

## Minnesota

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### REGULATORY LIMITS ON CLAIMS HANDLING

#### Timing for Responses and Determinations

The Minnesota Unfair Claims Practices Act governs time limits to respond to insurance claims. See Minn. Stat. § 72A.201. The Act provides that, except for health insurance claims, insurers must acknowledge a claim (providing specific information listed in the statute) and provide necessary forms and instructions with which to process the claim within ten business days after receipt of the claim. Minn. Stat. § 72A.201, subd. 4(1). In addition, an insurer must reply within ten business days to all communications about a claim to which a response is requested or needed. Minn. Stat. § 72A.201, subd. 4(2). Finally, unless modified by policy language or other law, notice of acceptance or denial of a claim must be given within thirty business days after receipt of notification of a claim, Minn. Stat. § 72A.201, subd. 4(3), and within sixty days of receipt of a proof of loss, Minn. Stat. § 72A.201, subd. 4(11). If the investigation of a claim cannot reasonably be completed within the time allowed, an insurer may take additional time to investigate but must notify the insured or claimant of that fact within the thirty-day time period and explain why the investigation is not complete and the expected date of completion. *Id.*

#### Standards for Determination and Settlements

Claims filing and handling and settlement practices are also governed by Minnesota's Unfair Claims Practices Act. See Minn. Stat. § 72A.201, subd. 4-6.

Minn. Stat. § 72A.201, subd. 5, governs general settlement offers and agreements and provides that the following acts by an insurer, adjuster, self-insured, or self-insurance administrator constitute unfair settlement practices:

- Making a payment, settlement, or settlement offer without explaining what the payment is for;
- Making an offer to settle one portion of a claim contingent upon an agreement to settle another portion;
- Refusing to pay elements of a claim for which there is no good faith dispute;
- Threatening to cancel, rescind, or not renew a policy if no settlement is reached;
- Failing to issue settlement proceeds within five days of a settlement agreement or the performance of conditions by the claimant, whichever is later;
- Failing to inform the insured of the policy provision(s) under which payment is made;
- Settling or attempting to settle a claim under cash value provisions for less than the value of the property;

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- Settling or offering to settle a claim with an insured under replacement value provisions for less than the sum necessary to replace the damaged item with one of like kind and quality, including applicable taxes, license, and transfer fees;
- Reducing or attempting to reduce any settlement for depreciation of an item not adversely affected by age, use, or obsolescence; and
- Reducing or attempting to reduce a settlement unless the resale value of the item has increased over the pre-loss value by the repair of the damage.

Minn. Stat. § 72A.201, subd. 6, provides specific rules regarding the handling of settlement offers and agreements for automobile insurance claims.

While the Act does not provide for a private cause of action, *Morris v. Am. Family Mut. Ins. Co.*, 386 N.W.2d 233, 238 (Minn. 1986) and *Schermer v. State Farm Fir & Cas. Co.*, 702 N.W.2d 898, 902 (Minn. Ct. App. 2005), *aff'd on other grounds*, 721 N.W.2d 307 (Minn. 2006), Chapter 72A authorizes the insurance commissioner and attorney general to bring suit against insurers for violations of the Act. Minn. Stat. §§ 72A.21, 72A.25; *State v. Am. Family Mut. Ins. Co.*, 609 N.W.2d 1 (Minn. Ct. App. 2000), *followed by Mitchell v. Chicago Title Ins. Co.*, No. CT 02-17299, 2004 WL 2137815 (D. Minn. Aug. 13, 2004).

## PRINCIPLES OF CONTRACT INTERPRETATION

Insurance policies are contracts that are governed by “[g]eneral contract principles” and “interpreted to give effect to the intent of the parties.” *Nathe Brothers v. American Nat’l Fire Ins. Co.*, 615 N.W.2d 341, 344 (Minn. 2000). These principles of interpretation include:

- Parties to insurance contracts, as in other contracts, absent legal prohibition or restriction, are free to contract as they see fit, and the extent of liability of an insurer is governed by the contract they enter into.
- Subject to the statutory law of the state, a policy of insurance is within the application of general principles of the law of contracts.
- Inasmuch as the language of an insurance policy is that of the insurer, any reasonable doubt as to its meaning must be resolved in favor of the insured, but the court has no right to read an ambiguity into plain language of an insurance policy in order to construe it against the one who prepared the contract.
- Where there is no ambiguity there is no room for construction. In such cases, the parties being free to contract, the language used must be given its usual and accepted meaning.
- Contracts of insurance, like other contracts, must be construed according to the terms the parties have used, to be taken and understood, in the absence of ambiguity, in their plain, ordinary, and popular sense, so as to give effect to the intention of the parties as it appears from the entire contract.
- The endorsements or riders attached to an insurance contract are part of the contract, and the endorsements and the policy must be construed together.
- A policy and endorsements should be construed, if possible, so as to give effect to all provisions, but, where provisions in the body of the policy conflict with an endorsement or rider, the provision of the endorsement governs.
- Exclusions in a policy or endorsements are as much a part of the contract as other parts thereof and must

be given the same consideration in determining what is the coverage.

*Bobich v. Oja*, 104 N.W.2d 19, 24-25 (Minn. 1960). A policy is ambiguous “only if it is reasonably subject to more than one interpretation.” *Hammer v. Investors Life Ins. Co. of N. Am.*, 511 N.W.2d 6, 8 (Minn. 1994). If no ambiguity exists, the policy’s plain language controls. *Henning Nelson Constr. Co. v. Fireman’s Fund Am. Life Ins. Co.*, 383 N.W.2d 645, 652 (Minn. 1986). But if a term is ambiguous, courts may look to extrinsic evidence to clarify the policy language, and if no clarifying information is available, the ambiguity must generally be resolved against the insurer. See, e.g., *Gareis v. Benefit Ass’n of R. Employees Ins. Co.*, 169 N.W.2d 730, 732 (Minn. 1969); *Holm v. Mut. Service Casualty Ins. Co.*, 261 N.W.2d 598, 600 (Minn. 1977). However, this doctrine of contra proferentem only applies to disputes between an insurer and an insured. *Econ. Premier Assur. Co. v. W. Nat. Mut. Ins. Co.*, 839 N.W.2d 749, 755 (Minn. Ct. App. 2013). The doctrine does not apply to disputes between two insurance companies, such as disputes concerning which policy provides primary coverage. *Id.*

In *Atwater Creamery Co. v. Western Nat’l Mut. Ins. Co.*, 366 N.W.2d 271, 277-78 (Minn. 1985), the Minnesota Supreme Court adopted the “reasonable expectations” doctrine that “may in certain limited situations protect the reasonable expectations of the insured with respect to coverage where the literal terms and conditions of the policy bar the claim.” *West Bend Mut. Ins. Co. v. Allstate Ins. Co.*, 776 N.W.2d 693, 701 (Minn. 2009). However, the courts have been reluctant to apply the doctrine and have limited its use “to ‘resolving ambiguity’ in policy terms ‘and for correcting extreme situations,’ such as ‘where a party’s coverage is significantly different from what the party reasonably believes it has paid for and where the only notice the party has of that difference is in an obscure and unexpected provision.’” *Id.* (quoting *Carlson v. Allstate Ins. Co.*, 749 N.W.2d 41, 49 (Minn. 2008)). Similarly, an ambiguous policy may not be construed against the insurer if doing so would result in coverage “beyond the reasonable expectations of the insured.” *Occidental Fire & Cas. Co. v. Soczynski*, 765 F.3d 931, 937 (8th Cir. 2014).

