

Tennessee

REGULATORY LIMITS ON CLAIMS HANDLING

Timing for Responses and Determinations

Under Tenn. Code Ann. § 56-8-105, insurance companies must: (1) Acknowledge and act reasonably promptly upon communications with respect to claims arising under insurance policies and (2) either affirm or deny coverage within a reasonable amount of time after proof of loss statements have been filed.

Tenn. Code Ann. § 56-7-109 deals directly with the timely reimbursement of health insurance claims. This section defines "clean claims" as those which require no further information, adjustment or alteration by the provider of the services in order to be processed and paid by the health insurer. Tenn. Code Ann. § 56-7-109(a)(1)(A).

Under § 56-7-109(b)(1)(A), a health insurance entity is required to, within 30 days of receiving a claim submitted on paper from a provider, pay the total amount of the claim, if clean, pay the portion of the claim that is clean and not in dispute and notify the provider in writing why the remaining portion of the claim will not be paid or notify the provider in writing of all reasons why the claim is not clean and will not be paid and what substantiating documentation and information is required to adjudicate the claim as clean.

If the claim is received by electronic submission, the health insurance entity only has 21 calendar days to do one of the above. Tenn. Code Ann. § 56-7-109(b)(1)(B).

Under § 56-7-109, health insurance entities are also required to provide contracted providers with all necessary information to properly submit a claim. If the insurance company does not comply with such provisions, they are forced to pay 1% interest per month, which accrues from the day after the payment was due on the amount of the claim that remains unpaid. Tenn. Code Ann. § 56-7-109(b)(4).

Standards for Determination and Settlements

Tenn. Code Ann. § 56-8-105 sets forth the requirements regarding the standards for determinations and settlements. Included are the following:

- Knowingly misrepresenting relevant facts or insurance policy provisions relating to coverages at issue;
- Failing to adopt and implement reasonable standards for the prompt investigation and settlement of claims arising under its policies;
- Not attempting in good faith to effectuate prompt, fair and equitable

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settlement of claims submitted in which liability has become reasonably clear;

- Offering substantially less than the amounts ultimately recovered in actions brought by such insureds, provided that equal consideration is given to the relationship between the amounts claimed and the amounts ultimately recovered through litigation;
- Refusing to pay claims without conducting a reasonable investigation except when denied because of an electronic submission error by the claimant;
- Failing to affirm or deny coverage of claims within a reasonable time after proof of loss statements have been completed;
- Attempting to settle or settling claims for less than the amount that a reasonable person would believe the insured or beneficiary 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 that was altered without notice to, or knowledge or consent of, the insured;
- Making claims payments to an insured or beneficiary without indicating the coverage under which each payment is being made;
- Unreasonably delaying the investigation or payment of claims by requiring both a formal proof of loss form and subsequent verification that would result in duplication of information and verification appearing in the formal proof of loss form;
- Failing, in the case of claims denials or offers of compromise settlement, to promptly provide a reasonable and accurate explanation of the basis for such actions;
- In response to a request for claims forms, failing to provide forms necessary to present claims within fifteen (15) calendar days of such a request with reasonable explanations regarding their use;

Tenn. Code Ann. § 56-8-105.

The Commissioner of Insurance has sole enforcement authority for such violations, which means that a private right of action does not exist under this section. *See Lindsey v. Allstate Ins. Co.*, 34 F. Supp.2d 636, 647 (W.D. Tenn. 1999). However, these regulations do not wholly foreclose the application of the Tennessee Consumer Protection Act. Under Tenn. Code Ann. § 56-8-113, the application of the Tennessee Consumer Protection Act against insurance companies is limited to the remedies available at common law; declaratory, injunctive, or equitable relief under Title 29 (Remedies and Special Proceedings) or the Tennessee Rules of Civil Procedure; or statutory remedy, cause of action, right to relief or sanction under Title 50 (Employer and Employee) or Title 56 (Insurance).

PRINCIPLES OF CONTRACT INTERPRETATION

The interpretation of a contract is a question law. *Guiliano v. Cleo, Inc.*, 995 S.W.2d 88, 95 (Tenn. 1999). The cardinal rule of contractual interpretation is that the entire agreement is considered to ascertain and give effect to the intent of the parties. *Maggart v. Almany Realtors, Inc.*, 259 S.W.3d 700, 703-04 (Tenn. 2008). The court will initially determine the intent of the parties by examining the “plain and ordinary meaning of the written words that are contained within the four corners of the contract.” *Dick Broad. Co. v. Oak Ridge FM, Inc.*, 395 S.W.3d 653, 659 (Tenn. 2013). This analysis is objective, and the court applies the meaning that a reasonable person in the same situation as the parties to the contract would have given to the words. *Stonebridge Life Ins. Co. v. Horne*, No.

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W2012-00515-COA-R3-CV, 2012 WL 5870386, at *7 (Tenn. Ct. App. Nov. 21, 2012). When the language is clear and unambiguous, the literal meaning of the words controls, and the contract is interpreted according to its terms as they are written without neutralizing their effect. *Maggart*, 259 S.W.3d at 704.

If an ambiguity in the meaning of a contract or one of its provisions is found, the interpretation of the contract becomes a question of fact. *Dick Broad*, 395 S.W.3d at 659. An ambiguity exists when a contractual provision can be given more than one reasonable interpretation and its meaning may fairly be understood in more than one way. *Maggart*, 259 S.W.3d at 704. A contractual provision is not ambiguous merely because the parties differ as to their interpretations and the court will not use a strained construction of the contract to find an ambiguity where none exists. *Id.*

Where an ambiguity is found a court may consider extrinsic evidence to ascertain the intent of the parties including “the circumstances or conditions surrounding the execution of the contract, the situation of the parties, the subject matter of the contract, and the object or purpose of the contract.” *Stonebridge*, 2012 WL 5870386, at *8. However, when an ambiguity is found, a court may construe its meaning against the drafter of the contract. *Kiser v. Wolfe*, 353 S.W.3d 741, 748 (Tenn. 2011).

CONTRACT INTERPRETATION

Common Issues

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

Faulty workmanship may be the result an “occurrence” in Tennessee. *Travelers Indem. Co. of Am. v. Moore & Assocs., Inc.*, 216 S.W.3d 302, 309 (Tenn. 2007). In *Travelers Indem. Co. of Am. v. Moore & Assocs., Inc.*, one of the issues before the court was whether water penetration resulting from faulty window installation was an “occurrence” as defined by the CGL policy. *Id.* at 308. The court determined an “occurrence” is defined as an “accident,” which is an event that is unforeseen by the insured, if the insured had completed the work properly. *Id.* at 308-09. The court reasoned that, “[i]f foreseeability is determined from the negligent completion of the project, then the negligent acts of the insured will almost never be “accidents” because, by definition, negligence requires that damages be foreseeable.” *Id.* at 308. Since the insured could not have foreseen water penetration if the windows had been installed properly, the court held the alleged water penetration was both an “accident” and an “occurrence.” *Id.* at 309.

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

Tennessee has an Anti-Indemnity Statute. Tenn. Code Ann. § 62-6-123.

The Tennessee Court of Appeals has held that the prohibition of a construction contract that attempts to indemnify a party for personal or property damage caused by that party's sole negligence does not extend prohibiting such indemnity in a contract with a supplier. Instead, the court found the Uniform Commercial Code (UCC) controlling. *Trinity Industries, Inc. v. McKinnon Bridge Co., Inc.*, 77 S.W.3d 159, 46 U.C.C. Rep. Serv. 2d 119 (Tenn. Ct. App. 2001).

