

Nevada

REGULATORY LIMITS ON CLAIMS HANDLING

Timing for Responses and Determinations

Time limitations with respect to casualty insurance are set forth in NRS § 690B.012. Generally, an insurer must approve or deny a claim within 30 days after receiving the claim. If the claim is approved, the insurer must pay the claim within 30 days of approval. If the approved claim is not paid within the 30 days, the insured is entitled to interest on that claim at the rate of interest set forth in the insurance contract, or in the absence of a contractual provision, prime rate at the largest bank in Nevada plus two percent. NRS § 99.040. The interest must be calculated from the date the payment is due until the date the claim is ultimately paid.

If the insurer requires additional information or time to determine whether to approve or deny a claim, the policy holder must be notified of its request for additional information or time within 20 days after receiving the claim and at least once every 30 days thereafter, until the claim is approved or denied. The subsequent payment provisions following such a request are set forth in NRS § 690B.012 (3) and (4).

NRS § 691A.010 provides that all contracts of property insurance covering subjects located in Nevada are subject to the applicable provisions of chapter § 687B, and to other applicable provisions of the code. Thus, the relevant time limitations involved with approving, denying, and paying a claim, outlined above, are also applicable to claims filed under a contract for property insurance.

Standards for Determination and Settlements

The Nevada Unfair Claims Settlement Practices Act (“Act”), found at NRS § 686A.310, establishes unfair trade practices for determinations and settlement of claims. If the insurer commits any practice labeled as unfair by NRS § 686A.310, a cause of action may be brought against the insurer under the Act and the insurer may be liable to the insured for any resulting damages. NRS § 686A.310(2); *Bergerud v. Progressive Cas. Ins.*, 453 F. Supp. 2d 1241, 1250 (D. Nev. 2006). However, based on state legislative history and a lack of pronouncement from the Nevada Supreme Court, a U.S. District Court in Nevada held that the Unfair Claims Settlement Practices Act does not codify the law of bad faith in Nevada. *Pioneer Chlor Alkali Co. v. National Union Fire Ins. Co.*, 863 F. Supp. 1237, 1243–44 (D. Nev. 1994).

PRINCIPLES OF CONTRACT INTERPRETATION

Fundamental tenets of insurance law govern Nevada courts’ interpretation of insurance contract language. *Farmers Ins. Group v. Stonik*, 110 Nev. 64, 67, 867 P.2d 389, 391 (1994). An insurance policy is a contract of adhesion and should be interpreted broadly, affording the greatest possible coverage to the insured. *Id.* (citing *Harvey’s Wagon Wheel Inc. v. MacSween*, 96 Nev. 215, 219–20, 606 P.2d 1095, 1098 (1980)). Any ambiguity in an insurance contract must be interpreted against the drafting party and in favor of the insured. *Neumann v. Standard Fire Ins.*, 101 Nev. 206, 209, 699 P.2d 101, 104 (1985) (citing *Yosemite Ins. Co. v. State Farm Mut. Auto Ins.*, 98 Nev. 460, 653 P.2d 149 (1982)).

Nevada courts will not rewrite contract provisions that are otherwise unambiguous. *Stonik*, 110 Nev. at 67, 867 P.2d at 391. In addition, Nevada courts will not increase an obligation to the insured where such was intentionally and unambiguously limited by the parties. *Senteney v. Fire Ins. Exchange*, 101 Nev. 654, 656, 707 P.2d 1149, 1150–51 (1985) (citing *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 623 P.2d 981 (1981)).

CONTRACT INTERPRETATION

Common Issues

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

The Nevada Supreme Court has not spoken to whether faulty workmanship constitutes an “occurrence” under a CGL policy, but the court had interpreted the term to mean “a happening that is not expected, foreseen or intended.” Adopting other Nevada courts’ reasoning, the District Court in *Ariz. Civ. Constructors v. Colony Ins. Co.*, 481 F. Supp. 3d 1141, 1148 (2020) held that faulty workmanship did not constitute an occurrence where the faulty workmanship did not cause other independent property damage. See also, e.g., *Evanston Ins. Co. v. W. Cmty Ins. Co.*, No. 2:13-cv-01268, 2014 U.S. Dist. LEXIS 136129, 2014 WL 4798536, at *6 (D. Nev. Sept. 26, 2014) (reasoning that faulty workmanship is not unexpected, while the “results” from faulty workmanship could be unexpected); *Big-D Const. Corp. v. Take it for Granite Too*, 917 F. Supp. 2d 1096, 1108 (D. Nev. 2013) (“[T]he Nevada Supreme Court would hold that faulty workmanship itself does not fall under the common meaning of accident, and there is not an occurrence.”).

