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REGULATORY LIMITS ON CLAIMS HANDLING

Timing for Responses and Determinations

Relevant time limits are found in the North Carolina General Statutes and the North Carolina Administrative Code (“the NCAC”). Examples: The insurer has thirty days after receiving written or electronic notice of the claim to acknowledge a claim (N.C. Gen. Stat. § 58-3-100(c)); loss and claim payments are to be mailed or otherwise delivered within ten business days after the claim is settled (11 NCAC 4.0421); failure to furnish a blank proof of loss form to the insured within 15 days after receipt of notice of the loss may prejudice an insurer’s ability to require the submission of a formal proof of loss form by the insured (N.C. Gen. Stat. § 58-3-40). Failing to communicate promptly with the insured regarding acknowledgment, payment and denial of claims may also constitute a violation of N.C. Gen. Stat. § 58-63-15(11) and allow a recovery of treble damages and attorneys’ fees under North Carolina’s unfair and deceptive trade practice laws.

Standards for Determination and Settlements

Standards for the handling of claims involving minors are set forth in N.C. Gen. Stat. § 1-402, which provides that in litigation involving infants, no final order or judgment affecting the merits of the case is binding on the infant unless submitted to and approved by a judge. Because of this statute and the common law rule that minors generally cannot enter into binding contracts, all settlements involving a claim by a minor must be judicially approved to be binding.

Regulations promulgated in the NCAC by the North Carolina Department of Insurance address claims handling and settlements. Under 11 N.C.A.C. 4.0117, claim denials must be in writing and shall cite the specific policy provisions and/or the legal basis relied upon in denying the claim. Offers to settle shall be confirmed in writing and shall cite the specific policy provision or legal basis relied upon in support of a compromise.

Under N.C. Gen. Stat. § 75-1.1 and § 58-63-15(11), the following constitute an unfair and deceptive trade practice:

- Misrepresenting pertinent facts or insurance policy provisions relating to coverages at issue;
- Failing to acknowledge and act reasonably promptly upon communications with respect to claims arising under insurance policies;

Walter E. Brock, Jr.
walter.brock@youngmoorelaw.com

Matthew J. Gray
matt.gray@youngmoorelaw.com

Andrew P. Flynt
andrew.flynt@youngmoorelaw.com

David W. Earley
david.earley@youngmoorelaw.com

Patrick T. VanderJeugd
patrick.vanderjeugd@youngmoorelaw.com

Matthew C. Burke
matthew.burke@youngmoorelaw.com

Christy C. Dunn
christy.dunn@youngmoorelaw.com

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- Failing to adopt and implement reasonable standards for the prompt investigation of claims arising under insurance policies;
- Refusing to pay claims without conducting a reasonable investigation based upon all available information;
- Failing to affirm or deny coverage of claims within a reasonable time after proof-of-loss statements have been completed;
- Not attempting in good faith to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear;
- Compelling [the] insured to institute litigation to recover amounts due under an insurance policy by offering substantially less than the amounts ultimately recovered in actions brought by such insured;
- Attempting to settle a claim for less than the amount to which a reasonable man would have believed he was entitled;
- Attempting to settle claims on the basis of an application which was altered without notice to, or knowledge or consent of, the insured;
- Making claims payments to insureds or beneficiaries not accompanied by [a] statement setting forth the coverage under which the payments are being made;
- Making known to insureds or claimants a policy of appealing from arbitration awards in favor of insureds or claimants for the purpose of compelling them to accept settlements or compromises less than the amount awarded in arbitration;
- Delaying the investigation or payment of claims by requiring an insured claimant, or the physician, [or] either, to submit a preliminary claim report and then requiring the subsequent submission of formal proof-of-loss forms, both of which submissions contain substantially the same information;
- Failing to promptly settle claims where liability has become reasonably clear, under one portion of the insurance policy coverage in order to influence settlements under other portions of the insurance policy coverage; and/or
- Failing to promptly provide a reasonable explanation of the basis in the insurance policy in relation to the facts or applicable law for denial of a claim or for the offer of a compromise settlement.

See, e.g., Gray v. North Carolina Insurance Underwriting Association, 352 N.C. 61, 529 S.E.2d 676 (2000) (holding that a violation of §58-63-15(11) is an actionable violation of §75-1.1 even if it does not constitute a general business practice by the insurer).

PRINCIPLES OF CONTRACT INTERPRETATION

The general rules of construction applicable to insurance policies in North Carolina are well established:

As with all contracts, the goal of construction is to arrive at the intent of the parties when the policy was issued. Where a policy defines a term, that definition is to be used. If no definition is given, non-technical words are to be given their meaning in ordinary speech, unless the context clearly indicates another meaning was intended. The various terms of the policy are to be harmoniously construed, and if possible, every word and every provision is to be given effect. If, however, the meaning of words or the effect of provisions is uncertain or capable of several reasonable interpretations, the doubts will be resolved

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against the insurance company and in favor of the policyholder. Whereas, if the meaning of the policy is clear and only one reasonable interpretation exists, the courts must enforce the contract as written; they may not, under the guise of construing an ambiguous term, rewrite the contract or impose liabilities on the parties not bargained for and found therein.

Gaston County Dyeing Machine Co. v. Northfield Ins. Co., 351 N.C. 293, 299-300, 524 S.E.2d 558, 563 (2000) (citing *Woods v. Nationwide Mut. Ins. Co.*, 295 N.C. 500, 505-506, 246 S.E.2d 773, 777 (1978)).

Ambiguity is not created merely because the parties assign different meanings to the policy's language. Rather, the language at issue must "reasonably [be] susceptible to more than one interpretation" in order to be deemed ambiguous. *N.C. Farm Bureau Mut. Ins. Co. v. Mizell*, 138 N.C. App. 530, 532, 530 S.E.2d 93, 95 (2000).

Note that the insured has the burden of bringing itself within the insuring language of the contract. *Kubit v. MAG Mut. Ins. Co.*, 210 N.C. App. 273, 283, 708 S.E.2d 138, 147 (2011). Once it has been determined that the insuring language embraces the particular claim or injury, the burden then shifts to the insurer to prove that a policy exclusion excepts the particular injury from coverage. *Id.* North Carolina courts have pronounced that: "Exclusionary clauses are interpreted narrowly while coverage clauses are interpreted broadly to provide the greatest possible protection to the insured." *Id.* (citation omitted).

