BROWNSON • NORBY PLLC

ATTORNEYS AT LAW

Insurance, Claims, Liability, and Regulatory Law

MINNESOTA EDITION

Brownson Norby, PLLC's annual summary of Minnesota law is useful to insurance and corporate risk managers and claims handlers – ***Updated for 2018***

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Statutes of Limitations

Statutes of Limitations establish the time period during which a plaintiff, insured, claimant, or insurer (in a coverage or subrogation action) must file a cause of action to preserve a claim. The limitations period typically begins to run from the date of accident or injury, or the date an individual becomes aware of a potential claim.

2 YEARS
Libel (Minn. Stat. §541.07)
Slander (Minn. Stat. §541.07)
Assault (Minn. Stat. §541.07)
Battery (Minn. Stat. §541.07)
False Imprisonment (Minn. Stat. §541.07)
Whistleblower Claims (Minn. Stat. §541.07)
Actions Against Veterinarians (Minn. Stat. §541.07)
Recovery of Wages or Overtime Under Federal or State Law (Minn. Stat. §541.07)
Improvements to Real Property (Minn. Stat. §541.051)
Dram Shop (Minn. §340A.802, Subd. 2)

3 YEARS
Wrongful Death (Minn. Stat. §573.02)

4 YEARS
Strict Liability Arising from the Manufacture, Sale, Use or Consumption of a Product (Products Liability) (Minn. Stat. §541.05, Subd. 2)
Medical Malpractice (Minn. Stat. §541.076, Subd. 2)

6 YEARS
Upon a Contract or Other Obligation where no Other Limitation is Expressly Prescribed (Minn. §541.05, Subd. 1), including subrogation indemnity claims of insurers against tortfeasors (which begin to accrue upon payment to insureds)
Action upon a Liability Created by Statute (Minn. Stat. §541.05, Subd. 1)
Trespass upon Real Estate (Minn. Stat. §541.05, Subd. 1)
Taking, Detaining, or Injuring Personal Property (Minn. Stat. §541.05, Subd. 1)
Fraud (Minn. Stat. §541.05, Subd. 1)
Injury to the Person or to Rights of Another (Negligence) (Minn. §541.05, Subd. 1)
Assault, Battery, False Imprisonment, or Other Tort Resulting in Personal Injury if the Conduct Also Constitutes Domestic Abuse (Minn. §541.05, Subd. 1)

10 YEARS
Repose - Real Property (Minn. Stat. §541.051)

Key Minnesota Rules of Civil Procedure and General Rules of Practice

Minn. R. Civ. P. 3.01 – ***An action is initiated at service of the Summons and Complaint, not at filing.*** A civil action will be considered commenced against a defendant when a summons is served on that defendant, or if service is by mail or *other means, the defendant agrees to in writing or electronically*, as of the date of acknowledgment of service.

"Pocket Filing Rule"- At the date of service, the Plaintiff has one year to file the action. Actions not filed within a year are deemed dismissed with prejudice. Minn. R. Civ. P. 5.04

Minn. R. Civ. P. 56.05 – sworn or certified copies of all documents referenced in an affidavit in support of a summary judgment motion must be attached to or served with the affidavit. *A "sworn copy" includes items signed under penalty of perjury as per Minn. Stat. Sec. 358.116.*

Minn. R. Civ. P. 11.01 – every pleading and motion must be signed by at least one attorney or any self-represented party and shall state the attorney's registration number, if applicable, plus the signer's address, phone number *and email address*.

Minn. R. Civ. P. 11.03 – if the court finds a violation of Minn. R. Civ. P. 11.02, governing representations to the court, Rule 11.03 *does not limit sanctions authorized by other rules or statutes or by the court's inherent power*.

Minn. R. Civ. P. 33.01(d) – a party's answers to interrogatories must be signed under oath or *penalty of perjury. If signed under penalty of perjury, the answers must be signed below a declaration using language substantially similar to: "I declare under penalty of perjury that everything I have stated in this document is true and correct." Also, the answers must be dated and designate the county and state where they were executed by a party or its representative.*

Minn. R. Civ. P. 45.06 – A party must submit a foreign subpoena to the court administration in the county where discovery is sought in this state. The court administration may then issue a subpoena for service upon the person or entity to which the subpoena is directed. The foreign subpoena issued by the court administrator must include terms used in the out of state subpoena and contain or attach the names, addresses and phone numbers of all counsel of record and/or self-represented parties in the case. Service of the subpoena and its enforcement shall remain in accordance with the Minnesota rules and statutes.

Minn. Gen. R. Prac. 2.01 – *judges have discretion to limit or prohibit use of electronic devices in the courtroom. If permitted, devices must be silent and discreet.*

Minn. Gen. R. Prac. 5 – *When out of state attorneys appear in court, they are subject to all rules that apply to Minnesota lawyers.*

Minn. Gen. R. Prac. 7 – *When a document is e-filed and served, the electronic record in the e-filing system constitutes proof of service.*

Minn. Gen. R. Prac. 14.01(b) – *effective July 1, 2016, unless otherwise authorized, Minnesota attorneys must electronically file and serve all documents. Under **Rule 14.04(b)**, documents must bear a facsimile or typographical signature such as: /s/ John Smith.*

Minn. Gen. R. Prac. 15 –*affidavits must be signed, sworn and notarized or signed under penalty of perjury in accordance with § 358.116.*

Minnesota Practice Points – State and Federal Court

Verification of Interrogatory Answers

In Minnesota state court, it has been held that a party must respond to interrogatories with an answer "to the extent his knowledge permits," state a lack of knowledge, or assert an objection. *Garrity v. Kemper Motor Sales*, 159 N.W.2d 103, 106-07 (Minn. 1968). It is impermissible to give no answer to an interrogatory. *Id.*

In the federal courts: "The person who makes the answers must sign them, and the attorney who objects must sign any objections." Fed. R. Civ. P. 33(b)(5). In addition, "Interrogatories must be answered … if [a] party is a public or private corporation, a partnership, an association, or a governmental agency, by any officer or agent, who must furnish the information available to the party." Fed. R. Civ. P. 33(b)(1)(B). That is, "Fed.R.Civ.P. 33(a) provides that where interrogatories are directed at a corporation, the corporation must designate someone to answer on its behalf 'such information as is *available* to the party.'" *General Dynamics Corp. v. Selb Mfg. Co.*, 481 F.2d 1204, 1210 (8th Cir.1973), *cert. denied*, 414 U.S. 1162 (1974) (quoting *United States v. Kordel*, 397 U.S. 1, 8 (1970) (emphasis in original)).

Thus, in federal actions, a corporate representative is obligated to furnish all information available to a corporation – not just within the bounds of her personal knowledge. *United States v. 3963 Bottles, more or less, etc.*, 265 F.2d 332, 336 (7th Cir. 1959); 4A Moore's Federal Practice ¶ 33.26 at 33-146. An officer or employee's knowledge is imputed to the party-corporation. *Acme Precision Products, Inc. v. American Alloys Corp.*, 422 F.2d 1395, 1398 (8th Cir. 1970). A corporate representative responding to interrogatories is obligated to obtain all information available to the corporation, including "information within the personal knowledge of former … employees, employed by [the corporation] at the time [an] action commenced. Additionally, it would include information possessed by its corporate counsel." *Gen. Dynamics*, 481 F.2d at 1210-11.

Depositions of Organizations

In Federal Court, via notice or subpoena, "a party may name as the deponent a public or private corporation, a partnership, an association, a governmental agency, or other entity and must describe with reasonable particularity the matters for examination." Fed. R. Civ. P. 30(b)(6). The entity is required to select a director, officer, managing agent or other representative to testify on its behalf and can determine the topics on which any such designated person will testify. *Id.* A subpoena must notify any nonparty organization as to its duty to select a representative. *Id.* Under the rule, the corporate deponent "must testify about information known or reasonably available to the organization." *Id.*

The State Court rule mimics Fed. R. Civ. P. 30(b)(6), and, similarly, includes the requirement that a corporate representative "shall testify as to matters known or reasonably available to the organization." Minn. R. Civ. P. 30.02(f).

Practice Points – *Continued*

Depositions in Federal Cases

In federal cases, a deposition of a person or party may be taken without leave of court, subject to certain exceptions. Fed. R. Civ. P. 30 (a)(1). And, the attendance of a deponent may be compelled by service of a subpoena. *Id.*

A deposition may also be taken with leave of the court granted to the extent consistent with Fed. R. Civ. P. 26(b)(1) and (2). Fed. R. Civ. P. 30 (a)(2). That is, the court may grant leave where there is no stipulation by the parties as to the deposition, and the deposition would lead to more than ten depositions being taken by a party, a deponent has already been deposed in the action, or the deposition is sought prematurely, unless the party provides written certification that the deponent plans to leave the county. Fed. R. Civ. P. 30 (a)(2)(A)(i)-(iii). The court may also grant leave if a deponent is in prison. Fed. R. Civ. P. 30 (a)(2)(B).

Requests for Admissions

In State and Federal Court, parties may serve on other parties *written requests for admissions* related to facts or the application of law to facts, or opinions as to either, and regarding the genuineness of documents disclosed.

Fed. R. Civ. P. 36 Minn. R. Civ. P. 36

Deadline for Filing of Action

In State Court, any action not filed within one year after it is commenced by service of a summons and complaint upon any party is "deemed dismissed with prejudice against all parties unless the parties within that year sign a stipulation to extend the filing period." Minn. R. Civ. P. 5.04(a)

Initial Disclosures

Under Fed. R. Civ. P. 26(a), parties must make certain disclosures, including Initial Disclosures, which must be provided to other parties "without awaiting a discovery request." *Id.* Pursuant to the rule, the following must be disclosed:

- Names, addresses, telephone numbers of any person likely to have discoverable information in support of a claim or defense, plus the nature of that information, unless such information is to be used only for purposes of impeachment
- Copies, or descriptions of locations and nature of, all documents, including electronic information, and things, a party has in its possession, custody or control that support its claim or defense, unless to be used solely for impeachment
- A computation of all categories of damages claimed, plus a party must produce all non-privileged or otherwise protected documents or other items supporting the computation of damages for inspection and copying, "including materials bearing on the nature and extent of injuries suffered"
- Any insurance contract under which an insurer might be liable to pay all or part of a potential judgment, or to reimburse or indemnify for any payments made in satisfaction of a judgment

In State Court, Minn. R. Civ. P. 26.01(a) adopts the Initial Disclosure requirement of Fed. R. Civ. P. 26(a), requiring parties to disclose the same information before a discovery request.

Insurance Law in Minnesota

Claims Handling and Unfair Practices
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Claims Handling and Unfair Practices

Minnesota Statute § 72A.201 requires that insurers adhere to a number of mandates when it comes to handling claims

- After receiving notification of a claim, an insurer must acknowledge receipt within **ten business days**. Minn. Stat. § 72A.20, subd. 4(1).

- An insurer must complete an investigation and let the insured or claimant know if a claim is accepted or denied **within 30 days** after notification of a claim. If an investigation cannot be completed during that time, the insurer must provide notice of the reasons for the delay and as to the expected date of completion within the 30-day deadline. Minn. Stat. § 72A.201, subd. 4(3).

- Where evidence of fraud is suspected, an insurer need not disclose their specific reasons for failing to complete their investigation within 30 days. Minn. Stat. § 72A.201, subd. 4(4).

- Once an insured or claimant files a notification of claim, the insurer must notify the individual of benefits or coverage to which they may be entitled under their policy and of any documentation the insured must supply to determine eligibility. Minn. Stat. § 72A.20, subd. 4(5).

- If an insured or claimant is not represented by counsel and has filed a notification of claim known to remain unresolved, an insurer must advise the individual in writing about the expiration of the statute of limitations period at least **60 days before** it expires. Minn. Stat. § 72A.201, subd. 4(8).

Unfair Settlement Practices

- Every offer of settlement, settlement (whether partial or final payment), must include an explanation of what the payment, settlement, or offer of settlement is for. Minn. Stat. § 72A.201, subd. 5(1).
- Unless otherwise provided by the policy, payment of the final agreed upon settlement, whether for all or part of the claim, must be made within 5 business days from the agreement or from the date of performance by the claimant of any condition in the agreement, whichever is later. Minn. Stat. § 72A.201, subd. 5(5).

Proof of Loss- What's Next?

After a proof of loss statement is completed, an insurer must:

- *Affirm or deny coverage within 60 days;*
- *Notify the insured or claimant of acceptance or denial of the claim in writing within 60 business days and maintain a copy of the notice in the claim file;*
- *If a claim is denied, or a compromise settlement is proposed, provide the insured with with the specific grounds of denial or compromise with written reference to the specific policy provision, condition, or exclusion.*

Minn. Stat. § 72A.201, subd. 4(11).

Responsiveness- 10 day Rule

Within ten business days, an insurer must acknowledge, act on and respond to an insured's communications that concern a claim or require a response. Minn. Stat. § 72A.201, subd. 4(2).