## CONTRACT INTERPRETATION

### Common Issues

**1. Faulty Workmanship as an “Occurrence” [What is the state of the common law in your state on this subject?]**

Faulty workmanship alone under a general liability insurance policy cannot establish an “occurrence” where the policy defines an occurrence as “an accident or happening or event or a continuous or repeated exposure to conditions that unexpectedly and unintentionally cause injury to or destruction of tangible property/” *Western Nat’l Mut. Ins. Co. v. Frost Paint & Oil Corp.*, 1997 Minn. App. 1428 (Minn. App. Jan. 29, 1997), cited with approval in *Aten v. Scottsdale Ins. Co.*, 2006 U.S. LEXIS 76342 (D. Minn. Oct. 19, 2006).

**2. Does Your State Have an Anti-Indemnity Statute? [And if so, does it have any notable peculiarities?]**

See Minn. Stat. section 337.02, which renders indemnity provisions in a “building and construction contract” unenforceable except to the extent that the underlying damage or injury is attributable to the promisor’s own negligence or wrongful act. *Target v. All Jersey Janitorial Serv.*, 916 F. Supp. 909 (D. Minn. 2013).

## CHOICE OF LAW

Minnesota generally allows the parties of an insurance policy to agree on which jurisdiction's law will govern the contract. *Allianz Ins. Co. of Can. v. Sanftleben*, 454 F.3d 853, 855 (8th Cir. 2006) (citing *Milliken & Co. v. Eagle Packaging Co.*, 295 N.W.2d 377, 380 n.1 (Minn. 1980)). In the absence of such an agreement, the court's threshold task is to decide whether the choice of one state's law over another creates an actual conflict. *See, e.g., Honeywell v. Ruby Tuesday*, 43 F. Supp. 2d 1074, 1077 (D. Minn. 1999). If a conflict exists, the court next determines whether the law involved is procedural or substantive. *Id.* If the court concludes that the law involved is procedural, then the court will apply the law of the forum without further analysis. *Davis v. Furlong*, 328 N.W.2d 150, 153 (Minn. 1983) (“[Minnesota follows] the almost universal rule that matters of procedures and remedies [are] governed by the law of the forum state.”). However, if the court concludes that the law involved is substantive, then it must apply the five choice-influencing factors first articulated by the Minnesota Supreme Court in *Milkovich v. Saari*, 203 N.W.2d 408, 412 (1973): (1) predictability of result, (2) maintenance of interstate order, (3) simplification of the judicial task, (4) advancement of the forum's governmental interest and (5) application of the better rule of law.

*Smith v. Stonebridge Life Ins. Co.*, No. 03-1006, 2003 U.S. Dist. LEXIS 13894 (D. Minn. Aug. 8, 2003) and *JSI Industries v. Steadfast Ins. Co.*, No. 03-6535, 2004 U.S. Dist. LEXIS 10005 (D. Minn. May 13, 2004), provide examples of the application of these factors in insurance contexts. Although these inquiries are inherently factual, in both instances the federal courts noted Minnesota's interest in generally prohibiting the tort of first-party bad faith claims (*see* Section V below) while applying Minnesota law to foreclose bad faith claims that had been asserted under the laws of other states.

## DUTIES IMPOSED BY STATE LAW

### Duty to Defend

#### 1. Standard for Determining Duty to Defend

An insurer's duty to defend is contractual, *Meadowbrook v. Tower Ins. Co.*, 559 N.W.2d 411, 415 (Minn. 1997), and is distinct from and broader than an insurer's duty to indemnify, *Franklin v. W. Nat'l Mut. Ins. Co.*, 574 N.W.2d 405, 406 (Minn. 1998) (cited with approval in *Rechtzigal Trust v. Fidelity Nat'l Title Ins. Co.*, 748 N.W.2d 312, 320 (Minn. Ct. App. 2008)) ; *accord: N. Star Mut. Ins. Co. v. Erickson*, No. A22-0784, 2023 Minn. App. Unpub. LEXIS 8, \*5 (Minn. Ct. App. Jan. 9, 2023). The duty to defend arises “when any part of the claim is ‘arguably’ within the scope of the policy's coverage.” *Jostens v. Mission Ins. Co.*, 387 N.W.2d 161, 165-66 (Minn. 1986). Where a defense is denied, the burden rests with the insurer to show that the entire claim or cause of action in question clearly falls outside of the policy's coverage. *Id.*

An insurer's duty to defend is not triggered until an insured “tenders the defense” to the insurer. *See SCSC Corp. v. Allied Mut. Ins. Co.*, 536 N.W.2d 305, 316-17 (Minn. 1995), *overruled in part on other grounds, Bahr v. Boise Cascade Corp.*, 766 N.W.2d 910 (Minn. 2009). However, the tender need not be in any specific form. Instead, the insured only needs to provide notice of a claim or lawsuit and give the insurer an opportunity to defend. *Home Ins. Co. v. Nat'l Union Fire Ins. of Pittsburgh*, 658 N.W.2d 522, 532-33 (Minn. 2003). No express request is necessary. *Id.* Once the insurer receives notice, the insurer is responsible for contacting the insured to determine whether its assistance is required. *Id.* at 533. An insured can recover the costs of defense if a

claim is tendered but the insurer does not defend as contractually required. *Jostens*, 387 N.W.2d at 167.

## 2. Issues with Reserving Rights

Minnesota law allows insurers to defend an action under a reservation of rights. The Minnesota Supreme Court has “consistently urged” insurers to resolve coverage issues in such situations through the use of declaratory judgment actions. *Grain Dealers Mut. Ins. Co. v. Cady*, 318 N.W.2d 247, 249 n.3 (Minn. 1982); *Spicer, Watson & Carp v. Minnesota Lawyers Mut. Ins. Co.*, 502 N.W.2d 400, 404 (Minn. Ct. App. 1993). A reservation of rights does not, by itself, create a conflict of interest between the insured and the insurer. *Mutual Service Casualty Ins. Co. v. Luetmer*, 474 N.W.2d 365, 368-69 (Minn. Ct. App. 1991). However, if an actual conflict arises between the two, the insured is entitled to select counsel of its own choice. *Id.* at 369. By way of example, such a conflict “clearly” arises if the insurer initiates a declaratory judgment action against the insured to determine coverage. *Id.* An insurer that fails to make a reservation of rights is estopped from later denying coverage of the claim, up to the policy limits. *Remodeling Dimensions, Inc. v. Integrity Mut. Ins. Co.*, 819 N.W.2d 602, 616 (2022)(citing to *Faber v. Roelofs*, 311 Minn. 428, 442-43, 250 N.W.2d 817, 825 (1977)).

An insurer that has defended an insured under a reservation of rights has a right to withdraw the defense if all of the arguably covered claims are resolved. *Meadowbrook v. Tower Ins. Co.*, 559 N.W.2d 411, 416 (Minn. 1997). Any other rule would be contrary to public policy in that it may discourage insurers from defending borderline cases if unable to end their involvement in the case once the covered claims were resolved. *Id.*

As discussed in Section VII, a reservation of rights may give the insured the right to enter into a Miller-Shugart settlement, potentially impacting the insurer from contesting the insured’s underlying liability.