CHOICE OF LAW

North Carolina courts generally apply the principle of *lex loci contractus* to choice of law issues relating to insurance policies. This means "that the substantive law of the state where the last act to make a binding contract occurred, usually delivery of the policy, controls the interpretation of the contract." *Fortune Ins. Co. v. Owens*, 351 N.C. 424, 428, 526 S.E.2d 463, 466 (2000); *SPX Corp. v. Liberty Mut. Ins. Co.*, 210 N.C. App. 562, 572, 709 S.E.2d 441, 448 (2011).

However, N.C. Gen. Stat. § 58-3-1 provides: "All contracts of insurance on property, lives, or interests in this State shall be deemed to be made therein, and all contracts of insurance the applications for which are taken within the State shall be deemed to have been made within this State and are subject to the laws thereof."

North Carolina courts have used § 58-3-1 to create an exception to the general principle of *lex loci contractus* when a close connection exists between North Carolina and the interests insured by the policy. *See, e.g., Collins & Aikman Corp. v. Hartford Accident & Indem. Co.*, 335 N.C. 91, 93-94, 436 S.E.2d 243, 245-246 (1993). For example, in *Collins & Aikman Corp.*, the North Carolina Supreme Court held that an excess liability policy was governed by North Carolina law under § 58-3-1, despite the fact the policy had been delivered to the insured's broker's office in California, because North Carolina had a close connection to the interests insured by the policy in that the insured owned 102 trucks, 97 of which were titled in North Carolina, and the accident implicating the excess policy occurred in North Carolina. *Id.* at 93-95. On the other hand, the mere presence of the insured interests in North Carolina at the time of the accident or other occurrence does not constitute a sufficient connection to warrant the application of North Carolina law to the policy if the policy was issued in another jurisdiction. *Fortune Ins. Co.*, 351 N.C. at 428.

Any choice of law provision in an insurance contract applied for or issued in North Carolina calling for the application of the law of a foreign jurisdiction violates N.C. Gen. Stat. § 58-3-1 and is void as a matter of law. *See Cordell v. Brotherhood of Locomotive Firemen and Enginemen*, 208 N.C. 632, 182 S.E. 141, 146 (1935).

CONTRACT INTERPRETATION

Common Issues

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

In North Carolina, claims for faulty workmanship do not seek damages because of an “occurrence.” Builders Mut. Ins. Co. v. Mitchell, 210 N.C. App. 657, 709 S.E.2d 528 (2011).

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

North Carolina’s anti-indemnification statutes provides that indemnity and hold harmless provisions in construction contracts that attempt to indemnify or hold harmless a party against its own negligence, in whole or in part, are against public policy, void, and unenforceable. N.C. Gen. Stat. § 22B-1. The promisor’s fault must be a proximate cause of the loss, damage, or expense indemnified for the provision to be enforceable.

This statute was amended in 2019. Under the amended statute, design professionals can no longer be contractually required to defend other parties to their contracts. A contract’s indemnity provision may still be drafted to require the designer to indemnify others, but the duty to defend has been declared “against public policy, void, and unenforceable.” This prohibition applies only to certain design professionals: architects, landscape architects, engineers, land surveyors, geologists, and soil scientists.

North Carolina’s anti-indemnification statute does not affect insurance policies. N.C. Gen. Stat. § 22B-1(e).

DUTIES IMPOSED BY STATE LAW

Duty to Defend

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

In North Carolina “there is no statutory requirement that an insurance company provide its insured with a defense.” *Brown v. Lumbermens Mutual Casualty Co.*, 326 N.C. 387, 391, 390 S.E.2d 150, 152 (1990). The duty to defend an insured comes from the language of the insurance policy. *Waste Management of Carolinas, Inc. v. Peerless Ins. Co.*, 315 N.C. 688, 691, 340 S.E.2d 374, 377 (1986). Generally, the insurer will be obligated to defend its insured against all allegations of a lawsuit if any of the allegations of the complaint would, if found to be true, have triggered coverage. See *Kubit v. Mag Mut. Ins. Co.*, 210 N.C. App. 273, 278-279, 708 S.E.2d 138, 145 (2011) (“the question is, assuming the facts as alleged to be true, whether the insurance policy covers that injury”) (citation omitted). When the pleadings state facts demonstrating that the alleged injury is covered by the policy, then the insurer has a duty to defend, whether or not

the insured is ultimately liable. *Waste Management of Carolinas, Inc. v. Peerless Ins. Co.*, 315 N.C. 688, 691, 340 S.E.2d 374, 377 (1986). The insurer's duty to defend continues until its coverage limits have been exhausted in the settlement of a claim or claims against the insured or in payment of a judgment against the insured. *Brown v. Lumbermens Mutual Casualty Co.*, 326 N.C. 387, 390 S.E.2d 150 (1990).

An insurer who wrongfully refuses to defend a suit against its insured is liable to the insured for sums reasonably expended in payment or settlement of the claim, for reasonable attorneys' fees, for other expenses of defending the suit, for court costs, and for other expenses incurred because of the refusal of the insurer to defend. *Bruce-Terminix Co. v. Zurich Ins. Co.*, 130 N.C. App. 729, 504 S.E.2d 574 (1998). An insurer who wrongfully refuses to defend will be deemed to have waived policy defenses to coverage. *Ames v. Continental Casualty*, 79 N.C. App. 530, 538, 340 S.E.2d 479, 485 (1986).

2. Issues with Reserving Rights

An insurer may provide a defense to the insured under a reservation of rights, which preserves claimed coverage defenses. *National Mortg. Corp. v. American Title Ins. Co.*, 41 N.C. App. 613, 255 S.E.2d 622, *rev'd on other grounds*, 299 N.C. 369, 261 S.E.2d 844 (1979). In North Carolina, filing a declaratory judgment action to clarify coverage issues has the same effect as serving the insured with a reservation of rights and thus avoids estoppel to deny coverage. *Fortune Ins. Co. v. Owen*, 132 N.C. App. 489, 493-94, 512 S.E.2d 487, 490 (1999), *aff'd*, 351 N.C. 424, 526 S.E.2d 463 (2000).

