Regulations

The Department of Commerce and Consumer Affairs ("DCCA") governs the insurance industry in Hawaii and serves as a conduit for consumers to file complaints against insurers.

DISCOVERY ISSUES IN ACTIONS AGAINST INSURERS

Discoverability of Claims Files Generally

In Hawaii, while claims files in general may be discoverable, certain documents may be protected under the work product doctrine: "For general guidance purposes only, the Court notes that the work product doctrine provides a qualified protection from discovery in a civil action when the documents materials are (1) document and tangible things otherwise discoverable, (2) prepared in anticipation of litigation, and (3) by or for another party or by that other party's representative." *American Savings Bank v. Pain Webber Inc.,* 210 F.R.D. 721, 723 (D. Hawaii 2001). To satisfy the second element of the work product doctrine, there must be some threat of litigation, and the document must have been generated after that threat had materialized. *Id.*

There is very little case law in Hawaii regarding discovery issues in actions against insurers. However, mainland cases are instructive in litigating this issue.

Underwriting files can be relevant because they may contain an insurer's position on coverage, claims and relations with policyholders. *See Hoechst Celanese Corporation v. National Fire Insurance Company of Pittsburgh, Pennsylvania,* 623 A.2d 1099, 1107 (Del. Super. 1991). The court in *Hoechst* allowed discovery of underwriting files and reinsurance materials reasoning that they were relevant because they may provide evidence as to how the insurance company intended to apply the insurance policy. *Id* at 1107.

In *Open Software Foundation Inc. v. United States Fidelity & Guaranty Co.,* 191 F.R.D. 325 (D. Mass.), the court held that the underwriting file must be produced by the insurer if was non-privileged.

In *Nestle Foods Corp. v. Aetna Casualty and Surety Co.,* 135 F.R.D. 101 (D. NJ. 1990), the court ruled that the underwriting files were discoverable and relevant because they may help with interpreting the policies and the intent of the drafters.

With regards to claims files, the law is clear that an insured may obtain the claims file maintained by the insurer. *Terrell v. Western Casualty Ins. Co.,* 427 S.W.2d 825, 828 (Ky. Ct. App. 1979).

Discoverability of Reserves

There are no specific Hawaii cases that address the discoverability of reserves; however, several mainland cases establish that reserves may be relevant to establish a bad faith case. *Lipton v. Superior Court,* 48 Cal. App.4th 1599, 1614 (Cal.App. 2d 1996).

While loss reserve files may be relevant in a bad faith claim, there are instances when they are not and thus not open to discovery. *In re Couch,* 80 B.R. 512, 518 (Bankr.S.D.Cal. 1987) (Court ruled that, because reserve policy is established by legislature and the Insurance Commissioner, it cannot be fairly equated with an admission of liability or the value of any particular claim.)

Other courts have ruled that if the reserves files were established as part of an attorney's work or in expectation of litigation, then the reserve files would be protected by the attorney-client privilege or work product doctrine. *Simon v. G.D. Searle & Co.,* 816 F.2d 397, 401 (8th Cir. 1987).

Discoverability of Existence of Reinsurance and Communications with Reinsurers

There is no case law in Hawaii about the discoverability regarding the existence of reinsurance and/or communications with reinsurers. However, there are several California cases which are instructive on these issues. In *Fireman's Fund Ins. Co. v. Superior Court,* 233 Cal.App.3d 1138, 1141 (Cal. App. 1st Dist. 1991), the court ruled that reinsurance documents may be relevant in the bad faith claim and decided that, before ruling on the relevancy of the documents, it would review the documents *in camera* to determine if any documents should be withheld from disclosure.

In contrast, the court in *Lipton v. Superior Court,* 48 Cal. App.4th, 1599 (Cal. App. 2d 1996) stated that because the reinsurance contract does not alter the original contract between the insurer and insured, an argument can be made that reinsurance documents have no relevance and are unlikely to lead to the discovery of admissible information. The court added that correspondence between insurer and reinsurer that is not privileged and which discusses liability exposure, may be relevant and discoverable. *Id.*

As is evident, while mainland courts differ on this issue, ultimately, whether reinsurance documents are discoverable is largely dependent on their relevancy.

Attorney/Client Communications

In Hawaii, attorney-client privilege has long been recognized under common law, then codified as Hawaii Rules of Evidence ("H.R.E.") Rule 503. *Anastasi v. Fid. Nat'l Title Ins. Co.*, 134 Haw. 400, 341 P.3d 1200, 2014 Haw. App. LEXIS 585 citing *Di Cenzo v. Izawa*, 68 Haw. 528, 535, 723 P.2d 171, 175 (1986).

