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). See SDCL §§ 58-17-12. 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,
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) (holding that when the processing of medical bills commences as soon as received, attorney’s fees will not be awarded)).

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 Determination 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.

**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 contact 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.

*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 Ins. Co. v. Engelmann*, 2002 SD 8, ¶ 18, 639 N.W.2d 192. “The liability 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. *Biegler 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. *Id.* In South Dakota, acting under a reservation of rights is an established procedure. *Id.*

B. State Privacy Laws; Insurance Regulatory Issues; Arbitration/Mediation

1. Criminal Sanctions

Every violation of South Dakota’s Deceptive Trade Practices Consumer Protection law is a criminal offense. See SDCL § 37-24-6 (“Each act in violation of this section under one thousand dollars is a Class 1 misdemeanor. Each act in violation of this statute over one thousand dollars but under one hundred thousand dollars is a Class 6 felony. Each act in violation of this section over one hundred thousand dollars is a Class 5 felony.”).

2. The Standards for Compensatory and Punitive Damages

Compensatory damages are calculated as the “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. The Supreme Court of
South Dakota reviews an award of punitive damages under a five-factor test: (1) the amount of compensatory damages awarded, (2) the nature and enormity of the wrong, (3) the intent of the wrongdoer, (4) the wrongdoer's financial condition, and (5) all of the circumstances attendant to the wrongdoer's actions. *Biegler v. Am. Family Mut. Ins. Co.*, 2001 S.D. 13, ¶ 48, 621 N.W.2d 592, 605.

3. **Insurance Regulations to Watch**

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 suffered as a result of such act or practice. SDCL § 37-24-31.

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.

4. **State Arbitration and Mediation Procedures**

Under SDCL § 21-25A-3, the arbitration provisions of SDCL Ch. 25-25 do not apply to insurance policies. SDCL § 21-25A-3. “[e]very provision in any such policy requiring arbitration or restricting a party thereto or beneficiary thereof from enforcing any right under it by usual legal proceedings in ordinary tribunals or limiting the time to do so is void and unenforceable.” *Id.* However, Section 21-25A-3 does not impair the enforcement of or invalidate a contractual provision for arbitration entered into between insurance companies. *Id.*

South Dakota has adopted the Uniform Mediation Act. SDCL Ch. 19-13A. The scope of the Uniform Mediation Act is listed at SDCL § 19-13A-3. The Uniform Mediation Act establishes a privilege of confidentiality for mediators. See SDCL §§ 19-13A-4; 19-13A-8. A mediation communication is privileged and is not subject to discovery or admissible in evidence in a proceeding unless waived under SDCL § 19-13A-5. The following privileges apply: (1) a mediation party may refuse to disclose and may prevent disclosure of a mediation communication, (2) A mediator may refuse to disclose mediation communications and may prevent any other person from disclosing a mediation communication of the mediator, and (3) a nonparty participant may refuse to disclose and prevent any other person from disclosing the nonparty’s mediation communication. *Id.* There are various exceptions to the privilege, listed at SDCL § 19-13A-6, such as a threat or statement of a plan to inflict bodily injury or commit a crime of violence. SDCL § 19-13A-6.
Before accepting a mediation, an individual who is requested to serve as a mediator shall analyze whether there is a conflict of interest. SDCL § 19-13A-9. An attorney or other individual designated by a party may accompany the party to and participate in a mediation. SDCL § 19-13A-10. SDCL Ch. 19-13A governs mediations pursuant to a referral or agreement to mediate made on or after January 1, 2008. SDCL § 19-13A-15.

5. **State Administrative Entity Rule-Making Authority**

Under SDCL § 58-32-56, the director of insurance may adopt reasonable rules and regulations consistent with chapter 58-32 for the following purposes: (1) effectuation of the chapter, (2) establishment of procedures for eligibility of proposed coverages for export, and (3) establishment, procedures, and operations of any voluntary organization of brokers or others designated to assist the brokers to comply with chapter 58-32. SDCL § 58-32-56.

There are also specific provisions directing the director of insurance to promulgate rules. For example, 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.*

V. **EXTRACONTRACTUAL CLAIMS AGAINST INSURERS: ELEMENTS AND REMEDIES**

A. **Bad Faith Claim Handling/Bad Faith Failure to Settle Within Limits**

1. **First Party**

A claim of first-party bad faith is an intentional tort that “typically occurs when an insurance company consciously engages in wrongdoing during its processing or paying of policy benefits to its insured.” *Hein v. Acuity*, 2007 S.D. 40, ¶ 10, 731 N.W.2d 231, 235. In order to be successful on a claim of bad faith, a plaintiff must prove: “(1) an absence of a reasonable basis for denial of policy benefits, and (2) the insurer’s knowledge of the lack of a reasonable basis for denial.” *Harvieux v. Progressive N. Ins. Co.*, 2018 S.D. 52, ¶ 13, 915 N.W.2d 697, 701, reh'g denied (Aug. 13, 2018) (citing *Mordhorst v. Dakota Truck Underwriters & Risk Admin. Servs.*, 2016 S.D. 70, ¶ 9, 886 N.W.2d 322, 324).

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 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**

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.

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). The South Dakota Supreme Court has indicated that claim files should be submitted to the court for an in camera review so the court can determine whether they are relevant to the litigation and whether attorney client privilege prohibits their discoverability. *Andrews v. Ridco, Inc.*, 2015 S.D. 24, ¶ 43, 863 N.W.2d 540, 555

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.

SDCL § 15-6-26(b)(1).

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.

SDCL § 58-11-44. 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. 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 Clause

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. Preexisting Illness or Disease Clauses

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).

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)).

E. Statutes of Limitations and Repose

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. There are several other more specific statutes of limitations based on the specific claim. E.g., SDCL § 15-2-14.1 (“An action against a physician, … for malpractice, error, mistake, or failure to cure, whether based upon contract or tort, can be commenced only within two years after the alleged malpractice, error, mistake, or failure to cure shall have occurred…”).

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.

X.  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. Id.

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. Id. at 635.

XI.  LH&D BENEFICIARY ISSUES

A.  Change of Beneficiary

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).
B. **Effect of Divorce on Beneficiary Designation**

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.* Compare *Am. Gen. Life Ins. Co. v. Jenson*, No. CIV. 11-5057-JLV, 2012 WL 848158, at *17 (D.S.D. Mar. 12, 2012) (finding the effect of SDCL § 29A-2-804 creates a rebuttable statutory presumption that can be overcome by a clear indication of a contrary intent).

XII. **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**

The state and federal rules for interpleader actions differ in actual language; however, 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.