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

Nevada has not adopted an anti-indemnity statute. Nevada follows the “express negligence doctrine” under which “parties are free to contractually agree to indemnify another for its own negligence” but “an express or explicit reference to the indemnitee’s own negligence is required.” *Reyburn Lawn & Landscape Designers, Inc. v. Plaster Development Co., Inc.*, 255 P.3d 268, 274 (2011) (quoting *George L. Brown Ins. v. Star Ins. Co.*, 126 Nev. 316, 237 P.3d 92, 97 (Nev. 2010)). Parties have great freedom in allocating risk between each other. Under Nevada law, indemnity clauses which require one party to reimburse another party for its own negligence must be in writing and expressly and explicitly state this intent. In *Brown*, the Nevada Supreme Court adopted the majority rule which requires that an insurance contract expressly or explicitly reference the indemnitee’s own negligence before an indemnitee may be indemnified for its own negligence. See *Medallion Dev. V. Converse Consultants*, 113 Nev. 27, 33, 930 P.2d 115, 119 (1997), superseded by statute as stated in *Doctors Company v. Vincent*, 120 Nev. 644, 654, 98 P.3d 681, 688 (2004). The Nevada Supreme Court took this analysis a step further in a more recent decision in *Reyburn*. Now, an indemnification clause must explicitly or expressly state that the indemnitor will indemnify the indemnitee for the indemnitee’s contributory negligence as well as its own negligence. In *Reyburn*, the Court extended the holding in *Brown* to require express language of indemnification for contributory negligence as well as the sole negligence of the indemnitor.

CHOICE OF LAW

Nevada allows contracting parties to insurance contracts broad limits to choose the law that will determine the validity and effect of their contract. *Progressive Gulf Ins. Co. v. Faehnrich*, 130 Nev. 167, 171, 327 P.3d 1061, 1064 (2014) (citing *Ferdie Sievers & Lake Tahoe Land Co., Inc. v. Diversified Mortg. Inv'rs*, 95 Nev. 811, 815, 603 P.2d 270, 273 (1979)). However, the situs agreed upon must have a substantial relationship to the transaction and the agreement must not be contrary to the public policy of the forum or other interested state. *Id.*

DUTIES IMPOSED BY STATE LAW

Duty to Defend

1. Standard for Determining Duty to Defend

An insurance company's duty to defend and/or indemnify the insured arises from the provisions of the insurance policy. *United Nat'l Ins. Co. v. Frontier Ins. Co., Inc.*, 120 Nev. 678, 686-87, 99 P.3d 1153, 1158 (2004). The insurer must defend any lawsuit brought against its insured which potentially seeks damages within the coverage of the policy. *Id.* An insurance policy is judged from the perspective of one not trained in law or in insurance, with the terms of the contract viewed in their plain, ordinary, and popular sense. *Siggelkow v. Phoenix Ins. Co.*, 109 Nev. 42, 44, 846 P.2d 303, 305 (1993). Ambiguous terms in an insurance policy are construed in favor of the insured and against the insurer. *Harvey's Wagon Wheel*, 96 Nev. at 219–20, 606 P.2d at 1098.

However, when contract language is clear and unambiguous, a court cannot distort the plain meaning of the contract under the guise of interpretation. *Watson v. Watson*, 95 Nev. 495, 496, 596 P.2d 507, 508 (1979). Nevada courts will enforce unambiguous policy provisions that exclude coverage. *Senteney*, 101 Nev. at 657, 707 P.2d at 1151.

The duty to defend attaches upon notice of a demand against its insured and continues through litigation until the final resolution of that claim. *Allstate Ins. Co. v. Miller*, 125 Nev. 300, 309, 212 P.3d 318, 325 (2009).

2. Issues with Reserving Rights

As previously noted, an insurer must generally approve or deny a policy holder's claim within 30 days after receiving notice of it. NRS § 690B.012. If an insurer denies the policy holder's claim, but is concerned about satisfying its duty to defend, the insurer may assume the insured's defense under a reservation of its rights. *See Nautilus Ins. Co. v. Access Med., LLC*, 137 Nev. Adv. Op. 10, 482 P.3d 683, 689 (2021). According to NRS § 104.1308, an insurer who promises to defend its policy holder under an explicit reservation of rights does not thereby prejudice the rights reserved. An insurer defending a policy holder under a reservation of rights should notify the policy holder of its intentions within the 30-day period described above.

Nevada law requires an insurer to provide independent counsel for its insured when a conflict of interest arises between the insurer and the insured. *State Farm Mut. Auto. Ins. Co. v. Hansen*, 131 Nev. Adv. Op. 74, 357 P.3d 338, 341-42 (2015). A reservation of rights does not create a per se conflict of interest. Rather, courts must make a case-by-case determination whether there is an actual conflict of interest. *Id.* at 343. A conflict of interest may arise when an insurer reserves its right to determine coverage, yet provides counsel to defend its insured, because the outcome of the litigation may also decide the outcome of the coverage determination—a determination that may pit the insured's interest against the insurer's. *Id.*, 357 P.3d at 340. When such a conflict of

interest exists, Nevada law requires the insurer to satisfy its contractual duty to provide representation by permitting the insured to select independent counsel and by paying the reasonable costs of such counsel. *Id.*, 357 P.3d at 341–42.

State Privacy Laws; Insurance Regulatory Issues; Arbitration/Mediation

Nevada has not adopted by statute “The Insurance Information and Privacy Protection Model Act.” However, under NRS § 679B.135, the Nevada Insurance Commissioner may adopt the same provisions as provided in the model legislation originally drafted by the National Association of Insurance Commissioners. At this time, the Commissioner has not formally adopted any provisions of The Insurance Information and Privacy Protection Model Act.