## State Privacy Laws; Insurance Regulatory Issues; Arbitration/Mediation

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### 1. Tort of Invasion of Privacy

Minnesota has recognized a person’s right to bring a tort action based upon invasion of privacy. *Lake v. Wal-Mart Stores, Inc.*, 582 N.W.2d 231 (Minn. 1998), cited with approval in *In re Minn. Living Assistance, Inc.*, 934 N.W.2d 300, 310 (Minn. 2019); accord: *Boday v. Lakeville Motor Express, Inc.*, 663 N.W.2d 550, 553 (Minn. 2003).

Subject to certain exceptions, the Minnesota Insurance Fair Information Reporting Act provides that insurers must obtain written authorization to disclose or obtain personal or privileged information about a person collected in connection with an insurance transaction. Minn. Stat. § 72A.502, subd. 1. Exceptions to the statute include disclosures to prevent fraud and criminal activity, certain disclosures to aid actuarial studies, disclosures pursuant to a subpoena and disclosures to affiliates for marketing purposes. *Id.*, subd. 2-11a. An insurer must notify its insured of any disclosure in writing within ten days, specifying the person to whom

information was disclosed and the nature of the information disclosed. *Id.*, subd. 12. A private cause

of action exists for violations of this statute. See Minn. Stat. § 72A.503. See *Davenport v. Farmers Ins. Group*, 378 F.3d 839, 844 (8th Cir. 2004)(reversing district court’s dismissal of claim based solely on section 72A.502, subd. 6).

The state also requires any business that maintains personal data to notify the owner of such data of any security breach. Minn. Stat. § 325E.61. The Attorney General is authorized to enforce the statute. *Id.*, subd. 6.

The Minnesota Insurance Code does not appear to adopt the privacy protections contained in the federal Gramm-Leach-Bliley Act, 15 U.S.C. 6801, 6805, and 6807, as other states have done. See Mich. Insurance Code § 500.547 (Protection of customer records and information). However, in 2021 the Commerce Department proposed a law providing additional protections to protect consumers’ privacy of data provided to insurance companies. See <https://mn.gov/commerce/news/?id=17-494515> (accessed May 6, 2023). The law is based on the NAIC Data Security Act, and was approved by the Governor on June 6, 2021. Minn. Stat. §§ 60A.985 – 9858 (2021). It establishes the exclusive state standards applicable to licensee for data security, the investigation of a cybersecurity event, and notification of such an event. *Id.*, § 60A.9858.

## 2. Criminal Sanctions

Violation of Minn. Stat. § 60A.985 *et al.* subjects a violator to the penalties set forth in section 60A.052 (suspension or revocation of authority or censure).

## 3. The Standards for Compensatory and Punitive Damages

The measure of damages in insurance cases is the same as any other contract case under Minnesota law. Specifically, if an insurance policy is breached, the insured is entitled to recover damages that “naturally and proximately” flow from the breach. *Olson v. Rugloski*, 277 N.W.2d 385, 387-88 (Minn. 1979). Compensatory damages can be awarded in certain cases and are not automatically capped at the policy limits. *Id.* However, courts differentiate between damages caused by the *breach* from those caused by the underlying *loss*. See *Mattson Ridge, LLC v. Clear Rock Title, LLP*, 824 N.W.2d 622, 631 (Minn. 2012). Thus, an insured can only recover damages beyond the policy benefits that are caused by an *unreasonable* delay by the insurer in making payments. *Id.* Conversely, damages that would have still occurred had the policy not been breached are not recoverable. *Id.* Although the delay must be unreasonable for an award of such damages, it is not necessary to prove “willful, wanton, and malicious behavior” by the insurer. *Swanny of Hugo, Inc. v. Integrity Mut. Ins. Co.*, No. A15-0370, 2015 Minn. App. Unpub. LEXIS 1191, at \*6-73 (Minn. Ct. App. Dec. 28, 2015).

Punitive damages are not recoverable in contract actions except in rare circumstances where the defendant’s breach constitutes an independent tort. *Olson*, 277 N.W.2d at 388. The Minnesota Supreme Court has specifically held that punitive damages are not recoverable for bad faith refusal to pay benefits because a “malicious or bad-faith motive in breaching a contract does not convert a contract action into a tort action.” *Haagenson v. Nat’l Farmers Union Prop. & Cas. Co.*, 277 N.W.2d 648, 652 (Minn. 1979). (However, as discussed in Section V.A.1, a statutory remedy of “taxable costs” may be available that resembles punitive damages.)

It has been suggested that punitive damages may be available for bad faith failure to settle a third-party claim. *Pillsbury Co. v. Nat’l Union Fire Ins. Co. of Pittsburgh, Pennsylvania*, 425 N.W.2d 244, 249

(Minn. Ct. App. 1988). This argument typically relies on the seminal bad faith case of *Short v. Dairyland Ins. Co.*, 334 N.W.2d 384, 385 (Minn. 1983). Although the trial court allowed punitive damages in *Short*, this issue was not considered by the Supreme Court. *Short*, 334 N.W.2d at 387 (“Only the issue of the excess damages is before this Court.”) In *Fette v. Columbia Cas. Co.*, No. CO-93-242, 1993 Minn. App. LEXIS 954, at \*5-6 (Minn. Ct. App. Sept. 28, 1993), the Minnesota Court of Appeals, in an unpublished decision, held that the first-party versus third-party distinction is immaterial and punitive damages are not recoverable for an insurer’s bad faith. *Accord: Speed RMG Partners, LLC v. Artic Cat Sales, Inc.*, No. 20-CV-609 (NEB/LIB), 2022 U.S. Dist. LEXIS 52167, at \*35-36 (D. Minn. Mar. 22, 2022).

To the extent that punitive damages may be available, Minnesota statutes prescribe several procedural and substantive limitations on obtaining an award. Punitive damages are available only if the plaintiff proves by “clear and convincing evidence that the acts of the defendant show deliberate disregard for the rights or safety of others.” Minn. Stat. § 549.20. Procedurally, a party cannot seek punitive damages in an initial complaint. Minn. Stat. § 549.191. Instead, a plaintiff must move the court for permission to amend the complaint to seek punitive damages. *Id.* Minn. Stat. §§ 549.191-549.20 contain several other procedural and substantive factors governing such motions and punitive damage awards in general.

#### 4. Insurance Regulations to Watch

On November 18, 2021, The Minnesota Commerce Department issued Bulletin 2021-2, to remind Crop-Hail carriers of the Minnesota requirements for the rate filing process.

<https://mn.gov/commerce-stat/pdfs/2021-2-admin-bulletin.pdf> (accessed May 6, 2023)

On December 30, 2021, the Department issued Bulletin 2021-3 to all insurance companies and fraternal benefit societies, hospital service corporations, non-ERISA employer group plans, managed care organizations, *et al.* to advise entities delivering or issuing individual and group health insurance policies in Minnesota that discrimination against an individual because of the individual’s gender identity or expression is prohibited.

<https://mn.gov/commerce-stat/pdfs/admin-bulletin-2020-5.pdf> (accessed May 6, 2023).

On March 1, 2022, the Department issued Bulletin 2022-1 advise entities delivering or issuing individual and group health insurance policies in Minnesota that discrimination against an individual because of the individual’s sexual orientation and gender identify or expression is prohibited.

