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New Mexico

REGULATORY LIMITS ON CLAIMS HANDLING

Timing for Responses and Determinations

The New Mexico Insurance Code, Unfair Claims Practices, NMSA 1978, § 59A-16-20 sets forth general rules regarding the time limits for adjusting claims. The only definite period specified is ninety (90) days from reporting, for settlement of catastrophic claims. NMSA 1978, § 59A-16-20(F). All other time requirements are more general. The Act requires insurers to act "reasonably promptly," in acknowledging claims. § 59A-16-20(B). The Act requires "prompt," investigation of the claim. § 59A-16-20(C). The Act also requires affirming or denying coverage within a "reasonable time." § 59A-16-20(D). Finally, the Act requires prompt settlement of a claim where liability is apparent, so not to influence settlement of other policy coverage and a prompt explanation of the basis for a denial of the claim or settlement offer. § 59A-16-20(M)(N).

Standards for Determination and Settlements

The New Mexico Insurance Code, Unfair Claims Practices, NMSA 1978, § 59A-16-20 sets forth the requirements for claims handling and settlement. Insurers are not permitted to misrepresent coverage § 59A-16-20(A). Insurers are required to act in good faith to effectuate prompt, fair, and equitable settlements after liability is "reasonably clear." § 59A-16-20(E). Insurers are precluded from attempting to settle for less than an insured would believe he is entitled to by reference to written advertising material. § 59A-16-20(H). Insurers are prohibited from compelling insureds to litigate to recover amounts due under the policy by offering substantially less than the amounts ultimately recovered when the insured has made a claim for similar amounts to those ultimately recovered. § 59A-16-20(G). The Act also precludes insurers from a regular practice of appealing arbitration awards, multiple claim forms, delayed reservation of rights. § 59A-16-20(K)(L)(N) respectively.

PRINCIPLES OF CONTRACT INTERPRETATION

New Mexico interprets insurance contracts by the same principles which govern the interpretation of all contracts, absent a statute to the contrary. Rummel v. Lexington Ins. Co., 1997-NMSC-041, 123 N.M. 752, 758, 945 P.2d 970, 976. See also, Jaramillo v. Providence Washington Ins. Co., 1994-NMSC-015, 117 N.M. 337, 871 P.2d 1343 (1994). An ambiguity in an insurance contract is usually construed against the insurer, because courts will weigh their interpretation against the party that drafted a contract's language. Id. See also Federal Ins. Co. v. Century Federal SAv. & Loan Ass'n, 1992-NMSC-009, ¶ 20,113 N.M. 162, 167, 824 P.2d 302, 307 (1992). Mitigating this rule is the requirement that courts adopt the interpretation that is most in accord with reason and the probable expectations of the parties. Id. An ambiguity exists when a term is reasonably and fairly susceptible to different constructions. See United Nuclear Corp. v. Allstate Ins. Co., 2012-NMSC-032, ¶ 10, 285 P.3d 644. Conflicting provisions within an insurance policy can also create an ambiguity. See Federal Ins. Co. v. Century Federal

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SAv. & Loan Ass'n, 1992-NMSC-009, ¶ 16,113 N.M. 162, 167, 824 P.2d 302, 307 (1992). In order to refute the presumption in favor of the insured, the insurer must provide evidence that supports the construction for which it advocates. Jaramillo v. Providence Washington Ins. Co., 1994-NMSC-015, 117 N.M. 337, 871 P.2d 1343 (1994). The insurer's interpretation, especially when it concerns an exclusion to the overall coverage, must be clearly expressed in the policy. Id. Exclusions to coverage will be construed narrowly in favor of the insured. See King v. Travelers Ins. Co., 1973-NMSC-013, ¶ 26, 84 N.M. 550, 505 P.2d 1226.

Insurance contracts are construed as a whole, including declarations, endorsements, and any other attachments. Jaramillo v. Providence Washington Ins. Co., 1994-NMSC-015, 117 N.M. 337, 871 P.2d 1343 (1994). The traditional rules of punctuation, syntax, and grammar may also help clarify a contractual ambiguity. Id. If any provisions appear questionable or ambiguous, New Mexico courts look to whether their meaning and intent is explained by other parts of the policy. Id. The resolution of ambiguities becomes a matter for the court and is often described as a matter of law rather than a factual determination. Id. If ambiguities cannot be resolved by examining the language of the insurance policy, courts may look to extrinsic evidence such as the premiums paid for insurance coverage, the circumstances surrounding the agreement, the conduct of the parties, and oral expressions of the parties' intentions. Id. See also, Mark V, Inc. v. Mellekas, 1993-NMSC-001, 114 N.M. 778, 845 P.2d 1232 (1993).

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" may be deemed an occurrence in New Mexico. In Pulte Homes of New Mexico, Inc. v. Indiana Lumbermens Ins. Co., the New Mexico Court of Appeals held alleged faulty workmanship constituted an "occurrence" under the terms of a CGL policy. 2016-NMCA-028, ¶ 25, 367 P.3d 869, 878. The Court reached this conclusion because it found the policy at issue did not "expressly state that faulty workmanship can never constitute an accident." Id.

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

   New Mexico has two anti-indemnity statutes: the Construction Anti-Indemnity Statute, located at NMSA 1978, § 56-7-1 (2005) and the Oilfield Anti-Indemnity Statute, located at NMSA 1978, 56-7-2 (2003). Both statutes serve to "promote safety in uniquely hazardous work places." Holguin v. Fulco Oil Svs. L.L.C., 2010-NMCA-091, ¶ 10, 149 N.M. 98, 101, 245 P.3d 42, 45. Both statutes are construed "first with a view toward furthering the public policy of safety embodied in the statutes and, as a secondary matter, in light of the public policy favoring freedom of contract." Id. Indemnity agreements that purport to indemnify the other party against all claims, including for claims of negligence by the indemnitee, violate the statutes and are deemed void as against public policy. See generally Pina v. Gruy Petroleum Mgmt. Co., 2006-NMCA-063, 139 N.M. 619, 136 P.3d 1029. This holds true, even if the agreement's choice of law provision invokes a foreign state's laws. See id. ¶ 22.

CHOICE OF LAW

New Mexico interprets insurance contracts according to the law of the place where the contract was executed, which is referred to as *lex loci contractus*. State Farm Mut. Auto. Ins. Co. v. Ballard, 2002-NMSC-030,¶7, 132 N.M. 696, 698, 54 P.3d 537, 539. See also, Shope v. State Farm Ins. Co., 1996-NMSC-052, 122 N.M. 398, 925 P.2d 515. To overcome *lex loci contractus*, there must be a countervailing interest that is fundamental and separate from general policies of contract interpretation. Id. Application of the rule must result in a violation of "fundamental principles of justice" in order to apply New Mexico law rather than the law of the jurisdiction where the contract was signed. Id. See also Wilkeson v. State Farm Mut. Auto. Ins. Co., 2014-NMCA-077, 329 P.3d 749; Demir v. Farmers Texas County Mutual Ins. Co., 2006-NMCA-091, 140 N.M. 162, 140 P.3d 1111.

