

NORTH DAKOTA

I. REGULATORY LIMITS ON CLAIMS HANDLING

A. Timing for Responses and Determinations

North Dakota law imposes requirements regarding the timing for responses and determinations. Under section 26.1-04-03(9)(j), an insurer must affirm or deny coverage within a “reasonable time” after proof of loss has been submitted. Under N.D.C.C. § 26.1-36-37.1, an insurer must pay the claim or the portion of the claim that isn’t contested, deny the claim, or make an initial request for additional information within fifteen business days after receiving a health insurance proof of loss form. If a claim, or a portion of a claim, is disputed, the insured or its assignee must be notified in writing that the claim is contested and the reasons for the dispute must be stated. *Id.*; see also N.D.C.C. § 26.1-33-05 (providing provisions required in life policy); N.D.C.C. § 26.1-36-04 (providing provisions required in accident and health policy provisions). Otherwise, N.D.C.C. § 26.1-04-03 governs the handling of insurance claims.

B. Standards for Determination and Settlements

Claims handling standards are set forth in N.D.C.C. § 26.1-04-03. The North Dakota Supreme Court has not determined whether the statute creates a private right of action. *Dvorak v. Am. Family Mut. Ins. Co.*, 508 N.W.2d 329, 333 (N.D. 1993). However, the Court has ruled that an allegation of a single act of misconduct is insufficient as a matter of law to support a claim under section 26.1-04-03. *Id.* at 332-33. A plaintiff must make a showing the defendant insurance company is involved in prohibited conduct with a “frequency indicating a general business practice.” *Id.* at 333 (quoting *Volk v. Wis. Mortg. Assur. Co.*, 474 N.W.2d 40, 45 (N.D. 1991)). For purposes of N.D.C.C. Ch. 26.1-04, the repeated denial of the same claim on the same grounds constitutes a single act as opposed to a pattern or practice. *Estvold Oilfield Servs., Inc. v. Hanover Ins. Co.*, No. 1:17-CV-016, 2018 WL 1996453, at *6 (D.N.D. Apr. 27, 2018).

The District Court for the District of North Dakota has determined that section 26.1-04-03 does not provide a private right of action. *Farmer’s Union Cent. Exch., Inc. v. Reliance Ins. Co.*, 675 F. Supp. 1534, 1538 (D.N.D. 1987), rev’d on other grounds, 921 F.2d 822 (8th Cir. 1990).

II. PRINCIPLES OF CONTRACT INTERPRETATION

North Dakota law covering insurance contracts is set forth in N.D.C.C. Ch. 26.1-29. Insurance policy interpretation is a question of law, which is fully reviewable on appeal. *K & L Homes*, 2013 ND 57, ¶ 8, 829 N.W.2d 724. In insurance contract interpretation cases, a court will construe the specific language of the insurance contract to determine and give effect to the mutual intention of the parties. *Grinnell Mut. Reinsurance Co. v. Thies*, 2008 ND 164, ¶ 7, 755 N.W.2d 852. If the language of the insurance contract is clear, there is no room for construction. *State v. N.D. State Univ.*, 2005 ND 75, ¶ 12, 694 N.W.2d 255. If coverage depends on an undefined term, the plain ordinary meaning of the term is applied. *Id.* Insurance contracts are construed as a whole to give meaning and effect to each clause, if possible. *Id.*

While insurance policies are regarded as adhesion contracts, a court will not rewrite a contract to impose liability of the policy unambiguously precludes coverage. *Hughes v. State Farm Mut. Auto Ins. Co.*, 236 N.W.2d 870, 885 (N.D. 1976). A court may, however, invoke the Doctrine of Reasonable Expectations in the case of ambiguity in order to fulfill a reasonable belief of the insured. *See Mills v. Agrichemical Aviation, Inc.*, 250 N.W.2d 663 (N.D. 1977) (stating “[w]hat the one hand bestows, the other imperceptibly takes away. This kind of legerdemain by draftsmanship, the lack of notice to the buyer of the policy exclusions, the inconspicuous placement of the exclusionary clauses in the contracts, their obscure relationship to each other, and the reasonable belief of the insured that he was securing general liability coverage . . . all foster coverage expectations which must be fulfilled in this instance.”).

