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NEBRASKA

REGULATORY LIMITS ON CLAIMS HANDLING
Timing for Responses and Determinations

Property & Casualty

Nebraska has adopted the model standards for prompt, fair, and equitable settlements which are applicable to all insurers, including property and casualty insurers. The regulations provide that within fifteen days after receipt by the insurer of settlement information of a properly executed proof of loss, the claimant must be advised of the acceptance or denial of the claim by the insurer. § 8 of Chapter 60 of the Nebraska Unfair Property and Casualty Claims Settlement Practices Rule.

If the insurer needs additional time to determine whether a claim should be accepted or denied, it shall notify the claimant of this within fifteen days after receipt of settlement information or the proof of loss, giving the reasons more time is needed. If the investigation remains incomplete, thirty days from the initial notification and every thirty days thereafter, the insurer shall send to the claimant a letter setting forth the reasons additional time is needed for investigation. § 8 of Chapter 60 of the Nebraska Unfair Property and Casualty Claims Settlement Practices Rule.

In cases where there is no dispute regarding coverage as to one or more portions of the insurance policy and where liability has become reasonably clear, the insurer shall offer to claimants, within fifteen days of receipt of settlement information, amounts within policy limits which are fair and reasonable as shown by the insurer's completed investigation. The insurer
shall tender payment within fifteen days of claimant's acceptance. § 8 of Chapter 60 of the Nebraska Unfair Property and Casualty Claims Settlement Practices Rule.

Life Health & Accident

Nebraska's regulations relating to settlement practices in life, sickness and accident insurance claims require insurance companies to acknowledge receipt of a life, sickness and accident insurance claim within fifteen days. Within that same time period, an insurance company must send a claimant the necessary claim forms with instructions and reasonable assistance to help a claimant fill out the forms. The insurance company, within that initial fifteen day period, must initiate its investigation into the claim. §§ 6 and 7 of Chapter 61 of the Nebraska Unfair Life, Sickness and Accident Claims Settlement Practices Rule.

A Nebraska insurer must affirm or deny liability on claims within fifteen days of receipt of the proof of loss, and if a claim remains unresolved within that time frame the insurer must provide the insured a reasonable written explanation for the delay. If the

investigation into a claim remains incomplete, the insurer shall, thirty days from the date of the initial notification that the claim remains unresolved and every thirty days thereafter, send the insured a reasonable written explanation setting forth the reasons that additional time is needed for investigation. See § 8 of Chapter 61 of the Nebraska Unfair Life, Sickness and Accident Claims Settlement Practices Rule.

If a claim is accepted and there is no dispute as to the amount owed, the insurer must make payment on the claim within fifteen days. With each claim payment, the insurer shall provide to the insured an "Explanation of Benefits" that shall include, if applicable, the name of the provider or services covered, the amount charged, the dates of service and a reasonable explanation of the computation of benefits. See § 8 of the Nebraska Unfair Life, Sickness and Accident Claims Settlement Practices Rule.

If a claim is denied, the insurer must advise the insured of the denial within fifteen days that the decision to deny the claim is made. The denial must be in writing and shall reference the specific policy provisions, conditions or exclusions upon which the denial is based. If after a denial is made an insured objects to the denial and the denial is maintained by the insurance company, the insurance company shall notify the insured in writing that he or she may have the matter reviewed by the Nebraska Department of Insurance, and the insurance company shall provide the insured/claimant with the Department's address and phone number. See § 8 of Chapter 61 of the Nebraska Unfair Life, Sickness and Accident Claims Settlement Practices Rule.

Additionally, NEB. REV. STAT. § 44-3,143 provides that failure to pay life insurance proceeds to a beneficiary within thirty days of receipt of proof of death of the insured by the insurance company results in the insurance company being required to pay interest on the amount due calculated from the date of receipt of the proof of death if the beneficiary meets the additional statutory requirements.

Standards for Determination and Settlements

Under NEB. REV. STAT. § 44-1540, the following actions relating to determination and settlement standards constitute "unfair claims settlement practices" in all types of insurance claims, including health, accident, life, property and casualty:

- Knowingly misrepresenting to claimants and insureds relevant facts or policy provisions relating to coverages at issue;
- Failing to acknowledge with reasonable promptness pertinent communications with respect to claims arising under its policies;
- Failing to adopt and implement reasonable standards for the prompt investigation and settlement of claims arising under its policies;
- Not attempting in good faith to effectuate prompt, fair, and equitable settlement of claims submitted in which liability has become reasonably clear;
- Not attempting in good faith to effectuate prompt, fair, and equitable settlement of property and casualty claims (a) in which coverage and the amount of the loss are reasonably clear and (b) for loss of tangible personal property within real property which is insured by a policy subject to section 44-501.02 and which is wholly destroyed by fire, tornado, windstorm, lightning, or explosion;
- Compelling insureds or beneficiaries to institute litigation to recover amounts due under its policies by offering substantially less than the amounts ultimately recovered in litigation brought by them;
- Refusing to pay claims without conducting a reasonable investigation;

- Failing to affirm or deny coverage of a claim within a reasonable time after having completed its investigation related to such claim;
- Attempting to settle a claim for less than the amount to which a reasonable person would believe the insured or beneficiary was entitled by reference to written or printed advertising material accompanying or made part of an application;
- Attempting to settle claims on the basis of an application which was materially altered without notice to or knowledge or consent of the insured;
- Making a claims payment to an insured or beneficiary without indicating the coverage under which each payment is being made;
- Unreasonably delaying the investigation or payment of claims by requiring both a formal proof-of-loss form and subsequent verification that would result in duplication of information and verification appearing in the formal proof-of-loss form;
- Failing, in the case of the denial of a claim or the offer of a compromise settlement, to promptly provide a reasonable and accurate explanation of the basis for such action;
- Failing to provide forms necessary to present claims with reasonable explanations regarding their use within fifteen working days of a request;
- Failing to adopt and implement reasonable standards to assure that the repairs of a repairer owned by or affiliated with the insurer are performed in a skillful manner;
- Requiring the insured or claimant to use a particular company or location for motor vehicle repair;
- Failing to provide coverage information or coordinate benefits pursuant to section 68-928; and
- Failing to pay interest on any proceeds due on a life insurance policy as required by section 44-3,143.