DUTIES IMPOSED BY STATE LAW

Duty to Defend

1. Standard for Determining Duty to Defend

The New Mexico Jury Instruction for Bad Faith Failure to Defend, UJI 13-1703 NMRA, reads:

> A liability insurance company has a duty to defend its insured against all claims which fall within the coverage of the insurance policy. A liability insurance company must act reasonably under the circumstances to conduct a timely investigation and fair evaluation of its duty to defend.
>
> An insurance company acts in bad faith in refusing to defend a claim if the terms of the insurance policy do not provide a reasonable basis for the refusal.

An insurance company is obligated to defend when the complaint filed by the claimant alleges facts **potentially** within coverage of the policy. Dove v. State Farm Fire and Casualty, 2017-NMCA-051, ¶ 11. Phrased another way, if the allegations of the complaint or the alleged facts tend to show that an occurrence may come within the coverage of the policy, the insurer has a duty to defend regardless of the ultimate liability of the insured. Id. This is a low standard for a claimant to meet; alleged facts need only potentially bring a claim that falls within coverage.

There is a duty to defend even when the facts in the complaint are not stated with sufficient clarity so that it can be determined from the face of the complaint whether the action falls within the coverage of the policy. Id. Any doubt about whether the allegations are within policy coverage is resolved in the insured's favor. Id. If there is any doubt whether the claim is covered, then an insurer who refused to defend breached its duty to defend. Id. ¶ 15.

If the duty to defend does not arise from the complaint on its face, the duty to defend may arise if the insurer is notified of factual contentions or if the insurer could have discovered facts, through reasonable investigation, implicating a duty to defend. Id. at ¶ 11. In G & G Services, Inc. v. Agora Syndicate, Inc., the New Mexico Court of Appeals held that in determining whether an insurance company has a duty to defend, the insurer is required to conduct such investigation

into the facts and circumstances underlying the Complaint against its insured as is reasonable given the factual information provided by the insured or the circumstances surrounding the claim. 2000-NMCA-003, ¶ 23, 128 N.M. 434, 440, 993 P.2d 751, 757. In Southwest Steel Coil, Inc. v. Redwood Fire & Cas. Ins. Co., the Court of Appeals further noted that the facts known, but unpleaded, may bring a claim within the policy coverage at a later stage in the litigation. 2006-NMCA-151, ¶ 14, 140 N.M. 720, 726, 148 P.3d 806, 812. However, even if the insurer's own investigation reveals that a claim is not covered, a complaint that states facts within a policy's coverage gives rise to an insurer's duty to defend. Found. Reserve Ins. Co., Inc. v. Mullenix, 1982-NMSC-038, ¶ 6, 97 N.M. 618, 619-20, 642 P.2d 604, 605-06. An insurer, though denying coverage and liability must nonetheless defend its insured unless and until it receives a judicial ruling in its favor relieving it of any further obligations. Dove, 2017-NMCA-051, ¶ 12.

These cases changed New Mexico's previous rule that an insurance company can rely upon the four corners of the Complaint to determine whether there is a duty to defend. New Mexico courts now place an affirmative duty on the insurance company to conduct an investigation to determine whether there is a duty to defend. If an investigation leads the insurer to believe that coverage is in doubt, the duty to defend still applies. Id. The proper remedy is not a unilateral denial of coverage. Id. An insurer should undertake its duty to defend even when coverage is in doubt, then seek a declaratory judgment that the insured is not covered by the policy. Id. The declaratory judgment relieves an insurer of its duty to defend. Id. Alternatively, if an insurer doubts the existence of coverage, but nonetheless assumes its duty to defend, then it may proceed with defending under a reservation of rights to later deny coverage. Id.

State Farm & Casualty Co. v. Ruiz, established that when an insurance company wrongfully fails to defend after a demand, it suffers serious consequences and becomes liable for a judgment entered against the insured and for any reasonable settlement entered into by the insured in good faith, up to policy limits, notwithstanding any of the policy provisions to the contrary. In short, all coverage defenses are lost if the court determines the insurance carrier has wrongfully refused to defend. 36 F. Supp. 2d 1308, 1318 (D.N.M. 1999).

The supreme court has also addressed the issue as to what triggers an insurer's duty to defend the insured. In Garcia v. Underwriters at Lloyd's London, the Court held that actual notice of a claim triggers a duty for the insurer to defend, unless the insured affirmatively denies a defense. 2008-NMSC-018, ¶ 18, 143 N.M. 732, 737, 182 P.3d 113, 118. The duty to defend arises and is determined from the allegations on the face of the complaint, or from known facts that are unpleaded but even arguably bring a claim within the scope of coverage. Pulte Homes of New Mexico, Inc. v. Indiana Lumbermens Insurance Company, 2016-NMCA-028, ¶ 10.In addition, the insurer has an obligation to defend if there is a dispute in the law. Servants of the Paraclete Inc. v. Great American Insurance Company 857 F. Supp. 822 (D.N.M. 1994). The issue in that case involved whether various insurance companies had defense and indemnity obligations to the Church and priests accused of sexual abuse. Id. Some of the carriers argued that their policies provided no defense or coverage because the sexual abuse did not occur within their respective policy periods. Id. Rather than deciding which trigger of coverage theory New Mexico would apply, the Court decided that, because there was a dispute in the law, the insurers had obligations to defend. Id.

2. Issues with Reserving Rights

A reservation of rights must be made in a timely manner. Failure to timely reserve rights may lead to a waiver of coverage defenses. Am. Gen. Fire & Cas. Co. v. Progressive Cas. Co., 1990-NMSC-094, ¶ 16, 110 N.M. 741, 745, 799 P.2d 1113, 1117. A complete failure to reserve rights constitutes a waiver of coverage defenses against the insured. Id. Intervention in the underlying action by way of declaratory judgment is generally the preferred method for litigating coverage issues; however, the right to intervene is discretionary. See Burge v. Mid-Continent Casualty Company, 1997-NMSC-009, ¶ 15, 123 N.M. 1, 933 P.2d 210.

State Privacy Laws; Insurance Regulatory Issues; Arbitration/Mediation

New Mexico has several relevant laws in addition to the Federal privacy laws generally applicable to insurers. Other relevant statutes include: the Domestic Abuse Insurance Practices Act, NMSA 1978, § 59A-16B-6, which requires abuse claim information be kept private; and the Genetic Information Privacy Act, NMSA 1978 § 24-21-3, which prohibits persons from obtaining genetic information or samples for genetic analysis from a person without first obtaining informed and written consent from the person or the person's authorized representative.

1. Criminal Sanctions

The privacy regulations themselves do not contain any criminal sanctions or penalties.

2. The Standards for Compensatory and Punitive Damages

The regulations do not contain any provisions regarding damages. However, the authorizing statute states that willful violations of any regulations shall subject the violator to applicable penalties under the Insurance Code. NMSA 1978, § 59A-2-9(D).

3. Insurance Regulations to Watch

Rules 13.1.3.2 through 13.1.3.28 N.M.A.C. regulate insurance companies' use of non-public information. These regulations require certain personal financial and health information to remain private. In addition, New Mexico prohibits decreasing limits policies ("Pac-man policies") unless the coverage falls within certain exceptions. Those that are allowed must conform to the regulatory requirements. 13.11.2.6 N.M.A.C.

4. State Arbitration and Mediation Procedures

The Office of Superintendent of Insurance has a Consumer Assistance Bureau that will resolve complaints against insurers. If the insured is represented by an attorney or has filed a lawsuit, the Office of Superintendent of Insurance will not resolve any Complaint. The Office will investigate the claim and determine if a statute or regulation has been violated.