An insurance company transacting insurance business in North Dakota must obtain a certificate of authority. N.D.C.C. § 26.1-02-07. The failure to obtain a certificate of authority does not impair the validity of any act or contract of the company and does not prevent the company from defending any civil acting in any North Dakota court, however it prevents a company from maintaining a civil action in any court in North Dakota to enforce any right, claim or demand arising out of the transaction of insurance business until the company has obtained a certificate of authority. *Id.*

III. CHOICE OF LAW

North Dakota applies the significant contacts rule to choice of law problems in cases arising from contract. *Issendorf v. Olson*, 194 N.W.2d 750 (N.D. 1972). This approach analyzes all of the facts and circumstances surrounding the occurrence, and gives controlling effect to the law of the jurisdiction which has the greatest interest in the specific issue raised in the litigation due to the relationship or contact with the occurrence or the parties. *Nat’l Farmers Union Prop. & Cas. Co. v. Dairyland Ins. Co.*, 485 F. Supp. 1009, 1011 (D.N.D. 1980).

IV. DUTIES IMPOSED BY STATE LAW

A. Duty to Defend

1. Standard for Determining Duty to Defend

Whether an insurer has a duty to defend its insured is generally determined by the insurance policy and the claimant's pleadings. *Applegren v. Milbank Mut. Ins. Co.*, 268 N.W.2d 114, 116 (N.D. 1978). A liability insurer has a duty to defend its insured if the allegations of the complaint could support recovery upon a risk covered under the insurer's policy. *Kyllo v. Northland Chem. Co.*, 209 N.W.2d 629, 634 (N.D. 1973). The test is whether the complaint gives rise to potential liability or a possibility of coverage under the insurance policy. *Nodak Mut. Ins. Co. v. Heim*, 1997 ND 36, ¶ 11, 559 N.W.2d 846, 849. Any doubt about an insurer's duty to defend is resolved in favor of the insured. *Id.* at ¶ 11. However, an insurer has no duty to defend an action if there is no possibility of coverage under the policy. *Ohio Cas. Ins. v. Clark*, 1998 ND 153, ¶ 8, 583 N.W.2d 377.

When several claims have been made against an insured, the insurer has a duty to defend the entire lawsuit if there is a possibility of coverage or potential for one of the claims. *Heim*, 1997 36 at ¶ 11. Attorney fees are recoverable if the insured can show a breach of the insurer's duty to defend. *Farmers Union Mut. Ins. Co. v. Decker*, 2005 ND 173, ¶ 13, 704 N.W.2d 857. An insurance company is only responsible for the portion of attorney fees incurred from the time the duty to defend arose. *Id.*

2. Issues with Reserving Rights

An insurer can reserve rights to involve coverage defenses under the policy. See *Midwest Med. Ins. Co. v. Doe*, 1999 ND 17, ¶ 6, 589 N.W.2d 581, 583. However, if an insurer defends its insured without reservation of rights, it essentially admits liability under the policy. *Nat'l Farmers Union Prop. & Cas. Co. v. Michaelson*, 110 N.W.2d 431, 438 (N.D. 1961). This, however, does not create insurance by estoppel, and such action does not operate to create a policy which was previously nonexistent. *Id.*

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

1. Criminal Sanctions

In North Dakota, there are several criminal sanctions under title 26.1 of the North Dakota Century Code. For example, a person may not commit a fraudulent insurance act. N.D.C.C. 26.1-02.1-02.1(1). As explained in more detail below, a fraudulent insurance act includes various enumerated acts or omissions committed by a person knowingly and with intent to defraud as outlined in N.D.C.C. § 26.1-02.1-01(5). A person also may not knowingly or intentionally interfere with the enforcement or investigation of suspected violations. N.D.C.C. 26.1-02.1-02.1(2). In

addition, a person convicted of a felony involving dishonesty or breach of trust may not participate in the business of insurance. N.D.C.C. 26.1-02.1-02.1(3)(a). A person in the business of insurance also may not knowingly or intentionally permit a person convicted of a felony involving dishonesty or breach of trust to participate in the business of insurance. N.D.C.C. 26.1-02.1-02.1(3)(b). If a person violates any of the above prohibitions, he or she is guilty of varying degrees of punishments outlined in N.D.C.C. § 26.1-02.1-05.

