FOR MORE INFORMATION

BAKER STERCHI COWDEN & RICE, L.L.C.
Kansas City, Missouri
www.bakersterchi.com

Michael Shunk
mshunk@bakersterchi.com

Kansas

REGULATORY LIMITS ON CLAIMS HANDLING

Timing for Responses and Determinations

Kansas has adopted the National Association of Insurance Commissioners' ("NAIC") Unfair Claims Settlement Practices Model Regulation (1981), subject to certain limited exceptions. K.A.R. 40-1-34. This means that an insurer presented with a property and casualty claim must (1) acknowledge the claim within 10 days, (2) advise a first party claimant of the acceptance or denial of a claim within 15 days after receipt of proof-of-loss, and (3) complete its investigation within 30 days or provide updated notifications regarding the status of the claim every 45 days if it remains under investigation. See *id.* Please note that Kansas has not adopted the more recent or current NAIC model regulations.

No Kansas statute or regulation specifically governs the timing of the issuance of a reservation of rights letter. The insurer must issue a unilateral reservation of rights, or enter into a mutual "non-waiver agreement" with the insured, that is both "clear" and "timely." *Bogle v. Conway*, 199 Kan. 707, 714, 433 P.2d 407 (1967). The insurer may change its coverage position as it learns facts that place the claim outside of the policy's coverage. *Id.*

For accident and injury policies, an insurer has thirty (30) days from the date of receipt to pay the claim in full, or to send acknowledgment of receipt of a claim and a request for additional information if needed as well as specific reasons for denial if necessary. *See* Kansas Health Care Prompt Payment Act, ch. 134, sec. 2, K.S.A. § 40-2442(a). If the insurer fails to comply with subsection (a), such insurer must pay interest at the rate of 1% per month on the amount of the claim that remains unpaid thirty (30) days after receipt. § 40-2442(b). The insured must submit all additional information requested by the insurer within thirty (30) days after receipt of the request for additional information. § 40-2442(c). Within 15 days after receipt of all requested additional information, the insurer must pay a clean claim in accordance with this section or send a notice to the insured stating that the insurer refuses to reimburse all or part of the claim and the specific reasons for such denial. § 40-2442(d). If the insurer fails to comply with subsection (d), such insurer must pay interest on any amount of the claim that remains unpaid at the rate of 1% per month. *Id.*

Standards for Determination and Settlements

Under K.S.A. § 40-219, whenever the insurer becomes liable for a loss to any person in the state, after all appeals have become final, it has three months from the date of judgment to pay the claim, or it may be enjoined from doing business within the state.

Kansas statutory provisions identify, as "unfair claim settlement practices," the following conduct that is committed "flagrantly and in conscious disregard" or "with such frequency as to indicate a general business practice":

- misrepresenting pertinent facts or insurance policy provisions relating to coverages at issue;
- failing to acknowledge and act reasonably promptly upon communications with respect to claims arising under insurance policies;
- failing to adopt and implement reasonable standards for the prompt investigation of claims arising under insurance policies;
- refusing to pay claims without conducting a reasonable investigation based upon all available information;
- failing to affirm or deny coverage of claims within a reasonable time after proof of loss statements have been completed;

  . . . .

- 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.

K.S.A. § 40-2404(9).

While the failure to comply with the above sections can result in a cause of action by the regulating agency, it does not give rise to a private right of action. *Jahnke v. Blue Cross and Blue Shield of Kansas, Inc.*, 353 P.3d 455, 465 (Kan. App. 2015).

PRINCIPLES OF CONTRACT INTERPRETATION

As with any other contract, the language of an insurance policy, must, if possible, be construed in such a way as to give effect to the intention of the parties. *American Family Mutual Ins. Co. v. Wilkins*, 179 P.3d 1104, 1109 (Kan. 2008); *Hall v. Shelter Mutual Ins. Co.*, 253 P.3d 377, 380 (Kan. App. 2011). In construing a policy, a court should consider the document as a whole and endeavor to ascertain the intent of the parties from the language used, while taking into account the situation of the parties, the nature of the subject matter, and the purpose to be accomplished. *American Family*, 179 P.3d at 1109.

Because the insurer writes the policies, it has a duty to make the meaning clear. *Id.* If the insurer intends to restrict or limit coverage under the policy, it must use clear and unambiguous language. *Id.* Clear and unambiguous language will be taken in its plain, ordinary, and popular sense. *Id.* If the terms of the policy are ambiguous, uncertain, conflicting, or susceptible of more than one construction, the policy will be construed in favor of the insured. *Id.* Whether a policy is ambiguous is a question of law to be decided by the courts, and the test for determining whether a policy is ambiguous is what a reasonably prudent insured would understand the language to mean. *Id.* at 1110; *First Financial Ins. Co. v. Bugg*, 962 P.2d 515, 519 (Kan. 1998).