5. State Administrative Entity Rule-Making Authority

NMSA 1978, § 59A-2-9.3 authorizes the Superintendent of Insurance to promulgate rules establishing the confidentiality of certain consumer information. Acting upon the enabling legislation, the New Mexico Department of Insurance has promulgated Rules 13.1.3.2 through 13.1.3.28 N.M.A.C.

EXTRACONTRACTUAL CLAIMS AGAINST INSURERS: ELEMENTS AND REMEDIES

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

3. First Party

Insureds have private causes of action for bad faith at common law and by statute. The Unfair Claims Practices Act, NMSA 1978 § 59A-16-20, provides first party claimants a private cause of action for violation of any of its provisions. Insureds also may have claims pursuant to New Mexico's Unfair Trade Practices Act NMSA 1978 § 57-12-10. See, Valley Imp. Ass'n. v. U.S. Fidelity & Guar. Corp., 129 F.3d 1108 (1997).

Uniform Jury Instruction 13-1702 provides:

> An insurance company acts in bad faith when it refuses to pay a claim of the policyholder for reasons which are frivolous or unfounded. An insurance company does not act in bad faith by denying a claim for reasons which are reasonable under the terms of the policy.

Therefore, New Mexico further recognizes common law Bad Faith claims where the denial of an insured's first-party claim is "frivolous or unfounded." Chavez v. Chenoweth, 1976-NMCA-076, ¶ 31, 89 N.M. 423, 429, 553 P.2d 703, 709. The insurer's action in denying coverage must rest upon a reasonable basis. Where payment of policy proceeds depends on an issue of law or fact that is "fairly debatable" the insurer is entitled to debate that issue. United Nuclear Corp. v. Allendale Mut. Ins. Co., 1985-NMSC-090, ¶ 54, 103 N.M. 480, 492, 709 P.2d 649, 661. "Unfounded" does not mean erroneous or incorrect. Rather, it means essentially "reckless disregard" where the insurer utterly fails to exercise care for the insured's interests in the denial of a claim, lacking any arguable support. See American Nat. Property and Cas. Co. v. Cleveland, 2103-NMCA-013, ¶ 12, 293 P.3d 954.

An insurer may not simply refuse to investigate the claim of the insured using a failure to verify the claim as a justification for denial of coverage. Jessen v. National Excess Ins. Co., 1989-NMSC-040, ¶ 18, 108 N.M. 625, 629, 776 P.2d 1244, 1248, overruled on other grounds, Paiz v. State Farm Fire and Cas. Co., 1994-NMSC-079, 118 N.M. 203, 880 P.2d 300. Unreasonable delay in payment of a just claim is, itself, bad faith. Travelers Ins. Co. v. Montoya, 1977-NMCA-062, ¶ 5, 90 N.M. 556, 557, 566 P.2d 105, 106.

The damages recoverable include compensatory damages, pre and post judgment interest, treble damages (upon proving willful violation of the Unfair Trade Practices Act), punitive damages, and attorneys' fees and costs. However, it is possible that a court will find that insureds may not claim or recover both treble and punitive damages. See G & G Services, Inc. v. Agora Syndicate, Inc., 2000-NMCA-003, ¶ 40, 128 N.M. 434, 444, 993 P.2d 751, 761; Cf. Hale v. Basin Motor Co., 1990-NMSC-068, ¶20, 110 N.M. 314, 320, 795 P.2d 1006, 1012. The New Mexico Supreme Court has also held that, in every case of claimed insurance bad faith, the jury is to be instructed on punitive damages. Sloan v. State Farm Mut. Auto. Ins. Co., 2004-NMSC-004, ¶6, 135 N.M. 106, 108, 85 P.3d 230, 232. The Court concluded that under New Mexico law, bad faith conduct by an insurer typically involves a culpable mental state, and therefore the determination whether the bad faith

evinced by a particular defendant warrants punitive damages is ordinarily a question for the jury to resolve. Id. Accordingly, an instruction on punitive damages will ordinarily be given whenever the plaintiff's insurance-bad-faith claim is allowed to proceed to the jury. Id. The Court did decide, however, to afford the trial court the discretion to withhold a punitive-damages instruction in those rare instances in which the plaintiff has failed to advance any evidence tending to support an award of punitive damages. Id. Attorney's fees may be available in actions where a first party insured prevails against an insurer who has not paid a claim on any type of first party coverage, upon a finding by the court that the insurer acted unreasonably in failing to pay the claim. NMSA 1978 § 39-2-1.

4. Third-Party

In Hovet v. Allstate Ins. Co., the New Mexico Supreme Court held that third-party claimants under an automobile liability policy may sue the insurer for unfair settlement practices under the Insurance Code. 2004-NMSC-010, ¶ 21, 135 N.M. 397, 403, 89 P.3d 69, 75. The Court, however, placed certain limitations on the third-party right of action. The most significant limitation is that lawsuits for unfair settlement practices cannot proceed simultaneously with the underlying negligence litigation. Instead, the third-party action may only be brought after the underlying negligence action is resolved in favor of the third party. Id. ¶ 26. Further, if the third-party settles the underlying negligence case, no cause of action ever accrues against the insurer for unfair settlement practices under the Code. Id. In King v. Allstate, the New Mexico Court of Appeals reaffirmed the ruling in Hovet that the third-party right of action does not accrue unless and until there has been an adjudication of the underlying negligence action in favor of the third party. 2007-NMCA-044, 141 N.M. 612, 159 P.3d 261.

Importantly, however, the Supreme Court limited the types of third-party claims that it recognized in Hovet and King, holding that a third party does not have a claim against insurers providing nonmandatory excess liability insurance coverage. Jolley v. Associated Electric & Gas Ins. Servs. Ltd. (AEGIS), 2010-NMSC-029, 148 N.M. 436, 237 P.3d 738. The United States District Court for the District of New Mexico declined to extend the holding in Hovet to third party suits against a homeowner's policy. See Williams v. Foremost Ins. Co., 102 F.Supp.3d 1230, 1239 (D.N.M. 2015).

Fraud

The Trade Practices and Frauds section of New Mexico's Insurance Code prohibits fraudulent conduct by an insurer. NMSA 1978, § 59A-16-3. In New Mexico a claim or defense of fraud requires the establishment of the following elements:

- A representation of fact was made which was not true;
- Either the falsity of the representation was known to the party making it or the representation was recklessly made;
- The representation was made with the intent to deceive and to induce the party claiming fraud to rely on the representation;
- The party claiming fraud did in fact rely on the representation.

UJI 13-1633 NMRA. While this instruction allows a party to recover damages that are proximately caused by fraud, it does not allow for a recovery of damages for emotional distress. William v. Stewart, 2005-NMCA-061, ¶ 38, 137 N.M. 420, 112 P.3d 281.

Intentional or Negligent Infliction of Emotional Distress

In New Mexico to recover for intentional infliction of emotional distress a plaintiff must prove that:

- The conduct of the defendant was extreme and outrageous under the circumstances; and
- The defendant acted intentionally or recklessly; and
- As a result of the conduct of defendant plaintiff experienced severe emotional distress.