Duties of the Insurer

Duty to Defend

An insurers duty to defend is broader than its duty to indemnify. *Meadowbrook, Inc. v. Tower Ins. Co., Inc.*, 559 N.W.2d 411, 415 (Minn. 1997). *See also section on Duty to Indemnify below on page 12.* An insurer has a duty to defend an insured against claims that are arguably within the scope of coverage under their insurance policy, based upon a comparison of the allegations in a complaint and the applicable policy language. *Id.*

Uncertainties concerning coverage are typically resolved in favor of an insured. *See Amatuzio v. U.S. Fire Ins. Co.*, 409 N.W.2d 278, 280 (Minn. Ct. App. 1987). Insurers have the burden to show that a claim falls outside of the scope of coverage. *Jostens, Inc. v. Mission Ins. Co.*, 387 N.W.2d 161, 165-66 (Minn. 1986). If a complaint fails to establish coverage, an insurer still retains the duty to defend if it has independent knowledge of facts that may warrant coverage; and, in the event of a breach of the duty to defend, an insured is usually entitled to costs and attorneys' fees. *See Domtar, Inc. v. Niagara Fire Ins. Co.*, 563 N.W.2d 724, 737-38 (Minn. 1997).

A primary insurer with a duty to defend has a right to seek contribution for defense costs from any other primary insurer that also has a duty to defend. *Cargill, Inc. v. Ace American Ins. Co.*, 784 N.W.2d 341, 354 (Minn. 2010). But, a breach of the duty to defend precludes an insurer from securing contribution.

Where there is a possibility of coverage, the duty to defend arises.
U.S. Fidelity & Guaranty Co. v. Louis A. Roser Co., 585 F.2d 932 (8th Cir. 1978).

Minnesota courts hold that an insurer has a duty to defend whenever a third-party commences suit seeking damages that would be covered under a policy if judgment against the insured was granted on any of the claimant/plaintiff's causes of action. *John Deere Ins. Co. v. Shamrock Indus., Inc.*, 929 F.2d 413 (8th Cir. 1991).

The duty to defend is based upon the indemnity coverage provided in a policy, along with the allegations set forth in a claimant or plaintiff's complaint.
Red Lake County State Bank v. Employers Ins. of Wausau, 874 F.2d 546 (8th Cir. 1989).

If an insurer questions coverage, it may defend under a reservation of rights, preserving its right to dispute coverage. *Dixon v. Nat'l American Ins. Co.*, 411 N.W.2d 32 (Minn. Ct. App. 1987).

An **excess insurer** is typically not obligated to defend until the primary policy limits are exhausted – but, if a primary insurer denies coverage, then an excess insurer must defend.
Grossman v. Amer. Fam. Mut. Ins. Co., et al, 461 N.W.2d 489 (Minn. Ct. App. 1990).

If an insurer does not defend, it may be liable for all damages incurred by an insured.
Brown v. State Auto. & Cas. Underwriters, 293 N.W.2d 822 (Minn. 1980).

An insurer does not have a contractual duty to defend an insured before a lawsuit is commenced.
S.G. v. St. Paul Fire & Marine Ins. Co., 460 N.W.2d 639 (Minn. Ct. App. 1990)

Duties of the Insurer- *Continued*

Duty to Indemnify

An insurer's duty to indemnify is more limited than the duty to defend. *See Remodeling Dimensions, Inc. v. Integrity Mut. Ins. Co.*, 819 N.W.2d 602, 616-17 (Minn. 2012) This duty applies only when liability exists on a claim that falls within the policy language. *Id.*

The insured bears the initial burden of proving coverage of the claim under the policy. *Id.* If the insured meets this burden, ***then the burden shifts to the insurer*** to prove the applicability of an exclusion under the policy. *Id.*

Unlike the duty to defend, where Minnesota courts look to the allegations in the complaint, determining whether an insurer has the duty to indemnify is based on the "factual findings of the jury." *Id. See also, Nelson v. American Home Assur. Co.*, 824 F.Supp.2d. 909, 915 (D. Minn. 2011) (applying Minnesota law).

If an insurer breaches the duty to indemnify, it is liable for the cost of any judgment entered, plus interest. *Bown v. State Auto & Cas. Underwriters*, 293 N.W.2d 822, 825 (Minn. 1980). An insured may also recover attorneys' fees and costs for litigating the duty to indemnify if he proves a breach of the duty, and if the insured personally defended the underlying action. *Id.*

Duty to Exercise Good Faith in Settlement

An insurer must consider the interests of an insured, along with its own interests, when considering an offer of settlement. *Continental Cas. Co. v. Res. Ins. Co.*, 238 N.W.2d 862 (Minn. 1976).

An insurer, having assumed control of settlement of claims against its insured, must exercise "good faith" in considering offers for settlement within the policy limits. *See Short v. Dairyland Ins. Co.*, 334 N.W.2d 384, 387-88 (Minn. 1983).

If the insurer fails to consider offers of settlement within the policy, it may become liable to any judgment in excess of the policy limits. *Id.*

In exercising "good faith" the insurer must view the situation as if there were no policy limits to the claim, and give equal consideration to the financial exposure of the insured. *Id;* citing *Continental Cas. Co.*, 238 N.W.2d 862 (Minn. 1976).

The Covenant of Good Faith and Fair Dealing

This covenant is implied in every insurance policy. But, since breach of the implied covenant of good faith and fair dealing does not constitute a tort in Minnesota, an insured cannot seek punitive damages against an insurer on grounds of bad faith unless the insurer has also engaged in another, separate tort.
In re Silicone Implant Ins. Coverage Litigation, 677 N.W.2d 405 (Minn. 2003).

Coverage Disputes and Actions

Declaratory Judgment Actions

In the event of a coverage dispute between an insurer and insured because of a claim, either may bring an action for declaratory relief.

The Minnesota Uniform Declaratory Judgment Act provides that courts may "declare rights, status, and other legal relations whether or not further relief is or could be claimed." Under the Act, a declaration may be affirmative or negative and has the full force and effect of a final decree or judgment of the court. As long as there is an actual controversy between an insurer and insured, either party may obtain a declaration of rights or legal statuses under an insurance policy.

Like in any other civil matter, in an action for declaratory relief, a court may make findings of fact and conclusions of law. In practice, the party seeking a declaratory judgment may wish to file a proposed order containing findings of fact and conclusions of law in its favor, which may be adopted in whole or in part by the court.

Insurers in Minnesota should note that in some cases, courts have ruled that if an insurer brings a declaratory action to determine coverage in an underlying tort action, it cannot escape responsibility for the attorneys' fees incurred by its insured in the declaratory action if the insurer has a duty to defend in the underlying matter according to the terms of the subject insurance policy.

Policy Rescission

Generally, as a matter of public policy, Minnesota courts disfavor rescission of insurance contracts. Courts tend to fear that the voiding of a policy allows an insurer to engage in "retroactive underwriting," which is unfair to an insured that later makes a claim. In the event of fraud or misrepresentation by an insurance applicant, Minnesota law may permit rescission of a policy. *See Merchants & Farmers Mut. Cas. Co. v. St. Paul-Mercury Indem. Co.*, 8 N.W.2d 827 (Minn. 1943).

Otherwise, rescission of an insurance contract may be accomplished by agreement. It there is a question of whether agreement of the parties exists, Minnesota courts look to the acts of the parties to determine intent. *McQuarrie v. Waseca Mut. Ins. Co.*, 337 N.W.2d 685, 687-88 (Minn. 1983).

Declaratory Judgment Actions in Federal Court

In a coverage dispute where jurisdiction is based on diversity of citizenship, the Eighth Circuit has held that state law governs an insurance policy's construction and application. *Interstate Bakeries Corp. v. OneBeacon Ins.*, 686 F.3d 539, 542 (8th Cir. 2012).

Federal courts sitting in diversity apply the forum state's conflict-of-laws rule. *Nesladek v. Ford Motor Co.*, 46 F.3d 734, 736 (8th Cir. 1995).

According to the Eighth Circuit, in Minnesota, the substantive law of the state where an insurance policy is negotiated, entered into and performed applies to its construction and application. *USF&G v. Louis A. Roser Co.*, 585 F.2d 932, 935 n.2 (8th Cir. 1978).

If there is no conflict between state laws, "the inquiry proceeds no further, and the Court applies Minnesota law." *Healey v. I-Flow, LLC*, 853 F. Supp. 2d 868, 875 (D. Minn. 2012).

Coverage Disputes:
Construction of the Policy

In Minnesota, an insurer has the burden of proving any limitations on coverage or exclusions in a policy in defense of a claim. *Caledonia Community Hosp. v. St. Paul Fire & Marine Ins. Co.*, 239 N.W.2d 768 (Minn. 1976).

An insured must establish a contract of insurance, and its provisions, and has the burden of proving a loss. *National Surety Corp. v. Michigan Fire & Marine Ins. Co.*, 59 F.Supp. 493 (D. Minn. 1944).

If a policy is lost, destroyed, or missing, Minnesota courts have failed to establish what secondary or circumstantial evidence may be admitted to meet the insured's burden that it is entitled to coverage. *See, American States Ins. Co. v. Mankato Iron & Metal, Inc.*, 848 F.Supp. 1436 (D. Minn. 1993).

Choice of Law in Insurance Disputes

Minnesota Courts will determine whether a conflict exists. Then, if the application of the law of either state will not offend due process, courts apply a test fashioned by the Minnesota Supreme Court in *Milkovich v. Saari*, 203 N.W.2d 408 (1973). The rule in *Milkovich* requires that the court assess whether selecting the law of one state over the other will be "outcome determinative," and if the state has significant contacts to establish an interest such that its law should apply, and that such application would not be arbitrary or unfair.

Policy Exclusions

Minnesota courts construe policy exclusions strictly against insurers. *Hennings v. State Farm Fire Cas. Co.*, 438 N.W.2d 680 (Minn. Ct. App. 1989).

Unlike some states, Minnesota has no *direct action* rule or statute, but, once a claimant secures a judgment against an insured, the claimant can bring an action against the insurer for the amount owed under the operable policy. *See, e.g., Davis v. Furlong*, 328 N.W.2d 150 (Minn. 1983).

Typically, policy language is afforded its **plain meaning**. *Twin City Hide v. Transamerica Ins. Co.*, 358 N.W.2d 90 (Minn. Ct. App. 1984).

A provision in an insurance policy is **ambiguous if it is susceptible to two or more reasonable, differing interpretations**. *Columbia Heights Motors, Inc. v. Allstate Ins. Co.*, 275 N.W.2d 32 (Minn. 1979). If an ambiguity cannot be resolved using the policy, courts apply the rule of **"construction against the insurer."** *Anderson v. Northwestern Bell Telephone Co.*, 443 N.W.2d 546 (Minn. Ct. App. 1989).

But – if two or more interpretations of a policy provision are reasonable, then the interpretation favoring coverage will be adopted by the court. *Amatuzio v. U.S. Fire Ins. Co.*, 409 N.W.2d 278 (Minn. Ct. App. 1987).

If an endorsement to an insurance policy conflicts with the terms of the policy itself, the endorsement is controlling. *Horace Mann Ins. Co. v. Independent School Dist.*, 355 N.W.2d 413 (Minn. 1984).

If policy language contravenes a statute, the statute governs. *Atwater Creamery Co. v. Western National Mut. Ins. Co.*, 366 N.W.2d 271 (Minn. 1985).

Coverage Disputes:
Policy Risks and Coverage

What could the insured reasonably expect?

Minnesota courts utilize the rule of **"reasonable expectations"** of the insured, and consider the scope of coverage, and the parties' intent when assessing an insurance contract. *Amatuzio v. U.S. Fire Ins. Co.*, 409 N.W.2d 278 (Minn. Ct. App. 1987).

However, where there is no latent exclusion or ambiguity in the terms of a policy, the reasonable expectations rule does not apply. *Centennial Ins. Co. v. Zylberberg*, 422 N.W.2d 18 (Minn. Ct. App. 1988).

Did the insurer assume the risk?

Minnesota courts will not impose a forced construction of an insurance policy to hold an insurer liable where the insurer has not assumed the particular risk. *Henning Nelson Constr. Co. v. Fireman's Fund American Life Ins. Co.*, 383 N.W.2d 645 (Minn. 1986).

What did the parties intend?

Minnesota courts look to the parties' intent at the time of contracting in interpreting an insurance policy. *Aetna Ins. Co. v. Getchell Steel Treating Co.*, 395 F.2d 12 (8th Cir. 1968).

Policy language is the best evidence of the parties' intent at the time a policy commenced; if a policy's terms are clear, Minnesota courts will not look beyond the policy's language when interpreting coverage. *Employers Mut. Cas. Co. v. Kangas*, 245 N.W.2d 873 (Minn. 1976).