In construing an endorsement to an insurance policy, the endorsement and policy must be read together. *Thornburg v. Schweitzer*, 240 P.3d 969, 976 (Kan. App. 2010). The policy remains in full force and effect except as altered by the words of the endorsement. *Id.*

CONTRACT INTERPRETATION

Common Issues

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

   Under Kansas Law, damages caused by faulty materials and workmanship are a covered "occurrence", for purposes of coverage under a CGL. See *Lee Builders, Inc. v. Farm Bureau Mut. Inc. Co. Ins. Co.,* 281 Kan. 844, 137 P.3d 486 (Kan. 2006).

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

   Yes, pursuant to K.S.A. § 16-121, "[a]n indemnification provision in a contract which requires the promisor to indemnify the promisee for the promisee's negligence or intentional acts or omissions is against public policy and is void and unenforceable." Likewise, "[a] provision in a contract which requires a party to provide liability coverage to another party, as an additional insured, for such other party's own negligence or intentional acts or omissions is against public policy and is void and unenforceable." There are a six somewhat narrow enumerated exceptions.

CHOICE OF LAW

When the question of choice of law goes to the substance of a contractual obligation, Kansas courts apply the primary rule of *lex loci contractus*, which calls for the application of the law of the state where the contract is made. See *Layne Christensen Co. v. Zurich Canada*, 38 P.3d 757, 766 (Kan. App. 2002). Kansas courts have differentiated between cases involving contract interpretation (coverage questions) and performance (e.g., the duty to defend), however, finding that questions as to the duty to defend arise in the "place of performance" – i.e., where the claim to be defended is pending. *Aselco, Inc. v. Hartford Ins. Grp.*, 848, 21 P.3d 1011, 1018 (2001). The law of the forum where the insurer was called upon to defend governs the determination of the existence of the duty to defend. *Id*.

Kansas state court opinions rely upon *Aselco* for the holding that the proper choice of law for a dispute regarding the insurer's performance is the "place of performance." The Kansas Supreme Court declined to review *Aselco*, and has subsequently cited it with approval at least twice, each time noting that it declined review. See *Miller v. Westport Ins. Corp*., 200 P.3d 419, 425 (Kan. 2009); *Dragon v. Vanguard Indus*., 89 P.3d 908, 914 (Kan. 2004). In *Dragon*, the Kansas Supreme Court specifically relied upon *Aselco*'s rule regarding choice of law:

> Kansas courts have traditionally applied the rule of *lex loci contractus*. In most instances, this means courts apply the substantive law of the state where the contract was made, although in some instances the courts look to the place of performance.

277 Kan. at 784, 89 P.3d at 914.

The Kansas state courts have not specifically articulated whether "bad faith" claims fall within a dispute as to coverage, or a dispute regarding performance.

DUTIES IMPOSED BY STATE LAW
Duty to Defend

1. Standard for Determining Duty to Defend

There is a duty to defend if there is a "potential" for coverage. *Spivey v. Safeco Ins. Co.*, 865 P.2d 182, 188 (Kan. 1993). The insurer's duty to defend is determined not only by the specific claims made by the claimant, but also any facts that the insurer knew or "could have ascertained from a reasonable investigation." *Miller v. Westport Ins. Corp.*, 200 P.3d 419, 424 (Kan. 2009). An insurer can satisfy its duty to defend by doing so under a reservation of rights or non-waiver agreement and will not thereby waive any coverage defenses. *Davin v. Athletic Club of Overland Park*, 96 P.3d 687, 690 (Kan. App. 2004).

2. Issues with Reserving Rights

No Kansas statute or regulation specifically governs the timing of the issuance of a reservation of rights letter. The insurer must issue a unilateral reservation of rights, or enter into a mutual "non-waiver agreement" with the insured, that is both "clear" and "timely." *Bogle v. Conway*, 433 P.2d 407, 411 (Kan. 1967). The insurer may change its coverage position as it learns facts that place the claim outside of the policy's coverage. *Id.*

There has been no precise definition of what constitutes "timely" notice under Kansas law. The Kansas Supreme Court has declined to establish a bright line rule. *Becker v. Bar Plan Mut. Ins. Co.*, 429 P.3d 212, 220 (Kan. 2018).

> In many cases, the insurer reserves its rights contemporaneously or almost contemporaneously with its assumption of its insured's defense. While we decline to make a bright line rule requiring such, a court must nevertheless consider that "the insured must be fairly and timely informed of the insurer's position. That information should include the basis for the position taken by the insurer. Only then is the insured in a position to make his choice as to the course to pursue in protecting himself."

Id. (quotation omitted).

Whether a reservation of rights is timely depends on the facts of the case. *Continental Ins. Co. v. Wilco Truck Rental, Inc.*, 1986 Kan. App. LEXIS 1491 (Kan. Ct. App. Nov. 6, 1986). Three years is too long to wait to send a reservation of rights. *Bogle, supra*. Six months after suit was filed and 4 months after the insurer assumed the defense of the insured was timely notice, however. *Wilco Truck Rental, supra*.