Attorney/Client privilege is set forth in HRE Rule 503 and exists for the purposes of "facilitating the rendition of professional legal services to the client". Notably, there are seven exceptions in HRE Rule 503(d) for which "[t]here is no privilege under this rule", but there is no exception that suggests that attorney-client privilege is inapplicable when a bad faith claim is asserted. In *Anastasi* (2014), the Intermediate Court of Appeals ("ICA") held that the "assertion of a bad faith claim does not nullify the attorney-client privilege." (*Anastasi* (2014) was reviewed by the Hawaii Supreme Court in *Anastasi v. Fid. Nat'l Title Ins. Co.*, 137 Haw. 104, 366 P.3d 160, 2016 Haw. LEXIS 30, which affirmed ICA's decision regarding attorney-client privilege but vacated in part as to other issues.)

DEFENSES IN ACTIONS AGAINST INSURERS

Misrepresentations/Omissions: During Underwriting or During Claim

H.R.S. § 431:13-103 (13) specifically prohibits misrepresentations in insurance applications. It is well settled in Hawaii that under contract law, a party to a contract can typically avoid its obligations if the contract was formed based upon material misrepresentations made by the other party. Restatement 2d of Contracts, § 164 (2nd 1981).

As long as insureds continue to make material misrepresentations to either obtain benefits they would not be entitled to, or to obtain benefits at a lower premium rate, a charge of bad faith *per se* cannot stand since insurers will have a reasonable basis to challenge the availability of coverage.

A misrepresentation shall not prevent a recovery on the policy unless made with actual intent to deceive or unless

it materially affects either the acceptance of the risk or the hazard assumed by the insurer. H.R.S. § 431:10-209 (1987). *See also, Vannatta v. Pacific Guardian Life Ins. Co. Ltd.*, 1 Haw. App. 294, 296, 618 P.2d 317, 319 (1980). A misrepresentation is material where the insurer, as a careful and intelligent person, either would not have issued the policy had the truth been known, or would have issued it only at a higher rate of premium. *Park v. Government Employees Ins. Co.*, 89 Hawai`i 394, 399, 974 P.2d 34, 39 (1999). A misrepresentation prevents recovery on a policy if it "materially affects the acceptance of the risk or the hazard assumed by the insurer." *First Ins. Co. v. Sariaslani*, 80 Haw. 491, 911 P.2d 126, 1996 Haw. App. LEXIS 11. This was most recently upheld in *Farmer v. Pac. Specialty Ins. Co.,* 2010 Haw. App. LEXIS 525, 130 Haw. 349, 310 P.3d 1050, 2010 WL 3819610, in which the ICA entered judgement against the insured for a misrepresentation of the manufacturer of his motorcycle.

To rescind a policy, the insurer must show that the insured's representations contained in the policy application were: (1) misrepresentations, and (2) made with either an intent to deceive, or (3) materially affected the insurer's decision to accept the risk or hazard. *Gasaway v. Northwestern Mut. Life Ins. Co.*, 26 F.3d 957, 958 (9th Cir. 1994) (applying Hawai`i law). The misrepresentation in this context "need only relate to the insurance company's decision to insure the risk." *Genovia v. Jackson Nat'l Life Ins. Co.*, 795 F.Supp. 1036, 1041 (D.Haw. 1992). Whether there was a misrepresentation in an insurance application, whether it was made with actual intent to deceive, and whether it materially affected either the acceptance of the risk or hazard assumed by the insurer are disputed questions of fact and are thus jury questions. *Vannata* at 296, 618 P.2d at 319. *See also, Matsuura v. E.I. du Pont de Nemours & Co.*, 102 Haw. 149, 73 P.3d 687, 2003 Haw. LEXIS 353 (citing *Park v. Government Employees Ins. Co.*, 89 Hawaii 394, 399, 974 P.2d 34, 39 (1999): "the general rule is that 'if a party's misrepresentation of assent is induced by either a fraudulent or a material misrepresentation by the other party upon which the recipient is justified in relying, the contract is voidable by the recipient.'" (quoting Restatement (Second) of Contracts § 164(1) (1979)).)

Failure to Comply with Conditions

An insured's failure to comply with conditions of the policy is a "reasonably arguable basis for denying [the insured's] claim" and also a lack of basis for a bad faith claim. *Flowers v. United Servs. Auto. Ass'n*, 2008 Haw. App. LEXIS 449. This is due to the fact that an insurance policy is a contract, which must be "construed according to the entirety of its terms and conditions as set forth in the policy." *Flowers,* citing *Dairy Rd. Partners v. Island Ins. Co.*, 92 Hawai'i 398, 411-12, 992 P.2d 93, 106-07 (2000).