State Privacy Laws; Insurance Regulatory Issues; Arbitration/Mediation

The Consumer and Customer Information Privacy Act, found in N.C. Gen. Stat. § 58-39-1 to § 58-39-165, embodies North Carolina's privacy law. This Act was first passed in 1981 and is based on model legislation originally drafted by the National Association of Insurance Commissioners. North Carolina is one of approximately 15 states that have enacted the NAIC model act.

The Gramm-Leach-Bliley Act passed by the United States Congress (P.L. 106-102, 113 Stat. 1338, 11/12/99) has profound implications on privacy issues on both the state and federal level. In 2001, North Carolina enacted its own version of GLB by amending the Insurance Information and Privacy Protection Act in numerous ways.

EXTRACONTRACTUAL CLAIMS AGAINST INSURERS: ELEMENTS AND REMEDIES

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

3. First Party

An insurer has an implied duty to deal fairly and act in good faith with its insured. *See Robinson v. North Carolina Farm Bureau Insurance Co.*, 86 N.C. App. 44, 50, 356 S.E.2d 392, 395 (1987). Good faith means honesty in fact and the observance of reasonable standards of fair dealing in the insurance industry. A violation of an insurer's duty of good faith gives rise to an action in tort for which consequential and punitive damages may be sought. *See Von Hagel v. Blue Cross of North Carolina*, 91 N.C. App. 58, 61-62, 370 S.E.2d 695, 698 (1988). To establish liability for punitive

damages, an insured must prove three elements:

First, the insured must show that the insurer (1) failed to pay a justifiable claim, *see Miller v. Nationwide Mutual Insurance Co.*, 112 N.C. App. 295, 305-306, 435 S.E.2d 537, 544-45 (1993), (2) failed to investigate a claim before denying a claim when presented with credible evidence supporting the claim from the insured, *see Von Hagel*, 370 S.E.2d at 699, (3) failed to pay in a timely manner, *see Robinson*, 356 S.E.2d at 395-96, or committed some similar act.

Second, the insured must establish that the insurer acted in “bad faith.” Bad faith means conduct which is “not based on honest disagreement or innocent mistake.” *Lovell v. Nationwide Mutual Insurance Company*, 108 N.C. App. 416, 421, 424 S.E.2d 181, 185, *aff’d in part, disc. rev, improvidently allowed in part*, 334 N.C. 682, 435 S.E.2d 71 (1993) (per curiam).

Third, the insured must prove that an element of aggravation accompanied the insurer’s actions. Aggravated conduct may be shown by fraud, malice, or willful or wanton conduct. *See* N.C. Gen. Stat. § 1D-15(a)(1)-(3).

The insurance carrier is not liable for bad faith where the policy at issue is open to more than one reasonable interpretation and the insurance company promptly and consistently denies the insurance claim based on an interpretation of the policy “that is neither strained nor fanciful, regardless of whether it is correct.” *Olive v. Great American Insurance Co.*, 76 N.C. App. 180, 189, 333 S.E.2d 41, 46, *disc. rev, denied*, 314 N.C. 68, 336 S.E.2d 400 (1985).

4. Third-Party

North Carolina does not recognize any cause of action for bad faith or unfair or deceptive trade practices by third-party claimants against the insurance company of an adverse party. *See Lee v. Mut. Community Savings Bank*, 136 N.C. App. 808, 810, 525 S.E.2d 854 (2000).

Fraud

There are five elements of actionable fraud in North Carolina. These elements are as follows:

- That the defendant made a false representation or concealed a material fact;
- That the false representation or concealment was reasonably calculated to deceive;
- That the false representation was made or the concealment was done with the intent to deceive;
- That the plaintiff was in fact deceived by the false representation or concealment and that the plaintiff’s reliance was reasonable; and
- That the plaintiff suffered damages as a result of his reliance on the defendant’s false representation or concealment.

See, e.g., Myers & Chapman, Inc. v. Thomas G. Evans, Inc., 323 N.C. 559, 568, 374 S.E.2d 385, 391 (1988), *reh’g denied*, 324 N.C. 117, 377 S.E.2d 235 (1989).

The plaintiff has the burden of proof as to each element. A statement of opinion, belief, recommendation, future prospect or a mere promise is generally not a representation of fact. *See Johnson v. Phoenix Mutual Life Insurance*

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Co., 300 N.C. 247, 255, 266 S.E.2d 610, 616 (1980), *overruled in part on other grounds by Myers & Chapman*, 374 S.E.2d at 391-92. However, a promise can be a false representation of fact if, at the time it is made, the defendant has no intention of carrying it out. *See Leake v. Sunbelt Ltd., of Raleigh*, 377 S.E.2d 285, 288-89, *disc. rev, denied*, 324 N.C. 578, 381 S.E.2d 774 (N.C. 1989).

Intentional or Negligent Infliction of Emotional Distress

In North Carolina, to recover on a claim for intentional infliction of serious emotional distress, the plaintiff must prove three elements by the greater weight of the evidence: "1) extreme and outrageous conduct by the defendant 2) which is intended to and does in fact cause 3) severe emotional distress." *Waddle v. Sparks*, 331 N.C. 73, 82, 414 S.E.2d 22, 27 (1992) (citation omitted).

As to the first element, conduct is deemed "extreme and outrageous" when it "exceeds all bounds usually tolerated by decent society." *Stanback v. Stanback*, 297 N.C. 181, 196, 254 S.E.2d 611, 622 (1979) (citation omitted). Under the second element, plaintiff must show either that defendant intended to cause severe emotional distress or that the "defendant's actions indicate[d] a reckless indifference to the likelihood that they [would] cause severe emotional distress." *Dickens v. Puryear*, 302 N.C. 437, 452, 276 S.E.2d 325, 335 (1981). "Severe emotional distress" is defined for purposes of the third element as

any emotional or mental disorder, such as, for example, neurosis, psychosis, chronic depression, phobia, or any other type of *severe and disabling* emotional or mental condition which may be generally recognized and diagnosed by professionals trained to do so.