Property & Casualty

No insurer shall deny a claim on the grounds of a specific policy provision, condition, or exclusion unless reference to such provision, condition, or exclusion is included in the denial. The denial must be given to the claimant in writing and the claim file of the insurer shall contain documentation of the denial. Payments shall be made for any such portion of the insurance policy notwithstanding the existence of disputes as to other portions of the insurance policy coverage where such payment can be made without prejudice to any interested party. Additionally, insurers shall not fail to settle first-party claims on the basis that responsibility for payment should be assumed by others, except as may otherwise be provided by policy provisions. § 8 of Chapter 60 of the Nebraska Unfair Property and Casualty Claims Settlement Practices Rule.

Insurers may not assign a percentage of negligence to a claimant for the purpose of reducing a settlement, when there exists no reasonable evidence upon which the assigned percentage of negligence could be based. Finally, if the insurer denies a claim or portion thereof, and the claimant objects to such denial, the insurers shall notify the claimant in writing that he or she may have the matter reviewed by the Nebraska Department of Insurance, and the insurer shall provide the claimant with the Department's current address and phone number. Also, to avoid claims of unfair settlement practices, insurers should provide coverage information to the Department of Health and Human Services when specifically requested. § 8 of Chapter 60 of the Nebraska Unfair Property and Casualty Claims Settlement Practices Rule.

No insurer may deny a claim based on information obtained in a telephone conversation or personal interview with any source unless the telephone conversation or personal interview is documented in the claim file. All denials must be in writing, and in sending the denial letter to the insured, the letter must contain the specific policy provisions, conditions or exclusions upon which the denial is based. See § 8 of Chapter 61 of the Nebraska Unfair Life, Sickness and Accident Claims Settlement Practices Rule.

PRINCIPLES OF CONTRACT INTERPRETATION

Under Nebraska law, courts construe insurance policies to "give effect to the parties' intentions at the time the contract was made." *Fireman's Fund v. Structural Sys. Tech., Inc.*, 426 F. Supp. 2d 1009, 1023 (D. Neb. 2006). An insurance contract is interpreted according to the reasonable expectations of the insured at the time the contract was made. *Id.* In case of doubt, the policy is liberally construed in favor of the insured. *Id.* A contract is construed as a whole, and if possible, effect must be given to every part. *Id.* at 1024. In discerning the parties' intentions, courts first determine as a matter of law whether a policy is ambiguous. *Id.* An insurance policy is ambiguous when a word, phrase, or provision in the contract has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings. *Id.* Where a clause in an insurance contract can be fairly interpreted in more than one way, there is an ambiguity to be resolved by the court as a matter of law. *Id.*

Nebraska courts first determine whether a contract is ambiguous "on an objective basis, not by the subjective contentions of the parties" and are therefore not compelled to find ambiguity simply because the parties suggest opposing interpretations. *Id.* The resolution of an ambiguity in an insurance policy turns not on what the insurer intended the language to mean, but what a reasonable person in the position of the insured would have understood it to mean at the time the contract was made. *Id.* If a court determines that a policy is ambiguous, it may "employ rules of construction and look beyond the language of the policy to ascertain the intention of the parties." *Id.* Rules of construction require that in the case of ambiguities, the construction favorable to the insured prevails so as to afford coverage. *Id.* When an insurer wishes to limit its coverage, it is the duty of the insurer to draft the terms precisely. *Id.*

If the court determines, however, that a policy is not ambiguous then it "may not resort to rules of construction, and the terms are to be accorded their plain and ordinary meaning as the ordinary or reasonable person would understand them." *Id.* In such a case, a court will seek to ascertain the intentions of the parties from the language of the policy. *Id.* When interpreting the plain meaning of the terms of the insurance policy, Nebraska courts prefer the "natural and obvious meaning of the provisions in a policy" over a "fanciful, curious, or hidden meaning." *Id.* Ambiguity will not be read into policy language which is plain and unambiguous in order to construe against the preparer of the contract. *Id.*

CONTRACT INTERPRETATION

Common Issues

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

Nebraska courts have held that faulty workmanship, standing alone, is not covered under a standard CGL policy as it is not a fortuitous event. *Auto-Owners Ins. Co. v. Home Pride Co.*, 268

Neb. 528, 535, 684 N.W.2d 571, 577 (2004). When undefined in the policy itself, courts have consistently defined "accident" within the meaning of liability insurance contracts as including any event which takes place without foresight or expectation of the person acted upon or affected thereby. *E.g., Farr v. Designer Phosphate & Premix Int'l.*, 253 Neb. 201, 206, 570 N.W.2d 320, 325 (1997). As such, an accident caused by faulty workmanship is a covered occurrence because in that instance, an unintended and unexpected event has occurred, thereby triggering coverage. *Auto-Owners*, 268 Neb. at 535, 684 N.W.2d at 577. Specifically, if faulty workmanship causes bodily injury or property damage to something other than the insured's work product, coverage may exist. *Id*.