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

There are no specific Hawaii cases which address this issue.

Preexisting Illness or Disease Clauses

An individual's failure to disclose a preexisting injury when applying for employment is insufficient to deny her workers' compensation benefits. *Teixeira v. Kauikeolani Children's Hosp.,* 3 Haw. App. 432, 433, 652 P.2d 635, 636 (1982).

Haw. Rev. Stat. § 431:10H-108 governs preexisting conditions in group and individual long-term care insurance policies. In *Estate of Doe v. Paul Revere Ins. Group,* 86 Haw. 262, 948 P. 2d 1103(Haw. 1997), the Hawaii Supreme Court held that, pursuant to H.R.S. Chapter 431, article 10A, part 1, in general, and H.R.S. § 431:10A-105(2)(A)(ii), in particular, that the standard "incontestability clause" precludes Defendant from denying Plaintiff the "Total

Disability Benefit" for which Plaintiff contracted, notwithstanding that the HIV infection that caused the disability arguably "manifested" itself prior to the effective date of coverage.

Statutes of Limitations and Repose

The statute of limitations is two (2) years after the cause of action accrued. H.R.S. § 657-7. In practice, Hawaii courts have upheld that the statute of limitations runs after the "plaintiff discovers or should have discovered the negligent act, the damage, and the causal connection between the two". *Kimberly v. State*, 2005 Haw. LEXIS 392 citing *Hays v. City & County of Honolulu*, 81 Hawai'i 391, 392 n.1, 917 P.2d 718, 719 n.1 (1996); *Yamaguchi v. Queen's Medical Center*, 65 Haw. 84, 90, 648 P.2d 689, 693-94 (1982).

The statute of limitation accrues if the claimant has factual knowledge necessary for an actionable claim; legal knowledge of negligence is not required. *Kimberly* citing *Buck v. Miles*, 89 Hawai'i 244, 249-50, 971 P.2d 717, 722-23 (1999).

Further, knowledge as to the identity of the proper defendant does not delay or toll the statute of limitations. *Russell v. Attco, Inc.*, 82 Hawai'i 461, 463-65, 923 P.2d 403, 405-07 (1996). "A continuing tort sufficient to toll a statute of limitations is occasioned by continual unlawful acts, not by continual ill effects from an original violation, and for there to be a continuing tort there must be a continuing duty." *Davis v. Ass'n of Apt. Owners of Kona Plaza*, 2003 Haw. App. LEXIS 309, citing *Anderson v. State*, 88 Hawaii 241, 247, 965 P.2d 783, 789 (App. 1998).

TRIGGER AND ALLOCATION ISSUES FOR LONG-TAIL CLAIMS

Trigger of Coverage

"The Supreme Court of Hawaii adopts the injury-in-fact trigger for all standard comprehensive general liability policies." *Sentinel Ins. Co. v. First Ins. Co. of Hawaii*, 76 Haw. 277, 298, 875 P.2d 894, 915 (1994). Under this theory, "coverage is triggered by the actual occurrence during the policy period of an injury-in-fact. Under this trigger, an injury occurs whether detectable or not; in other words, an injury need not manifest itself during the policy period, as long as its existence during that period can be proven in retrospect." *Id*.

Allocation Among Insurers

In *Sentinel Ins. Co. v. First Ins. Co. of Hawaii*, 76 Haw. 277, 298, 875 P.2d 894, 915 (1994) the Supreme Court of Hawaii held that where the amount of damages cannot be accurately attributed to any particular year, damages should be shared by successive insurers on a time-on-the-risk basis.

CONTRIBUTION ACTIONS

Claim in Equity vs. Statutory

Hawaii's State Legislature intended to follow California law to "establish[] a good faith settlement procedure for joint tortfeasors and co-obligors and thus adopted *Tech-bilt, Inc. v. Woodward-Clyde & Assoc.*, 38 Cal. 3d 488, 698 P.2d 159, 213 Cal. Rptr. 256 (Cal. 1985) as Act 300, promulgated as H.R.S. § 663-15.5 (Supp. 2002). *Troyer v. Adams*, 102 Haw. 399, 77 P.3d 83, 2003 Haw. LEXIS 455, citing Sen. Stand. Comm. Rep. No. 828, in 2001 Senate

Journal, at 1253

H.R.S. § 663-15.5, in pertinent part, states:

- A release, dismissal with or without prejudice, or a covenant not to sue or not to enforce a judgment that is given in good faith under subsection (b) to one or more joint tortfeasors, or to one or more co-obligors who are mutually subject to contribution rights, shall:
  - Not discharge any other party not released from liability unless its terms so provide;
  - Reduce the claims against the other party not released in the amount stipulated by the release, dismissal, or covenant, or in the amount of the consideration paid for it, whichever is greater; and
  - Discharge the party to whom it is given from all liability for any contribution to any other party.

