I. Regulatory Limits on Claims-Handling

A. Timing for Responses and Determinations

The Minnesota Unfair Claims Practices Act governs time limits to respond to insurance claims. See Minn. Stat. § 72A.201. The Act provides that, except for health insurance claims, insurers must acknowledge a claim (providing specific information listed in the statute) and provide necessary forms and instructions with which to process the claim within ten business days after receipt of the claim. Minn. Stat. § 72A.201, subd. 4(1). In addition, an insurer must reply within ten business days to all communications about a claim to which a response is requested or needed. Minn. Stat. § 72A.201, subd. 4(2). Finally, unless modified by policy language or other law, notice of acceptance or denial of a claim must be given within thirty business days after receipt of notification of a claim, Minn. Stat. § 72A.201, subd. 4(3), and within sixty days of receipt of a proof of loss, Minn. Stat. § 72A.201, subd. 4(11). If the investigation of a claim cannot reasonably be completed within the time allowed, an insurer may take additional time to investigate but must notify the insured or claimant of that fact within the thirty-day time period and explain why the investigation is not complete and the expected date of completion. Id.

B. Standards for Determinations and Settlements

Claims handling and settlement practices are also governed by Minnesota’s Unfair Claims Practices Act. See Minn. Stat. § 72A.201, subd. 4-6.

Minn. Stat. § 72A.201, subd. 5, governs general settlement offers and agreements and provides that the following acts by an insurer, adjuster, self-insured, or self-insurance administrator constitute unfair settlement practices:

1. Making a payment, settlement, or settlement offer without explaining what the payment is for;

2. Making an offer to settle one portion of a claim contingent upon an agreement to settle another portion;
3. Refusing to pay elements of a claim for which there is no good faith dispute;

4. Threatening to cancel, rescind, or not renew a policy if no settlement is reached;

5. Failing to issue settlement proceeds within five days of a settlement agreement or the performance of conditions by the claimant, whichever is later;

6. Failing to inform the insured of the policy provision(s) under which payment is made;

7. Settling or attempting to settle a claim under cash value provisions for less than the value of the property;

8. Settling or offering to settle a claim with an insured under replacement value provisions for less than the sum necessary to replace the damaged item with one of like kind and quality, including applicable taxes, license, and transfer fees;

9. Reducing or attempting to reduce any settlement for depreciation of an item not adversely affected by age, use, or obsolescence; and

10. Reducing or attempting to reduce a settlement unless the resale value of the item has increased over the preloss value by the repair of the damage.

Minn. Stat. § 72A.201, subd. 6, provides specific rules regarding the handling of settlement offers and agreements in automobile insurance claims.


C. Privacy Protections (In Addition to Federal Gramm-Leach-Bliley Act)

Subject to certain exceptions, the Minnesota Insurance Fair Information Reporting Act provides that insurers must obtain written authorization to disclose or to obtain personal or privileged information about a person collected in connection with an insurance transaction. Minn. Stat. § 72A.502. Exceptions to the statute include disclosures to prevent fraud and criminal activity, certain disclosures to aid actuarial studies, disclosures pursuant to a subpoena and disclosures to affiliates for marketing purposes. Id. An insurer must notify its insured of any disclosure in writing within ten days, specifying the person to whom information was disclosed and the nature of the information disclosed. Id., subd. 12. A private cause of action exists for violations of this statute. See Minn Stat. § 72A.503.

II. Principles of Contract Interpretation

Insurance policies are contracts that are governed by “[g]eneral contract principles” and “interpreted to give effect to the intent of the
parties.” Nathe Brothers v. American Nat’l. Fire Ins. Co., 615 N.W.2d 341, 344 (Minn. 2000). These principles of interpretation include:

[1.] Parties to insurance contracts, as in other contracts, absent legal prohibition or restriction, are free to contract as they see fit, and the extent of liability of an insurer is governed by the contract they enter into.

[2.] Subject to the statutory law of the state, a policy of insurance is within the application of general principles of the law of contracts.

[3.] Inasmuch as the language of an insurance policy is that of the insurer, any reasonable doubt as to its meaning must be resolved in favor of the insured, but the court has no right to read an ambiguity into plain language of an insurance policy in order to construe it against the one who prepared the contract.

[4.] Where there is no ambiguity there is no room for construction. In such cases, the parties being free to contract, the language used must be given its usual and accepted meaning.

