

# DIGEST OF INSURANCE LAW

## NEW MEXICO

Courtesy of  
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Albuquerque, New Mexico

### CIVIL JUDICIAL SYSTEM

#### Courts of Original Jurisdiction

**Municipal Court.** Municipal courts exist where a municipality's population is between 2,500 and 5,000 or the municipality is located in a county whose population is less than 200,000. N.M. Stat. Ann. §35-14-1. Municipal courts have jurisdiction over all offenses and complaints under ordinances of the municipality. N.M. Stat. Ann. §35-14-2. A municipality whose population is 1,500 or less may designate jurisdiction over its municipal ordinances to its county's magistrate court. N.M. Stat. Ann. §35-14-1.

**Magistrate Court.** Each county with a population of less than 200,000 has a magistrate court with civil jurisdiction for claims not exceeding \$10,000, excluding interests and costs. N.M. Stat. Ann. §§35-1-1 through 35-3-3. Magistrate courts' criminal jurisdiction is limited to minor crimes. N.M. Stat. Ann. §35-3-4. Magistrate courts have no jurisdiction in equity, domestic relations, malicious prosecution, libel, slander, writs of habeas corpus, or land titles. N.M. Stat. Ann. §35-3-3. They are not courts of record, but juries are available. N.M. Stat. Ann. §§35-1-1, 35-8-1. Magistrate judgments are appealable to district courts for trials de novo. N.M. Stat. Ann. §35-13-2.

**Metropolitan Court.** Metropolitan courts exist in counties with populations greater than 250,000; Bernalillo County is the only county with a metropolitan court in the state of New Mexico. N.M. Stat. Ann. §34-8A-1. [www.metrocourt.state.nm.us](http://www.metrocourt.state.nm.us). The county and metropolitan courts have co-extensive jurisdiction over all offenses and complaints under county ordinances, municipal ordinances located within county, and civil actions not greater than \$10,000, exclusive of interest and costs. N.M. Stat. Ann. §34-8A-3. Metropolitan courts do not have jurisdiction over ordinances of municipalities with populations between 2,500 and 5,000 or uncontested municipal parking violations. *Id.* Trial by jury is available in metropolitan court. N.M. Stat. Ann. §34-8A-5. Records are available and decisions are appealable to district courts. N.M. Stat. Ann. §34-8A-6.

**Probate Court.** Probate courts are courts of record. There is one in each county. N.M. Stat. Ann. §34-7-1 *et seq.*

**District Court.** District courts have unlimited civil and criminal jurisdiction, both legal and equitable, and concurrent jurisdiction with probate courts. They have appellate jurisdiction of cases arising in magistrate and metropolitan courts. Trial de novo is available in appeals from magistrate court only. State is divided into thirteen judicial districts. N.M. Const. art. VI, § 13. N.M. Stat. Ann. § 34-6-1.

#### Appellate Courts

**Supreme Court.** The Supreme Court has original appellate jurisdiction in appeals from district courts in which there is imposed a sentence of death or life imprisonment; from granting of writs of habeas corpus and in any other matter specifically reserved to it; by certiorari to Court of Appeals where their decision conflicts with Supreme Court opinion or one of its own decisions, or involves significant constitutional question or one of substantial public interest; or in matters certified to it by Court of Appeals. Supreme Court must consist of at least 5 Justices. N.M. Const. art. VI.

**Court of Appeals.** Has appellate jurisdiction of any civil action not specifically vested in the Supreme Court. NMRA, Rule 12-102(B). The Court of Appeals must have at least 7 judges. N.M. Const. art. VI. No opinion of New Mexico Court of Appeals shall be published until after time has expired for review of decision by the New Mexico Supreme Court.

## LAW

### Abbreviations

- L. – Session Laws enacted in biennial sessions of the legislature, followed by year of enactment.
- N.M. – New Mexico Reports.
- N.M. Stat. Ann. – New Mexico Statutes Annotated 1978, as amended.
- P. – Pacific Reporter.
- P.2d – Pacific Reporter, Second Series.



P.3d – Pacific Reporter, Third Series.  
 S.C.R.A. – Supreme Court Rules Annotated.  
 NMS – New Mexico Supreme Court decision.  
 NMCA – New Mexico Court of Appeals decision.

## ACCIDENT AND HEALTH INSURANCE

See “DISABILITY” and “WORKER’S COMPENSATION, OCCUPATIONAL DISEASE.”

**Collections.** Life, accident, and health insurance benefits are exempted from the creditor process, with “accident insurance” understood to include proceeds from an uninsured motorist policy. N.M. Stat. Ann. § 42-10-3. *In re: Portal*, 2002 NMSC 011, 132 N.M. 171, 45 P.3d 891.

**Oral Contract.** An oral contract for insurance is effected when parties have agreed upon subject matter, risk to be insured against, duration of risk, amount of insurance, rate of premium and identity of parties. *Ellingwood v. N.N. Investors*, 111 N.M. 301, 805 P.2d 70 (1991).

**Notice of Cancellation.** Statutory requirement that insured receive 10-day notice to of cancellation does not apply to life insurance or when cancellation is based on nonpayment. N.M. Stat. Ann. §59A-18-29 (A). *Chavez v. American Life & Cas.*, 117 N.M. 393, 872 P.2d 366 (1994).

**Accord and Satisfaction.** Where a policy provides double indemnity for accidental death, acceptance of the amount named in the policy in full settlement is not accord and satisfaction barring recovery of double indemnity. *Buel v. Kansas City Life*, 32 N.M. 34, 250 P. 635 (1926).

**Contribution.** Under standard pro-ration clause, insurer may avail itself of limitation of liability therein reserved regardless of correctness of answers in application for policy under which recovery is sought and even though answers do not void policy, if it is disclosed that insured had existing insurance, or afterwards acquired insurance, covering same loss and gave no notice thereof. *Gilbert v. Inter-Ocean*, 41 N.M. 463, 71 P.2d 56 (1937).

**Disease Induced by Accident.** Where a policy excluded loss caused by disease or by medical procedures, coverage was thereby excluded for loss of insured’s left arm resulting from improper insertion of IV needle, although an unintended occurrence or mistake, occurred during medical treatment of insured’s diabetic condition. *Castorena v. Colonial Life*, 107 N.M. 460, 760 P.2d 152 (1988).

**ERISA.** A third-party healthcare provider is not preempted by the Employee Retirement Income Security Act (ERISA) from seeking payment of claims based on theories sounding in contract and promissory estoppel under state law. In short, where such a party alleges that the insurer or its agent promised payment of claims to a provider, that promise stands independently, and can support a lawsuit that ERISA does not preempt to collect the promised funds. *Alliance Health of Santa Teresa, Inc. v. National Presto Indus., Inc.*, 2005 NMCA 053, 113 P.3d 360.

**Fraud – Burden of Proof.** In cases of fraud by insured, substantial prejudice need not be shown. Substantial prejudice must be shown in cases of misrepresentation, concealment, and noncooperation by the insured. A presumption of prejudice arises upon proof of a breach of the policy provisions. If the insurance company relies on the presumption it may move for summary judgment and the burden will then shift to insured to produce evidence showing that the insurer was not prejudiced. The requirement of substantial prejudice is not limited to situations where innocent third parties are injured. *Eldin v. Farmers Alliance Mut. Ins.*, 119 N.M. 370, 890 P.2d 823 (Ct. App. 1994).

**Fraud – Insurance Application.** In action to recover disability benefits under health and accident policy by insured who had falsely stated in application that she was carrying no other accident or health insurance, insurer, which did not show that statement had been made fraudulently or with intent to deceive, had burden to show that it was material to acceptance of risk within provision of policy barring recovery. *Gilbert v. Inter-Ocean*, 41 N.M. 463, 71 P.2d 56 (1937). False, though innocent, representation in application that applicant was not pregnant was held to defeat liability for death occurring at subsequent childbirth. *Vigil v. American Ins.*, 37 N.M. 44, 17 P.2d 936 (1932).

## ACCIDENTAL MEANS

**Liability Threshold.** Insurer’s liability for injury or death by “accidental means” arises when an accident is the proximate efficient cause of loss, rather than when the accident is literally the sole cause. *Armijo v. World Ins. Co.*, 78 N.M. 204, 429 P.2d 904 (1967). New Mexico follows Cardozo’s approach, which does not distinguish between “accidental means” and “accidental results.” *Vallejos v. Colonial Life & Acc. Ins. Co.*, 91 N.M. 137, 571 P.2d 404 (1977).

**External, Violent, and Accidental Cause.** Alkali poisoning resulting in death from drinking milk from cows that had eaten goldenrod is within terms of life policy indemnifying against death resulting from effects of “injury, through external, violent and accidental



cause.” *Buel v. Kansas City Life*, 32 N.M. 34, 250 P. 635 (1926).

**Violent External Cause.** Where tympanum of ear was ruptured by external violence in diving into water, a jury finding that injury resulted from “violent external causes” was supported. *Rodey v. Travelers*, 3 N.M. 543, 9 P. 348.

**Earth Movement.** Term “earth movement,” within policy excluding from coverage against collapse of buildings and structures at uranium mill any loss or damage caused by or resulting from flood, earthquake, landslide, subsidence or any other earth movement, was correctly construed as applying only to naturally occurring phenomenon; not applying to property damage losses occasioned when tailings dam at uranium mill failed. *United Nuclear Corp. v. Allendale Mut. Ins. Co.*, 103 N.M. 480, 709 P.2d 649 (1985).

**Narcotics.** When person dies from injection or consumption of narcotics without intention to injure himself or commit suicide, his death is to be considered “accident,” or brought about by “accidental means” within meaning of accident insurance policy. *Vallejos v. Colonial Life & Acc. Ins. Co.*, 91 N.M. 137, 571 P.2d 404 (1977).

## ADJUSTERS

**Definition.** An “adjuster” is any person that investigates or adjusts losses or claims arising under insurance contracts on behalf of insurer or self-insurer, for fee, commission, or other compensation. N.M. Stat. Ann. §59A-13-2. All adjusters must be licensed. N.M. Stat. Ann. §59A-13-3. Applicant for adjuster’s license shall file with Superintendent of Insurance surety bond in favor of Superintendent of not less than \$10,000. N.M. Stat. Ann. §59A-13-5.

**Claims against Adjusters.** A plaintiff may pursue a claim against insurer’s adjuster for breach of the duty of good faith and fair dealing in handling a claim despite absence of contract between insured and adjuster. *Del-laira v. Farmers Ins. Exchg.*, 2004 NMCA 132, 102 P.3d 111. An adjuster is an entity related to or pursuant to an agreement with the insurer issuing the policy who has control over and makes the ultimate determination regarding the merits of insured’s claim. *Id.* An entity that controls the claim determination process may have an incentive similar to that of an unscrupulous insurer to delay payment or coerce an insured into a diminished settlement. *Id.* The entity acts as an insurer and is therefore bound within the special relationship created through the insurance contract. *Id.* An insured’s expectations of good faith handling and ultimate determination of his or her claim for benefits by the insurer extends no

less to an entity that both handles and determines the claim than to the insurer issuing the policy. *Id.*

## AGE

See “AUTOMOBILES” and “NEGLIGENCE.”

## AGENTS AND BROKERS

**Broker. (Non-Resident Broker.)** A Broker is person generally who, not being agent of insurer, as independent contractor and on behalf of insured solicits, negotiates, or procures insurance or annuity contracts or renewal or continuation thereof for insureds or prospective insureds other than himself. Non-resident broker is a broker residing or domiciled in a state other than New Mexico or residing or domiciled in a foreign country. N.M. Stat. Ann. §59A-12-3.

**Broker as Insured’s Agent.** Statute providing that, in any controversy between insured or his beneficiary and insurer, issuing insurance through his licensed agent at request of broker, broker shall be held to be agent of insured has purpose of protecting insured; thus it should not be construed or applied in manner which would allow insurers to mislead those who reasonably rely on their agent’s representations and should be held to be a restrictive interpretation because it is derogation of common law of agency. *Fryar v. Employers Ins. of Wausau*, 94 N.M. 77, 607 P.2d 615 (1980). Agency contracts between insurer and agent for indefinite duration are terminable at will. *See Melnick v. State Farm*, 106 N.M. 726, 749 P.2d 1105 (1988).

**Agent.** An agent is a person appointed by an insurer authorized to transact insurance in New Mexico, who solicits applications for insurance or annuity contracts on its behalf, who countersigns insurances policies/contracts, and who performs other services relative to transactions that the insurer may authorize. N.M. Stat. Ann. §59A-12-2.

**Solicitor.** An agent may employ a solicitor who may solicit insurance and perform such other duties in handling agent’s business as agent may authorize. N.M. Stat. Ann. §59A-12-4, -14. Person who solicits insurance for one agency, receiving compensation in commission, and obtains data for applications, delivers policies, and collects premiums held employed solicitor and not broker. *Berry v. Pennsylvania Fire*, 33 N.M. 661, 274 P. 169 (1928).

**Authority.** Test of agent’s authority are the duties assigned to him and authority and obligations that go with such assignment. Issue of extended authority of insurance agent generally, whether actual or apparent, is usually one of fact. *See Pribble v. Aetna Life Ins. Co.*, 84



N.M. 211, 501 P.2d 255 (1972); *Phillips v. United Serv. Auto. Ass'n*, 91 N.M. 325, 573 P.2d 680 (Ct. App. 1977).

Agent Duty. Agent owed life insurer duty to disclose any fact that might affect insurer's interests, including applicant's deteriorating health prior to delivery of policy. *Jackson Nat. Life Ins. Co. v. Receconi*, 113 N.M. 403, 827 P.2d 118 (1992).