Extreme and outrageous conduct is that which goes beyond bounds of common decency and is atrocious and intolerable to the ordinary person. Emotional distress is "severe" if it is of such an intensity and duration that no ordinary person would be expected to tolerate it.

UJI 13-1628. In addition, conduct that occurs in the context of a special relationship between parties is more likely to be extreme and outrageous. Baldonado v. El Paso Natural Gas Co., 2008-NMSC-005, ¶ 26, 143 N.M. 288, 294, 176 P.3d 277, 283.

While New Mexico has considered the claim of negligent infliction of emotional distress, it has never recognized the cause of action except for bystander liability. Akutagawa v. Laflin, Pick & Heer, P.A., 2005-NMCA-132, ¶ 21, 138 N.M. 774, 779, 126 P.3d 1138, 1143. Negligent infliction of emotional distress to a bystander requires three elements: (1) claimant's close family relationship with the victim; (2) suffering severe emotional distress as a result of seeing or perceiving the occurrence; and (3) the occurrence resulted in physical injury or death to the victim. UJI 13-1629.

The Court has also refused to recognize recovery for emotional distress for damages to property or for a plaintiff that suffers severe emotional distress by witnessing the injury of another in the same accident. Castillo v. City of Las Vegas, 2008-NMCA-141, ¶¶ 27, 31, 145 N.M. 205, 213, 195 P.3d 870; 878; Montoya v. Pearson, 2006-NMCA-097, 140 N.M. 243, 142 P.3d 11.

Finally, negligent infliction of emotional distress is not allowed in any cause of action to proceed in the context of contractual or extra-contractual damage claims, unless the "specialized nature" of the contract requires reasonable care to be taken to avoid the infliction of severe emotional distress. Akutagawa, 2005-NMCA-132, ¶ 21, 138 N.M. 774, 779, 126 P.3d 1138, 1143.

State Consumer Protection Laws, Rules and Regulations

The New Mexico Legislature has created a consumer relations division. NMSA 1978 § 62-19-14. That division shall:

- receive and investigate non-docketed consumer complaints and assist consumers in resolving, in a fair and timely manner, complaints against a person under the authority of the commission, including mediation and other methods of alternative dispute resolution: provided, however, that assistance pursuant to this paragraph does not include legal representation of a private complainant in an adjudicatory proceeding;
- work with the consumer protection division of the attorney general's office, the governor's constituent services office and other state agencies as needed to ensure fair and timely resolution of complaints;
- advise the commission on how to maximize public input into commission proceedings, including ways to

eliminate language, disability and other barriers;

- identify, research and advise the commission on consumer issues;
- assist the commission in the development and implementation of consumer policies and programs; and
- perform such other duties as prescribed by the commission.

The complaints that the division receives, regarding quality or quantity of services provided by a regulated entity, are recorded in order to determine the concerns of consumers. NMSA 1978 § 62-19-14(B).NMSA

New Mexico has provided additional protection to consumers by adopting the Unfair Practices Act, which prohibits unfair or deceptive trade practices and unconscionable trade practices in the conduct of any trade or commerce. Private remedies include, injunctions, attorney fees and costs and treble damages. See NMSA 1978 §§ 57-12-1 to -26.

Lastly, New Mexico has adopted a Trade Practices and Frauds section of its Insurance Code. *See,* NMSA 1978 §§ 59A-16-1 to -30. The Trade Practices and Frauds Act contains consumer remedies both in connection with sales of policies and for unfair claims practices. NMSA 1978, § 59A-16-20.

DISCOVERY ISSUES IN ACTIONS AGAINST INSURERS

Discoverability of Claims Files Generally

In general, New Mexico protects materials prepared in anticipation of litigation or for trial by a party's insurer or insurer's agent from discovery. Rule 1-026(B) NMRA If, upon a showing of substantial need and undue hardship on the requesting party to obtain the equivalent, the court orders production of the claims file or other insurer materials, the court is to protect against disclosure of the mental impressions, conclusions, or legal theories of the party concerning the litigation. Claims files will only be protected against discovery in New Mexico where they are genuinely prepared in anticipation of litigation or for trial. New Mexico has held that, even though ultimately they may end up being used in litigation, materials prepared during the course of ordinary investigations or in the ordinary course of business are not subject to protection as materials prepared in anticipation of litigation. Hartman v. Texaco Inc., 1997-NMCA-032, 123 N.M. 220, 937 P.2d 979.

It should be noted that the Federal District Court for the District of New Mexico has held that claims file materials generated after litigation are not protected by the work product doctrine if they are prepared in the ordinary course of business. See Barela v. Safeco Insurance Co., 2014 WL 11497826 (D.N.M. 2014). Thus, there is a rebuttable presumption that the materials are not privileged or protected from discovery before a final decision is made as to the claim. Id.

Discoverability of Reserves

This issue has not been addressed by the New Mexico appellate courts. However, there are judges who have held reserve information may lead to admissible evidence and therefore, is discoverable. See Fava v. Liberty Mutual Ins. Co., 1:17-cv-00456-WJ-LF (D.N.M. 2017).

Discoverability of Existence of Reinsurance and Communications with Reinsurers

The New Mexico state courts have not examined discovery of reinsurance and reinsurers at this time. However, in one federal case arising out of New Mexico, the Tenth Circuit held that it was not an abuse of discretion for the trial court to deny discovery relating to reinsurance. The district court's decision to deny discovery was based on the burden of litigating collateral issues relating to the reinsurance contracts. Society of Lloyd's v. Reinhart, 402 F.3d 982 (10th Cir. 2005).

Attorney/Client Communications

The elements of attorney-client privilege are 1. Communication 2. Made in confidence 3. Between privileged persons 4. For the purpose of facilitating the attorney's rendition of professional legal services to the client. Rule 11-503 NMRA; S.F. Pacific Gold Corp. v. United Nuclear Corp., 2007-NMCA-133, 143 N.M. 215, 175 P.3d 309. The communications must be for the purpose of legal advice. See Bhandari v. Artesia General Hospital, 2014-NMCA-018, 317 P.3d 856. The privilege can be waived. However, New Mexico follows the more restrictive view of the minority of jurisdictions and holds the privilege can only be waived by offensive or direct use of privileged materials. See Public Service Company of New Mexico v. Lyons, 2000-NMCA-077, 129 N.M. 487, 10 P.3d 166.

DEFENSES IN ACTIONS AGAINST INSURERS

Misrepresentations/Omissions: During Underwriting or During Claim

Substantial prejudice must be shown by insurer in cases of misrepresentation, concealment or non-cooperation of insured in order to void a policy. Eldin v. Farmers Alliance Mut. Ins. Co., 1994-NMCA-172, ¶ 18, 119 N.M. 370, 375, 890 P.2d 823, 828. This substantial prejudice rule was also extended to consent-to-settle provisions. State Farm Mut. Auto. Ins. v. Fennema, 2005-NMSC-010,¶ 8, 137 N.M. 275, 277, 110 P.3d 491, 493. However, this rule does not extend to an insured's material breach of a fraud provision. Eldin, 1994-NMCA-172, ¶ 10, 119 N.M. at 372, 890 P.2d at 828.

In the case of Crow v. Capitol Bankers Life Ins. Co., the court held that a material misrepresentation in answering a question regarding the existence of a significant bodily disorder will render the policy void. 1995-NMSC-018, ¶¶ 40–41, 119 N.M. 452, 459, 891 P.2d 1206, 1213. A misrepresentation is material if the insurer would not have entered into the contract but for the misrepresentation. Id.