[5.] Contracts of insurance, like other contracts, must be construed according to the terms the parties have used, to be taken and understood, in the absence of ambiguity, in their plain, ordinary, and popular sense, so as to give effect to the intention of the parties as it appears from the entire contract.

[6.] The endorsements or riders attached to an insurance contract are part of the contract, and the endorsements and the policy must be construed together.

[7.] A policy and endorsements should be construed, if possible, so as to give effect to all provisions, but, where provisions in the body of the policy conflict with an endorsement or rider, the provision of the endorsement governs.

[8.] Exclusions in a policy or endorsements are as much a part of the contract as other parts thereof and must be given the same consideration in determining what is the coverage.

Bobich v. Oja, 104 N.W.2d 19, 24-25 (Minn. 1960). A policy is ambiguous “only if it is reasonably subject to more than one interpretation.” Hammer v. Investors Life Ins. Co. of N. Am., 511 N.W.2d 6, 8 (Minn. 1994). If no ambiguity exists, the policy’s plain language controls. Henning Nelson Constr. Co. v. Fireman’s Fund Am. Life Ins. Co., 383 N.W.2d 645, 652 (Minn. 1986). But if a term is ambiguous, courts may look to extrinsic evidence to clarify the policy language, and if no clarifying information is available,
the ambiguity must be resolved against the insurer. See, e.g., Gareis v. Benefit Ass’n of R. Employees Ins. Co., 169 N.W.2d 730, 732 (Minn. 1969); Holm v. Mut. Service Casualty Ins. Co., 261 N.W.2d 598, 600 (Minn. 1977). However, this doctrine of contra proferentem only applies to disputes between an insurer and an insured. Econ. Premier Assur. Co. v. W. Nat. Mut. Ins. Co., 839 N.W.2d 749, 755 (Minn. Ct. App. 2013). The doctrine does not apply to disputes between two insurance companies, such as disputes concerning which policy provides primary coverage. Id.

In Atwater Creamery Co. v. Western Nat’l Mut. Ins. Co., 366 N.W.2d 271, 277-78 (Minn. 1985), the Minnesota Supreme Court adopted the “reasonable expectations” doctrine that “may in certain limited situations protect the reasonable expectations of the insured with respect to coverage where the literal terms and conditions of the policy bar the claim.” West Bend Mut. Ins. Co. v. Allstate Ins. Co., 776 N.W.2d 693, 701 (Minn. 2009). However, the courts have been reluctant to apply the doctrine, and have limited its use “to ‘resolving ambiguity’ in policy terms ‘and for correcting extreme situations,’ such as ‘where a party's coverage is significantly different from what the party reasonably believes it has paid for and where the only notice the party has of that difference is in an obscure and unexpected provision.’” Id. (quoting Carlson v. Allstate Ins. Co., 749 N.W.2d 41, 49 (Minn. 2008)). Similarly, an ambiguous policy may not be construed against the insurer if doing so would result in coverage “beyond the reasonable expectations of the insured.” Occidental Fire & Cas. Co. v. Soczynski, 765 F.3d 931, 937 (8th Cir. 2014).

III. Choice of Law

Minnesota generally allows the parties of an insurance policy to agree on which jurisdiction’s law will govern the contract. Allianz Ins. Co. of Can. v. Sanftleben, 454 F.3d 853, 855 (8th Cir. 2006) (citing Milliken & Co. v. Eagle Packaging Co., 295 N.W.2d 377, 380 n.1 (Minn. 1980)). In the absence of such an agreement, the court’s threshold task is to decide whether the choice of one state’s law over another creates an actual conflict. See, e.g., Honeywell v. Ruby Tuesday, 43 F. Supp. 2d 1074, 1077 (D. Minn. 1999). If a conflict exists, the court next determines whether the law involved is procedural or substantive. Id. If the court concludes that the law involved is procedural, then the court will apply the law of the forum without further analysis. Davis v. Furlong, 328 N.W.2d 150, 153 (Minn. 1983) (“[Minnesota follows] the almost universal rule that matters of procedures and remedies [are] governed by the law of the forum state.”). However, if the court concludes that the law involved is substantive, then it must apply the five choice-influencing factors first articulated by the Minnesota Supreme Court in Milkovich v. Saari, 203 N.W.2d 408, 412 (1973): (1) predictability of result, (2) maintenance of interstate order, (3) simplification of the judicial task, (4) advancement of the forum’s governmental interest and (5) application of the better rule of law.