Relevant to the inquiry on timeliness is whether the insured suffered any prejudice as a result of the late reservation of rights. *Id.* The facts considered by the *Wilco Truck Rental* court were whether the insured had adequate time to meaningfully defend the case, attempt a settlement, and, if necessary, to prepare for trial. *Id.*

The reservation of rights letter must clearly set forth the specific facts and policy language that would provide a basis for denial of coverage, and it must give notice that the insurer reserves the

right to use these defenses to coverage in any action to collect on the policy. *Bogle*, *supra*. The insurer must identify all defenses to coverage that are known to the insurer at the time the reservation is issued. *Pacific Indem. Co. v. Berge*, 473 P.2d 48, 57 (Kan. 1970).

Vague or ambiguous reservations will not be effective. Note that even a mutual non-waiver agreement that is signed by the insured (as opposed to a unilateral reservation of rights letter) will not be effective to prevent an estoppel or waiver argument if the agreement does not clearly express the factual and policy grounds for the potential denial of coverage. *Bogle*, 433 P.2d at 411-12.

In drafting a mutual non-waiver agreement or unilateral reservation of rights, the insurer should attempt, insofar as possible, to use "plain English" explanations geared toward an unsophisticated audience in explaining its position. *Id.* The agreement or reservation of rights should set forth the specific policy language that applies and explain how the known facts appear to place the claims outside of coverage. *Id.* The non-waiver or reservation of rights must clearly explain that the insurer may ultimately deny coverage for the claim, which would leave the insured personally exposed to a judgment that is not covered by the policy. *Id.*

State Privacy Laws; Insurance Regulatory Issues; Arbitration/Mediation

1. Criminal Sanctions

Criminal sanctions have never been ordered by a Kansas court against an insurer for refusal to defend.

2. The Standards for Compensatory and Punitive Damages

An insured may recover for injuries which result directly from the breach of an insurer's contractual duty to defend. *Guarantee Abstract & Title Co., Inc. v. Interstate Fire and Cas. Co., Inc.*, 652 P.2d 665, 668 (1982). Where an insurer's reasons for refusing to defend are "without just cause or excuse," an insured may also recover reasonable attorneys' fees expended in bringing suit against the insurer for breach of its duty to defend. *Hartford Fire Ins. Co. v. Vita Craft Corp.*, 911 F.Supp.2d 1164, 1183 (D. Kan. 2012); K.S.A. § 40-256. An insurer who wrongfully declines to defend may be liable for a judgment in excess of the policy limits where the insured can show that the excess judgment is traceable to the insurer's refusal to defend. *Snodgrass v. State Farm Mut. Auto. Ins. Co.*, 804 P.2d 1012, 1021 (Kan. App. 1991).

To recover punitive damages, the plaintiff must show existence of "an independent tort resulting in additional injury." *Pacific Employers Inc. Co. v. P.B. Hoidale Co., Inc.*, 789 F.Supp. 1117, 1123 (D. Kan. 1992) (citing *Guarantee Abstract & Title Co., Inc. v. Interstate Fire and Cas. Co., Inc.*, 652 P.2d 665, 667 (Kan. 1982)). Where an independent tort or wrong warrants assessment of punitive damages, proof of the independent tort "must indicate the presence of malice, fraud or wanton disregard for the rights of others." *Guarantee*, 652 P.2d at 667. Further, before punitive damages may be awarded, "a plaintiff must establish a right to recovery of actual damages." *Traylor v. Wachter*, 607 P.2d 1094, 1098 (Kan. 1980). Where a plaintiff cannot recover actual or compensatory damages for an alleged

wrongful act of the insurer, he cannot recover punitive damages. *Id.*

The Kansas insurance commissioner may also order penalties against an insurer. Under K.S.A. § 40-2406(a), when the commissioner believes a person has engaged in any unfair or deceptive act or practice, they may hold a proceeding and issue charges. The commissioner may order the charged party to pay a monetary penalty for each violation, revoke the license of the charged party, or order a refund of any payments withheld from the consumer. § 40-2407(a). The commissioner may also order the charged party to pay the costs incurred as a result of conducting the proceeding, including witness fees, mileage allowances, costs associated with reproduction of documents which become a part of the hearing record, and the expense of making a record of the hearing. § 40-2406(b).

3. Insurance Regulations to Watch

The Kansas legislature regularly considers bills pertaining to life, accident, and injury policies. Property and casualty insurance is less commonly the subject of legislative action.

4. State Arbitration and Mediation Procedures

Kansas does not recognize binding mediation. *Wasinger v. Roman Catholic Diocese of Salina*, 407 P.3d 665, 670 (Kan. App. 2017). By statute, mediation proceedings are confidential. K.S.A. § 23-3505.

An arbitration clause requiring parties to an agreement to submit any existing or subsequent controversy to arbitration is "valid, enforceable, and irrevocable, except upon a ground that exists at law or in equity for the revocation of a contract." § 5-428(a).