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

Yes, Nebraska has an anti-indemnity statute. Nebraska's anti-indemnity statute provides for circumstances in which a public or private contract or agreement to indemnify another party for their own negligence is void as against public policy and wholly unenforceable. *Id.* These circumstances include a contract or agreement for the construction, alteration, repair, or maintenance of a building structure, highway, bridge, viaduct, water, sewer, gas distribution system, or other work dealing with or connected to construction. *Id.*

However, this statute includes a notable exception for construction bonds or insurance contracts or agreements. NEB. REV. STAT. § 25-21,187(1). Nebraska courts have interpreted that exception to allow indemnity if it is expressly tied to an insurance policy and the promise to insure is set out in the contract. *See Anderson v. Nashua Corp.,* 251 Neb. 833, 838, 560 N.W.2d 446, 449 (1997) (stating that NEB. REV. STAT. § 25-21,187 does not render an agreement invalid because it provides an exception for insurance instead of indemnity).

CHOICE OF LAW

For choice of law questions, Nebraska generally follows the Restatement (Second) of Conflict of Laws. *Fireman's Fund v. Structural Sys. Tech., Inc.*, 426 F. Supp. 2d 1009, 1023 (D. Neb. 2006). Section 188 of the Restatement (Second) of Conflict of Laws states that the "rights and duties of the parties with respect to an issue in contract are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the transaction and the parties under the [general choice-of-law] principles stated in § 6." Restatement (Second) of Conflict of Laws § 188 (1971).

Nebraska courts are guided by the Restatement § 193 to determine the choice of law with respect to an insurance contract. *Fireman's Fund*, 436 F. Supp. 2d at 1023. The validity of a contract of fire, surety or casualty insurance and the rights created thereby are determined by the local law of the state which the parties understood to be the principal location of the insured risk during the term of the policy, unless with respect to the particular issue, some other state has a more significant relationship to the transaction and the parties. *Id.* Thus, there is a presumption in favor of the law of the "state which the parties understood was to be the principal location of the insured risk during the term of the policy" with respect to casualty insurance. *Id.*

DUTIES IMPOSED BY STATE LAW

Duty to Defend

1. Standard for Determining Duty to Defend

Nebraska law recognizes that an insurer's duty to defend is broader than, and distinct from, the duty to indemnify. Cizek Homes, Inc. v. Columbia National Insurance Co., 22 Neb. App. 361, 367-68 (2014); Peterson v. Ohio Cas. Group, 272 Neb. 700, 724 N.W.2d 765 (2006); John Market Ford, Inc. v Auto-Owners Ins., Co., 249 Neb. 286, 543 N.W.2d 173 (1996); Union Ins., Co. v. Land and Sky, Inc., 247 Neb. 696, 529 N.W.2d 773 (1995). Any determination of an insurer's duty to defend in Nebraska must begin with the seminal case of Allstate v. Novak, 210 Neb. 184 (1981). As Allstate v. Novak makes clear, insurers have a duty to defend whenever facts are ascertained which give rise to the potential for liability under the policy. When determining whether such facts exist, an insurer cannot rely solely on the allegations of the petition, but also must conduct an investigation to determine its obligation to defend. *Id.; Cizek Homes,* 22 Neb. App. At 368.

2. Issues with Reserving Rights

When coverage is in doubt, the insurer can offer to defend the insured, reserving all of its defenses in case the insured is later found liable, and upon such notification the insured may either accept the reservation of rights and allow the insurer to proceed with the defense, or it may reject the reservation of rights and take over the defense itself. *First United Bank of Bellevue v. First Am. Title Ins.,* Co., 242 Neb. 640, 496 N. W.2d 474 (1993); *City of Carter Lake v. Aetna Cas. and Sur., Co.*, 604 F.2d 1052 (8th Cir. 1979).

State Privacy Laws; Insurance Regulatory Issues; Arbitration/Mediation

The Privacy of Insurance Consumer Information Act, NEB. REV. STAT. §§ 44-901 to 44-925, embodies Nebraska's privacy law and closely follows the model act. As it relates to property and casualty insurance, the Act governs the treatment of nonpublic personal financial information about individuals by all licensees of the Department of Insurance.

The Act requires a licensee to provide notice to individuals about its privacy and practices, describes the conditions under which a licensee may disclose nonpublic personal financial information about individuals to affiliates and non-affiliated third parties, and provides methods for individuals to prevent a licensee from disclosing that information. NEB. REV. STAT. §§ 44-902 – 44-918.

The Act applies to nonpublic personal financial information about the individuals who obtain or are claimants or beneficiaries of products or services primarily for personal, family, or household purposes from licensees. The Act does not apply to information about companies or individuals who obtain products or services for business, commercial, or agricultural purposes. NEB. REV. STAT. § 44-902.

Unless otherwise expressly prohibited by Chapter 44, the Director of the Department of Insurance may share documents, materials, or other information, including otherwise confidential and privileged documents, materials, or information with other state, federal, foreign, and international regulatory and law enforcement agencies. The director may also share information with the International Association of Insurance Supervisors, the Bank for International Settlements, and the National Association of Insurance Commissioners and its affiliates and subsidiaries if the recipient agrees to maintain the confidential or privileged status of the document, material, or

other information. NEB. REV. STAT. § 44-154.

The Director may also receive documents, materials, or other information, including otherwise confidential and privileged documents, materials, or information, from other state, federal, foreign, or international regulatory and law enforcement agencies and from the National Association of Insurance Commissioners and its affiliates and subsidiaries. The director shall maintain as confidential or privileged any document, material, or other information received pursuant to an information-sharing agreement entered into pursuant to this section with notice or the understanding that the document, material, or other information is confidential or privileged under the laws of the jurisdiction that is the source of the document, material, or information. NEB. REV. STAT. § 44-154.