Smith v. Stonebridge Life Ins. Co., No. 03-1006, 2003 U.S. Dist. LEXIS 13894 (D. Minn. Aug. 8, 2003) and JSI Industries v. Steadfast Ins. Co., No. 03-6535, 2004 U.S. Dist. LEXIS 10005 (D. Minn. May 13, 2004), provide examples of the application of these factors in insurance contexts. Although these inquiries are inherently factual, in both instances the federal courts noted Minnesota’s interest in generally prohibiting first-party bad faith claims (see Section V below) while applying Minnesota law to foreclose bad faith claims that had been asserted under the laws of other states.
IV. **Duties Imposed by State Law**

A. **Duty to Defend**

1. **Standard for Determining Duty to Defend**

An insurer’s duty to defend is contractual, Meadowbrook v. Tower Ins. Co., 559 N.W.2d 411, 415 (Minn. 1997), and is distinct from and broader than an insurer’s duty to indemnify, Franklin v. W. Nat’l Mut. Ins. Co., 574 N.W.2d 405, 406 (Minn. 1998) (cited with approval in Rechtzigal Trust v. Fidelity Nat’l Title Ins. Co., 748 N.W.2d 312, 320 (Minn. Ct. App. 2008)). The duty to defend arises “when any part of the claim is ‘arguably’ within the scope of the policy’s coverage.” Jostens v. Mission Ins. Co., 387 N.W.2d 161, 165-66 (Minn. 1986). Where a defense is denied, the burden rests with the insurer to show that the entire claim or cause of action in question clearly falls outside of the policy’s coverage. *Id.*

An insurer’s duty to defend is not triggered until an insured “tenders the defense” to the insurer. See SCSC Corp. v. Allied Mut. Ins. Co., 536 N.W.2d 305, 316-17 (Minn. 1995), overruled in part on other grounds, Bahr v. Boise Cascade Corp., 766 N.W.2d 910 (Minn. 2009). However, the tender need not be in any specific form. Instead, the insured only needs to provide notice of a claim or lawsuit and give the insurer an opportunity to defend. Home Ins. Co. v. Nat’l Union Fire Ins. of Pittsburgh, 658 N.W.2d 522, 532-33 (Minn. 2003). No express request is necessary. *Id.* Once the insurer receives notice, the insurer is responsible for contacting the insured to determine whether its assistance is required. *Id.* at 533. An insurer can recover the costs of defense if a claim is tendered but the insurer does not defend as contractually required. *Jostens*, 387 N.W.2d at 167.

2. **Issues With Reserving Rights**

Minnesota law allows insurers to defend an action under a reservation of rights. The Minnesota Supreme Court has “consistently urged” insurers to resolve coverage issues in such situations through the use of declaratory judgment actions. Grain Dealers Mut. Ins. Co. v. Cady, 318 N.W.2d 247, 249 n.3 (Minn. 1982); Spicer, Watson & Carp v. Minnesota Lawyers Mut. Ins. Co., 502 N.W.2d 400, 404 (Minn. Ct. App. 1993). A reservation of rights does not, by itself, create a conflict of interest between the insured and the insurer. Mutual Service Casualty Ins. Co. v. Luetmer, 474 N.W.2d 365, 368-69 (Minn. Ct. App. 1991). However, if an actual conflict arises between the two, the insured is entitled to select counsel of its own choice. *Id.* at 369. By way of example, such a conflict “clearly” arises if the insurer initiates a declaratory judgment action against the insured to determine coverage. *Id.*

An insurer that has defended an insured under a reservation of rights has a right to withdraw the defense if all of the arguably covered claims are resolved. Meadowbrook v. Tower Ins. Co., 559 N.W.2d 411, 416 (Minn. 1997). Any other rule would be contrary to public policy in that it may discourage insurers from defending borderline cases if unable to end their involvement in the case once the covered claims were resolved. *Id.*

As discussed in Section VII, a reservation of rights may give the insured the right to enter into a Miller-Shugart settlement, potentially impacting the insurer from contesting the insured’s underlying liability.
B. **Duty to Settle**

An insurer is liable for failure to exercise “good faith” when deciding whether to reject or accept settlement offers. *Short v. Dairyland Ins. Co.*, 334 N.W.2d 384, 387-88 (Minn. 1983). An insurer breaches this duty by acting in bad faith. See Part V below.