Waddle, 414 S.E.2d at 27 (citation omitted). A plaintiff is not required to show physical injury to recover for intentional infliction of emotional distress. *See Dickens*, 276 S.E.2d at 331-35. But the plaintiff must present evidence of a medical diagnosis to substantiate alleged severe emotional distress. *Waddle*, 414 S.E.2d at 28.

State Consumer Protection Laws, Rules and Regulations

North Carolina's Unfair and Deceptive Trade Practices Act prohibits "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce." N.C. Gen. Stat. § 75-1.1(a). The Act provides a private cause of action for persons injured by violations of its terms. *See* N.C. Gen. Stat. § 75-16. Claims for relief under Chapter 75 are subject to a four-year statute of limitations. *See* N.C. Gen. Stat. § 75-16.2. Damages for violations of Chapter 75 may be trebled. *See* N.C. Gen. Stat. § 75-16. A plaintiff who prevails on a claim under the Act may be entitled to attorneys' fees if he establishes that, "[t]he party charged with the violation has willfully engaged in the act or practice, and there was an unwarranted refusal by such party to fully resolve the matter which constitutes the basis of such suit." N.C. Gen. Stat. § 75-16.1(1). If the defendant prevails, he may be entitled to recover attorneys' fees if he shows that "the party instituting the action knew, or should have known, the action was frivolous and malicious." N.C. Gen. Stat. § 75-16.1(2). *See also*, N.C. Gen. Stat. § 58-63-15, *supra*, for standards regarding insurance claims handling and settlements. A violation of that statute may constitute a violation of N.C. Gen. Stat. Chapter 75 as a matter of law.

DISCOVERY ISSUES IN ACTIONS AGAINST INSURERS

Discoverability of Claims Files Generally

Documents prepared by an insurer before it denies a claim are discoverable, unless an insurer can produce

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evidence that it reasonably anticipated litigation prior to the denial of the claim. *Evans v. United Services Auto. Ass'n*, 142 N.C. App. 18, 541 S.E.2d 782, cert. denied, 353 N.C. 371, 547 S.E.2d 810 (2001). The general rule is that a reasonable possibility of litigation and protection of work-product doctrine only arises in a first-party insurance case after insurer has made a decision with respect to denial of the claim of the insured; therefore, in general, only documents accumulated after claim denial will be done in anticipation of litigation. *Ring v. Commercial Union Ins. Co.*, 159 F.R.D. 653 (M.D.N.C. 1995). However, special circumstances may trigger the protection earlier. *Id.*

Discoverability of Reserves

The U.S. District Court for the Eastern District of North Carolina has held that information related to reserves “falls within the scope of permissible discovery.” *PCS Phosphate Co. v. American Home Assurance Co.*, No. 5:14-CV-99-D, 2015 WL 8490976, at *4 (E.D.N.C. Dec. 10, 2015). If relevant to the litigation, this includes the time that the reserve was established, the amount of the reserve, and any changes in the amount of the reserve. *Id.*

Discoverability of Existence of Reinsurance and Communications with Reinsurers

The U.S. District Court for the Eastern District of North Carolina has held that communications with reinsurers is discoverable, if relevant to the litigation. *PCS Phosphate*, 2015 WL 8490976, at *3. Such communications can potentially be withheld on the basis of attorney/client privilege, however. *Id.*

Attorney/Client Communications

In a bad faith action, the insurance company and its counsel may avail themselves of the protection afforded by the attorney-client privilege if the attorney was acting as a legal advisor when the communication was made. *Evans v. United Services Auto. Ass'n*, 142 N.C. App. 18, 32, 541 S.E.2d 782, 791 (2001); *Ring v. Commercial Union Ins. Co.*, 159 F.R.D. 653, 657 (M.D.N.C. 1995). “It is an established rule of the common law that confidential communications made to an attorney in his professional capacity by his client are privileged, and the attorney cannot be compelled to testify to them unless his client consents.” *Scott v. Scott*, 106 N.C. App. 606, 612, 417 S.E.2d 818, 822 (1992) (citation and internal quotation marks omitted).

DEFENSES IN ACTIONS AGAINST INSURERS

Misrepresentations/Omissions: During Underwriting or During Claim

The North Carolina Court of Appeals has issued inconsistent decisions as to whether a scienter requirement exists in order to void a policy for a misrepresentation in the application. The North Carolina Court of Appeals has held that, in the context of a fire/homeowners policy, N.C.G.S. § 58-44-16 is the controlling statute and any misrepresentations or concealment made in the application process is governed by that statute, not N.C.G.S. § 58-3-10. *Crawford v. Commercial Union Midwest Ins. Co.*, 147 N.C. App. 455, 459, 556 S.E.2d 30, 33 (2001).¹ N.C.G.S. § 58-44-16 provides, in pertinent part, that the “entire policy shall be void if, whether before or after a loss, the insured has willfully concealed or misrepresented any material fact or circumstance concerning this insurance or the subject of this insurance, or the interest of the insured in the subject of this insurance, or in the

case of any fraud or false swearing by the insured relating the subject of this insurance.” (Emphasis added).

However, the North Carolina Court of Appeals has also held that a material misrepresentation in the application of a fire/homeowners policy is governed by N.C.G.S. § 58-3-10, and thus is void upon a showing that the misrepresentation was material, regardless of whether the misrepresentation was willful or knowing. *See, e.g., Metropolitan Property and Casualty Co. v. Dillard*, 126 N.C. App. 795, 799, 487 S.E.2d 157, 159-60 (1997); *Old Colony Ins. Co. v. Garvey*, 253 F.2d 299, 301 (4th Cir. 1958); and *Matter of McCrary*, 112 N.C. App. 161, 435 S.E.2d 359 (1993). N.C.G.S. § 58-3-10 provides that:

All statements or descriptions in any application for a policy of insurance, or in the policy itself, shall be deemed representations and not warranties, and a representation, unless material or fraudulent, will not prevent recovery on the policy.