1. Criminal Sanctions

There are no criminal sanctions under the Privacy of Insurance Consumer Information Act.

2. The Standards for Compensatory and Punitive Damages

Punitive damages are likely not available under Nebraska law. However, the comments to the introduction on the pattern jury instructions on damages suggest a contrary view. Nebraska Jury Instructions, Second Edition. NJI2d Civ. 4.00 (5)(b). The following may be considered in awarding damages:

- The nature and extent of the injury, including whether the injury is temporary or permanent and whether any resulting disability is partial or total;
- The reasonable value of the medical, hospital, nursing, and similar care and supplies reasonably needed by and actually provided to the plaintiff and reasonably certain to be needed and provided in the future;
- The wages, salary, profits, reasonable value of the working time the plaintiff has lost because of his/her inability or diminished ability to work;
- The reasonable value of the earning capacity the plaintiff is reasonably certain to lose in the future;
- The physical pain and mental suffering the plaintiff has experienced and is reasonably certain to experience in the future; and
- The plaintiff's husband's/wife's loss of consortium.

NJI2d Civ. 4.00.

3. Insurance Regulations to Watch

LB 296 is under consideration in the Nebraska Legislature. This bill has various insurance related components to it, though it is notable in that it has a provision for ensuring that telehealth service providers are reimbursed for their services.

4. State Arbitration and Mediation Procedures

NEB. REV. STAT. § 25-2602.01 prohibits the enforcement of arbitration clauses by insurers. Section f (4) of Nebraska's Uniform Arbitration Act provides that the subsection making agreements to submit to arbitration valid and enforceable does not apply to agreements concerning or relating to an insurance policy other than a contract between insurance companies including reinsurance contract. *Id.*

5. State Administrative Entity Rule-Making Authority

The Nebraska Department of Insurance

PO Box 82089

Lincoln, Nebraska 68501-2089

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EXTRACONTRACTUAL CLAIMS AGAINST INSURERS: ELEMENTS AND REMEDIES

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

Nebraska law recognizes both first-party and third-party bad faith claims against insurers. Under Nebraska law the elements of bad faith are:

- the absence of a reasonable basis for denying benefits of the insurance policy; and
- the defendant's knowledge or reckless disregard of the lack of a reasonable basis for denying the claim.

Fo Ge Investments, LLC v. First American Title, 27 Neb.App. 671, 680 (2019); *Hayes v. Metropolitan Property and Casualty Insurance Company,* 908 F. 3d 370 (8th Cir. 2018); Williams *v. Allstate Indem. Com.*, 266 Neb. 794, 669 N.W.2d. 459 (2003); *Radecki v. Mutual of Omaha Ins. Co.*, 255 Neb. 224, 583 N.W.2d 320 (1998).

The requisite "knowledge or reckless disregard" may be inferred and imputed to an insurance company when "[t]here is reckless indifference to facts or to proof submitted by the insured. This reckless indifference to the facts or to the proof submitted by an insured is shown by the insurer's failure to conduct a proper investigation and subject the results to a reasonable evaluation and review." *Ruwe v. Farmers Mut. United Ins. Co.*, 238 Neb. 67, 74, 469 N.W.2d 129 (1991). The requirement of intentional or reckless conduct arises from the recognition that an insurer must be given wide latitude in its ability to investigate claims and to resist false or unfounded efforts to obtain funds not available under the contract of insurance. Insurers are entitled to debate claims which are "fairly debatable" or subject to reasonable dispute without being subject to a claim for bad faith. *LeRette v. American Medical Services, Inc.*, 270 Neb. 545, 557, 705 N.W.2d 41 (2005). Whether a claim is "fairly debatable" or subject to reasonable dispute is appropriately decided by the Court as a matter of law. *Id.* Such a determination is based on the information available to the insurance company at the time the claim is presented. *Id.*

Recoverable damages in a bad faith action include:

- Contract damages;
- Consequential damages in contract;
- Compensatory damages in tort (including damages for mental suffering); and
- Reasonable attorney fees under NEB. REV. STAT. § 44-359.

Where an unauthorized foreign insurer or alien insurer is sued on its insurance contract delivered to a Nebraska resident or a corporation authorized to do business in Nebraska, and the insurer has failed to make a payment in accordance with its policy within thirty days of a demand and prior to commencement of the suit, and such failure to pay is vexatious and without reasonable cause, then the court may allow the plaintiff a reasonable attorneys' fee not to exceed twelve and one half percent of the judgment. NEB. REV. STAT. § 44-2012.

3. First Party

An insured seeking damages for a bad faith settlement of a first-party insurance claim must prove the insurer had no reasonable basis for denying the claim and that the insurer knew of, or recklessly disregarded, the lack of reasonable basis for the denial. *LeRette v. Am. Med. Sec., Inc.*, 270 Neb. 545, 553, 705 N.W.2d 41 (2005); *Williams v. Allstate*, 266 Neb. 794, 669 N.W.2d 455 (2003); *Ruwe v. Farmers Mut. United Ins., Co.*, 238 Neb. 67, 469 N.W.2d 129 (1991); *Braesch v. Union Ins., Co.*, 237 Neb. 44, 464 N.W.2d 769 (1991) (overruled on other grounds). The Nebraska Supreme Court has held that "only a policyholder has standing to bring a first-party bad faith claim." *Millard Gutter Co. v. Farm Bureau Prop. & Cas. Ins. Co.*, 312 Neb. 629, 641 (2022).