In general, policy provisions providing for **punitive damages** are void as against public policy in Minnesota. *U.S. Fire Ins. Co. v. Goodyear Tire & Rubber Co.*, 726 F.Supp. 740 (D. Minn. 1989).

Transfer

The transfer of the subject of an insurance policy does not automatically transfer the insurance coverage. *Closuit v. Mitby*, 56 N.W.2d 428 (Minn. 1953).

Insurance Policies are Assignable in Minnesota.

See, Brown v. Equitable Life Assur. Society of the U.S., 79 N.W. 968 (Minn. 1899).

If a policy provision sets forth a requirement for consent in advance of any assignment, then transfer without the requisite consent is invalid. *Sauber v. Northland Ins. Co., 87 N.W.2d 591 (Minn. 1958).*

A provision as to consent does not apply against a successor corporation where it secures a predecessor's assets and liabilities. *Gopher Oil Co. v. American Hardware Mut. Ins. Co., 588 N.W.2d 756 (Minn. Ct. App. 1999).*

Coverage Disputes: *Policy Defenses*

Nonpayment of Premium

Certain insurance policies may be cancelled by an insurer for nonpayment – or untimely payment – of premiums.

Under Minn. Stat. § 65B.15, Subd. 1(1):

"No cancellation or reduction in the limits of liability of coverage during the policy period of any policy shall be effective unless notice thereof is given and unless based on one or more reasons stated in the policy which shall be limited to the following … nonpayment of premium …"

Minnesota courts have enforced policy provisions providing that where an insured fails to pay the premium owed, the policy lapses or is void. *Evans v. Government Employees Ins. Co.*, 257 N.W.2d 689 (Minn. 1977).

For auto insurance policies, unless a policy sets forth terms as to forfeiture due to untimely or nonpayment of premiums, an insurer must provide written notification of its intent to cancel coverage to the insured. *See*, Minn. Stat. § 65B.16.

Breach of Warranty

Minnesota courts deem statements in an insurance application representations, not warranties. *First Nat'l Bank of Duluth v. Nat'l Liberty Ins. Co. of America*, 194 N.W.6 (Minn. 1923).

Misrepresentations

Under Minn. Stat. § 60A.08, Subd. 9, other than for life or accident and health insurance:

"No oral or written misrepresentation made by the assured, or in the assured's behalf, in the negotiation of insurance, shall be deemed material, or defeat or avoid the policy, or prevent its attaching, ***unless made with intent to deceive and defraud, or unless the matter misrepresented increases the risk of loss."***

A misrepresentation must be material for a contract to be terminated. *Waseca Mut. Ins. Co. v. Noska*, 331 N.W.2d 917 (Minn. 1983).

Most insurance policies require **notice** of an action or claim for coverage to be in effect. *Jostens, Inc. v. CNA Ins./Continental Cas. Co.*, 403 N.W.2d 625 (Minn. 1987), *overruled on other grounds.*

Tort Cases and Coverage

Minnesota courts have upheld a rule of manifestation, even if a claimant's disability resulted from a condition that was present, but had not yet manifested, when a policy was secured. *Cohen v. North American Life & Cas. Co.*, 185 N.W.2d 939 (Minn. 1921).

Lack of Cooperation

An insured has a duty to cooperate with its insurer in the course of investigating and resolving a claim. Certain insurance policies may even have a *cooperation clause*. To prove lack of cooperation, an insurer must establish substantial prejudice as a result of the insured's conduct. *See*, Minn. Stat. § 65B.15; *Miller v. Shugart*, 316 N.W.2d 729 (Minn. 1982).

Reservations of Rights and Attorneys' Fees

Reservations of Rights

Conflicts of Interest May Transform an Insurer's Duty to Defend into a Duty to Reimburse

In Minnesota, "an insurer may undertake a defense under a reservation of rights" as "a matter of agreement between the insurer and the insured." *Jostens, Inc. v. Mission Ins. Co.*, 387 N.W.2d 161, 167 n.6 (Minn. 1986). At times, however, a reservation of rights can create a conflict of interest when a coverage action is later commenced.

Not every reservation of rights creates a conflict of interest between an insurer and its insured, but Minnesota courts have found that a conflict exists when an underlying action would involve the trial of an issue of fact regarding which an insured and insurer would take opposing sides in a coverage dispute brought by the insurer under its reservation of rights. *Id.* That is, "in cases where the parties agree and the main action can be tried without having to try a fact issue that also creates a conflict of interest, the reservation of rights device can be a useful, simple, and inexpensive method of handling the litigation." *Id.*

Collection of Attorney Fees by Insured

Under Minn. Stat. § 555.08, "Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper. The application therefor shall be by petition to a court having jurisdiction to grant the relief. If the application be deemed sufficient, the court shall, on reasonable notice, require any adverse party whose rights have been adjudicated by the declaratory judgment or decree, to show cause why further relief should not be granted forthwith."

A district court may award attorneys' fees incurred by an insured in a declaratory judgment action against multiple insurers – even if only one insurer breached the duty to defend.

Redeemer Covenant Church of Brooklyn Park v. Church Mut. Ins. Co., 567 N.W.2d 71, 83 (Minn. Ct. App. 1997).

"For over 100 years, the law in Minnesota has been that, absent a contractual agreement or statute, a party cannot collect attorney fees."

Garrick v. Northland Ins. Co., 469 N.W.2d 709, 713 (Minn. 1991) (citing Frost v. Jordon, 36 N.W. 713, 714 (Minn. 1887)).

An insured is not entitled to its attorneys' fees or costs if the insurer had no duty to defend in the underlying action.

See, Wakefield Pork, Inc. v. RAM Mut. Ins. Co., 731 N.W.2d 154, 162 (Minn. Ct. App. 2007).

Licensing and Continuing Insurance Education

Minnesota Resident Licensing

To apply for an insurance producer license, a Minnesota resident must:

- Submit a uniform application and fingerprint card to the commissioner
- Consent to and pay the fee for a criminal history check
- In most instances, pass a written examination on lines of authority, duties of insurers, and State insurance laws

Prior to approving an application, the commissioner must ensure an applicant is at least eighteen years old; has not engaged in conduct that warrants denial, revocation, or suspension of a license; and has completed a pre-licensing course, paid the applicable fees, and passed the relevant examinations.

Minnesota Nonresident Licensing

A nonresident is eligible for a producer license in this state if she:

- Submits a copy of her home-state application for licensure or a completed uniform application to the commissioner
- Is currently licensed as a resident in good standing in her home state
- Pays the applicable fees
- Lives in a state that awards nonresident producer licenses to Minnesota residents on the same basis.

Individuals licensed to sell lines of insurance are required to take continuing insurance education courses to maintain their licenses. Insurance producers and adjusters must:

- ✓ Complete 24 hours of continuing education courses during each licensing period, including three hours of ethics courses. No more than twelve of the hours may be courses sponsored, offered by, or affiliated with an insurance company or its agents.
- ✓ File compliance reports with the commissioner upon completion. The license renewal date is the last day of the insurance producer's birth month.

If a licensed individual needs an extension of time to complete his continuing education obligations, he must request a waiver or extension from the commissioner, which may be granted upon a showing of good cause. If such a request is denied, the licensed person has 30 days to satisfy the continuing ed requirements.

Professional Liability

General Principles of Professional Liability
Insurance Agent/ Agency Liability
Lawyers, Doctors, and Other Professionals

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Questions? **Contact Brownson Norby, PLLC Attorneys**
Robert Brownson
Kristi Brownson
Aaron Simon

General Principles of Professional Liability

Professional liability claims, at its basic level, is an expansion of tort law and the legal concepts of ***negligence, breach of contract, breach of fiduciary duty, negligent misrepresentation, and even fraud.***

As such, in every case, the basic four principles apply:

- *Was there a duty or contract?*
- *Did the professional breach that duty or contract?*
- *Did that breach cause damages?*
- *Were there actually damages?*

Elements of Negligence for Professional Liability

1. **Duty -** of the professional to such skill, prudence and diligence as other members of his profession commonly possess and exercise;
2. **Breach -** of that professional duty;
3. **Causation -** a causal connection between the negligent conduct of the professional and the resulting damage; and,
4. **Damage** – actual loss or damage resulting from the professional's negligence.

Fiduciary Duty

To prove a breach of fiduciary duty, a plaintiff must not only prove the elements of breach, causation, and damages, ***but must demonstrate the the existence of a fiduciary duty.*** *See Hudson v. Snyder Body, Inc.*, 326 N.W.2d 149, 157 (Minn. 1982)

A fiduciary duty does not automatically attach to every professional/ client relationship. *Stenberg v. Northwestern National Bank of Rochester*, 238 N.W.2d 218 (Minn. 1976)(a banker is not in a fiduciary relationship with a bank customer, rather the relationship is one of debtor and creditor).

Rather, for the duty to attach, there often must be a "special relationship" that exists beyond the mere professional/ client relationship. *Gabrielson v. Warnemunde*, 443 N.W.2d 540 (Minn. 1989) (no per se fiduciary duty between insurance agent and client).

What is a "Professional"?

Minnesota courts have defined "professional" for a liability claim as:

- One who exercises advanced or specialized knowledge. *W. Nat. Mut. Ins. Co. v. Structural Restoration, Inc.*, A09-1598, 2010 WL 1753336 (Minn. App. May 4, 2010).
- "Professional services [] as services 'arising out of a vocation, calling, occupation, or employment involving specialized knowledge, labor, or skill.'" *Houg v. State Farm Fire & Cas. Co.*, 509 N.W.2d 590, 592 (Minn. Ct. App. 1993).

In general, the standard of care held to any professional is to act as a similar reasonably prudent professional would act under the same circumstances.

Insurance Agent and Insurance Agency Liability

Gabrielson Standard of Care

"Absent an agreement to the contrary, an agent has no duty beyond what he or she has specifically undertaken to perform for the client.[] Thus, the agent is under no affirmative duty to take other actions of behalf of the client if the typical principal agent relationship exists." *Gabrielson v. Warnemunde*, 443 N.W.2d 540, 543-44 (Minn. 1989).

"The legal duty of an insurance agent is to exercise the skill and care that a reasonably prudent insurance agent would exercise under similar circumstances." S*cottsdale Ins. Co. v. Transport Leasing/Contract, Inc.*, 671 N.W.2d 186, 195-196 (Minn. App. 2003).

"Unless there is a special circumstance or relationship, the agent's duty is to act in good faith and to simply follow the instructions of the insured." *Id.* at 196.

As such, under Minnesota law, insurance agents do not have a duty to act affirmatively, absent a special relationship. *See Minnesota Mut. Fire & Cas. Ins. Co. v. Manderfeld*, 482 N.W.2d 521, 527 (Minn. App. 1992).

Why this standard?

The normal standard of care of insurance is limited under *Gabrielson* because, given the multitude of insurance options available, it would be unreasonable to require an agent to inquire of an insured of every possible insurance scenario. *See Gates v. Logan*, 862 P.2d 134, 136 (Wash. App. 1993).

When is there a "Special Relationship?"

Showing the existence of a special relationship is a high burden for the plaintiff to meet and Minnesota courts are frequently wary in finding one. *See Hayun v. Arnold W. Ribnick Agency, Inc.*, 1998 WL 747414 at *2 (Minn. App. 1998) ("Minnesota courts have found that special circumstances existed in few cases.").

In one case where the Plaintiff met the burden, the insured was an uneducated an illiterate farmer, who could not read his policy. *Osendorf v. American Family*, 318 N.W.2d 237, 238 (Minn. 1982). The farmer therefore relied on his agent to help him select the proper coverage as well as tell him exactly what coverage he had. *Id.* The farmer's first agent misrepresented to him that his part-time farm workers would be covered under the policy. *Id.* While in fact, they were excluded. *Id.* His second agent, whom he sued, serviced the policy for ten years, making ten visits to the farm. *Id. The Court held that the agent was aware, or should have been aware, that the farmer employed part-time workers who were not covered by the policy, and that the agent should have advised the farmer of this gap in coverage. Id.*

It is only if "special circumstances" are present in the interactions between the insurance agent and the insurance customer that the insurance agent may possibly be under a duty to take some sort of affirmative action, rather than to merely follow the instructions of the insurance customer. *See Urie v. Johnson*, 405 N.W.2d 887 (Minn. 1987).

Insurance Agent and Insurance Agency Liability - *Continued*

Special Relationship Factors

Plaintiffs routinely argue either **explicitly or implicitly** that special circumstances exist giving rise to a special relationship. Despite often vague and general allegations in this regard, frequently the undisputed facts of a case favor the Court's application of the *Gabrielson* standard of care.