“A fair reading, giving the words their usual and ordinary meaning, requires indemnification with only one exception, i.e., the sole negligence of [indemnitee]. This statement is clear and unequivocal.” *Plumlee v. LGM Engineers Contractors*, 1987 WL 16351, *3 (Tenn. Ct. App. 1987). By clearly avoiding the restriction criteria in T.C.A. § 62-6-123, an indemnitee may also satisfy the requirements under the common law for a “clear and unequivocal” statement of indemnification in the event of joint negligence.

Regarding Exculpatory Clauses:

If the clause at issue does not purport to deprive plaintiff of damages under the contract but merely limits what damages plaintiff is entitled to and the manner in which those damages can be enforced it is not an exculpatory clause. *Shipwash v. United Airlines, Inc.*, 28 F. Supp. 3d 740 (E.D. Tenn. 2014).

In Copeland v. Healthsouth/Methodist Rehab. Hospital, the Tennessee Supreme Court set out three non-exclusive factors for determining the enforceability of exculpatory clauses: (1) relative bargaining power of the parties; (2) the clarity of the language; and (3) public policy and public interest considerations. The weight given to each factor is largely based on the totality of the circumstances surrounding the signing of the agreement. Regarding the second factor, the Court specifically required language to be “so clear and understandable” that an ordinary layperson would comprehend the rights that were being given up.

CHOICE OF LAW

Tennessee follows the *lex loci contractus* rule for claims based on a contract. *Vantage Tech., LLC v. Cross*, 17 S.W.3d 637, 650 (Tenn. Ct. App. 1999). Under the *lex loci contractus* rule, the court presumes that the law of the jurisdiction where the contract was executed should govern, absent a contrary intent. *Id.* The intent of the parties is gathered from the terms of the contract and all the attending circumstances. *Gov't Emps. Ins. Co. v. Bloodworth*, No. M2003-02986-COA-R10-CV, 2007 WL 1966022, at *26 (Tenn. Ct. App. Jun. 29, 2007). The purpose of this choice of law rule is that the location and jurisdiction of the risk the insurance contract contribute to the terms and conditions of the policy. *Id.* at *27.

Tennessee will, therefore, apply the substantive law of the state where the policy was issued if there is no enforceable choice of law clause in the contract stating otherwise. *Id.* at *27. To be enforceable, the choice of law provision must be executed in good faith. *Williams v. Smith*, 465 S.W.3d 150, 153 (Tenn. Ct. App. 2014). In addition, the jurisdiction whose law is chosen must bear a material connection to the transaction. *Goodwin Bros. Leasing, Inc. v. H & B Inc.*, 597 S.W.2d 303, 306 (Tenn. 1980). That is, the basis for the choice of another jurisdiction's law must be reasonable and not merely a sham or subterfuge. *Id.* “Finally, the parties' choice of another jurisdiction's law must not be “contrary to ‘a fundamental policy’ of a state having [a] ‘materially greater interest’ and whose law would otherwise govern.” *Williams*, 465 S.W.3d at 153.

The Tennessee Supreme Court has also held where the parties execute or make a contract in one state, but it is agreed that the place of performance is to be in another state the law of the place of performance will govern. *Solomon v. FloWarr Mgmt., Inc.*, 777 S.W.2d 701, 705 n.5 (Tenn. Ct. App. 1989).

DUTIES IMPOSED BY STATE LAW

Duty to Defend

1. Standard for Determining Duty to Defend

In Tennessee, like in many states, the duty to defend is more expansive than the general duty to indemnify. *Travelers Indem. Co. of Am. v. Moore & Assocs., Inc.*, 216 S.W.3d 302, 305 (Tenn. 2007). In fact, in the context of insurance law, the duty to defend is not affected by the facts of a case ascertained before, during, or after the suit. Tennessee employs what is known as the "pleading test." *St. Paul Fire & Marine Ins. Co. v. Torpoco*, 879 S.W.2d 831, 835 (Tenn. 1994). The court will only take into consideration the insurance policy at issue and the allegations set forth in the pleadings in order to determine whether an insurer has a duty to defend an insured. If the allegations are within the risk insured against and the insured has demonstrated that there is a potential basis for recovery, then the insurer must defend regardless of the actual facts or the ultimate grounds on which the liability to the injured parties may be predicated. *Id.* If the underlying petition does not allege facts within the scope of coverage, the insurer has no duty to defend. *Id.* However, the pleading test is based exclusively on the facts as they are alleged in the pleadings rather than on the facts as they actually are. *Id.* Once coverage is found for any portion of a suit, an insurer must defend the entire suit. *Drexel Chem. Co. v. Bituminous Ins. Co.*, 933 S.W.2d 471, 480 (Tenn. Ct. App. 1996).

If any dispute exists as to the meaning of a term/provision regarding what is covered in a contract, the court shall construe any ambiguity in favor of the insured, thereby triggering the insurance company's duty to defend. *Harrell v. Minnesota Mut. Life Ins. Co.*, 937 S.W.2d 809, 814 (Tenn. 1996). Additionally, if the allegations in the pleadings are ambiguous and there is any doubt as to whether the pleadings sufficiently state a cause of action which would impose the insurer's duty to defend, the court shall construe any such ambiguity in favor of the insured. *State Auto Ins. Co. v. Gordon Constr., Inc.*, No. M1999-00785-COA-R3-CV, 2001 WL 513884, at *3 (Tenn. Ct. App. May 15, 2001).

2. Issues with Reserving Rights

Under Tennessee law, an insurer is estopped to deny coverage where it has taken charge of and conducted the defense of the claims asserted against its insured, without having reserved its rights by some form of agreement, stipulation or notice. *Am. Home Assurance Co. v. Ozburn-Hessey Storage Co.*, 817 S.W.2d 672, 674 (Tenn. 1991). A reservation of rights will be strictly construed against the insurer. *See Transamerica Ins. Grp. v. Beem*, 652 F.2d 663, 666 (6th Cir. 1981) (construing Tennessee law). A reservation of rights is sufficient so long as it fairly informs the insured of the insurer's position. *Richards Mfg. Co. v. Great Am. Ins. Co.*, 773 S.W.2d 916, 919 (Tenn. Ct. App. 1988). Any such reservation of rights must be "clearly and fairly communicated to the insured." *Id.* In order to preserve the right to litigate coverage at a later date, the insurer "must advise the insured that it will represent the insured, but that it intends to reserve the right

to litigate the issue of policy coverage of the insured should there be an adverse judgment in tort action.” *Id.* at 918. However, “it is not required that the reason given for the insurer’s position be legally correct. The position taken may be correct, but for other legal reasons.” *Union Univ. v. Evanston Ins. Co.*, No. 120CV01254JDBJAY, 2022 WL 507666, at *6 (W.D. Tenn. Feb. 19, 2022) (quoting *Richards Mfg. Co. v. Great Am. Ins. Co.*, 773 S.W.2d 916, 919 (Tenn. Ct. App. 1988)).

