BROWNSON • NORBY PLLC

ATTORNEYS AT LAW

Insurance, Claims and Liability 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 2016***

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CONTENTS

CONTENTS - continued

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 Updates to the Minnesota Rules of Civil Procedure and General Rules of Practice

Effective July 1, 2015, unless otherwise noted

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. R. Civ. P. 3.01 – a civil action will be considered commenced against a defendant where 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.

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 – This is a brand new rule governing subpoenas for depositions and discovery outside Minnesota. Now, 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. 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. 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. 5 – *When out of state attorneys appear in court, they are subject to all rules that apply to Minnesota lawyers.*

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

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.*

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).

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)

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

Initial Disclosures in Federal Court

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

Claims Handling and Unfair Practices in Insurance Law

Minnesota law 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.
- 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.
- 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.
- 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.
- If a claimant requests written proof of coverage and limits of an insurance policy, an insurer must disclose the information within 30 days.

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

- *Affirm or deny coverage within a reasonable time*
- *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 a prompt, reasonable explanation*

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.

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.

Insurance Law – *Licensing and Duties of Insurer*

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.

Minnesota insurers owe two duties to insureds – to defend and indemnify.

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. Uncertainties concerning coverage are typically resolved in favor of an insured. Insurers have the burden to show that a claim falls outside of the scope of coverage. 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.

A primary insurer with a duty to defend has a right to seek contribution for defense costs from any other insurer that also has a duty to defend. But, a breach of the duty to defend precludes an insurer from securing contribution.

An insurer's duty to indemnify is more limited than the duty to defend. This duty applies only when liability exists on a claim that falls within policy coverage.

If an insurer breaches the duty to indemnify, it is liable for the cost of any judgment entered, plus interest. 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.

General Insurance Law in Minnesota

Declaratory Actions

In the event of a coverage dispute between an insurer and insured as a result 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.

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.

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).

Insurance Contracts – Construction and Procedural Issues

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 a certain precedent as to what secondary evidence may be admitted in a proceeding to meet an insured's burden of proof. *See, American States Ins. Co. v. Mankato Iron & Metal, Inc.*, 848 F.Supp. 1436 (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.

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).

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).

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).

Policies – Risks and Coverage

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).

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).

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).

The Parties' Intent at The Time of Contracting ~ assists courts 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).

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).

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

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).

Duty to Defend and Duty of Good Faith and Fair Dealing

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).

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).

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 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).

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).

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).

Minn. Stat. §§ 72A.20-72A.201 govern an Insurer's Duties in this State, including the Duty of Good Faith and Fair Dealing. Sec. 72A.201 sets forth provisions concerning standards for the following:

- *Claim filing and handling*
- *Preauthorization approval*
- *Fair settlement offers and agreements*
- *Automobile insurance claims handling, settlement offers, and agreements*
- *Releases*
- *Claim denial*

The Covenant of Good Faith and Fair Dealing – 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).

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. Sec. 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).

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

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

In *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), the Minnesota Supreme Court found that where an insurance policy afforded 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.

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).

The Minnesota Supreme Court has found that 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).

Reservations of Rights and Attorney 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).

Automobile Liability Claims

No Fault Insurance

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. 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. 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

Uninsured and Underinsured Coverage goes above and beyond 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.

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; provide to 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 day; respond to correspondence within ten days; notify an insured of the relevant statute of limitations at least 60 days prior to its expiration; pay any interest on overdue payments for automobile personal injury claims; and, in the event of a settlement, 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. An insurer also may not 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.

Dram Shop Liability and Damages

Under Minnesota's Civil Damages Act, 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.

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.

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 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. 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. 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. A landowner's duty to warn, however, only applies to hidden dangers and does not extend to inherent or known hazards.

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. 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.

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. 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*.

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. 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.

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. 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.

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.

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.

More Defenses to Premises Liability Claims

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. The duty to remove snow and ice arises only once a "reasonable length of time" has passed after the storm. 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. 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.

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. 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. The mere-slipperiness rule covers municipalities and the state, and applies to sidewalks, streets, parking lots and driveways.