Some factors that the Court look at are:

- Express agreement between the parties;
- Personal or social relationship;
- Long established relationship or entrustment in which the agent clearly appreciates the duty of giving advice and agent exercises discretion in the types and amount of insurance procured;
- Agent holding his/herself out as a highly-skilled expert coupled with reliance by the client insured;
- Charge any additional fees (such as agency fees or service fees);
- Delegation of final decision making authority regarding insurance to agent;
- Did the customer always have the final say on what insurance to purchase and how much insurance to purchase;
- Was the agent the exclusive insurance agent?;
- Was the insurance customer a sophisticated or unsophisticated individual?;
- Could the insurance customer read and thus was the insurance customer capable of reading his or her own policy?

Even if a few of these factors are met, Minnesota courts might not impose a special relationship. The Court will look at these factors as a whole on a case by case basis.

Key Facts: Delegation and Sophistication

There is no special relationship when there is no delegation of decision-making authority and no lack of sophistication on the part of the insured. *See Beauty Craft Supply & Equip. Co. v. State Farm Fire & Cas. Ins. Co.*, 479 N.W.2d 99, 101-02 (Minn. Ct. App. 1992) ("Special circumstances may arise when the insured delegates decision-making authority to the agent and the agent acts as an insurance consultant").

Insured's Responsibility to Know

Generally, Minnesota courts have held that the insured is responsible to educate himself or herself in insurance matters. *Louwagie v. State Farm Fire & Cas. Co.*, 397 N.W.2d 567, 569 (Minn. App. 1986).

Lawyers, Doctors, and Other Professionals

Lawyers

Legal malpractice claims are subject to a **six year limitations** period in Minnesota and begin to *accrue on the date a plaintiff suffers compensable damage* and can show facts sufficient to survive a motion to dismiss for failure to state a claim.

To prove legal malpractice claim, a plaintiff must demonstrate:

(1) an attorney-client relationship;
(2) negligence or breach of contract by the attorney;
(3) proximate causation between the attorney's actions and the plaintiff's damages; and,
(4) that, *but for the attorney-defendant's conduct*, the plaintiff would have been successful in the underlying action. (This is extremely difficult to prove). *Padco, Inc. v. Kinney & Lange*, 444 N.W.2d 889, 890 (Minn. App. 1989).

Expert testimony in the form of affidavits is typically required to establish the standard of care, breach, and causation elements. As with medical malpractice claims, expert affidavits must be served with the pleadings or within 180 days after the summons and complaint are served, and are not required when the alleged conduct and causation issues are within common knowledge.

Doctors

Medical malpractice claims generally must be brought within **four years after treatment ends**. In a wrongful death action based on medical malpractice, the statute of limitations period is three years from the date of death, but within four years from the date a claim accrued.
To establish a medical malpractice claim, a plaintiff must prove: (1) the applicable standard of care recognized by the medical community; (2) that the defendant's conduct deviated from that standard; (3) that the defendant's departure from the standard was a direct cause of injuries to the plaintiff; and (4) damages.

Expert testimony is generally required to establish the standard of care and a departure from the standard by a defendant doctor. Expert affidavits must be served by a plaintiff with the summons and complaint or within 180 days after commencement of a med-mal action, although expert testimony is not required when the acts or omissions of a defendant fall within the general knowledge and experience of lay persons.

Other Professionals

To state a malpractice action against another professional, like an architect or accountant, a plaintiff must demonstrate:

- The existence of a standard of care,
- A departure from that standard of care on the part of the professional, and
- Proximate causation between the professional's departure the plaintiff's damages.

In Minnesota, professionals must use the same degree of skill and learning as a practitioner in a similar practice, in similar circumstances and in good standing would use, and must exercise reasonable care in applying such skill and learning. As in other malpractice actions, expert testimony is typically required unless a claim can be otherwise established.

Asbestos Claims in Minnesota

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Asbestos Claims in Minnesota

Asbestos cases in Minnesota are handled at the Ramsey County District Court in St. Paul under a general Case Management Order, which sets out various discovery requirements, deadlines, and other pretrial matters. According to the general Pretrial Order for these cases, there are mandated deadlines for disclosure of experts and other witnesses, and other steps in a case. These uniform orders help keep these cases running smoothly for all parties, and for counsel, judges and their staff.

The *statute of limitations* period applicable to asbestos claims varies depending on whether a party brings a personal injury claim, a wrongful death action, or a different kind of case. Generally, an asbestos exposure claim does not begin to accrue under Minnesota law until a plaintiff can establish a causal connection between his injury or disease and a defendant's act or omission.

Minnesota has an "Inactive Docket," meaning plaintiffs have the option to place their case on such a docket so that it is properly served and filed for statute of limitations purposes, and their claim is preserved.

Asbestos personal injury cases are set for trial by request of a plaintiff. All cases in the state are tried at the Ramsey County Court, and the Case Management Order provides that preference for trial dates is given to living plaintiffs with mesothelioma. "Living mesothelioma" cases may be set for trial as soon as five months after a plaintiff serves discovery responses or has his deposition taken, while all other cases may not be assigned a trial date less than nine months from the date a plaintiff first responds to discovery.

Traditionally, subrogation claims in Minnesota were not allowed to proceed until all personal injury asbestos actions were resolved and cleared from the docket. In recent years, however, courts have relaxed their stance on this issue to some extent. In certain matters, subrogation claims have been permitted to advance despite that a personal injury action remains unresolved.

Brownson Norby Leading the Jurisdictional Charge

Attorneys Kristi K. Brownson and Robert D. Brownson, along with co-counsel, won an important ruling from the United States District Court in Minnesota when Brownson Norby client Conwed Corporation was dismissed from an asbestos lawsuit for lack of personal jurisdiction in Minnesota.

Relying upon recent United States Supreme Court decisions restricting where corporations may be sued, the Honorable Judge Susan Nelson held that Conwed Corporation was not "at home" in Minnesota and could not be sued there by Kansas residents. This determination follows Conwed's previous success in having the case dismissed in state court in St. Louis, Missouri. In an unsuccessful attempt to justify personal jurisdiction in Minnesota, Plaintiffs contended that because Conwed Corporation manufactured ceiling tile (at issue in the case) in Minnesota between 1959 and 1974, and maintained a corporate headquarters there until 1985, Minnesota was a proper forum. The Court disagreed.

In its October 10, 2017, ruling, the Court sided with Conwed holding that only current contacts with the state should be considered. As such, the Court dismissed the case for lack of both general and specific personal jurisdiction. *Michael P. McGill and Tatyana Bobrova v. Conwed Corporation*, Civil No. 17-01047 (SRN/HB) (D. Minn. Oct. 10, 2017).

Property Damage and Economic Loss in Environmental Cases

Is a claim for costs associated with environmental cleanup or response "property damage" under Minnesota law?

The Minnesota Court of Appeals has found that coverage was triggered, and that property damage had taken place, where the Minnesota Pollution Control Agency (MPCA) brought a claim for cleanup of a site. *See, Indus. Steel Container Co. v. Fireman's Fund Ins. Co.*, 399 N.W.2d 156 (Minn. Ct. App. 1987).

The Minnesota Supreme Court has ruled that a claim initiated under Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) or the Minnesota Environmental Response and Liability Act (MERLA) is, in fact, a property damage claim, or an action for "damages because of property damage." *Minnesota Mining & Mfg. Co. v. Travelers Indem. Co.*, 457 N.W.2d 175 (Minn. 1990).

The Minnesota Supreme Court has held that asbestos removal or abatement related claims constitute a property damage claim, versus a claim for economic loss, in this State.

80 South Eighth Street, Ltd. v. Carey-Canada, Inc., 486 N.W.2d 393 (Minn. 1992); *Bd. of Regents of the University of Minnesota v. Royal Ins. Co.*, 503 N.W.2d 486 (Minn. Ct. App. 1993), *aff'd in part, rev'd in part*, 517 N.W.2d 888 (Minn. 1994).

The United States Environmental Protection Agency aims to protect the environment and human health.

The MPCA's mission involves protecting Minnesota's air and water, and controlling waste in the State.

The MPCA issues legislative reports and fact sheets for the public's information, and provides notices, webcasts, and other useful resources and publications for residents.

Programs to protect Minnesota's environment have been enacted by the MPCA, including those addressing issues like asbestos, feedlots, landfills, noise, road salt, storm water, wastewater, and wellheads and source water.

Brownson Norby Attorney Robert Brownson is a founding member of the ALRA Group, an organization providing counsel to companies and forecasting the future of asbestos litigation.

The ALRA Group is a team of highly experienced defense lawyers who, for nearly 30 years, have represented international, national, regional, and local defendants in asbestos litigation in every major jurisdiction throughout the United States.

- ALRA Group members include six preeminent lawyers who have handled and supervised the defense of more than 300,000 asbestos bodily injury cases.
- Their experience includes work as National Coordinating Counsel for Defendants in diverse industries comprising all major aspects of the products and exposures giving rise to asbestos bodily injury claims.
- As national, regional, and local state counsel, they have handled trials, settlements, and appeals, of numerous cases, including major consolidated cases ranging from dozens, to thousands, of individual claims, and the major class action cases containing hundreds, to tens of thousands, of individual claims.
- Most importantly, the hallmark of their efforts has been success amid the shifting, complex sands of asbestos litigation.

Asbestos litigation has bankrupted scores of otherwise viable companies. This trend continues and investors need sound business advice. As members of the ALRA Group, we analyze asbestos risks for business, insurance and financial clients and predict their future asbestos liability.

The ALRA Group has a proven track record in counseling companies about asbestos liability risk management strategies.

Members of the ALRA Group have been at the forefront of developing, analyzing, and presenting, scientific, technical, and medical developments pertaining to asbestos exposure, and disease.

Uniquely, members of the ALRA Group have managed and handled the funding of expense, and settlement, of asbestos bodily injury cases, over a period of many years, for a diverse group of Defendants, and major insurance companies.

Regulatory Law

Regulation and Rule-Making Overview

Regulatory Enforcement Actions

Tobacco and Electronic Nicotine Delivery Systems

Cannabinoids

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Regulation & Rule-Making Overview

Most people are familiar with the process of making "law" through the legislature, where elected representatives propose and publically debate a bill that becomes law when signed by the chief executive, such as the President, a governor or a mayor. ***In other cases, the legislature may pass a law that empowers federal, state or local agencies to make administrative "rules" that have the power of law.*** The rationale behind empowering non-elected administrators to make law is that regulatory agencies are assumed to have special expertise in complicated areas such as insurance, health, technology and agriculture. Often the expectation is that the legislative body will pass a law addressing a general public policy goal, and a designated government agency is then authorized to develop and enforce specific rules designed to accomplish that goal.

This process does not always go smoothly.

As public sentiment and political power shift, or when new information about a particular challenge comes to light, the desired alignment between legislative goals and administrative rules may become strained. Further, because regulatory agencies have affirmative authority to enforce rules and punish alleged offenders, legal conflicts with agencies may arise where consumers, industries, or other government officials take issue with the application of executive power to mandate or restrict certain activity. ***Ultimately, legal conflicts with agencies can be resolved by the courts, but short of litigation, there are other means to address conflicts with regulatory agencies.***

Proposals to enact or amend regulatory law at all levels is addressed through specific rule-making procedures.

At the federal level, agencies use a **"notice and comment"** process, which engages the industry and the public for comments on the proposed rule or activity. As might be expected, public comments submitted in response to controversial rule proposals can cover a broad divergent range of views. **However, the comment period is the only opportunity for direct public engagement with the agency, and a unified and consistent response from stakeholders can be an effective means to influence regulatory decisions.** After the close of the comment period, the agency considers all of the comments and in most cases publishes an official response to the issues raised in the comments. The agency may accept or reject alternative proposals, or may table the proposed rule for further review in light of issues raised in the comments. Final rules are published in the Federal Register and that point become law on the appointed date.

At the state level, Minnesota agencies follow a similar practice of "notice and comment" whereby the agency must solicit comments from the public regarding the subject matter of the proposed rule. **Unlike the federal process, Minnesota agencies only publish the general subject matter of the proposed rule – Minnesota agencies are not obligated to publish a draft of the actual proposed rule.** In addition, an administrative law judge will preside over a hearing at which both the agency and the public are offered opportunities to discuss the rule and address any questions or concerns. After the hearing and all comments and rebuttals have been reviewed by the administrative law judge, a report is issued that either approves the rule for adoption or identifies issues that must be corrected in order for the rule to be adopted. Final rules are published in the Minnesota State Register.

Regulation & Rule-Making Overview - *Continued*

At the local (city, township, village) level, in Minneapolis for example, the council first provides notice of intent to introduce a proposal for an ordinance at a formal meeting of the entire City Council. Then, at the next Calendar meeting, the proposal is formally introduced, a first reading is conducted, and the proposal is referred for evaluation by the Standing Committee. **The Standing Committee is only obligated to conduct public hearings on proposed ordinances when required by law, at which members of the public may submit testimony.** After consideration of the proposed ordinance and public testimony, the Standing Committee submits to the City Council a report in which it recommends either: approve, approve as amended, do not approve, or no recommendation at all. The report is then considered, a full City Council vote is conducted, and the proposed ordinance is either passed or adopted as amended, and submitted to the Mayor for approval; remanded back to the Standing Committee; or defeated by formal action. After approval by the Mayor, the ordinance is published in the Saturday edition of City's official newspaper. Final ordinances are published in the Minneapolis Code of Ordinances.