If the insurer wants to reserve its rights until after the defense of the action, i.e., the payment of the underlying claim, it must specify this, or it will waive the right to disclaim. *Allstate Ins. Co. v. Dixon*, No. 01-A-01-9011CG00421, 1991 WL 79549, at *5 (Tenn. Ct. App. May 17, 1991). “An insurer’s failure to raise a policy defense until after there has been a judgment against its insured will result in the insurer being estopped to raise that defense.” *Knox-Tenn Rental Co. v. Home Ins. Co.*, 833 F. Supp. 665, 670 (E.D. Tenn. 1992), *aff’d*, 2 F.3d 678 (6th Cir. 1993).

State Privacy Laws; Insurance Regulatory Issues; Arbitration/Mediation

Under Tenn. Code Ann. § 56-11-108, all information, documents and any copies of such either obtained by or disclosed to the commissioner or any other person in the course of an examination or investigation made pursuant to § 56-11-107, is to be given confidential treatment.

These items are not subject to subpoena and cannot be made public by the Commissioner of Insurance, the National Association of Insurance Commissioners, or any other person, except to insurance departments of other states, without the insurer's or health maintenance organization's prior written consent, unless the Commissioner, after providing notice and opportunity to be heard to the insurer or health maintenance organization and its affiliates that would be affected, determines that the interest of the policyholders, enrollees, providers, shareholders, or the public will be served by the publication. In that event, the Commissioner may publish all or a part as he deems appropriate. Tenn. Code Ann. § 56-11-108(a).

1. Criminal Sanctions

Tennessee insurance privacy laws do not impose criminal sanctions for violations by insurers.

2. The Standards for Compensatory and Punitive Damages

Punitive damages may be awarded if the defendant acts either intentionally, fraudulently, maliciously, or recklessly. *Lance v. Owner's Ins. Co.*, No. E2015-00274-COA-R3-CV, 2016 Tenn. App. LEXIS 369, at *41 (Ct. App. May 25, 2016). Also see remedies under the Tennessee Consumer Protection Act.

3. Insurance Regulations to Watch

SB 1074 and HB 1432 enacts the Tennessee Preexisting Conditions Protection Act, which prohibits health insurance issuers from imposing preexisting condition exclusions on insureds. Amends Tenn. Code Ann. Title 56.

4. State Arbitration and Mediation Procedures

Generally, written agreements or provisions within a written contract to arbitrate are valid, enforceable, and irrevocable, except where grounds exist at law or equity for the revocation of any contract. Tenn. Code Ann. § 29-5-302(a).

With respect to the procedure to enforce an agreement to arbitrate, The Tennessee Uniform Arbitration Act provides:

- On application of a party showing an agreement described in § 29-5-302, and the opposing party's refusal to arbitrate, the court shall order the parties to proceed with arbitration, but if the opposing party denies the existence of the agreement to arbitrate, the court shall proceed summarily to the determination of the issue so raised and shall order arbitration if found for the moving party; otherwise, the application shall be denied.
- On application, the court may stay an arbitration proceeding commenced or threatened on a showing that there is no agreement to arbitrate. Such an issue, when in substantial and bona fide dispute, shall be forthwith and summarily tried and the stay ordered if found for the moving party. If found for the opposing party, the court shall order the parties to proceed to arbitration.
- If an issue referable to arbitration under the alleged agreement is involved in an action or proceeding pending in a court having jurisdiction to hear applications under subsection (a), the application shall be made therein. Otherwise and subject to § 29-5-318, the application may be made in any court of competent jurisdiction.
- Any action or proceeding involving an issue subject to arbitration shall be stayed if an order for arbitration or an application therefor has been made under this section or, if the issue is severable, the stay may be with respect thereto only. When the application is made in such action or proceeding, the order for arbitration shall include such stay.
- An order for arbitration shall not be refused on the ground that the claim in issue lacks merit or bona fides or because any fault or grounds for the claim sought to be arbitrated have not been shown

Tenn. Code Ann. § 29-5-303.

Furthermore, the parties may provide a method of appointment of arbitrators, and the parties will be bound by such method. *Id.* at § 29-5-304. However, in the absence of a specified method, or if the agreed upon method fails, then the court shall, on application of a party, appoint one or more arbitrators. *Id.*

With respect to the conduct of arbitration hearings:

- The arbitrators shall appoint a time and place for the hearing and cause notification to the parties to be served personally or by registered mail not less than five (5) days before the hearing. Appearance at the hearing waives such notice. The arbitrators may adjourn the hearing from time to time as necessary and on request of a party and for good cause, or upon their own motion may postpone the hearing to a time not later than the date fixed by the agreement for making the award unless the parties consent to a later date. The arbitrators may hear and determine the controversy upon the evidence produced, notwithstanding the failure of a party duly notified to appear. The court on application may direct the arbitrators to proceed promptly with the hearing and determination of the controversy;
- The parties are entitled to be heard, to present evidence material to the controversy and to

cross-examine witnesses appearing at the hearing;

- The hearing shall be conducted by all the arbitrators but a majority may determine any question and render a final award. If, during the course of the hearing, an arbitrator for any reason ceases to act, the remaining arbitrator or arbitrators appointed to act as neutrals may continue with the hearing and determination of the controversy

Tenn. Code Ann. § 29-5-306.

5. State Administrative Entity Rule-Making Authority

Pursuant to Tenn. Code Ann. § 56-2-301, the commissioner of the Tennessee Department of Commerce and Insurance has the authority to promulgate rules and regulations.

EXTRACONTRACTUAL CLAIMS AGAINST INSURERS: ELEMENTS AND REMEDIES

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

3. First Party

Tennessee does not recognize a general common law tort for bad faith by an insured against an insurer and, thus, any claims of bad faith must be brought pursuant to Tennessee's bad faith statute. Tennessee Code Annotated § 56-7-105 provides that an insurance company refusing to pay a loss within sixty days after a demand by the policy holder shall be liable for a penalty not exceeding 25% of the liability, provided it shall appear that the refusal was not in good faith and inflicted an additional expense on the plaintiff. The statute is penal in nature and must be strictly construed. *Minton v. Tenn. Farmers Mut. Ins. Co.*, 832 S.W.2d 35, 38 (Tenn. Ct. App. 1992). The plaintiff has the burden of proving bad faith on the part of the insurer. *Palmer v. Nationwide Mut. Fire Ins. Co.*, 723 S.W.2d 124, 126 (Tenn. Ct. App. 1986).

The bad faith penalty is not recoverable in every refusal of an insurance company to pay a loss. An insurance company is entitled to rely upon available defenses and refuse payment if there are substantial legal grounds that the policy does not afford coverage for the alleged loss. *Sisk v. Valley Forge Ins. Co.*, 640 S.W.2d 844, 852 (Tenn. Ct. App. 1982). The statutory bad faith penalty applies to first party coverages, and in the past it has not been applied to some automobile liability insurance policies. See *Medley v. Cimmaron Ins. Co., Inc.*, 514 S.W.2d 426 (Tenn. 1974); see also *Tenn. Farmers Mut. Ins. Co. v. Cherry*, 374 S.W.2d 371 (Tenn. 1964); *Manns v. Ind. Lumbermen's Mut. Ins. Co. of Indianapolis*, 482 S.W.2d 557 (Tenn. Ct. App. 1971). However, one decision of the Tennessee Supreme Court has been argued by some to hold the insurer's conduct in handling an underinsured motorist claim could trigger the statutory penalty. *Gaston v. Tenn. Farmers Mut. Ins. Co.*, 120 S.W.3d 815 (Tenn. 2003). Both the Tennessee Court of Appeals and the Middle District of Tennessee have weighed in recently on the issue. The Tennessee Court of Appeals weighed in on the issue recently in *Giles v. Geico*. In *Giles*, the Court of Appeals held that the bad faith penalties in Tenn. Code Ann. § 56-7-105 do not apply to auto insurance policies.