Nevertheless, the Commissioner has adopted several regulations meant to protect the privacy of insureds. According to NAC § 679B.842, insurers must provide an “initial privacy notice” to all new customers. Thereafter, the insurer must continue to provide similar privacy notices every twelve months, so long as the insured maintains a policy with the insurer, in accordance with NAC § 679B.844. The notices must accurately reflect privacy policies and practices of the insurer. A complete list of the information to be included in privacy notices can be found in NAC § 679B.846.

Further, Nevada prohibits the disclosure of non-public personal information in a manner contrary to federal law. NRS § 686A.025.

EXTRACONTRACTUAL CLAIMS AGAINST INSURERS: ELEMENTS AND REMEDIES

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

3. First Party

According to the Nevada Supreme Court, bad faith is established where the insurer acts unreasonably and with knowledge that there is no reasonable basis for its conduct. *Guaranty Nat’l Ins. Co. v. Potter*, 112 Nev. 199, 206, 912 P.2d 267, 272 (1996); see also *Goodrich v. Garrison Prop. & Cas. Ins. Co., Inc.*, 526 F. Supp. 3d 789, 802, 2021 WL 982315 (D. Nev. 2021) (“The Court ultimately must consider whether (1) there was an objectively reasonable basis for Defendant’s decision and, if not, whether (2) Defendant subjectively knew or recklessly disregarded that no reasonable basis to deny the claim existed.”). An insurer’s duty to its policy holder is “akin” to a fiduciary relationship, but does not rise to that level. *Powers v. United States Services Auto. Ass’n.*, 114 Nev. 690, 700–01, 962 P.2d 596, 602–03 (1998). When investigating claims, insurers must act with the interest of the insured in mind. Misconduct, such as misrepresenting or concealing facts to gain an advantage over the insured, is a breach of the fiduciary nature of the insurer’s responsibility. *Id.* Bad faith can apply to denial or delay of a claim and also to an insurer’s failure to adequately inform an insured of a settlement offer. *Miller*, 125 Nev. at 310, 212 P.3d at 325. Failure to inform can be a proximate cause of an insured’s damages. *Id.* at 313–14, 212 P.3d at 327.

Additionally, there are three elements required to establish an insurance bad faith claim; absent any of these three elements, a claim for bad faith must fail. *Pioneer Chlor Alkali Co.*, 863 F. Supp. at 1250. The three elements are:

1. The insurer denies or refuses to pay an insurance claim;
2. With no reasonable basis for its denial or refusal to pay the claim; and
3. The insurer must either have knowledge of, or recklessly disregard for, the fact that there was no reasonable basis for denying or refusing to pay the claim.

American Excess Ins. Co. v. MGM Grand Hotels, Inc., 102 Nev. 601, 605, 729 P.2d 1352, 1354–55 (1986); *Arminas Wagner Enterprises, Inc. v. Ohio Sec. Ins. Co.*, --- F. Supp. 3d ----, 2023 WL 2072499, at *6 (D. Nev. Feb. 17, 2023).

In Nevada, until the insured has established “legal entitlement,” no claim for bad faith will lie. *Pemberton v. Farmers Ins. Exch.*, 109 Nev. 789, 796–97, 858 P.2d 380, 384 (1993). In order to establish legal entitlement, and thus a claim for bad faith, an insured must demonstrate fault by the tortfeasor, which gives rise to damages, and must prove the extent of the damages. *Id.* at 797, 858 P.2d at 384. However, an insured is not required to obtain a judgment against the tortfeasor before he or she is entitled to receive proceeds under a UM policy. *Id.*

4. Third-Party

The Nevada Supreme Court has not recognized third party bad faith. *Gunny v. Allstate Ins. Co.*, 108 Nev. 344, 345, 830 P.2d 1335, 1336 (1992).

Fraud

A plaintiff can assert fraud in addition to a contractual claim based on the circumstances surrounding the contract’s execution and performance. *Great American Ins. Co. v. General Builder Inc.*, 113 Nev. 346, 355, 934 P.2d 257, 263 (1997) (citing *Amoroso Const. v. Lazovich and Lazovich*, 107 Nev. 294, 810 P.2d 775 (1991)).

According to Nevada law, the plaintiff has the burden of proving each element of a fraud claim by clear and convincing evidence. *Lubbe v. Barba*, 91 Nev. 596, 598, 540 P.2d 115, 117 (1975). The elements of fraud include: (1) a false representation made by the defendant; (2) defendant’s knowledge or belief that the representation is false (or knowledge that it had an insufficient basis for making the representation); (3) defendant intended to induce the plaintiff to act, or to refrain from acting, in reliance upon the misrepresentation; (4) plaintiff’s justifiable reliance upon the misrepresentation; and (5) damage to the plaintiff resulting from such reliance. *J.A. Jones Const. Co. v. Lehrer McGovern Bovis, Inc.*, 120 Nev. 277, 290, 89 P.3d 1009, 1018 (2004) (citing *Wohlers & Co. v. Bartgis*, 114 Nev. 1249, 1260–61, 969 P.2d 949, 957–58 (1998)). Justifiable reliance upon an alleged misrepresentation is established when a plaintiff shows that the false misrepresentation “played a material and substantial part in leading the plaintiff to adopt his particular course.” *Blanchard v. Blanchard*, 108 Nev. 908, 911, 839 P.2d 1320, 1322 (1992) (quoting *Lubbe*, 91 Nev. at 600, 540 P.2d at 118).