V. **Extra Contractual Claims Against Insurers: Elements and Remedies**

A. **Bad Faith**

1. **First Party**

Minnesota historically has been in the minority of jurisdictions that do not recognize first party bad faith. See, e.g., *Morris v. Am. Family Mut. Ins. Co.*, 386 N.W.2d 233, 237 (Minn. 1986). However, the legislature created a mechanism to recover for bad faith with the adoption of Minn. Stat. § 604.18, which became effective August 1, 2008. The statute allows an insured to recover amounts in excess of what is owed under the policy under certain circumstances. The legislation does not apply to all forms of insurance, and its exemptions include workers’ compensation and certain life and health policies. Minn. Stat. § 604.18, subd. 1.

Liability under the statute is established if the insured can show:

1. the absence of a reasonable basis for denying the benefits of the insurance policy; and

2. that the insurer knew of the lack of a reasonable basis for denying the benefits of the insurance policy or acted in reckless disregard of the lack of a reasonable basis for denying the benefits of the insurance policy.

Minn. Stat. § 604.18, subd. 2. If such a showing is made, the insured is entitled to recover “taxable costs” in “an amount equal to one-half of the proceeds awarded that are in excess of an amount offered by the insurer at least ten days before the trial begins or $250,000, whichever is less,” plus attorney fees not to exceed $100,000. Minn. Stat. § 604.18, subd. 3. Additional punitive damages may not be awarded. Id.

A plaintiff cannot seek taxable costs for bad faith in an initial complaint. Minn. Stat. § 604.18, subd. 4. Instead, the insured must make a subsequent motion supported by affidavits for leave to amend the complaint to seek an award under the statute. Id. The motion “may” be granted by the court if there is prima facie evidence in support of the bad faith claim. Id. If the motion to amend is granted, taxable costs are considered in a separate proceeding after a determination has been made on the underlying claim for benefits. Id. A claim under the statute may not be assigned. Id.

As of the time of this writing there have been no reported decisions by Minnesota’s appellate courts interpreting the statute in any depth. In unreported decisions the Minnesota Court of Appeals has followed the United States District Court in holding that an insurer is not liable under the statute if the merit of the insured’s claim was “fairly debatable.” *Homestead Hills Homeowner Ass’n v. Am. Family Mut Ins. Co.*, No. A12-0703, 2012 Minn.
2. Third Party

An insurer may be liable for failing to exercise “good faith” in handling third party claims against an insured. Short v. Dairyland Ins. Co., 334 N.W.2d 384, 387-88 (Minn. 1983). An insurer breaches its duty of good faith where (1) the insured is clearly liable; (2) the insurer refuses to settle within the policy limits; and (3) the refusal to settle is not made in good faith. Id. Typically, the insured assigns his or her bad faith claim against the insurer to an injured claimant in return for relief from the excess judgment. The injured claimant (assignee) may then proceed with the claim for bad faith. See, e.g., Strand v. Travelers Ins. Co., 219 N.W.2d 622, 622 (Minn. 1974).

The third prong of the test for bad faith is the most commonly litigated. The policyholder (or assignee) has the burden of proving the insurer acted in bad faith by refusing to settle within the policy limits. See Peterson v. Am. Family Mut. Ins. Co., 160 N.W.2d 541, 544 (Minn. 1968). Unfortunately, Minnesota courts have not provided a clear definition of acts that satisfy that prong. Minnesota’s seminal bad faith case states that the duty to exercise good faith “includes an obligation to view the situation as if there were no policy limits applicable to the claim.” Short, 334 N.W.2d at 387-88. In a frequently cited case, the Minnesota Court of Appeals presented a list of duties an insurance company should carry out to act in good faith:

In order to carry out this duty, the insurer should: fully investigate a claim, fairly evaluate the claim against the insured, inform the insured of the consequences of a judgment that exceeds the limits of the policy, inform the insured of the potential conflict of interest of the insured and the insurer if the case has a settlement value in excess of the policy limits, and inform the insured of settlement offers, and other pertinent information of the claim to the insured.

Kissoondath v. U.S. Fire Ins. Co., 620 N.W.2d 909, 916 (Minn. Ct. App. 2001). The court held that in instances where the insured is clearly liable, any one of the above factors “in and of itself may be determinative of a breach of the duty of good faith.” Id. (emphasis in original).