A person also may not act or hold oneself out to be an insurance producer, insurance consultant, or surplus lines insurance producer unless properly licensed. N.D.C.C. 26.1-26-03. A person also may not sell, solicit, or negotiate insurance for any class of insurance unless the person is licensed for that line of authority under North Dakota law. *Id.* A person who willfully violates this prohibition is guilty of a class C felony. *Id.*

It is also a crime for any unauthorized insurance company or other insurance entity or any representative of the same that transacts any unauthorized act of insurance business is guilty of a class C felony. N.D.C.C. § 26.1-02-25. There are several other penalties throughout this title of the North Dakota Century Code. *See e.g.*, N.D.C.C. § 26.1-27-03 (providing that a person who holds oneself out to be an administrator without a certificate of authority is guilty of a class C felony).

2. The Standards for Compensatory and Punitive Damages

A plaintiff is entitled to recover under tort law all damages proximately caused by the insurer's conduct, including punitive damages. *Ingalls v. Paul Revere Life Ins. Grp.*, 1997 ND 43, ¶ 47, 561 N.W.2d 273. Compensatory damages are awarded to compensate a victim for his injuries. Under N.D.C.C. § 32-03-20, “[f]or the breach of an obligation not arising from contract, the measure of damages, except when otherwise expressly provided by law, is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not.” N.D.C.C. § 32-03-20

In contrast, a finding of oppression, fraud, or malice, actual or presumed, is a prerequisite to an award of punitive damages, also known as exemplary damages. N.D.C.C. § 32-03.2-11; *see also Cont'l Cas. Co. v. Kinsey*, 499 N.W.2d 574, 579 (N.D. 1993). N.D.C.C. § 32-03.2-11 states “[i]n any action for the breach of an obligation not arising from contract, when the defendant has been guilty by clear and convincing evidence of oppression, fraud, or actual malice, the court or jury, in addition to the actual damages, may give damages for the sake of example and by way of punishing the defendant.” N.D.C.C. § 32-03.2-11(1). A party may not seek exemplary damages when the action is commenced; rather, after filing the suit, the party may make a motion to amend the pleadings to claim exemplary damages along with an applicable legal basis for an award of the same. *Id.* For the purposes of statute of limitations, the pleadings amended in this manner relate back to the time the action was commenced. *Id.* If the trier of fact determines that exemplary damages are to be awarded, the amount of exemplary damages may not exceed two times the amount of compensatory damages or two hundred fifty thousand

dollars, whichever is greater. N.D.C.C. § 32–03.2–11(4). A jury must not be informed of the limit on exemplary damages. *Id.* N.D.C.C. § 32-03.2-11 provides guidance with regard to exemplary damages in North Dakota.

3. Insurance Regulations to Watch

N.D. Century Code § 26.1-02-27 states that “[a]n insurance company, nonprofit health service corporation, or health maintenance organization may not disclose to a nonaffiliated third party a customer’s nonpublic personal information contrary to the provisions of title V of the Gramm-Leach-Bliley Act [Pub. L. 106-102; 113 Stat. 1436].” The commissioner shall adopt rules as may be necessary to carry out § 26.1-02-27. *Id.* The rules must be consistent with and no more restrictive than the model regulation adopted by the national association of insurance commissioners entitled “Privacy of Consumer Financial and Health Information Regulation.” *Id.* N.D. Century Code § 26.1-02-27 does not create a private right of action. *Id.*

North Dakota law requires confidentiality of medical information. An insurance company must adopt and maintain procedures to ensure confidentiality in compliance with all federal and state law and regulations and professional ethical standards. N.D.C.C. § 26.1-36-12.4(1); *see also* HIPPA regulations. Data or information pertaining to the health, diagnosis or treatment of a person covered under a policy or contract, or a prospective insured, regardless of the format, must remain confidential and cannot be disclosed unless a valid exception excuses or required disclosure. *Id.* If the data or information identifies the covered person or prospective insured, disclosure is proper if the person consents by a written, dated, and signed approval. N.D.C.C. § 26.1-36-12.4(1)(a). If the data or information identifies the health care provider, disclosure is proper if the provider consents by a written, dated and signed approval. N.D.C.C. § 26.1-36-12.4(1)(b). Disclosure may be made if the data or information does not identify either the covered person or the prospective insured or the health care provider and the disclosure is for use for statistical purposes or research. N.D.C.C. § 26.1-36-12.4(1)(c). Disclosure is proper if required by statute or court order, N.D.C.C. § 26.1-36-12.4(1)(d), or if the information is pertinent in the event of a claim or litigation between the covered person or prospective insured and the insurer. N.D.C.C. § 26.1-36-12.4(1)(e).