Nevada law specifically recognizes a cause of action for constructive fraud, which is defined as the breach of some legal or equitable duty which, irrespective of moral guilt, the law declares fraudulent because of its tendency to deceive others or to violate confidence. *Perry v. Jordan*, 111 Nev. 943, 946, 900 P.2d 335, 337 (1995) (citing *Long v. Towne*, 98 Nev. 11, 13, 639 P.2d 528, 529–30 (1982)). Constructive fraud is characterized by a breach of duty arising out of a fiduciary duty or confidential relationship. *Id.* at 946–47, 900 P.2d at 337.

The statute of limitations for relief on the ground of fraud is three years. NRS § 11.190(3)(d). However, the time period begins to accrue upon the discovery by the aggrieved party of the facts constituting the fraud or mistake. *Id.*

Intentional or Negligent Infliction of Emotional Distress

In order to recover under the theory of intentional infliction of emotional distress, a plaintiff must establish the following: (1) defendant’s extreme and outrageous conduct with either the intention of, or reckless disregard for, causing emotional distress; (2) the plaintiff actually suffered severe or extreme emotional distress; and (3) the

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defendant's conduct actually or proximately caused the distress. *Olivero v. Lowe*, 116 Nev. 395, 398, 995 P.2d 1023, 1025 (2000); *Barmettler v. Reno Air, Inc.*, 114 Nev. 441, 447, 956 P.2d 1382, 1386 (1998); *Posadas v. City of Reno*, 109 Nev. 448, 456, 851 P.2d 438, 444 (1993); *Nelson v. City of Las Vegas*, 99 Nev. 548, 555, 665 P.2d 1141, 1145 (1983). Extreme and outrageous conduct is that which is outside all possible bounds of decency and is regarded as utterly intolerable in a civilized community. *Maduik v. Agency Rent-A-Car*, 114 Nev. 1, 4, 953 P.2d 24, 26 (1998) (citing *California Book of Approved Jury Instructions ("BAJI")* No. 12.74).

In order to prevail on a negligent infliction of emotional distress cause of action in cases where emotional distress damages are not secondary to physical injuries, either a physical impact must have occurred or proof of serious emotional distress causing physical injury or illness must be presented. *Barmettler*, 114 Nev. at 448, 956 P.2d at 1387.

State Consumer Protection Laws, Rules and Regulations

NRS § 686A.310(2) expressly provides a private right of action for an insured party or claimant against an insurer for breaches of the list of unfair practices in settling claims set forth in NRS § 686A.310(1). *Bergerud*, 453 F. Supp. 2d at 1250. See Section I, B above. But the same statute does not create a private right of action for a third-party claimant who has no contractual relationship with the insurer. *Id.*; *Gunny*, 108 Nev. at 346, 830 P.2d at 1336.

The Nevada Unfair Claims Settlement Practices Act was not intended to codify the common law tort of bad faith; while the statute and the common law may overlap, the statute reaches different conduct than that which is contemplated by the common law tort. *Hart v. Prudential Property & Cas. Ins. Co.*, 848 F. Supp. 900, 904–05 (D. Nev. 1994). While the Nevada Unfair Claims Settlement Practices Act prohibits conduct that is similar to that prohibited by the common law tort of bad faith, the Act actually specifies the manner in which an insurer should handle determinations of coverage on an insured's claim. *Id.* at 904; *Arlitz v. GEICO Cas. Co.*, --- F. Supp. 3d ---, 2022 WL 17155941, at *21 (D. Nev. Nov. 22, 2022) ("The statute describes an unfair practice when an insurer 'fail[s] to provide promptly to an insured a reasonable explanation of the basis in the insurance policy, with respect to the facts of the insured's claim and the applicable law, for the denial of the claim ..."). The Act also limits damages to those specifically attributable to the breach. See *Id.* Essentially, bad faith under the Act is not as broad in scope as the common law tort, which is established where the insurer acts unreasonably and with knowledge that there is no reasonable basis for its conduct. *Guaranty Nat'l Ins. Co.*, 112 Nev. at 206, 912 P.2d at 272; *Goodrich v. Garrison Prop. & Cas. Ins. Co., Inc.*, 526 F. Supp. 3d 789, 801, 2021 WL 982315 (D. Nev. 2021).

DISCOVERY ISSUES IN ACTIONS AGAINST INSURERS

Discoverability of Claims Files Generally

Nevada Rule of Civil Procedure ("N.R.C.P.") 26(b)(3) mandates discovery of materials resulting from an insurance company's investigation unless the insurer's investigation has been performed at the request of an attorney. *Ballard v. Eighth Judicial Dist. Court*, 106 Nev. 83, 85, 787 P.2d 406, 407 (1990). Discovery materials are not privileged if the investigation would have taken place in the ordinary course of business without the involvement or presence of an attorney. *Columbia/HCA Healthcare Corp. v. Eight Judicial Dist. Court*, 113 Nev. 521, 527, 936 P.2d 844, 848 (1997). The attorney-client privilege applies to insurers only when the statement is taken by the insurer at the express direction of counsel for the insured. *Ballard*, 113 Nev. at 85–6, 787 P.2d at 407–08.