Recreational Use Immunity

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.

Product Liability Cases

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

A 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 Law

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.

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

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.

***I**n 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.

Employment Law

Minnesota employers, labor organizations, and employment agencies are prohibited from engaging in unfair employment practices based upon an employee's race, color, creed, religion, national origin, sex, marital status, public assistance status, disability, sexual orientation, or age.

Employers must also make reasonable accommodations in accordance with the Americans with Disabilities Act (ADA) and the Minnesota Human Rights Act with respect to known disabilities of qualified disabled persons or job applicants, unless an employer demonstrates that the accommodation at issue constitutes an *undue hardship*.

A *reasonable accommodation* refers to the measures that must be taken to accommodate known limitations of a qualified disabled individual.

Reasonable accommodations may include:

Modifying Facilities
Job Restructuring
Modifying Work Schedules
Reassignments
Acquiring or Modifying Equipment or Devices
Providing Aides on a Temporary or Periodic Basis

Termination of Employees

In Minnesota, employment is presumed to be at-will, meaning employers may terminate employees with or without cause at any time.

For a Minnesota employee to overcome the presumption that employment is at-will in a wrongful termination action, she must prove that her (former) employer intended to create a lifetime employment contract. Typically, she must show language on the part of the employer to demonstrate that the employer intended to provide job security. General statements about job security, or as to employer policies or desires are usually insufficient evidence of an employer's intent.

Whistleblowers

In Minnesota, an employer may not discharge, discipline, threaten, or discriminate against an employee because he reports a violation or suspected violation of law in good faith to his employer, or to a government entity or law enforcement official.

Employers also may not penalize an employee if she is requested by a public body or official to participate in an investigation, or because she refuses to perform, at the employer's request, an action she objectively believes is unlawful, or, in the case of healthcare, if she reports a suspected violation of the duty of care or ethical standards. A public employee may not be penalized for making a good faith communication about the findings of a study he believes to be true.

Disclosures that would violate state or federal law, or common law confidentiality principles, are not permitted by statute.

Minnesota whistleblower claims are subject to a two year statute of limitations period.

To establish a prima facie case under the whistleblower statute, a plaintiff must demonstrate that he engaged in protected conduct, that he was subject to an adverse employment action, and that there is a causal connection between the conduct and the employer's action.

If a plaintiff successfully establishes a prima facie case, the employer-defendant must demonstrate that its adverse employment action was for a "legitimate business reason."

If an employer meets its burden, then to ultimately prevail, a plaintiff must show that the employer's proposed legitimate business reason is simply pretext, and that the adverse employment action was actually motivated by the employee's protected conduct.

Damages

An employee-whistleblower asserting a violation of the statute may pursue any and all damages recoverable at law, including damages for:

- *Emotional distress*
- *Costs and disbursements*
- *Reasonable attorneys' fees*
- *Injunctive or other equitable relief*

If the court determines that an employer violated the statute, the court may order:

- *Reinstatement of the employee*
- *Back-pay*
- *Restoration of lost service credit*
- *Compensatory damages*
- *Expungement of any adverse records*

Business Torts

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.

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."

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 or not 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.

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.

Professional Liability Claims

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.

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.

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.

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.

Federal Preemption

Certain kinds of claims are subject to federal preemption under the Supremacy Clause of the United States Constitution. Federal preemption allows for invalidation of state laws in conflict with federal law, resulting in the application of federal law to certain state claims.

Federal law may also expressly preempt state law where a court concludes that a piece of federal legislation is so comprehensive in its scope that it occupies an entire field.