4. State Arbitration and Mediation Procedures

North Dakota has adopted the Uniform Arbitration Act. *See* N.D.C.C. Ch. 32-29.3. “An arbitrator may conduct an arbitration in such manner as the arbitrator considers appropriate for a fair and expeditious disposition of the proceeding. The authority conferred upon the arbitrator includes the power to hold conferences with the parties to the arbitration proceeding before the hearing and among other matters, determine the admissibility, relevance, materiality, and weight of any evidence.” N.D.C.C. § 32-29.3-15(1). If an arbitrator orders a hearing, the arbitrator shall set a time and place and give notice of the hearing not less than five days before the hearing begins. N.D.C.C. § 32-29.3-15(3). At the hearing, a party to the arbitration proceeding has a right to be heard, to present evidence material to the controversy, and to cross-examine

witnesses appearing at the hearing. N.D.C.C. § 32-29.3-15(4). This section of the code provides a more detailed recitation of the specific procedures of arbitration in North Dakota.

Mediation is defined in Rule 8.8 of the North Dakota Rules of Court as “a process in which a nonjudicial neutral mediator facilitates communication between parties to assist the parties in reaching voluntary decisions related to their dispute.” N.D.R.Ct. 8.8(a)(1)(A). With regard to this form of alternate dispute resolution (“ADR”), within fourteen days or within a time frame directed by the court prior to the pretrial conference, a Rule 8.8 statement to the court is required to be filed with the district court. N.D.R.Ct. 8.8(b) (an example form of this statement is found in appendix F of the North Dakota Rules of Court). The statement must certify that the parties discussed ADR participation with each other, and that each party has discussed ADR with his or her attorney, if applicable. *Id.* If a party does not wish to participate in a form of ADR, the statement must contain his or her reason for not participating. *Id.* If the parties agree to ADR, but cannot agree on the neutral third party to facilitate the process, the court may appoint a person from the ADR roster maintained by the North Dakota State Court Administrator’s office. *Id.*

5. State Administrative Entity Rule-Making Authority

Each biennium, the legislative management appoints an administrative rules committee. N.D.C.C. 54-35-02.5. The administrative rules committee reviews administrative rules adopted under pursuant to the Administrative Agencies Practice Act (N.D.C.C. Ch. 28-32). N.D.C.C. 54-35-02.6 The administrative rules committee considers oral and written comments received concerning administrative rules, and determines (1) whether they are properly implementing legislative purpose and intent, (2) whether there is dissatisfaction with administrative rules or with statutes relating to administrative rules, and (3) whether there are unclear or ambiguous statutes relating to administrative rules. *Id.* The committee will then make any rule change recommendations to the appropriate agencies and makes recommendations to legislative management for the amendment or repeal of statutes relating to administrative rules. In North Dakota, the Commissioner of Insurance serves as the regulator of insurance related issues. *See e.g.*, N.D.C.C. § 26.1-26-11.1 (authorizing the commissioner of insurance to “adopt rules to implement licensing procedures and requirements specific to each line of insurance and each product type within each line of insurance.”). The administrative code that concerns the insurance commissioner can be found in Title 45 of the North Dakota Administrative Code.

V. EXTRACONTRACTUAL CLAIMS AGAINST INSURERS: ELEMENTS AND REMEDIES

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

1. First Party

An insurance company has a duty to act fairly and in good faith in dealing with its insured. *Hartman v. Miller*, 2003 ND 24, ¶ 12, 656 N.W.2d 676. “The gravamen of the test for bad faith is

whether the insurer acts unreasonably in handling an insured's claim." *Id.*; see also N.D. J.I. Civ. 19.10. An insurer is not guilty of bad faith for denying a claim when the claim is fairly debatable or when the insurer has a reasonable basis for denying payment. *Fetch v. Quam*, 2001 ND 48, ¶ 18, 623 N.W.2d 357.

2. Third-Party

The insurer generally does not owe a third party claimant a duty of good faith and fair dealing where no contract or other rights confer such a right upon the third party. *Dvorak v. Am. Family Mut. Ins. Co.*, 508 N.W.2d 329, 331 (N.D. 1993). However, where the insurance contract designates the third party as an intended claimant or third party beneficiary, the insurer may owe the third party a duty of good faith and fair dealing in handling the claim. *Szarkowski v. Reliance Ins. Co.*, 404 N.W.2d 502 (N.D. 1987).

