I. Regulatory Limits on Claims-Handling

A. Timing for Responses and Determinations

Nebraska’s regulations relating to settlement practices in life, sickness and accident insurance claims require insurance companies to acknowledge receipt of a life, sickness and accident insurance claim within 15 days. Within that same time period, an insurance company must send a claimant the necessary claim forms with instructions and reasonable assistance to help a claimant fill out the forms. The insurance company, within that initial 15 day period, must initiate its investigation into the claim. §§ 6 and 7 of Chapter 61 of the Nebraska Unfair Life, Sickness and Accident Claims Settlement Practices Rule.

A Nebraska insurer must affirm or deny liability on claims within 15 days of receipt of the proof of loss, and if a claim remains unresolved within that time frame the insurer must provide the insured a reasonable written explanation for the delay. If the investigation into a claim remains incomplete, the insurer shall, 30 days from the date of the initial notification that the claim remains unresolved and every 30 days thereafter, send the insured a reasonable written explanation setting forth the reasons that additional time is needed for investigation. See § 8 of Chapter 61 of the Nebraska Unfair Life, Sickness and Accident Claims Settlement Practices Rule.

If a claim is accepted and there is no dispute as to the amount owed, the insurer must make payment on the claim within 15 days. With each claim payment, the insurer shall provide to the insured an “Explanation of Benefits” that shall include, if applicable, the name of the provider or services covered, the amount charged, the dates of service and a reasonable explanation of the computation of benefits. See § 8 of the Nebraska Unfair Life, Sickness and Accident Claims Settlement Practices Rule.

If a claim is denied, the insurer must advise the insured of the denial within 15 days that the decision to deny the claim is made. The denial must be in writing and shall reference the specific policy provisions, conditions or exclusions upon which the denial is based. If after a denial is made an insured objects to the denial and the denial is maintained by the insurance company, the insurance company shall notify the insured in writing that he or she may have the matter reviewed by the Nebraska Department of Insurance, and the insurance company shall provide the insured/claimant with the
Department’s address and phone number. See § 8 of Chapter 61 of the Nebraska Unfair Life, Sickness and Accident Claims Settlement Practices Rule.

Additionally, Neb. Rev. Stat. § 44-3,143 provides that failure to pay life insurance proceeds to a beneficiary within 30 days of receipt of proof of death of the insured by the insurance company results in the insurance company being required to pay interest on the amount due calculated from the date of receipt of the proof of death if the beneficiary meets the additional statutory requirements.

B. Standards for Determinations and Settlements

Pursuant to Neb. Rev. Stat. § 44-1540, the following actions relating to determination and settlement standards are unfair claims settlement practices in all types of insurance claims, including health, accident, and life:

(1) Knowingly misrepresenting to claimants and insureds relevant facts or policy provisions relating to coverages at issue;

(2) Failing to acknowledge with reasonable promptness pertinent communications with respect to claims arising under its policies;

(3) Failing to adopt and implement reasonable standards for the prompt investigation and settlement of claims arising under its policies;

(4) Not attempting in good faith to effectuate prompt, fair, and equitable settlement of claims submitted in which liability has become reasonably clear;

(5) Not attempting in good faith to effectuate prompt, fair, and equitable settlement of property and casualty claims (a) in which coverage and the amount of the loss are reasonably clear and (b) for loss of tangible personal property within real property which is insured by a policy subject to section 44-501.02 and which is wholly destroyed by fire, tornado, windstorm, lightning, or explosion;

(6) Compelling insureds or beneficiaries to institute litigation to recover amounts due under its policies by offering substantially less than the amounts ultimately recovered in litigation brought by them;

(7) Refusing to pay claims without conducting a reasonable investigation;

(8) Failing to affirm or deny coverage of a claim within a reasonable time after having completed its investigation related to such claim;

(9) Attempting to settle a claim for less than the amount to which 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;