To initiate an arbitration proceeding, a party must give notice in a record to the other parties to the agreement in the agreed manner between the parties. K.S.A. § 5-431(a). In the absence of agreement, the notice must be given by certified or registered mail, return receipt requested and obtained, or by service as authorized for the commencement of a civil action. *Id.*

The notice must describe the nature of the controversy and the remedy sought. *Id.* If the parties agree on a method for appointing an arbitrator, that method must be followed, unless the method fails. § 5-433(a). If the parties have not agreed upon a method, the method fails, or the chosen arbitrator is unable to act, the court, on motion by a party, shall appoint an arbitrator. *Id.*

An arbitrator may issue subpoenas for witnesses and permit discovery and depositions. *See* K.S.A. § 5-439. Parties in an arbitration proceeding may be represented by counsel. § 5-438. After presentation of any evidence by the parties, the arbitrator must make a signed record of an award and give notice to each party. § 5-441. After parties receive notice of the award, the prevailing party must make a motion to the court for an order confirming the award, at which time the court shall issue a confirming order. § 5-444. The court has discretion to add reasonable attorneys' fees and other expenses of litigation incurred in a judicial proceeding after the award is made. § 5-447(c).

5. State Administrative Entity Rule-Making Authority

K.S.A. § 40-2404(15) gives the state insurance commissioner the authority to generate rules and regulations necessary to carry out title V of the Federal Gramm-Leach-Bliley Act. The privacy act passed by the United States Congress on November 11, 1999, has had profound effects on both state and federal privacy issues. As of this date, the Kansas insurance commissioner has not passed any

substantive privacy laws in addition to Gramm-Leach-Bliley.

EXTRACONTRACTUAL CLAIMS AGAINST INSURERS: ELEMENTS AND REMEDIES

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

3. First Party

Kansas does not recognize the tort of bad faith against a liability insurance company by the insured in a first-party relationship. *Spencer v. Aetna Life & Cas. Ins. Co.*, 611 P.2d 149, 158 (Kan. 1980). The Kansas Supreme Court held that the legislature provides sufficient remedies for insureds for claims against insurers for lack of good faith. *Id.* Any insurance contract duties, whether the duty to settle, defend, act in good faith or otherwise, are contractual, and any remedies are limited thereto. See *Glenn v. Fleming*, 799 P.2d 79, 89-90 (Kan. 1990).

However, "[i]n refusing to pay a claim, an insurance company has a duty to make a good faith investigation of the facts surrounding the claim." *Johnson v. Westhoff Sand Co.*, 62 P.3d 685, 697 (Kan. App. 2003). "If there is a bona fide and reasonable factual ground for contesting the insured's claim, there is no failure to pay without just cause or excuse." *Id.* When an insurer refuses to pay a loss until its challenge to liability raising a substantial legal question of first impression is settled by the court, the insurer has not acted in bath faith or refused to pay without just cause. See *Narron v. Cincinnati Ins. Co.*, 97 P.3d 1042, 1050-51 (Kan. 2004).

"An insurance company may become liable for an amount in excess of its policy limits if it fails to act in good faith and without negligence when defending and settling claims against its insured. When the insurer determines whether to accept or reject an offer of settlement, it must give at least the same consideration to the interests of its insured as it does to its own interests." *Glenn v. Fleming*, 799 P.2d at 85.

4. Third-Party

Kansas recognizes a third-party bad faith action, but the "plaintiff who seeks damages from an insurer under a third-party bad faith action must bring the action as a contract claim. Kansas does not allow bad faith actions to be brought in tort." *Aves by Aves v. Shah*, 906 P.2d 642, 648 (Kan. 1995). The standard for third-party bad faith is a negligence standard. "[I]n third-party claims, a private insurance company, in defending and settling claims against its insured, owes a duty to the insured not only to act in good faith but also to act without negligence." *Miller v. Sloan, Listrom, Eisenbarth, Sloan, & Glassman*, 978 P.2d 922, 930 (Kan. 1999).

Fraud

There are five elements to a fraud claim in Kansas. The elements include: (1) an untrue statement of fact; (2) known to be untrue by the party making it; (3) made with the intent to deceive, or with reckless disregard for the truth; (4) where the other party justifiably relies on the statement; and (5) acts to his injury or detriment. *Alires v. McGehee*, 85 P.3d 1191, 1195 (Kan. 2004).

Under Kansas law, the falsity of any material statement in the application for any policy may not bar the right to recovery unless the false statement has actually contributed to the contingency or event on which the policy is to become due and payable. K.S.A. § 40-2205(C); see also *Waxse v. Reserve Life Ins. Co.*, 809 P.2d 533, 536-37 (Kan. 1991).

Intentional or Negligent Infliction of Emotional Distress

To recover on a claim for negligent infliction of emotional distress in Kansas, the plaintiff must prove that the conduct was accompanied by, or resulted in, immediate physical injury. *Curts v. Dillard's Inc.*, 48 P.3d 681, 682 (Kan. App. 2002) (overruled on other grounds). "A plaintiff must show that the physical injuries complained of were the direct and proximate result of the emotional distress caused by the [defendant's] alleged negligent conduct." *Id.* (citations omitted); see also *Burdett v. Harrah's Kan. Casino Corp.*, 311 F. Supp. 2d 1166, 1178 (D. Kan. 2004) (*citing Reynolds v. Highland Manor, Inc.*, 954 P.2d 11, 13 (Kan. App. 1998)). A major exception to the physical injury rule is when the defendant is charged with acting in a willful and wanton manner or with the intent to injure. *Curts*, 48 P.3d at 682; see also *Burdett*, 311 F. Supp. 2d at 1178-79.