[https://mn.gov/commerce-stat/pdfs/bulletin\\_2022\\_1.pdf](https://mn.gov/commerce-stat/pdfs/bulletin_2022_1.pdf) (accessed May 6, 2023).

On March 13, 2023, the Department issued Bulletin 2023-1, permitting each insurer writing homeowner’s insurance for property located in the seven county metropolitan area or a city of the first class to submit its annual report electronically.

<https://mn.gov/commerce-stat/pdfs/bulletin-2023-1.pdf> (accessed May 6, 2023).

#### 5. State Arbitration and Mediation Procedures

Minnesota insurance statutes generally do not regulate arbitration clauses in policies, except that an

arbitration provision is required in certain policies insuring against losses from hail, tornados and cyclones. Minn. Stat. § 66A.29. Binding arbitration is also required for claims under \$10,000 arising under certain no-fault automobile policies. Minn. Stat. §§ 65B.42(4); 65B.525. Insurers are prohibited from publicizing a policy of appealing arbitration awards as a tactic to coerce favorable settlements. Minn. Stat. § 72A.20, subd. 12(11).

Minnesota has adopted the Revised Uniform Arbitration Act, Minn. Stat. §§ 572B.01-572B.31. Although arbitration agreements are freely enforced under Minnesota law, as a practical matter most arbitrations are governed by federal law given the broad reach of the Federal Arbitration Act. *See* 9 U.S.C. §§ 1-2.

Rule 114 of the General Rules of Practice for the District Courts requires parties to almost all civil cases to participate in a mandatory alternative dispute resolution (“ADR”) process. The rule provides a number of potential ADR processes that the parties may select or the court may order, such as binding or non-binding arbitration. Some of these processes are supervised and funded by the court, but options vary by county. As a practical matter, virtually every case in state court that is not dismissed at an early stage is mediated with a private mediator paid by the parties.

Most federal judges in Minnesota require parties to appear at a settlement conference before the magistrate judge assigned to the case. These settlement conferences resemble mediations that can last an entire day, or extend over multiple days, at the magistrate judge’s discretion. It is not uncommon for successive settlement conferences to be ordered if events in the case warrant, such as following a ruling on a dispositive motion.

## 6. State Administrative Entity Rule-Making Authority

The Commissioner of Commerce is authorized under numerous statutes to promulgate rules related to the insurance industry in Minnesota. *E.g.*, Minn. Stat. §§ 45.023; 60A.03, subd. 2; 62A.04, subd. 9. Unless specifically exempted, the Commissioner’s rulemaking is governed by the Minnesota Administrative Procedures Act, Minn. Stat. §§ 14.003.

## EXTRACONTRACTUAL CLAIMS AGAINST INSURERS: ELEMENTS AND REMEDIES

### Bad Faith Claim Handling/Bad Faith Failure to Settle Within Limits

#### 3. First Party

Minnesota historically has been in the minority of jurisdictions that do not recognize first party bad faith. *See, e.g., Morris v. Am. Family Mut. Ins. Co.*, 386 N.W.2d 233, 237 (Minn. 1986). However, the legislature created a mechanism to recover for bad faith with the adoption of Minn. Stat. § 604.18, which became effective August 1, 2008. The statute allows an insured to recover amounts in excess of what is owed under the policy under certain circumstances. The legislation does not apply to all forms of insurance, and its exemptions include workers’ compensation and certain life and health policies. Minn. Stat. § 604.18, subd. 1.

Liability under the statute is established if the insured can show:

- the absence of a reasonable basis for denying the benefits of the insurance policy; and
- that the insurer knew of the lack of a reasonable basis for denying the benefits of the insurance policy or acted in reckless disregard of the lack of a reasonable basis for denying the benefits of the insurance policy.

Minn. Stat. § 604.18, subd. 2. If such a showing is made, the insured is entitled to recover “taxable costs” in “an amount equal to one-half of the proceeds awarded that are in excess of an amount offered by the insurer at least ten days before the trial begins or \$250,000, whichever is less,” plus attorney fees not to exceed \$100,000. Minn. Stat. § 604.18, subd. 3. Additional punitive damages may not be awarded. *Id.*

A plaintiff cannot seek taxable costs for bad faith in an initial complaint. Minn. Stat. § 604.18, subd. 4. Instead, the insured must make a subsequent motion supported by affidavits for leave to amend the complaint to seek an award under the statute. *Id.* The motion “may” be granted by the court if there is prima facie evidence in support of the bad faith claim. *Id.* If the motion to amend is granted, taxable costs are considered in a separate proceeding after a determination has been made on the underlying claim for benefits. *Id.* A claim under the statute may not be assigned. *Id.*

The Minnesota Supreme Court recently affirmed the court of appeals’ ruling that the uninsured motorist carrier violated the statute and was liable for \$100,000 in taxable costs and \$97,940.50 in attorney fees. *Petersen v. Western Nat’l Mut. Ins. Co.*, 946 N.W.2d 903, 911 (Minn. 2020) (“In sum, the second prong of the statutory insurer standard of conduct requires an insured to prove that the insurer knew, or recklessly disregarded or remained indifferent to information that would have allowed it to know, that it lacked an objectively reasonable basis for denying the insured’s claim for benefits.”).

In an unreported state district court case, the Washington County Court dismissed a request by the plaintiff for leave to amend to add a claim for bad faith, arguing that the statute was applicable to a group long-term disability policy. The court held that such a policy is excluded from recovery under the statute on the following grounds: (1) the statute applies to “insurance policies”, but (2) that term does not include a “written agreement of a health carrier as defined in section 62A.011”: (3) a “health carrier” is “an insurance company licensed under chapter 60A to offer, sell, or issue a policy of accident and sickness insurance as defined in section 62A.01”; (4) a “policy of accident and sickness insurance” include any policy covering insurance in section 60A.06, subd. 1, clause (5)(a), which includes policies that “insure against loss or damage by the sickness, bodily injury or death of the assured or dependents” such as a long-term disability policy. *Brunckhorst v. Reliance Standard Life Ins. Co.*, No. 82-CV-18-4091, State of Minnesota, Tenth Judicial District (Aug. 19, 2019).

In unreported decisions, the Minnesota Court of Appeals has followed the United States District Court in holding that an insurer is not liable under the statute if the merit of the insured’s claim was “fairly debatable.” *Homestead Hills Homeowner Ass’n v. Am. Family Mut. Ins. Co.*, No. A12-0703, 2012 Minn. App. Unpub. LEXIS 1114, at \*12 (Minn. Ct. App. Nov. 26, 2012); *N. Nat’l Bank v. N. Star Mut. Ins. Co.*, No. A12-0182, 2012 Minn. App. Unpub. LEXIS 915 (Minn. Ct. App. Sept. 17, 2012) (citing *Friedberg v. Chubb & Son*, 800 F.Supp.2d 1020, 1025 n.1 (D. Minn. 2011)). *But see The Landings Homeowners Ass’n, Inc. v. Delos Ins. Co.*, No. 27-cv-13-7193, 2014 WL 1660400 (Minn. Dist. Ct. Feb. 3, 2014) (trial order) (property damage claim; plaintiff’s motion to add claim

for bad faith granted).

