I. Regulatory Limits on Claims-Handling

A. Timing for Responses and Determinations

The requirements for all health insurance policies delivered within South Dakota are contained in SDCL Title 58, Chapter 17. See SDCL §§ 58-17-1, 58-17-12. Every health insurance policy delivered or issued for delivery to any person in South Dakota must contain the provisions set forth in SDCL §§ 58-17-14 to 58-17-29 (inclusive). SDCL § 58-17-25 requires the following language (or its approved equivalent) to appear in all health insurance policies in South Dakota:

Time of payment of claims: Indemnities payable under this policy for any loss other than loss for which this policy provides any periodic payment, will be paid immediately upon receipt of due written proof of such loss. Subject to due written proof of loss, all accrued indemnities for loss for which this policy provides periodic payment will be paid __________ (insert period for payment which must not be less frequently than monthly) and any balance remaining unpaid upon termination of liability will be paid immediately upon receipt of due written proof.

A clean claim, which is defined by SDCL § 58-12-19 as a claim for which there is no need for additional information to determine eligibility or adjudicate the claim, must be paid, denied, or settled within thirty calendar days after receipt by the carrier if submitted electronically, and within forty-five calendar days after receipt by the carrier, and if the claim is payable under the plan. SDCL § 58-12-20. If the resolution of an otherwise clean claim requires additional information, the carrier must, within thirty calendar days after receipt of the claim, give the provider, policyholder, insured, or parties, as appropriate, a full explanation of what additional information is needed in order to determine eligibility or adjudicate the claim. Id. The person receiving the request must submit all additional information within thirty calendar days. Id.

No private right of action exists for violation of the time limits. SDCL § 58-12-21. However, a bad faith action may be predicated upon failure to timely pay a claim. Isaac v. State Farm Mut. Auto Ins. Co., 522 N.W.2d 752 (S.D. 1994).
The requirements for all life insurance and annuities are contained in SDCL Title 58, Chapter 15. All life insurance policies must contain a timely payment of claims provision. SDCL § 58-15-26. “[W]hen a policy becomes a claim by the death of the insured, settlement shall be made upon receipt of due proof of death and, at the insurer's option, surrender of the policy or proof of the interest of the claimant, or both. If an insurer shall specify a particular period prior to the expiration of which settlement shall be made, such period may not exceed two months from the receipt of such proof. Id.

For any private placement policy, settlement may be made in cash, or, if permitted under the policy, by distributing assets of the separate account to the claimant with the consent of the policyholder, so long as the fair market value of the assets are independently verified at the time of the insurer’s disbursement. Id. In any private placement policy, the obligation of the insurer to settle that portion of the policy attributable to separate account assets is subject to the liquidity of the assets and the insurer must settle such portion of the policy as and when the assets can be, by their respective terms, either converted to cash, which may be later than two months after the insurer’s receipt of due proof of death, or otherwise dispersible by the insurer. Id.

Cash surrender value is covered by SDCL § 58-15-33. For policies where the cash surrender value is in excess of one million dollars at the date of death, settlement may be made in cash or, if allowed under the policy, by distributing assets of the separate account to the claimant with the consent of the policyholder. Id.

B. **Standards for Determinations and Settlements**

All claims must be settled as soon as possible and in accordance with the terms of the insurance contract. SDCL § 58-19-31. Claims which are fairly debatable may be challenged by the insurer. Matter of Cert. of Question of Law, 399 N.W.2d 320, 324 (S.D. 1987).

A frequent issue appearing in claims handling and settlements is the presence of a minor plaintiff or defendant. To sue or defend on behalf of an incompetent person or a minor, a guardian or conservator must be appointed by the court to act on behalf of the party. Fink v. Fink, 17 N.W.2d 717, 718 (S.D. 1945). SDCL § 15-6-17(c) governs representation of minors and incompetent persons.

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

The director of insurance of the South Dakota Division of Insurance must promulgate rules to protect the privacy of “personally identifiable health care and medical information, data, and records.” SDCL § 58-2-40. The regulations promulgated by the Division of Insurance apply to individuals licensed or registered under SDCL Title 58 to work in the insurance industry. Id.