Duty of reasonable care is imposed on title insurance agents that is independent of any duties arising out of insurance contract. *Cottonwood Enterprises v. McAlpin*, 111 N.M. 793, 810 P.2d 812 (1991). Title company, absent contractual duty, still had statutory duty to vendor to search real property title, and failure to discover defects in title was actionable by vendor. *Ruiz v. Garcia*, 115 N.M. 269, 850 P.2d 972 (1993).

Automobile insurer has no duty to make purchaser aware of importance of uninsured motorist (UM) coverage before accepting rejection of UM coverage. Purchaser must only be fully informed of fact of rejection, rather than significance of rejection, and insurance agent has no duty to inform prospective purchasers of ramifications of their decision. Insured's rejection of uninsured motorist coverage was valid and effective, even though insurance agent did not explain significance of UM coverage at time of rejection; language of UM rejection form and documents accompanying policy clearly informed insureds that no UM coverage had been purchased or would be provided. N.M. Stat. Ann. §66-5-301; *Vigil v. Rio Grande Ins. of Santa Fe*, 124 N.M. 324, 950 P.2d 297 (Ct. App. 1997).

Notice. Notice to agent, or knowledge imparted to him, is notice to insurer, regardless of whether agent actually communicates information to insurer. *Jackson Nat. Life Ins. Co. v. Receconi*, 113 N.M. 403, 827 P.2d 118 (1992).

Binding Insurer. Agent may bind insurer by oral agreement for insurance that is to be effective immediately only if such act is within the actual or apparent authority of agent. *Ellingwood v. N.N. Investors Life Ins. Co., Inc.*, 111 N.M. 301, 805 P.2d 70 (1991). Negligent representations of special agents as to scope or interpretation of insurance contract are not binding on insurer unless made within their scope of authority. *Union Life v. Burk*, 169 F.2d 235 (10<sup>th</sup> Cir. 1948).

Misrepresentations and Improper Conduct. In enacting the Unfair Insurance Practices Act (N.M. Stat. Ann. §59A-16-1 *et seq.*) the legislature did not intend to preclude claims by the state under other laws for misrepresentations or alleged improper conduct relating to insurance activities. *Stratton v. Gurley Motor Co.*, 105 N.M. 803, 737 P.2d 1180 (Ct. App. 1987).

Fraud. Unless assured by act or neglect that adjustor aided a fraud in obtaining life policy on a fictitious application, insurer is bound by its agents' acts, is estopped from denying truth of application, and it cannot be said that minds of parties did not meet and contract eventuate. *Gallegos v. Kansas City Life*, 34 N.M. 579, 286 P. 420 (1930).

Statements inserted in application attached to policy known by agent to be false are not binding on assured unless latter participated in fraud. *Id.* Insured's failure to read application when signing and failure to read copy of application attached to policy as required by statute, does not relieve insurer whose agent falsified answers. *Griego v. New York Life*, 44 N.M. 330, 102 P.2d 31 (1940).

Liability. Agent soliciting casualty insurance is liable to his client for failure to procure policy ordered from him in amount and kind of coverage client would have had if policy ordered had been procured. *Brown v. Cooley*, 56 N.M. 630, 247 P.2d 868 (1952); *Stoes Bros. Inc. v. Freudenthal*, 81 N.M. 61, 463 P.2d 37 (Ct. App. 1969); *Topmiller v. Cain*, 99 N.M. 311, 657 P.2d 638 (Ct. App. 1983).

Insurance agent who agreed to "take care of everything" when insured's business policy was cancelled, satisfied legal duty by procuring another insurance carrier which was willing to insure insured's business. *Corbin v. State Farm*, 109 N.M. 589, 788 P.2d 345 (1990).

Medical insurer is liable to insured employer for costs of defense incurred defending a retaliatory discharge claim brought by an employee because they filed a worker's compensation claim, as such claims would not be filed if insurer's agent had not misrepresented that employer's policy covered on the job injuries. *Charter Services, Inc. v. Principal Mut. Life Ins. Co.*, 117 N.M. 82, 868 P.2d 1307 (1994).

## ARBITRATION

No Duty to Submit to Court. Automobile insurer had no duty or obligation to submit issue of liability, as between it and insured's administrator, under uninsured motorist coverage to court rather than through arbitration as specified in the policy and insurer could not be charged with bad faith in pursuing arbitration to which administrator participated. *Chacon v. Mountain States*, 82 N.M. 602, 485 P.2d 358 (Ct. App. 1971).

Policy Terms. Where claimant for uninsured motorist coverage made claim under policy which specified that matters upon which insurer and any person making claim disagree would be settled by arbitration, valid agreement to arbitrate between claimant and insurer existed, despite claimant's argument that he should not be



bound by terms of policy since he did not sign policy. *Wood v. Millers Nat. Ins.*, 96 N.M. 525, 632 P.2d 1163 (1981).

**Court Ordered Arbitration.** Under the New Mexico Arbitration Act, NMSA 1978, §§44-7A-1 to -32 (1971, as amended through 2004), the court is compelled to order the parties to arbitrate unless it finds that there is no enforceable agreement to arbitrate. If the court finds that there is no enforceable agreement, it may not order the parties to arbitrate. A mere request for arbitration cannot by itself be sufficient to waive the right to contest arbitration and require proof of the existence of an arbitration agreement in court. *Alexander v. Calton & Associates, Inc.*, 2005-NMCA-34, 110 P.3d 509.

**Scope.** Scope of matters submitted to arbitrators should be determined by arbitration clause in underinsured motorist (UIM) insurance policy and parties' instructions to arbitrators, and not by the order of the trial court staying the proceedings pending arbitration. Matter of offset that had already been determined by parties was not arbitrable. *Casias v. Dairyland Ins. Co.*, 126 N.M. 772, 975 P.2d 385 (Ct. App. 1999).

**Illusory Promise.** An arbitration agreement between Plaintiff employee and Defendant employer obtained for continued at-will employment is an illusory promise that not supported by consideration. Defendant's promise to arbitrate was illusory because employer retained the ability to unilaterally change the arbitration agreement. Since no contract containing an enforceable agreement to arbitrate was formed between Plaintiff and Defendant, Defendant's motion to compel arbitration was properly denied. *Piano v. Premier Distributing Co.*, 2005-NMCA-018, 107 P.3d 11.

**Consensual Arbitration Provision.** Insurer's contract's consensual arbitration provision in its standard UM endorsement does not violate New Mexico law or public policy. The Legislature has not expressly required binding arbitration in the adjudication of UM disputes, and the rules and regulations promulgated by the Department of Insurance do not require binding arbitration where the Superintendent of Insurance has approved a substitute UM endorsement that is more favorable to the insured. In the context of UM disputes between insurer and insured, where the UM endorsement provides for arbitration only upon the consent of both parties, and where the Superintendent of Insurance has approved such an endorsement, New Mexico law does not compel binding arbitration. *McMillan v. Allstate*, 2004-NMSC-002, 84 P.3d 65.

**Escape Hatch Clause.** An "escape hatch" arbitration clause giving automobile insurer the right to request trial de novo of awards in excess of the limits of the Manda-

tory Financial Responsibility Act, whether or not by stacking, violates New Mexico public policy and is void as substantively unconscionable. *Padilla v. State Farm*, 2003-NMSC-011, 68 P.3d 901, overruling *Bruch v. CAN Ins.*, 117 N.M. 211, 870 P.2d 749 (Ct. App. 1994).

## ASSIGNMENT

See "FIRE INSURANCE."

**Debt.** Where testator's policies of life insurance named wife as beneficiary, and wife joined with testator in pledging policies as collateral security for loan, whether testator's estate or proceeds of policies should be looked to retire indebtedness was to be determined by testator's intent. *In re Gallagher's Will*, 57 N.M. 112, 255 P.2d 317 (1953).

**Agent's Authority.** Secret limitations on agents' authority, inconsistent with his apparent authority and unknown to those dealing with him, may not defeat validity of agent's agreement to transfer policy to insured's assignee or agent's execution of endorsement to that effect. *Houtz v. General Bonding*, 235 F.2d 591 (10th Cir. 1956). Recognizes validity of oral assignment and assumption of liability policy. *See Id.*

**Disposition of Property.** Subject to certain limitations and restrictions, owner may dispose of his real and personal property, including insurance policies, either inter vivos or by testamentary disposition in such manner as he sees fit. *Harris v. Harris*, 83 N.M. 441, 493 P.2d 407 (1972).

## AUTOMOBILES

See Law Digest Tables.

See "NEGLIGENCE."

**Licensing Requirements.** Minimum age for driver's license is 16 years and 6 months. Applicants between 16 years and 6 months and 18 years must: 1) graduate from a driver's education course including DWI prevention, 2) have a provisional license for the twelve-month period immediately preceding the date of the application for the driver's license, 3) comply with the provisional license's restrictions and requirements, 4) have not been convicted of a traffic offense during the ninety days prior to applying for a driver's license, and 5) must not have been convicted of an offense involving alcohol or drugs during the provisional period. Applicants between 18 and 25 years of age must complete a DWI prevention and education program. N.M. Stat. Ann. §66-5-9. N.M. Stat. Ann. §66-5-5. Minimum age for a license to operate a motor scooter is 13, if driver exam is passed. *Id.*

**Provisional Licensing Requirements.** A provisional license's minimum age is 15 years and 6 months. Appli-

cants must have completed a driver's education course, held an instruction permit for at least six months, and not been convicted of a traffic offense within the 90 days prior to applying for the provisional license. An instruction permit's minimum age is 15; applicants must be enrolled in or have completed a driver education course and must have passed an examination. N.M. Stat. Ann. §66-5-8. N.M. Stat. Ann. §66-5-5.

**Family Purpose Doctrine.** The Family Purpose Doctrine is recognized in New Mexico. There is a presumption of agency between a vehicle's owner and driver. The age of the driver is wholly immaterial. The burden of proof is on the owner to rebut the presumption of agency arising from the doctrine. *Burkhart v. Corn*, 59 N.M. 343, 284 P.2d 226 (1955).

**Exclusions – Umbrella Policies.** Family exclusion provisions contained in umbrella policies involving motor vehicle accidents, are unenforceable as a violation of New Mexico public policy. Once an insurance company offers insurance that is in excess of the limits required by law, whether it is primary vehicle coverage beyond that which is required by statute or umbrella policies which include coverage for motor vehicle accidents, the coverage applies equally to the victims of such accidents whether or not they are family members. *Government Empls. Ins. Co. v. Welch*, 2004- NMSC-014, 90 P.3d 471.

**Exclusions – Mandatory Liability Policies.** Exclusion of coverage for insureds and family members in mandatory automobile liability policies violates the requirements of the New Mexico Mandatory Financial Responsibility Act and such exclusions are contrary to New Mexico public policy. *State Farm v. Ballard*, 2002- NMSC-030, 54 P.3d 537.

**Guest Statute.** Guest statute is unconstitutional as denial of equal protection under 14th Amendment and Art. II §18 of New Mexico Const. since classification imposed by statute is unreasonable, arbitrary, and does not rest upon some ground having fair and substantial relation to objects of legislation. *McGeehan v. Bunch*, 88 N.M. 308, 540 P.2d 238 (1975).

**Imputed Negligence/Joint Enterprise.** Exclusion in garage policy for persons using covered vehicles while in business of servicing vehicles did not apply to accident when, individual who had been given permission to use covered vehicle for purposes of servicing it, was using the vehicle solely for personal reasons. *Kitchens v. Houston General*, 119 N.M. 799, 896 P.2d 479 (1995).

**Last Clear Chance.** Last clear chance doctrine abolished. See *Scott v. Rizzo*, 96 N.M. 682, 634 P.2d 1234 (1981).

**Permissive Use.** Reasonable belief clause stating that no person is insured if using vehicle without reasonable belief in permission to do so does not establish separate category of insured, but restricts coverage available to listed insured persons, and does not resolve issue of liability coverage with respect to driver who reasonably believed that she had owner's consent. *USAA v. National Farmers*, 119 N.M. 397, 891 P.2d 538 (1995). Coverage under omnibus clause extends to any subsequent permittee operating insured vehicle as long as named insured has given his or her initial permission to use vehicle, even if named insured prohibits use by anyone other than initial permittee. *Id.*

**Punitive Damages.** Punitive damages are not recoverable from estate of deceased tortfeasor and, therefore are not recoverable as uninsured motorist (UM) benefits if tortfeasor has died. *Jaramillo v. Providence Washington Ins.*, 117 N.M. 337, 871 P.2d 1343 (1994).

**Carrier for Hire, Definition.** Primary business test determines whether entity is a carrier for hire, subject to Motor Carrier Act: "a carriage is 'for hire' if [the carrier has title to the disputed goods] and the primary business of the carrier is transportation of the goods, but ... the carriage is private if its primary business is the sale of its own goods which the owner transports in furtherance of that business and the transportation is merely incidental thereto." *Progressive Northwestern Ins. Co. v. Martinez*, 125 N.M. 46, 956 P.2d 845 (Ct. App. 1998).

Insured who held title to sand and gravel he transported to his customers, and who did not transport materials for other suppliers, was not "carrier for hire" subject to minimum liability coverage limits set by Department of Transportation. *Progressive Northwestern Ins. Co. v. Martinez*, 125 N.M. 46, 956 P.2d 845 (Ct. App. 1998).

**Common Carrier.** Common carrier is held to highest degree of care. *Cavazos v. Geronimo*, 56 N.M. 624, 247 P.2d 865 (1952). Carrier is not absolved from liability merely because passenger is not injured while in act of alighting or at very spot or moment where or when he alighted. *Thompson v. Anderman*, 59 N.M. 400, 285 P.2d 507 (1955).

**Seat Belts.** N.M. Stat. Ann. §66-7-373(B) provides that nonuse of seat belts is not evidence of fault or negligence, and shall not limit or apportion damages, does not violate separation of powers doctrine. *Mott v. Sun Country*, 120 N.M. 261, 901 P.2d 192 (Ct. App. 1995).

