I. Regulatory Limits on Claims-Handling

A. Timing for Responses and Determinations

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.

A bad faith action may be predicated upon failure to timely pay a claim, therefore an insurer has a strong incentive to provide a timely response. Isaac v. State Farm Mut. Auto Ins. Co., 522 N.W.2d 752 (S.D. 1994). Distinguished by Plucker v. United Fire & Casualty Company, 2016 Wl 5415655 (D.S.D. Sept. 28, 2016); which held that when the processing of medical bills commences as soon as received, attorney’s fees will not be awarded.

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

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,
the basic policies underlying the particular field of law
(certainty, predictability and uniformity of result, and
ease in the determination and application of
the law to be applied.

Id. at 68. 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.

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

IV.  Duties Imposed by State Law

A.  Duty to Defend

1.  Standard for Determining Duty to Defend

"Insurers are obliged to keep separate the independent duty to defend
from the obligation to indemnity their insureds." St. Paul Fire & Marine
insurer has a continuing duty to defend until it obtains a complete release
on behalf of its insured." Meier v. McCord, 2001 SD 103, ¶ 12, 632 N.W.2d
477 (citing SDCL § 58-11-9.6). The insurer bears the burden of showing that
it had no duty to defend its insured. Biegl.v. Am. Family Mut. Ins. Co.,
2001 SD 13, ¶ 20, 621 N.W.2d 592. To meet its burden, the insurer must
demonstrate that the claim clearly falls outside of the policy coverage. Id.
(quoting State Farm Mut. Auto Ins. Co. v. Wertz, 540 N.W.2d 636, 638 (S.D.
1995)). If doubt exists after considering the complaint, and when
appropriate, other record evidence, such doubts must be resolved in favor of
the insured. Id.

2.  Issues with Reserving Rights

In general, an insurer who defends an insured waives the right to assert
policy defenses unless it first notifies the insured that it disclaims
liability under the policy. St. Paul Fire & Marine Ins. Co. v. Engelmann,
2002 SD 8, ¶ 16, 639 N.W.2d 192. However, if the insurer adequately reserves
its right to assert the noncoverage defense later, it will not be bound by
the judgment. Id. at ¶ 17 (quoting Gray v. Zurich Inc. Co., 65 Cal.2d 263,
279, 419 P.2d 168, 178, 54 Cal. Rptr. 104, 114 (1966)).

A reservation of rights is a notice to the insured that the insurer
will defend the insured but that the insurer is not waiving any defenses it
may have under the policy. Id. at ¶ 19. Through a reservation of rights,
insurers can provide the insured a defense to liability and reserve for later
the question whether the policy provides coverage.  

In South Dakota, acting under a reservation of rights is an established procedure.  

**B. Duty to Settle**

Implied in every insurance contract is a covenant that neither party will do anything to injure the rights of the other in receiving the benefits of the agreement.  Harter v. Plains Ins. Co., 1998 SD 59, ¶ 19, 579 N.W.2d 625 (quoting Helmbolt v. LeMars Mut. Ins. Co. Inc., 404 N.W.2d 55, 57 (S.D. 1987)). The covenant includes a duty to settle claims without litigation in appropriate cases.  

A failure to make a good faith settlement may provide a basis for a bad faith claim if the judgment against the insured exceeds the policy limits.  See, e.g., Crabb v. Nat'l Indem. Co., 205 N.W.2d 633, 639 (S.D. 1973). In considering what constitutes good or bad faith, the interests of the insured must be given equal consideration with those of the insurer; in making a decision to try a case or settle, the insurer must in good faith view the circumstances as it would if there were no policy limits applicable to the claim.  

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

**A. Bad Faith**

1. **First Party**

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 insured 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.


2. Third Party

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 tortfeasor’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 (IIED or NIED)

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

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, Rules 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.