#### 4. Third-Party

An insurer may be liable for failing to exercise “good faith” in handling third party claims against an insured. *Short v. Dairyland Ins. Co.*, 334 N.W.2d 384, 387-88 (Minn. 1983). An insurer breaches its duty of good faith where (1) the insured is clearly liable; (2) the insurer refuses to settle within the policy limits; and (3) the refusal to settle is not made in good faith. *Id.* Typically, the insured assigns his or her bad faith claim against the insurer to an injured claimant in return for relief from the excess judgment. The injured claimant (assignee) may then proceed with the claim for bad faith. See, e.g., *Strand v. Travelers Ins. Co.*, 219 N.W.2d 622, 622 (Minn. 1974).

The third prong of the test for bad faith is the most commonly litigated. The policyholder (or assignee) has the burden of proving the insurer acted in bad faith by refusing to settle within the policy limits. See *Peterson v. Am. Family Mut Ins. Co.*, 160 N.W.2d 541, 544 (Minn. 1968). Unfortunately, Minnesota courts have not provided a clear definition of acts that satisfy that prong. Minnesota’s seminal bad faith case states that the duty to exercise good faith “includes an obligation to view the situation as if there were no policy limits applicable to the claim.” *Short*, 334 N.W.2d at 387-88. In a frequently cited case, the Minnesota Court of Appeals adopted the wording of the district court’s jury instruction given in the *Short* case:

In order to carry out this duty, the insurer should: fully investigate a claim, fairly evaluate the claim against the insured, inform the insured of the consequences of a judgment that exceeds the limits of the policy, inform the insured of the potential conflict of interest of the insured and the insurer if the case has a settlement value in excess of the policy limits, and inform the insured of settlement offers, and other pertinent information of the claim to the insured.

*Kissoondath v. U.S. Fire Ins. Co.*, 620 N.W.2d 909, 916 (Minn. Ct. App. 2001). The court in *Kissoondath* held that in instances where the insured is clearly liable, any one of the above factors “in and of itself may be determinative of a breach of the duty of good faith.” *Id.* (emphasis in original).

Another indicator of bad faith under prong three is failing to keep the insured updated on developments, most importantly settlement negotiations. See, e.g., *Kissoondath*, 620 N.W.2d at 919 (holding that the insurer’s failure to keep the insured aware of ongoing developments constituted bad faith); *Larson v. Anchor Casualty Co.*, 82 N.W.2d 376, 384 (Minn. 1957) (discussing the good faith requirement and stressing the insurance company’s duty to keep the insured aware of settlement offers and the status of the litigation).

A bad faith claim does not constitute a tort. *Morris v. Am. Family Mut. Ins. Co.*, 386 N.W.2d 233, 237 (Minn. 1986). Thus, damages are limited to those “naturally and proximately” flowing from the breach. *Olson v. Rugloski*, 277 N.W.2d 385, 387-88 (Minn. 1979). Generally, these damages equal the excess judgment. Section IV.B.2 contains additional discussion regarding damages, including punitive damages.

## Fraud

In Minnesota, an insured must establish the following elements to prove fraud: (1) a material false representation having to do with a past or present fact that is susceptible of knowledge; (2) the representation is known to be

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false or asserted as one's own knowledge without knowing its truth or falsity; (3) the representation is made with an intent to induce and actually does induce the other person to act; (4) the party acts in reliance of the representation; and (5) incurs damage attributable to the representation. *Specialized Tours v. Hagen*, 392 N.W.2d 520, 532 (Minn. 1986).

### Intentional or Negligent Infliction of Emotional Distress

To recover for intentional infliction of emotional distress, a plaintiff must demonstrate (1) intentional or reckless conduct; (2) that is extreme and outrageous; and (3) that resulted in severe emotional distress. *Saltou v. Dependable Ins. Co.*, 394 N.W.2d 629, 632 (Minn. Ct. App. 1986). To recover for negligent infliction of emotional distress, a plaintiff must first prove the four elements of negligence: (1) the existence of a duty of care; (2) a breach of that duty; (3) an injury; and (4) the breach of the duty being the proximate cause of the injury. *Engler v. Illinois Farmers Ins. Co.*, 706 N.W.2d 764, 767 (Minn. 2005). A plaintiff must then prove that he or she: (1) was within the zone of danger of physical impact [created by the defendant's negligence; (2) reasonably feared for his or her own safety; and (3) suffered severe emotional distress with attendant physical manifestations. *Id.*

Typically, claims for mental distress are only allowed in contract matters in exceptional circumstances where the breach is accompanied by an independent tort. *Saltou* at 632-33. Insureds often have difficulty stating a claim for emotional distress because the insured must show that the extreme and outrageous conduct occurred independently from the acts that constituted the breach of contract. *See, e.g., Markgraf v. Douglas Corp.*, 468 N.W.2d 80, 83 (Minn. Ct. App. 1991); *Saltou*, 394 N.W.2d at 633. In fact, the Minnesota Court of Appeals has held that "[t]he failure to pay an insurance claim in itself, no matter how malicious, does not constitute a tort; it constitutes a breach of an insurance contract." *Saltou*, 394 N.W.2d at 633.

### State Consumer Protection Laws, Rules and Regulations

Minnesota's Unfair Claims Practice Act, Minnesota Stat. §§ 72A.17-72A.32, regulates "unfair methods of competition or unfair or deceptive acts or practices." Minn. Stat. § 72A.17. Portions of the Act are described in Section I above. As indicated above, the Act does not provide for a private cause of action. *Morris v. Am. Family Mut. Ins. Co.*, 386 N.W.2d 233, 238 (Minn. 1986).

## DISCOVERY ISSUES IN ACTIONS AGAINST INSURERS

### Discoverability of Claims Files Generally

Minnesota courts have historically published very few district court decisions, and courts commonly handle discovery matters informally or through summary orders. These decisions are given broad deference by the state's appellate courts and, as a result, there are few state opinions to draw from that analyze discovery issues in significant detail. However, the United States District Court for the District of Minnesota has denied discovery of other claim files in a bad faith case that the plaintiff argued were necessary to show "a pattern or practice of denying or undervaluing" claims. *Cargill v. Ron Burge Trucking*, 284 F.R.D. 421, 429 (D. Minn. 2012). The court found that other claim files were irrelevant and discovery of them was inconsistent with Rule 1 of the Federal Rules of Civil Procedure requiring that the case be administered "to secure the just, speedy, and inexpensive determination" of the action. *Id.*

## Discoverability of Reserves

The United States District Court for the District of Minnesota has allowed the discovery of reserve information in a breach of contract and bad faith case, dismissing relevance and work product objections with little comment. *Gulf Ins. Co. v. Skyline Displays*, No. 02-CV-3632, 2003 U.S. Dist. LEXIS 26511, at \*12 (D. Minn. Oct. 20, 2003). In a fact-specific diversity case arising out of Minnesota, the Eighth Circuit held that individual case reserves set by the legal department of a primarily self-insured defendant constituted protected work product because they were set by attorneys. *Simon v. G.D. Searle & Co.*, 816 F.2d 397, 400-02 (8th Cir. 1987). However, other corporate documents analyzing the reserves in aggregate, and adjusting them through formulas for other “variables such as inflation,” were deemed discoverable. *Id.* at 402. Language within the opinion may provide an argument for the production of insurance reserves, especially considering that the court repeatedly referred to the “corporate risk management documents” at issue as “insurance documents.”