**Service of Process – Non-resident Motorists.** Accomplished by service on Secretary of State as true and lawful agent. Plaintiff must show in complaint or by affidavit that defendant is person contemplated by statute. Copy of process with complaint, order of Court directing

that service be made as provided, and notice that same has been served on Secretary of State must be delivered to defendant personally without the state. Statute contemplates all non-residents or their agents operating motor vehicles on public highways in state. N.M. Stat. Ann. §§66-5-103 to -104. Under this statute defendant must be non-resident at time of accident and not merely at time suit is filed for service to be valid. *Fisher v. Terrell*, 51 N.M. 427, 187 P.2d 387 (1947). (But see "SERVICE OF PROCESS.") Read together, N.M. Stat. Ann. (1978 Comp.) §66-5-219(A), and N.M. Stat. Ann. (1978 Comp.) §§66-5-230 (now §66-5-221) require that insurance policy enable owners of motor vehicles to respond in damages to innocent victims injured by negligent drivers. *Estep v. State Farm*, 103 N.M. 105, 703 P.2d 882 (1985).

Uninsured and Underinsured. In multiple-claimant situations, insured motorists who are covered under an uninsured/underinsured motorist policy and who suffer from injuries resulting from an automobile accident are entitled to collect up to the limit of their underinsurance policy to the extent that their damages exceed the amounts that the tortfeasor's insurer has previously paid to them. *State Farm v. Valencia*, 120 N.M. 662, 905 P.2d 202 (Ct. App. 1995). Passenger injured in one-car accident was not entitled to uninsured/underinsured motorist (UIM) coverage as Class II insured under driver's policy, and thus there was no coverage to "stack" with the UIM coverage provided to passenger as Class I insured under his parents' policy, where driver's policy had \$50,000 limit of UIM coverage but contained offset provision which reduced available amount of UIM coverage by any amounts paid under that policy's liability coverage and passenger was paid full amount of driver's policy's \$50,000 limit of liability coverage. *Samora v. State Farm*, 119 N.M. 467, 892 P.2d 600 (1995).

UM – Notification of Exclusion. Family member who was a class one insured and passenger in vehicle driven by his brother who was an excluded driver under policy, nevertheless had uninsured motorist coverage under policy. Driver exclusion was an ineffective rejection of coverage for a class one insured because the policy failed to notify class one insureds that they were excluded from uninsured motorist coverage. UM coverage for class one insureds was not expressly excluded by the policy. *Phoenix Indem. Ins. Co. v. Pulis*, 2000–NMSC-023, 9 P.3d 639.

UM – Direct Action. Object of uninsured motorist insurance is to protect persons injured in automobile accidents from losses which would otherwise go uncompensated because of tortfeasor's lack of liability coverage. Insured is not first required to bring action against uninsured tortfeasor to establish liability and damages

but may bring direct action on uninsured motorist claim against insurer. *Guess v. Gulf Ins. Co.*, 96 N.M. 27, 627 P.2d 869 (1981).

Stacking. Insurance companies must obtain written rejections of stacking in order to eliminate ambiguity and limit their liability. Where a policy lacks a plain and affirmative declaration that the amount charged represents a single premium for a single amount of coverage, insured is entitled to stack all coverages. This ensures that the insured's reasonable expectations are met and that an insured gets what he or she pays for and no more. *Montano v. Allstate Indem. Co.*, 2004-NMSC-020, 92 P.3d 1255.

UM – Stacking. Stacking is appropriate means to compensate insured for losses suffered through fault of uninsured or under-insured motorist where total payout does not exceed amount of insured's damages. *Konnick v. Farmers Ins. Co. of Arizona*, 103 N.M. 112, 703 P.2d 889 (1985). Insured could stack her own class one coverage with class two coverage for vehicle which she occupied in determining tortfeasor's underinsured motorist status. *Morro v. Farmers Ins.*, 106 N.M. 669, 748 P.2d 512 (1988).

Breach. An insurer must demonstrate it was substantially prejudiced by an insured's breach of insurance policy before being relieved of obligation under the policy. Proof that the insured breached policy provision creates a presumption of substantial prejudice. *State Farm v. Fennema*, 2005–NMSC-010, 110 P.3d 491.

Insurable Interest. Person may have insurable interest in automobile without having title. Person has insurable interest in property by the existence of which he will gain an advantage, or by the destruction of which he will suffer a loss. *L'Allier v. Turnacliiff*, 107 N.M. 382, 758 P.2d 796 (1988).

## AVIATION

No liability to guest by owner or pilot for injury or death unless same result from intentional or reckless conduct. N.M. Stat. Ann. §64-1-20. But see abolishment of GUEST STATUTE (above).

Exclusion in aviation policies against coverage unless an airworthiness certificate was in full force and effect was not ambiguous for failure to specifically refer to federal aviation regulations and operated to preclude recovery for failure of insured to perform a timely annual inspection on aircraft. *See Security Mutual v. O'Brien*, 99 N.M. 638, 662 P.2d 639 (1983).

## BROKERS

See "AGENTS, BROKERS AND SOLICITORS."



## CANCELLATION

Notice. Insurer may cancel insurance policy at any time for nonpayment, and without cause within sixty days of the policy's effective date; notice of pending cancellation is required at least ten days prior to cancellation. After sixty days, a policy may only be canceled for reasonable cause; cancellation may be subject to notice requirement, per the rules and regulations of the Superintendent. N.M. Stat. Ann. §59A-18-29. The 10-day requirement of notice does not apply to life insurance and, generally, notice is not required when basis of cancellation is nonpayment. *Chavez v. American Life & Cas. Ins. Co. of Fargo, ND*, 117 N.M. 393, 872 P.2d 366 (1994).

Insurer is not required to give notice of reasonable cause for cancellation of policy more than 60 days after its issuance. *Corbin v. State Farm*, 109 N.M. 589, 788 P.2d 345 (1990).

Notice need only give insured definite understanding policy is cancelled. No particular form necessary in absence of statutory or policy provisions. *Russell v. Starr*, 56 N.M. 49; 239 P.2d 735 (1952).

Burden. Insurer, having raised defense of cancellation of policy, had burden of proving strict compliance with its own cancellation provisions. *Harris v. Quinones*, 507 F.2d 533 (10<sup>th</sup> Cir. 1974).

Prejudice. Insurer must demonstrate substantial prejudice as result of material breach of insurance policy by insured before insurer will be relieved of its obligations under policy. *Foundation Reserve Ins. Co. v. Esquivel*, 94 N.M. 132, 607 P.2d 1150 (1980). Any material misrepresentations in application for life policy made by agent rather than insured, would not allow insurer to rescind policy. *Jackson Nat. v. Receconi*, 113 N.M. 403, 827 P.2d 118 (1992).

Freedom to Contract. An automobile insurer's decision not to contract at all with a given person is allowable but an insurer's contract entered into with a given person cannot be limited except where permitted by statute or regulation. *Padilla v. Dairyland Ins.*, 109 N.M. 555, 787 P.2d 835 (1990).

## CONSTRUCTION OF POLICY

Exclusionary Clause. Under New Mexico law exclusionary policy language will be enforced so long as its meaning is clear and it does not conflict with public policy as embodied by express statutory language or by legislative intent. *Jimenez v. Foundation Reserve Ins.*, 107 N.M. 322, 757 P.2d 792 (1988). Exclusionary policies are narrowly construed with reasonable expectation of insured providing basis for analysis. Policy may ex-

clude injuries arising from intentional acts if exclusionary clause is clear and does not conflict with statute. When exclusionary clause nullifies coverage of granting clause, court should refuse to apply clause that deprives insured of coverage reasonably understood to be provided. *Knowles v. USAA*, 113 N.M. 703, 832 P.2d 394 (1992). Policy that violates statute protecting insureds is enforceable against insurer. *Jackson Nat. v. Receconi*, 113 N.M. 403, 827 P.2d 118 (1992).

Notice – Portate. Insurer has an implied duty to notify insured with a premium notice after insured submits a written application to convert (portate) from a group to an individual life insurance policy. Policy would cease to make sense and parties' contract could not be honored if decedent were required to remit payment without knowing how much to remit. Therefore, insurer can not rely on insured's failure to remit payment as the basis for denying beneficiary's claim. *Estate of Griego v. Reliance Standard Life Ins. Co.*, 997 P.2d 150, 2000-NMCA-022.

Primary and Secondary Liability. Where insurance policies involved contain "other" or "excess" insurance clauses, which attempt to make the other insurer primarily liable, and such language would leave an insured without any coverage, the policies are held to be "mutually repugnant" and cancel each other out. The test to apply in determining which insurer is primary and which is secondary is the "closest to the risk." The insurer that is closest to the risk is the primary insurer and in *Branchal v. Safeco Ins. Co. of Am.*, 106 N.M. 70, 738 P.2d 1315 (1987), the Court determined that the policy insuring the vehicle that was involved in the accident, rather than the policy insuring the injured passenger, was closest to the risk and primarily liable. In cases not involving automobiles, a broader test is applied determining the "total policy insuring intent" based on the primary policy risks and the primary function of each policy. *State Farm v. Farmers Alliance Mut. Ins. Co.*, 2004-NMCA-101, 134 N.M. 194, 75 P.3d 1179.

Ambiguity of Terms. Although ambiguities in insurance policy must be liberally construed in favor of insured, language is only ambiguous when its meaning is doubtful or when it has a double meaning. *Foundation Reserve v. McCarthy*, 77 N.M. 118 (1966). Determination of whether policy is ambiguous is a question of law for the court. *Martinez v. Allstate Ins. Co.*, 124 N.M. 36, 946 P.2d 240 (1997). As strangers to policy, accident victims were not entitled to benefit of rule that ambiguous policy provisions are to be construed against insurer. *Casias v. Continental Cas. Co.*, 125 N.M. 297, 960 P.2d 839 (Ct. App. 1998).

Rule that ambiguity is construed against insurers that wrote policy does not prevent examination of facts



to determine what parties intended policy language to mean and should not automatically result in decision favorable to insured. *Crawford Chevrolet, Inc. v. National Hole-In-One Ass'n*, 113 N.M. 519, 828 P.2d 952 (1992). Signing of written application for insurance did not preclude evidence that agreement of parties was not integrated in such writing but was the product of representations of the agent that had been reasonably relied upon and accepted by applicant. *Ellingwood v. N.N. Investors Life*, 111 N.M. 301, 805 P.2d 70 (1991).

To extent that insurer in drafting insurance form is responsible for language of policy, any ambiguity will be resolved in favor of beneficiary. To extent that wording of incontestability clause of life insurance policy is prescribed by statute, and not controlled by insurer, language of clause will not be strictly construed against insurer. *Crow v. Capital Bankers Life*, 119 N.M. 452, 891 P.2d 1206 (1995).

Policy ambiguity did not need to be construed in favor of coverage where the question was who is to be included as a class one insured where third party, who is not a named insured or a family member, is seeking coverage under a policy not purchased by the third party. *Jaramillo v. Providence Washington Ins. Co.*, 117 N.M. 337, 871 P.2d 1343 (1994).

Homeowner's policy covers accident at home owned by insured but not listed in policy where the term "insured location" included "any other premises acquired by you during policy period for your use as a residence" despite the fact that the accident occurred before insured moved into home. *Farmers Ins. v. Burton*, 109 N.M. 260, 784 P.2d 1003 (1990).

In evaluating whether insurance contract is ambiguous as to coverage, court can consider four corners of contract, as well as the circumstances surrounding creation of contract. Where liability insurer fails to clearly exclude coverage of punitive damages and insured reasonably expects such coverage, contract will be construed against insurer responsible for drafting contract. Although liability insurance policy did not contain express exclusion of punitive damages award, provision that policy was subject to same exclusions as contained in underlying umbrella policies, one of which contained punitive damages exclusion, was sufficient to exclude coverage for punitive damages. Liability insurance policy, referring to exclusions contained in immediately preceding layer of coverage, without specifying which policy was immediately preceding, was ambiguous as to whether it provided coverage for punitive damages, where not all of preceding policies contained punitive damages exclusion. *Rummel v. St. Paul Surplus Lines Ins. Co.*, 123 N.M. 767, 945 P.2d 985 (1997).

Appellate courts look to the language of an automobile insurance policy in order to establish the risks that insurer and its policyholder assumed when insurance policy was issued. *Nollen v. Reynolds*, 125 N.M. 387, 962 P.2d 633 (Ct. App. 1998).

Exemptions from Collections. N.M. Stat. Ann. §42-10-3 exempting life, accident, and health insurance benefits from creditor process, permits the exemption of proceeds from an uninsured motorist policy as "accident" insurance. *In re Portal*, 2002-NMSC-011, 45 P.3d 891.

Uninsured Motorist. Automobile insurance policy's limitations of recovery of uninsured motorist (UM) benefits were based on damages sustained by insured person, not the number of owners or operators who might be involved. Language relating to the "each accident" limit referred to "bodily injury to two or more persons," not bodily injury caused by two or more persons. *Martinez v. Allstate Ins. Co.*, 124 N.M. 36, 946 P.2d 240 (1997).

Intentional Wrongs. Criminal acts exclusions of physician malpractice policy were not void as against public policy to compensate victims of medical malpractice; rather public policy of not indemnifying insured for intentional wrongs (sexual assault of minor patient) supported exclusions. *New Mexico Physicians Mut. Liab. Co. v. LaMure*, 116 N.M. 92, 860 P.2d 734 (1993).

Offset. Public policy did not entitle guest passenger to recover under both liability and underinsured motorist coverages of negligent host driver's policy which required offset of liability proceeds paid against underinsured benefits. *Mountain States Mut. Cas. Co. v. Martinez*, 115 N.M. 141, 848 P.2d 527 (1993).