Bad faith is an intentional tort that cannot arise when the insurer's actions are merely negligent, rather some level or wrongdoing is required. *Braesch*, 237 Neb. 44, 56, 464 N.W.2d 769. The Nebraska Supreme Court has recognized that an insurance company has a right to debate a claim which is fairly debatable or subject to a reasonable dispute without being subject to a bad faith claim. *Williams*, 266 Neb. 794, 799, 669 N.W.2d 455. Whether a claim is subject to a reasonable dispute is appropriately decided by the Court as a matter of law based upon the information available to the insurance company at the time the demands presented. *Id.*

The tort of first-party bad faith on the part of an insurer can arise out of a number of bad faith settlement tactics, including inadequate investigation, delays in settlement, false accusations, and more. *Ruwe*, 238 Neb. 67, 469 N.W.2d 129. As a matter of law, if a lawful basis for denial of a claim actually exists, the insurer cannot be held liable in an action alleging bad faith. *LeRette*, 270 Neb. 545, 705 N.W.2d 41; *Radecki v. Mut. of Omaha Ins., Co.*, 255 Neb. 224, 583 N.W.2d 320 (1998).

In Nebraska, the law surrounding claims made for bad faith has been slow to develop and is not well-defined. Unlike a claim for negligence, when a claim for bad faith is made there is no standard jury instruction which neatly sets forth the type of damages available. The matter is complicated further by the fact that bad faith is a tort, but the duties involved have their basis in contract.

4. Third-Party

Third-party bad faith claims arise under Nebraska law when an insurer wrongfully fails to settle a claim by a third-party against an insured. *Braesch*, 237 Neb. 44, 48, 464 N.W.2d 769. When an insurer

decides to resist a claim of liability by a third-party against an insured, an implied agreement arises with its insured that it will exercise good faith where the insured's rights are concerned. Thus, an insurer is required to use due care and reasonable diligence to ascertain the facts surrounding a claim and obtain competent legal advice concerning the claim. *Hadenfeldt*, 195 Neb. 578, 239 N.W.2d 499. Before rejecting a claim by a third-party, an insurer must fully and fairly consider the claim, and refusal to settle must be based on an honest belief that the insurer can defeat the action or keep the judgment within the limit of the policy. *Olsen*, 174 Neb. 375, 118 N.W.2d 318. When an insurer rejects a claim without the use of due care and reasonable diligence in its investigation, a bad faith claim may be brought by the insured. *Hadenfeldt*, 195 Neb. 578, 239 N.W.2d 499.

Further, under current Nebraska law a third-party cannot make a bad faith claim against an insurer directly. *See Millard Gutter Co. v. Shelter Mut. Ins. Co.*, 312 Neb. 606 , 622 (2022). There, the Nebraska Supreme Court rejected this theory and noted there was no legal basis that an insurer owes a third-party any obligation of good faith and fair dealing. *Id.* The implied covenant of good faith and fair dealing is reserved for the contractual relationship between a policyholder and an insurer. *Id.* The Court noted that post-loss assignments, "neither increases nor changes the insurer's obligations under the policy." *Id.* at 623. That said, there remains the possibility that the insured could assign a bad faith claim to the third-party. However, there has been some uncertainty among courts in this area that will require monitoring to determine how the law develops going forward with regarding the assignment of third-party bad faith claims.

In a third-party bad faith claim, an insured may recover damages in excess of the policy limit when the insurer, in bad faith, refuses to settle within the limit and the third-party subsequently obtains judgment against the insured in excess of the policy limit. Beyond the amount of the judgment against the insured, it is not entirely clear what additional damages the Nebraska Supreme Court will deem recoverable in third-party bad faith actions.

Fraud

The elements of fraud in Nebraska are as follows: (1) a false (2) representation was made, (3) that when made, was known to be false or was made recklessly or without knowledge of its truth and as a positive assertion, (4) with the intention that the plaintiff rely upon it, (5) the plaintiff did so rely, and (6) the plaintiff suffered damage as a result. *Eicher v. Mid Am. Fin. Inv., Corp.*, 270 Neb. 370, 702 N.W.2d 792 (2005); *Freeman v. Hoffman-La Roche, Inc.*, 260 Neb. 552, 618 N.W.2d 827 (2000).

A claim for fraud may arise through silence on the part of a defendant. To prove a claim for fraud by silence, a plaintiff must show that a duty to speak existed, that the information was material, and that the suppression of the information tended to induce action which the other party would not otherwise have taken. *Grone v. Lincoln Mut. Life Ins., Co.*, 230 Neb. 144, 430 N.W.2d 507 (1988).

Intentional or Negligent Infliction of Emotional Distress

The elements of intentional infliction of emotional distress are: (1) intentional or reckless conduct, (2) which is so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency and is to be regarded as atrocious and utterly intolerable in a civilized community, and (3) which caused emotional distress so

severe no reasonable person should be expected to endure it, which requires an extremely disabling emotional response. *Roth v. Wiese*, 271 Neb. 750, 716 N.W.2d 419 (2006); *Brandon v. County of Richardson*, 261 Neb. 636, 624 N.W.2d 604 (2001).

Nebraska recognizes emotional distress as a basis for recovery in bad faith actions, even when no physical injury is present. *See Braesch*, 237 Neb. 44, 464 N.W.2d 769; *Bailey*, 1 Neb. App. 408, 498 N.W.2d 591. Although in *Braesch*, the Court allowed damages for mental distress proximately caused by the insurer's bad faith without addressing the existence of other damages, the Court in *Bailey* held that emotional distress damages can only be recovered when there are injuries in addition to the loss of the benefits of the contract and the emotional distress, and those other injuries must cause severe and substantial emotional distress or mental suffering. The Nebraska Supreme Court has not yet addressed the issue of the recoverability of emotional distress damages in third-party bad faith claims.