Another indicator of bad faith under prong three is failing to keep the insured updated on developments, most importantly settlement negotiations. See, e.g., Kissoondath, 620 N.W.2d at 919 (holding that the insurer’s failure to keep the insured aware of ongoing developments constituted bad faith); Larson v. Anchor Casualty Co., 82 N.W.2d 376, 384 (Minn. 1957) (discussing
the good faith requirement and stressing the insurance company’s duty to keep
the insured aware of settlement offers and the status of the litigation).

A bad faith claim does not constitute a tort. Morris v. Am. Family
Mut. Ins. Co., 386 N.W.2d 233, 237 (Minn. 1986). Thus, damages are limited to
those “naturally and proximately” flowing from the breach. Olson v. Rugloski,
277 N.W.2d 385, 387-88 (Minn. 1979). Generally, these damages equal the
excess judgment. Punitive damages are not recoverable except in rare
circumstances where the defendant’s breach constitutes an independent tort. Id. at 388.

B. Fraud

In Minnesota an insured must establish the following elements to prove
fraud: (1) a material false representation having to do with a past or
present fact that is susceptible of knowledge; (2) the representation is
known to be false or asserted as one’s own knowledge without knowing its
truth or falsity; (3) the representation is made with an intent to induce and
actually does induce the other person to act; (4) the party acts in reliance
of the representation; and (5) incurs damage attributable to the
representation. Specialized Tours v. Hagen, 392 N.W.2d 520, 532 (Minn. 1986).

C. Intentional or Negligent Infliction of Emotional Distress (IIED
or NIED)

To recover for IIED, a plaintiff must demonstrate (1) intentional or
reckless conduct; (2) that is extreme and outrageous; and (3) that resulted
in severe emotional distress. Saltou v. Dependable Ins. Co., 394 N.W.2d 629,
632 (Minn. Ct. App. 1986). Typically, claims for mental distress are only
allowed in contract matters in exceptional circumstances where the breach is
accompanied by an independent tort. Id. at 632-33. Insureds often have
difficulty stating a claim for IIED because the insured must show that the
extreme and outrageous conduct occurred independently from the acts that
constituted the breach of contract. See, e.g., Markgraf v. Douglas Corp., 468
N.W.2d 80, 83 (Minn. Ct. App. 1991); Saltou, 394 N.W.2d at 633. In fact, the
Minnesota Court of Appeals has held that “[t]he failure to pay an insurance
claim in itself, no matter how malicious, does not constitute a tort; it
constitutes a breach of an insurance contract.” Saltou, 394 N.W.2d at 633.

The same applies to NIED claims. See Markgraf, 468 N.W.2d. at 83. In
addition, even if exceptional circumstances exist that may support an NIED
claim, a claimant must show that the insured’s acts caused either physical
injury or physical danger to the claimant. Id. (citing Langeland v. Farmers
State Bank of Trimont, 319 N.W.2d 26, 32 (Minn. 1982)); see also Engler v.
Illinois Farmers Ins. Co., 706 N.W.2d 764, 770 (Minn. 2005) (permitting
recovery for distress caused by fearing for another’s safety or witnessing
serious injury to another but requiring plaintiff to be in a “zone of danger
of physical impact” and meet additional elements).

D. State Consumer Protection Laws, Rules and Regulations

Minnesota’s Unfair Claims Practice Act, Minnesota Stat. §§ 72A.17-
72A.32, regulates “unfair methods of competition or unfair or deceptive acts
or practices.” Minn. Stat. § 72A.17. Portions of the Act is described in
Section I above. As indicated above, the Act does not provide for a private

VI. Discovery Issues in Actions Against Insurers

A. Discoverability of Claims Files Generally

Minnesota courts have historically published very few district court decisions, and courts commonly handle discovery matters informally or through summary orders. These decisions are given broad deference by the state’s appellate courts and, as a result, there are few state opinions to draw from that analyze discovery issues in significant detail. However, the United States District Court for the District of Minnesota has denied discovery of other claim files in a bad faith case that the plaintiff argued were necessary to show “a pattern or practice of denying or undervaluing” claims. Cargill v. Ron Burge Trucking, 284 F.R.D. 421, 429 (D. Minn. 2012). The court found that other claim files were irrelevant and discovery of them was inconsistent with Rule 1 of the Federal Rules of Civil Procedure requiring that the case be administered “to secure the just, speedy, and inexpensive determination” of the action. Id.