Giles v. Geico General Ins. Co., No. M2021-00165-COA-R3-CV, 2021 Tenn. App. WL 5013746 (Tenn. Ct. App. Sep. 15, 2021).

However, prior to recovery under Tenn. Code Ann. § 56-7-105:

(1) the policy of insurance must, by its terms, have become due and payable, (2) a formal demand for payment must have been made, (3) the insured must have waited 60 days after making his demand before filing suit (unless there was a refusal to pay prior to the expiration of the 60 days), and (4) the refusal to pay must not have been in good faith.

Palmer v. Nationwide Mut. Fire Ins. Co., 723 S.W.2d 124, 126 (Tenn. Ct. App. 1986). Moreover, the plaintiff must prove the insurer's bad faith and the issue of whether the insurer acted in good faith is a fact question for the jury. *See id.*; *Johnson v. Tennessee Farmers Mut. Ins. Co.*, 205 S.W.3d 365, 370 (Tenn. Ct. App. 2006). However, where there is evidence that the insured made no formal demand or failed to wait sixty (60) days after the formal demand was made before filing suit, the insured will not be entitled to the bad faith penalty. *Hurley v. Tennessee Farmers Mut. Ins. Co.*, 922 S.W.2d 887 (Tenn. Ct. App. 1995).

Additionally, it is not bad faith for an insurer adjusting a first party claim to delay or refuse payment of disputed benefits where there exists "substantial legal grounds that the policy does not afford coverage for the alleged loss." *Nelms v. Tenn. Farmers Mut. Ins. Co.*, 613 S.W.2d 481 (Tenn. Ct. App. 1978). Also, a finding of bad faith refusal to pay could expose an insurance company to punitive or treble damages, because Tenn. Code Ann. § 56-7-105 does not foreclose liability pursuant to the Tennessee Consumer Protection Act. *Riad v. Erie Ins. Exchange*, 436 S.W.3d 256, 275-76 (Tenn. Ct. App. 2013).

Finally, an insurance company may determine its obligations under a policy of insurance as to any and all parties or claimants through a declaratory judgment action, an interpleader claim or action, or both. The filing of such action or claim creates a rebuttable presumption the insurance company is acting in good faith when making a determination of its obligations under a policy of insurance. Tenn. Code Ann. § 56-7-102(f).

4. Third-Party

The implied covenant of good faith and fair dealing runs only between the insurer and the insured, so a third party cannot sue for its breach based upon a refusal to settle claims. *Clark v. Hartford Accident and Indent. Co.*, 457 S.W.2d 35 (Tenn. Ct. App. 1970). However, a plaintiff's cause of action for bad faith may be assigned so long as it survives the test of "assignability." *Carne v. Md. Cas. Co.*, 346 S.W.2d 259 (Tenn. 1961). In addition, an insured's cause of action based on an automobile carrier's bad faith in failing to settle a claim within the policy limits survives the death of the insured and passes to the insured's personal representative. Tenn. Code Ann. § 20-5-120(a).

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Fraud

Under Tennessee common law, "intentional misrepresentation," "fraudulent misrepresentation," and "fraud" are different names for the same cause of action. *Hodge v. Craig*, 382 S.W.3d 325, 342-43 (Tenn. 2012) (citing *Concrete Spaces, Inc. v. Sender*, 2 S.W.3d 901, 904 n.1 (Tenn. 1999)). In order to maintain an action for fraudulent misrepresentation in Tennessee, a plaintiff must prove the following: (1) that the defendant made a representation of fact; (2) that the representation was false; (3) the representation related to a material fact; (4) the representation was made either knowingly, recklessly, or without belief in its truth; (5) the plaintiff acted reasonable in relying on the representation; and (6) that plaintiff suffered damage as a result of the misrepresentation. *Hodge*, 382 S.W.3d at 343.

The two key elements necessary in succeeding on a claim for fraud against the insurer are (1) misrepresentation; and (2) reasonable reliance on the misrepresentation. *Holt v. Am. Progressive Life Ins. Co.*, 731 S.W.2d 923 (Tenn. Ct. App. 1987).

Intentional or Negligent Infliction of Emotional Distress

The Tennessee Supreme Court has established three primary elements necessary to succeed on a claim for intentional infliction of emotional distress: (1) the conduct complained of must be intentional or reckless; (2) the conduct must be so outrageous that it is not tolerated by civilized society; and (3) the conduct must result in serious mental injury to the plaintiff. *Bain v. Wells*, 936 S.W.2d 618, 622 (Tenn. 1997). In these cases, the plaintiff is not required to prove his emotional distress through expert testimony because the existence of a severe mental injury can be inferred from the outrageousness of the offending conduct. *Miller v. Willbanks*, 8 S.W.3d 607, 615 (Tenn. 1999).

Conduct will be considered extreme and outrageous when it is "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and otherwise "shocks the conscience." *Id.* Conduct is intentional or reckless where the actor desires to inflict severe emotional distress, or where he knows that such distress is certain, or substantially certain to result from his conduct. *Id.*

To prevail on a claim of negligent infliction of emotional distress, a plaintiff in Tennessee must: "(1) satisfy the five elements of ordinary negligence: duty, breach of duty, injury or loss, causation in fact, and proximate or legal cause; (2) establish a "serious" or "severe" emotional injury; and (3) support his or her serious or severe injury with expert medical or scientific proof." *Marla H. v. Knox Cnty.*, 361 S.W.3d 518, 529 (Tenn. Ct. App. 2011) (internal citations omitted). The court described an emotional injury as "serious" or "severe" in instances where a reasonable person would be unable to adequately with the mental stress caused by the circumstances of the case. *Id.*

In cases of negligent infliction of emotional distress, medical expert proof is required as a safeguard for potentially fraudulent claims. *Camper v. Minor*, 915 S.W.2d 437, 446 (Tenn. 1996). Unlike in intentional infliction of emotional distress cases, the conduct causing distress does not have to be considered "outrageous" for the plaintiff to prevail and the severity of the mental injury cannot always be inferred by the conduct in such cases.

State Consumer Protection Laws, Rules and Regulations

Tennessee Code Annotated § 56-8-113 limits the applicability of the Tennessee Consumer Protection Act to insurance providers. It provides:

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Notwithstanding any other law, title 50 and this title shall provide the sole and exclusive statutory remedies and sanctions applicable to an insurer, person, or entity licensed, permitted, or authorized to do business under this title for alleged breach of, or for alleged unfair or deceptive acts or practices in connection with, a contract of insurance as such term is defined in § 56-7-101(a). Nothing in this section shall be construed to eliminate or otherwise affect any:

- Remedy, cause of action, right to relief or sanction available under common law;
- Right to declaratory, injunctive or equitable relief, whether provided under title 29 or the Tennessee Rules of Civil Procedure; or
- Statutory remedy, cause of action, right to relief or sanction referenced in title 50 or this title.

The import of this statute is that unless an alleged cause of action is a common law cause of action, seeks declaratory, injunctive or equitable relief, or rights to relief as sanctioned by Title 50 (Workers Compensation) and title 56 (Insurance), the Tennessee Consumer Protection Act is inapplicable. *Riad v. Erie Ins. Exchange*, 436 S.W.3d 256, 269 (Tenn. Ct. App. 2013).