Under Kansas law the tort of intentional infliction of emotional distress is the same as the tort of outrage. *Hallam v. Mercy Health Ctr. of Manhattan, Inc.*, 97 P.3d 492, 494 (Kan. 2004). The elements are as follows: (1) The conduct of defendant must be intentional or in reckless disregard of plaintiff; (2) the conduct must be extreme and outrageous; (3) there must be a causal connection between defendant's conduct and plaintiff's mental distress; and (4) plaintiff's mental distress must be extreme and severe. *Taiwo v. Vu*, 822 P.2d 1024, 1029 (Kan. 1991).

Further, liability for "extreme emotional distress" has two threshold requirements. *Id.* The court must determine "(1) whether the defendant's conduct may reasonably be regarded as so extreme and outrageous as to permit recovery; and (2) whether the emotional distress suffered by plaintiff is in such extreme degree the law must intervene because the distress inflicted is so severe that no reasonable person should be expected to endure it." *Id.* (citing *Roberts v. Saylor*, 637 P.2d 1175, 1179 (Kan. 1981)).

State Consumer Protection Laws, Rules and Regulations

The Kansas legislature defines unfair methods of competition and unfair or deceptive acts or practices in the business of insurance in K.S.A. § 40-2404. The act protects against misrepresentations and false advertising in insurance policies, defamation, false advertising generally, boycott, coercion and intimidation, false statements and entries, unfair discrimination, rebates, unfair claim settlement practices, failure to maintain complaint handling procedures, misrepresentation in insurance applications and disclosure of nonpublic personal information.

If the insurance commissioner determines that the insurer has engaged in any of the above practices, the insurer will be served with a statement of charges and a public hearing will be held. § 40-2406. If unfair or deceptive practices are found, the commissioner has the discretion to order the cessation of the action and the monetary penalty of not more than $1,000 for each violation, not to exceed $10,000 in the aggregate. §40-2407(a)(1). However, if the person knew, or should have known that the actions were in violation of the act, the penalty shall not be more than $5,000 for each violation, not to exceed $50,000 in the aggregate in any six-month period. *Id.*

DISCOVERY ISSUES IN ACTIONS AGAINST INSURERS

Discoverability of Claims Files Generally

The Kansas Supreme Court has held: "The initial investigation of a potential claim, made by an insurance company prior to the commencement of litigation, and not requested by or made under the guidance of counsel, is made in the ordinary course of business of the insurance company, and not in anticipation of litigation or for trial ...." *Henry Enters., Inc. v. Smith*, 592 P.2d 915, 921 (Kan. 1979). This is not the case when the initial investigation was requested by counsel retained by an insurance company, and the claim file was prepared in anticipation of litigation. See *Heany v. Nibbelink*, 932 P.2d 1046, 1050 (Kan. App. 1997).

Discoverability of Reserves

Kansas courts have not dealt directly with the discoverability of insurance reserve information. Discovery of documents is governed by K.S.A. § 60-226. Unless otherwise limited by order of the court, if documents are relevant to the subject matter involved in the pending action and are not privileged, they should be discoverable. § 60-226(b).

Discoverability of Existence of Reinsurance and Communications with Reinsurers

Kansas courts have not dealt directly with the discoverability of the existence of reinsurance and communications with reinsurers. Discovery of documents is governed by K.S.A. § 60-226. Unless otherwise limited by order of the court, if documents are relevant to the subject matter involved in the pending action and are not privileged, they should be discoverable. § 60-226(b).

Attorney/Client Communications

The Kansas Supreme Court has held that "[t]he mere fact an insurance company retains an attorney to represent the insured against a lawsuit does not mean the attorney is also the insurance company's attorney capable of binding the insurance company." *Bell v. Tilton*, 674 P.2d 468, 472 (Kan. 1983). Kansas recognizes the joint defense privilege: where several persons employ an attorney and a third party seeks to have communications made therein disclosed, none of the several persons--not even a majority--can waive this privilege. *State v. Maxwell*, 65, 691 P.2d 1316, 1320 (Kan. App. 1984) (citing 81 Am.Jur.2d, Witnesses § 189). This rule extends the attorney-client privilege to communications made in the course of joint defense activities. *Id.* "Where two or more persons jointly consult an attorney concerning mutual concerns, their confidential communications with the attorney, although known to each other, will be privileged in controversies of either or both of the clients with the outside world." *Id.*

DEFENSES IN ACTIONS AGAINST INSURERS

Misrepresentations/Omissions: During Underwriting or During Claim

An insurer may not unilaterally rescind a policy. The insurer may either pursue declaratory judgment action regarding its right to rescind, or may pursue a cause of action to rescind the policy. See *National Union Fire Ins. Co. v. Midland Bancor*, 854 F. Supp. 782 (D. Kan. 1994). Note that an insurer with exclusionary language related to misrepresentations in the application may enforce that exclusionary language without seeking rescission. *American Special Risk Mgmt. Corp. v. Cahow*, 192 P.3d 614, 623 (Kan. 2008).