VI. Discovery Issues in Actions Against Insurers

A. Discoverability of Claims Files Generally

It is a rare case where the insurer’s decisions and conduct in the underlying litigation would be admissible in a first party bad faith claim. Dakota, Minn. & E. R.R. Corp. v. Acuity, 2009 SD 69, ¶ 42 771 N.W.2d 623. The appropriate inquiry in deciding the relevance of such evidence is whether the insurer’s post-filing conduct sheds light on the reasonableness of the insurer’s decision in denying insurance benefits. Id. The court should also consider the evidence and weigh the probative value of any potentially relevant evidence against the danger of unfair prejudice. Id. at ¶ 43 (citing SDCL §19-19-403).

B. Discoverability of Reserves

There is no reported case law in South Dakota regarding the discoverability of reserve information in suits brought against insurers. The scope of discovery in general is provided by SDCL § 15-6-26(b)(1), which provides:
Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

C. Discoverability of Existence of Reinsurance and Communications with Reinsurers

SDCL § 15-6-26(b)(2) provides:

A party may obtain discovery of the existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment. Information concerning the insurance agreement is not by reason of disclosure admissible in evidence at trial. For purposes of this paragraph, an application for insurance shall not be treated as part of an insurance agreement.

Accordingly, an insured suing his insurer may obtain information regarding reinsurance information. There is no reported case law, however, regarding whether communications between an insurer and its reinsurer are discoverable.

D. Attorney/Client Communications

Communications between an insurer and its attorney are privileged and not discoverable, however, if the insurer raises the defense of advice of counsel, the privilege is waived to the extent of the defense.

We do not believe, as some courts have held, that the defense of advice of counsel waives the attorney/client privilege with respect to all communication between client and counsel concerning the transaction for which counsel’s advice was sought. We find that the attorney/client privilege is waived only to the extent necessary to reveal the advice given by an attorney that is placed in issue by the defense of advice of counsel.


VII. Defenses in Actions Against Insurers
A. Misrepresentations/Omissions: During Underwriting or During Claim

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 Herdmann 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. Failure to Comply with Conditions

A common coverage defense asserted by insurers is an insured’s failure to provide timely notice of suit as the insurance contract requires. Compliance with such a condition, however, does not provide an absolute defense:

The modern view of notice requirements focuses on the purpose for the requirement and realizes that it is not to provide a technical escape hatch to allow the insurance company to deny coverage. The modern view does not belittle the need for notice to the insurer, but instead puts the notice requirement in its proper perspective. The clear purpose of the notice provision is to protect the ability of the insurer to prepare a viable defense by preserving its ability fully to investigate the accident. In other words, notice requirements are included in insurance contracts to protect the insurance company’s interest from being prejudiced. If delay notification has not prejudiced the insurer’s ability to defend a claim, then there is no reason to strictly enforce the notice requirement.

Auto-Owners Ins. Co. v. Hansen Hous., Inc., 2000 SD 13, ¶ 31, 604 N.W.2d 504 (quotation and internal citations omitted). Logically, compliance with other conditions would also provide a defense to coverage if the non-compliance resulted in prejudice to the insurer.

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

A consent judgment is subject to collateral attack when the facts show that the judgment or settlement was entered into fraudulently, collusively, or in bad faith. Wolf v. Royal Ins. Co., 472 N.W.2d 233, 235 n.1 (S.D. 1991). Generally, when an insurer declines coverage, an insured may settle rather than proceed to trial to determine its legal liability. Id. at 235. “However, the amount must be reasonable in view of the size of possible recovery and degree of probability of claimant’s success against the insured. The insurer’s denial of coverage must be unjustified before policy provisions, such as a cooperative clause, are considered waived.” Id.

D. 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.

VIII. Trigger and Allocation Issues for Long-Tail Claims

A. Trigger of Coverage

South Dakota has no reported case law discussing long-tail claims.
B. **Allocation Among Insurers**

South Dakota has no reported case law discussing long-tail claims.

IX. **Contribution Actions**

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


B. **Elements**

South Dakota has no reported case law specifically discussing the elements of a claim for contribution in insurance. However, cases cited as persuasive in South Dakota identify the elements of (1) both companies insure the same interest, (2) one company is not the primary insurer, and (3) one company paid more than its pro rata share, as being elements of equitable contribution. See *Nat’l Farmers Union Prop. & Cas. Co. v. Farm & City Ins. Co.*, 2004 SD 124, ¶ 16, 689 N.W.2d 619.