DISCOVERY ISSUES IN ACTIONS AGAINST INSURERS

Discoverability of Claims Files Generally

The discoverability of claim files has not been addressed by Tennessee state courts. In the federal context, a claim file does not have to be prepared by an attorney to be considered work product, but the driving force behind the preparation of the claim file must be litigation in order for that claim file information in order to be deemed to be protected by the Court. See *King v. CVS Pharmacy, Inc.*, No. 1:09-cv-209, 2010 WL 1643256, at *2 (E.D. Tenn. Apr. 21, 2010). The Sixth Circuit has noted that making coverage decisions is part of the ordinary business of insurance and if the “driving force” behind the preparation of a claim file is to assist the insurer in deciding coverage, then the claim file is not protected by the work-product doctrine, even if the documents were prepared by attorneys. *In re Professionals Direct Ins. Co.*, 578 F.3d 432, 439 (6th Cir. 2009).

Discoverability of Reserves

Again, no case in Tennessee state court addresses the discoverability of reserves. However, Tennessee federal courts have held reserve information is irrelevant in the context of bad faith and breach of contract claims. In *First Horizon Nat'l Corp. v. Hous. Cas. Co.*, No. 2:15-cv-2235-SHL-dkv, 2016 WL 5869580, at *15 (W.D. Tenn. Oct. 5, 2016), the court held that reserve information was irrelevant and denied a motion to compel production of reserve information, finding that reserves “are a business judgment and do not reflect a legal determination of the validity of the [insured’s] claim.” Additionally, in *First Horizon Nat'l Corp. v. Certain Underwriters at Lloyd's*, No. 2:11-cv-02608-SHM-dkv, 2013 WL 11090763, at *9 (W.D. Tenn. Feb. 27, 2013), the court denied a motion to compel, holding that reserve information is not relevant because it reflects an estimate of potential liability that may not be based upon a thorough factual and legal analysis. The court also noted that, to the extent reserves are established based on legal consideration, they are most likely privileged under the work product doctrine. *Id.*

Discoverability of Existence of Reinsurance and Communications with Reinsurers

Reinsurance agreements are discoverable under Rule 26 of the Federal Rules of Civil Procedure. *First Horizon Nat'l Corp. v. Certain Underwriters at Lloyd's*, No. 2:11-cv-02608-SHM-dkv, 2013 WL 11090763, at *8 (W.D. Tenn. Feb. 27, 2013). In *First Horizon Nat'l Corp.*, the court drew a distinction between the reinsurance agreement itself and reinsurance-related documents, noting that the discoverability of communications between insurers and reinsurers depends on the nature of the issues to which the communications is alleged to be relevant. *Id.* Communications between insurers and reinsurers may be relevant if it reflects “the nature and extent of the insurer’s claims investigations, their interpretations of policies, and potential admissions on coverage.” *Id.* The court also acknowledged that some communications between insurers and reinsurers may be protected by the attorney-client privilege and work product doctrine. *Id.*

Attorney/Client Communications

The Supreme Court of Tennessee has held that there is no attorney client relationship formed between the insurer and the attorney it hires to represent the insured. *In re Youngblood*, 895 S.W.2d 322, 328 (Tenn. 1995). Therefore, an insurer would not be able to afford themselves of the attorney client relationship when they are not the client. *Blaylock & Brown Const., Inc. v. AIU Ins. Co.*, 796 S.W.2d 146, 155 (Tenn. Ct. App. 1990). However, in cases where the insurance company is sued directly, the above would not be applicable. *Youngblood*, 895 S.W.2d at 328.

DEFENSES IN ACTIONS AGAINST INSURERS

Misrepresentations/Omissions: During Underwriting or During Claim

Under Tennessee law, in order to prove an action for fraudulent misrepresentation, the plaintiff must prove the following:

- That defendants made a representation of fact;
- That the representation was false;
- The representation related to a material fact;
- The representation was made either knowingly recklessly or without belief in its truth;
- That plaintiff acted reasonably in relying on the representation; and
- That plaintiff suffered damages as a result of the representation.

City State Bank v. Dean Ritter Reynolds, Inc., 948 S.W.2d 729, 738 (Tenn. Ct. App. 1996).

Tennessee Courts have held as a general rule that a party may also be held liable for damages caused by a failure to disclose material facts to the same extent the party would be liable for damages under fraudulent or negligent misrepresentation. *Gray v. Boyle Inv. Co.*, 803 S.W.2d 678, 683 (Tenn. Ct. App. 1990). For an action to constitute fraud by concealment or suppression of the truth, the Courts have stated that there must be more proof than mere silence or a mere failure to disclose known facts. *PNC Multifamily Cap. Institutional Fund XXVI Ltd. P'ship v. Bluff City Cmty. Dev. Corp.*, 387 S.W.3d 525, 550 (Tenn. Ct. App. 2012). Instead, the Courts have stated that there

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must be concealment and that the silence must amount to fraud. *Hall v. DeSaussure*, 297 S.W.2d 81, 87 (1956). Concealment may consist of withholding information asked for, or making use of some device to mislead, thus involving act and intention. *Id.* Concealment generally infers that the defendant in some way was called upon to make a disclosure. *Id.* As a result, the Courts have stated that in addition to a failure to disclose known facts, there must likewise be “some trick or contrivance intended to exclude suspicion and prevent inquiry, or else that there must be a legal or equitable duty resting on the party knowing such facts to disclose them.” *Patten v. Standard Oil Co. of Louisiana*, 55 S.W.2d 759, 761 (Tenn. 1933).

Under Tenn. Code Ann. § 56-7-103, misrepresentations made by insurance applicants can only void a policy or prevent its attaching if they were made with actual intent to deceive or if they materially increase the risk of loss.

No written or oral misrepresentation or warranty made in the negotiations of a contract or policy of insurance, or in the application for contract or policy of insurance, by the insured or in the insured's behalf, shall be deemed material or defeat or void the policy or prevent its attaching, unless the misrepresentation or warranty is made with actual intent to deceive, or unless the matter represented increases the risk of loss.

Whether a statement was a misrepresentation or made with intent to deceive are questions reserved for the trier of fact. *Womack v. Blue Cross & Blue Shield of Tenn.*, 593 S.W.2d 294, 295 (Tenn. 1980). Any issue as to whether or not a misrepresentation materially increased the risk is a question of law to be decided by the Court. *Id.*

Tennessee law imposes a duty upon those seeking to obtain insurance to make a fair disclosure to the insurer of all facts of risk. *Collins v. Pioneer Tide Ins. Co.*, 629 F.2d 429, 433 (6th Cir. 1980) (applying Tennessee law). That duty is breached by the applicant either by providing false statements or by failing to give full information known to the prospective insurer about matters material to risk, provided the insurer has no actual knowledge. *Id.*

With regard to materiality of the statement, Tennessee Courts have recognized that a misrepresentation increases the risk of loss when it is of such importance that it naturally and reasonably influences the judgment of the insurer in making the contract. *Sine v. Tenn. Farmers Mut. Ins. Co.*, 861 S.W.2d 838, 839 (Tenn. Ct. App. 1993).