To rescind based upon misrepresentations or omissions by the insured, the insurer must prove intent. There must

be more than a mere negligent misrepresentation or omission by the insured. See *National Bank of Andover v. Kansas Bankers Surety Co.,* 225 P.3d 707 (Kan. 2010). The insurer must show: (1) there was an untrue statement of fact made by the insured or an omission of material fact, (2) the insured knew the statement was untrue, (3) the insured made the statement with the intent to deceive or recklessly with disregard for the truth, (4) the insurer justifiably relied on the statement, and (5) the false statement actually contributed to the contingency or event on which the policy is to become due and payable. See *Chism v. Protective Life Ins. Co.*, 234 P.3d 780, 787 (Kan. 2010); K.S.A. 40-2205(C) (imposing fifth element); *Miller v. Sloan, Listrom, Eisenbarth, Sloan and Glassman,* 978 P.2d 922 (Kan. 1999) (analyzing claim of fraud by silence). The aforementioned elements must be proven by "clear and convincing" evidence. *Waxse v. Reserve Life Ins. Co.,* 809 P.2d 533, 536 (Kan. 1991).

However, note that, where a policy contains express language allowing for rescission for negligent misrepresentation, not rising to the level of fraud, rescission will probably be permitted. *National Bank of Andover v. Kan. Bankers Sur. Co.* 225 P.3d 707, 718 (Kan. 2010). *National Bank of Andover* permitted rescission where there was express policy language *and* the insured was "sophisticated." Whether this holding extends to individual consumers is unclear.

Reliance is not presumed, but is an element of a cause of action to rescind a policy that must be proven by clear and convincing evidence. See *Chism*, 234 P.3d at 787. Reliance is treated as a separate element of rescission by the Kansas courts, see, e.g., *American States Ins. Co. v. Ehrlich*, 701 P.2d 676, 680 (1985).

Life insurance becomes incontestable when it has been in force more than two years. *Jackson Nat'l Life Ins. Co. v. Thomure*, 1996 Kan. App. Unpub. LEXIS 1164, at *27 (Kan. Ct. App. Feb. 23, 1996); K.S.A. 40-420(2). No other types of insurance are required to be incontestable under Kansas law.

K.S.A. § 40-418 governs misrepresentations for life insurance policies and states:

> No misrepresentation made in obtaining or securing a policy of insurance on the life or lives of any person or persons, citizens of this state, shall be deemed material or render the policy void unless the matter misrepresented shall have actually contributed to the contingency or event on which the policy is to become due and payable.

Kansas has recognized that an insurer may rescind a life insurance policy after a misrepresentation is made on the insurance application with reckless disregard for the truth. *Chism v. Protective Life Ins. Co.*, 234 P.3d 780, 791 (Kan. 2010).

Health insurance is handled differently and is governed by § 40-2205. Section (C) of this statute adds a causal relation requirement to the misrepresentation and states:

> (C) The falsity of any material statement in the application for any policy covered by this act may not bar the right to recovery thereunder unless the false statement has actually contributed to the contingency or event on which the policy is to become due and payable: Provided, however, that any recovery resulting from the operation of this section shall not bar the right to render the policy void in accordance with its provisions.

The Kansas courts have not yet construed this section of the statute, but in *Waxse v. Reserve Life Ins. Co.*, 809 P.2d 533 (Kan. 1991), the court found that the falseness of the application statement will not bar recovery under the policy unless it actually contributes to the event upon which the policy becomes due and payable. *Id.* at 586, 809 P.2d at 536-37. The last sentence of (C) stating "any recovery resulting from the operation of this section shall not bar the right to render the policy void in accordance with its provisions" has not been tested in court, but it

may allow an insurance company to void a policy for misrepresentations before a loss occurs.

Failure to Comply with Conditions

The insurer may raise defenses based upon the failure of the insured to comply with conditions of the insurance policy, such as failure to give notice to the insurer or failure to cooperate. *See Johnson v. Westhoff Sand Co.*, 62 P.3d 685, 694 (Kan. App. 2003). However, to prevail on a defense of failure to notify, the insurer has the burden to prove it was actually prejudiced by the lack of notice by the insured. *Id.* Such prejudice is not presumed and the burden is on the insurer to show that the prejudice is substantial. *Id.* Moreover, "[t]he breach of a cooperation clause in a liability insurance policy does not by itself relieve the insurer of the responsibility. The breach must cause substantial prejudice to the insurer's ability to defend itself and the burden to establish this policy defense is on the insurer." *Id.* at 695.