A plaintiff is entitled to recover under tort law all damages proximately caused by the insurer's conduct, including punitive damages. *Ingalls v. Paul Revere Life Ins. Grp.*, 1997 ND 43, ¶ 47, 561 N.W.2d 273. A plaintiff may also recover fees and costs incurred in seeking contract benefits. *State Farm Fire & Cas. Co. v. Sigman*, 508 N.W.2d 323, 325-27 (N.D. 1993).

B. Fraud

Insurance fraud is codified in N.D.C.C. § 26.1-02.1. A "fraudulent insurance act" is defined in N.D.C.C. § 26.1-02.1-01(5) as including the following acts or omissions committed by a person knowingly and with the intent to defraud:

- a. Presenting, causing to be presented, or preparing with knowledge or belief that it will be presented to or by an insurer, reinsurer, insurance producer, or any agent thereof, false or misleading information as part of, in support of, or concerning a fact material to one or more of the following:
 - (1) An application for the issuance or renewal of an insurance policy or reinsurance contract;
 - (2) The rating of an insurance policy or reinsurance contract;
 - (3) A claim for payment or benefit pursuant to an insurance policy or reinsurance contract;
 - (4) Premiums paid on an insurance policy or reinsurance contract;
 - (5) Payments made in accordance with the terms of an insurance policy or reinsurance contract;
 - (6) A document filed with the commissioner or the chief insurance regulatory official of another jurisdiction;
 - (7) The financial condition of an insurer or reinsurer;

- (8) The formation, acquisition, merger, reconsolidation, dissolution, or withdrawal from one or more lines of insurance or reinsurance in all or part of this state by an insurer or reinsurer;
 - (9) The issuance of written evidence of insurance;
 - (10) The reinstatement of an insurance policy; or
 - (11) The formation of an agency, brokerage, or insurance producer contract.
- b. Solicitation or acceptance of new or renewal insurance risks on behalf of an insurer, reinsurer, or other person engaged in the business of insurance by a person who knows or should know that the insurer or other person responsible for the risk is insolvent at the time of the transaction.
 - c. Removal, concealment, alteration, or destruction of the assets or records of an insurer, reinsurer, or other person engaged in the business of insurance.
 - d. Theft by deception or otherwise, or embezzlement, abstracting, purloining, or conversion of monies, funds, premiums, credits, or other property of an insurer, reinsurer, or person engaged in the business of insurance.
 - e. Attempting to commit, aiding or abetting in the commission of, or conspiring to commit the acts or omissions specified in this section.
- C. Intentional or Negligent Infliction of Emotional Distress**

The elements of a cause of action for intentional infliction of emotional distress are (1) extreme and outrageous conduct; (2) that is intentional or reckless; and (3) that the conduct caused severe emotional distress. *Hougum v. Valley Mem'l Homes*, 1998 ND 24, ¶ 26, 574 N.W.2d 812. “The ‘extreme and outrageous’ threshold is narrowly limited to conduct that exceeds ‘all possible bounds of decency’ and which would arouse resentment against the actor and lead to an exclamation of “‘outrageous’” by an average member of the community.” *Id.* The Court makes the initial determination as to whether a jury could reasonably regard the defendant’s conduct as extreme and outrageous. *See Sec. Nat’l Bank v. Wald*, 536 N.W.2d 924, 927 (N.D. 1995). However, “[i]f reasonable persons could differ, a plaintiff is entitled to have the trier-of-fact decide whether the conduct is sufficiently extreme and outrageous to result in liability.” *Dahlberg v. Lutheran Soc. Servs.*, 2001 ND 73, ¶ 21, 625 N.W.2d 241.

The elements of a cause of action for negligent infliction of emotional distress are (1) the defendant created an unreasonable risk of physical injury to plaintiff; and (2) the defendant’s negligence caused the plaintiff to suffer emotional distress that resulted in bodily harm. *Muchow v. Lindblad*, 435 N.W.2d 918, 921 n.4 (N.D. 1989). “The bodily harm essential to sustaining a claim for relief for negligent infliction of emotional distress is defined . . . as ‘any physical impairment of the condition of another’s body, or physical pain or illness.’” *Id.* at 921. In sum, “transitory, non-recurring physical phenomena do not constitute bodily harm, but long

and continued physical phenomena may constitute physical illness and bodily harm.” *Hartman v. Estate of Miller*, 2003 ND 24, ¶ 32, 656 N.W.2d 676.