Chapter 20:06:45 of the South Dakota Administrative Rules (ARSD) contains comprehensive privacy regulations. In addition to the privacy regulations, South Dakota statute specifically provides that all medical records for individuals receiving mental health services are to remain private and confidential. SDCL §§ 27A-12-25, 27A-12-25.1, & 27A-12-26. Section 27A-12-26 covers limited circumstances in which disclosure of the
information may be made. Similarly, all information obtained during the course of a worker’s compensation proceeding “shall be used for no other purpose than for the information of the department or insurance company with reference to the duties imposed upon the department.” SDCL § 62-6-5.

In addition, the South Dakota Supreme Court has recognized that a physician may be held civilly liable by his or her patient for making unauthorized disclosures of confidential information. See Schaffer v. Spicer, 215 N.W.2d 134 (S.D. 1974).

II. Principles of Contract Interpretation

Rights and obligations under an insurance contract are determined by the language of the contract, which must be construed according to the plain meaning of its terms. State Farm Fire & Cas. Co. v. Harbert, 2007 S.D. 107, ¶ 17, 741 N.W.2d 228. Contracts are not given broad interpretations so as to produce an absurd result. Union Pac. R.R. v. Certain Underwriters at Lloyd’s London, 2009 SD 70, ¶ 14, 771 N.W.2d 611. An absurd result is one that is unreasonable or ridiculously incongruous. Id.

When an insurance contract is fairly susceptible of different interpretations, ambiguities will generally be construed in favor of the insured. Friesz ex rel. Friesz v. Farm & City Ins. Co., 2000 S.D. 152, ¶ 8, 619 N.W.2d 677. However, a court may not seek out a strained or usual meaning for the benefit of the insured. Id.

III. Choice of Law

South Dakota employs the significant relationship approach set forth by the Restatement (Second) in a choice of laws analysis. Chambers v. Dakotah Charter, Inc., 488 N.W.2d 63, 66-68 (S.D. 1992). Myriad factors are considered under the approach. Id. First, the rights and liabilities of the parties are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties considering the following:

1. A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.
2. When there is no such directive, the factors relevant to the choice of the applicable rule of law include:
   a. the needs of the interstate and international systems,
   b. the relevant policies of the forum,
   c. the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
   d. the protection of justified expectations,
   e. the basic policies underlying the particular field of law
   f. certainty, predictability and uniformity of result, and
   g. ease in the determination and application of the law to be applied.
Second, the contacts to be taken into account in applying the above principles to determine the law applicable to an issue include:

(a) the place where the injury occurred,
(b) the place where the conduct causing the injury occurred,
(c) the domicile, residence, nationality, place of incorporation and place of business of the parties, and
(d) the place where the relationship, if any, between the parties is centered.

These contacts are to be evaluated according to their relative importance with respect to the particular issue. Id.

IV. Extra Contractual Claims Against Insurers: Elements and Remedies

A. Bad Faith

The elements of a bad faith action include: (1) the existence of a contract of insurance; (2) a loss compensable under the terms of the policy; (3) the absence of a reasonable basis for denial of the claim; and (4) that the insurer knew there was not a reasonable basis to deny the claim, or that the insurer acted in reckless disregard of the existence of a reasonable basis to deny the claim. Brooks v. Milbank Ins. Co., 2000 SD 16, ¶ 15, 605 N.W.2d 173; see also Roger M. Baron, When Insurance Companies Do Bad Things; The Evolution of the “Bad Faith” Causes of Action in South Dakota, 44 S.D. L. Rev. 471 (1999).