B. Discoverability of Reserves

The United States District Court for the District of Minnesota has allowed the discovery of reserve information in a breach of contract and bad faith case, dismissing relevance and work product objections with little comment. Gulf Ins. Co. v. Skyline Displays, No. 02-CV-3632, 2003 U.S. Dist. LEXIS 26511, at *12 (D. Minn. Oct. 20, 2003). In a fact-specific diversity case arising out of Minnesota, the Eighth Circuit held that individual case reserves set by the legal department of a primarily self-insured defendant constituted protected work product because they were set by attorneys. Simon v. G.D. Searle & Co., 816 F.2d 397 (8th Cir. 1987). However, other corporate documents analyzing the reserves in aggregate, and adjusting them through formulas for other “variables such as inflation,” were deemed discoverable. Id. at 402. Language within the opinion may provide an argument for the production of insurance reserves, especially considering that the court repeatedly referred to the “corporate risk management documents” at issue as “insurance documents.”

C. Discoverability of Existence of Reinsurance and Communications With Reinsurers

In Gulf Ins. Co. v. Skyline Displays, No. 02-CV-3632, 2003 U.S. Dist. LEXIS 26511, at *14 (D. Minn. Oct. 20, 2003), the United States District Court for the District of Minnesota required production of a reinsurance agreement but not related documents such as “drafts, correspondence, negotiations, and the like.” However, the decision appeared to leave open the possibility that these documents could become discoverable if there was evidence beyond “speculation” that such documents contained relevant admissions by the insurers. Id. The court also suggested that reinsurance agreements are subject to mandatory disclosure under Rule 26(a)(1) of the Federal Rules of Civil Procedure. Similar mandatory disclosures came into effect under the Minnesota Rules of Civil Procedure in 2013.

D. Attorney/Client Communications
The Minnesota Supreme Court has unequivocally held that “defense counsel hired by an insurer to defend a claim against its insured represents the insured.” Pine Island Farmers Coop. v. Erstad & Riemer, P.A., 649 N.W.2d 444, 449 (Minn. 2002). Accordingly, “defense counsel owes a duty of undivided loyalty to the insured and must faithfully represent the insured's interests” to the same degree “as if the insured had retained the attorney personally.” Id. (quoting Crum v. Anchor Casualty Co., 119 N.W.2d 703, 712 (Minn. 1963)). However, an attorney may also represent the insurer as a co-client so long as no actual conflict of interest exists and the insured gives consent after consulting with counsel. Id. at 451. In such a case, which is common, the attorney’s communications with the insurer will be privileged.


VII. Defenses in Actions Against Insurers

A. Misrepresentations/Omissions: During Underwriting or During Claim

An insurer may rescind an insurance policy if an insured’s material misrepresentation is (1) “made with intent to deceive or defraud,” or (2) “increases the risk of loss” to the insurer. Minn. Stat, § 60A.08, subd. 9; Nielsen v. Mut. Serv. Cas. Ins. Co., 67 N.W.2d 457, 459 (Minn. 1954). Although this statute does not apply to “life insurance or accident and health insurance,” Id., Minn. Stat. § 62A.06, subd. 3, provides a similar standard for health insurance. It is not necessary for the insurer to show that it would not have issued the policy “but for” the misrepresentation so long as the risk of loss increased. Pioneer Indus. v. Hartford Fire Ins. Co., 639 F.3d 461, 467-68 (8th Cir. 2011).

“Materiality” is ordinarily a jury question based on the specific facts of a particular case. Meyer v. Blue Cross & Blue Shield of Minn., 500 N.W.2d 150, 152-53 (Minn. Ct. App. 1993). A material misrepresentation increases the risk of loss when it impairs the insurer’s ability to initially make a reasonable decision to provide coverage. Howard v. Aid Ass’n for Lutherns, 272 N.W.2d 910, 912-913 (Minn. 1978); see also Waite v. Am. Family Mut. Ins. Co., 352 N.W.2d 19 (Minn. 1984). The risk of loss is also increased if the misrepresentation increases the likelihood that the insurer will be liable in the future. In re Silicone Implant Ins. Coverage Litigation, 652 N.W.2d 46, 77 (Minn. Ct. App. 2002), rev’d on other grounds, 667 N.W.2d 405 (Minn. 2003) (citing Sec. Mut. Casualty Co. v. Affiliated FM Ins. Co., 471 F.2d 238, 242 (8th Cir. 1972)).