Driver Exclusion Endorsement. To be enforceable, driver exclusion endorsement to auto policy must be signed by each named insured. *Tafoya v. Western Farm Bureau Ins. Co.*, 117 N.M. 385, 872 P.2d 358 (1994).

Beneficiary Interest. Where divorce decree or property settlement agreement requires party to keep life insurance policy in effect and to retain specific beneficiary, that beneficiary has vested interest in insurance policy proceeds and may assert that vested interest. *Bernal v. Nieto*, 123 N.M. 621, 943 P.2d 1338 (Ct. App. 1997).

Excess Liability. Excess liability policy stating that liability did not attach until underlying insurer "has paid or has been held liable to pay" total underlying limits did not require full payment of underlying insurance in cash, but permitted finding of excess insurer's liability despite insolvency or bankruptcy of underlying insurer, underlying insurer's refusal to pay, or underlying insurer's negotiation of settlement for less than policy limits. Policy

expressly allowed for situations in which underlying insurer was in past legally bound to pay, but has not made payment up to the present. Excess liability policy that excluded coverage for punitive damages did not preclude allocation of punitive damages to underlying insurance and allocation of compensatory damages to excess insurance. Excess insurer could have included provision in its policy that made its excess layer operative only after all underlying insurance was applied to compensatory damages part of award. *Rummel v. Lexington Ins. Co.*, 123 N.M. 752, 945 P.2d 970 (1997).

### CONTRIBUTION

See "ACCIDENT AND HEALTH INSURANCE"; "FIRE INSURANCE"; "LIABILITY INSURANCE."

Uniform Contribution among Tortfeasors Act adopted N.M. Stat. Ann. 1978, §§41-3-1 to -8. However, Uniform Contribution Among Joint Tortfeasors Act no longer has force in New Mexico with respect to contribution among concurrent tortfeasors. *Wilson v. Galt*, 100 N.M. 227, 668 P.2d 1104 (Ct. App. 1983).

Comparative Negligence. In comparative negligence case, concurrent tortfeasor is not liable for entire damage caused by his concurrent tortfeasors. *Bartlett v. New Mexico Welding Supply*, 98 N.M. 152, 646 P.2d 579 (Ct. App. 1982).

Subrogation. Where plaintiff insured acquiesced in court order providing that intervening insurer's subrogation rights would be protected by court, that insurer would be prohibited from participating in case, and that insurer would not be permitted to introduce evidence of medical expenses paid, insured became obligated to assume proof of insurer if she did not want its claimed amount for medical expenses deducted from jury's award. By failing to produce evidence as to insurer's claim, insured waived any objection to deduction of insurer's claim from amount awarded, but insurer should contribute to insured's attorney fees. *Maldonado v. Haney*, 94 N.M. 335, 610 P.2d 222 (Ct. App. 1980).

Severe Liability. Several Liability Act, N.M. Stat. Ann. §41-3A-1 to 2. Several liability applies to the liability of two or more wrongdoers to the plaintiff where doctrine of comparative negligence applies. Joint liability abolished except as provided in statute. Where several liability applies, any defendant who establishes that the fault of another is proximate cause of plaintiff's injury is liable only for such damages equal to the ratio of such defendant's fault to total fault of all persons including parties and nonparties. Joint and several liability applies among defendants who intentionally inflicted injury; are vicariously liable for the acts of the other; are strictly liable for the sale of defective products; or other

situations having a sound policy basis. Fault of more than one person is causally apportioned to distinct harms; fault of persons causing distinct harms shall not be compared to fault of persons causing other distinct harms. Persons are severally liable for only distinct harms they proximately caused. Severally liable defendants are not entitled to contribution or to reduction of damages owed by them where plaintiff recovers from another person who also proximately caused plaintiff's injury. Act does not affect contractual rights of indemnity or contribution. Act does not alter the doctrine of proximate cause.

Injured person may pursue recovery from each severally liable tortfeasors without reduction, notwithstanding that settling tortfeasor pays more in settlement than his apportioned share of total damages as determined; settling tortfeasor is free of further liability to injured person and to other tortfeasors for contribution. *Wilson v. Galt*, 100 N.M. 227, 668 P.2d 1104 (1983). See Several Liability Act, N.M. Stat. Ann. §41-3A-1 *et seq.*

### DAMAGES

Compensatory Damages. Compensatory damages are recoverable if they proximately result from violation of legally recognized right of person seeking damages. *Topmiller v. Cain*, 99 N.M. 311, 657 P.2d 638 (Ct. App. 1983).

Punitive Damages. May be awarded only when conduct of wrongdoer may be said to be malicious, intentional, fraudulent, oppressive, or committed recklessly or with wanton disregard of plaintiff's rights. *Hood v. Fulkerson*, 102 N.M. 677, 699 P.2d 608 (1985).

Arbitration. Under the Uniform Arbitration Act, N.M. Stat. Ann. §§44-7A-1 to -32, an arbitrator may award punitive damages if such an award is authorized by law in a civil action involving the same claim and the evidence produced at the hearing justifies the award under the legal standards applicable to the claim. See *Aguilera v. Palm Harbor Homes, Inc.*, 2002-NMSC-029, 54 P.3d 993.

Bad Faith. Punitive damages may only be awarded against an insurer in a bad faith case when the insurer's conduct was in reckless disregard for the interests of the plaintiff, was based on a dishonest judgment, or was otherwise malicious, willful, or wanton; a showing of a culpable mental state in addition to bad faith is not required in every bad-faith case to recover punitive damages for an insurer's failure to settle or pay. *Sloan v. State Farm*, 2004-NMSC-004, 85 P.3d 230.

Jury Award. An appellate court must read the record before it bearing in mind, with respect to each relevant factor announced in *BMW of North America, Inc. v.*

*Gore*, 517 U.S. 559, 574, 134 L. Ed. 2d 809, 116 S. Ct. 1589 (1996), whether the jury's award of punitive damages is comparatively reasonable. Anytime the record clearly shows that the jury should not have concluded as it did, the appellate court may, exercising its *de novo* power, set aside the award. Any doubt in the mind of the appellate court concerning the question of what appropriate damages may be in the abstract, or owing to the coldness of the record, should be resolved in favor of the jury verdict. *Aken v. Plains Electric*, 2002–NMSC-021, 49 P.3d 662.

Court of appeals affirmed jury award of \$371,330.11 in compensatory damages to minor plaintiff and \$28,160 to plaintiff's mother and punitive damages award in the amount of \$998,725. Stating reluctance to set "concrete constitutional limits" on the ratio between compensatory and punitive damages and that "in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." *Atler v. Murphy Enters., Inc.*, 2005 NMCA 6, 104 P.3d 1092 (citing with approval U.S. Supreme Court's decision in *State Farm v. Campbell*, 538 U.S. 408 (2003)).

**Wrongful Death.** Damages for wrongful death may be recovered by proof of present worth of life of decedent to decedent's estate, and is based on decedent's age, earning capacity, health, habits and probable duration of life. *Cerrillos Coal R. Co. v. Deserant*, 9 N.M. 49, 49 P. 807 (1897). Recovery may be had for pain and suffering and for medical and related care between time of injury and death, same as could have been recovered by injured party where death does not ensue. *Stang v. Hertz Corp.*, 81 N.M. 348, 467 P.2d 14 (1970). However, loss of society is not element of damages in wrongful death. *Wilson v. Wylie*, 86 N.M. 9, 518 P.2d 1213 (Ct. App.1974). Exemplary damages are authorized by statute. N.M. Stat. Ann. §41-2-3. See also New Mexico Uniform Jury Instructions—Civil, Ch. 18, Damages.

## DEATH

See Law Digest Tables.

**Presumed Dead.** Persons inexplicably absent from their usual place of residence and unheard of by relatives or other persons who would reasonably be expected to hear from them are presumed dead after continuous period of 5 years. N.M. Stat. Ann. §45-1-107.

**Common Carrier.** The common carrier death statute (1953 Comp. § 22-20-4) is an exception to the general death statute (1953 Comp. § 22-20-1); therefore, when recovery is had against the carrier, there is not a cause of action against the employee. However, the remedy provided by the common carrier death statute is not an ex-

clusive remedy; a manufacturer of a defective public conveyance can be sued under the general wrongful death statute. *Langham v. Beech Aircraft Corp.*, 88 N.M. 516, 543 P.2d 484 (1975).

## DISABILITY

**Permanent Total Disability.** Workers' Compensation Act N.M. Stat. Ann. §52-1-25, -25.1, defines permanent total disability as "the permanent and total loss or loss of use of both hands or both arms or both feet or both legs or both eyes or any two of them; or a brain injury resulting from a single traumatic work-related injury that causes, exclusive of the contribution to the impairment rating arising from any other impairment to any other body part, or any preexisting impairments of any kind, a permanent impairment of thirty percent or more as determined by the current American Medical Association guide to the evaluation of permanent impairment."

**Temporary Total Disability.** The Act defines temporary total disability as "the inability of a worker, by reason of accidental injury arising out of and in the course of the worker's employment, to perform the duties of that employment prior to the date of the worker's maximum medical improvement." Workers' Compensation Act N.M. Stat. Ann. §52-1-25, -25.1.

Insured entitled to total disability benefits where unable substantially to follow vocation, though not absolutely helpless. *Bubany v. New York*, 39 N.M. 560, 51 P.2d 864 (1935).

**Burden of Proof.** Insured seeking to recover disability benefits under policy defining total disability as impairment of mind or body which continuously renders it impossible for insured to follow gainful occupation, had burden of proving disability and that disability was caused by impairment of mind or body. *Barrows v. Mutual*, 48 N.M. 206, 147 P.2d 362 (1944).

**Waiver of Premiums.** Provision held inoperative where proof of disability not submitted before expiration of grace period. *Warren v. New York Life*, 40 N.M. 253, 58 P.2d 1175 (1936).

## FINANCIAL RESPONSIBILITY ACT

**Financial Responsibility.** Unless the vehicle is specifically exempted from provisions of the Mandatory Financial Responsibility Act, no owner shall permit upon the streets or highways of New Mexico the operation of an uninsured motor vehicle, or a motor vehicle for which evidence of financial responsibility affirmed to the Motor Vehicle Division of Taxation and Revenue is not currently valid. N.M. Stat. Ann. §66-5-205.

Statutorily Liability Policy Requirements. Statutory requirement for carrier's liability policies will be read into policy of public carrier despite actual language of policy. See *Lopez v. Townsend*, 42 N.M. 601, 82 P.2d 921 (1938).

Joining Tortfeasor's Insurer. Injured party ordinarily has no claim directly against liability insurer of negligent defendant. Joinder of allegedly negligent tortfeasor's automobile liability insurer as party defendant is allowed if the coverage was mandated by law, it benefits the public, and no language of the law expresses an intent to deny joinder. *Raskob v. Sanchez*, 126 N.M. 394, 970 P.2d 580 (1998).

### FIRE INSURANCE

Assignment. Even though insurance policy is assigned, it is still assignor's insurance which he is entitled to have applied to extinguishment of indebtedness and payment to assignee of insurance operated to discharge lien debt. *Fire Association v. Patton*, 15 N.M. 304, 107 P. 679 (Terr. 1910).

Non-Assignment Provision. Non-assignment provision of fire policy was for benefit of insurer; assignment as between insured and assignee held valid. *McClendon v. Dean*, 45 N.M. 496, 117 P.2d 250 (1941).

Assignment as Security. Assignment of fire policy as security does not disqualify insured to maintain action on policy in his own name. *Turner v. New Brunswick*, 45 N.M. 126, 112 P.2d 511 (1941).

Cancellation. See "CANCELLATION."

Mortgage. In fire insurance policy, mortgage clause providing that insurance, as to interest of mortgagor or owner was union or "standard mortgage clause," rather than loss payable or open mortgage clause. *Nassar v. Utah Mortgage*, 100 N.M. 419, 671 P.2d 667 (Ct. App. 1983).

Contribution Between Companies. Where there are several policies each stipulating to pay a proportion of loss based on total insurance, the contracts are independent, and each insurer binds itself to pay its own proportion without regard to what may be paid by others and no right of contribution exists in favor of either of them. Further, settlement of one policy does not affect insured's recovery on another. *Rallis v. Connecticut Fire Ins. Co.*, 46 N.M. 77, 120 P.2d 736 (1941).

Proof of Loss. Substantial compliance with terms of fire insurance policy as to notice and proof of loss is all that is required. *Robinson v. Palatine*, 11 N.M. 162, 66 P. 535 (Terr. 1901).

Overvaluation. Overvaluation of property in proof of loss, through mistake or inadvertence, not sufficient to avoid policy, as for fraud. *Turner v. New Brunswick*, 45 N.M. 126, 112 P.2d 511 (1941).

Oral Contract. Oral contract for fire insurance is enforceable if plaintiff establishes the subject matter of contract, risk insured against, duration of risk, amount of insurance, rate of premium, and identity of parties. *Harden v. St. Paul*, 51 N.M. 55, 178 P.2d 578 (1947).

Conditional Seller. Conditional seller has insurable interest in property contracted to be sold. *Fulwiler v. Traders*, 59 N.M. 366, 285 P.2d 140 (1955).

### FRAUD

See "ACCIDENT AND HEALTH INSURANCE"; "AGENTS, BROKERS AND SOLICITORS"; "FIRE INSURANCE, Proof of Loss."

Insurer's Rights. Insurer has right to set up its own standards, avail itself of its own experience and that of others, secure information from applicant and rely thereon as true, and govern its actions accordingly. *Modisette v. Foundation Reserve Ins. Co.*, 77 N.M. 661, 427 P.2d 21 (1967).