Discoverability of Reserves

There is no state law on point. Federal decisions state that while not privileged, reserves information is generally irrelevant and need not be produced. *Residential Constructors, LLC v. Ace Prop. & Cas. Ins. Co.*, 2006 WL 3149362, at *16 (D. Nev. Nov. 1, 2006). However, the U.S. District Courts in Nevada have determined that while reserve information is generally irrelevant, it is relevant in cases involving a bad faith claim against the insurer. See

Dogra v. Liberty Mut. Fire Ins. Co., 2:14-CV-01841-GMN, 2015 WL 5086434, at *2 (D. Nev. Aug. 25, 2015).

Discoverability of Existence of Reinsurance and Communications with Reinsurers

The Nevada Supreme Court has not expressly ruled on this issue; therefore, the existence of reinsurance and communication with reinsurers is governed by the normal discovery rules. Thus, information may be obtained regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action. N.R.C.P. 26(b)(1). However, a federal decision noted that in an average insurance coverage dispute, reinsurance policies are generally not relevant, and even if the reinsurance policy were, the burden or expense of discovering reinsurance likely outweighs the benefit. *Progressive Cas. Ins. Co. v. F.D.I.C.*, 2013 WL 5947783, at *9 (D. Nev. Nov. 1, 2013).

Attorney/Client Communications

Nevada recognizes the tripartite relationship; therefore, an insurer holds a privilege with defense counsel as against third parties. *Nev. Yellow Cab Corp. v. Eighth Judicial Dist. Court of Nev.*, 123 Nev. 44, 52, 152 P.3d 737, 742 (2007); *State Farm Mut. Auto. Ins. Co. v. Hansen*, 131 Nev. 743, 747, 357 P.3d 338, 340 (2015).

DEFENSES IN ACTIONS AGAINST INSURERS

Misrepresentations/Omissions: During Underwriting or During Claim

The Nevada Revised Statutes provide as follows with respect to misrepresentations made by insurance applicants. NRS § 687B.110, Representations in applications, provides:

All statements and descriptions in any application for an insurance policy or annuity contract, by or in behalf of the insured or annuitant, shall be deemed to be representations and not warranties. Misrepresentations, omissions, concealment of facts and incorrect statements shall not prevent a recovery under the policy or contract unless either:

1. Fraudulent;
2. Material either to the acceptance of the risk, or to the hazard assumed by the insurer; or
3. The insurer in good faith would either not have issued the policy or contract, or would not have issued it at the same premium rate, or would not have issued a policy or contract in as large an amount, or would not have provided coverage with respect to the hazard resulting in the loss, if the true facts had been made known to the insurer as required either by the application for the policy or contract or otherwise.

NRS § 687B.110(1)–(3).

Under most circumstances involving misrepresentations by an insured to an insurance company, it is "a question of fact for the jury to decide whether the variance between the representation and the existing facts was material." *Powers*, 114 Nev. at 697, 962 P.2d at 601 (citing *Gerhauser v. N.B.M. Ins. Co.*, 7 Nev. 174, 196, 1871 WL 3395 at 12 (1871)). If the deception relates to the claims process rather than to the application process, it is only in the rarest of cases of this kind that the materiality issue can be taken from the jury. *Id.* at 698. The jury must decide whether the false representation is material, substantially related to or, reasonably relevant to the insurance company's investigation. *Gerhauser*, 7 Nev. at 196, 1871 WL 3395 at 12.

The Nevada Supreme Court has stated that the introductory language of NRS § 687B.110 offers hope to

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consumers that insurance contracts will not be made voidable by inaccuracies and omissions in their applications. *Randono v. CUNA Mut. Ins. Group*, 106 Nev. 371, 376, 793 P.2d 1324, 1327 (1990). However, the exceptions largely consume the rule and appear to deny, in most situations, the protection and relief that the statute may have been attempting to grant. *Id.*

Courts have refused to apply either common law or statutory rules against misrepresentation where waiver or estoppel is present. If the insurance company knew or could have reasonably discovered the misrepresentation through an investigation of its own files, then Nevada courts will not apply the rule against misrepresentation to void a contract. *See Violin v. Fireman's Fund Ins. Co.*, 81 Nev. 456, 462 P.2d 287, 290 (1965). However, absent proof of waiver or estoppel, an insurer is not bound to an insurance contract that was induced by misrepresentation. *Id.*

Failure to Comply with Conditions

When a clause is included in an insurance policy that performance of the conditions is a condition precedent to the right of action against the insurer, full recognition will be given to such provision. *State Farm Mut. Auto. Ins. Co. v. Cassinelli*, 67 Nev. 227, 244, 216 P.2d 606, 615 (1950) (overruled by statute for the specific issues of late notice of the claim); *Lucini-Parish Ins. V. Buck*, 108 Nev. 617, 620, 836 P.2d 627, 629 (1992); *Las Vegas Metro. Police Dep't v. Coregis Ins. Co.*, 127 Nev. 548, 553, 256 P.3d 958, 962 (2011). The effect of the failure to perform such conditions precedent is described in varying language. Nevada courts have held that the failure “constitutes good ground for the forfeiture of the indemnity”; that by the failure to comply the assured had “forfeited his right to rely on the policy”; that the assured was bound to give the required notice “if it wanted to save the policy”; that the failure “released defendant;” that the assured, by reason of the failure, was “relieved from liability”; that the failure was “a bar to recovery”; that by reason of the failure the insurer “ceased to be liable;” (and) that the failure was “fatal to a recovery” on the policy. *Id.*