In *Crawford*, the court dealt with the conflicting opinion of *Metropolitan* as follows:

We acknowledge this Court has held a material misrepresentation in the application of a fire/homeowners policy is governed by section 58-3-10 and thus is void upon a showing the misrepresentation is material, regardless of whether the misrepresentation was willful or knowing. In 1903, however, our Supreme Court applied section 58-176 (the predecessor statute to section 58-44-15) to a dispute involving an alleged misrepresentation in the procurement of a fire/homeowners insurance policy. Thus, necessarily construed “before . . . a loss” to include the application process. Accordingly, we reject Defendant's contention that section 58-44-15 does not apply to the application process and that any material misrepresentations made in the application process must be governed by section 58-3-10. In the context of a fire/homeowners policy, section 58-44-15 is the controlling statute and any misrepresentation or concealment made in the application process is governed by that statute, not section 55-3-10.

147 N.C. App. at 458-59, 556 S.E.2d at 33 (internal citations omitted). The court concluded that there was no evidence offered at summary judgment that the insured knowingly or willfully made misrepresentations in the application process and, therefore, reversed a summary judgment that had been granted to the insurer in reliance upon N.C.G.S. § 58-3-10. *Id.* at 459.

North Carolina Pattern Jury Instruction 880.15 notes that “[a] representation is false if it is untrue. However, the law does not require that a representation literally be true and accurate in every respect. A representation is not considered under the law to be false if it is substantially true.” Answers to ambiguous questions cannot be deemed false. *See Cockerham v. Pilot Life Insurance Company*, 92 N.C. App. 218, 220, 374 S.E.2d 174, 176 (1988).

A misrepresentation in an application for an insurance policy is deemed “material” if the knowledge or ignorance of it would naturally and reasonably influence the judgment of the insurance company in making the insurance contract, or estimating the degree and character of the risk, or in fixing the rate of premium. *See Tolbert v. Mutual Benefit Life Insurance Co.*, 236 N.C. 416, 418-419, 72 S.E.2d 915, 917 (1952). In a policy of life insurance, written questions and answers relating to health are deemed material as a matter of law. *See id.* Materiality is subjective, as one insurer may be more risk averse than another. *Goodwin v. Investors Life*, 332 N.C. 326, 332-333, 419 S.E.2d 766, 769-770 (1992).

An insurer cannot attempt to rescind an insurance policy if the insurer or the agent knew at the time of the representation that it was false. *See Willetts v. Integon Life Insurance Corp.*, 45 N.C. App. 424, 430, 263 S.E.2d 300, 305 (1980), *disc. rev. denied*, 300 N.C. 562, 270 S.E.2d 116 (1980). In fact, a regulation promulgated by the North Carolina Department of Insurance provides in part:

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If an insurer does not promptly attempt to rescind an accident, health or disability policy upon becoming aware that the insured's application contained false statements, the insurer may not subsequently use such false statements as a basis for attempted rescission or alteration of the policy . . .

11 NCAC 4.0316.

Failure to Comply with Conditions

In the absence of bad faith by the insured, "[a]n unexcused delay by an insured in giving notice to insurer of accident does not relieve insurer of its obligation to defend and indemnify unless delay operates materially to prejudice insurer's ability to investigate and defend." *Great American Ins. Co. v. C. G. Tate Const. Co.*, 303 N.C. 387, 390, 279 S.E.2d 769, 771 (1981).

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

"With regard to claims against an insured in which a default judgment is obtained in favor of the claimant, 'if an insurer had a right to defend the injury action against the insured, had timely notice of such action, and elects not to defend, the judgment, in the absence of fraud or collusion, is binding upon the insurer as to issues which were or might have been litigated therein.'" *Naddeo v. Allstate Ins. Co.*, 139 N.C. App. 311, 318, 533 S.E.2d 501, 506 (2000) (citation omitted), overruled in part on other grounds as stated in, *Kubit v. Mag Mut. Ins. Co.*, 210 N.C. App. 273, 708 S.E.2d 138 (2011).

The insurer is not allowed to invoke "no action" provision in its policy as a defense when the insurer unjustifiably refuses to defend a third party action against its insured. *Indiana Lumbermen's Mut. Ins. Co. v. Champion*, 80 N.C. App. 370, 343 S.E. 2d 15 (1986). A "no action" clause in assigned risk policy was unenforceable as to coverage within compulsory limits, but is valid when asserted as defense to a judgment obtained against insured by collusion. *Strickland v. Hughes*, 273 N.C. 481, 160 S.E.2d 313 (1968).

Preexisting Illness or Disease Clauses

North Carolina follows the general rule of insurance contract interpretation that when there is any doubt about its interpretation or meaning, an insurance policy exclusion precluding recovery for pre-existing disabilities or any other reason is strictly construed against the insurer. *See, e.g., Cantrell v. Liberty Life Insurance Co.*, 315 S.E.2d 544, 547 (N.C. App.), *disc. rev, denied*, 321 S.E.2d 127 (N.C. 1984). The North Carolina General Statutes provide that:

At the time of issuing any new policy of individual or family hospitalization insurance or individual accident and health insurance to insureds over age 65, the term "preexisting conditions," or its equivalent in said policy shall include only conditions specifically eliminated by rider.

N.C. Gen. Stat. § 58-51-60. Notably, a mere undiagnosed symptom of pain prior to the policy term does not amount to a preexisting illness. *See McDaniel v. North Carolina Mutual Life Insurance Co.*, 319 S.E.2d 676, 677 (N.C. App.), *disc. rev, denied*, 321 S.E.2d 897 (N.C. 1984).

Subject to certain exceptions, a group health insurer may currently exclude from coverage a pre-existing condition for a period of not more than 12 months after an insured has enrolled in the plan, or not more than 18 months in the case of a late enrollee. *See* N.C. Gen. Stat. § 58-68-30. The exclusionary period is reduced - the

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insured receives a credit - if the insured's condition was covered on the enrollment date under one of several other health plans listed by statute. *See id.* § 58-68-30(a) (requiring reduction of the exclusionary period by any amounts of "creditable coverage"); *see also id.* § 58-68-30(c) (listing types of policies which may provide "creditable coverage"). The North Carolina General Statutes require that if a policy includes such a provision limiting coverage for preexisting conditions, the policy also must contain a provision defining "preexisting condition," notifying the insured of the exclusionary period, and informing the insured that he may be entitled to a credit against the period for coverage under a previous health plan. *See* N.C. Gen. Stat. § 58-51-15(a)(2)b. The statute sets forth an example of such a provision and requires that insurance policies follow the model language in substance. *See id.*

Note that effective 1/1/14, policies subject to the federal Affordable Care Act may not contain a pre-existing condition clause.