(10) Attempting to settle claims on the basis of an application which was materially altered without notice to or knowledge or consent of the insured;
(11) Making a claims payment to an insured or beneficiary without indicating the coverage under which each payment is being made;

(12) 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;

(13) Failing, in the case of the denial of a claim or the offer of a compromise settlement, to promptly provide a reasonable and accurate explanation of the basis for such action;

(14) Failing to provide forms necessary to present claims with reasonable explanations regarding their use within fifteen working days of a request;

(15) Failing to adopt and implement reasonable standards to assure that the repairs of a repairer owned by or affiliated with the insurer are performed in a skillful manner.

(16) Requiring the insured or claimant to use a particular company or location for motor vehicle repair.

(17) Failing to provide coverage information or coordinate benefits pursuant to section 68-928.

(18) Failing to pay interest on any proceeds due on a life insurance policy as required by section 44-3,143.

Additionally, no insurer may deny a claim based on information obtained in a telephone conversation or personal interview with any source unless the telephone conversation or personal interview is documented in the claim file. All denials must be in writing, and in sending the denial letter to the insured, the letter must contain the specific policy provisions, conditions or exclusions upon which the denial is based. See § 8 of Chapter 61 of the Nebraska Unfair Life, Sickness and Accident Claims Settlement Practices Rule.

C. **State Privacy Laws, Rules, and Regulations**

The Privacy of Insurance Consumer Information Act, Neb. Rev. Stat. § 44-901 to 44-925, embodies Nebraska’s privacy law. The Privacy of Insurance Consumer Information Act governs the treatment of nonpublic personal health information and nonpublic personal financial information about individuals by all licensees of the Department of Insurance.

The act requires a licensee to provide notice to individuals about its privacy practices, describes the conditions under which a licensee may disclose nonpublic personal health information and nonpublic personal financial information about individuals to affiliated and non-affiliated third parties, and provides methods for individuals to prevent a licensee from disclosing that information. Neb. Rev. Stat. § 44-902.

The act applies to nonpublic personal financial information about individuals who obtain or are claimants or beneficiaries of products or services primarily for personal, family, or household purposes from licensees. The act does not apply to information about companies or about
individuals who obtain products or services for business, commercial, or agricultural purposes. The act also applies to all nonpublic personal health information. Neb. Rev. Stat. § 44-902.

Unless otherwise expressly prohibited by Chapter 44, the Director of the Department of Insurance may share documents, materials, or other information, including otherwise confidential and privileged documents, materials, or information, with other state, federal, foreign, and international regulatory and law enforcement agencies and with the National Association of Insurance Commissioners and its affiliates and subsidiaries if the recipient agrees to maintain the confidential or privileged status of the document, material, or other information. Neb. Rev. Stat. § 44-154.

The Director may also receive documents, materials, or other information, including otherwise confidential and privileged documents, materials, or information, from other state, federal, foreign, or international regulatory and law enforcement agencies and from the National Association of Insurance Commissioners and its affiliates and subsidiaries. The director shall maintain as confidential or privileged any document, material, or other information received pursuant to an information-sharing agreement entered into pursuant to this section with notice or the understanding that the document, material, or other information is confidential or privileged under the laws of the jurisdiction that is the source of the document, material, or information. Neb. Rev. Stat. § 44-154.

II. Principles of Contract Interpretation

Under Nebraska law, courts construe insurance policies to “give effect to the parties’ intentions at the time the contract was made.” Fireman’s Fund v. Structural Sys. Tech., Inc., 426 F. Supp. 2d 1009, 1023 (D. Neb. 2006). An insurance contract is interpreted according to the reasonable expectations of the insured at the time the contract was made. Id. In case of doubt, the policy is liberally construed in favor of the insured. Id. A contract is construed as a whole, and if possible, effect must be given to every part. Id. at 1024. In discerning the parties’ intentions, courts first determine as a matter of law whether a policy is ambiguous. Id. An insurance policy is ambiguous when a word, phrase, or provision in the contract has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings. Id. Where a clause in an insurance contract can be fairly interpreted in more than one way, there is an ambiguity to be resolved by the court as a matter of law. Id.