Failure to Comply with Conditions

Even when there has been a substantial and material breach of the insured's obligations and a resulting failure of a condition precedent to the insurer's liability, the breach and nonoccurrence of the condition does not discharge the insurer absent a showing that the insurer has been substantially prejudiced. Roberts Oil Co. v. Transamerica Ins. Co., 1992-NMSC-032, ¶ 35, 113 N.M. 745, 833 P.2d 222.

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

New Mexico holds that consent or no-action clauses will be enforced to relieve the insurer of a stipulated judgment only where the insurer can demonstrate prejudice from the stipulated settlement. The insurer must demonstrate some interest that has been frustrated by the insured's breach of the clause. See Roberts Oil Co. v.

Transamerica Ins. Co., 1992-NMSC-032, 113 N.M. 745, 833 P.2d 222.

Under New Mexico law, settlements entered without insurer's knowledge or consent must be reasonable and in good faith, even if insurer breached its duty to defend. Failure to defend has serious consequences but does not preclude an insurer from raising a defense that a settlement is unreasonable. Am. Gen. Fire & Casualty Co. v. Progressive Casualty Co. 1990-NMSC-094, ¶ 18, 110 N.M. 741.

In evaluating reasonableness of settlement between insured and injured person, the trier of fact may take into consideration any evidence of bad faith, collusion or fraud. The implied covenant of good faith and fair dealing binds insured, as well as insurer. Continental Casualty Co. v. Westerfield, 961 F.Supp. 1502, 1505 (D.N.M. 1997) (internal citations omitted). Collusion in settlement agreement may be found where evidence demonstrates absence of conflicting interests—lack of opposition between plaintiff and insurer that otherwise would assure settlement is the result of hard bargaining. Id. Under New Mexico law, a finding that the settlement and resulting state court judgment entered against insured for legal malpractice was collusive as matter of law did not relieve insurers of any obligations for settlement but precluded settlement and stipulated judgment from being entitled to any res judicata or collateral estoppel effect. Id.

Preexisting Illness or Disease Clauses

New Mexico Statute § 59A-20-3(A) provides:

> No insurer shall deliver or issue for delivery in the state any life insurance policy unless the policy contains in substance all of the applicable standard provisions required by Sections 369 through 380 [59A-20-4 to 59A-20-15 NMSA 1978] of this article, subject to Section 346 [59A-18-17 NMSA 1978] of the Insurance Code as to waiver or use of substitute provisions with the superintendent's approval.

Pre-existing condition clauses are permitted life insurance policies in New Mexico.

There is no case law in New Mexico specifically discussing the enforceability of pre-existing illness/disease clauses. In Ellingwood v. N.N. Investors Life Insurance Company, Inc., the Court held that there was an issue of material fact as to whether life and health insurance applicant misrepresented his medical condition, which precluded summary judgment for insurer. 1991-NMSC-006, 111 N.M. 301, 805 P.2d 70. In Ellingwood, the agent obtained information from the life insurance applicant which was inconsistent and incomplete. In addition, the applicant's health problems were readily apparent. 1991-NMSC-006, ¶ 19, 111 N.M. 301, 307, 805 P.2d 70, 76. The Court held that even though the applicant misrepresented his pre-existing health conditions, when the applicant gives sufficient information to alert insurance company to his particular medical condition or history, company is bound to make such further inquiry as is reasonable under the circumstances in order to ascertain facts surrounding information given. Id. ¶ 21. Regardless of whether an insured is covered under a contract for temporary insurance or a permanent policy, where a jury finds that an insurer has been given sufficient information to alert it to a serious medical condition, and an insurer has failed to investigate records of that condition made available by applicant, the insurer is charged with information in those records. Id.

If the insurer undertakes an investigation of disclosed medical records after issuing a binder for temporary insurance, any information in those records that might cause the insurer to reevaluate its position may form the basis of a right to cancel the policy, prior to the time the insured files a claim for benefits; however, any risk should be shifted to the insurer with respect to any loss that arises in the interim. *Id.* ¶ 23. The Ellingwood court refused to grant summary judgment to the life insurance carrier even though there were material misrepresentations of the applicant's pre-existing condition, where such misrepresentations could easily have

been detected by the agent and underwriters. Id.

In a Tenth Circuit case out of New Mexico, Fought v. Unum Life Ins. Co. Of Am., the Tenth Circuit declined to enforce a preexisting illness clause where the disability was from surgery related to the preexisting condition. 379 F.3d 997 (10th Cir. 2004). The policy did not specifically exclude disability as a result of the surgery, but only referred to preexisting conditions. Id. The Court found that, had the insurer intended to exclude the results of surgery, it could have done so. Id. Therefore, under these circumstances, the disability was covered under the policy. Id.

Even when there has been a substantial and material breach of the insured's obligations and a resulting failure of a condition precedent to the insurer's liability, the breach and nonoccurrence of the condition does not discharge the insurer absent a showing that the insurer has been substantially prejudiced. Roberts Oil Co. v. Transamerica Ins. Co., 1992-NMSC-032, 113 N.M. 745, 833 P.2d 222.

Statutes of Limitations and Repose

The statute of limitation varies depending upon the type of claim being asserted. For example, if the claim is based upon contract then it is governed by New Mexico's six year statute of limitation. NMSA 1978, § 37-1-3. This section provides that an action upon a written contract must be filed no later than six years "after their causes accrue." NMSA 1978, § 37-1-1. In Brooks v. State Farm Ins. Co., the Court found that an auto accident did not trigger the limitations period for uninsured motorist coverage recovery under an insurance policy because the theory for recovery was breach of contract, not a tort theory of recovery; therefore, the date of the breach of the insurance contract is the date from which limitations begins to run. 2007-NMCA-033, ¶ 11, 141 N.M. 322, 325, 154 P.3d 697, 700. See Whelan v. State Farm Mutual Auto. Ins. Co., 2014-NMSC-021, ¶ 17 (Noting that requiring an insured to file suit after an accident but before a justiciable cause of action exists frustrates the public policy concerns addressed by UM/UIM coverage).

If the claim is based upon fraud, then NMSA 1978, § 37-1-4 requires the claim be filed within four years. NMSA 1978 § 37-1-4 also requires other claims founded upon accounts and unwritten contracts; those brought for injuries to property or for the conversion of personal property and all other actions not otherwise provided be made within four years. In these cases, the cause of action will not accrue until the fraud, mistake, injury or conversion complained of, is discovered by the aggrieved party. NMSA 1978 § 37-1-7.

The "common thread" in New Mexico cases is that, for the statute of limitations, a cause of action accrues from the injury rather than the wrongful act. Zamora v. Prematic Serv. Corp., 936 F.2d 1121 (10th Cir. 1991). However, the time that an injury occurs is different under NMSA 1978, § 37-1-3 and -4. In Zamora, the Court held that where the insured knew that the auto liability policy had been cancelled and that the insurer would neither defend nor indemnify against loss or pay for the damages, the claim was governed by the six-year contract statute of limitations under NMSA 1978, § 37-1-3. 936 F.2d 1121 (10th Cir. 1991).