Agent's Representations. Where agent represented that policy included coverage for insured's occupational injuries, insured was not charged with duty of reading and understanding policy and certificate but was only bound to examine such documents as was reasonable for him to do, and he would only be held to that which would have been thereby alerted. *Pribble v. Aetna Life Ins. Co.*, 84 N.M. 211, 501 P.2d 255 (1972).

Settlement. Settlement that is product of fraud or collusion at expense of nonparticipating liability insurer would release that insurer from any obligation under the settlement. *Rummel v. Lexington Ins. Co.*, 123 N.M. 752, 945 P.2d 970 (1997).

### HOSPITALS

Sovereign Immunity. Existence of liability insurance does not constitute waiver of sovereign immunity from tort liability absent specific authorization from the legislature. *Clark v. Ruidoso Hosp.*, 72 N.M. 9, 380 P.2d 168 (1963). But see abolishment of sovereign immunity under "NEGLIGENCE."

Lien. Hospital furnishing services to patient for injuries resulting from accident, except those covered by Worker's Compensation, has lien on judgment or settlement proceeds excluding attorneys fees, costs and expenses of obtaining same. Lien perfected by filing and notice to patient or attorney and insurer prior to disbursement of proceeds. After perfection any person dis-

bursing without payment of lien is liable to hospital. Applies only to hospitals located in state. N.M. Stat. Ann. §48-8-1 to -3.

**Vicarious Liability.** A hospital is not vicariously liable for the tort of a physician who is not its “employee”; it does not share in the responsibility to advise patients of novelty and risks of particular medical treatment. The staff doctor (independent contractor) is solely responsible for his personal malpractice or negligence. *Cooper v. Curry*, 92 N.M. 417, 589 P.2d 201 (Ct. App. 1978).

## HUSBAND AND WIFE

See Law Digest Tables.

**Community Property.** Community Property is in effect in New Mexico. N.M. Stat. Ann. § 40-3-6.

**Immunity.** There is no immunity from tort liability between spouses regardless of whether intentional or nonintentional tort is involved. *Maestas v. Overton*, 87 N.M. 213, 531 P.2d 947 (1975).

**Debt.** Spouse’s separate debt, such as one arising from tort committed while married but not in furtherance of marriage, is first satisfied by that spouse’s separate property, then, debtor spouse’s one half interest in community property, then by debtor spouse’s interest in residence. Neither spouse’s interest in community property or separate property shall be liable for separate debt of other spouse. N.M. Stat. Ann. §§40-3-9, -10.

**Tort.** Each spouse may recover for tortious wrongs committed against him or her personally by third person. *Romero v. Felter*, 83 N.M. 736, 497 P.2d 738 (1972).

**Loss of Consortium.** A spouse has a cause of action for negligent loss of consortium for the death of her husband because “[l]oss of consortium is simply the emotional distress suffered by one spouse who loses the normal company of his or her mate when the mate is physically injured due to the tortious conduct of another.” *Romero v. Byers*, 117 N.M. 422, 872 P.2d 840 (1994).

**Per Person Loss of Consortium.** Husband’s separate claim for loss of consortium against insured following automobile accident that injured wife and daughter fell under “per person” rather than “per occurrence” liability limits of insured’s automobile insurance policy, where policy provided that separate consortium claim could be made if the financial responsibility law recognized loss of consortium as a separate claim not included in the bodily injury liability limits. New Mexico’s financial responsibility statute did not prohibit combining loss of consortium claim with a bodily injury claim. New Mexico’s tort law, that allows an independent claim for loss

of consortium, did not require separate liability limits for such claims under financial responsibility law. *Nollen v. Reynolds*, 125 N.M. 387, 962 P.2d 633 (Ct. App. 1998).

**Divorce – Life Policy.** Divorce alone does not divest former spouse of proceeds of life policy in which she is named beneficiary, although beneficiary’s interest may be terminated by agreement which can reasonably be construed as relinquishment of spouse’s right to proceeds. *Romero v. Melendez*, 83 N.M. 776, 498 P.2d 305 (1972). Wife’s divorce from insured under life policies had no effect upon her status as beneficiary. *Harris v. Harris*, 83 N.M. 441, 493 P.2d 407 (1972).

**Disposition – Death Benefits.** Unexercised right to change designation of beneficiary of death benefits under health benefits contract has no effect on disposition of proceeds. *Barela v. Barela*, 95 N.M. 207, 619 P.2d 1251 (Ct. App. 1980).

**Designate Beneficiary.** Husband as manager of community property had power to designate beneficiary other than his wife on insurance policy but could not exercise that power in violation of his fiduciary duty to his wife, in fraud of her rights, or to give community property to himself. *Roselli v. Rio Communities Serv. Station, Inc.*, 109 N.M. 509, 787 P.2d 428 (1990).

**Agency.** Spouse, acting as agent, had actual authority from named insured to purchase automobile liability insurance, while rejecting uninsured motorist coverage, and therefore, named insured was bound by spouse’s actions. *Vigil v. Rio Grande Ins. of Santa Fe*, 1997-NMCA-124, 950 P.2d 297.

## INFANTS

See “AUTOMOBILES, Age”; “NEGLIGENCE, Age.”

## INLAND MARINE

**Recovery Amount.** In action by insured to recover under inland marine all-risk floater policy for damage sustained by insured’s inventory of mobile homes due to the second of two hailstorms, evidence supported findings that actual cash value of mobile homes after hail damage was the discounted amount for which they were sold by insured. *Roswell Trailers v. Potomac*, 91 N.M. 502, 576 P.2d 1133 (1978).

**Cancellation.** Section 59A-18-29(F) NMSA 1978, regarding the cancellation of insurance policies, does not apply to inland marine insurance contracts.

## LIABILITY INSURANCE

**Bad Faith.** Implied obligations of good faith and fair dealing requires insurer to settle in appropriate cases although express terms of policy do not impose such a



duty. *Dairylands Ins. Co. v. Herman*, 124 N.M. 624, 954 P.2d 56 (1997). Insurer may be held liable for judgment entered against insured in excess of policy limits if insurer has unreasonably refused to accept settlement offered within policy limits. To assess punitive damages for breach of insurance policy, there must be evidence of bad faith or malice in insurer's refusal to pay claim. Bad faith means any frivolous or unfounded refusal to pay. See *United Nuclear Corp. v. Allendale Mut. Ins. Co.*, 103 N.M. 480, 709 P.2d 649 (1985). "Unfounded" refusal to pay means utter lack of foundation, arbitrary or baseless refusal to pay that lacks any arguable support in wording of policy of facts of claim; synonymous with "frivolous." *Jackson Nat. v. Receconi*, 113 N.M. 403, 827 P.2d 118 (1992). Insurer cannot be partial to its own interests, but must give its interests and interests of insured equal consideration. *Lujan v. Gonzales*, 84 N.M. 229, 501 P.2d 673 (1972).

Automobile liability insurer did not satisfy its duty to treat its interests and interest of its insured equally when it required release of all claims, including subrogation claims, against its insured as condition precedent to policy limits settlement, where there was substantial likelihood of recovery in excess of insurance policy limits. Claimant may reasonably refuse to release subrogated claims during settlement negotiations, if such release may cause claimant to lose substantial portion of the recovery; reasonableness of such a demand may preclude, as a matter of law, extinguishing all liability to insured. Regarding good faith duty to settle, there is no presupposition that settlement is always preferred means of protecting policyholder's interests. However, good faith does impose upon insurer duty to settle whenever practicable. Insurer has a good faith duty to minimize, if not eliminate, its insured's liability. To satisfy its good faith duty to minimize insured's liability, insurer must balance interests of itself and its insured, reasonableness of claimant's demands, and probable outcome of litigation as opposed to settlement. *Dairyland Ins. Co v. Herman*, 124 N.M. 624, 954 P.2d 56 (1997).

**Bad Faith – Jury Question.** Bad-faith conduct by an insurer typically involves a culpable mental state, and therefore the determination whether the bad faith evinced by a particular defendant warrants punitive damages is ordinarily a question for the jury to resolve. *Sloan v. State Farm*, 2004 NMSC 4, 135 N.M. 106, 85 P.3d 230.

**Punitive Damages.** Punitive damages award of \$4,000,000 to insured for breach of contractual duty of carriers to supervise third party claims administrator did not violate due process; carriers acted in bad faith by their failure, with knowledge of "incurred loss" premium arrangement, to provide proper supervision or disclose

inadequate claims administration, the punitive damages were not disproportionate to the \$540,000 in compensatory damages, and carriers' intentional acts paralleled acts described as unfair in Insurance Code, for which no statutory fines were provided. *Allsup's Convenience Stores, Inc. v. North River Ins. Co.*, 127 N.M. 1, 976 P.2d 1 (1998). In Workers' Compensation claims, the Administration has exclusive jurisdiction over bad faith claims. *Cruz v. Liberty Mut. Ins.*, 119 N.M. 301, 889 P.2d 1223 (1995).

**Compromise of Claims – Duty to Act in Good Faith.** Carriers of retrospective premium workers' compensation and general liability policies breached a fiduciary duty to insured by failing to disclose the third party claims administrator's inadequate claims handling. *Allsup's Convenience Stores, Inc. v. North River Ins. Co.*, 127 N.M. 1, 976 P.2d 1 (1998).

**Cooperation of Insured.** Insured's alleged breach of policy conditions must cause insurer substantial prejudice before policy may be avoided for misrepresentation, concealment or noncooperation by insured; substantial prejudice requirement is not limited to cases involving rights of innocent third parties under liability policies. *Eldin v. Farmers Alliance*, 119 N.M. 370, 890 P.2d 823 (Ct. App. 1994).

**Direct Action against Insurer.** Accident victims could not sue insurer under medical expense provisions of tortfeasor's combined automobile and homeowners' policy to enforce policy unless they were intended third-party beneficiaries of policy. *Casias v. Continental Cas. Co.*, 125 N.M. 297, 960 P.2d 839 (Ct. App. 1988).

**Unfair Claims Practices.** Unfair claims practices under Section 59A-16-30, NMSA 1978 Comp. created a right of action for "any person" including third parties who suffered damages as a result of violation of the Trade Practices and Fraud Article. *Hovet v. Allstate Ins. Co.*, 2004-NMSC-010, 89 P.3d 69.

**Duty to Defend.** Insurer's duty to defend arises out of nature of allegations in complaint filed against insured. *Servants of Paraclete Inc. v. Great American*, 857 F. Supp. 822 (D.N.M. 1994). Duty to defend arises from allegations on face of complaint or from known but unpleaded facts supporting claim arguably within coverage; duty may arise at start of suit or later if issues change. *American General v. Progressive*, 110 N.M. 741, 799 P.2d 1113 (1990). Duty to defend exists even if any of allegations of complaint are groundless, false or fraudulent. *Satterwhite v. Stolz*, 79 N.M. 320, 442 P.2d 810 (Ct. App. 1968). Determination whether exclusionary provision in automobile policy applied had to be determined in primary action and not in declaratory judgment action, and insurer was under duty to defend in-

sured in primary action until court hearing in such action found that insurer was relieved of liability under non-coverage provision of policy, where provision of policy concerning duty of insurer to defend read, "Company shall: (a) defend any suit against insured...even if suit is groundless, false or fraudulent." *Foundation Reserve Ins. Co., Inc. v. Mullenix*, 97 N.M. 618, 642 P.2d 604 (1982).

**Breach of Duty to Defend.** For breach of duty to defend insurer is liable for reasonable attorney's fees incurred by insured in defense of action brought against him. *Lujan v. Gonzales*, 84 N.M. 229, 501 P.2d 673 (Ct. App. 1972). Risk Management Division's statutory obligation to provide coverage for costs of defending governmental entities is limited to risks delineated in Tort Claims Act, and does not extend to mandamus actions. *Board of County Comm'rs v. Risk Mgt. Div.*, 120 N.M. 178, 899 P.2d 1132 (1995).

**Investigation.** Insurer is required to conduct such investigation into facts and circumstances underlying complaint against its insured as is reasonable given factual information provided by insured or provided by circumstances surrounding claim in order to determine whether it has a duty to defend. *G&G Services, Inc. v. Agora Syndicate, Inc.*, 1999-NMCA-003, 993 P.2d 751.

**Conflict of Interest.** Mere fact that conflicts of interest between insurer and insured appeared did not relieve insurer of duty to tender defense for insured in tort action against insured. *American Employers Ins. Co. v. Crawford*, 87 N.M. 375, 533 P.2d 1203 (1975).

**Uniform Contribution among Tortfeasors Act** adopted N.M. Stat. Ann. §§41-3-1 to -8. *But see Wilson v. Galt*, 100 N.M. 227, 668 P.2d 1104 (Ct. App. 1983) (Uniform Contribution Among Tortfeasors Act no longer applies to contribution among concurrent tortfeasors).

**Stacking.** Exclusionary provisions of auto policies that purport to deny stacking have been held void as against public policy of compensating innocent victims. Insured allowed stacking to determine limit of underinsured/uninsured motorist coverage. *Jimenez v. Foundation Reserve Ins. Co.*, 107 N.M. 322, 757 P.2d 792 (1988).

**Personal Injury Coverage.** Personal injury coverage in bank's liability and umbrella policy did not extend to claim that bank had exercised influence as lending institution to discourage and interfere with third party's business and contractual relations, and thus insurer did not have duty to defend, despite contentions that umbrella policy connoted "full coverage" and that words "other defamatory material" covered anything not included in

libel or slander. *Western Commerce Bank v. Reliance Ins. Co.*, 105 N.M. 346, 732 P.2d 873 (1987).

**Class One and Two Insured.** The term "class one insured" generally means those persons who are named insureds under the policy, i.e., owner, spouse, etc.; "class two insured" generally means any person occupying insured vehicle at time of accident. *Moro v. Farmers*, 106 N.M. 669, 748 P.2d 512 (1988).