State Consumer Protection Laws, Rules and Regulations

Nebraska's Consumer Protection Act, NEB. REV. STAT. §§ 59-1601 to 59-1625, provides that unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce shall be unlawful. NEB. REV. STAT. § 59-1602. Additionally, any contract, combination, in the form of a trust or otherwise, or conspiracy in restraint of trade or commerce is unlawful. NEB. REV. STAT. § 59-1603.

The Act provides a private cause of action for persons injured by violations of its terms, subject to a four-year statute of limitations. NEB. REV. STAT. §§ 59-1609 to 59-1612. However, it appears recovery under the Consumer Protection Act requires establishing a breach of contract claim before the courts will consider a private claim. *See Lynch v. State Farm*, 275 Neb. 136, 143, 745 N.W.2d 291 (2008) (stating it is necessary to establish a claim for breach of contract before the Court will consider claims under the Consumer Protection Act or the Uniform Deceptive Trade Practices Act which are dependent upon breach of contract). A plaintiff prevailing on a claim under the Act may be entitled to recover costs, including a reasonable attorney's fee. NEB. REV. STAT. §§ 59-1609. The court may also, in its discretion, increase the award of damages to an amount which bears a reasonable relation to the actual damages which have been sustained and which damages are not susceptible of measurement by ordinary pecuniary standards, except that such increased award shall not exceed one thousand dollars in some circumstances. *Id.* In addition to the private civil cause of action, the Act also provides for civil penalty for any person or business violating its terms; the Attorney General, acting in the name of the state, may seek recovery of the penalties. NEB. REV. STAT. § 59-1614.

DISCOVERY ISSUES IN ACTIONS AGAINST INSURERS

Discoverability of Claims Files Generally

The extent to which insurers' claims files are generally discoverable remains unclear in Nebraska, as no reported case law exists directly addressing the issue. Nebraska's Discovery Rules protect against the discovery of documents and tangible things prepared in anticipation of litigation or for trial by a party (including the party's attorney and insurer) absent a showing of substantial need and undue hardship. See Rule 26 (b)(3) of the Nebraska Discovery Rules.

However, in an unreported opinion, the United States District Court for the District of Nebraska discussed the work-product privilege as it pertained to insurance claims files. *See Turner v. Moen Steel Erection, Inc.*, No. 8:06CV227, 2006 WL 3392206, (D.Neb. Oct. 5, 2006). The Court stated that although not determinative, factors

such as who prepared the documents, the nature of the documents, and the time the documents were prepared were relevant to the analysis. *Id.* at *17. Additionally, "courts have routinely recognized that the investigation and evaluation of claims is part of the regular, ordinary and principal business of insurance companies." *Id.* Thus, the party asserting the privilege must make a factual showing the primary purpose of the insurance investigation was in anticipation of litigation, or the court may conclude that the investigation was conducted in the ordinary course of investigating a potential claim. *Id.*

Discoverability of Reserves

The Nebraska Supreme Court has not specifically ruled on the discoverability of reserves in claims of bad faith or otherwise. In cases involving risk management pools, there is statutory guidance on discoverability of reserves. NEB. REV. STAT. § 44-4318 states that information regarding that portion of the funds or liability reserve of a risk management pool established for the purpose of satisfying a specific claim or cause of action shall be exempt from disclosure under sections 84-712 to 84-712.09 (providing access to public records). Notwithstanding any other provision of law to the contrary, a party to a claim or action against a public agency or any risk management pool shall not be entitled to discover that portion of the funds or liability reserve established by the pool for purposes of satisfying the claim or cause of action, except that such information shall be discoverable in any supplemental or ancillary proceeding to enforce a judgment against a public agency or risk management pool

Discoverability of Existence of Reinsurance and Communications with Reinsurers

The Nebraska Supreme Court has not specifically ruled on the discoverability of the existence of reinsurance and/or communications with reinsurers.

Attorney/Client Communications

An insurer asserting that a claims file is protected by the attorney-client privilege has the burden of proving the documents sought are protected. *See generally Greenwalt v. Wal-mart Stores, Inc.*, 253 Neb. 32, 567 N.W.2d 560 (1997). *See also* Neb. Rev. Stat. 27-503. Although the attorney-client privilege applies in claims against insurers, it could be waived if the insurer, by its affirmative conduct, puts the documents to which discovery is sought directly at issue in a case. *See generally State v. Roeder*, 262 Neb. 951, 636 N.W.2d 870 (2001). Recently, Nebraska has proposed new rules of discovery which, if adopted, would largely track with Rule 26 of the Federal Rules. The practical effect of this would be to require privilege logs in all cases where such an objection is made.

DEFENSES IN ACTIONS AGAINST INSURERS

Misrepresentations/Omissions: During Underwriting or During Claim

No oral or written misrepresentation or warranty made in the negotiation for a contract or policy of insurance by the insured, or in his or her behalf, shall be deemed material or defeat or avoid the policy, or prevent its attaching, unless such misrepresentation or warranty deceived the company to its injury. NEB. REV. STAT. § 44-358.

An insurer in Nebraska may rescind an insurance policy when the insured has knowingly made a material misrepresentation. A misrepresentation will be material if the insurer would not have issued the policy had it been aware of the true facts. *Lowry v. State Farm Mut. Auto. Ins., Co.*, 228 Neb. 171, 421 N.W.2d 775 (1988). An insurer may rescind a policy based on material misrepresentations made by affirmative statements, or by the

silence of the insured when the insured had a duty to speak. *Grone*, 230 Neb. 144, 430 N.W.2d 507. The misrepresentation must have been made knowingly with the intent to deceive, the insurer must have relied and acted on the false statement, and the insurer must have been deceived to its injury. *Lowry*, 228 Neb. 171, 421 N.W.2d 775.