An insurer’s knowledge of the lack of a reasonable basis may be inferred and imputed to a company where there is a reckless disregard of a lack of reasonable basis for denial or a reckless indifference to facts or proofs submitted by the insured. Matter of Cert. of a Question of Law, 399 N.W.2d 320, 324 (S.D. 1987). However, insurers may challenge claims that are fairly debatable. Id. The following eight factors are often analyzed in determining whether an insurer has acted in good faith:

(1) the strength of the injured claimant’s case on the issues of liability and damages;
(2) attempts by the insurer to induce the insured to contribute to a settlement;
(3) failure of the insurer to properly investigate the circumstances so as to ascertain the evidence against the insured;
(4) the insurer’s rejection of advice of its own attorney or agent;
(5) failure of the insurer to inform the insured of a compromise offer;
(6) the amount of financial risk to which each party is exposed in the event of a refusal to settle;
(7) the fault of the insurer in inducing the insurer’s rejection of the compromise offer by misleading it as to the facts; and
(8) any other factors tending to establish or negate bad faith on the part of the insurer.
An action for bad faith may be maintained by an insured against his insurer in a third-party coverage situation, e.g., refusing to settle a third-party tort-feasor’s claim with an excess judgment against the insured. Crabb v. Nat’l Indem. Co., 205 N.W.2d 633, 638 (S.D. 1973). However, a third party who is injured by the insured cannot sue the insured’s insurance company for bad faith, but, following an excess judgment, the defendant-insured may assign his bad faith claim to the prevailing plaintiff. See id. at 633, 638 (holding that excess judgment need not be paid by insured prior to assigning bad faith claim).

The remedy for an insurer’s bad faith is an award of compensatory damages. Biegler v. Am. Family Mut. Ins. Co., 2001 SD 13, ¶ 43, 621 N.W.2d 592 (quoting SDCL § 21-3-1). Compensatory damages are provided for by SDCL § 21-3-1, which states in part: “the measure of damages, except where otherwise expressly provided by this code, is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not.” Additionally, punitive damages are available in all tort actions, including bad faith actions. Harter v. Plains Ins. Co., 1998 SD 59, ¶ 35, 579 N.W.2d 625. If a party can establish that an insured has refused to pay insurance benefits and that such refusal is vexatious or without reasonable cause, the trial court must allow the plaintiff a reasonable sum for attorney fees. SDCL § 58-12-3.

B. Fraud

The elements of a claim for deceit include: (1) false representation of material fact; (2) the representation is made without reasonable grounds for believing it to be true; (3) the representation was made to induce the other to act; (4) the other person acted in reliance upon it; and (5) the other person was damaged by the reliance. Grynberg v. Citation Oil & Gas Corp., 1997 SD 121, ¶ 24, 573 N.W.2d 493.


C. Intentional or Negligent Infliction of Emotional Distress

1. Intentional Infliction of Emotional Distress

A claim of intentional infliction of emotional distress is proved by establishing that the defendant: (1) by extreme and outrageous conduct, (2) acted intentionally or recklessly to cause the plaintiff severe emotional distress, (3) which conduct in fact caused the plaintiff severe distress, and (4) the plaintiff suffered an extreme, disabling emotional response to the defendant’s conduct. Citibank, (S.D.), N.A. v. Hauff, 2003 SD 99, ¶ 23, 668 N.W.2d 528 (quoting Harris v. Jefferson Partners, L.P., 2002 SD 132, ¶ 11, 653 N.W.2d 496, 500). South Dakota law defines extreme and outrageous conduct as conduct that exceeds all bounds usually tolerated by decent society and which is of a nature especially calculated to cause, and does cause, serious mental distress. Stene v. State Farm Mut. Auto. Ins. Co., 1998 SD 95, ¶ 32, 583 N.W.2d 399.
2. **Negligent Infliction of Emotional Distress**

Negligent infliction of emotional distress requires proof of the following elements: (1) the defendant engaged in negligent conduct; (2) the plaintiff suffered emotional distress; (3) the defendant’s conduct was the proximate cause of the plaintiff’s emotional distress; and (4) the plaintiff suffered a physical manifestation of the distress. Nelson v. WEB Water Dev. Ass’n, 507 N.W.2d 691, 699 (S.D. 1993). In addition, there must be some causal nexus between the distress and the physical injury. *Id.*

For both negligent and intentional infliction of emotional distress claims, a successful plaintiff is entitled to compensatory damages in an “amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not.” SDCL § 21-3-1. For any tort action, punitive damages are available, if “the defendant has been guilty of oppression, fraud, or malice, actual or presumed . . . .” SDCL § 21-3-2.