Furthermore, an insured’s failure to submit to an IME qualifies as a breach of the insurance contract and precludes the policy holder from recovering under the policy, even if he/she subsequently undergoes the IME, as her failure to submit to an IME when initially requested still qualified as a violation of coverage. *Schwartz v. State Farm Mut. Auto. Ins. Co.*, 2009 WL 2197370, at *7 (D. Nev. July 22, 2009).

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

Ordinarily, the insured must cooperate with the insurer. He may not settle with the claimant without breaching the cooperation clause in the policy. *See Hansen v. State Farm Mut. Auto. Ins. Co.*, 2012 WL 6205722, *4 (2012). The right and duty to defend affords an insurer the right to control the defense. *Id.* at *5. Generally, Nevada considers an insured’s duty to cooperate as an unambiguous requirement or condition precedent to an insurer’s obligation to provide coverage. *See Valentine v. State Farm Mut. Auto. Ins. Co.*, 105 F. Supp. 3d 1176, 1183 (D. Nev. 2015). On the other hand, any breach of the insurer’s duties deprives the insured of the security that he has purchased because the breach leaves him exposed to personal judgment and damage which may exceed the policy limits. *Hansen*, 2012 WL 6205722 at *4. Accordingly, when such a breach occurs, the insured is generally held to be free from his obligations under the cooperation clause, and thus, may settle with the claimant. *Id.* Moreover, when an insurer breaches its obligations under an insurance policy, such as its duty of good faith and fair dealing, it may be held to be the proximate cause of any damages arising from a foreseeable settlement or excess judgment. *Miller*, 125 Nev. at 314, 212 P.3d at 327-28. However, insurers are free to challenge the amount of any such judgment. *Id.*

Preexisting Illness or Disease Clauses

- **Statutes**

Nevada used to define the term “preexisting condition” in NRS § 689A.585 as follows:

“Preexisting condition” means a condition, regardless of the cause of the condition, for which medical advice, diagnosis, care or treatment was recommended or received during the 6 months preceding the effective date of the new coverage. The term does not include genetic information in the absence of a diagnosis of the condition related to such information.

However, this definition was repealed by the Nevada Legislature and the repeal was approved by the Governor on May 15, 2019. The repeal went into effect on January 1, 2020. See *HEALTH INSURANCE—MANDATES*, 2019 Nevada Laws Ch. 61 (A.B. 170).

Other statutory provisions regarding preexisting conditions include: NRS § 689B.450 and NRS § 689C.082, which further define the term “preexisting condition,” and were both similarly repealed by the Nevada legislature in 2019; and NRS § 689B.500 and NRS § 689C.190, which regulate coverage of preexisting conditions under group health insurance policies. Moreover, the Nevada legislature now requires that health insurance companies not deny, or limit coverage based on a person’s pre-existing condition, in fact, the statute requires that health insurance companies provide coverage regardless of preexisting conditions. NRS § 689A.032. Further, NRS § 689B.500 was amended to state that a health insurance carrier must provide a health benefit plan to any group regardless of any preexisting conditions in the group, rather than state that an insurance carrier cannot deny coverage based on a preexisting condition, as it was written previously. See 2019 Nevada Laws Ch. 61 (A.B. 170). NRS § 689C.190 was similarly amended. See *Id.*

- **Case Law**

In Nevada, there have been no cases specifically interpreting preexisting illness clauses in insurance policies. However, clauses incorporated within an insurance contract generally will be construed as written absent any ambiguity; only when ambiguity exists will Nevada courts go beyond the language of the policy and consider the intent of the parties, the subject matter of the policy, and the circumstances surrounding issuance. *Farmers Ins. Exchange v. Young*, 108 Nev. 328, 333 n.3, 832 P.2d 376, 379 n.3 (1992).

If ambiguities exist, the policy will be judged from the perspective of one not trained in law or insurance; the ambiguity will be construed against the drafting party and in favor of the insured. *Stonik*, 110 Nev. at 67, 867 P.2d at 391. Moreover, as noted previously in Section VII.D.1, any clauses in health insurance contracts which restrict, limit, or deny coverage because of pre-existing conditions will likely now be determined as unlawful in Nevada. See NRS § 689A.032.

Statutes of Limitations and Repose

The statute of limitations in an insurance coverage action depends upon whether the plaintiff asserts a cause of action based upon contract or tort theories. Actions based upon breach of contract are subject to a six-year limitations period. NRS § 11.190. However, an action sounding in tort, including a bad faith breach of an implied

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covenant of good faith, has a four-year limitations period. See *Davis v. State Farm Fire & Casualty Co.*, 545 F. Supp. 370, 372 (D. Nev. 1982). These run from the date of denial or breach. Generally, cases involving personal injury or wrongful death have a two-year statute of limitations. NRS § 11.190(4); *Crabb v. Harmon Enterprises, Inc.*, 130 Nev. 1167 (2014).