Examples of federal laws preempting state law, at least in part, include:

The Employee Retirement Income Security Act of 1974 (ERISA) (preempts state laws on employee benefit plans, but not state laws regulating securities, banking or insurance)

Home Owners' Loan Act (HOLA)

The Interstate Commerce Commission (ICC) Termination Act (preempts state laws regulating price, routes, services of motor carriers, but does not invalidate any state's safety regulatory authority)

Federal Employers' Liability Act (FELA)

The National Labor Relations Act (NLRA) (preempts all laws regulating activities such as unfair labor practices, picketing and strike activities, and claims arguably subject to the Act)

The National Bank Act (NBA) (preempts burdensome and duplicative state regulations hindering the authority of national banks to engage in the business of banking)

Federal Insecticide, Fungicide and Rodenticide Act (FIFRA)

Federal Railroad Safety Act (FRSA)

Comprehensive Environmental Response, Compensation and Liability Act (CERCLA)

Wrongful Death Actions

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.

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.

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 as a result of *murder*. 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.

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.

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

Workers' Compensation Law

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.

When an employee suffers a work-related injury and notifies 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.

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.

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.

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.

Government Claims and Immunities

Notice

A person claiming damages from a municipality or its employee must provide notice of the claim to the governing body of the municipality within 180 days of the loss or injury if the municipality does not have actual notice of the incident. The notice must identify the time, place, and circumstances surrounding the incident, name the municipal employee involved, and provide the amount of compensation demanded.

In a wrongful death action, the personal representative, surviving spouse, next of kin, or consular office (in the event the deceased was a foreign citizen) may present notice on behalf of the deceased.

Statutory Cap on Liability

Minnesota limits the amount of damages recoverable against municipalities and their employees, from $300,000 to $1,500,000, depending on the kind of claim alleged, and date of the incident. Punitive damages are not recoverable in these cases.

Discretionary Immunity

A municipality is generally liable for its torts, but statutory immunity, or discretionary immunity, protects government entities from liability where alleged tortious conduct constitutes a discretionary or policy-making activity, even if there was an abuse of discretion. Courts interpret statutory immunity narrowly and examine the nature of the challenged conduct to determine whether statutory immunity applies.

To receive discretionary immunity, the activity or function must involve policymaking and a balancing of social, political, or economic factors. It may not consist merely of decision-making premised on professional or scientific conclusions. Planning decisions, matters of public policy, safety issues, financial and legal considerations are typically protected by statutory immunity, unlike operational or day-to-day decisions.

Qualified Immunity protects public officials from federal lawsuits for damages. Courts apply a two-step analysis to determine whether qualified immunity protects an official. First, they determine whether an official's conduct violated a constitutional right. Second, courts assess whether the constitutional right at issue is clearly established, meaning defined to a degree that a reasonable official would understand what constitutes a violation of the right.

Under the qualified immunity test, a government official is protected when her conduct did not violate a clearly established right.

The common law doctrine of ***Official Immunity*** shields public officials from claims in tort, but protects only public officials charged with duties requiring exercise of judgment and discretion. It does not apply to ministerial acts, or to willful or malicious wrongs.

Vicarious Official Immunity shields governmental entities from liability claims involving the acts of their employees and is typically extended if an employee is entitled to official immunity for a discretionary act. It does not apply if an employee is not entitled to official immunity.

Comparative Fault

Under Minnesota's comparative fault laws, a plaintiff's contributory negligence will not bar recovery unless his fault is greater than that of the defendant's. 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.

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. He may move to amend the pleadings to claim punitive damages only after a lawsuit has been filed. 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. 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. 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.

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 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.

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, stormwater, wastewater, and wellheads and source water.

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. 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. 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.

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. 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. 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.

Prejudgment Interest

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

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 actually 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

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. 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. If a proposed structured settlements is at issue, a statement from the parties describing the costs of the settlement to the tortfeasor must also be provided.

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.

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 or not they settle, all defendants pay only their fair share of liability under a *Pierringer* release, which prohibits nonsettling defendants from seeking contribution from settling defendants. A *Pierringer* release allows a jury to determine the relative fault of settling and nonsettling 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 nonsettling defendants; and (3) provides that a plaintiff will indemnify settling defendants from contribution claims of nonsettling 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. 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.

-Additional Resources-

Minnesota Laws

Minnesota No-Fault Certification Form

Minnesota Administrative Rules

Constitution of the State of Minnesota, October 13, 1857

Minnesota Office of the Revisor of Statutes

Minnesota Rules of Court

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