Failure to Comply with Conditions

Tennessee, like most states, recognizes the validity of conditions precedent for insurance coverage. *Alcazar v. Hayes*, 982 S.W.2d 845, 848 (Tenn. 1998). For instance, in a UM coverage case, a policy may require the insured to provide suit papers “at once” to the insurance company. Under certain circumstances, the insurance company may avoid coverage if the insured fails to fulfill this condition. In *Alcazar v. Hayes*, 982 S.W.2d 845 (Tenn. 1998), the Tennessee Supreme Court stated the rule in such a case as follows:

[O]nce it is determined that the insured has failed to provide timely notice in accordance with the insurance policy, it is presumed that the insurer has been prejudiced by the breach. The insured, however, may rebut this presumption by proffering competent evidence that the insurer was not prejudiced by the insured's delay.

Tennessee courts have also repeatedly upheld the validity of an insurance policy condition requiring the insured to cooperate with the insurance company. *Thaxton v. Allstate Ins. Co.*, No. 87-251-II, 1988 WL 23922, at *2 (Tenn. Ct. App. Mar. 18, 1988); *Horton v. Employers Liability Assur. Corp.*, 164 S.W.2d 1016, 1017 (1942). The insured's lack of cooperation, however, must be substantial and material to result in a breach of the policy condition. *Thaxton*, 1988 WL 23922, at *2 (rejecting the “California rule” which presumes prejudice when cooperation

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clause is breached as well as the approach where proof of harm is immaterial). In Tennessee, the burden is on the insurer to show substantial prejudice from an insured's breach of his or her duty to cooperate. *Id.* Cooperation with the third party, as opposed to the carrier, in such particulars as the admission of liability or making of voluntary payments will clearly be a breach of the duty to cooperate. *See, e.g., Anderson v. Dudley L. Moore Ins. Co.*, 640 S.W.2d 556 (Tenn. Ct. App. 1982). Inadvertent or innocent deficiencies in the duty to cooperate will not defeat coverage. *Thaxton*, 1988 WL 23922, at *2.

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

In *State Auto. Ins. Co. v. Lashlee-Rich*, the Court of Appeals of Tennessee held an insured that violated a voluntary payment and no-action clause in an insurance policy was precluded from claiming coverage under that policy. *See* No. 02A01-9703-CH-71, 1997 WL 781896 (Tenn. Ct. App. 1997). In *Lashlee-Rich*, a construction company (Lashlee-Rich) accidentally hit an electrical wire while doing construction work, putting a nearby ice cream toppings business in peril of losing its inventory. *Id.* at *1. Lashlee-Rich quickly contracted with an electric company to perform the necessary repairs and then sought to collect reimbursement from State Auto, its insurer. *Id.* Although Lashlee-Rich notified State Auto of the occurrence the following day, it did not mention that it had assumed an obligation to pay the electric company. *Id.*

The court held, "Lashlee attempted to bypass the plain, unambiguous language in the insurance contracts and thereby divest State Auto of its rights to oversee the handling of any claim." *Lashlee-Rich*, 1997 WL 781896 at *4. In so doing, "undoubtedly, Lashlee-Rich violated the clear language of the policies by assuming an obligation, voluntarily making a payment and incurring an expense without State Auto's consent. Lashlee-Rich did all of the foregoing to their own peril." *Id.* at *5.

Preexisting Illness or Disease Clauses

Tennessee statutory law deals with conversion of group health insurance policies to individual policies and preexisting conditions:

The converted policy shall not exclude a preexisting condition not excluded by the group policy. However, the converted policy may provide that any hospital, surgical or medical benefits payable under the policy may be reduced by the amount of the benefits payable under the group policy after the termination of the individual's insurance under the group policy. The converted policy may also include provisions so that during the first policy year the benefits payable under the converted policy, together with the benefits payable under the group policy, shall not exceed those that would have been payable had the individual's insurance under the group policy remained in force and effect.

Tenn. Code Ann. § 56-7-2317.

Under Tennessee Common law, an insurer may limit coverage in a sickness and hospitalization insurance policy against any condition originating prior to the issuance of the policy. *Horace Mann Mut. Ins. Co. v. Burrow*, 373 S.W.2d 469, 471 (Tenn. 1963). Such clauses are strictly construed against the insurer, and the existence of the condition must have manifested itself or been active prior to the issuance of the policy for the exclusion to apply. *Id.* at 472.

Statutes of Limitations and Repose

Most policies of insurance state a limitations period for filing a complaint against an insurance company for failure to pay a claim. Otherwise, a claim for breach of contract is subject to a six-year limitations period. Tenn. Code Ann. § 28-3-109(a)(3). A claim for civil remedies for insurance fraud, in certain circumstances, may be brought within five (5) years. Tenn. Code Ann. § 56-53-107(e). Generally, a claim for personal injury must be brought within one (1) year. Tenn. Code Ann. § 28-3-104(a)(l).

TRIGGER AND ALLOCATION ISSUES FOR LONG-TAIL CLAIMS

Trigger of Coverage

Trigger of coverage and the law of allocation among insurers in a "long-term exposure" or long tail case is not well settled in a majority of states, Tennessee included. Rajesh Bagga and Paul Rose, *The Law of Allocation — Who's Winning the Battle Anyway!*, American Bar Association Section of Litigation, July/August 2002 at 1. The case of *United States Fire Ins. Co. v. Vanderbilt University*, suggests that Tennessee may be leaning toward adoption of the "all sums" approach, whereby continuous or progressive injuries or damages trigger the full extent of liability policy coverage if any part of the injury or damage occurs during the policy period; however, the court's ruling is inconclusive. 82 F. Supp.2d 788, 798 (M.D. Tenn. 2000).

Allocation Among Insurers

Tennessee has no clear rule for allocation of liability among multiple insurers in a long tail claim. However, as referenced above, in a long tail claim, under the "all sums" approach, insurers would be held liable to the full extent of liability policy coverage, regardless of whether the injury or damage only occurred during part of the coverage period. *U.S. Fire Ins. Co. v. Vanderbilt Univ.*, 798; 82 F. Supp.2d 788, 798 (M.D. Tenn. 2000); Rajesh Bagga and Paul Rose, *The Law of Allocation — Who's Winning the Battle Anyway!*, American Bar Association Section of Litigation, July/August 2002 at 4.

CONTRIBUTION ACTIONS

Claim in Equity vs. Statutory

The Tennessee Supreme Court in *McIntyre v. Balentine*, 833 S.W.2d 52, 58 (Tenn. 1992), adopted the doctrine of comparative fault and simultaneously characterized the doctrine of joint and several liability as obsolete to the extent that it allows a plaintiff to sue and obtain a full recovery against any one or more of several parties against whom liability could be established. However, the Court did not and could not completely abolish the remedy of contribution because that remedy is afforded to the parties by the legislature. *Bervoets v. Harde Ralls Pontiac-Olds, Inc.*, 891 S.W.2d 905, 907 (Tenn. 1994). Since *McIntyre*, the Court has clarified the extent to which the doctrine remains applicable and determined that joint and several liability and the doctrine of contribution are still viable in certain limited circumstances in equity as follows:

- Products liability cases in which strict liability is asserted against defendants in the chain of distribution. *Owens v. Truckstops of Am.*, 915 S.W.2d 420 (Tenn. 1996).