Nebraska courts first determine whether a contract is ambiguous “on an objective basis, not by the subjective contentions of the parties” and are therefore not compelled to find ambiguity simply because the parties suggest opposing interpretations. Id. The resolution of an ambiguity in an insurance policy turns not on what the insurer intended the language to mean, but what a reasonable person in the position of the insured would have understood it to mean at the time the contract was made. Id. If a court determines that a policy is ambiguous, it may “employ rules of construction and look beyond the language of the policy to ascertain the intention of the parties.” Id. Rules of construction require that in the case of ambiguities, the construction favorable to the insured prevails so as to afford coverage. Id. When an insurer wishes to limit its coverage, it is the duty of the insurer to draft the terms precisely. Id.
If the court determines, however, that a policy is not ambiguous then it “may not resort to rules of construction, and the terms are to be accorded their plain and ordinary meaning as the ordinary or reasonable person would understand them.” Id. In such a case, a court will seek to ascertain the intentions of the parties from the language of the policy. Id. When interpreting the plain meaning of the terms of the insurance policy, Nebraska courts prefer the “natural and obvious meaning of the provisions in a policy” over a “fanciful, curious, or hidden meaning.” Id. Ambiguity will not be read into policy language which is plain and unambiguous in order to construe against the preparer of the contract. Id.

III. Choice of Law

For choice of law questions, Nebraska generally follows the Restatement (Second) of Conflict of Laws. Fireman’s Fund v. Structural Sys. Tech., Inc., 426 F. Supp. 2d 1009, 1023 (D. Neb. 2006). Section 188 of the Restatement (Second) of Conflict of Laws states that the “rights and duties of the parties with respect to an issue in contract are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the transaction and the parties under the [general choice-of-law] principles stated in § 6.” Restatement (Second) of Conflict of Laws § 188 (1971).

Nebraska courts are guided by the Restatement § 193 to determine the choice of law with respect to an insurance contract. Fireman’s Fund, 436 F. Supp. 2d at 1023. The validity of a contract of fire, surety or casualty insurance and the rights created thereby are determined by the local law of the state which the parties understood to be the principal location of the insured risk during the term of the policy, unless with respect to the particular issue, some other state has a more significant relationship to the transaction and the parties. Id. Thus, there is a presumption in favor of the law of the “state which the parties understood to be the principal location of the insured risk during the term of the policy” with respect to casualty insurance. Id.

IV. Extra Contractual Claims Against Insurers: Elements and Remedies

A. Bad Faith

Nebraska law recognizes the tort of bad faith in both first-party and third-party contexts. Under Nebraska law the elements of bad faith are:

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

(2) the defendant’s knowledge or reckless disregard of the lack of a reasonable basis for denying the claim.


The requisite “knowledge or reckless disregard” may be inferred and imputed to an insurance company when “[t]here is reckless indifference to facts or to proof submitted by the insured. . . . This reckless indifference to the facts or to the proof submitted by an insured is shown by the insurer’s failure to conduct a proper investigation and subject the results
to a reasonable evaluation and review.” Ruwe v. Farmers Mut. United Ins. Co., 238 Neb. 67, 74, 469 N.W.2d 129 (1991). The requirement of intentional or reckless conduct arises from the recognition that an insurer must be given wide latitude in its ability to investigate claims and to resist false or unfounded efforts to obtain funds not available under the contract of insurance. Insurers are entitled to debate claims which are “fairly debatable” or subject to reasonable dispute without being subject to a claim for bad faith. LeRette v. American Medical Services, Inc., 270 Neb. 545, 705 N.W.2d 41 (2005). Whether a claim is “fairly debatable” or subject to reasonable dispute is appropriately decided by the Court as a matter of law. Id. Such a determination is based on the information available to the insurance company at the time the claim is presented. Id.