Where passenger injured in one car accident was insured under his parents' automobile policy issued by one carrier, and was also insured as passenger under driver's automobile policy issued by another carrier, passenger was Class I insured of former carrier and Class II insured of latter carrier. *Samora v. State Farm*, 119 N.M. 467, 892 P.2d 600 (1995).

**Substitute Automobile.** Liability insurance policy issued to sole proprietor "d.b.a. Corky's Wrecker Service" afforded protection, defense, and coverage in connection with suit against sole proprietor arising from accident in which he became involved while on business and while driving substitute automobile owned by him individually where insurer intended to insure sole proprietor's wrecker service business and intended that policy meet insurance requirements of State Corporation Commission, including statutory requirement of liability insurance to cover "negligent operation" of wrecking service and where meaning of "named insured" in policy was ambiguous requiring that policy be construed to give effect to intent of parties. *Hertz Corporation v. Asbaugh*, 94 N.M. 155, 607 P.2d 1173 (Ct. App. 1980).

**Family.** An insured family member is entitled to recover for an accident involving the insured vehicle, as opposed to a vehicle owned by a third party, even though the automobile policy attempts to exclude coverage for any vehicle owned by the named insured, and the insured's injured family member is entitled to recover even though the negligent driver was also an insured family member. *Padilla v. Dairyland Ins.*, 109 N.M. 555, 787 P.2d 835 (1990).

**Step Down.** Under New Mexico law, the family exclusion step down provision contained in an out-of-state policy is invalid. The *lex loci contractus* rule does not apply under these facts and a foreign state's law does not determine whether the step down provision is valid. Intra-family tort exclusion provisions are offensive to New Mexico public policy. *State Farm v. Ballard*, 2002-NMSC-030, 54 P.3d 537.

**Household Exclusion.** Personal umbrella policy's household exclusion of liability coverage for injury to insured was void as against public policy requiring that the coverage apply to all automobile accident victims whether or not a family member. Once an insurance

company offers insurance that is in excess of the limits required by law, whether it is primary vehicle coverage beyond that which is required by statute or umbrella policies which include coverage for motor vehicle accidents, the coverage applies equally to the victims of such accidents whether or not they are family members. *Government Employees Ins. Co. v. Welch*, 2004-NMSC-014, 135 N.M.452, 90 P.3d 471.

**Omnibus.** Under the mandatory Financial Responsibility Act, the person covered under an omnibus coverage clause in an auto liability policy is a person who had "initial permission" to use the insured's auto, without regard to any restrictions or understandings between the parties, but the owner's auto liability insurance does not cover persons who had wrongful intent to deprive owner of his auto. *Allstate Ins. v. Jensen*, 109 N.M. 584, 788 P.2d 340 (1990).

**Employee.** Employee injured in on-the-job auto accident could retain uninsured motorist benefits under employer's auto policy exceeding amount employee had to reimburse employer for workers' compensation benefits. *Draper v. Mountain States Mut. Cas. Co.*, 116 N.M. 775, 867 P.2d 1157 (1994).

**Intentional Acts.** Policy may exclude injuries arising from intentional acts so long as exclusionary clause is clear and does not conflict with statutory law. *Knowles v. USAA*, 113 N.M. 703, 832 P.2d 394 (1992).

**Criminal Act – Not Rendering Professional Services.** Insurer not required to indemnify physician for liability resulting from sexual assault of minor patient since initial sexual assault did not constitute "rendering professional services" within coverage provisions of policy and criminal acts exclusion of policy was not void as a matter of public policy. *New Mexico Physicians Mut. Liab. Co. v. LaMure*, 116 N.M. 92, 860 P.2d 734 (1993).

**Bifurcation.** When a defendant's liability insurance company is joined as a nominal party (see *Raskob v. Sanchez*, 1998-NMSC-045, 970 P.2d 580) and seeks to prevent the court from revealing its presence to the jury until after liability and damages have been established, a trial court ought to bifurcate the trial and prevent the jury from hearing about the presence of insurance at the first stage. *Martinez v. Reid*, 2002-NMSC-015, 46 P.3d 1237.

## LIMITATION OF TIME FOR COMMENCEMENT OF ACTION

**Statutory Time Limitations.** A written contract cause of action expires in six years. N.M. Stat. Ann. §37-1-3. Actions for fraud, constructive fraud, misc. claims or oral contracts expire in four years. N.M. Stat. Ann. §37-1-4. Injury to person or reputation is based on time of injury and expires in three years. N.M. Stat. Ann.

§37-1-8. For disability of a minor or incapacitated, the limitations period is tolled 1 year after termination of incapacity. N.M. Stat. Ann. §37-1-10.

**Fraud – Discovery Rule.** Action for fraud accrues upon discovery of such fraud. N.M. Stat. Ann. §37-1-7.

**Life Insurance.** No policy of life insurance shall be issued or delivered in this state if it provides for period not less than five years within which action may be commenced after it shall accrue. N.M. Stat. Ann. §59A-20-25.

**Policy Provisions.** No special statute as to other types of insurance. Provisions in insurance policies which limit period within which suit may be brought after damage occurs are valid and enforceable if time period is reasonable. *Young v. Seven Bar Flying Serv., Inc.*, 101 N.M. 545, 685 P.2d 953 (1984).

**Provision providing a twelve month limitation for commencement of action in policy is valid and not contrary to public policy.** See *Electric Gin Co. v. Firemen's*, 39 N.M. 73, 39 P.2d 1024 (1935); *Wiseman v. Arrow Freightways, Inc.*, 89 N.M. 392, 552 P.2d 1240, (Ct. App. 1976).

**Time to Sue – Affirmative Defense.** Where insurer raises affirmative defense of violation of time to sue provision, it need not show it was prejudiced by violation. It need only show breach. *Sanchez v. Kemper Ins. Co.*, 96 N.M. 466, 632 P.2d 343 (1981). *But see Roberts Oil Co. v. Transamerica Ins. Co.*, 113 N.M. 745, 833 P.2d 222 (1992) ("The present case does not involve a time-to-sue clause, so there is no occasion to overrule *Sanchez*; but...we think its result and some of its rationale are questionable.").

**Unconscionability, Adhesion, Unequal Bargaining.** Time-to-sue provision of public employee blanket bonds covering state employees' unfaithful performance of their duties were valid absent unconscionability, adhesion, or state was in unequal bargaining position with its insurers. State's claim accrued and time-to-sue provision began to run when state discovered investment officer's illegal stock purchase rather than date of loss on sale of stock. *State ex rel. Udall v. Colonial Penn Ins. Co.*, 112 N.M. 123, 812 P.2d 777 (1991).

**Due Process.** Where medical malpractice claim accrued near end of three-year statute of repose, and application of statute would violate substantive due process rights of plaintiffs, court would apply three-year accrual based limitation period that would be applicable to claims if statute of repose had not been enacted. *Garcia v. LaFarge*, 119 N.M. 532, 893 P.2d 428. (1995).

**Accrual.** Medical malpractice cases brought under Tort Claims Act (TCA) are controlled by a discovery

rule and the cause of action accrues when the plaintiff knows or with reasonable diligence should have known of the injury and its cause. *Maestas v. Zager*, 2007-NMSC-003, 152 P.3d 141.

Subrogation. Uninsured Motorist carrier's subrogation action against alleged tortfeasor was subject to three-year statute of limitations for personal injury claims, rather than six-year period for contract claims, even if insured would have six years to bring claim against carrier. *Liberty Mutual v. Warren*, 119 N.M. 429, 891 P.2d 570 (N.M. App. 1995).

## MALPRACTICE

Medical. See N.M. Stat. Ann. §41-5-1 to 41-5-29.

Statutory Requirements and Limitations. The three-year limitations period of the Medical Malpractice Act, §41-5-13, runs from the underlying act of malpractice. Defendant had no professional contact with plaintiff after 2/8/89. Plaintiff's cause of action arose out of his cardiac arrest on 11/16/91. If defendant committed malpractice on 2/8/89, there were only 85 days remaining in the limitation period. This was an unreasonably short period to exercise his accrued right and violated the due process clause of the New Mexico Constitution. *Garcia v. La Farge*, 119 N.M. 532, 893 P.2d 428 (1995).

Expert Testimony. In professional negligence cases, both breach of implied warranty to use reasonable skill under contract law and negligence resulting in finding of malpractice must be proved by expert testimony, unless case is one where exceptional circumstances within common experience or knowledge of layman are present. *Adobe Masters v. Downey*, 118 N.M. 547, 883 P.2d 133 (1994).

Lost-Chance. Lost-chance concept recognized in New Mexico. The basic test for establishing loss of chance is no different from the elements required in other medical malpractice actions, or in negligence suits in general: duty, breach, loss or damage, and causation. *Alberts v. Schultz*, 1999-NMSC-015, 975 P.2d 1279.

Fraudulent Concealment. The doctrine of fraudulent concealment tolls the three-year medical malpractice statute of repose, N.M. Stat. §41-5-13 (1976) only when the plaintiff does not discover the alleged medical malpractice within the statutory period as a result of the defendant's fraudulent concealment. *Tomlinson v. George*, 2005-NMSC-020, 116 P.3d 105.

## NEGLIGENCE

See Law Digest Tables.

See "AUTOMOBILES."

Definition and discussion of negligence. *Krametbauer v. McDonald*, 44 N.M. 473, 104 P.2d 900 (1940).

Age. Infant held to same degree of care reasonably to be expected of children of like maturity and capacity. *McMullen v. Ursuline Order*, 56 N.M. 570, 246 P.2d 1052 (1952).

Assumption of Risk. Doctrine subject to application of comparative negligence rules. *Scott v. Rizzo*, 96 N.M. 682, 634 P.2d 1234 (1981).

Unavoidable Accident. Unavoidable accident abolished as defense. *Alexander v. Delgado*, 84 N.M. 717, 507 P.2d 778 (1973).

Attractive Nuisance. Doctrine applied notwithstanding father's warning to boy. *Selby v. Tolbert*, 56 N.M. 718, 249 P.2d 498 (1952). As general proposition, ponds, pools, lakes, streams and other waters do not constitute attractive nuisances. *Mellas v. Lowdermilk*, 58 N.M. 363, 271 P.2d 399 (1954); *but see Martinez v. Lyster*, 75 N.M. 639, 409 P.2d 493 (1965).

Comparative Negligence. Doctrine judicially adopted in its "pure" form in *Scott v. Rizzo*, 96 N.M. 682, 634 P.2d 1234 (1981). In adopting opinion of *Scott v. Rizzo*, court commented that liability concepts based on or related to negligence of either plaintiff, defendant, or both are subject to comparative negligence rule. No effort was made to catalog how various rules will be affected by comparative negligence doctrine. Adaptations will be made on case by case basis. Therefore, traditional theories of liability and defenses based on negligence concepts must be analyzed in light of comparative negligence rules. Rescue doctrine, if understood as shorthand for public policy imposing independent duty of care owed rescuer by those who create unreasonable risks of harm to others, remains vital under comparative negligence regime. *Govich v. North American Systems*, 112 N.M. 226, 814 P.2d 94 (1991).

Contributory Negligence. Doctrine judicially abolished. *Scott v. Rizzo*, 96 N.M. 682, 634 P.2d 1234 (1981).

Duty. Defined as legal obligation to conform to a standard of conduct to reduce risk of harm to individual or class of persons. *Baxter v. Noce*, 107 N.M. 48, 752 P.2d 240 (1988).

Breach of duty is conduct which unreasonably amplifies risk of harm to persons to whom duty is owed. *Baxter v. Noce*, 107 N.M. 48, 752 P.2d 240 (1988).

Duty to Protect. When person has duty to protect and third-party's act is foreseeable, such act, whether innocent, negligent, intentionally tortious, or criminal, does not prevent one with duty from being liable for



harm caused thereby. *Reichert v. Adler*, 117 N.M. 623, 875 P.2d 379 (1994) (quoting Restatement (Second) of Torts §449).

**Imputed Negligence.** Negligence of operator not imputed to passenger and they are not engaged in joint enterprise. *Silva v. Waldie*, 42 N.M. 514, 82 P.2d 282 (1938). Negligence of husband not imputed to wife. *Trefzer v. Stiles*, 56 N.M. 296, 243 P.2d 605 (1952). Negligence of father not imputed to 5 year old son suing executor of decedent driver of adverse car. *Frei v. Brownlee*, 56 N.M. 677; 248 P.2d 671 (1952). See *LeDoux v. Martinez*, 57 N.M. 86; 254 P.2d 685 (1953) (discussing imputed negligence).

**Scope of Employment.** Where employer permitted employee to use his truck to go to lunch, employee was not acting within scope of employment, so as to render employer liable for employee's negligence in operating truck. *Miller v. Hoefgen*, 51 N.M. 319, 183 P.2d 850 (1947).

**Bailment.** While vehicle was being negligently operated by prospective buyer, in absence of salesman, and struck child, transaction was one of bailment, and dealer and salesman were absolved from liability. *Paul v. Benavidez*, 56 N.M. 328, 243 P.2d 1018 (1952).

**Act of God.** If act of God was so overwhelming and destructive as to produce injury, regardless of whether defendant was negligent, defendant's negligence cannot be held to be "proximate cause" of injury. *Shepherd v. Graham Bell*, 56 N.M. 293, 243 P.2d 603 (1952).

**Intervening Cause.** Cause which might be reasonably anticipated will not break connection between original cause and injury. *Reif v. Morrison*, 44 N.M. 201, 100 P.2d 229 (1940).

**Joint and Several Liability.** Liability of concurrent tortfeasors is several rather than joint and several, with each tortfeasor paying only for its share of damages in proportion to comparative fault assigned by fact finder. *Otero v. Jordan Restaurant Ent.*, 119 N.M. 721, 895 P.2d 243 (Ct. App. 1995).