**D. State Consumer Protection Laws and Regulations**

South Dakota’s Deceptive Trade Practices Consumer Protection law is codified at SDCL Title 37, Chapter 24. A deceptive act or practice is broadly defined under SDCL § 37-24-6, and every violation of the law is a criminal offense. SDCL § 37-24-6. In addition, any person who claims to have been adversely affected by a violation of the law may bring a civil action for actual damages. SDCL § 37-24-31.

**E. State Class Actions**

In order to obtain certification of a class, plaintiffs must satisfy all of the prerequisites set forth in SDCL § 15-6-23(a), which states:

One or more members of a class may sue or be sued as representative parties on behalf of all only if:

1. The class is so numerous that joinder of all members is impracticable;
2. There are questions of law or fact common to the class;
3. The claims or defenses of the representative parties are typical of the claims or defenses of the class;
4. The representative parties will fairly and adequately protect the interests of the class; and
5. The suit is not against this state for the recovery of a tax imposed by chapter 10-39, 10-39A, 10-43, 10-44, 10-45, 10-46, 10-46A, 10-46B, or 10-52.

In addition to satisfying all of the above conditions, plaintiffs must meet at least one of the provisions of SDCL 15-6-23(b), which provides:

An action may be maintained as a class action if the prerequisites of § 15-6-23(a) are satisfied, and in addition:
(1) The prosecution of separate actions by or against individual members of the class would create a risk of:

(A) Inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class; or

(B) Adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) The party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate permanent injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) The court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include:

(A) The interest of members of the class in individually controlling the prosecution or defense of separate actions;

(B) The extent and nature of any litigation concerning the controversy already commenced by or against members of the class;

(C) The desirability or undesirability of concentrating the litigation of the claims in the particular forum;

(D) The difficulties likely to be encountered in the management of a class action.

A trial court’s refusal to certify a class action will only be reversed for an abuse of discretion. Swanson v. Sioux Valley Empire Elec. Ass’n, Inc., 535 N.W.2d 755, 759 (S.D. 1995). As soon as practicable after the commencement of a class action, the court must determine by order whether the class action is to be maintained. SDCL 15-6-23(c)(1).

V. Defenses In Actions Against Insurers

A. Misrepresentation/Rescission of Insurance Contract For Misrepresentation

SDCL § 58-11-44 covers applications for insurance or annuity and provides:

All statements and descriptions in any application for an insurance policy, certificate, or annuity contract, by or on behalf of the insured or annuitant, shall be deemed to be representations and not warranties. No misrepresentation, omission,
concealment of fact, or incorrect statement prevents a recovery under the policy or contract unless:

(1) Fraudulent or an intentional misrepresentation of a material fact; or
(2) Material either to the acceptance of the risk, or to the hazard assumed by the insurer; or
(3) The insurer in good faith would either not have issued the policy or contract, or would not have issued it at the same premium rate, or would not have issued a policy or contract in as large an amount, or would not have provided coverage with respect to the hazard resulting in the loss, if the true facts had been made known to the insurer as required either by the application for the policy or contract or otherwise.

With respect to any health insurance policy or certificate, subdivisions (2) and (3) of this section only apply to excepted benefits.

No applicant, insured, or annuitant may be asked to warranty or certify whether or not the applicant, insured, or annuitant is insurable.

Pursuant to SDCL § 58-11-44.2, § 58-11-44 does not prohibit an insurer or an insurer's representative from:

(1) Requesting information from an applicant for the purpose of determining that applicant's insurability; or
(2) Underwriting an application or declining coverage based upon that applicant's failure to meet the insurer's underwriting requirements.