## Discoverability of Existence of Reinsurance and Communications with Reinsurers

In *Gulf Ins. Co. v. Skyline Displays*, No. 02-CV-3632, 2003 U.S. Dist. LEXIS 26511, at \*14 (D. Minn. Oct. 20, 2003), the United States District Court for the District of Minnesota required production of a reinsurance agreement but not related documents such as “drafts, correspondence, negotiations, and the like.” However, the decision appeared to leave open the possibility that these documents could become discoverable if there was evidence beyond “speculation” that such documents contained relevant admissions by the insurers. *Id.* The court also suggested that reinsurance agreements are subject to mandatory disclosure under Rule 26(a)(1) of the Federal Rules of Civil Procedure. Similar mandatory disclosures came into effect under the Minnesota Rules of Civil Procedure in 2013.

## Attorney/Client Communications

The Minnesota Supreme Court has unequivocally held that “defense counsel hired by an insurer to defend a claim against its insured represents the insured.” *Pine Island Farmers Coop. v. Erstad & Riemer, P.A.*, 649 N.W.2d 444, 449 (Minn. 2002). Accordingly, “defense counsel owes a duty of undivided loyalty to the insured and must faithfully represent the insured's interests” to the same degree “as if the insured had retained the attorney personally.” *Id.* (quoting *Crum v. Anchor Casualty Co.*, 119 N.W.2d 703, 712 (Minn. 1963)). However, an attorney may also represent the insurer as a co-client so long as no actual conflict of interest exists and the insured gives consent after consulting with counsel. *Id.* at 451. In such a case, which is common, the attorney’s communications with the insurer will be privileged.

The Minnesota Court of Appeals, in an unpublished decision, endorsed an “advice of counsel” defense to a statutory bad faith action where the insurer’s attorney opined that the insurer’s settlement offer was reasonable. *Bernstrom v. Am. Family Mut. Auto. Ins. Co.*, No. A11-1297, 2012 Minn. App. Unpub. LEXIS 495, at \*9 (Minn. Ct. App. June 4, 2012). Generally, invocation of such a defense waives the attorney-client privilege regarding the transaction at issue. *Minn. Specialty Crops v. Minn. Wild Hockey Club*, 210 F.R.D. 673, 675-76 (D. Minn. 2002).

## DEFENSES IN ACTIONS AGAINST INSURERS

## Misrepresentations/Omissions: During Underwriting or During Claim

An insurer may rescind an insurance policy if an insured's material misrepresentation is (1) "made with intent to deceive or defraud," or (2) "increases the risk of loss" to the insurer. Minn. Stat, § 60A.08, subd. 9; *Nielsen v. Mut. Serv. Cas. Ins. Co.*, 67 N.W.2d 457, 459 (Minn. 1954). Although this statute does not apply to "life insurance or accident and health insurance." Minn. Stat, § 60A.08, subd. 9. Minn. Stat. § 62A.06, subd. 3, provides a similar standard for health insurance. It is not necessary for the insurer to show that it would not have issued the policy "but for" the misrepresentation so long as the risk of loss increased. *Pioneer Indus. v. Hartford Fire Ins. Co.*, 639 F.3d 461, 467-68 (8th Cir. 2011).

"Materiality" is ordinarily a jury question based on the specific facts of a particular case. *Meyer v. Blue Cross & Blue Shield of Minnesota*, 500 N.W.2d 150, 152-53 (Minn. Ct. App. 1993). A material misrepresentation increases the risk of loss when it impairs the insurer's ability to initially make a reasonable decision to provide coverage. *Howard v. Aid Ass'n for Lutherans*, 272 N.W.2d 910, 912-13 (Minn. 1978); see also *Waite v. Am. Family Mut. Ins. Co.*, 352 N.W.2d 19 (Minn. 1984). The risk of loss is also increased if the misrepresentation increases the likelihood that the insurer will be liable in the future. *In re Silicone Implant Ins. Coverage Litigation*, 652 N.W.2d 46, 77 (Minn. Ct. App. 2002), *rev'd on other grounds*, 667 N.W.2d 405 (Minn. 2003) (citing *Sec. Mut. Casualty Co. v. Affiliated FM Ins. Co.*, 471 F.2d 238, 242 (8th Cir. 1972)).

Minn. Stat. § 61A.11 prohibits a life insurer that issued a policy without a medical examination from challenging statements about age, physical condition or family history unless they were willfully made or intentionally misleading. The Minnesota Supreme Court has held that this standard requires proof of the insured's subjective intent to deceive in order to rescind a policy under the statute. *Larson v. Nw. Mut. Life Ins. Co.*, 855 N.W.2d 293, 299 (Minn. 2014), cited in *Ivers v. CMFG Life Ins. Co.*, No. 15-1577, 2016 WL 5796919 (D. Minn. Aug. 12, 2016), report and recommendation adopted, 2016 WL 5842447 (Dept. 30, 2016). This burden may be satisfied "in either of two ways: (1) by proof of the insured's actual intent to deceive, or (2) by inference when the insured had knowledge of material facts and failed to disclose those facts to the insurer." *Id.* This decision rejected contrary Eighth Circuit authority applying an objective standard to determine whether a misrepresentation was willful or intentional. See *Ellis v. Great-West Life Assur. Co.*, 43 F.3d 382, 387 (8th Cir. 1994). Cases decided prior to *Larson* should therefore be cited with caution. Section 61A.11 does not apply to misrepresentations other than age, physical condition, and family history. *PHL Variable Ins. Co. v. 2008 Christa Joseph Irrevocable Trust*, 970 F. Supp. 2d 932, 941 (D. Minn. 2013). Rescission of a policy for other types of misrepresentation, such as those relating to financial conditions, are governed by the common law. *Id.* This common law standard does not require proving an intentional misrepresentation by the insured to rescind a policy, but the misrepresentation must have been material. *Id.*

## Failure to Comply with Conditions

An insured's breach of a cooperation clause may void the contract if the breach is a substantial and material breach that prejudices the insurer. *Rieschl v. Travelers Ins. Co.*, 313 N.W.2d 615 (Minn. 1981); *Juvland v. Plaisance*, 96 N.W.2d 537 (Minn. 1959). This is consistent with Minn. Stat. § 65B.15, subd. 1(6), which provides that an insurer may cancel coverage if the insured fails to give written notice of a loss or lawsuit commenced, or refuses to cooperate in the investigation of a claim or defense of a lawsuit. The burden of proving a lack of cooperation rests with the insurer. *White v. Boulton*, 107 N.W.2d 370, 372 (Minn. 1961).

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

Under *Miller v. Shugart*, 316 N.W.2d 729, 734 (Minn. 1982), if the insurer denies coverage to the insured, the

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insured may settle the underlying case with the plaintiff and judgment is entered against the insured on the condition that the insured will not be personally liable and the judgment will only be collected against the insurer. The plaintiff may then pursue the insurer through a garnishment proceeding. *Id.* at 732. A Miller-Shugart settlement is available only when the insurer has disputed all coverage. *Buysse v. Baumann-Furrie & Co.*, 481 N.W.2d 27, 29 (Minn. 1992). An insured may also enter into a Miller-Shugart settlement where the insurer defends the insured under a complete reservation of rights but has not issued an outright denial. *Vetter v. Subotnik*, 844 F. Supp. 1352, 1355 (D. Minn. 1992); *C.H. Robinson v. Zurich Am. Ins. Co.*, No. 02-4794, 2003 U.S. Dist. LEXIS at 20154, at \*9 (D. Minn. Nov. 3, 2003).