In Torrez v. State Farm Mut. Auto. Ins. Co., when discussing an insured's claim for wrongful refusal to settle, it applied NMSA 1978, § 37-1-4. 705 F.2d 1192 (10th Cir. 1982). Although the Court applied the four-year statute of limitations, it rejected the insurer's statute of limitations defense because the cause of action accrued from the time the judgment. Id. The court found that the action accrued at the time of judgment, and not when the accident occurred or when the lawsuit was filed, because liability was not determined until the jury rendered its verdict. Id.

Absent a statutory prohibition on insurance policies creating their own limitations periods, provisions that limit the period within which a suit may be brought after damage occurs are valid and enforceable if the time period is reasonable. Wiley v. United Mercantile Life Ins. Co., 1999-NMCA-137, ¶¶ 9-10, 128 N.M. 98. In Wiley, the statute at issue permitted life insurance policies with limitation periods "not less than five years." *Id*. The Court held that the insurance company's three-year limit for bringing suit was reasonable, even though the general limitations period for contract disputes is six years. *Id.* But see, Electric Gin Co. v. Firemen's Fund Ins. Co., 1935-NMSC-001, ¶2, 39 N.M. 73, 39 P.2d 1024, 1024 (A provision in the fire policy that no suit could be maintained unless commenced within twelve months after a loss, was held void as against public policy and contrary to New Mexico's six-year limitation).

TRIGGER AND ALLOCATION ISSUES FOR LONG-TAIL CLAIMS

Trigger of Coverage

Long-tail issues arise mostly under occurrence-based claims when the injury or damage may not be detectable early on. No New Mexico case is determinative of what trigger of coverage theory should apply. For occurrence-based claims, the triggering event is generally the property damage or bodily injury itself. The occurrence of an injury or damage is the trigger. The damage causing event does not have to fall within the coverage period, but the result must.

The question of what event triggers coverage under an insurance policy or policies has been a matter of substantial debate in various jurisdictions. Some courts have used the first contact trigger of coverage. This theory typically uses the date on which the injury-producing event first occurs.

The second common trigger-of-coverage theory used by some courts is the manifestation trigger. Under this theory, the property insurer at the time the damage first manifests itself is solely responsible for the indemnification of the insured. This trigger-of-coverage theory appears to mainly have been used in the context of first party property claims.

Third, the "injury-in-fact" trigger states that coverage is first triggered at that point in time when an actual injury can be shown to have been first suffered. This trigger is frequently used in property damage third-party liability cases. In Leafland Group-II, Montgomery Towers Ltd. Partnership v. Ins. Co. of North Am., the court found that an insured could not pursue a claim for diminution of property value against their insurer because asbestos was used in the construction of the property and, in effect, had diminished the property value before insured bought and insured the building. 1994-NMSC-088, ¶ 12, 118 N.M. 281, 283, 881 P.2d 26, 28.

In Montrose v. Admiral Ins. Co., the California Supreme Court developed or popularized the continuous trigger-of-coverage theory for use in continuous or progressively deteriorating property damage cases. 913 P.2d 878 (Cal. 1995). Under this trigger-of-coverage theory, bodily injuries and property damage that are continuous or progressively deteriorating throughout successive policy periods are covered by all policies in effect during those periods. Continuous deteriorating property damage issues have not come before the New Mexico Appellate courts. A majority of jurisdictions follow the California approach.

When there are successive accidents or work induced injuries that lead to a disability, the insurance carrier covering the risk at the time of the most recent injury or exposure bearing a causal relation to the disability is usually liable for the entire compensation. Tom Growney Equipment Co. v. Jouett, 2005-NMSC-015, ¶ 24, 137 N.M. 497. In other words, disability is the triggering event. This avoids many long-tail issues regarding a distant initial injury. Jouett is a workers' compensation case. The plaintiff suffered a work-related injury in 1999, switched

employers, and worked a job that contributed to his initial injury. In 2001, his work-related activities led to disability. Under these circumstances, where a worker suffers a non-disabling initial injury but continues work related activities that lead to subsequent disability, the employer and insurer at the time of the disability are responsible for disability payments. Id. ¶ 53.

Allocation Among Insurers

Jouett establishes that the employer or insurance carrier at the time of the most recent injury or cause of disability is usually liable for the entire compensation. 2005-NMSC-015, ¶ 24, 137 N.M. 497. However, the Workers' Compensation Act allows for reducing the amount paid by the amount of money already received: "the compensation benefits payable by reason of disability caused by accidental injury shall be reduced by the compensation benefits paid or payable on account of any prior injury suffered by the worker if compensation benefits in both instances are for injury to the same member or function or different parts of the same member or function or for disfigurement and if the compensation benefits payable on account of the subsequent injury would, in whole or in part, duplicate the benefits paid or payable on account of the prior injury." NMSA 1978 § 52-1-47(D).

NMSA 1978 § 52-1-47(D) prevents double recovery and allocates the burden of successive injuries to other insurers/employers. *Leonard v. Payday Prof'l,* 2007-NMCA-128, ¶ 12, 142 N.M. 605. (holding that apportionment among employers was lawful and backed by substantial evidence.)

New Mexico Courts have not determined the issue of apportionment between insurers in all circumstances. However, in CC Hous. Corp. v. Ryder Truck Rental, Inc., the New Mexico Supreme Court determined that where an insured has two insurance policies with "other insurance" clauses that try to escape the insurer's liability, the two clauses negate one another, both carriers are primarily liable, and the loss should be pro-rated in proportion to the respective limits of each policy. 1987-NMSC-117, ¶ 15, 106 N.M. 577, 581, 746 P.2d 1109, 1113. The Ryder case is consistent with Sharon Steel Corp. v. Aetna Cas. & Sur. Co., 931 P.2d 127 (Utah 1997). Sharon Steel contains one of the better discussions of apportionment in a continuous injury or damage case. In Sharon Steel, the court ultimately determined that the best approach for apportioning defense costs among multiple insurers in continuous injury cases is one that looks not only at the years that each insurer was on the risk, but also takes into account respective policy limits. Again, no New Mexico court has recognized Sharon Steel as authoritative in New Mexico.

New Mexico has also addressed the issue of the apportionment of the costs of defense between insurers. In American General Fire and Cas. Co. v. Progressive Cas. Co., a homeowner's insurer brought a subrogation claim against the automobile insurer for the costs of defending the homeowner's claim. 1990-NMSC-094, 110 N.M. 741, 799 P.2d 1113. Because a duty to defend initially arose under the homeowner's insurance policy, the homeowner's insurer later notified the automobile insurer that the claim arose under the automobile policy, and the homeowner's insurer made a demand against the automobile insurer to defend and for the costs of defense. Am. Gen. Fire & Cas. Co. v. Progressive Cas. Co., 1990-NMSC-094, ¶ 20, 110 N.M. 741, 746, 799 P.2d 1113, 1118. The court determined that the automobile insurer had to reimburse the homeowner's insurer for the costs of the defense after the notification was made. Id. Similarly, in State Farm Mut. Ins. Co. v. Foundation Reserve Ins. Co., the court found that a secondary insurer could receive reimbursement for its defense costs after the primary insurer refused to tender the insured's defense. 1967-NMSC-197, ¶ 27, 78 N.M. 359, 363, 431 P.2d 737, 741.