Subject to certain significant exceptions, an employee covered under a group health plan is entitled under North Carolina law to obtain coverage under an individual policy upon termination of coverage under the group policy. *See* N.C. Gen. Stat. § 58-53-45 to 58-53-115. The new individual policy cannot exclude any preexisting condition covered under the old group policy. *See id.* § 58-53-85.

Statutes of Limitations and Repose

There is a three-year statute of limitations under North Carolina law for causes of action based upon contract or tort theories. *See* N.C. Gen. Stat. § 1-52. The three-year period governing actions based on contracts does not begin to run until the alleged breach occurs and the cause of action accrues. *See Duke Univ. v. St. Paul Mercury Ins. Co.*, 95 N.C. App. 663, 384 S.E.2d 36 (1989). However, under most property policies in North Carolina the statute of limitations runs from the date of the loss. Claims under North Carolina's unfair or deceptive trade practice statute are subject to a four-year statute of limitations. *See* N.C. Gen. Stat. § 75-16.2.

TRIGGER AND ALLOCATION ISSUES FOR LONG-TAIL CLAIMS

Trigger of Coverage

North Carolina expressly has adopted the injury-in-fact theory for trigger of coverage. When the date of the injury in fact occurs on a certain ascertainable date, the insurance policies on the risk on that date are triggered. *Gaston County Dyeing Mach. Co. v. Northfield Ins. Co.*, 351 N.C. 293, 524 S.E.2d 558 (2000). In construction defect cases, the injury in fact has been found to be the date on which the defective work was completed. *Hutchinson v. Nationwide Mutual*, 163 N.C. App. 601, 594 S.E.2d 61 (2004); *but see Erie Ins. v. Builders Mut. Ins. Co.*, 227 N.C. App. 238, 742 S.E.2d 803 (2013) (holding that the "occurrence" for purposes of coverage was not the date of construction of the wall, but rather the date of the wall's collapse, even though the faulty construction ultimately caused the collapse that resulted in the property damage); *Harleysville Mut. Ins. Co. v. Hartford Cas. Ins. Co.*, 90 F. Supp. 3d 526 (E.D.N.C. 2015) (summarizing the relevant law in this area). For exposure and disease cases, coverage is triggered under each policy in effect while an injurious exposure is occurring. *Imperial Casualty v. Radiator Specialty*, 67 F.3d 534 (4th Cir. 1995); *see also Radiator Specialty Co., v. Arrowood Indem. Co.*, 2022-NCSC-134, 383 N.C. 387, 881 S.E.2d 597 (2022).

Allocation Among Insurers

When multiple policies appear to provide coverage to a common insured for the same risk, the insurers'

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respective obligations to pay are determined by examining each policy on its own terms. *Gaston County Dyeing Mach. Co. v. Northfield Ins. Co.*, 351 N.C. 293, 524 S.E.2d 558 (2000). On a risk that triggers multiple policies issued by different insurers over consecutive policy periods, the North Carolina Supreme Court has permitted pro rata allocation of liabilities based on each insurers respective time on the risk. *Radiator Specialty Co.*, 383 N.C. at 412-17, 881 S.E.2d at 614-17.²

CONTRIBUTION ACTIONS

North Carolina has adopted the Uniform Contribution Among Tortfeasors Act, which controls contribution issues between joint tortfeasors. North Carolina applies general principles of equity to contribution issues between other types of joint obligors.

Statutory

North Carolina has adopted the Uniform Contribution Among Tortfeasors Act. *See generally* N.C. Gen. Stat. § 1B-1, *et seq.* Where two or more persons become jointly or severally liable in tort for the same injury to person or property or for the same wrongful death, there is a right of contribution among them even though judgment has not been recovered against all or any of them. N.C. Gen. Stat. § 1B-1(a). This right of contribution exists only in favor of a tortfeasor who has paid more than her pro-rata share of the common liability, and her total recovery is limited to the amount paid by her in excess of her pro-rata share. N.C. Gen. Stat. §1B-1(b). No tortfeasor is compelled to make contribution beyond his own pro rata share of the entire liability. *Id.* Where the tortfeasor has intentionally caused or contributed to the injury or wrongful death, he or she does not have a right of contribution. N.C. Gen. Stat. § 1B-1(c).

- Settlement

A tortfeasor who enters into a settlement with a claimant is not entitled to recover contribution from another tortfeasor whose liability for the injury or wrongful death has not been extinguished nor in respect to any amount paid in a settlement which is in excess of what was reasonable. N.C. Gen. Stat. § 1B-1(d).

A liability insurer who by payment has discharged in full or in part the liability of a tortfeasor and has thereby discharged in full its obligation as insurer, succeeds to the tortfeasor's right of contribution to the extent of the amount it has paid in excess of the tortfeasor's pro-rata share of the common liability. N.C. Gen. Stat. § 1B-1(e). This provision does not limit or impair any right of subrogation arising from any other relationship. *Id.*

Where one tortfeasor is entitled to indemnity from another, the right of the indemnity obligee is for indemnity and not contribution, and the indemnity obligor is not entitled to contribution from the obligee for any portion of her indemnity obligation. N.C. Gen. Stat. § 1B-1(f).

- Release, Covenant Not to Sue and Payment of Judgment by One of Several

When a release or a covenant not to sue is given in good faith to one of two or more persons liable in tort for the same injury or the same wrongful death, it does not discharge any of the other tortfeasors from liability unless by its terms it so provides. N.C. Gen. Stat. § 1B-4. It does, however, reduce the claim against the others to the extent of any amount stipulated by the release or the covenant, or in the

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amount of the consideration paid for it, whichever is greater. *Id.* It also discharges the tortfeasor to whom it is given from all liability for contribution to any other tortfeasor. *Id.*

A general release of “any and all claims” generally bars all claims, even if the parties intended a more narrow purpose or scope. Therefore, a general agreement which releases a party from liability for all causes of action includes a cause of action for contribution. *McNair v. Goodwin*, 262 N.C. 1, 136 S.E.2d 218 (1964).