Brownson • Norby attorneys have prepared formal comments and have appeared before many state and federal agencies representing various industry stakeholders interested in determining regulatory intent and advocating for industry positions.

Regulatory Enforcement Actions

Regulations, rules, and ordinances have the force and effect of law, and are enforced as such by the applicable agency or authority. For example, violations of FDA regulations could result in the issuance of a warning letter, or a seizure of adulterated or misbranded products, or even criminal prosecution. Further, recent legislative changes authorize FDA officials to enter and inspect private property. The disciplinary action taken depends on the nature of the violation. Decisions of federal agencies can be appealed through an administrative hearing. To the extent the determination at the administrative hearing is unfavorable, and the agency processes are considered "exhausted", an appeal may be made to the federal court.

Brownson • Norby attorneys have successfully represented clients in informal negotiations and in formal seizure and violation proceedings before FDA, DEA and OSHA.

Tobacco and Electronic Nicotine Delivery Systems

The FDA rule deeming e-cigarettes and vapor products as "tobacco products" became effective in 2016. **The Deeming Rule** requires manufacturers, retailers, and importers of ENDS products to comply with various deadlines and paperwork submissions. The deadlines differ based on the product type (e.g. e-cigarettes have different requirements than cigars), and based on when the product was introduced into the U.S. market (e.g. products on the market on or before August 8, 2016 are subject to different deadlines than products introduced into the market after that date).

Deadlines that have already come and gone for covered entities with products on the market prior to August 8, 2016, include submission of tobacco health documents, registration of domestic entities, and the ceasing of manufacture of "modified risk" products. Looming deadlines include the submission of ingredient listings for covered products, the revision of packaging and labels to include mandated warning statements and information, the submission of data on harmful constituents, and, anticipated to be the most challenging of all, the submission of the PMTA (the Premarket Tobacco Application).

In addition to the new standards and rules for **ENDS** products at the federal level, **many states and local level authorities have passed rules and ordinances affecting the industry including an increase of the legal age for purchasing tobacco products from 18 to 21.** There has also been significant movement toward banning or restricting the sale of flavored tobacco products. The cities of Minneapolis and St. Paul have approved proposals to ban menthol, wintergreen and mint flavored tobacco products amid heated debate at standing room only public hearings. Many other states and cities are considering similar actions. While FDA did not take specific action concerning flavored ENDS products in the 2016 Deeming Rule, FDA published a proposed rule and comment period to revisit the issue (March 2018).

The market for ENDS products is undeniably growing, and manufacturers, distributors and retailers may find it difficult to keep track of compliance responsibilities in light of the numerous sources of regulation (federal, state and local). Brownson • Norby attorneys provide ENDS clients with up to date information about their compliance responsibilities.

Cannabinoids

With a growing number of states legalizing marijuana for medical or recreational use, there has been increased national interest in another cannabis-derived product: cannabidiol (a.k.a. CBD). **CBD** is a natural substance derived from hemp, but unlike marijuana (also derived from or defined as cannabis), CBD contains no active level of THC, which is the intoxicating agent in marijuana. Consumers, advocates and a growing number of independent medical researchers claim that CBD has many important qualities that can improve quality of life issues for many people. **While the FDA is currently reviewing new drug applications for CBD products, the DEA has declared that it considers CBD an illegal controlled substance.** As such, conflicting or absent legal definitions of exactly what constitutes "marijuana" (illegal: considered a Schedule I Controlled Substance under federal law) and "hemp" (legal: if in accordance with the 2014 Federal Farm Bill) are causing uncertainty within the CBD industry.

Navigating the regulatory and legal space as it concerns CBD is complicated and challenging given that different positions have been taken by various agencies across the state-to-federal landscape. As noted above, federal agencies are in disagreement as to its legal status (e.g. DEA defines CBD as marijuana, and thus an illegal controlled substance; Congress, through the Farm Bill, authorizes the production of industrial hemp products having less than .3% THC; and, FDA is reviewing new drug applications for CBD products). This lack of consistency is mirrored at the state level.

Many states that still consider marijuana illegal have specifically legalized the use of CBD products for medical use, based on reported medical benefits. ***Other states*** have declared CBD to be legal for all purposes, yet other states have specifically declared that CBD is not legal. ***At this point in 2018, given the uncertainty at the federal level and the disparate positions of the various states, most states have refrained from taking a formal position on CBD's legality.*** Overall, the balance seems to be shifting in favor of nationwide legality as state and federal officials learn more about the significant benefits and relative lack of risk of CBD, but difficulties in marketing this product within reasonable compliance guidelines remain.

Brownson • Norby attorneys advise CBD clients and provide real time, straight answers in difficult situations that arise given the complicated and presently inconsistent nature of the law on this issue.

Minnesota Workers' Compensation

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Keith Czechowicz

Workers' Compensation Law- *Things to Know*

No Fault

The Minnesota Workers' Compensation Act (WCA) establishes a no-fault system to compensate workers injured on the job while, at the same time, limiting the liability of their employers. Under the no-fault model, ***an injured employee is not required to prove employer negligence and employers are prohibited from defending claims on the basis of alleged contributory negligence on the part of an employee.***

14 Day Notice

When an employee suffers a work-related injury, and notifies his/her employer ***within fourteen days of the injury***, the employer typically either submits the claim to its insurer or handles the claim internally. Benefit payments are made to the employee for medical care, wage loss, losses resulting from permanent injury or loss of use of a body part, or vocational rehabilitation services, at levels established by state law. If a work-related injury results in the death of an employee, benefit payments are typically made to the employee's spouse, children, or other dependents.

Workers' Compensation Division

In the event of a dispute between an employee and employer or insurer, claims may be presented to the Workers' Compensation Division of the Minnesota Department of Labor and Industry as an alternative to formal litigation. The WCD uses a number of alternative-dispute resolution methods as well as mediation to resolve claims. If claims are not resolved through these means, they are referred to the Office of Administrative Hearings for a formal hearing on the record. Decisions can be appealed to the Workers' Compensation Court of Appeals and then to the Minnesota Supreme Court.

3-year Statute of Limitations

If formal litigation is pursued, an employee must generally file a workers' compensation claim within three years of filing a written report of injury with the Department of Labor and Industry, or within six years from the date of the injury. A decedent's dependents must generally file a claim within three years from the date the Department of Labor and Industry's receives notice of the decedent's death.

Did you know?

An employee injured during the course of employment may in some instances be entitled to civil damages in addition to workers' compensation benefits.

If a third-party tortfeasor contributed to an employees' injury, the employee may, in some cases, seek tort damages as well as workers' compensation benefits.

An employee cannot retain the full value of both a workers' compensation and a tort damage award because an employer is permitted to deduct from the employee's workers' compensation benefits any amount received under tort law. An employer may also bring a subrogation action against the third party for reimbursement of workers' compensation payments made.

If an employee is injured while using an automobile in the course of work, the employee may be entitled to workers' compensation and no-fault insurance benefits, but workers' compensation benefits must be paid first.

Employer Liability and Types of Injuries

Employer Liability

Minn. Stat. § 176.021, subd. 1

Minn. Stat. § 176.021, subd.1 establishes an employers' liability. It states:

> ***"Every employer is liable…to pay compensation in every case of personal injury or death of an employee arising out of and in the course of employment without regard to the question of negligence."***

For an injury to be compensable, the following elements must exist:

- The employee must sustain a personal injury or occupational disease;
- The personal injury or occupational disease must arise out of the course of employment; and,
- The personal injury or occupational disease must occur in the course of employment.

Further, the employment ***only need be a substantial contributing factor to the injury***, not the sole cause of the condition, for a work injury to be compensable. Employers assume the risk of hiring an employee that may have a non-work-related, pre-existing condition aggravated by some type of work activity that might not be harmful to a healthy person. *Gillette v. Harold, Inc.*, 21 W.C.D. 105, 257 Minn. 313, N.W.2d 200 (1960).

Types of Injuries

There are six types of workers' compensation injuries:

1) specific injuries;
2) cumulative trauma or *Gillette* injuries;
3) occupational disease;
4) consequential injuries;
5) idiopathic injuries;
6) psychological/mental injuries.

Single and/or specific event-type injuries, a/k/a those caused by accident, are compensable so long as they arise out of or in the course of employment.

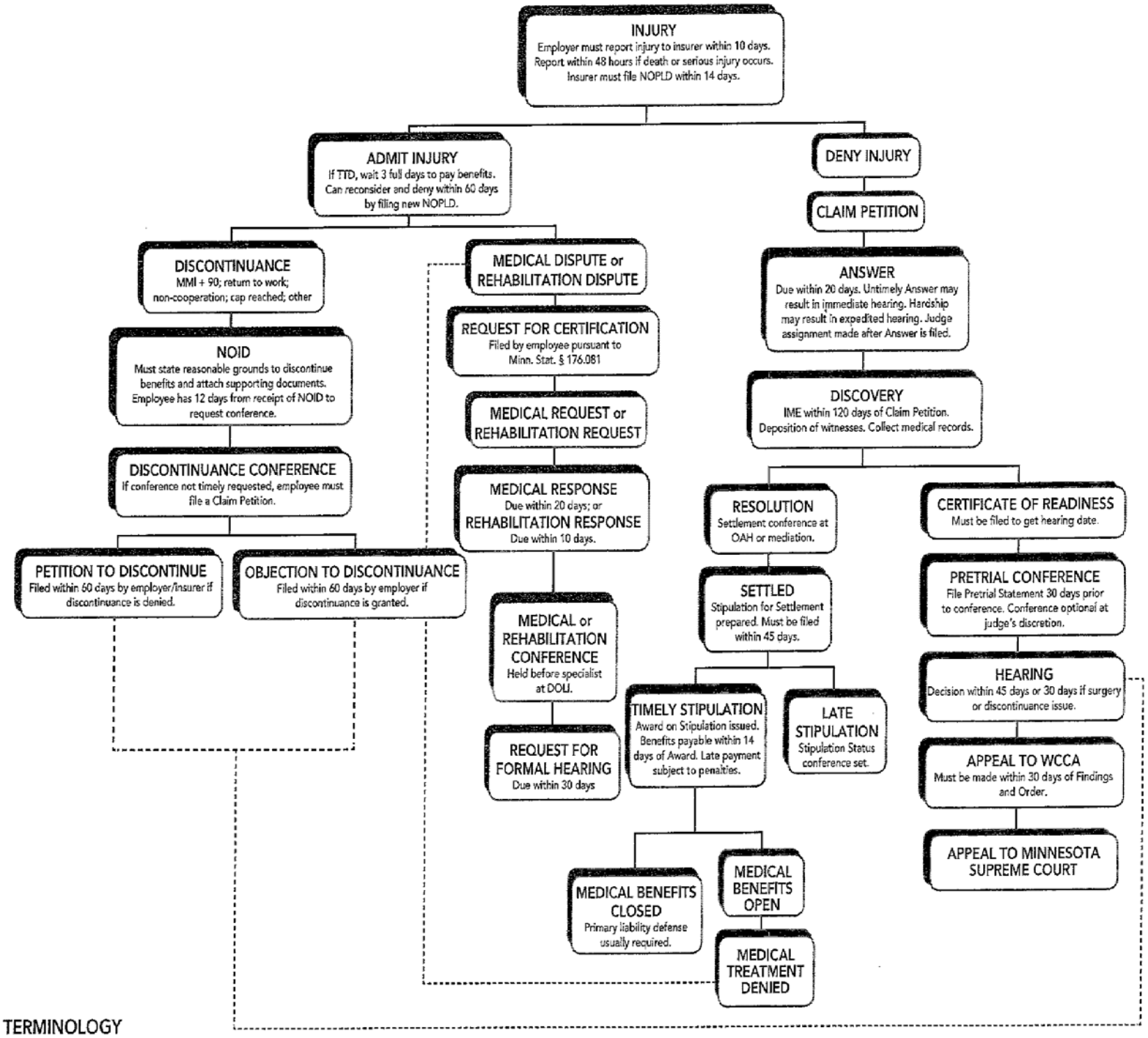
Cumulative trauma injuries, also known as *Gillette* injuries, are compensable if they occur as a result of repetitive trauma caused by performance of normal job duties (i.e. carpal tunnel syndrome is caused by repeating the same wrist movements.)

An injury from occupational disease is one "…arising out of and in the course of employment peculiar to the occupation in which the employee is engaged and due to the causes in excess of the hazards ordinary of employment…" Minn. Stat. § 176.011, subd. 15(a). An occupational disease injury becomes compensable when an employee is disabled due to that condition.