B. Failure to Comply with Conditions

An insured’s breach of a cooperation clause may void the contract if the breach is a substantial and material breach that prejudices the insurer. Rieschl v. Travelers Ins. Co., 313 N.W.2d 615 (Minn. 1981); Juvland v. Plaisance, 96 N.W.2d 537 (Minn. 1959). This is consistent with Minn. Stat. § 65B.15, subd. 1(6), which provides that an insurer may cancel coverage if the
insured fails to give written notice of a loss or lawsuit commenced, or refuses to cooperate in the investigation of a claim or defense of a lawsuit. The burden of proving a lack of cooperation rests with the insurer. White v. Boulton, 107 N.W.2d 370, 372 (Minn. 1961).

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

Under Miller v. Shugart, 316 N.W.2d 729, 734 (Minn. 1982), if the insurer denies coverage to the insured, the insured may settle the underlying case with the plaintiff and judgment is entered against the insured on the condition that the insured will not be personally liable and the judgment will only be collected against the insurer. The plaintiff may then pursue the insurer through a garnishment proceeding. Id. at 732. A Miller-Shugart settlement is available only when the insurer has disputed all coverage. Buysse v. Baumann-Furrie & Co., 481 N.W.2d 27, 29 (Minn. 1992). An insured may also enter into a Miller-Shugart settlement where the insurer defends the insured under a complete reservation of rights but has not issued an outright denial. Vetter v. Subotnik, 844 F. Supp. 1352, 1355 (D. Minn. 1992); C.H. Robinson v. Zurich Am. Ins. Co., No. 02-4794, 2003 U.S. Dist. LEXIS at 20154, at *9 (D. Minn. Nov. 3, 2003).

A Miller-Shugart settlement is binding on an insurer that received notice, provided that it is reasonable and not the product of fraud or collusion. E.g., Burbach v. Armstrong Rigging & Erecting, 560 N.W.2d 107, 109 (Minn. Ct. App. 1997). Whether a settlement is reasonable is a question of fact to be determined on an objective basis. Petco Animal Supplies Stores v. Ins. Co. of N. Am., No. 10-682, 2011 U.S. Dist. LEXIS 70748, at *15 (D. Minn. June 10, 2011) (citing Miller, 316 N.W.2d at 735). In Petco, id. at *17, the United States District Court for the District of Minnesota summarized “nearly thirty years” of “refine[ments]” made by the Minnesota courts to such settlements, reciting the elements of an agreement enforceable against an insurer:

1) The insurer has denied all obligations to pay damages on behalf of the insured;

2) The insurer (if it is not deemed to have waived notice) has received notice of the settlement and an "opportunity" to participate;

3) The insured is left without coverage by any other insurer to pay the claimed damages;

4) The settlement amount is later deemed to be reasonable;

5) The insured could have liability to the claimant;

6) The settlement was not the product of fraud or collusion; and

7) Coverage is ultimately determined to exist for the claim that became a judgment.

D. Statutes of Limitations
Actions based on insurance contracts are subject to a six-year statute of limitations. Minn. Stat. § 541.05, subd. 1(l). The limitations period begins to run when an insured has an identifiable claim for benefits against the insurer that can be initiated through the courts or arbitration. Spira v. Am. Standard Ins. Co., 361 N.W.2d 454, 457 (Minn. Ct. App. 1985); see also Entzion v. Illinois Farmers Ins. Co., 675 N.W.2d 925, 929 (Minn. Ct. App. 2004) (citing Noske v. Friedberg, 670 N.W.2d 740, 742 (Minn. 2003)). In a claim for bad faith failure to settle, the statute of limitations does not begin to run until the appellate process is complete and the judgment against the insured is final, including appeals. Amdahl v. Stonewall Ins. Co., 484 N.W.2d 811, 813 (Minn. Ct. App. 1992). An insurer may be liable under the Unfair Claims Practices Act for failing to advise an insured or claimant in writing of the expiration of a statute of limitations at least 60 days prior to expiration. Minn. Stat. § 72A.20l, subd. 4(8). This statute only applies to an insured or claimant who has filed a notification of a claim known to be unresolved and who has not retained an attorney. Id.