In Braaten v. Minn. Mut. Life Ins. Co., the court held that the insurer properly denied insurance benefits where the insured misrepresented the fact that he had been treated for alcoholism and where the insured died as a result of conditions related to alcoholism. 302 N.W.2d 48 (S.D. 1981); but see SDCL § 58-17-30.8 (noting that exclusion of insurance benefits based on the insured being under the influence of alcohol is now illegal in South Dakota). In Herdman v. Nat’l Reserve Life Ins. Co., the court held that benefits were properly denied where the insured died of heart-related health problems but failed to disclose his prior heart problems because “reasonable minds could not differ that there were misrepresentations, omissions and concealments in the application and that the matters so misrepresented increased the risk of loss.” 209 N.W.2d 364, 369 (S.D. 1973); see also Econ. Fire & Cas. Co. v. Tri-State Ins. Co., 827 F.2d 373 (8th Cir. 1987) (speaking to non-disclosure of teen driver as member of household and user of insured vehicle).

B. Preexisting Illness or Disease Clauses

1. Statutes

No policy or certificate may deny, exclude, or limit benefits for a covered individual for claims incurred more than twelve months following the
effective date of the person’s coverage due to a preexisting condition. SDCL 58-17-97(1). Moreover, no policy or certificate may define a preexisting condition more restrictively than:

(a) A condition that would have caused an ordinarily prudent person to seek medical advice, diagnosis, care, or treatment during the twelve months immediately preceding the effective date of coverage;
(b) A condition for which medical advice, diagnosis, care, or treatment was recommended or received during the twelve months immediately preceding the effective date of coverage; or
(c) A pregnancy existing on the effective date of coverage.

SDCL 58-17-97(2). Additionally, “[a]ny person qualifying for coverage in the risk pool pursuant to SL 2015, Ch 249 §§ 28, 29 and who does not enroll during the sixty-day open enrollment period is subject to a six-month waiting period for preexisting conditions as defined by § 58-17-84.” SDCL SL 2015, Ch 249 §§ 28, 29.

2. Case Law

No case law specifically addresses preexisting illness or disease claims. However, in general, “the scope of coverage of an insurance policy is determined from the contractual intent and the objectives of the parties as expressed in the contract.” St. Paul Fire & Marine Ins. Co. v. Schilling, 520 N.W.2d 884, 887 (S.D.1994) (citing City of Fort Pierre v. United Fire & Cas. Co., 463 N.W.2d 845, 848 (S.D.1990); Black Hills Kennel Club, Inc. v. Fireman's Fund Indem. Co., 77 S.D. 503, 94 N.W.2d 90 (1959)).

C. Statutes of Limitations

An action is commenced when the summons is served upon the defendant. SDCL § 15-2-30. Contract, statutory, and fraud claims must be brought within six years of the date of accrual of the claim. SDCL § 15-2-13. South Dakota’s catchall limitations period is three years and includes claims for negligence, bad faith, intentional infliction of emotional distress, and negligence infliction of emotional distress. SDCL § 15-2-14.

VI. Beneficiary Issues

Generally, an insured may change the beneficiary on his or her insurance policy by adhering to the procedures prescribed in the policy. In re Estate of Trautman, 2006 SD 39, ¶ 11, 713 N.W.2d 600. The South Dakota Supreme Court has also recognized an equitable exception, which is dependent on the circumstances, and allows for “that to be done which ought in equity to have been done.” Stemler v. Stemler, 141 N.W. 780, 784 (S.D. 1913).

Divorce affects a beneficiary designation. SDCL § 29A-2-804; see also Buchholz v. Storsve, 2007 SD 101, 740 N.W.2d 107 (discussing South Dakota’s adoption of the Uniform Probate Code, which resulted in the enactment of SDCL § 29A-2-804). Unless otherwise expressly provided for by a governing instrument, court order or contract relating to the division of the marital
estate made between the divorced individuals, the divorce or annulment of a marriage automatically revokes an ex-spouse’s beneficiary designation. Id.

VII. Interpleader Actions

A. Availability of Fee Recovery

South Dakota has no reported case law discussing whether fees and costs are recoverable in an interpleader action.

B. Differences in State vs. Federal Circuit

There is no substantive difference between the federal interpleader standards and the South Dakota interpleader standards. Compare SDCL § 15-6-22, with Fed. R. Civ. P. 22.