TRIGGER AND ALLOCATION ISSUES FOR LONG-TAIL CLAIMS

Trigger of Coverage

In first-party progressive property loss cases, Nevada has adopted the “manifestation rule.” *Jackson v. State Farm Fire & Casualty Co.*, 108 Nev. 504, 508-09, 835 P.2d 786, 789 (1992). Manifestation of loss is defined as “that point in time when appreciable damage occurs and is or should be known to the insured, such that a reasonable insured would be aware that his notification duty under the policy has been triggered.” *Id.*, 835 P.2d at 790 (citing *Prudential-LMI Comm. Ins. Co. v. Superior Court*, 51 Cal.3d 674, 798 P.2d 1230 (1990)). The manifestation date will generally be a question of fact; nonetheless, summary judgment may be appropriate where the undisputed evidence establishes that no damage had been discovered before a given date. *Id.*

The Nevada Supreme Court has not specifically addressed the issue of which trigger of coverage theory, manifestation or continuous exposure, should apply to third-party insurance cases. *Gary G. Day Constr. Co. v. Clarendon Am. Ins. Co.*, 459 F. Supp. 2d 1039, 1045–46 (D. Nev. 2006). In *Gary G. Day Constr. Co.*, the district court determined it need not speculate as to which theory Nevada Courts would adopt, as it found the policy language at issue to unambiguously set forth the requirements triggering coverage under the policy. *Id.* at 1046. However, an insurance carrier has a duty to defend and a duty to indemnify its insured; the duty to defend is triggered when the potential for indemnification arises and continues until the potential for indemnification ceases. *Nautilus Ins. Co.*, 137 Nev. Adv. Op. 10, 482 P.3d at 687 (2021); see Section IV.A.1.

Allocation Among Insurers

There is no bright line rule for determining how a court will apportion a loss among multiple insurers. However, with respect to motor vehicle insurance, the Nevada Supreme Court has determined where one policy explicitly defines its liability, and the other does not, the policy with the more specific language controls. *Alamo Rent-A-Car v. State Farm Mut. Auto. Ins. Co.*, 114 Nev. 154, 158, 953 P.2d 1074, 1074 (1998). In addition, under a “Coordination of Benefits” provision, if an insured's benefits under more than one policy exceed his medical expenses, the insurers' liability is determined on a pro rata basis. NRS § 689A.230; *State Farm Mut. Auto. Ins. Co. v. Cramer*, 109 Nev. 704, 708, 857 P.2d 751, 754 (1993).

According to the U.S. 9th Circuit Court of Appeals, Nevada has not adopted the California “horizontal rule” finding that when faced with this situation, the horizontal exhaustion rule does not apply when the language of the relevant policies provides specific guidance on payment priority. *Vigilant Ins. Co. v. Lincoln Gen. Ins. Co.*, 362 Fed. Appx. 841, 843 (9th Cir. 2010). Moreover, Nevada public policy is in favor of construing insurance policies narrowly against the insurer and in favor of coverage. When ambiguity in the language of a policy exists, the court considers not merely the language, but also the intent of the parties, the subject matter of the policy, and the circumstances surrounding its issuance. *Id.* at 843-44.

CONTRIBUTION ACTIONS

Claim in Equity vs. Statutory

Nevada treats contribution actions in equity and statutorily created contribution actions under NRS § 17.245 equally. NRS § 11.190(2)(c) sets a four (4) year statute of limitations to bring a contribution claim once there is a settlement or judgment against the defendant. This is because the court views a settlement or judgment as a quasi-contract, not based on an instrument or writing. However, contractually based contribution claims fall

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under NRS § 17.285 and therefore the statute of limitation to commence a contribution action within 1 year after the judgment has become final by lapse of time for appeal or after appellate review. *Saylor v. Arcotta*, 126 Nev. 92, 95, 225 P.3d 1276, 1278 (2010).

Elements

In Nevada, the elements for a claim in equity and statutory claim are essentially the same. Contribution claims exists when there are two or more tortfeasors who are jointly and severally liable tortfeasors “for the same injury or wrongful death” whether or not a judgment has been filed a party may file a contribution claim against joint tortfeasors. NRS § 17.285.

DUTY TO SETTLE

The Nevada Supreme Court has discussed the duty to settle in the context of an automobile uninsured motorist policy. *Miller*, 125 Nev. at 305, 212 P.3d at 318. In that case, the Nevada Supreme Court held that the duty to defend includes the right to control settlement and litigation against the insured. *Id.* at 308–09, 212 P.3d at 324–25. This likewise imposes the duty of good faith and fair dealing in settlement negotiations. Therefore, if an insurer fails to adequately inform an insured of a known reasonable settlement opportunity prior to the filing of a lawsuit, the insurer may breach its duty of good faith and fair dealing. *Id.* at 309, 212 P.3d at 325. If the insurer fails to adequately inform an insured of such an opportunity after the filing of a lawsuit, the insurer has breached its duty to defend against lawsuits. *Id.* at 312, 212 P.3d at 327.