VIII. Trigger and Allocation Issues for Long-Tail Claims

A. Trigger of Coverage

Minnesota’s seminal trigger and allocation case is Northern States Power Co. v. Fidelity & Casualty Co., 523 N.W.2d 657, 662 (Minn. 1994), holding that “Minnesota follows the ‘actual injury’ or ‘injury-in-fact’ theory to determine which policies have been triggered by an occurrence causing damages for which an insured is liable.” “The essence of the actual injury trigger theory is that each insurer is held liable for only those damages which occurred during its policy period; no insurer is held liable for damages outside its policy period.” Id. It is the insured’s burden to show that “some damage occurred during the policy period” before the policy is triggered. Id. at 663-64 (emphasis in original). This burden can be met “even though the injury [wa]s not ‘diagnosable,’ ‘compensable,’ or manifest during the policy period as long as it can be determined, even retroactively, that some injury did occur during the policy period.” In re Silicone Implant Ins. Coverage Litig., 667 N.W.2d 405, 415 (Minn. 2003). It is sufficient to trigger coverage “if the insured shows damage began on a particular date, X, and ended on, or was discovered at a later date, Y, which period of time includes the policy periods for the policies at issue.” Northern States Power Co., 523 N.W.2d at 663-64 (Minn. 1994).

B. Allocation Among Insurers

The Minnesota Supreme Court has repeatedly emphasized that “damages are very fact-dependent, so ‘trial courts must be given the flexibility to apportion them in a manner befitting each case.’” Silicone Implant Ins. Coverage, 667 N.W.2d at 417 (quoting Northern States Power Co., 523 N.W.2d at 663). As such, a trial court has considerable discretion when allocating damages between the triggered policies. Id. “As with all insurance contract-related issues, courts must consider many factors when deciding this issue, including the policy language, parties' intent or reasonable expectations, canons of construction and public policy.’” Id. at 418 (quoting Northern States Power Co., 523 N.W.2d at 663). Indeed, insurance “policies come in many forms and it is a mistake to read our case law as if the scope of coverage has been resolved for all such policies, no matter what their language.” Domtar v. Niagara Fire Ins. Co., 563 N.W.2d 724, 733 (Minn. 1997).
After determining which policies are triggered, Minnesota courts next consider whether the injuries at issue were continuous over multiple policy periods. *Silicone Implant Ins. Coverage*, 667 N.W.2d at 421. If the injuries were not continuous, the policy or policies in place at the time of the injury cover all losses. *Id.* Conversely, if the injuries were continuous, the court then considers “whether the continuous injury arose from some discrete and identifiable event,” such as a chemical spill or implantation of a medical device. *Id.* If the injuries can be traced to such an event, the policies in place at the time of the event become liable. *Id.* However, if there is no single, precipitating event, then liability may be allocated between the various policies. *Id.* However, “allocation is meant to be the exception and not the rule,” *Id.*, limited to “those difficult cases in which...damage is both continuous and so intermingled as to be practically indivisible,” *Domtar*, 563 N.W.2d at 733. Notwithstanding the trial court’s flexibility to apportion damages based on the circumstances of each case, the Minnesota Supreme Court has “recommended” that damages be allocated “pro rata” by each policy’s “time on the risk.” *Northern States Power Co.*, 523 N.W.2d at 663; *Wooddale Builders v. Md. Casualty Co.*, 722 N.W.2d 283, 300 (Minn. 2006).

IX. **Contribution Actions**

A. **Claim in Equity vs. Statutory**

An insurer’s right to seek contribution from a coinsurer is equitable under Minnesota law. *Cargill v. Ace Am. Ins. Co.*, 784 N.W.2d 341, 354 (Minn. 2010). General equitable principles therefore apply to contribution actions. For example, an insurer that has breached its own duties towards an insured does not have “clean hands” and cannot obtain contribution from other insurers. *Id.*

B. **Elements**

“[A] claim for equitable contribution requires (1) the insurers share a ‘common liability’ and (2) one insurer paid more than its proportionate share of that liability.” *Lexington Ins. Co. v. AXIS Surplus Ins. Co.*, No. CIV. 13-3348 RHK/FLN, 2014 WL 2508730, at *3 (D. Minn. June 4, 2014) (citing *Cargill*, 784 N.W.2d at 352 n.11). It is not essential to a contribution action that the involved insurers be in “precisely the same position regarding liability.” *Id.* Instead, each insurer must simply be jointly responsible for the same loss. *Id.* For example, contribution can be sought between primary and excess insurers as long as each policy is triggered, or between insurers insuring different risks provided that each risk contributes to the same loss (for example, negligent design and construction that each contribute to the loss). *Id.* As to the second element, courts have flexibility while allocating an insured’s liability between insurers, such as “pro rata” by each policy’s “time on the risk” (see Section VII above), but defense costs are allocated equally between insurers. *Cargill*, 784 N.W.2d at 354.