- Enforcement

Whether or not a judgment has been entered in an action against two or more tortfeasors, contribution may be enforced by a separate action. N.C. Gen. Stat. § 1B-3(a).

Where a judgment has been entered in an action against two or more tortfeasors, contribution may be enforced in that action by judgment in favor of one against another judgment defendant by motion upon notice to all parties to the action. N.C. Gen. Stat. § 1B-3(b).

If there is a judgment for the injury or wrongful death against a tortfeasor seeking contribution, any separate action by her to enforce contribution must be commenced within one year after the judgment has become final by lapse of time for appeal or after final judgment is entered. N.C. Gen. Stat. § 1B-3(c). If there has been no judgment against the tortfeasor seeking contribution, his right of contribution is barred unless he has either discharged by payment the common liability within the statute of limitations applicable to the claimant’s right of action against her, and has commenced her action for contribution within one year after payment, or unless he agreed while the action is pending against him to discharge the common liability and has done so and commenced his action for contribution within one year after the agreement. N.C. Gen. Stat. § 1B-3(d)(1)-(2). A tortfeasor seeking contribution may also join the other tortfeasors as third party defendants in the underlying action for the purpose of contribution. N.C. Gen. Stat. § 1B-3(d)(3).

The recovery of a judgment against one tortfeasor for the injury or wrongful death does not of itself discharge the other tortfeasors from liability to the claimant. The satisfaction of the judgment discharges the other tortfeasors from liability to the claimant for the same injury, but it does not impair any right of contribution. N.C. Gen. Stat. § 1B-3(e). Provided, however, that a consent judgment resulting from a request for the approval of a minor settlement or a settlement involving some other person under disability is not deemed a judgment as the term is used in N.C. Gen. Stat. § 1B-3; rather, it is treated as a release or covenant not to sue as those terms are used in N.C. Gen. Stat. § 1B-4 unless the judgment specifically provides otherwise.

- Pro Rata Share

In determining the pro rata shares of tortfeasors in the entire liability: (1) their relative degree of fault is not considered; (2) if equity requires, the collective liability of some as a group shall constitute a single share; and (3) principles of equity applicable to contribution generally apply. N.C. Gen. Stat. § 1B-2.

Equity

Whereas contribution among joint tortfeasors is controlled by the Uniform Contribution Among Tortfeasors Act in North Carolina, contribution among other types of joint obligors is controlled by general principles of equity. Under North Carolina’s common law:

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“The principle of contribution is equality in bearing a common burden. The general rule is that one who is compelled to pay or satisfy the whole or to bear more than his just share of a common burden or obligation, upon which several persons are equally liable or which they are bound to discharge, is entitled to contribution against the others to obtain from them payment of their respective shares. In other words, when any burden ought, from the relationship of the parties or in respect of property held by them, to be equally borne and each party is *aequali jure*, contribution is due if one has been compelled to pay more than his share. The doctrine is founded not upon contract [or statute], but upon principles of equity.”

Nebel v. Nebel, 223 N.C. 676, 684-685, 28 S.E.2d 207, 213 (1943) (citations omitted). “It is a prerequisite to a claim for contribution that the party seeking contribution ‘satisfy by payment or otherwise, more than his just proportion of the common obligation or liability.’” *Irvin v. Egerton*, 122 N.C. App. 499, 501, 470 S.E.2d 336, 337 (1996) (citations omitted).

Whereas compensatory damages denote damages in satisfaction of, or in recompense for, loss or injury sustained, contribution is a form of restitution that distributes the burden of payment among joint obligors. *Med. Mut. Ins. Co. of N.C. v. Mauldin*, 157 N.C. App. 136, 577 S.E.2d 680 (2003).

When two or more obligors are allegedly “jointly liable,” it means that they are undivided and must therefore be prosecuted in a joint action against them all. *Harlow v. Voyager Communications V*, 348 N.C. 568, 571, 501 S.E.2d 72, 74 (1998). Liability is said to be “joint and several” when a creditor may demand payment or sue one or more of the parties to such liability separately, or all of them together at his or her option. *Id.*

When one of the parties pays the amount of a compromise settlement to a judgment creditor, that party is entitled to a recovery from each codefendant of the proportionate part of such codefendant’s liability for the settlement even though the amount paid for the settlement was less than the payer’s proportionate liability on the original judgment. *Scales v. Scales*, 218 N.C. 553, 11 S.E.2d 569, 571 (1940).

DUTY TO SETTLE

An insurer is required to act in good faith in exercising its right to settle a claim against the insured and must consider the interests of the insured, but the insurer is not required to give more consideration or weight to the interests of the insured than its own interests. *Nationwide Mut. Ins. Co. v. Public Service Co. of North Carolina, Inc.*, 112 N.C. App. 345, 350, 435 S.E.2d 561, 564 (1993); *Cash v. State Farm Mut. Auto. Ins. Co.*, 137 N.C. App. 192, 528 S.E.2d 372 (2000). However, if an insurance company “admits that its insured is liable, without its insured’s knowledge or consent, [it] is acting in its own interest, and not as the agent of the insured.” *Anderson v. Gooding*, 43 N.C. App. 611, 614, 259 S.E.2d 398, 400, *appeal dismissed*, 299 N.C. 119, 261 S.E.2d 921 (1979), *rev’d on other grounds*, 300 N.C. 170, 265 S.E.2d 201 (1980).

LH&D BENEFICIARY ISSUES

Change of Beneficiary

North Carolina courts follow “the well-settled principle that an insurance policy is a contract and its provisions

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govern the rights and duties of the parties thereto.” *Primerica Life Ins. Co. v. James Masengill & Sons Const. Co.*, 211 N.C. App. 252, 261, 712 S.E.2d 670, 677 (2011) (quoting *Fidelity Bankers Life Ins. Co. v. Dortch*, 318 N.C. 378, 380, 348 S.E.2d 794, 796 (1986)). A determination of the beneficiaries of a life insurance policy must, therefore, be done in accordance with the contract. *Id.*

Note, however, that courts will apply the doctrine of “substantial compliance” when analyzing a beneficiary change form. “Where it appears that the insured has done all that he reasonably could do to comply with the specific policy provisions but was unable to fully comply by reason of circumstances beyond his control, the courts will give effect to the intention of the insured and hold that the change of beneficiary has been accomplished.” *English v. English*, 34 N.C. App. 193, 195-96, 237 S.E.2d 555, 557 (1977).