The insurer may rescind based on a material misrepresentation in the application even when it affects an innocent third-party injured by the insured's negligence in operating an automobile. *Glockel v. State Farm Mut. Auto. Ins.*, Co., 224 Neb. 598, 400 N .W.2d 250 (1987). The rule in *Glockel* is contrary to the majority of jurisdictions.

Under Nebraska law, the falsity of any statement in the application for any policy of sickness and accident insurance covered by NEB. REV. STAT. §§ 44-709 to 44-767 may not bar the right to recovery thereunder unless such false statement materially affected either the acceptance of the risk or the hazard assumed by the insurer. NEB. REV. STAT. § 44-710.14. Additionally, no oral or written misrepresentation or warranty made in the negotiation for a contract or policy of insurance by the insured is deemed material or defeats or avoids the policy, unless the misrepresentation or warranty deceived the company to its injury. NEB. REV. STAT. § 44-358. Moreover, the breach of a warranty or condition in any contract or policy of insurance shall not avoid the policy nor avail the insurer to avoid liability, unless such breach shall exist at the time of the loss and contribute to the loss, anything in the policy or contract of insurance to the contrary notwithstanding. NEB. REV. STAT. § 44-358.

Failure to Comply with Conditions

The breach of any condition in any contract or policy of insurance does not avoid the policy nor avail the insurer to avoid liability, unless the breach existed at the time of the loss and contributed to the loss, even if the policy contains statements to the contrary. NEB. REV. STAT. § 44-358. Section 44-358 does not deny an insurer the right to rely on the conditions of its policy which the insured is required to perform as a condition of recovery after the loss has occurred. *Coppi v. West Am. Ins.*, 247 Neb. 1, 524 N.W.2d 804 (1994)(overruled on other grounds).

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

A consent judgment is subject to collateral attack when the facts show that the judgment or settlement was entered into fraudulently, collusively, or in bad faith. *Carlson v. Zellaha*, 240 Neb. 432, 482 N.W.2d 281 (1992).

Preexisting Illness or Disease Clauses

Preexisting condition means a condition whether physical or mental, regardless of the cause of the condition, for which medical advice, diagnosis, care, or treatment was recommended or received within the six-month period ending on the enrollment. Genetic information shall not be treated as a condition for which preexisting condition exclusion may be imposed in the absence of a diagnosis of the condition related to such information. NEB. REV. STAT. § 44-6915.

Nebraska's Long-Term Care Insurance Act, NEB. REV. STAT. §§ 44-4501 to 44-4521, provides that a long-term care insurance policy or certificate, other than certain group policies as defined in NEB. REV. STAT. § 44-4508, may not define "preexisting condition" any more narrowly than to mean a condition for which medical advice or treatment was recommended by or received from a provider of health care services within six months preceding the effective date of coverage of an insured person. NEB. REV. STAT. § 44-4513(2).

The statute also provides that a long-term care insurance policy or certificate may not exclude coverage for a loss or confinement arising from a preexisting condition unless such loss or confinement occurs within six months of the policy's effective date. NEB. REV. STAT. § 44-4513(3).

Additionally, a health benefit plan may not deny, exclude, or limit benefits for a covered individual for losses incurred more than twelve months, or eighteen months in the case of a late enrollee, following the enrollment date of the individual's coverage due to a preexisting condition or the first date of the waiting period for enrollment if that date is earlier than the enrollment date. A health benefit plan cannot define "preexisting condition more narrowly than it is defined in section 44-6915, or impose any preexisting condition exclusion relating to pregnancy as a preexisting condition". NEB. REV. STAT. § 44-6916.

Judicially, preexisting conditions are defined as diseases, conditions, or illnesses that are manifest or active or when there is a distinct symptom or condition from which one learned in medicine can with reasonable accuracy diagnose the disease. *Katskee v. Blue Cross/Blue Shield of Nebraska*, 245 Neb. 808, 515 N.W.2d 645 (1994); *Fulsang v. Blue Cross of Western Iowa and South Dakota*, 235 Neb. 552 (1990).

Statutes of Limitations and Repose

In Nebraska, there is a five-year statute of limitations for actions on written contracts. NEB. REV. STAT. § 25-205. Actions based upon negligence must be commenced within four years. NEB. REV. STAT. § 25-207. Insurance companies may not issue policies of insurance in Nebraska which provide that the statute of limitations is less than that prescribed by the laws of Nebraska. NEB. REV. STAT. § 44-357.

TRIGGER AND ALLOCATION ISSUES FOR LONG-TAIL CLAIMS

Trigger of Coverage

Nebraska law is unclear as to when coverage is triggered in long-tail claims. With respect to liability coverage, the time of the occurrence of an accident within the meaning of a policy is not the time when the wrongful act was committed, but the time when the complaining party was actually damaged. *Farr v. Designer Phosphate & Remix Int'l.*, 253 Neb. 201, 570 N.W.2d 320 (1997).

Allocation Among Insurers

Given the scarcity of case law on the subject in Nebraska, there is no appellate guidance on the preferred approach to allocating a loss among multiple insurers in long-tail claims.

CONTRIBUTION ACTIONS

Claim in Equity vs. Statutory

In Nebraska, contribution is an equitable remedy given to the party who pays a debt that is concurrently owed by another party, and the existence of a common obligation makes the right to contribution possible. *Am. Family Mut. Ins. Co. v. Regent Ins. Co.*, 288 Neb. 25, 846 N.W.2d 170 (2014).