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

Kansas courts have not squarely addressed the issue of the effect of the insured's breach of a no-action clause. The United States District Court for the District of Kansas held that Kansas courts would most likely hold that the insurer must show it was prejudiced by the insured's breach before relying on breach for a defense. *See Cessna Aircraft Co. v. Hartford Acc. & Indem. Co.*, 900 F. Supp. 1489, 1517 (D. Kan. 1995). The court based its holding in part on the fact that Kansas case law does require proof of prejudice for breach of similar clauses, such as cooperation clauses. *Id.*

Preexisting Illness or Disease Clauses

Kansas insurance policies may impose a preexisting conditions exclusion for mental or physical conditions. K.S.A. § 40-1109f(a). The exclusion may not exceed 90 days following the effective date of enrollment and shall run concurrently with any waiting period. § 40-1109f(a). The exclusion limits or excludes benefits relating to a condition based upon the fact that the condition was present before the date of enrollment for such coverage, whether or not any medical advice, diagnosis, care, or treatment was recommended or received before such date. § 40-1109f(h). A group policy providing hospital, medical or surgical expense benefits must not impose any preexisting condition exclusion relating to pregnancy as a preexisting condition. § 40-2209(a)(6).

Statutes of Limitations and Repose

There is a five-year statute of limitations under Kansas law for causes of action based upon contract theories. *See* K.S.A. § 60-511. An action accrues when the plaintiff has the right to maintain a legal action. *Avien Corp. v. First Nat'l. Oil Corp.*, 79 P.3d 223, 226 (Kan. App. 2003). Because a cause of action for breach of a written contract accrues at the time of the breach, regardless of when the breach is discovered or is discoverable, there is not a statute of repose with respect to breach of contract claims. *Dunn v. Dunn*, 281 P.3d 540, 548 (Kan. App. 2012).

TRIGGER AND ALLOCATION ISSUES FOR LONG-TAIL CLAIMS

Trigger of Coverage

A trigger of coverage enters the discussion when the policyholder's claim implicates more than one policy period, and particularly when the claim implicates policies purchased over a number of years. *Atchison, Topeka & Santa*

Fe Ry. Co. v. Stonewall Ins. Co., 71 P.3d 1097, 1125 (Kan. 2003). Five theories for the trigger of coverage in cases involving slowly evolving injuries are described in Atchison:

- The exposure theory,
- The manifestation theory,
- The continuous-trigger theory,
- The injury-in-fact approach, and
- The double-trigger theory.

Id. (*citing Owens-Illinois, Inc. v. United Ins. Co.*, 138 N.J. 437, 449-51, 650 A.2d 974 (1994)).

An explanation of the five theories is as follows:

> (1) The exposure theory places the occurrence at the time the injury-producing agent first contacts the claimant's body. (2) The manifestation theory holds that there is no occurrence until the injury resulting from exposure manifests itself. (3) The continuous trigger theory includes the continuous period from first exposure to manifestation of injury in the occurrence. (4) The injury-in-fact approach holds that coverage is triggered by an inchoate injury which may be inferred by calculating backward from discovery of the injury to the time when that harm actually began. (5) The 'double-trigger' theory holds that injury occurs at the time of exposure and the time of manifestation, but not necessarily during the intervening period. *Id.*

Allocation Among Insurers

There seems to be no general rule for allocation of risk among insurers. Courts tend to look first to the language of the insurance policy. Different allocation methods include pro rata, allocation based on time-on-the-policy and joint and several liability. See *Atchison, Topeka & Santa Fe Ry. Co. v. Stonewall Ins. Co.*, 71 P.3d 1097 (Kan. 2003). Kansas also recognizes the right of insurers to engage in voluntary allocation amongst themselves, as long as "the voluntary allocation of risk between themselves by subscribing insurers is in accord with the general rule that a prerequisite to enforcing contribution between insurers is that their policies insure the same interest. However, the right of insurers to this allocation of risk must be determined not by an adjustment of equities, but by the provisions of the contracts which were made." *W. Cas. & Sur. Co. v. Trinity Universal Ins. Co.*, 764 P.2d 1256, 1259 (Kan. App. 1988).

CONTRIBUTION ACTIONS

Claim in Equity vs. Statutory

Under Kansas law, the doctrine of equitable contribution is as a remedy available to one who is forced to bear more than his fair share of a common burden or liability to recover from the others their chargeable proportion of the amount paid by him. *American States Ins. Co. v. Hartford Acc. & Indem. Co.*, 545 P.2d 399, 407 (Kan. 1976).

Under Kansas law, there is no right to contribution among joint tort-feasors because no defendant is liable for the fault of any other. K.S.A. § 60-258(a). All tortfeasors, including “empty chairs,” may have their fault assessed in the verdict.

Elements

To bring a claim for equitable contribution, a plaintiff needs to show (1) the parties are equal under a common liability or burden and (2) that the policy insures the same interest. *American States Ins. Co. v. Hartford Acc. & Indem. Co.*, 545 P.2d 399, 407 (Kan. 1976).