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- Cases in which an injury is caused by multiple defendants who breached a common duty. *Resolution Trust Corp. v. Block*, 924 S.W.2d 354 (Tenn. 1996).
- Cases in which an injury is caused by the concerted or collective action of the defendants. *GE v. Process Control Co.*, 969 S.W.2d 914 (Tenn. 1998).
- Vicarious liability cases, involving liability under the family purpose doctrine, respondeat superior, or other circumstances presenting agency-type relationships between the active wrongdoer and the one who is vicariously responsible. *Browder v. Morris*, 975 S.W.2d 308 (Tenn. 1998); *Camper v. Minor*, 915 S.W.2d 437 (Tenn. 1996).
- Cases in which a negligent defendant fails to prevent foreseeable intentional conduct. *Limbaugh v. Coffee Med. Ctr.*, 59 S.W.3d 73 (Tenn. 2001) (applying joint and several liability when the harm arising from the tortious acts of an intentional tortfeasor was a foreseeable risk created by a negligent defendant, and all tortfeasors have been made a party to the suit).
- Other “appropriate case[s]” in which “fairness demands.” *Process Control Co.*, 969 S.W.2d at 916 (citing *Owens*, 915 S.W.2d at 430 (allowing contribution when “fairness demands”); *Bervoets*, 891 S.W.2d at 907 (recognizing contribution in the “appropriate case”). Note, however, that this category is not a broad “catch-all” provision that defeats the fundamental concepts of comparative fault; it should only be applied in cases in which the failure to allow contribution would impose an injustice. *Id.*

Statutory contribution also exists and is codified in the Uniform Contribution among Tort-Feasors Act, Tenn. Code Ann. §§ 29-11-101 - 107. Under § 29-11-107(a), if multiple defendants are found liable in a civil action governed by comparative fault, a defendant shall only be severally liable for the percentage of damages for which fault is attributed to such defendant by the trier of fact, and no defendant shall be held jointly liable for any damages. However, notwithstanding subsection (a), joint and several liability remains in effect in the following circumstances set forth in subsection (b):

- To apportion financial responsibility in a civil conspiracy among two (2) or more at-fault defendants who, each having the intent and knowledge of the other's intent, accomplish by concert an unlawful purpose, or accomplish by concert a lawful purpose by unlawful means, which results in damage to the plaintiff; and
- Among manufacturers only in a product liability action as defined in Tenn. Code Ann. § 29-28-102, but only if such action is based upon a theory of strict liability or breach of warranty.

Nothing in § 29-11-107 eliminates or affects the doctrines of vicarious liability or respondeat superior or limits the ability of the trier of fact to allocate fault to a nonparty to the suit, including, but not limited to, an immune third party or settling party, person, or entity. Tenn. Code Ann. § 29-11-107(c), (d).

In determining the proportionate share of the shared liability between two (2) or more tortfeasors for the same injury or wrongful death, for purposes of pursuit of contribution among tortfeasors, the reasonable amount of the settlement and the relative degree of fault of the tortfeasors and the injured party or parties in bringing about the injury or wrongful death shall be compared, and the party seeking contribution shall be entitled to recover only to the extent that the party has paid more than the proportionate share of the common liability, with the proportionate share to be determined solely by comparison of the relative degrees of fault of the parties. Tenn. Code Ann. § 29-11-103.

If equity requires, the collective liability of some as a group shall constitute a single proportionate share. *Id.* Principles of equity generally applicable to contribution shall apply. *Id.* The tortfeasor's total recovery is limited to the amount paid by the tortfeasor in excess of this proportionate share. Tenn. Code Ann. § 29-11-102. There

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is no right of contribution for an intentional tortfeasor; thus, a negligent tortfeasor may seek contribution from an intentional tortfeasor, but not vice versa. *See id.*

Whether or not judgment has been entered in an action against two (2) or more tortfeasors for the same injury or wrongful death, the right of contribution may be enforced by a separate action in either circuit or chancery court, to be tried according to the forms of chancery. Tenn. Code Ann. § 29-11-104. Where a judgment has been entered, contribution may be enforced in that action by judgment in favor of one against other judgment defendants by motion upon notice to all parties to the action. *Id.* If there has been a judgment, the statute of limitations for commencing an action to enforce a right of contribution must be brought within one (1) year after satisfaction of the judgment. *Id.*

Elements

The right of contribution exists when two (2) or more persons are jointly or severally liable in tort for the same injury to person or property or for the same wrongful death, even though judgment has not been recovered against all or any of them. *See* Tenn. Code Ann. § 29-11-102. The right exists only in favor of a tortfeasor who has paid more than his proportionate share of the shared liability between two (2) or more tortfeasors for the same injury or wrongful death. *Id.*

DUTY TO SETTLE

An insurer having exclusive control over the investigation and settlement of a claim may be held liable by the insured for an amount in excess of the policy limits if, as a result of bad faith, it fails to effect settlement within the policy limits; and this may be true even though the injured party did not make an offer of settlement within the policy limits. *State Auto. Ins. Co. of Columbus, Ohio v. Rowland*, 427 S.W.2d 30, 33 (1968). Bad faith refusal to settle is defined, in part, as an insurer's disregard or demonstrable indifference toward the interests of its insured. *Johnson v. Tennessee Farmers Mut. Inc. Co.*, 205 S.W.3d 365, 370 (Tenn. 2006). Bad faith on the part of the insurer can be proved by facts that tend to show "a willingness on the part of the insurer to gamble with the insured's money in an attempt to save its own money or any intentional disregard of the financial interests of the plaintiff in the hope of escaping full liability imposed upon it by its policy." *Id.* (citing *Goings v. Aetna Cas. & Sur. Co.*, 491 S.W.2d 847, 849 (Tenn. Ct. App. 1972)).

"Bad faith" will be determined by consideration of the following factors: (1) That good faith required the Company to investigate the claim to such an extent that it would be in position to exercise an honest judgment as to whether the claim should be settled; (2) That the material question was not what the actual facts were but what facts relative to the accident and injuries were known to the insurer and its agents 'which they should have considered in deciding whether it should or should not settle an action brought against the insurer as the reasonable thing to be done'; (3) That a mere mistake of judgment would not constitute bad faith; (4) That while the right of the insurer to control negotiations for settlement must be subordinated to the purpose of the contract to indemnify the insured to the limit of the policy, there must be bad faith with resulting injury to the policy holder before a cause of action accrues; (5) That if the insurer dealt fairly with the insured and acted honestly and according to its best judgment it would not be liable; (6) That it owed its insured no duty to settle merely because a settlement could be made within the limits of the policy. *Stubblefield v. Tennessee Farmers Mut. Ins. Co.*, No. 01-A-019102CV00036, 1991 WL 117569, at *2 (Tenn. Ct. App. July 3, 1991).

"If the proof, in the light of all the relevant circumstances, and inferences to be drawn therefrom is such as to leave a reasonable basis for disagreement among reasonable minds, the question of good faith of the insurer in

the handling of the claim and conducting compromise negotiations is for the jury." *Id.* at *3.

LH&D BENEFICIARY ISSUES

Change of Beneficiary

The question of who is the beneficiary of a policy is governed by the contractual language of the policies themselves. See *Cronbach v. Aetna Life Ins. Co.*, 284 S.W. 72, 73 (Tenn. 1926) (holding that the mode of changing beneficiary prescribed in the policy must be followed); see also *Life & Cas. Ins. Co. of Tenn. v. Cornish*, 315 S.W.2d 6, 8 (Tenn. Ct. App. 1958) (ruling that provisions regarding change of beneficiary are part of the terms of the contract, and in order to effect a change of beneficiary, the mode prescribed in policy must be followed).