Furthermore, a change to the policy’s beneficiary or to the ownership of the policy may only be made by the owner of the life insurance policy. *Primerica*, 211 N.C. App. at 262, 712 S.E.2d at 678. Should someone other than the owner of the policy attempt a change, “the changes are a legal nullity and of no force and effect, being that the changes were never validly assented to by the proper party.” *Id.* See *Dortch*, 318 N.C. at 381-82, 348 S.E.2d at 797 (holding an attempted change in beneficiary to an insurance policy by the insured was a nullity and ineffectual because only the policy owner can effectively make such changes).

Effect of Divorce on Beneficiary Designation

In North Carolina, a divorce, by itself, generally will not annul or revoke the beneficiary designation in a life insurance policy. *Daughtry v. McLamb*, 132 N.C.App. 380, 382, 512 S.E.2d 91, 92 (1999). In rejecting the contention that an absolute divorce operates to revoke a spouse’s designation of the other spouse as beneficiary, North Carolina courts require that a separation agreement contain a specific intent to effect a beneficiary change. *DeVane v. Travelers Ins. Co.*, 8 N.C. App. 247, 250-51, 174 S.E.2d 146, 147-48 (1970). The prevailing rule of construction as to separation agreements is stated as:

General expression or clauses in a property settlement, agreement between a husband and wife, however, are not to be construed as including an assignment or renunciation of expectancies, and a beneficiary therefore retains his status under an insurance policy if it does not clearly appear from the agreement that in addition to the segregation of the property of the spouses it was intended to deprive either spouse of the right to take under an insurance contract of the other.

Id. at 250, 174 S.E.2d at 147 (citations omitted). For a change to an insurance beneficiary designation to be effective following divorce, there must be a clear intent that the beneficiary relinquishes his or her rights that might be acquired under the policy. *Id.* at 250, 174 S.E.2d at 147-48. See *Daughtry*, 132 N.C. App. at 382, 512 S.E.2d at 92 (holding that the parties’ divorce decree does not effect a beneficiary change when the decree does not specifically refer to life insurance, but instead refers only to insurance arising out of decedent’s employment). When a party has the right under the insurance policy to change the beneficiary, his failure to exercise that right, indicates that he does not wish to effect such a change. *Id.* at 250, 174 S.E.2d at 148.

Note that “[n]either [N.C.]G.S. § 50-11 which provides that ‘all rights arising out of the marriage shall cease and determine,’ nor [N.C.]G.S. § 31A-1 which bars rights to ‘(a)ny rights or interests in the property of the other spouse’ discloses a legislative intent that divorce should annul or revoke the beneficiary designation in a garden-variety insurance certificate. *Devane*, 8 N.C. App. at 251, 174 S.E.2d at 148.

INTERPLEADER ACTIONS

Availability of Fee Recovery

In North Carolina, “attorneys fees are not part of the ‘costs’ of litigation, nor is it the practice in this state, even in an interpleader case, to tax against the unsuccessful defendant an attorney’s fee for the plaintiff to be paid out of the fund.” *Metropolitan Life Ins. Co. v. Jordan*, 221 F. Supp. 842, 843 (W.D.N.C. 1963) (quoting *Supreme Lodge Knights of Honor v. Selby*, 69 S.E.2d 51 (1910)). Interpleader actions brought under a federal statute follow the same rules as to costs and attorneys’ fees as in an ordinary equity interpleader. *Id.* However, “the imposition of costs is discretionary, and is a discretion which, in absence of special circumstances, should be exercised in accordance with the usual practice. Beyond question, the usual practice in North Carolina is to deny counsel fees.” *Id.* (internal citation omitted).

Differences in State vs. Federal

Where an interpleader action is before a federal court pursuant to diversity subject matter jurisdiction, the Fourth Circuit’s decision in *Bd. of Educ. v. Winding Gulf Collieries*, 152 F.2d 382 (4th Cir. 1945), has been consistently construed as applying state law on the issue of attorneys’ fees in a diversity interpleader action. *New York Life Ins. Co. v. Youa Vang*, 2010 WL 76369 (W.D.N.C. Jan. 5, 2010). Note, however, that the court in *Lindsey v. Primerica Life Ins. Co.*, 2002 WL 1585908 (M.D.N.C. 2002), appears to be the only decision by a district court in North Carolina to apply federal law rather than state law in regards to an award of attorneys’ fees in a diversity interpleader action. *New York Life Ins. Co.*, 2010 WL 76369. The district court in *Lindsey* recognizes that the “uniform federal policy based on an exercise of traditional equity discretion” as related to an award of attorneys’ fees is appropriate in an interpleader action brought under the federal interpleader statute. *Lindsey*, 2002 WL 1585908. See *Trustees of Plumbers and Pipefitters Nat. Pension Fund v. Sprague*, 251 Fed. Appx. 155 (4th Cir. 2007) (recognizing a court’s discretionary authority to reimburse a plaintiff’s fees and costs under the federal interpleader statute). The *Lindsey* decision, however, appears to be an outlier in North Carolina. Given the reliance by most North Carolina district courts on the Fourth Circuit’s decision in *Bd. of Edu. v. Winding Gulf*, *supra*, most diversity interpleader actions will follow North Carolina’s usual practice and deny counsel fees. See also *Combined Ins. Co. of Am. v. Christian*, 2015 WL 5022379 (M.D.N.C. Aug. 24, 2015) (analyzing whether awarding attorneys’ fees in the context of the federal interpleader statute was appropriate, but ultimately awarding no attorneys’ fees).

¹ The North Carolina Supreme Court issued a split decision that left this Court of Appeals decision undisturbed, but without precedential value. *Crawford v. Commercial Union Midwest Ins. Co.*, 356 N.C. 609, 572 S.E.2d 781 (2002).

² Notably, the court limited its holding to benzene exposure and benzene-related injury and based it on the specific policy provisions at issue, specifically declining to overrule other North Carolina precedent.