An idiopathic condition results from a preexisting or underlying disability or disease (i.e. epileptic fits, fainting spells, heart conditions) specific to that employee. When these conditions cause a fall or other injury, the subsequent injury may be compensable if the employer placed the employee in a position in which the risk of harm increased.

Claim Process

Workers' compensation claims begin with the **First Report of Injury (FROI)**, where the employer must report the injury to the insurer ***within 10 days***. If primary liability for the injury is denied by the insurer, then the employee may file a Claim Petition. The filing of a Claim Petition initiates the litigation proceeding where primary liability has been denied, the employee is claiming additional benefits which have been denied or are in dispute, or in various other situations. The flow chart (Exhibit A) below further explains this process.



Types of Benefits

The workers' compensation system is structured to **provide fair compensation to employees who have sustained an injury in the course of employment**.

Temporary Total Disability

Temporary total disability (TTD) benefits are available to employees whose work injuries cause them to be totally disabled from work on a temporary basis. These benefits are paid at 2/3 average weekly wage, and subject to the maximum. Absent other defenses, TTD is paid until 90 days post service and filing of maximum medical improvement (MMI) or statutory cap -which is dependent upon the date of injury (DOI). MMI is the threshold "after which no further significant recovery from or significant lasting improvement to a personal injury can reasonably be anticipated, based upon reasonable medical probability, irrespective and regardless of subjective complaints of pain." Minn. Stat. § 176.011, subd. 13(a).

Temporary Partial Disability

Temporary partial disability (TPD) are wage loss benefits paid to the employee based upon the difference between current wages and wage at DOI. It is calculated at 2/3 of the difference between the wages, current and DOI. Also, current earnings must be an accurate reflection of employee's true earning capacity and cannot be insubstantial or sporadic in nature. Finally, the employee must be working and earning an income to collect TPD benefits.

Permanent Total Disability

Permanent total disability (PTD) assumes the medical condition is so significant that the employee cannot obtain gainful employment. PTD can be established based completely on the significance of the employee's medical condition (i.e. permanent loss of sight in both eyes) or vocation status, such as the inability to find gainful employment.

Permanent Partial Disability

Permanent partial disability (PPD) benefits are not intended to compensate injured employees for pain and suffering, loss of enjoyment of life, or other noneconomic damages; rather, they are intended to compensate for permanent loss or impairment of a bodily function. For payment of PPD benefits to be made, the permanency must be causally related to the personal injury. It is sufficient for the work-related activity or traumatic incident substantially aggravates, accelerates, or combines with a preexisting condition to produce the disability; the work-related activity need not be the sole cause of the permanent disability.

Further, PPD benefits are paid upon findings of MMI, or when a minimum ascertainable rating can be determined. When an employee reaches MMI, the doctor also typically states their impairment rating (i.e. 5%). Per the Minnesota Department of Labor and Industry website, this permanent partial rating determines the amount of money the employee receives in accordance with the following schedule:

Injuries on or after Oct. 1, 2000

Impairment rating %	Amount	Impairment rating %	Amount
0-5	$75,000	51-55	$165,000
6-10	$80,000	56-60	$190,000
11-15	$85,000	61-65	$215,000
16-20	$90,000	66-70	$240,000
21-25	$95,000	71-75	$265,000
26-30	$100,000	76-80	$315,000
31-35	$110,000	81-85	$365,000
36-40	$120,000	86-90	$415,000
41-45	$130,000	91-95	$465,000
46-50	$140,000	96-100	$515,000

For example, if the rating is 11 percent, find the 11- to 15-percent range on the table and multiply 11 percent by $85,000. The amount owed is $9,350. http://www.dli.mn.gov/wc/DispBenPpd.asp

Dependency/ Death Benefits

Dependency/death benefits are payable to dependent survivors of employees who die from injuries arising out of or in the course of employment. The rights of dependents to recover death benefits are dependent upon the employee's death as a result of a work-related injury or disease. Even if an employee dies while retired, the dependent's rights are not extinguished as long as the death is work-related.

Collateral Source Offset

Collateral source payments are related to a disability or injury, and are made up to the date of a verdict to a plaintiff or on behalf of a plaintiff, pursuant to income disability, the Minnesota Workers' Compensation Act, public programs providing benefits, accident or liability insurance, a contract or agreement concerning health care reimbursement, or an employment-related contract or wage continuation plan. Payments made under life insurance, the United States Social Security Act (USSSA), or a person's pension are not subject to the offset.

Parties may file a motion requesting computation of collateral sources within ten days of the entry of the verdict in any civil action where liability is admitted or determined and where a plaintiff is to receive a damage award. Minn. Stat. § 548.251, subd. 2. When a motion is filed, the court will determine the amounts of collateral sources paid or available to a plaintiff and will reduce the damage award accordingly. *Id.* The court will also determine the amounts paid by a plaintiff, himself, or by his family, to secure collateral source benefits for the two-year period before the accrual of the action and will offset any reduction in the plaintiff's damage award by that amount. *Id.*

In 2010, the Minnesota Supreme Court held that negotiated discounts obtained by a plaintiff's health insurer, which have the effect of decreasing the amount the plaintiff owes to a medical provider, also constitute collateral sources. *Swanson v. Brewster*, 784 N.W.2d 264 (Minn. 2010). This means that a plaintiff can recover only the amount negotiated and/or paid by his insurer, rather than the total amount initially billed by his medical provider. *Id.* In a 2012 order, a District Court Judge noted that in the 2010 case, the insurer had paid the medical provider for its subrogation rights and thus owned the provider's right to recover money paid on behalf of the plaintiff from individuals found liable for the plaintiff's injuries. Still, where a subrogation interest is not purchased like in the 2010 action, the collateral source statute excepts the subrogation interest and any related reductions from offset.

Minnesota Court of Appeals issued a collateral source offset decision related to Medicare benefits in July 2012, holding that while Medicare payments fall within the statutory collateral source definition, they are excepted from collateral source offset because they qualify as payments under the USSSA. *Renswick v. Wenzel*, 819 N.W.2d 198 (Minn. Ct. App. 2012).

Personal Injury Actions and Medicare

Reporting Requirements

Medicare functions as a secondary payer, which means it will not pay for medical expenses in situations where primary insurance pays, or self-insurance exists.

In 2007, Congress passed legislation requiring primary plans, including employers, workers' compensation, auto and liability insurers, group plans and programs, and third-party administrators, responsible for payment in cases involving Medicare-eligible claimants to provide notice of a claim to Medicare. While fines of up to $1,000 per day for failure to provide such notice are threatened, it remains unclear whether Medicare will enforce such stringent rules.

As of January 1, 2015, settlements of $300 or more must be reported to Medicare. Some experts urge, however, that any and all settlements involving a Medicare-eligible claimant be reported.

Preserving Medicare's Future Interests

Attorneys and others involved in civil actions with Medicare-eligible claimants must address Medicare's financial interests. Upon settling or securing a judgment in a case, participants must reimburse Medicare for past payments made on behalf of the claimant. Medicare's future interests, however, must also be assessed. In these instances, parties may arrange for what is deemed a Medicare set-aside, to include an additional pool of money in the settlement award to represent the anticipated future interest that may be asserted by Medicare for costs paid on future medical bills of a settling claimant.

The Medicare set-aside in personal injury cases is functionally similar to Medicare Set Aside (MSA) Trusts in workers' compensation actions. In workers' compensation matters, MSAs have been required since 1989. Parties place funds into a trust designated for payment of a claimant's future medical costs upon settlement or judgment. The Employee may then draw on those funds to pay for medical expenses and is not entitled to further Medicare assistance until the trust funds are depleted.

Medicare set-asides are not mandatory, but as the area of Medicare's secondary payer interests advances, it is advisable that all parties to personal injury cases account for Medicare's present and future interests.

Upon a payment, settlement, award, or judgment, notice should be provided to the Medicare Benefits Coordination & Recovery Center (BCRC), which contains:

- ✓ The total amount of the settlement
- ✓ The total amount of PIP or Med-Pay benefits
- ✓ The amount of attorneys' fees paid by the Beneficiary
- ✓ The procurement expenses paid by the Beneficiary
- ✓ The date the case settled

Judgments, Settlements, and Releases

Prejudgment Interest

Minn. Stat. § 549.09

Settlement Agreements

Types of Releases

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Prejudgment Interest

Minn. Stat. § 549.09

The rate of prejudgment interest applicable to state court judgments and arbitration awards depends on the amount of the judgment.

For judgments entered on or after August 1, 2009 in an amount *less than or equal to $50,000*, the State Court Administrator will compute the prejudgment interest rate on an annual basis.

Judgments on or after 8/1/2009 in an amount *greater than $50,000* are subject to a prejudgment interest rate of *10% per year until paid.*

Year	Prejudgment Interest Rate	Judgments greater than $50,000
2000	5%	
2001	6%	
2002	2%	
2003	4%	
2004	4%	
2005	4%	
2006	4%	
2007	5%	
2008	4%	
2009	4%*	10%**
2010	4%*	10%
2011	4%*	10%
2012	4%*	10%
2013	4%*	10%

* For judgments less than or equal to $50,000 (entered on or after August 1, 2009)

** For judgments greater than $50,000 (entered on or after August 1, 2009)

Minnesota courts typically do not award prejudgment interest on:

- ✓ Judgments, awards or benefits in workers' compensation cases (not including third-party actions)
- ✓ Judgments or awards regarding future damages
- ✓ Punitive damages or fines that are non-compensatory in nature
- ✓ Judgments or awards that do not exceed the amounts over which a conciliation court has jurisdiction
- ✓ The portion of an award based on interest, costs, disbursements, attorneys' fees, or other similar items added by a court or arbitrator

Poehler v. Cincinnati Insurance Company

The Minnesota Supreme Court's recent decision in *Poehler v. Cincinnati Insurance Company*, held that preaward interest under Minn. Stat. § 549.09 applies to **appraisal awards**. As such, Minnesota insurers are now subject to interest on appraisal awards ***unless the policy language specifically excludes it, or specifically limits when the interest begins to accrue.*** *Poehler v. Cincinnati Insurance Co.*, 899 N.W.2d 135 (Minn. 2017).

Settlement Agreements

Minnesota law favors the settlement of disputes. A settlement is presumptively valid and will be enforced absent fraud, collusion, mistake, or improvidence, provided it represents a meeting of the minds as to the essential terms of the agreement and conforms to the principles of contract law.

A mediated settlement is equally enforceable if it contains a provision characterizing the agreement as binding, as well as a provision stating that the parties were advised in writing that the mediator owed no duty to them with regard to their legal rights, that signing the agreement could affect their rights, and that each should consult an attorney prior to signing the agreement.

Settlement agreements often contain releases of future claims. A release covering known injuries will generally preclude subsequent recovery for unknown consequences those known injuries. But a release covering unknown injuries may or may not preclude such recovery. If the parties intentionally agreed upon a settlement for unknown injuries, the release will be binding and recovery will be barred. If, on the other hand, a party demonstrates that unknown injuries were not contemplated when the settlement was executed, a release purporting to cover unknown injuries will not bar recovery.

Factors used to determine the validity and scope of a release include the length of time between the injury and settlement, the length of time between execution of the agreement and attempt(s) to avoid settlement, the extent to which a releasor received medical or legal advice at the time the agreement was executed, the language of the release, the adequacy of consideration exchanged by the parties, the competence of the releasor, and the nature of the releasor's injury.

Minor Settlements

Under Minnesota law, settlement agreements involving minors must be court-approved. Minn. Gen. R. Prac. 145; *See also In re Application of Larson*, 36 N.W.2d 601 (Minn. 1949). A petition verified by a parent or guardian must be filed with the court and include the minor's name and date of birth, a description of the claim, an affidavit, a letter or record(s) describing the minor's injuries and prognosis, and an indication of whether collateral source benefits are available or if any collateral source has asserted subrogation rights. Minn. Gen. R. Prac. 145.02. If a proposed structured settlement is at issue, a statement from the parties describing the costs of the settlement to the tortfeasor must also be provided. *Id.*

The court will hold a hearing where the minor must be present and will issue an order approving, modifying, or disapproving the proposed settlement, determining expenses that may be paid from the proceeds recovered, and specifying how the remaining balance is to be allocated. Minn. Gen. R. Prac. 145.04.

Releases

Pierringer Releases

Since 1978, the Minnesota Supreme Court has recognized the validity of *Pierringer* releases, which permit plaintiffs to settle with and release one joint tortfeasor while reserving claims against others. Whether they settle, all defendants pay only their fair share of liability under a *Pierringer* release, which prohibits non-settling defendants from seeking contribution from settling defendants. A *Pierringer* release allows a jury to determine the relative fault of settling and non-settling defendants in apportioning liability at trial.

A *Pierringer* release: (1) releases settling defendants from an action and discharges the portion of damages attributable to the settling defendants' negligence; (2) reserves the remainder of the action against non-settling defendants; and (3) provides that a plaintiff will indemnify settling defendants from contribution claims of non-settling parties.