Elements

H.R.S. § 663-12 states the following regarding the right of contribution:

- The right of contribution exists among joint tortfeasors.
- A joint tortfeasor is not entitled to a money judgment for contribution until the joint tortfeasor has by payment discharged the common liability or has paid more than the joint tortfeasor's pro rata share thereof.
- 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.
- When there is such a disproportion of fault among joint tortfeasors as to render inequitable an equal distribution among them of the common liability by contribution, the relative degrees of fault of the joint tortfeasors shall be considered in determining their pro rata shares, subject to section 663-17.

In Hawaii, a contribution plaintiff is entitled to contribution from a tortfeasor whose liability was extinguished by the settlement, either in the main action or a separate action. An independent action for contribution will not be allowed if the right can be enforced with a third-party action or cross-claim in the principal lawsuit. *Gump v. Wal-Mart Stores, Inc.,* 5 P.3d 407 (Haw. 2000).

There are no Hawaii cases regarding the “elements” of contribution actions.

DUTY TO SETTLE

The Hawaii Supreme Court in *Taylor v. Government Employees Ins. Co.,* 90 Haw. 302, 978 P.2d 740 (1999) held that:

> [I]t is unreasonable for a UIM carrier to precondition its refusal to consent to settle upon the failure of the insurer to achieve a settlement exhausting the tortfeasor’s policy limits.” In other words, by settling for less than the policy limits, the UIM insured agrees to forego compensation for the difference between the

> settlement amount and the tortfeasor's liability policy limits. The UIM carrier will not be responsible for covering that "gap" as a component of its obligation to compensate its insured for injury and damage exceeding the tortfeasor's policy limits. Accordingly, there is no legitimate reason for the UIM carrier to refuse to consent to a settlement on that basis.

It is well settled that the duty to provide coverage and the duty to defend on the part of an insurer are separate and distinct. *Sentinel Insurance Company, Ltd. v. First Insurance Company of Hawaii, Ltd.,* 76 Haw. 277, 875 P.2d 894 (1994).

LH&D BENEFICIARY ISSUES

Change of Beneficiary

There is limited case law regarding this matter. However, it seems that changing of a beneficiary is bound by and related to the terms of its contracts or any divorce decree (see below).

Effect of Divorce on Beneficiary Designation

Hawaii case law on this issue in largely contingent upon the factual circumstances in each given case and decisions are based upon the equitable standards set forth in one's divorce decree. For example, in *Nicoleta Jacoby v. Bennett Jacoby*, 134 Haw. 431, 341 P.3d 1231, 2014 Haw. App. LEXIS 584 it was agreed upon that Bennett maintain a 1.5 million life insurance policy with Nicoleta "being the exclusive primary beneficiary for so long as he has an obligation to pay child support or alimony." In *Kakinami v. Kakinami*, 125 Haw. 308, 260 P.3d 1126, 2011 Haw. LEXIS 182, the parties' divorce decree explicitly states that each party was allowed to "change beneficiary designations on his or her insurance policies and retirement plans."

H.R.S. § 580-47(a) governs the distribution of assets upon divorce. As set forth in *Labayog v. Labayog*, 83 Haw. 412, 927 P.2d 420 (Haw. App. 1996), "upon granting a divorce . . . the court may make such further orders as shall appear just and equitable. . . (3) finally dividing and distributing the estate of the parties, real, personal, or mixed, whether held commonly, joint or separate. . . In making such further orders, the court shall take into consideration: the respective merits of the parties, the relative abilities of the parties, the condition in which each party will be left in the divorce. . . and all other circumstances of the case."

INTERPLEADER ACTIONS

Availability of Fee Recovery

In an interpleader action, the court has discretion to award attorneys' fees and costs to the stakeholder when it is fair and equitable to do so. *Gelfgren v. Republic National Life Insurance Co., et. al,* 680 F.2d 79, 81 (9th Cir. 1982). *See also*, *Wright, Miller & Kane* at Section 1719.

Of note, the Court's discretion to award attorneys' fees and costs is limited if the award operates to diminish a distribution of the fund to satisfy a federal tax lien. *Abex Corp. v. Ski's Enterprises, Inc., et. al*, 748 F.2d 513, 517 (9th Cir. 1984).

Differences in State vs. Federal

There are no differences between state and federal interpleader actions. Rule 22 of the Hawaii Rules of Civil

Procedure regarding interpleaders follows Rule 22 of the Federal Rules of Civil Procedure.