Recoverable damages in a bad faith action include:

1) Contract damages;

2) Consequential damages in contract;

3) Compensatory damages in tort (including damages for mental suffering); and

4) Reasonable attorney fees under NEB. REV. STAT. § 44-359.

Punitive damages are likely not available under Nebraska law. However, the comments to the introduction on the pattern jury instructions on damages suggest a contrary view. Nebraska Jury Instructions, Second Edition (NJI2d).

Where an unauthorized foreign insurer or alien insurer is sued on its insurance contract delivered to a Nebraska resident or a corporation authorized to do business in Nebraska, and the insurer has failed to make a payment in accordance with its policy within 30 days of a demand and prior to commencement of the suit, and such failure to pay is vexatious and without reasonable cause, then the court may allow the plaintiff a reasonable attorneys’ fee not to exceed twelve and one half percent of the judgment. NEB. REV. STAT. § 44-2012.

B. Fraud

The following elements must be proven by clear and convincing evidence to support an action for fraud:

(1) a false;

(2) representation was made;

(3) that when made was known to be false or was made recklessly or without knowledge of its truth and as a positive assertion;

(4) with the intention that the plaintiff rely upon it;

(5) the plaintiff did so rely; and

(6) the plaintiff suffered damage as a result.


A plaintiff can claim fraud through silence on the part of a defendant. To prove a claim for fraud by silence, a plaintiff must show that a duty to speak existed, that the information was material, and that the suppression of the information tended to induce action that the other party otherwise would
C. Intentional or Negligent Infliction of Emotional Distress (IIED or NIED)

The elements of intentional infliction of emotional distress are:

1. intentional or reckless conduct;
2. the conduct was so outrageous as to go beyond all possible bounds of decency and is to be regarded as atrocious and utterly intolerable in a civilized community; and
3. the conduct caused emotional distress so severe that no reasonable person should be expected to endure it, which requires an extremely disabling emotional response.

Brandon ex rel. Estate of Brandon v. County of Richardson, 261 Neb. 636, 624 N.W.2d 604 (2001).

D. State Consumer Protection Laws, Rules, and Regulations

Nebraska’s Consumer Protection Act, Neb. Rev. Stat. §§ 59-1601 to 59-1622, makes it unlawful to engage in unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or business. It is also unlawful to enter into any contract, combination, in the form of trust or otherwise, or conspiracy in restraint of trade or commerce. The Act provides a private cause of action for persons injured by violations of its terms, subject to a four-year statute of limitations. Neb. Rev. Stat. §§ 59-1609 to 59-1612. However, it appears recovery under the Consumer Protection Act requires establishing a breach of contract claim before the courts will consider a private claim. See Lynch v. State Farm, 275 Neb. 136, 745 N.W.2d 291 (2008) (it is necessary to establish a claim for breach of contract before the Court will consider claims under the Consumer Protection Act or the Uniform Deceptive Trade Practices Act which are dependent upon breach of contract.) A plaintiff prevailing on a claim under the Act may be entitled to recover costs, including a reasonable attorney’s fee. The court may also, in its discretion, increase the award of damages to an amount which bears a reasonable relation to the actual damages which have been sustained and which damages are not susceptible of measurement by ordinary pecuniary standards, except that such increased award shall not exceed one thousand dollars in some circumstances. Neb. Rev. Stat. § 59-1609. In addition to the private civil cause of action, the Act also provides for civil penalty for any person or business violating its terms; the Attorney General, acting in the name of the state, may seek recovery of the penalties. Neb. Rev. Stat. § 59-1614.

E. State Class Actions

One or more members of a class may sue or defend for the benefit of all when the question is one of a common or general interest of many persons, or when the parties are very numerous, and it may be impracticable to bring them all before the court. Neb. Rev. Stat. § 25-319.