**Last Clear Chance.** Last Clear Chance Doctrine Abolished. *Scott v. Rizzo*, 96 N.M. 682, 634 P.2d 1234 (1981).

**Negligence Per Se.** Negligence as a matter of law exists when 1) applicable statute prescribes certain actions or defines standard of conduct, either explicitly or implicitly; 2) plaintiff is in class of persons sought to be protected by statute; 3) plaintiff's alleged harm or injury is generally of type legislature sought to prevent by enactment of statute; and 4) defendant violated statute (an issue for the jury). *Schwartzman v. Atchison*, 857 F. Supp. 838 (D.N.M. 1994). Operation of motor vehicle in

violation of statute enacted for protection of persons using highway is negligence per se. *Turrietta v. Wyche*, 54 N.M. 5, 212 P.2d 1041 (1949).

**Premises Liability.** Landowner or occupier of premises must act as reasonable person in maintaining property in reasonably safe condition in view of all circumstances, including likelihood of injury to another, seriousness of injury, and burden of avoiding risk; duty of care extends to all persons other than trespassers who enter property with consent, express or implied. *Ford v. Board of County Comm'rs*, 118 N.M. 134, 879 P.2d 766 (1994).

**Reasonable Care.** Risk is not made reasonable because it is made open and obvious to persons exercising ordinary care. *Klopp v. Wackenhut*, 113 N.M. 153, 824 P.2d 293 (1992).

**Duty of Ordinary Care.** An owner or one in possession of a vehicle who leaves a key in the ignition of an unattended and unlocked car owes a duty of ordinary care to those individuals injured in an automobile accident involving the vehicle when a thief steals the car and negligently or criminally causes the accident. The jury or finder of fact must decide whether Defendant's actions breached this duty of ordinary care and are a proximate cause and cause in fact of injuries which Plaintiffs prove. *Herrera v. Quality Pontiac*, 2003-NMSC-018, 73 P.3d 181.

**Proximate Cause.** To be considered proximate cause, alleged negligent acts need not be sole cause, but must be contributing cause to injury. *Tafoya v. Seay Bros.*, 119 N.M. 350, 890 P.2d 803 (1995).

**Res Ipsa Loquitur.** Doctrine of res ipsa loquitur applies when, in ordinary course of events, injury would not occur except through negligence of person in exclusive control and management of injuring instrumentality. Res ipsa is held to be proper in an escape of water case. Lack of notice to defendant is not sufficient to defeat claim under res ipsa. Even if all potential causes for water line break could be conclusively shown not to be due to defendant's negligence, he is only party with means of making showing. When applicable, res ipsa shifts the burden to defendant to address facts sufficient to negate an inference of negligence, thus summary judgment is inappropriate when the failure to provide evidence of an issue of fact is the basis for the motion. *Romero v. Truchas Mut. Domestic Water Consumer*, 121 N.M. 71, 908 P.2d 764 (Ct. App. 1995).

**Sudden Emergency.** Uniform jury instruction on sudden emergency should no longer be used in instructing jury in negligence cases; sudden emergency doctrine underlying instruction is unnecessary, potentially confusing to jury, and conducive to overemphasizing one

party's theory of case. *Dunleavy v. Miller*, 116 N.M. 353, 862 P.2d 1212 (1993).

## PRODUCTS LIABILITY

**Strict Products Liability.** New Mexico adopted doctrine of strict (products) liability in case of *Stang v. Hertz Corporation*, 83 N.M. 730, 497 P.2d 732 (1972). Manufacturer of product has duty to design and manufacture product that is reasonably fit and safe for purpose for which it is intended to be used. *Skyhook Corp. v. Jasper*, 89 N.M. 98, 547 P.2d 1140 (Ct. App. 1976). Failure to incorporate a safety feature into device may constitute defective condition of product but the test of whether or not such failure constitutes defect is whether product, absent the feature or device is unreasonably dangerous. *Skyhook Corp. v. Jasper*, 90 N.M. 143, 560 P.2d 934 (1977).

**Defense – Misuse.** Misuse as a defense in strict products liability. Where an injury is caused by a risk or misuse of the product which was not reasonably foreseeable to the supplier, he is not liable. *Van de Valde v. Volvo*, 106 N.M. 457, 744 P.2d 930 (Ct. App. 1987).

**Defense – Plaintiff's Negligence.** Plaintiff's negligence is partial defense to product liability claim in that percentage of plaintiff's fault, due to negligence, reduces amount of damages that plaintiff may recover. *Marchese Warner Communications, Inc.*, 100 N.M. 313, 670 P.2d 113 (Ct. App. 1983).

**Defense – Contributory Negligence.** Contributory negligence is not defense in products liability action when such negligence consists merely of failure to discover defect in product or to guard against possibility of its existence. Plaintiff must voluntarily and unreasonably proceed to encounter known danger for defense or contributory negligence in form of assumption of risk to bar recovery. *Bendorf v. Volkswagenwerk Aktiengesellschaft*, 88 N.M. 355, 540 P.2d 835 (Ct. App. 1975).

**Warnings.** Manufacturer of product must adequately indicate: (a) scope of danger (b) latent dangers and (c) extent or seriousness of harm that could result from danger. Physical aspects of warning by manufacturer in relation to its product, including conspicuousness and prominence and relative size of print, must be adequate to alert reasonably prudent person. *First Nat'l Bank, Albuquerque v. Nor-Am Agricultural Prod., Inc.*, 88 N.M. 74, 537 P.2d 682 (Ct. App. 1975).

**Economic Injury.** Distributor could not recover from manufacturer for purely economic injury from loss of business due to defects in products under tort theories of liability. *Allen v. Toshiba Corp.*, 599 F. Supp. 381 (D.N.M. 1984). Where there is no great disparity in bargaining power between commercial buyer and seller,

recovery for purely economic losses in a commercial setting may only be recovered in contract actions. *Utah Int'l v. Caterpillar*, 108 N.M. 539, 775 P.2d 741 (Ct. App. 1989).

**Preemption.** The National Traffic and Motor Vehicle Safety Act preempted state tort law for claims based upon lack of passive restraint systems against car makers who complied with such act but failed to install airbags. *Kitts v. General Motors*, 875 F.2d 787 (C.A. 10, 1989).

## RELEASE

See Law Digest Tables.

**Disavowal.** Release obtained from person under care of doctor or in hospital or sanitarium within 15 days from date of occurrence causing injury may be disavowed within 15 days of release from care or from hospital and release may not be used as evidence. Release void if not acknowledged before Notary Public. N.M. Stat. Ann. §§41-1-1, -2.

**Consideration.** Compromise payment on accident policy in advance of proof of loss or liquidation of amount held sufficient consideration for release of liability under policy. *Moruzzi v. Federal Life*, 42 N.M. 35, 75 P.2d 320 (1938).

**Settlement.** Where there is no evidence of authority to settle on behalf of injured person or ratification of settlement made, it is not error to refuse to permit jury to consider settlement. *Turrietta v. Wyche*, 54 N.M. 5, 212 P.2d 1041 (1949).

**Subrogation.** Insured's settlement with and/or release of tortfeasor, tortfeasor's estate, or tortfeasor's insurance carrier in violation of express policy provisions destroys subrogation rights of insurer. *March v. Mountain States Mut. Cas. Co.*, 101 N.M. 689, 687 P.2d 1040 (1984).

**Avoidance.** In New Mexico release constitutes complete defense. *Thomas v. Barber's Super Markets*, 74 N.M. 720, 398 P.2d 51 (1964). Only exception may be if release was obtained by fraud, undue influence or legal mistake. *Moruzzi v. Federal Life*, 42 N.M. 35, 75 P.2d 320 (1938). Mutual mistake as to extent of injury is not sufficient ground for setting aside release. Mutual mistake as to existence of injury is sufficient ground to avoid release. *Bennie v. Pastor*, 393 F.2d 1 (10th Cir. 1968).

**Governing Authority.** Releases, being contractual in nature, are governed by laws of contracts generally, as well as any specific legislative acts prescribing manner by which such agreements may be validated. *Ratzlaff v. Seven Bar Flying Serv., Inc.*, 98 N.M. 159, 646 P.2d, 586 (1982).

Freedom to Contract. Statutory requirement that insurer obtain acknowledgment before notary public of release of liability did not impair obligation of contract as applied to release executed by claimant; statutory requirement did not restrict freedom of parties to contract, even though statute interfered in some minor degree with insurer's freedom to contract with claimant. *Mitschelen v. State Farm*, 89 N.M. 586, 555 P.2d 707 (Ct. App. 1976).

## REPRESENTATIONS AND WARRANTIES

Materiality. Misrepresentation on insurance application is material if insurer would not have entered into contract but for misrepresentation. *Crow v. Capitol Bankers Life*, 119 N.M. 452, 891 P.2d 1206 (1995).

Rescission. Any material misrepresentations in application for life policy would not allow insurer to rescind policy, where any misrepresentations were made by agent, rather than insured. *Jackson Nat'l Life v. Receconi*, 113 N.M. 403, 827 P.2d 118 (1992). In action for rescission of insurance policy under New Mexico law, it is immaterial whether misrepresentation by insured was made innocently, negligently, or fraudulently. *John Hancock Mut. Life v. Weisman*, 27 F.3d 500 (10th Cir. 1994).

## SERVICE OF PROCESS

Upon Non-Resident Motorists. See "AUTOMOBILES."

Personal Service Outside State. Jurisdiction in personam may be obtained on resident or non-resident by serving summons personally thereon outside state when resident or non-resident, personally or through agent, transacts business in state, operates motor vehicle in state, contracts to insure person, property or risk located in state at contracting, or commits tortious act in state. Cause of action must arise out of one of above acts. N.M. Stat. Ann. §38-1-16.

S.C.R.A. (1986), 1-004. Process in civil actions before the District Courts.

## SUBROGATION

Allowed Parties. Subrogation is generally not allowed where one officiously pays debt of another, but is allowed where one secondarily liable pays debt and then proceeds against one primarily liable inasmuch as one secondarily liable has legal interest to protect. *Fireman's Fund Ins. Cos. v. Phillips, Carter R & A., Inc.*, 89 N.M. 7, 546 P.2d 72 (Ct. App. 1976).

Trial Practice. When subrogated insurers are required to be joined as party and case is to be tried by jury, fact of insured's joinder is not to be disclosed to

jury. Evidence that party was insured is not admissible to show negligence but may be admitted, with limiting instruction, to show ownership or control, proof of agency, or bias or prejudice of witness. *Safeco Ins. Co. v. USF&G*, 101 N.M. 148, 679 P.2d 816 (1984).

Contingent Subrogation Right. Although insurer's subrogation right is not fixed until loss payment is made, contingent subrogation right in favor of insurer arises when loss occurs. *March v. Mountain States Mut. Cas. Co.*, 101 N.M. 689, 687 P.2d 1040 (1984).

Voluntary Relinquishment. If auto insurer voluntarily relinquishes its subrogation rights against third party tortfeasor, insured's settlement with third party without insured's consent, in violation of policy, does not preclude insured from seeking uninsured motorist benefits from insurer. *Vidal v. American General Cos.*, 109 N.M. 320, 785 P.2d 231 (1990).

Omnibus. By using truck of independent contractor at time of accident, corporation that hired independent contractor became insured by operation of omnibus clause under independent contractor's policy, and thus corporation was not liable to insurer in subrogation for damage to truck. *Insurance Co. of North Am. v. Wylie Corp.*, 105 N.M. 406, 733 P.2d 854 (1987).

Loss of Subrogation Right. Insurer's subrogation rights were destroyed by insured's settlement and release together with insured's notation, on insurer's loan receipt under medical payment provision which required insured to do nothing after loss to prejudice insured's subrogation rights, stating that receipt was signed under doctrine of out-of-state case holding actions for personal injuries to not be assignable prior to judgment; thus, insurer was not liable under such medical payment provision. *Jacobson v. State Farm*, 83 N.M. 280, 491 P.2d 168 (1971).

Duty to Reimburse Insurer. Insured was contractually obligated to hold portion of its settlement for health insurer under terms of health insurance policy providing that insurer was subrogated to insured's rights against third parties to extent of benefits paid. Health insurer that had given notice of its subrogation rights was not required to intervene in suit or settlement to preserve insured's contractual duty to hold portion of settlement with tortfeasor to reimburse health insurer for benefits paid. Settlement between insured and tortfeasor does not destroy insurer's right of subrogation if tortfeasor knows of insurer's right of subrogation and insurer does not consent to settlement. *Health Plus of N.M., Inc. v. Harrell*, 125 N.M. 189, 958 P.2d 1239 (Ct. App. 1998).

Statute of Limitations. Insurance company's subrogation action against alleged tortfeasor was subject to the 3 year statute of limitations for personal injury claims,

not the 6 year statute of limitations for contracts, even if insured had six years to bring claim against carrier. *Liberty Mutual v. Warren*, 119 N.M. 429, 891 P.2d 570 (Ct. App. 1995).

**Active Participation.** Under the active participation exception to the common fund doctrine, an insurer's proportionate contribution to insured's attorney's fees and costs may be reduced or waived if: (1) insurer actively participated in or substantially contributed to recovery; or (2) attorney's fees are excessive and inequitable. *Amica Mutual v. Maloney*, 120 N.M. 523, 903 P.2d 834 (1995).

### UNINSURED MOTORIST

**Multiple-Vehicle Coverage.** Statute which requires motor vehicle coverage requires only that each of several vehicles insured under single policy be covered by one minimum coverage with no need for separate full coverage for each. Where insurer charges separate full uninsured motorist premium for each vehicle under single or several policies, insured must be permitted to stack coverages for which he has paid; even where second premium is reduced, fairness may require stacking. *Lopez v. Foundation Reserve Ins. Co., Inc.*, 98 N.M. 166, 646 P.2d 1230 (1982).