D. State Consumer Protection Laws, Rules and Regulations

North Dakota’s Unfair Trade Practices Law, N.D.C.C. Ch. 51-10, and Consumer Fraud and Unlawful Credit Practices statute, N.D.C.C. § 51-15-02, protect consumers from unfair methods of competition and deceptive acts or practices in trade and commerce. No implied private right of action exists under Chapter 51-15. N.D.C.C. § 51-15-02.3. The North Dakota Supreme Court has not determined whether these laws apply in the insurance context.

The North Dakota Prohibited Practices in the Insurance Business Act is set forth in N.D.C.C. Chapter 26.1-04. Among prohibited practices are unfair methods of competition or unfair and deceptive acts or practices, *see* N.D.C.C. § 26.1-04-02; *see also* N.D.C.C. § 26.1-04-03; coercing purchaser or borrower to insure with a particular company or insurance producer, *see* N.D.C.C. § 26.1-04-04; discrimination by life insurance companies and rebates and inducements by insurance producers, *see* N.D.C.C. § 26.1-04-05; factoring in visual acuity in life or accident and sickness contracts, *see* N.D.C.C. § 26.1-04-05.1; insured persons and applicants for insurance accepting rebates, *see* N.D.C.C. § 26.1-04-06; and misrepresentations of terms of policy and future dividends, *see* N.D.C.C. § 26.1-04-07.

VI. DISCOVERY ISSUES IN ACTIONS AGAINST INSURERS

A. Discoverability of Claims Files Generally

The North Dakota Supreme Court has not determined whether claims files are discoverable. However, when considering a discovery request for disclosure of an insurer’s entire claims file, the North Dakota Supreme Court held that compelling a blanket authorization for disclosure of the insurer’s entire claims file without a specific examination of the requested information to analyze whether it is in fact discoverable is a misapplication of the law. *W. Horizons Living Ctrs. v. Feland*, 2014 ND 175, ¶ 19, 853 N.W.2d 36.

B. Discoverability of Reserves

The North Dakota Supreme Court has not determined whether reserves are discoverable.

C. Discoverability of Existence of Reinsurance and Communications with Reinsurers

Although North Dakota has not addressed whether reinsurance information is discoverable, it would likely be inadmissible at trial. *See, i.e., W. Nat. Mut. Ins. Co. v. Univ. of N.D.*, 2002 ND 63, ¶ 37, 643 N.W.2d 4.

D. Attorney/Client Communications

The North Dakota Supreme Court has determined that the insured may invoke attorney/client privilege in refusing to disclose, and to prevent any other person from disclosing, confidential communications pursuant to N.D.R. Civ. P 26. See *W. Horizons Living Ctrs. v. Feland*, 2014 ND 175, ¶ 19, 853 N.W.2d 36. If further demand is made, the district court should conduct an in camera hearing to determine the discoverability of the purportedly protected documents and communications. *Id.*

VII. DEFENSES IN ACTIONS AGAINST INSURERS

A. Misrepresentations/Omissions: During Underwriting or During Claim

An oral or written misrepresentation made in the negotiation of an insurance contract or policy by the insured or in the insured's behalf is material or defeats or avoids the policy or prevents its attaching only if the misrepresentation has been made with actual intent to deceive or unless the matter misrepresented increased the risk of loss. N.D.C.C. § 26.1-29-25. If the representation is false in a material point, the insured may rescind the insurance contract from the time when the representation becomes false. N.D.C.C. § 26.1-29-24. Materiality is to be determined not by the event, but solely by the probable and reasonable influence of the facts upon the party to whom the communication is due in forming the party's estimate of the disadvantages of the proposed contract or in making the party's inquiries. N.D.C.C. § 26.1-29-17.

B. Failure to Comply with Conditions

An insurance policy may declare that a violation of specific provisions of the policy will avoid the policy. Absent such a declaration, the breach of an immaterial provision does not avoid the insurance policy. N.D.C.C. § 26.1-30-17. Similarly, North Dakota follows a "notice prejudice" rule with respect to notice of claims under occurrence-based liability policies, requiring an insurer to show actual prejudice resulting from untimely notice. *Finstad v. Steiger Tractor, Inc.*, 301 N.W.2d 392, 397-98 (N.D. 1981) (applying the notice-prejudice rule to a group accident policy). The North Dakota Supreme Court has specifically withheld from ruling on whether the "notice prejudice" rule applies to claims submitted under claims made and reported policies. See *Emp'rs Reinsurance Corp. v. Landmark*, 547 N.W.2d 527, 533 (N.D. 1996).