A plaintiff in a class action must have an interest in the controversy common with all those for whom he sues, and there must be that unity of
interest between them so that the action may be brought by them jointly. Persons who have an interest adverse to those of the parties purported to be represented may not maintain a representative or class suit on behalf of the latter. Sarratt v. Lincoln Benefit Life Co., 212 Neb. 436, 323 N.W.2d 81 (1982).

V. Defenses In Actions Against Insurers

A. Misrepresentation/Rescission of Insurance Contract for Misrepresentation

An insurer in Nebraska may rescind an insurance policy when the insured has made a material misrepresentation. For a misrepresentation to be material, an insurer must be able to prove it would not have issued the policy had it been aware of the true facts. Lowry v. State Farm Mutual Auto. Ins. Co., 228 Neb. 171, 421 N.W.2d 775 (1998). An insurer may rescind a policy based on material misrepresentations made by affirmative statements, or by the silence of the insured when the insured had a duty to speak. Grone v. Lincoln Mutual Life Ins. Co., 230 Neb. 144, 430 N.W.2d 507 (1998). The misrepresentation must have been made knowingly with the intent to deceive, the insurer must have relied and acted on the false statement, and the insurer must have been deceived to its injury. Lowry, 421 N.W.2d at 778.

Under Nebraska law, the falsity of any statement in the application for any policy of sickness and accident insurance covered by Neb. Rev. Stat. §§ 44-709 to 44-767 may not bar the right to recovery thereunder unless such false statement materially affected either the acceptance of the risk or the hazard assumed by the insurer. Neb. Rev. Stat. § 44-710.14. Additionally, no oral or written misrepresentation or warranty made in the negotiation for a contract or policy of insurance by the insured is deemed material or defeats or avoids the policy, unless the misrepresentation or warranty deceived the company to its injury. Moreover, the breach of a warranty or condition in any contract or policy of insurance shall not avoid the policy nor avail the insurer to avoid liability, unless such breach shall exist at the time of the loss and contribute to the loss, anything in the policy or contract of insurance to the contrary notwithstanding. Neb. Rev. Stat. § 44-358.

B. Preexisting Illness or Disease Clauses

Preexisting condition means a condition whether physical or mental, regardless of the cause of the condition, for which medical advice, diagnosis, care, or treatment was recommended or received within the six-month period ending on the enrollment. Genetic information shall not be treated as a condition for which preexisting condition exclusion may be imposed in the absence of a diagnosis of the condition related to such information. Neb. Rev. Stat. § 44-6915.

Nebraska’s Long-Term Care Insurance Act, Neb. Rev. Stat. § 44-4513, provides that a long-term care insurance policy or certificate, other than certain group policies as defined in Neb. Rev. Stat. § 44-4508, may not define “preexisting condition” any more narrowly than to mean a condition for which medical advice or treatment was recommended by or received from a provider of health care services within six months preceding the effective date of coverage of an insured person. Neb. Rev. Stat. § 44-4513(2).

The statute also provides that a long-term care insurance policy or certificate may not exclude coverage for a loss or confinement arising from a
preexisting condition unless such loss or confinement occurs within six months of the policy’s effective date. Neb. Rev. Stat. § 44-4513(3).

Additionally, a health benefit plan may not deny, exclude, or limit benefits for a covered individual for losses incurred more than twelve months, or eighteen months in the case of a late enrollee, following the enrollment date of the individual’s coverage due to a preexisting condition or the first date of the waiting period for enrollment if that date is earlier than the enrollment date. A health benefit plan cannot define “preexisting condition more narrowly than it is defined in section 44-6915, or impose any preexisting condition exclusion relating to pregnancy as a preexisting condition”. Neb. Rev. Stat. § 44-6916.

Judicially, preexisting conditions are defined as diseases, conditions, or illnesses that are manifest or active or when there is a distinct symptom or condition from which one learned in medicine can with reasonable accuracy diagnose the disease Katskee v. Blue Cross/Blue Shield of Nebraska, 245 Neb. 808, 515 N.W.2d 645 (1994).