DUTY TO SETTLE

Cases in Kansas concerning the duty of an insurer to settle actions against the insured focus on the failure of the insurer to accept or initiate a settlement offer. *Miller v. Sloan, Listrom, Eisenbarth, Sloan and Glassman*, 978 P.2d 922, 928 (Kan. 1999). If an insurance policy explicitly reserves the right to settle to the insurer, the insured cannot complain that the insurer settles or refuses to settle within policy limits absent a showing of bad faith or negligence on the part of the insurer. *Saucedo v. Winger*, 915 P.2d 129, 134 (Kan. App. 1996). Further, if the policy requires consent of the insured before the insurer enters into settlement with an injured party, the insured should not be allowed to withhold consent except at its own risk. *Id.* However, when the language in the policy is ambiguous, the policy must be interpreted in favor of the insured. *See id.* at 268, 915 P.2d at 136.

LH&D BENEFICIARY ISSUES

Change of Beneficiary

In general, where a right to change the beneficiary is reserved in an insurance policy, the beneficiary has no vested interest in the policy. *Wear v. Mizell*, 946 P.2d 1363, 1366 (Kan. 1997). Rather, the beneficiary has only an inchoate right to the proceeds of a policy, subject to being divested at any time during the lifetime of the insured, by transfer, assignment, or change of beneficiary. *Id.*; *Holloway v. Selvidge*, 548 P.2d 835, 839 (Kan. 1976); *Nicholas v. Nicholas*, 83 P.3d 214, 223 (Kan. 2004). Where a right to change the beneficiary is reserved, the insured can change the beneficiary without the consent of the original beneficiary. *Hollaway*, 548 P.2d at 839.

Effect of Divorce on Beneficiary Designation

In terms of the effect of a divorce on a beneficiary's rights, Kansas courts have recognized the principle that in the absence of terms in an ordinary life insurance policy that the rights of the beneficiary are conditioned upon the continuance of the marriage between the insured and the beneficiary, the general rule is that the rights of the beneficiary are not affected by the fact that the parties are divorced subsequent to the issuance of the policy. *Cincinnati Life Ins. Co. v. Palmer*, 94 P.3d 729, 733 (Kan. App. 2004).

Importantly, § 23-2802(d) (formerly § 60-1610(b)(1)) of the Kansas Statutes sets forth a rigid requirement that is relevant here. Section 23-2802(d) provides that a divorce "decree shall provide for any changes in beneficiary designation on: (1) any insurance or annuity policy that is owned by the parties, or in the case of group life insurance policies, under which either of the parties is a covered person…Nothing in this section shall relieve the parties of the obligation to effectuate any change in beneficiary designation by the filing of such change with the insurer or issuer in accordance with the terms of such policy." K.S.A. § 23-2802(d).

The Kansas Court of Appeals has construed this statute to require any change in beneficiary on any insurance or

annuity policy to be specified in the divorce decree. *Cincinnati Life Ins. Co.*, 94 P.3d at 733 (Kan. App. 2004). "[A]bsent such an express provision in the decree, an active beneficiary designation of either spouse at the time of the divorce is not changed." *Id.* (emphasis added). The court determined that "just as the decree shall divide the real and personal property of the parties, the decree shall provide for any changes in beneficiary designation on any insurance policy owned by the parties." *Id.*

INTERPLEADER ACTIONS

Availability of Fee Recovery

K.S.A. § 60-222 provides that a stakeholder may bring an interpleader action if the stakeholder is or may be exposed to double or multiple liability. "Interpleader protects the stakeholder from multiple suits, and from determining at its peril the validity and priority of disputed claims; it also protects the claimants by bringing them together in one action so that a fair and equitable distribution of the fund may be made." *Farmers State Bank & Trust Co. v. Yates Center*, 624 P.2d 971, 977 (Kan. 1981).

K.S.A. § 60-222 does not authorize a defendant in an interpleader action to attorney fees. *Club Exchange Corp. v. Searing*, 567 P.2d 1353, 1358 (Kan. 1977). Furthermore, no published case has specifically stated that a stakeholder is entitled to attorney fees. In an unpublished decision, a Kansas appellate court, relying on *Club Exchange Corp.*, stated that attorney fees are allowable in an interpleader action to the stakeholder, but not automatically awarded. *Ruhland v. Elliott*, 2013 Kan. App. Unpub. LEXIS 737, 23, 305 P.3d 48, 2013 WL 4046605 (Kan. App. 2013). In *Club Exchange Corp.*, the court noted that under the federal interpleader procedure, counsel fees "are frequently awarded to the stakeholder." 567 P.2d at 1358.

Differences in State vs. Federal

K.S.A. § 60-222 mimics the federal interpleader rule, F.R.C.P. 22(a). Under F.R.C.P. 22(a), the decision to award attorney fees to the stakeholder lies within the discretion of the trial court. *Aetna U.S. Healthcare v. Higgs*, 962 F. Supp. 1412, 1414 (D. Kan. 1997). As a general rule, fees are charged against the fund and deposited with the court. *Id.* Fees are normally awarded to an interpleader stakeholder who (1) is disinterested; (2) concedes its liability in full; (3) deposits the disputed fund in court;(4) seeks discharge; and (5) who is not in some way culpable as regards the subject matter of the interpleader proceeding." *Transamerica Premier Ins. Co. v. Growney*, 1995 U.S. App. LEXIS 31836, 4 (10th Cir. Kan. Nov. 13, 1995).