**Stack.** Where a policy lacks a plain and affirmative declaration that the amount charged represents a single premium for a single amount of coverage, in the absence of such a declaration, insured is entitled to stack all coverages. Insurance companies must obtain written rejections of stacking in order to eliminate ambiguity and limit their liability to ensure that the insured's reasonable expectations are met and that an insured gets what he or she pays for. *Montano v. Allstate Indem. Co.*, 2004-NMSC-020, 92 P.3d 1255.

**Stack.** Permissive driver of auto covered by one of three policies was "insured person" entitled to "stack" coverages of all three policies pursuant to their terms; policy provided, if more than one premium was paid for uninsured motorist coverage "under this or other policies issued by insurer" limit of liability would be total limits for each separate premium. *Richardson v. Farmers Ins. Co.*, 112 N.M. 73, 811 P.2d 571 (1991). Alleged fact that permissive driver, who temporarily deviated from her duties by taking a side trip before returning vehicle to its insured owner, did not change her status under uninsured motorist policy either as permissive driver or as employee injured in the course of her employment. *Lucero v. New Mexico Pub. Sch. Ins. Auth.*, 119 N.M. 465, 892 P.2d 598 (1995).

**Direct Action by Claimant.** Direct actions by claimant against automobile insurer for uninsured motor-

ist benefits is permissible. Where claimant for uninsured motorist coverage made claim under policy which specified that matters upon which insurer and any person making claim disagree would be settled by arbitration, valid agreement to arbitrate between claimant and insurer existed, despite claimant's argument that he should not be bound by terms of policy since he did not sign policy. *Wood v. Millers Nat'l Ins. Co.*, 96 N.M. 525, 632 P.2d 1163 (1981).

**Purpose.** Uninsured or unknown motorist statutes are designed to protect injured party from uninsured or unknown motorist and are not designed to protect insurance company from injured party. *Montoya v. Dairyland Ins. Co.*, 394 F. Supp. 1337 (D.N.M. 1975).

**Breach.** An insurer must demonstrate it was substantially prejudiced by an insured's breach of material breach of insurance policy before it will be relieved of its obligations. Proof that the insured breached the consent-to-settle provision creates a presumption of substantial prejudice. *State Farm v. Fennema*, 2005-NMSC-010, 110 P.3d 491.

**Property.** Word "property," as used in uninsured motorist statute, includes coverage of house damaged when uninsured motorist negligently drove his vehicle causing damage to house. *Richards v. Mountain States Mut. Cas. Co.*, 104 N.M. 47, 716 P.2d 238 (1986).

**Payment Priority.** Insurer of vehicle in which injured person was riding as passenger, rather than as owner or driver, was required to first pay uninsured motorist benefits before injured party's insurer could be required to pay under its uninsured motorist coverage. *Branchel v. Safeco*, 106 N.M. 70, 738 P.2d 1315 (1987).

**Family.** Auto policy excluding from uninsured motorist coverage uninsured vehicles owned by or available for use of insured or any family member was incompatible with stated purpose of uninsured motorist insurance statute and was invalid. *Foundation Reserve Ins. v. Marin*, 109 N.M. 533, 787 P.2d 452 (1990).

**Statutory Offset.** For purposes of determining amount that insured can recover from underinsured motorist (UIM) carrier, statutory offset, referring to the sum of limits of liability under all bodily injury liability insurance applicable at time of accident, is to be subtracted either from total of insured's uninsured motorist coverage or from insured's damages, whichever method produces the smaller result. Household exclusion from liability coverage in automobile insurance policy would not be applied to deny underinsurance benefits to wife, who was injured while riding as a passenger in vehicle driven by her husband. Underinsured motorist benefits for Class I insureds, who are named insured and their families as opposed to mere passengers, may be limited



only by statutory conditions, not by additional conditions under contract. *Martinez v. Allstate Ins. Co.*, 124 N.M. 36, 946 P.2d 240 (Ct. App. 1997).

**Multiple Claimants.** In multiple-claimant situations, insured motorists who are covered under an uninsured/underinsured motorist policy and who suffer from injuries resulting from an automobile accident are entitled to collect up to the limit of their underinsurance policy to the extent that their damages exceed the amounts that the tortfeasor's insurer has previously paid to them. *State Farm v. Valencia*, 120 N.M. 662, 905 P.2d 202 (Ct. App. 1995).

**Coverage Rejection.** Rejection of uninsured motorist coverage must be made part of automobile insurance policy by endorsement on declarations sheet, by attachment to policy, or by some other means that makes rejection part of the policy. Insureds' rejection of uninsured motorist coverage was valid and effective, even though insurance agent did not explain coverage at time of rejection, and automobile insurance application form and its rejection language and declarations page were never submitted for approval to superintendent of insurance. Insureds showed no prejudice from insurer's failure to submit those policy provisions for approval. *Vigil v. Rio Grande Ins. of Santa Fe*, 1997-NMCA-124, 950 P.2d 297.

### WAIVER AND ESTOPPEL

**Definition – Estoppel.** Estoppel by conduct arises when party has been induced by conduct of another to do or forbear from doing something he would not have done and his reliance on conduct of another resulted in him taking position to his prejudice or detriment. *Capo v. Century Life Ins. Co.*, 94 N.M. 373, 610 P.2d 1202 (1980).

**Application – Estoppel.** Estoppel is proper theory for preventing abuses arising from misrepresentations and mistakes, but should not be applied to prevent insurer, having discovered error, from correcting error where insured is adequately and fairly notified of change. *Anderson v. Dairyland Ins. Co.*, 97 N.M. 155, 637 P.2d 837 (1981).

**Definition – Waiver.** "Waiver" is intentional relinquishment or abandonment of known right. *Wells Fargo Bank v. Dax*, 93 N.M. 737, 605 P.2d 245 (Ct. App. 1979).

**Waiver by Insurer.** Waiver by insurer requires showing that insurer knew of nonoccurrence of condition and intended to waive compliance with condition. *Jackson Nat'l v. Receconi*, 113 N.M. 403, 827 P.2d 118 (1992).

**Failure to Inquire or Examine.** Failure of company to inquire of assured or examine record, respecting encumbrances, held no waiver of policy provision excluding encumbered property. *Shoucair v. North British*, 16 N.M. 563, 120 P. 328 (Terr. 1911).

**Waiver by Retention.** Waiver by insurer of defenses to recovery on a policy may arise from retention of benefits, as where insurer accepts or retains premiums after demand for payment of the loss, and insurer is then stopped to deny liability. *Miller v. Phoenix*, 52 N.M. 68, 191 P.2d 993 (1948).

**Forfeiture.** Forfeiture clause in insurance policy for non-payment of premiums may be waived by insurer. *Martin v. New York*, 30 N.M. 400, 234 P. 673 (1923). *Smith v. New York*, 26 N.M. 408, 193 P. 67 (1920). Acknowledgement of payment contained in policy is prima facie evidence of payment in action to recover premium. In action on policy, where insurer interposes defense of non-payment of premium, acknowledgment is conclusive evidence of payment, absent fraud. *Krisberg v. Inter-Ocean*, 39 N.M. 107; 41 P.2d 519 (1935).

**Knowledge – Forfeiture.** Before insurer can be held to have waived or to have been estopped from asserting right of forfeiture, insurer must have had knowledge of facts. *Modisette v. Foundation Reserve Ins. Co.*, 77 N.M. 661, 427 P.2d 21 (1967).

**Agent's Representations.** Reasonable reliance on insurance agent's representations is factor to be considered in determining whether insured fulfilled his duty to examine policy, and was thus excused from failure to discover error in policy. *Anderson v. Dairyland Ins. Co.*, 97 N.M. 155, 637 P.2d 837 (1981).

**Reasonable Inquiry.** Insurance company is bound to make an inquiry, reasonable under the circumstances, to ascertain facts surrounding applicant's particular medical condition or history. *Ellingwood v. New Mexico Investors Life Ins. Co., Inc.*, 111 N.M. 301, 805 P.2d 70 (1991).

### WORKERS' COMPENSATION

See Law Digest Tables.

The New Mexico Workers' Compensation Act was amended substantially in 1988, 1989, 1990 and 1991. N.M. Stat. Ann. §52-1-1 *et seq.*

**Definition – Employment.** There must be mutual assent, express or implied, for contract of hire to exist, for purposes of determining whether claimant is "worker" as defined by Workers' Compensation Act. *Benavidez v. Sierra Blanca Motors*, 1996-NMSC-045, 922 P.2d 1205 (1996).

Liability of Employer. Employer's liability is limited to the act and is not subject to any other liability for injuries to his employees, in absence of contract of indemnity between employer and third party. *Beal by Boatwright v. Southern Union Gas*, 62 N.M. 38, 304 P.2d 566 (1956).

"Arise Out Of" and "Course of Employment." N.M. Stat. Ann. §52-1-19, provides that employee is covered for injury by accident arising out of and in course of employment. "Course of Employment" refers to time, place and circumstances under which injury occurred. "Arise out of" relates to cause of injury. Accidental injury must "arise out of" and "occur in course of" employment before workman's compensation benefits can be recovered. *Gutierrez v. Artesia Pub. Schs.*, 92 N.M. 112, 583 P.2d 976 (Ct. App. 1978). Worker not entitled to workers' compensation for injury suffered during self-directed, off-duty athletic activity. *Meeks v. Eddy County Sheriff's Dept.*, 118 N.M. 643, 884 P.2d 534 (Ct. App. 1994).

Insurer's Contractor. When workers' compensation insurer contracts with private organization for medical case management service, that private organization and its employees are subject to same constraints as insurer itself with respect to ex parte communications with worker's treating physicians. *Gomez v. Nielson's Corp.*, 119 N.M. 670, 894 P.2d 1026 (Ct. App. 1995).

Prison Work Release. A prisoner who volunteers to participate in a work release program and is injured while under the direction of a private business is entitled to Workers' Compensation. *Benavidez v. Sierra Blanca Motors*, 1996-NMSC-045, 922 P.2d 1205 (1996).

Previous Employer. Employer and its insurer were entitled to reduction in workers' compensation liability to extent that future medical expenses were necessary as result of accident which occurred during employment with previous employer; claimant's disability was caused by accident suffered while working for previous employer and accident working for employer, and injuries were to same member or function. *McMains v. Aztec Well Serv.*, 119 N.M. 22, 888 P.2d 468 (Ct. App. 1994).

Special Employer Liability. A special employer (one who borrows an employee) is liable when: (1) the employee has made a contract of hire, express or implied, with the special employer; (2) the work being done is essentially that of the special employer; and (3) the special employer has the right to control the details of the work. For a discussion regarding the distinctions between special employees, borrowed employees, and statutory employees, see *Rivera v. Sagebrush Sales, Inc.*, 118 N.M. 676, 884 P.2d 832 (Ct. App. 1994).

Exclusive Remedy. Tort claim by deceased employee's husband against employer for loss of consortium was barred as remedy at law under exclusivity provisions of Workers' Compensation Act, where workers' compensation was exclusive remedy of employee's survivors. *Singhas v. New Mexico State Hwy. Dept.*, 120 N.M. 474, 902 P.2d 1077 (Ct. App. 1995).

Tortfeasor Release. Worker's release of third-party tortfeasor or prosecution to judgment of action against third-party tortfeasor is not absolute bar to subsequent collection of workers' compensation benefits from employer. *Montoya v. AKAL Security Inc.*, 114 N.M. 354, 838 P.2d 971 (1992).

Mental Impairment. N.M. Stat. Ann. §52-1-24 (b)-(c), defines primary mental impairment and secondary mental impairment. The fact that claimant sustained physical injuries from accident did not prevent compensation of primary mental impairment sustained in same accident when mental impairment was unrelated to the physical injuries. *Chavez v. Mountain State Constr.*, 1996-NMSC-070, 929 P.2d 971.

False Application Defense. Employer was not entitled to false application defense in workers' compensation proceeding, where it failed to comply with explicit statutory requirement that it clearly and conspicuously disclose that claimant will be entitled to no future compensation benefits if he knowingly and willfully conceals or makes misrepresentation about information requested on medical condition questionnaire. *Pena v. Phelps Dodge*, 119 N.M. 735, 895 P.2d 257 (Ct. App. 1995).

Liens. Workers' compensation premiums are not lienable under N.M. Stat. Ann. §48-2-2 because they are neither labor, equipment, nor materials as contemplated by that section. Persons who perform labor, i.e. those doing work, may have liens for the value of their labor; the employer's insurer may not. Unpaid workers' compensation insurance premiums furnished to certain contractors are "material" to those contractors so that they may be recovered from the contractors' performance bonds, as though a lien had been filed against the improved premises, but the entity furnishing same shall have no lien against the improved premises. *CIT Group v. Horizon Potash*, 118 N.M. 665, 884 P.2d 821 (Ct. App. 1994).

Attorneys Fees. Employers' denial of causation and request for credit places past workers' compensation benefits in jeopardy, and preservation of those benefits by attorney warrants attorney fee award; past benefits preserved from attack by employer constitute quantifiable benefit to worker. In awarding attorney fees in workers' compensation case, pertinent inquiry should be



to determine whether attorney contributed anything to case for which he should be paid, and award fees accordingly. *County of Bernalillo v. Sisneros*, 119 N.M. 98, 888 P.2d 980 (Ct. App. 1994).

Constitutionality. Workers compensation claimants have standing to challenge the statute based on constitutional challenges. See *Corn v. New Mexico Ed. FCU*, 119 N.M. 199, 889 P.2d 234 (Ct. App. 1994). Rational basis review should be applied in analyzing equal protection claims to the Tort Claims Act damages cap. *Trujillo v. City of Albuquerque*, 1998-NMSC- 031, 965 P.2d 305.