A Miller-Shugart settlement is binding on an insurer that received notice, provided that it is reasonable and not the product of fraud or collusion. *E.g., Burbach v. Armstrong Rigging & Erecting*, 560 N.W.2d 107, 109 (Minn. Ct. App. 1997). Whether a settlement is reasonable is a question of fact to be determined on an objective basis. *Petco Animal Supplies Stores v. Ins. Co. of N. Am.*, No. 10-682, 2011 U.S. Dist. LEXIS 70748, at \*15 (D. Minn. June 10, 2011) (citing *Miller*, 316 N.W.2d at 735). In *Petco*, the United States District Court for the District of Minnesota summarized “nearly thirty years” of “refine[ments]” made by the Minnesota courts to such settlements, reciting the elements of an agreement enforceable against an insurer:

- The insurer has denied all obligations to pay damages on behalf of the insured;
- The insurer (if it is not deemed to have waived notice) has received notice of the settlement and an “opportunity” to participate;
- The insured is left without coverage by any other insurer to pay the claimed damages;
- The settlement amount is later deemed to be reasonable;
- The insured could have liability to the claimant;
- The settlement was not the product of fraud or collusion; and
- Coverage is ultimately determined to exist for the claim that became a judgment.

*Id.* at \*17.

## Preexisting Illness or Disease Clauses

By statute no claim may be denied or reduced on the basis of a preexisting disease or physical condition after the policy has been in place for two years, unless the condition or disease is specifically named or described in the policy. Minn. Stat. §62A.04, subd. 2(b) (accident and health coverage). However, the policy can be voided on the basis of fraud if the insurer intentionally withholds information about a “known pre-existing condition” during the application process. *Kersten v. Minn. Mut. Life Ins. Co.*, 608 N.W.2d 869, 875 (Minn. 2000); Minn. Stat. §62A.04, subd. 2.

For purposes of a pre-existing condition clause, “an illness commences when it ‘manifests itself so as to interfere with bodily functions.’” *Svenddal v. New England Life Ins. Co.*, 388 N.W.2d 787, 789 (Minn. Ct. App. 1986) (quoting *Kellerman v. City of St. Paul*, 1 N.W.2d 378, 380 (Minn. 1941)).

## Statutes of Limitations and Repose

Actions based on insurance contracts are subject to a six-year statute of limitations. Minn. Stat. § 541.05, subd. 1(l). The limitations period begins to run when an insured has an identifiable claim for benefits against the insurer

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that can be initiated through the courts or arbitration. *Spira v. Am. Standard Ins. Co.*, 361 N.W.2d 454, 457 (Minn. Ct. App. 1985); see also *Entzion v. Illinois Farmers Ins. Co.*, 675 N.W.2d 925, 929 (Minn. Ct. App. 2004) (citing *Noske v. Friedberg*, 670 N.W.2d 740, 742 (Minn. 2003)). In a claim for bad faith failure to settle, the statute of limitations does not begin to run until the appellate process is complete and the judgment against the insured is final, including appeals. *Amdahl v. Stonewall Ins. Co.*, 484 N.W.2d 811, 813 (Minn. Ct. App. 1992). An insurer may be liable under the Unfair Claims Practices Act for failing to advise an insured or claimant in writing of the expiration of a statute of limitations at least 60 days prior to expiration. Minn. Stat. § 72A.201, subd. 4(8). This statute only applies to an insured or claimant who has filed a notification of a claim known to be unresolved and who has not retained an attorney. *Id.* When the insurer has received no communication from the insured or claimant for a period of two years preceding the expiration of the applicable statute of limitations that shall not be considered to be known to be unresolved. *Id.*

## TRIGGER AND ALLOCATION ISSUES FOR LONG-TAIL CLAIMS

### Trigger of Coverage

Minnesota's seminal trigger and allocation case is *Northern States Power Co. v. Fidelity & Casualty Co.*, 523 N.W.2d 657, 662 (Minn. 1994), holding that "Minnesota follows the 'actual injury' or 'injury-in-fact' theory to determine which policies have been triggered by an occurrence causing damages for which an insured is liable." "The essence of the actual injury trigger theory is that each insurer is held liable for only those damages which occurred during its policy period; no insurer is held liable for damages outside its policy period." *Id.* It is the insured's burden to show that "some damage occurred during the policy period" before the policy is triggered. *Id.* at 663-64 (emphasis in original), followed by, *Wooddale Builders, Inc. v. Md. Cas. Co.*, 722 N.W.2d 283, 292 (2006); see also *Cargill, Inc. v. Ace Am. Ins. Co.*, 748 N.W.2d 341, 349-50 (2010) (concluding that the exception recognized in *Wooddale Builders* did not apply). This burden can be met "even though the injury [wa]s not 'diagnosable,' 'compensable,' or manifest during the policy period as long as it can be determined, even retroactively, that some injury did occur during the policy period." *In re Silicone Implant Ins. Coverage Litig.*, 667 N.W.2d 405, 415 (Minn. 2003). It is sufficient to trigger coverage "if the insured shows damage began on a particular date, X, and ended on, or was discovered at a later date, Y, which period of time includes the policy periods for the policies at issue." *Northern States Power Co.*, 523 N.W.2d at 663-64.

### Allocation Among Insurers

The Minnesota Supreme Court has repeatedly emphasized that "damages are very fact-dependent, so 'trial courts must be given the flexibility to apportion them in a manner befitting each case.'" *Silicone Implant Ins. Coverage*, 667 N.W.2d at 417 (quoting *Northern States Power Co.*, 523 N.W.2d at 663). As such, a trial court has considerable discretion when allocating damages between the triggered policies. *Id.* "'As with all insurance contract-related issues, courts must consider many factors when deciding this issue, including the policy language, parties' intent or reasonable expectations, canons of construction and public policy.'" *Id.* at 418 (quoting *Northern States Power Co.*, 523 N.W.2d at 663). Indeed, insurance "policies come in many forms and it is a mistake to read our case law as if the scope of coverage has been resolved for all such policies, no matter what their language." *Domtar v. Niagara Fire Ins. Co.*, 563 N.W.2d 724, 733 (Minn. 1997).

After determining which policies are triggered, Minnesota courts next consider whether the injuries at issue were continuous over multiple policy periods. *Silicone Implant Ins. Coverage*, 667 N.W.2d at 421. If the injuries were

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not continuous, the policy or policies in place at the time of the injury cover all losses. *Id.* Conversely, if the injuries were continuous, the court then considers “whether the continuous injury arose from some discrete and identifiable event,” such as a chemical spill or implantation of a medical device. *Id.* If the injuries can be traced to such an event, the policies in place at the time of the event become liable. *Id.* However, if there is no single, precipitating event, then liability may be allocated between the various policies. *Id.* However, “allocation is meant to be the exception and not the rule,” *Id.*, limited to “those difficult cases in which...damage is both continuous and so intermingled as to be practically indivisible,” *Domtar*, 563 N.W.2d at 733. Notwithstanding the trial court’s flexibility to apportion damages based on the circumstances of each case, the Minnesota Supreme Court has “recommended” that damages be allocated “pro rata” by each policy’s “time on the risk.” *Northern States Power Co.*, 523 N.W.2d at 663; *Wooddale Builders v. Md. Casualty Co.*, 722 N.W.2d 283, 300 (Minn. 2006).