Miller v. Shugart Releases

When an insurer disputes coverage, a *Miller v. Shugart* settlement allows an injured plaintiff to settle with its insured on condition that judgment will be entered in the amount of a stipulated sum to be collected from the proceeds of applicable insurance coverage. *Miller v. Shugart*, 316 N.W.2d 729 (Minn. 1982)/ If the court finds there is coverage, a plaintiff is then entitled to recover the amount of the stipulated judgment, up to the policy limits, in a garnishment action against the insurer.

To render a Miller-Shugart release enforceable, an insurer must have denied coverage under a policy.

Naig Releases are used in workers' compensation cases to resolve an injured employee's claims against a third-party tortfeasor for damages not recoverable under workers' compensation law. A Naig Release permits an employer or insurer to continue pursuing a claim against a third-party tortfeasor to recover workers' compensation benefits paid. Employees pursuing a Naig settlement must provide to their employer to allow the employer or its insurer to protect its interest by appearing or intervening in the case. An employee who executes a Naig agreement relinquishes the right to receive damages from the third-party tortfeasor for payments made under workers' compensation law. And, employers cannot credit the amount of an employee's settlement not recoverable under workers' compensation law against future compensation payments to the employee.

A ***Reverse-Naig Release*** allows an employer to settle a subrogation claim with a third-party tortfeasor and avoid statutory allocation of the tort recovery between collection costs, the injured employee or dependents, and the employer. But, the employer also waives its rights to an employee's future recovery against a tortfeasor, including the right to claim a percentage of the employee's recovery as a credit against future workers' compensation payments.

Other Areas of Potential Liability

Personal Injury Liability
Wrongful Death Actions
Business Liability
Products Liability
Construction Liability
Dram Shop Liability
Premises Liability
Automobile Liability
Comparative Fault

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Personal Injury Liability Coverage

In Minnesota, personal injury liability insurance coverage does not apply to "property damage" claims.

If property damage other than an "injury" is claimed, personal injury liability coverage does not apply.

Minnesota courts have held that conversion is not a personal injury tort, and that personal injury liability insurance covers "personal injuries and not property damage."
Inland Constr. Corp. v. Continental Cas. Co., 258 N.W.2d 881 (Minn. 1977).

Equitable Relief

Where an insurance policy affords coverage for "losses and expenses" associated with claims for an insured's wrongful conduct, an insurer has a duty to defend a reinstatement action even if there is no corresponding claim for damages, such as for lost compensation. *Independent School Dist. No. 697 v. St. Paul Fire & Marine Ins. Co.*, 495 N.W.2d 863 (Minn. Ct. App. 1993), *aff'd*, 515 N.W.2d 576 (Minn. 1994).

In Minnesota, claims in equity may not be covered under standard CGL policies. *City of Thief River Falls v. United Fire & Cas. Co.*, 336 N.W.2d 274 (Minn. 1983).

The Minnesota Court of Appeals has found that responses costs, or payments that must be made by an insured under a CGL policy, if the insured/claimant can show "that damage existed during the policy periods and response costs were later necessary to respond to the damage," the policies were effective. *Fairview Hosp. & Healthcare Services v. St. Paul Fire & Marine Ins. Co.*, 518 N.W.2d 41 (Minn. Ct. App. 1994).

An action for a writ of mandamus to compel commencement of a condemnation proceeding is not one in which a party is "seeking damages" within the meaning of an insurer's duty to defend. *City of Thief River Falls v. United Fire & Cas. Co.*, 336 N.W.2d 274 (Minn. 1983).

The State Supreme Court has also held that payments mandated by the Minnesota Pollution Control Agency (MPCA) under the Minnesota Environmental Response and Liability Act (MERLA) that are required to clean up preexisting groundwater contamination constitute "damages because of … property damage" under CGL policies. *See, e.g., Bituminous Cas. Corp. v. Tonka Corp.*, 457 N.W.2d 175 (Minn. 1990).

Wrongful Death Actions

Minn. Stat. § 573.02

In Minnesota, when an individual or corporation wrongfully causes the death of another, the decedent's spouse or next of kin may pursue a wrongful death action to recover pecuniary losses, including damages due to the loss of advice, comfort and protection resulting from a spouse, parent or relative's death. Minn. Stat. § 573.02, subd. 1.

In these actions, if a jury determines that the beneficiaries of the deceased sustained pecuniary losses, and subsequently awards damages, the court will allocate the award according to each beneficiary's proportionate pecuniary loss. *Id.*

Interestingly, the Minnesota Wrongful Death Statute does not apply to a death or claim arising prior to its enactment in 1905, or which was pending in a Minnesota state court at that time, unless final judgment was not yet entered—but, it does apply to a death or claim arising prior to its enactment which occurred because of *murder*. Minn. Stat. § 573.02, subd. 4. There is no limitations period for an action based on the intentional act of murder. In the Minnesota courts, such a claim may be commenced at any time.

Statute of Limitations

3 Years **–** A wrongful death action must be filed within three years of the date of a decedent's death.

4 Years **–** A wrongful death action premised on medical or dental malpractice must be filed within three years of the date of death, but also within four years of the date of accrual of the action, which is generally the date of the decedent's last treatment. *See* Minn. Stat. § 541.076.

6 Years **–** A wrongful death action must be filed within six years after an alleged wrongful act or omission.

Business Liability

Minnesota law provides for causes of action in various business torts, including misappropriation of confidential information, misappropriation of trade secrets, unfair competition, breach of contract (like a non-compete agreement), breach of the duty of loyalty and violation of the Uniform Trade Secrets Act. Minn. Stat. § 325C.01

In Minnesota, a trade secret is: "information, including a formula, pattern, compilation, program, device, method, technique, or process, that […] derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and […] is the subject of efforts that are reasonable under the circumstances to maintain its secrecy."
Minn. Stat. § 325C.01, subd. 5.

Also, that a trade secret exists is not negated merely because an employee acquires the trade secret without providing specific or express notice if the employee knew or should have known the owner expected or intended that the secrecy of the information constituting the trade secret be maintained.

Temporary Injunctions in Business Tort actions

Under the Minnesota Rules, a party may seek a temporary injunction through a notice of motion or an order to show cause.

A temporary injunction may be granted upon sufficient grounds, proved through an affidavit, deposition testimony, or oral testimony in court.

A court can order that a trial be advanced and consolidated with a hearing on a motion for temporary injunction before or after the hearing commences.

Whether there is such consolidation, evidence received by the court on a motion for temporary injunction, which would be otherwise admissible at trial, becomes part of the trial record under Minn. R. Civ. P. 65.02.

Products Liability

Products liability actions may be alleged in the context of negligence, strict liability, and breach of warranty claims.

The plaintiff must prove:

(1) the defendant's product was in a defective condition, rendering it unreasonably dangerous for its intended use;
(2) the defect existed when the product left the defendant's control; and,
(3) proximate cause.

Failure to Warn

A failure to warn action is based on the duty of a manufacturer to provide reasonable, adequate warnings and instructions regarding the intended use of its product and/or reasonably foreseeable use of the product.

Factors assessed in determining whether a manufacturer provided adequate warnings include:

- *The likelihood of harm;*
- *The seriousness of the harm;*
- *The cost and feasibility of providing warnings to eliminate the harm;*
- *Whether an ordinary user would be able to see and understand warnings and instructions provided; and*
- *Whether the manufacturer considered scientific knowledge and advances in a particular field.*

Design Defect

Design defect claims are premised on the duty of a manufacturer to use reasonable care while designing a product to avoid exposing buyers or users to unreasonable danger or harm in using the product as intended or in a manner reasonably foreseeable to the manufacturer.

To determine whether a manufacturer's design resulted in an unreasonably dangerous and defective product, courts consider a number of factors, including:

- *The danger presented by the product;*
- *The likelihood of harm;*
- *The seriousness of the harm;*
- *The cost and feasibility of avoiding the harm; and*
- *Whether a manufacturer considered scientific knowledge and advances in a particular field.*

Manufacturing Defect

A plaintiff may bring a manufacturing defect claim when, as an ordinary consumer, she was unable to anticipate the danger posed by a product.

In these cases, the focus is on the condition of a product, rather than on the acts or omissions of its manufacturer.

Construction Liability

Construction law cases involve claims like ***breach of contract, breach of implied warranty, breach of statutory warranty, negligence, and fraud and misrepresentation.*** These kinds of allegations are usually asserted against a contractor, or against a contractor and its subcontractors.

When a claim may be brought:
Minn. Stat. §541.051

2 years- These cases, other than those involving fraud, must be filed within **two years** after the date a defect is discovered.

10 years- They must also be brought within ten years after the date of substantial completion of the property (i.e. when the property can be used or occupied for its intended purpose). Interestingly, if a defect is detected during the ninth or tenth year after substantial completion, an action can be brought within two years from that date. That is, under the circumstances, the limitations period can extend to twelve years.

Action for Indemnity or Contribution must be brought within 2 years- An action for indemnity or contribution arising out of this kind of claim must be brought within two years after a cause of action accrues, and arises at the earlier of either when the underlying construction defect case is commenced, or when a final judgment, settlement, or award is paid in the underlying action.

Warranty of Construction
Minn. Stat. § 327A.02

In every sale and contract for sale of a house, and in every sale or contract involving major structural improvements to a home, the seller or contractor must warrant to the buyer or owner that the dwelling will be free from defects in workmanship and materials for one year. A seller or contractor also warrants that a dwelling will be free from defects caused by faulty installation of plumbing, electric, heating and cooling systems for a two-year period, and free from major construction defects due to noncompliance with building standards for ten years.

Unless a seller has actual notice of loss or damage that is covered by a statutory warranty, a buyer or owner is required to provide written notice of a loss to the seller or contractor within six months after a defect was, or should have been, discovered.

After receiving such notice, a seller or contractor must inspect the home within 30 days and provide a written offer to repair within fifteen days after the inspection. If there is no inspection or offer to repair, or if the parties agree to the scope of repairs to be made, but a vendor or contractor fails to complete the contemplated repairs, an owner may pursue a cause of action against the seller or contractor, subject to certain requirements governing timing and alternative dispute resolution.

If a cause of action is based on the sale of an existing home, a successful plaintiff may recover damages in the amount necessary to remedy the breach or defect, or equal to the difference between the value of the house without the defect and its value with the defect. If a claim as to a home improvement warranty is alleged, a plaintiff can recover money damages in the amount necessary to remedy the defect or breach, or may seek the equitable remedy of specific performance.

Dram Shop Liability and Damages

Under Minnesota's Civil Damages Act, Minn. Stat. § 340A.707, a spouse, child, parent, guardian, employer, or other individual who sustains injury to their person, property, or means of support, or suffers other pecuniary loss due to the intoxication of another, has a right of action for damages against the person who caused the intoxication ***by illegally selling*** alcoholic beverages, as long as written notice is given to the proposed defendant-licensee or municipality within 240 days after an attorney is retained.

How does an insurer seek contribution or indemnity?

In these cases, an insurer seeking contribution or indemnity must provide written notice within 120 days after the injury occurs, or within 60 days of receiving written notice of a claim for contribution or indemnity. The notice must include:

- The time, date, and person to whom alcoholic beverages were sold or bartered;
- The name and address of the persons who suffered injury or damage; and
- The date and approximate time the damage and/or injury occurred.

Failure to provide written notice may warrant summary judgment against an insurer.

Damages

In Minnesota, the dram shop statute provides for recovery of *bodily injury, property damage, loss of support, and other pecuniary loss damages.*

Bodily injury damages may be recovered for pain, disability, disfigurement, embarrassment and emotional distress.

Property damages encompass harm to real and personal property.

To recover means of support damages, i.e. monies representing the financial support that a plaintiff would have received from a deceased or injured individual but for the accident, a plaintiff must show that his standard of living has been lost or diminished to such a degree that his status is now one of dependence.

Pecuniary damages include those paid for loss of aid, advice, comfort and protection.

Minnesota's Social Host Law

Minn. Stat. § 340A.90

Minnesota's social host law provides for a right of action in the event of injuries related to ***intoxication by an individual under age 21***. Under the statute, **auto insurance providers** cannot recover on any subrogation claim under the subrogation clause of uninsured, underinsured, collision, or other first-party insurance coverage as a result of payments made to individuals with claims, or parts of a claim, arising under the statute.

Premises Liability

Duties of Landowners

Landowners and occupiers have a duty to exercise reasonable care to prevent harm to others due to conditions on the property that pose a foreseeable risk of injury. *See Foss v. Kincade*, 766 N.W.2d 317, 320-21 (Minn. 2009). Reasonable care requires that a landowner or occupier reasonably inspect and repair the premises on a continual basis and warn entrants of unreasonable risks of harm. *Presbrey v. James*, 781 N.W.2d 13, 18-9 (Minn. Ct. App. 2010). If a landowner has actual or constructive knowledge of a dangerous condition, but fails to repair the condition or warn others of its existence, he may be liable. *Id.* A landowner's duty to warn, however, only applies to hidden dangers and does not extend to inherent or known hazards. *Zimmer v. Carlton County Co-op. Power Ass'n*, 483 N.W.2d 511, 514 (Minn. Ct. App. 1992).