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

A settlement between the insured defendant and plaintiff that is reduced to judgment is enforceable against an insurer if: (1) the insurer receives notice of the agreement; (2) the agreement is not the result of fraud or collusions; and (3) the agreement is reasonable. *Sellie v. N.D. Ins. Guar. Ass'n*, 494 N.W.2d 151, 155 (N.D. 1992) (citing *Miller v. Shugart*, 316 N.W.2d 729 (Minn. 1982)). Notice is not required if the insurer has refused to defend and has abandoned its insured. See *id.* at 156. "The burden of proof is on the claimant, the plaintiff judgment creditor, to show that the settlement is reasonable and prudent." *Id.* at 159 (quoting *Miller*, 316 N.W.2d

at 735). “The test as to whether the settlement is reasonable and prudent is what a reasonably prudent person in the position of the defendant would have settled for on the merits of plaintiff’s claim.” *Id.* The reasonableness of a *Miller-Shugart* settlement is a question of fact. *D.E.M. v. Allickson*, 555 N.W.2d 596, 603 (N.D. 1996).

D. Preexisting Illness or Disease Clauses

“Each accident and health insurance policy delivered or issued for delivery to any person in this state must contain a provision specifying the additional exclusions or limitations, if any, applicable under the policy with respect to a disease or physical condition of a person, not otherwise excluded from the person’s coverage by name or specific description effective on the date of the person’s loss, which existed prior to the effective date of the person’s coverage under the policy. Any such exclusion or limitation may only apply to a preexisting disease or physical condition for which medical advice or treatment was received by the person during the two-year period before the effective date of the person’s coverage. The exclusion or limitation may not apply to loss incurred or disability commencing after the end of the two-year period commencing on the effective date of the person’s coverage.” N.D.C.C. § 26.1-36-04(1)(d).

The case of *Daley* dealt with an insurance company who denied coverage for a knee injury because, as excluded under the preexisting condition clause of the contract, the injury wasn’t a “covered sickness.” *Daley v. Am. Family Mut. Ins. Co.*, 355 N.W.2d 812 (N.D. 1984). In reversing the trial court’s denial of a jury trial to the insurer, the North Dakota Supreme Court found that the insurer had raised genuine issues of material fact as to its defense based on the pre-existing condition exclusion on the policy. *Id.* at 815-16.

E. Statutes of Limitations and Repose

In deciding the appropriate statute of limitations in a given case, courts consider the actual nature of the subject matter of the action and not the form of the remedial procedure. *Johnson v. Nodak Mut. Ins. Co.*, 2005 ND 112, ¶ 12, 699 N.W.2d 45. Actions based upon breach of an insurance contract or tort (i.e. bad faith breach of implied covenant of good faith) are generally subject to a six-year limitations period. N.D.C.C. § 28-01-16; *Bender v. Time Ins. Co.*, 286 N.W.2d 489 (N.D. 1979). The cause of action accrues when the aggrieved party discovers the facts that constitute the basis for its cause of action or claim for relief. *Hebron Pub. Sch. Dis. No. 13 v. U.S. Gypsum Co.*, 475 N.W.2d 120, 126 (N.D. 1991).

The six-year limitations period does not apply to actions against automobile insurers to recover no-fault benefits. See N.D.C.C. § 26.1-41-19; *Johnson v. Nodak Mut. Ins. Co.*, 2005 ND 112, ¶ 12, 699 N.W.2d 45 (“We conclude the specific language in N.D.C.C. § 26.1-41-19 governs “all actions for basic . . . no-fault benefits,” rather than the more general statute of limitations for actions upon a contract”). If no basic or optional excess no-fault benefits have been paid for loss, an action for the benefits may be commenced not later than two years after the injured person suffers the loss and either knows, or in the exercise of reasonable diligence should know, that

the loss was caused by the accident, or not later than four years after the accident, whichever is earlier. N.D.C.C. § 26.1-41-19(1). If basic or optional excess no-fault benefits have been paid for loss, an action for recovery of further benefits for the loss by either the same or another claimant may be commenced not later than four years after the last payment of benefits. *Id.*