The Court then went on to state that a failure to adequately inform of settlement opportunities is a “factor” in a bad faith claim. *Id.* When evaluating whether the failure to settle is bad faith, the following factors are to be considered:

1. The probability of the insured’s liability;
2. The adequacy of the insurer’s investigation of the claim;
3. The extent of damages recoverable in excess of policy coverage;
4. The rejection of offers in settlement after trial;
5. The extent of the insured’s exposure as compared to that of the insurer; and
6. The nondisclosure of relevant factors by the insured or insurer.

Id. at 312, 311 P.3d at 326. If an insurer fails to settle or fails to inform an insured of a reasonable opportunity to settle, it can be considered the proximate cause of all damages arising from a foreseeable settlement or excess judgment. *Id.* at 312, 312 P.3d at 327.

Likewise, NRS § 686A.310(1) of the Nevada Unfair Claims Settlement Practices Act makes an insurer’s failure to promptly settle a claim actionable:

1. Engaging in any of the following activities is considered to be an unfair practice:
 - e. Failing to effectuate prompt, fair and equitable settlements of claims in which liability of the insurer has become reasonably clear.
2. . . . an insurer is liable to its insured for any damages sustained by the insured as a result of the commission of any act set forth in subsection 1 as an unfair practice.

LH&D BENEFICIARY ISSUES

Generally, an intended third-party beneficiary is bound by the terms of a contract even if he/she is not a signatory. Whether an individual is an intended third-party beneficiary, however, depends on the parties’ intent, gleaned from reading the contract as a whole in light of the circumstances under which it was entered. *Canfora v.*

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Coast Hotels & Casinos, Inc., 121 Nev. 771, 779, 121 P.3d 599, 605 (2005).

Change of Beneficiary

The Nevada Supreme Court has held that neither a divorce decree that lacks the necessary, specific language nor an unsigned, undated change of beneficiary card is sufficient to establish the insured's intent to change his designated beneficiary. *Ohran v. Sierra Health & Life Ins. Co., Inc.*, 111 Nev. 688, 690–91, 895 P.2d 1321, 1322–23 (1995).

Effect of Divorce on Beneficiary Designation

Divorce revokes any revocable disposition of property by operation of law between former spouses, unless the express terms of a governing instrument or a court order provide otherwise. *Primerica Life Ins. Co. v. Abah*, 2014 WL 12791942, at *1 (D. Nev. Oct. 16, 2014) (citing NRS § 111.781(1)(a)). An oral agreement as to property division does not divest an ex-wife or ex-husband of any insurance benefits of the ex-spouse absent a written agreement to the contrary. *Ohran*, 111 Nev. at 690, 895 P.2d at 1322.

INTERPLEADER ACTIONS

Availability of Fee Recovery

In Nevada, there have been no holdings specifically interpreting the availability of fee recovery by insurers in interpleader actions. However, in Nevada, generally a statute must authorize the recovery of costs and attorney's fees. *City of Las Vegas v. Sw. Gas Corp.*, 90 Nev. 178, 179, 521 P.2d 1229, 1230 (1974).

In insurance cases, the Nevada Supreme Court has held that the insurer disclaims any interest in the sum it deposits with the court when it files interpleader. *Farmers Ins. Exch. v. Civil Serv. Emps. Ins. Co.*, 94 Nev. 733, 733, 587 P.2d 420, 420 (1978); compare *Michel v. Eighth Judicial Dist. Court ex rel. County of Clark*, 117 Nev. 145, 17 P.3d 1003 (2001) (permitting the stakeholder's attorney to recover attorney's fees from the deposited sum where the stakeholder was not an insurer). Therefore, the court seemingly disfavors awarding attorneys' fees to the insurer from the deposited sum. The dispute is likely to be controlled by the specific contract language.

Differences in State vs. Federal

The key difference is that in the 9th Circuit, “[g]enerally, courts have discretion to award attorney fees to a disinterested stakeholder in an interpleader action.” *Abex Corp. v. Ski's Enterprises, Inc.*, 748 F.2d 513, 516 (9th Cir. 1984). The 9th Circuit recognizes that interpleader by an insurer offers two benefits. First, it benefits all parties by “promoting early litigation on the ownership of the fund, thus preventing dissipation.” *Trustees of Directors Guild of Am.-Producer Pension Benefits Plans v. Tise*, 234 F.3d 415, 426 (9th Cir. 2000), *opinion amended on denial of reh'g*, 255 F.3d 661 (9th Cir. 2000) (quoting *Schirmer Stevedoring Co. Ltd. v. Seaboard Stevedoring Corp.*, 306 F.2d 188, 193 (9th Cir. 1962)). Second, it allows insurance companies to “disclaim[] any position as to which of the claimants is entitled to the fund.” *Id.*

The amount of attorneys' fees awarded in the 9th Circuit is generally modest in order to avoid depleting the fund at the expense of those who are entitled to it. *Id.* at 427. Fees that are compensable by the Plaintiff insurer include “preparing the complaint, obtaining service of process on the claimants to the fund, and preparing an order discharging the plaintiff from liability and dismissing it from the action.” *Id.* at 426–27. Attorneys' fees are limited to those that are incurred in filing and obtaining a release from liability, not litigation, because an interpleader plaintiff must be a disinterested party to the litigation. *Id.* at 426.