In State Farm Mutual. Auto. Ins. Co. v. Safeco Ins. Co., the Supreme Court was presented with the question of whether the primary or secondary underinsured (UIM) insurer, if either, should be given the statutory offset for the tortfeasor's liability coverage. 2013-NMSC-006, 298 P.3d 452. Under State Farm Mut. Auto. Ins. Co. v. Jones,

2006-NMCA-060, 139 N.M. 558, 135 P.3d 1277, the primary insurer who insured the vehicle involved in the accident was entitled to an offset of any liability payments. Id. The Safeco Court overruled Jones on this issue and held the primary insurer of the vehicle in which the passenger was riding is obligated to exhaust its UIM limits before a secondary insurer must pay UIM benefits, consistent with Tarango v. Farmers Insurance Company of Arizona, 115 N.M. 225, 849 P.2d 368 (1993), and Schmick v. State Farm Mutual Automobile Insurance Company, 103 N.M. 216, 704 P.2d 1092 (1984). Id.

CONTRIBUTION ACTIONS

Claim in Equity vs. Statutory

In 1981, New Mexico adopted a contributory negligence and several liability system, which extinguished contribution among concurrent tortfeasors. The general rule is that each tortfeasor is severally responsible for its own percentage of comparative fault. See NMSA 1978, § 41–3A–1(A) (1987); Bartlett v. N.M. Welding Supply, Inc., 1982-NMCA-048, 98 N.M. 152, 158, 646 P.2d 579, 585 (Ct. App. 1982), superseded in part on other grounds by NMSA 1978 § 41–3A–1. As a result, "contribution no longer applies to concurrent tortfeasors on the basis of each tortfeasor's negligence." Id. However, there are four (4) statutory exceptions where joint and several liability will apply, as more fully explained below. When joint and several liability applies, Defendants will not be precluded from seeking contribution from other tortfeasors.

Elements

The doctrine of several liability was codified in Section 41-3A-1, entitled "Several liability." NMSA 1978 § 41-3A-1 provides:

- In causes of action to which several liability applies, any defendant who establishes that the fault of another is a proximate cause of a plaintiff's injury shall be liable only for that portion of the total dollar amount awarded as damages to the plaintiff that is equal to the ratio of such defendant's fault to the total fault attributed to all persons, including plaintiffs, defendants and persons not party to the action.
- The doctrine imposing joint and several liability shall apply:
    - to any person or persons who acted with the intention of inflicting injury or damage;
    - to any persons whose relationship to each other would make one person vicariously liable for the acts of the other, but only to that portion of the total liability attributed to those persons;
    - to any persons strictly liable for the manufacture and sale of a defective product, but only to that portion of the total liability attributed to those persons; or
    - to situations not covered by any of the foregoing and having a sound basis in public policy.
- Where a plaintiff sustains damage as the result of fault of more than one person which can be causally apportioned on the basis that distinct harms were caused to the plaintiff, the fault of each of the persons proximately causing one harm shall not be compared to the fault of persons proximately causing other distinct harms. Each person is severally liable only for the distinct harm which that person proximately caused.
- No defendant who is severally liable shall be entitled to contribution from any other person, nor shall such defendant be entitled to reduce the dollar damages determined by the factfinder to be owed by the defendant to the plaintiff in accordance with Subsection B of this section by any amount that the plaintiff

has recovered from any other person whose fault may have also proximately caused injury to the plaintiff.

- Nothing in this section shall be construed to affect or impair any right of indemnity or contribution arising out of any contract of agreement or any right of indemnity otherwise provided by law.

NMSA 1978 § 41-3A-1. The statue specifically provides that a Defendant may seek any "right of indemnity or contribution arising out of any contract of agreement or any right of indemnity otherwise provided by law." Supra. Thus, when joint and several liability applies, Defendants may seek contribution from other tortfeasors.

DUTY TO SETTLE

The New Mexico Jury Instruction for Bad Faith Refusal to Settle, UJI 13-1704 NMRA, reads:

> A liability insurance company has a duty to timely investigate and fairly evaluate the claim against its insured, and to accept reasonable settlement offers within policy limits.
>
> An insurance company's failure to conduct a competent investigation of the claim and to honestly and fairly balance its own interests and the interests of the insured in rejecting a settlement offer within policy limits is bad faith. If the company gives equal consideration to its own interests and the interests of the insured and based on honest judgment and adequate information does not settle the claim and proceeds to trial, it has acted in good faith.

Dairyland Ins. Co. v. Herman defines an insurer's duty to settle. 1998-NMSC-005, ¶ 14, 124 N.M. 624, 629, 954 P.2d 56, 61. Settlement is not always the preferred means of protecting an insured's interests, but the implied covenant of good faith and fair dealing imposes a duty on insurers to settle whenever practicable. *Id.* ¶ 13. So, where the express terms of a policy do not require settlement, the implied covenant of good faith may require it. The insurer's good-faith attempt to evaluate and settle a case are generally accorded deference, but deference diminishes when there is a substantial likelihood that recovery exceeds policy limits. *Id.* ¶ 14. When there is a great risk of recovery beyond policy limits and settlement becomes an option to dispose the claim, the good-faith covenant requires settlement. *Id.* ¶ 15. Should the insurer refuse to accept a reasonable settlement offer within policy limits, it shall be liable for the entire judgment including amounts in excess of the policy limits. *Id.* ¶ 15.

In Dairyland, the damages inflicted by an insured were unquestionably beyond the $50,000 policy limits. The insured drove while heavily intoxicated, drove his car into oncoming traffic, killed 3 people, maimed a 9-year-old Andrew Herman, and trapped a 9-year-old Andrew Herman in a car with his dead mother for hours. *Id.* ¶ 2. Dairyland refused to settle with the Hermans for the remainder of the insured's policy limit, approximately $33,000. *Id.* ¶ 5. The Hermans then received a judgment against the insured for a total of $3,000,000. *Id.* ¶ 8. Dairyland then filed a declaratory judgment action seeking to be absolved from paying in excess of the policy limits. *Id.* ¶9. The Hermans countered by alleging failure to settle in these circumstances constituted bad faith. *Id.* The Dairyland Court was answering a certified question for the 10th Circuit, so the Court only concluded that 1) Dairyland's refusal to settle without a release of all claims against the insured was not per se/matter of law good faith representation of the insured and 2) Dairyland's failure to settle *may* constitute bad faith—but that's a question for the jury.*Id.* ¶¶ 1, 30.

City of Hobbs v. Hartford Fire Ins. Co., a Tenth Circuit case arising out of New Mexico, stands for the proposition that the duty to settle applies to the insurer even when the claimant has not made a firm offer to settle. 162 F.3d 576 at 26-27 (10th Cir. 1998). The insurance company in City of Hobbs had bad facts and were on notice that damages in this case could be well above policy limits. *Id.* at 30. Additionally, the attorneys seemingly could have

settled within the policy limits if an offer was made. *Id.* at 32. In light of this knowledge, and the fact that a large verdict seemed evident close to trial, the insurance company's failure to make an offer to settle supported an inference of bad faith. *Id.*

LH&D BENEFICIARY ISSUES

Change of Beneficiary

Where a statute unambiguously confers insured with a right to designate a beneficiary, New Mexico courts have held that the insured's right to change beneficiaries, for whatever reason, is absolute and is not to be denied by either a federal or state court. Hook v. Hook, 1984-NMSC-068, ¶ 5, 101 N.M. 390, 391, 683 P.2d 507, 508. Absent an irrevocable designation of beneficiary, New Mexico law grants insureds with the right to designate and change health insurance beneficiaries.