Elements

In order to recover on a claim for contribution among joint tort-feasors, the following elements must be shown: (1) There must be a common liability among the party seeking contribution and the parties from whom contribution is sought; (2) the party seeking contribution must have paid more than its pro rata share of the common liability; (3) the party seeking contribution must have extinguished the liability of the parties from whom the contribution is sought; and (4) if such liability was extinguished by settlement, the amount paid in settlement must be reasonable. *Estate of Powell v. Montage*, 277 Neb. 846, 756 N.W.2d 496 (2009).

DUTY TO SETTLE

An insurer must use due care and reasonable diligence to ascertain facts surrounding a claim, and obtain competent legal advice concerning the claim. *Hadenfeldt v. State Farm Mut. Auto. Ins., Co.*, 195 Neb. 578, 239 N.W.2d 499 (1976). When an insurer elects to effect settlement on such terms as it can get, an implied agreement arises that the insurer will exercise due care and good faith where the rights of the insured are concerned. *Olsen v. Union Fire Ins., Co.*, 174 Neb. 375, 118 N.W.2d 318 (1962). An insurer may settle a claim within the limits of the policy as it so chooses. *Id.*

LH&D BENEFICIARY ISSUES

Change of Beneficiary

NEB. REV. STAT. § 44-370 allows a company issuing a life insurance policy to determine in its contract whether the insured has the ability to change the beneficiary of a life insurance policy or whether the designation of the beneficiary is irrevocable. *See Universal Assurors Life Ins. Co. v. Hohnstein*, 243 Neb. 359, 364, 500 N.W.2d 811, 815 (1993); *see also Goodrich v. Equitable Life Assur. Soc. of the U.S.*, 111 Neb. 616, 197 N.W. 380, 382 (1924). However, "provisions of a life insurance contract providing for the manner in which an assignment thereof, or change of beneficiary, is to be made is incorporated therein for the benefit of the insurer." *Marley v. New York Life Ins. Co.*, 147 Neb. 646, 657, 24 N.W.2d 652, 658 (1946). Therefore, "if the insurer waives compliance with such provisions, the failure to comply therewith cannot be raised by third persons." *Id.* A change in beneficiary becomes effective when the insured has "done all that he could to comply with the provisions of the policy." *Id.* The standard requiring all reasonable efforts be made is based on the principle of equity. *Id.*

It does not matter whether the insurer has actually made the change since "the insured may not be deprived of his right to make the change by the neglect of the company to perform a ministerial act." *Goodrich*, 111 Neb. at 616, 197 N.W. at 382. The Nebraska Supreme Court has said that when an insurer reserves the right to consent to a change of beneficiary, this right of consent is "a purely formal matter." *Id.*, 111 Neb. at 616, 197 N.W. at 383.

Effect of Divorce on Beneficiary Designation

In Nebraska, if a property settlement agreement is unambiguous "the effect of a decree must be declared in light of the literal meaning of the language used." *Metropolitan Life Ins. Co. v. Beaty*, 242 Neb. 169, 175, 493 N.W.2d 627, 631 (1993). Further, where "a property settlement agreement validly provides for the disposition of life insurance benefits, the subsequent execution of a change of beneficiary form absent consent of the other party to the agreement is ineffective." *Id.*; *see Hohertz v. Estate of Hohertz*, 19 Neb. App. 110 (Neb. Ct. App. 2011).

The general rule is that divorce does not affect a beneficiary designation in a life insurance policy, absent modification of the designation in the divorce decree. *Rice v. Webb,* 287 Neb. 712 (2014)(*citing Pinkard v.*

Confederation Life Ins. Co., 264 Neb. 312, 647 N.W.2d 85 (2002)). The rule is based on the notion that the beneficiary's claim to the proceeds evolves from the terms of the policy rather than the status of the marital relationship. *Id.* However, a spouse may waive such a beneficiary interest in a divorce decree so long as the decree language relinquishing such interest is unambiguous. *Id.*

INTERPLEADER ACTIONS

Availability of Fee Recovery

There are no reported cases in Nebraska addressing the issue of whether attorney fees are recoverable in an interpleader action. However, in Nebraska, attorney fees are generally difficult to recover and "may be recovered in a civil action only where provided for by statute or when a recognized and accepted uniform course of procedure has been to allow recovery of attorney fees." *Young v. Midwest Family Mut. Ins. Co.,* 276 Neb. 206, 753 N.W.2d 778 (2008); *Eicher v. Mid. Am. Fin. Inv. Corp.*, 270 Neb. 370, 381, 702 N.W.2d 792, 806 (2005).

Differences in State vs. Federal

The requirements for interpleader in Nebraska state court are more stringent than they are in federal court because Nebraska, unlike the federal courts, has retained the four requirements from equity jurisprudence. Those requirements are as follows: (1) the claimants must all be claiming the same property or fund, (2) their claims must all be derived from a common source, (3) the stakeholder must be disinterested, and (4) the stakeholder must not be independently liable to any of the claimants. See *Ehlers v. Perry*, 242 Neb. 208, 211, 494 N.W.2d 325, 329 (1993); *Strasser v. Commercial Nat. Bank*, 157 Neb. 570, 572–73, 60 N.W.2d 672, 674 (1953).

In contrast, at the federal level, persons having claims against the plaintiff may be joined as defendants and required to interplead when their claims are such that the plaintiff is or may be exposed to double or multiple liability. It is not ground for objection to the joinder that the claims of the several claimants or the titles on which their claims depend to not have a common origin or are not identical but are adverse to and independent of one another. FED.R.CIV.P. 22(1); see also *Great Am. Ins. Co. v. Bank of Bellevue*, 366 F. 2d 289, 293–94 (8th Cir. 1966).