A life insurance policy in which the right to name or change the beneficiary is reserved to the insured is a contract in which the insurer agrees to pay the death benefit to the beneficiary designated by the insured. See *Dyke v. Dyke*, 122 F.Supp. 529, 535 (E.D. Tenn. 1954). The person entitled to a policy's benefits is the person designated as the beneficiary in the insurance contract. See *Travelers Ins. Co. v. Webb*, Nos. 01-A-01-9508-CH00379, 94-2051-III, 1996 WL 23491, at *2 (Tenn. Ct. App. Jan. 24, 1996).

If an insured executes a change of beneficiary form, then it must be considered as a part of the insurance contract. See *Stonebridge Life Ins. Co. v. Horne*, No. W2012-00515-COA-R3-CV, 2012 WL 5870386, at *5 (Tenn. Ct. App. Nov. 21, 2012) (citing *D & E Const. Co., Inc. v. Robert J. Denley Co., Inc.*, 38 S.W.3d 513 (Tenn. 2001)).

When reviewing change in benefit forms, Tennessee courts engage in common law analysis of contract interpretation. Courts pay special emphasis to the intention of the parties as reflected in the change of benefit form, and the cardinal rule is that the intention of the parties must prevail. See *Allstate Ins. Co. v. Watson*, 195 S.W.3d 609, 611 (Tenn. 2006).

Tennessee has long recognized the substantial compliance test for change of beneficiaries in life insurance policies. See *Sun Life Assurance Co. of Canada v. Hicks*, 844 S.W.2d 652, 654 (Tenn. Ct. App. 1992). Essentially, Tennessee courts will give effect to the intention of an insured by holding that the change of beneficiary has been accomplished where he has done all that he could to comply with the provisions of the policy. *Cronbach v. Aetna Life Ins. Co.*, 284 S.W.72, 73 (Tenn. 1926). Whether an insured has done "all that he could" to change a beneficiary in compliance with policy requirements is necessarily a fact-specific inquiry. See *Hicks*, 844 S.W.2d at 654.

Effect of Divorce on Beneficiary Designation

The principles of contract law, not family law, govern the designation of beneficiaries of insurance or annuity policies under Tennessee law. In *Bowers v. Bowers*, 637 S.W.2d 456 (Tenn. 1982), the Tennessee Supreme Court addressed the split among the Tennessee state courts on whether a divorce decree surrendering property rights precludes the claim of an ex-wife who remained the named beneficiary on her former husband's insurance or annuity policy. *Id.* at 458. The Court found that being a named beneficiary on an insurance policy is not a "property right" and does not "arise out of the marital relationship." *Id.* Later, in *Mathews v. Harris*, 713 S.W.2d 311 (Tenn. 1986), the Tennessee Supreme Court held that the beneficiary designation of a former wife by name was not affected by the subsequent divorce proceedings nor by the parties' property settlement agreement waiving future claims.

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Tennessee appellate courts have stated that the designation of beneficiaries on life insurance policies and death benefits in annuity agreements are matters of contract between the participant and the company or organization issuing the policy of life insurance or funding the annuity agreement. See *Lunsford v. Lunsford*, No. M2004-00662-COA-R3-CV, 2005 WL 2572389, at *2 (Tenn. Ct. App. Oct. 12, 2005). Tennessee law does not distinguish between a death benefit in an annuity agreement and the death benefit in a retirement plan. *Id.* Designation of beneficiaries in these contracts cannot be altered by will, by completing a survey conducted by an employer, or by marital dissolution agreement. *Id.*

Under Tennessee law, the designation of beneficiaries on life insurance policies and the death benefits in annuity agreements are matters of contract between the participant and the company or organization issuing the policy of life insurance or funding the annuity agreement. *Id.* As such, the beneficiary may be changed only by substantially complying with the contract provisions.” *Id.* Thus, in Tennessee a change of beneficiary must be accomplished in substantial compliance with the terms of the insurance [or annuity] contract, and the language of a will does not operate to deprive the named beneficiary of her rights to policy proceeds. See *In re Estate of Williams*, No. M2000-02434-COA-R3-CV, 2003 WL 1961805, at *18 (Tenn. Ct. App. Apr. 28, 2003). However, parties may contract outside of the marital relationship to surrender beneficiary claims to a policy. See *Lunsford*, 2005 WL 2572389, at *3.

INTERPLEADER ACTIONS

Availability of Fee Recovery

In both federal and state courts in Tennessee, attorney’s fees are rarely awarded as a matter of right, but rather such an allowance is within the discretion of the court. See *Unum Life Ins. Co. of Am. v. Kelling*, 170 F.Supp.2d 792, 793 (M.D. Tenn. 2001); *Inter-Southern Life Ins. Co. v. McDaniel*, 19 S.W.2d 269, 272 (Tenn. 1929).

Differences in State vs. Federal

Attorney’s fees are generally unavailable in federal court in Tennessee for insurance companies. Whether a court should allow a party who commences an interpleader action to recover his attorney’s fees and costs is a matter committed to judicial discretion and is rarely awarded as a matter of course. *Unum Life Ins. Co. v. Kelling*, 170 F.Supp.2d 793, 794 (M.D. Tenn. 2001); see also *Western Life Ins. Co. v. Nanney*, 290 F.Supp. 687, 688 (E.D. Ten. 1968); *Paul Revere Life Ins. Co. v. Riddle*, 222 F.Supp. 867, 868 (E.D. Tenn. 1963).

The general rule is that a disinterested “mere stakeholder” plaintiff who brings a necessary interpleader action is entitled to a reasonable award of attorney’s fees. *Kelling*, 170 F. Supp.2d at 793 (citing *Mut. Life Ins. Co. v. Bondurant*, 27 F.2d 464 (6th Cir. 1928)); *In re Creekstone Apartments Assocs., L.P.*, 165 B.R. 851 (Bankr. M.D. Tenn. 1994)). There are, however, exceptions to the general disinterested plaintiff rule, and courts have used their discretion to exclude insurance companies from fee recovery according to three distinct theories. *Id.* at 794.

First, courts have found insurance companies should not be compensated merely because conflicting claims have arisen during the normal course of business and such a cost should not be transferred to the insured. *Id.* Second, courts have denied insurance companies awards of attorney’s fees because insurance companies, by definition, are interested stakeholders. *Id.* Filing the interpleader action immunizes the company from further liability under the contested policy. *Id.* The insurance company avoids the risk of paying the proceeds to the incorrect

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beneficiary and therefore avoids subjecting itself to subsequent litigation. *Id.* at 794-95. Third, courts have also exempted insurance companies from the general rule based upon the policy argument that it would be inequitable to deplete the fund that is the subject of preservation through the interpleader and this policy concern is even stronger when a minor seeks to benefit from the fund. *Id.* at 795.

In state courts in Tennessee, allowances for attorney's fees are similarly not a matter of right but are within the sound discretion of the court and will not be awarded absent a "clear necessity" which demanded the filing of the bill of interpleader. *Inter-Southern Life Ins. Co. v. McDaniel*, 19 S.W.2d 269, 272 (Tenn. 1929); *see also Woodard v. Metro. Life Ins. Co.*, 24 S.W.2d 888, 888 (Tenn. 1930). Tennessee courts, however, generally do not punish an uninterested stakeholder from filing an interpleader action and may award a reasonable fee to be paid out of the fund. *See Butler v. Fowler*, 188 S.W.2d 612 (Tenn. Ct. App. 1944) (allowing an award of a reasonable attorney's fee to Metropolitan Life Insurance Company).