C. Statutes of Limitations

In Nebraska, there is a five-year statute of limitations for actions on written contracts. Neb. Rev. Stat. § 25-205. Actions based upon tort theories must be commenced within four years. Neb. Rev. Stat. § 25-207. Insurance companies may not issue policies of insurance in the State of Nebraska which provide that the statute of limitations is less than that prescribed by the laws of Nebraska Neb. Rev. Stat. § 44-357.

VI. Beneficiary Issues

Neb. Rev. Stat. § 44-370 (1988) allows a company issuing a life insurance policy to determine in its contract whether the insured has the ability to change the beneficiary of a life insurance policy or whether the designation of the beneficiary is irrevocable. See Universal Assurers Life Ins. Co. v. Hohnstein, 243 Neb. 359, 364, 500 N.W.2d 811, 815 (1993); see also Goodrich v. Equitable Life Assur. Soc. of the U.S., 111 Neb. 616, 197 N.W. 380, 382 (1924). However, “provisions of a life insurance contract providing for the manner in which an assignment thereof, or change of beneficiary, is to be made is incorporated therein for the benefit of the insurer.” Marley v. New York Life Ins. Co., 147 Neb. 646, 657, 24 N.W.2d 652, 658 (1946). Therefore, “if the insurer waives compliance with such provisions, the failure to comply therewith cannot be raised by third persons.” Id. A change in beneficiary becomes effective when the insured has “done all that he could to comply with the provisions of the policy.” Id. The standard requiring all reasonable efforts be made is based on the principle of equity. Id.

It does not matter whether the insurer has actually made the change since “the insured may not be deprived of his right to make the change by the neglect of the company to perform a ministerial act.” Goodrich, 111 Neb. at 616, 197 N.W. at 382. The Nebraska Supreme Court has said that when an insurer reserves the right to consent to a change of beneficiary, this right of consent is “a purely formal matter.” Id., 111 Neb. at 616, 197 N.W. at 383.

In Nebraska, if a property settlement agreement is unambiguous “the effect of a decree must be declared in light of the literal meaning of the

VII. Interpleader Actions

A. Availability of Fee Recovery

There are no reported cases in Nebraska addressing the issue of whether attorney fees are recoverable in an interpleader action. However, in Nebraska, attorney fees are generally difficult to recover and “may be recovered in a civil action only where provided for by statute or when a recognized and accepted uniform course of procedure has been to allow recovery of attorney fees.” Eicher v. Mid. Am. Fin. Inv. Corp., 270 Neb. 370, 381, 702 N.W.2d 792, 806 (2005).

B. Differences in State vs. Federal Circuit

The requirements for interpleader in Nebraska state court are more stringent than they are in federal court because Nebraska, unlike the federal courts, has retained the four requirements from equity jurisprudence. Those requirements are as follows: (1) the claimants must all be claiming the same property or fund, (2) their claims must all be derived from a common source, (3) the stakeholder must be disinterested, and (4) the stakeholder must not be independently liable to any of the claimants. See Ehlers v. Perry, 242 Neb. 208, 211, 494 N.W.2d 325, 329 (1993); Strasser v. Commercial Nat. Bank, 157 Neb. 570, 572–73, 60 N.W.2d 672, 674 (1953).

In contrast, at the federal level, persons having claims against the plaintiff may be joined as defendants and required to interplead when their claims are such that the plaintiff is or may be exposed to double or multiple liability. It is not ground for objection to the joinder that the claims of the several claimants or the titles on which their claims depend to not have a common origin or are not identical but are adverse to and independent of one another. Fed.R.Civ.P. 22(1); see also Great Am. Ins. Co. v. Bank of Bellevue, 366 F. 2d 289, 293–94 (8th Cir. 1966).