VIII. TRIGGER AND ALLOCATION ISSUES FOR LONG-TAIL CLAIMS

A. Trigger of Coverage

In determining the appropriate trigger of coverage under property insurance policy for loss due to progressive damage, North Dakota courts will look to the language of the policy itself and the nature of loss or damage. *Kief Farmers Co-op Elevator Co. v. Farmland Mut. Ins. Co.*, 534 N.W.2d 28, 35 (N.D. 1995). North Dakota courts will not rewrite insurance contracts to exclude coverage on the basis of a manifestation theory. *Id.*

B. Allocation Among Insurers

Allocation of losses for the same casualty between an insured's separate policies is governed by the contracts. *Keifer v. Gen. Cas. Co. of Wis.*, 381 N.W.2d 205, 208 (N.D. 1986). "Multiple coverages should be construed equitably in light of the particular facts of the case." *Houser v. Gilbert*, 389 N.W.2d 626, 630 (N.D. 1986).

IX. CONTRIBUTION ACTIONS

A. Claim in Equity vs. Statutory

Under North Dakota law, "[c]ontribution can be awarded only when the parties are jointly liable on a common liability or burden." *U.S. Fid. & Guar. Co. v. N.D. Workmen's Comp. Bureau*, 275 N.W.2d 618, 623 (N.D. 1979). "A liability insurer, who by payment has discharged in full or in part the liability of a tort-feasor and has thereby discharged in full its obligation as insurer, is subrogated to the tort-feasor's right of contribution to the extent of the amount it has paid in excess of the tort-feasor's pro rata share of the common liability." N.D.C.C. § 32-38-01(5). However, "[t]his provision does not limit or impair any right of subrogation arising from any other relationship." *Id.*

B. Elements

Despite recognizing a right to contribution, North Dakota has no reported cases specifically identifying the elements necessary to receive contribution.

X. DUTY TO SETTLE

Insurers have an implied duty to negotiate a good faith settlement. *Dvorak v. Am. Family Mut. Ins. Co.*, 508 N.W.2d 329, 331-32 (N.D. 1993). However, an insurer does not breach its

implied duty to settle a case where the insurer has a right of reimbursement from the insured. *Cont'l Cas. Co. v. Kinsey*, 513 N.W.2d 66, 69 (N.D. 1994). The test is whether an insurer acts reasonably in settling the claim; the North Dakota Supreme Court has held an insurer does not act in bad faith by reasonably refusing to settle a claim where liability is fairly debatable. *Hanson v. Cincinnati Life Ins. Co.*, 1997 ND 230, ¶ 26, 571 N.W.2d 363.

XI. LH&D BENEFICIARY ISSUES

A. Change of Beneficiary

“Every life insurance policy issued or delivered in this state by any life insurance corporation doing business in the state must contain the entire contract between the parties.” N.D.C.C. 26.1-33-01. However, indorsement of a change of beneficiary accomplished in accordance with a life policy becomes a part of the contract, and the new beneficiary becomes entitled to the insurance proceeds by the terms of the policy. *Anderson v. Northern & Dakota Trust Co.*, 288 N.W. 562 (N.D. 1939).

B. Effect of Divorce on Beneficiary Designation

In North Dakota, a beneficiary’s rights in an insurance policy are not affected by a divorce between the beneficiary and the insured, however, the beneficiary may still contract away an interest in the policy through a settlement agreement even if the beneficiary is not formally changed. *Ridley v. Metro. Fed. Bank FSB*, 544 N.W.2d 867, 868-869 (N.D. 1996).

XII. INTERPLEADER ACTIONS

A. Availability of Fee Recovery

North Dakota has no reported case law discussing whether fees and costs are recoverable in a state interpleader action. However, the Federal District Court of North Dakota has awarded costs and fees in interpleader actions. *See, e.g., Hartford Life & Acc. Ins. Co. v. Rogers*, No. 3:13-CV-101, 2014 WL 4980891, *3 (D.N.D. Oct. 3, 2014) (“A court may award attorneys’ fees and costs to an interpleader plaintiff ‘if the plaintiff is (1) a disinterested stakeholder, (2) who had conceded liability, (3) has deposited the disputed funds with the court, and (4) has sought a discharge from liability.’” (citing *Metro. Life Ins. Co. v. Kubich*, 83 Fed. Appx. 425, 431 (3d Cir. 2003))).

B. Differences in State vs. Federal

There are no substantive difference between the federal interpleader standards and the North Dakota interpleader standards. *Compare* N.D.R. Civ. P. 22, *with* Fed. R. Civ. P. 22.