The occurrence of an accident alone is insufficient to demonstrate a breach of the duty of care. Instead, factors such as the status of an individual entrant when she entered the land, the foreseeability of the particular harm that resulted, the duty to inspect, repair, or to provide warnings, the reasonableness of completed inspections and repairs, and the opportunity and practicability of making such repairs will be considered in determining whether a there was a breach of the duty of care on the part of a landowner.

Entrant Status

An entrant's status as an invitee or licensee is no longer determinative under Minnesota law.

A landowner owes the same duty of care to a licensee and invitee she does to all other individuals invited onto the premises. *Peterson v. Balach*, 199 N.W.2d 639, 642 Minn. (1972). Although the licensee-invitee distinction is no longer viable, an entrant's status nevertheless remains a factor in determining the liability of a landowner in the event of an accident. *See Foss v. Kincade*, 766 N.W.2d 317, 320-21 (Minn. 2009).

As to trespassers, landowners must only provide adequate warnings regarding hidden, artificial dangers created or retained by the landowner where the presence of trespassers is, or should be, anticipated. *Hanson v. Bailey*, 83 N.W.2d 252, 257 (Minn. 1957).

However, a landowner will be liable for injuries sustained by young trespassing children when the landowner maintains a dangerous, artificial condition in an area where children are likely to trespass – known as an *attractive nuisance*. *Sirek by Beaumaster v. State, Dept. of Natural Resources*, 496 N.W.2d 807, 810-11 (Minn. 1993).

Defenses to Premises Liability Claims

Assumption of Risk

Minnesota recognizes two kinds of assumed risk: *primary* and *secondary*.

Primary assumption of the risk entirely bars a plaintiff from recovering damages. The elements of primary assumption of risk are that a plaintiff:

(1) knew of the risk,
(2) appreciated the risk, and
(3) voluntarily chose to accept the risk, but had the option to avoid it.

The rule applies where a plaintiff and defendant voluntarily enter into a relationship in which the plaintiff assumes well-known, incidental risks, such as where a plaintiff engages in a paintball game or was a spectator at a sporting event. *See Alwin v. St. Paul Saints Baseball Club, Inc.*, 672 N.W.2d 570, 572-73 (Minn. Ct. App 2003). In these cases, a plaintiff consents to a defendant's negligence, which relieves the defendant of any duty owed to the plaintiff with respect to incidental risks. *Id.*

The issue of primary assumption of risk is generally determined by a jury, but may be decided by a court as a matter of law when only one reasonable conclusion is possible based on undisputed facts.

Secondary assumption of risk arises under the same circumstances as primary assumption of risk, except that in these cases, a plaintiff has not manifested consent. *See Olson v. Hansen*, 216 N.W.2d 124, 127-8 (Minn. 1974). Secondary assumption of risk will not bar a plaintiff from recovering damages resulting from a defendant's negligence, but instead functions as a kind of contributory negligence rule, allocating fault between a plaintiff and defendant to limit the eventual recovery by a plaintiff. *Id.*

Open and Obvious

An individual entering another's land has a duty to exercise reasonable care and to observe conditions that are obvious to an ordinary, prudent person. A landowner owes no duty to entrants with respect to obvious dangers on her land. In Minnesota, a condition is obvious if it is objectively visible, such as a low-hanging tree branch, or a steep hill. A landowner may be liable if she should have anticipated harm despite the condition's obvious nature.
See Louis v. Louis, 636 N.W.2d 314, 318-20 (Minn. 2001).

Lack of Knowledge

Unless a landowner, or his employees, directly created or produced a dangerous condition, a landowner is only liable under a negligence theory where he had actual or constructive knowledge of a condition.
Evidence that a condition was present for a period of time sufficient to constitute constructive knowledge may satisfy the knowledge requirement, but speculation as to the individual or entity that caused a hazard, or about the length of time it existed, warrants judgment in favor of a landowner or occupier.
See Rinn v. Minnesota State Agr. Soc., 611 N.W.2d 361, 364-65 (Minn Ct. App. 2000)

Defenses to Premises Liability Claims- *Continued*

Minne - "Snowta": The Land of Snow and Ice

Although a landowner owes a duty of reasonable care to entrants, he has no duty to remove snow and ice during a winter storm. *Mattson v. St. Luke's Hospital of St. Paul*, 89 N.W.2d 743, 745-6 (Minn. 1958). The duty to remove snow and ice arises only once a "reasonable length of time" has passed after the storm. *Id.* In other states, courts have held that a "reasonable length of time" is at least three or four hours after a storm, but not several days.

Cities are responsible for snow and ice removal from public sidewalks in Minnesota. *Bentson v. Berde's Food Center*, 44 N.W.2d 481, 483-4 (Minn. 1950). Landowners are not subject to suit under common law for injuries sustained as a result of a slip and fall on a city sidewalk, but may become liable for injuries if they created a defect or dangerous condition on the sidewalk, made an extraordinary use of the sidewalk, negligently maintained a structure erected on the sidewalk for their benefit or for the benefit of their building, or maintained a structure, such as a downspout, that discharged water onto the sidewalk. *Id.*

Government Property, The "Mere Slipperiness Doctrine"

Although a city is responsible for the maintenance of sidewalks, Minnesota municipalities are not liable for injuries due to the natural accumulation of snow and ice on city sidewalks unless a municipality permits snow and ice to remain there for a period of time long enough for ridges and irregularities to develop. *See Rosenwald v. State, Dept. of Natural Resources*, 777 N.W.2d 535, 537-8 (Minn. Ct. App. 2010). Under the "mere slipperiness" rule, a governmental entity is liable only if the condition is more dangerous than mere smooth and slippery ice, and then, only if it had notice of the condition and a reasonable opportunity to remedy it. *Id.* The mere-slipperiness rule covers municipalities and the state, and applies to sidewalks, streets, parking lots and driveways. *Id.*

Recreational Use Immunity

Minn. Stat. § 466.03

Political subdivisions are immune from tort liability with respect to claims related to recreational areas and for losses or injuries related to use of school property made available to the public for recreational purposes. Municipalities and school districts remain liable for conduct that would allow a trespasser to recover damages against a private individual, and the existing duties of school districts are not otherwise reduced by the recreational use immunity. *See also Krieger v. City of St. Paul*, 762N.W.2d 274, 276-7 (Minn. Ct. App. 2009).

Automobile Liability Claims

No Fault Insurance

Minn. Stat. § 65B

Minnesota adopted a no-fault insurance model in 1975. Under the system, every car owner in the state is required to carry no-fault insurance that covers, at minimum, medical expense losses of $20,000 and other basic economic losses of $20,000. Minn. Stat. §65B.44, subd. 1. In the event of an accident, an insured's own insurer will automatically reimburse the insured for no-fault benefits (or personal injury protection ["PIP"] benefits), regardless of fault, as long as the accident arose out of the maintenance or use of a motor vehicle.

No-fault benefits include: reasonable and necessary medical expenses; income loss; replacement services loss; funeral expenses; and economic and replacement services losses of survivors. Insureds entitled to PIP benefits under Minnesota law include those named as insureds in insurance policies, and their spouses, other relatives, and minor children if they reside with the insured.

No-fault aims to limit litigation and compensate the insured. Minn. Stat. §65B.42. To seek noneconomic damages in a negligence action premised on a car accident, a victim must demonstrate that his medical expenses exceed $4,000, or that the injury sustained resulted in permanent disfigurement, permanent injury, disability for sixty days or more, or death. Since the goal of no-fault is to provide fair compensation, a court will deduct from any negligence-based recovery payments made or available to the recipient under no-fault benefits.

Uninsured and Underinsured Coverage

Minn. Stat. § 65B.49, subd. 3a. goes above and beyond the requirements of no-fault, providing coverage to an insured in instances where PIP benefits are insufficient to cover compensable damages, and where another driver involved in a car accident is legally liable, but either has no insurance or insufficient insurance to compensate the injured insured.

Minnesota drivers must carry uninsured and underinsured coverage with limits of up to $25,000 for accidents in which one person is injured or killed, and up to $50,000 for accidents in which more than one person is injured or killed. *Id.* at subd. 3a(1).

Each Minnesota vehicle must also be minimally insured for up to $30,000 to one individual for bodily injuries or death, $10,000 for property destruction in a single accident, and $60,000 total, per accident. *Id.* at subd., 3(1).

Just a Reminder…

Insurer DO's

When an accident is reported, an insurer must:

- **Inform** the insured of available benefits, applicable policy provisions, and contractual or legal time limits concerning the filing of a claim;
- **Inspect** the vehicle within five days if it is inoperable, or within 15 days if operable; and,
- **Provide** the insured the necessary documentation for filing a claim within ten days.

Upon the filing of a claim, an insurer must:

- **Acknowledge** the claim within ten business days;
- **Advise** the insured of the anticipated completion date of its investigation;
- **Accept** or **Deny** the claim within 60 business days;
- **Respond** to correspondence within ten days;
- **Notify** the insured of the relevant statute of limitations at least 60 days prior to its expiration; and,
- **Pay** any interest on overdue payments for automobile personal injury claims;

In the event of a settlement, the insurer must:

- **Issue** payment within five days after receiving the executed agreement.

…and DON'T's

An insurer may **NOT:**

- **Delay** processing or settling claims if an insured retains an attorney or adjustor;
- **Demand** information irrelevant to the claim at issue;
- **Rely** solely on a blue book in determining value;
- **Arbitrarily** determine comparative negligence;
- **Require** the insured to travel an unreasonable distance to have her vehicle examined or repaired; or require that a certain entity perform such repairs.
- **Remit** payments to an insured without explanation;
- **Threaten** to cancel or alter a policy to induce settlement;
- **Depreciate** the value of property;
- **Issue** checks containing language suggesting that the check represents a final settlement;
- **Execute** a settlement concerning one portion of a claim contingent upon settling another portion;
- **Request** settlement of a claim;
- **Deny** a claim because the insured failed to officially report the claim; or, deny a claim prior to completing a reasonable investigation.

Comparative Fault

Minn. Stat. § 604

Under Minnesota's comparative fault statute, a plaintiff's contributory negligence will not bar recovery unless his fault is ***greater than that of the defendant's***. Minn. Stat. § 604.02. A plaintiff's contributory fault (less than 51%) will be deducted from the total amount of recovery, and the court may instruct the jury to determine the percentage of fault and amount of damages attributable to each party in a separate special verdict for purposes of apportioning damages. *Id.*

Minnesota's comparative fault statute does not apply to actions in contract.

Joint and Several Liability

In Minnesota, when two or more individuals are joint and severally liable, their contributions will be in proportion to the percent of fault attributable to each.

A party may be jointly and severally liable for an entire damage award where she was more than 50% at fault, if she committed an intentional tort, or if liability is premised on a specific statute. If two or more individuals acted in concert or pursuant to a common plan, they may also be held liable for the entire award of damages.

Punitive damages are not compensatory, but are imposed to punish and deter. In Minnesota, a plaintiff may not seek punitive damages in a complaint. Minn. Stat. § 549.191. They may move to amend the pleadings to claim punitive damages only after a lawsuit has been filed. *Id.* A motion to amend the pleadings must include the legal basis supporting a punitive damages claim, and must be supported by at least one affidavit. *Id.* The moving party will be granted permission to amend the pleadings to claim punitive damages if the court determines there is prima facie evidence in support of the motion. *Id.* Upon request of a party in a civil case, the court will determine whether compensatory damages are to be awarded before determining whether to award punitive damages. *See* Minn. Stat. § 549.20, subd. 4.

Because punitive damages are meant to punish, Minnesota courts have found that the purpose of such damages are lost when another satisfies the judgment. They have thus been reluctant to allow insurance to satisfy punitive damage awards.

Factors for Punitive Damages

Factors to be considered in deciding whether to award punitive damages include:

- the seriousness of the danger generated by a defendant's misconduct;
- the profitability of misconduct to a defendant;
- the duration of the misconduct and/or its concealment of it;
- a defendant's awareness of her actions;
- a defendant's attitude upon detection of her misconduct;
- the number of persons involved in the conduct;
- the financial position of a defendant; and,
- the potential effect of other sources of punishment on a defendant.

Minn. Stat. § 549.20, subd. 3.

BROWNSON • NORBY PLLC

ATTORNEYS AT LAW

The partners at Brownson Norby are litigators and seasoned defense attorneys practicing in Minnesota, North Dakota, Wisconsin, and throughout the country.

Brownson Norby attorneys represent corporations, insurance companies, public entities and individuals in civil litigation matters in the state, federal and appellate courts, and before administrative agencies.

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