## CONTRIBUTION ACTIONS

### Claim in Equity vs. Statutory

An insurer’s right to seek contribution from a coinsurer is equitable under Minnesota law. *Cargill v. Ace Am. Ins. Co.*, 784 N.W.2d 341, 354 (Minn. 2010). General equitable principles therefore apply to contribution actions. For example, an insurer that has breached its own duties towards an insured does not have “clean hands” and cannot obtain contribution from other insurers. *Id.*

### Elements

“[A] claim for equitable contribution requires (1) the insurers share a ‘common liability’ and (2) one insurer paid more than its proportionate share of that liability.” *Lexington Ins. Co. v. AXIS Surplus Ins. Co.*, No. CIV. 13-3348 RHK/FLN, 2014 U.S. Dist. LEXIS 75791, at \*7-8 (D. Minn. June 4, 2014) (citing *Cargill*, 784 N.W.2d at 352 n.11). It is not essential to a contribution action that the involved insurers be in “precisely the same position regarding liability.” *Id.* at \*13-14. Instead, each insurer must simply be jointly responsible for the same loss. *Id.* For example, contribution can be sought between primary and excess insurers as long as each policy is triggered, or between insurers insuring different *risks* provided that each *risk* contributes to the same *loss* (for example, negligent design and construction that each contribute to the loss). *Id.* at \*14-15As to the second element, courts have flexibility while allocating an insured’s liability between insurers, such as “pro rata” by each policy’s “time on the risk” (see Section VIII above), but defense costs are allocated equally between insurers. *Cargill*, 784 N.W.2d at 354.

### DUTY TO SETTLE

Under Minnesota law, an insurer has a duty to settle a claim when liability is clear and the amount demanded is not excessive. *Short v. Dairyland Ins. Co.*, 334 N.W.2d 384, 388 (Minn. 1983). This duty is confirmed by statute, which prohibits insurers from “not attempting in good faith to effectuate prompt, fair, and equitable settlements of claims in which liability has become reasonably clear” or not settling a claim “where liability has become reasonably clear, under one portion of the insurance policy coverage” for purposes of influencing other portions of coverage. Minn. Stat. § 72A.20, subd. 12(6); 12(13). Liability for bad faith breach of this duty is discussed in Section V. In *Mattson v. Underwriters at Lloyds of London*, 385 N.W.2d 854, 858 (Minn. Ct. App. 1986), the court of appeals held that this duty is owed only to the insured. Consequently, a third party could not recover attorney fees under Minnesota’s

“private attorney general” statute for an alleged violation of Minn. Stat. § 72A.20.

## LH&D BENEFICIARY ISSUES

### Change of Beneficiary

Under Minnesota law, the doctrine of “substantial compliance” allows an insured to change the beneficiary of a life insurance policy, even without notice to the insurer, if it is proven that (1) “the insured intended to change the beneficiary,” and (2) if the insured “took affirmative action or otherwise did substantially all that he could do to demonstrate that intention without regard to whether he complied with the change-of-beneficiary provisions in the policy.” *Brown v. Agin*, 109 N.W.2d 147, 151 (Minn. 1961), followed by *Strauss v. Kitsmiller*, No. A18-1016, 2019 WL 664525 (Minn. Ct. App. Feb. 19, 2019). However, failure to follow the policy’s provisions may confuse the issue, hindering a factual finding of the insured’s intent, and any confusion must be resolved in favor of the named beneficiary. *Gwin v. Gappa*, 394 N.W.2d 530, 534 (Minn. Ct. App. 1986). Examples of actions taken that were sufficient to allow the change in beneficiary have included the insured writing a letter to the intended beneficiary stating that the named beneficiary should not receive the proceeds, *Lemke v. Schwarz*, 286 N.W.2d 693, 695-96 (Minn. 1979), an insured serviceman abroad mailing a change-in-beneficiary form to the intended beneficiary, *Pabst v. Hesse*, 173 N.W.2d 925, 927 (1970), and an insured delivering a signed change-in-beneficiary form to his insurance agent, *Metropolitan Life Ins. Co. v. Belland*, 583 N.W.2d 592, 593 (Minn. App. 1998).

In the absence of a *contract* otherwise, premium payments by a beneficiary are considered gratuitous and do not provide a right to the policy or prevent the insured from changing the beneficiary to another. *McCloud v. Aetna Life Ins. Co.*, 21 N.W.2d 476, 478 (Minn. 1946).

### Effect of Divorce on Beneficiary Designation

Unless a policy, court order or contract between the spouses provides otherwise, a divorce automatically revokes one’s designation of their former spouse as a beneficiary under an insurance policy. Minn. Stat. §524.2-804, subd. 1; *In re DeJoode*, No. A13-0824, 2013 WL 6978496, at \*3 (Minn. Ct. App. Jan. 13, 2013). Policy proceeds are distributed as though the former spouse had died immediately before the divorce in the event of a statutory revocation. Minn. Stat. § 524.2-804, subd. 2. Recently, the Supreme Court upheld the Constitutionality of the statute, holding that it does not substantially impair pre-existing contractual arrangements. *See Sven v. Melin*, 138 S. Ct. 1815 (2018).

## INTERPLEADER ACTIONS

### Availability of Fee Recovery

There are no reported decisions of Minnesota state courts either allowing or disallowing attorney fees in interpleader actions. *See Equitable Life Assur. Soc. of U.S. v. Miller*, 229 F. Supp. 1018, 1021 (D. Minn. 1964). Successful interpleader plaintiffs, including insurance companies, are frequently awarded fees in federal cases within Minnesota. *See, e.g., Protective Life Ins. Co. v. Kridner*, No. CIV. 12-582, 2013 WL 1249205, at \*2 (D. Minn. Mar. 27, 2013); *Life Ins. Co. of N. Am. v. Sessing*, No. CIV.09-2269, 2010 WL 2010729, at \*2 (D. Minn. May 19,

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2010); *Redflex Traffic Sys. v. Network Elec.*, No. CIV 05-2702, 2006 WL 2265159, at \*2 (D. Minn. Aug. 7, 2006). To recover fees, an insurer must be ““(1) a disinterested stakeholder, (2) who has conceded liability, (3) has deposited the disputed funds into court, and (4) has sought a discharge from liability.”” *Kridner*, 2013 WL 1249205, at \*2 (quoting *Landmark Chems., SA v. Merrill Lynch & Co.*, 234 F.R.D. 62, 63 (S.D.N.Y.2005)). The amount of fees awarded “should be modest to avoid seriously depleting the stake.” *Sessing*, 2010 WL 2010729, at \*2 (internal quotation omitted). Fees incurred defending the insurer’s interest, such as disputing the amount of liability or defending against counterclaims unrelated to the deposited funds, are not recoverable. *Kridner*, 2013 WL 1249205, at \*6.

### Differences in State vs. Federal

Minnesota does not have a state interpleader statute analogous to 28 U.S.C. § 1335. However, Rules 22 of the Minnesota and Federal Rules of Civil Procedure are similar and there are not significant substantive differences between interpleader actions in federal or state court. However, Minnesota courts have not recognized a right to recover attorney fees by interpleader plaintiffs. Given this, along with the availability of national service of process and the relatively liberal jurisdictional requirements of the federal interpleader statute, 28 U.S.C. § 1335, a significant majority of Minnesota interpleader cases are filed in federal court.