> Unless the insured makes an irrevocable designation of beneficiary, the right to change of beneficiary is reserved to the insured and the consent of the beneficiary or beneficiaries shall not be requisite to surrender or assignment of this policy or to any change of beneficiary or beneficiaries, or to any other changes in this policy.

NMSA § 59A-22-15. In order to change the beneficiaries, the insured must generally comply with procedures adopted by the insurer or imposed by statute. Haley v. Schleis (In re Estate of Schleis), 1982-NMSC-010, ¶ 11, 97 N.M. 561, 563, 642 P.2d 164, 166. If no such procedures exist the courts may recognize a change desired by the insured if the intent is declared in an appropriate manner. Id. New Mexico has adopted a two-pronged test, which requires evidence of insured's clear expression of intent and evidence of reasonable efforts to change the beneficiary. Id.

In determining whether a beneficiary of an insurance policy has been changed, New Mexico courts try to adhere to the decedent's intent.. In Mut. Life Ins. Co. of New York v. Owens, an insured delivered to his former wife a signed request for change of beneficiary of his insurance policy from his then-wife, to his former wife. 1935-NMSC-072, 39 N.M. 421, 48 P.2d 1024, 1029. Insured died, before he formally executed the change of beneficiary. *Id.* The court held that insured's wife was entitled to recover on the policy as the beneficiary, since insured "had not done everything in his power" to effect the change of beneficiary to his former wife. Id. Thus the decedent's failure to act was evidence of his intent to keep his then-wife as beneficiary.

Effect of Divorce on Beneficiary Designation

NMSA 1978 § 45-2-804 governs the revocation of probate and non-probate transfers by divorce. NMSA 1978 § 45-2-804(B) provides:

- Except as provided by the express terms of a governing instrument, a court order or a contract relating to the division of the marital estate made between the divorced individuals before or after the marriage, divorce or annulment, the divorce or annulment of a marriage:
    - revokes any revocable:
        - disposition or appointment of property made by a divorced individual to the former spouse in a governing instrument and any disposition or appointment created by law or in a governing instrument to a relative of the divorced individual's former spouse;

- provision in a governing instrument conferring a general or nongeneral power of appointment on the divorced individual's former spouse or on a relative of the divorced individual's former spouse; and
- nomination in a governing instrument, nominating a divorced individual's former spouse or a relative of the divorced individual's former spouse to serve in any fiduciary or representative capacity, including a personal representative, executor, trustee, conservator, agent or guardian; and

- severs the interests of the former spouses in property held by them at the time of the divorce or annulment as joint tenants with the right of survivorship, transforming the interests of the former spouses into equal tenancies in common.

New Mexico case law does not explicitly label a life insurance policy a "governing instrument," but life insurance policies are generally instruments that govern non-probate transfers of property upon death. A life insurance policy was determined to be a governing instrument with consent from both parties in Lincoln Ben. Life Co. v. Guerrero, Civ. No. 14-1077 JCH/WPL, 2016 WL 4547157 at * 3(D.N.M. June 27, 2016).

New Mexico Appellate Courts have yet to examine NMSA 1978 § 45-2-804(B). Generally, the presumption is that a beneficiary left unchanged after a divorce is attributed to inattention rather than intention. *Id.* at *13. But this presumption can be overcome with evidence that a divorced person wants to keep their ex-spouse as a beneficiary. *Id*.

There is case law from before NMSA 1978 § 45-2-804(B). Divorce alone does not automatically divest a former spouse of the proceeds of a life insurance policy in which the former spouse was a named beneficiary. Romero v. Melendez, 1972-NMSC-041, ¶ 12, 83 N.M. 776, 779, 498 P.2d 305, 308. The beneficiary's interest may be terminated, however, by an agreement between the parties which may reasonably be construed as a relinquishment of the spouse's rights to the insurance. Id. In Harris v. Harris, the couple's divorce decree made no disposition of policies on husband's life insurance and the court reasoned that the husband and ex-wife owned policies as tenants in common from the time of the divorce. 1972-NMSC-005, ¶6, 83 N.M. 441, 442, 493 P.2d 407, 408. Where a divorce decree or property settlement agreement requires a party to keep a life insurance policy in effect and to retain a specific beneficiary, that beneficiary has a vested interest in the insurance policy proceeds and may assert that vested interest. Bernal v. Nieto, 1997-NMCA-067, 123 N.M. 621, 943 P.2d 1338.

INTERPLEADER ACTIONS

Availability of Fee Recovery

New Mexico Rule 1-022 NMRA provides as follows:

> A. Who May Interplead. 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 do not have a common origin or are not identical but are adverse to and independent of one another, or that the plaintiff avers that he is not liable in whole or in part to any or all of the claimants. A defendant exposed to similar liability may obtain such interpleader by way of cross-claim or counterclaim. The provisions of this rule supplement and do not in any way limit the joinder of parties permitted in Rule 1-020.
>
> B. Order to Interplead. Upon the filing of any complaint, cross-claim or counterclaim by way of

interpleader pursuant to Paragraph A of this rule, the district court shall take full and complete jurisdiction of the matter or thing in dispute and shall order all who have or claim an interest therein to interplead in said action within the time now by law allowed for plea and answer. Service of a copy of such order shall be made as provided in these rules for service on adverse parties.

C. Service Upon Nonresidents. In any action under the provisions of this rule, where it is made to appear to the satisfaction of the court by affidavit filed in said cause, that any person claiming an interest in or to any property in the custody of said court, is in fact a nonresident of New Mexico, the court shall order service to be made upon such nonresident by publication.

D. Disposition. The decree of the district court shall determine the disposition of the matter or thing in dispute and shall be binding upon all parties to the action on whom service has been made.

Rule 1-022 NMRA.

Rule 1-022 does not explicitly provide for fee recovery. New Mexico does not have case law regarding the recovery of fees. However, New Mexico Courts will look to the Federal Rule counterpart for guidance. As explained below, the Tenth Circuit has given the trial court discretion over the "common practice" of reimbursing an interpleader plaintiff's litigation costs out of the fund on deposit with the court.

Differences in State vs. Federal

The United States Court of Appeals for the Tenth Circuit "has recognized the 'common practice' of reimbursing an interpleader plaintiff's litigation costs out of the fund on deposit with the court." Transamerica Premier Ins. Co. v. Growney, No. 94-3396, 1995 WL 675368, at *1, *3 (10th Cir., Nov. 13, 1995)(internal quotations omitted). The award of fees and costs to an interpleader plaintiff is an equitable matter that lies within the discretion of the trial court. Id. The rationale for the award is that the plaintiff has, at its own expense, facilitated the efficient resolution of a dispute in which it has no interest Id. In an interpleader action, attorneys fees are normally awarded to a plaintiff who: "[i] is disinterested (*i.e.*, does not itself claim entitlement to any of the interpleader fund); [ii] concedes its liability in full; [iii] deposits the disputed fund in court; and [iv] seeks discharge, and who is not in some way culpable as regards the subject matter of the interpleader proceeding. Id.