

# DIGEST OF INSURANCE LAW

## NEW MEXICO

Not Revised for this Edition

### CIVIL JUDICIAL SYSTEM

#### Courts of Original Jurisdiction

Magistrate Court. Justice of Peace Court abolished. Each county (with less than 200,000 population) has magistrate court with civil jurisdiction to \$2,000, exclusive of interest and costs. Criminal jurisdiction limited to minor crimes. No jurisdiction in equity, domestic relations, malicious prosecution, libel, slander, writs of habeas corpus, land titles. Not court of record but jury available. Judgments appealable to District Court for trial de novo N.M. Stat. Ann. §35-13-2.

Small Claims Court exist in counties with population greater than 100,000 has jurisdiction co-extensive with that of magistrate courts and co-extensive with county, in all matters involving violation of county ordinances, to hold preliminary examinations in criminal cases and in all actions up to \$2,000 exclusive of interest. N.M. Stat. Ann. §34-8-1.

In counties with population greater than 200,000, Metropolitan Court has jurisdiction co-extensive with county over all offenses and complaints under ordinances of county and of any municipality located within county, and for civil actions not greater than \$5,000 exclusive of interest and costs. Trial by jury available. Record available. Decisions appealable to District Court.

Probate Courts are courts of record. One in each county.

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 small claims court, magistrate and metropolitan courts. Trial de novo, is available in appeals from magistrate court only. State is divided into thirteen judicial districts.

#### Appellate Courts

Supreme Court. Has original appellate jurisdiction in appeals from district court: in which there is imposed a sentence of death or life imprisonment; from Public Service Commission; from Corporation commission; 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. (5 Justices).

Court of Appeals. Has appellate jurisdiction of any civil action not specifically vested in Supreme Court. (10 Judges).

No opinion of New Mexico Court of Appeals shall be published until after time has expired for review of decision by New Mexico Supreme Court.

### LAW

#### Abbreviations

L.—Session Laws enacted in biennial sessions of legislature; followed by year of enactment.

N.M. — New Mexico Reports.

N.M. Stat. Ann. — New Mexico Statutes Annotated (1978).

P. — Pacific Reporter.

P.2d — Pacific Reporter, Second Series.

P.3d — Pacific Reporter, Third Series.

S.C.R.A. — Supreme Court Rule Annotated.

NMS — New Mexico Supreme Court decision.

NMCA — New Mexico Court of Appeals decision.

### ACCIDENT AND HEALTH INSURANCE

See “DISABILITY”; “WORKER’S COMPENSATION, Occupational Disease.”

State statute 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, 132 N.M. 171, 45 P.3d 891.

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 indemnity of parties. *Ellingwood v. N.N. Investors*, 111 N.M. 301, 805 P.2d 70 (1991).



**Cancellation.** Statutory requirement of 10-day notice to insured of cancellation does not apply to life insurance. Notice of cancellation to insured is not required when basis of cancellation is 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 policy provided double indemnity for accidental death, acceptance of amount named in policy in full settlement was not accord and satisfaction barring recovery of double indemnity. *Buel v. Kansas City Life*, 32 N.M. 34, 250 P. 635 (1926).

**Contribution.** Where beneficiary under policy insuring against accidental death and containing standard proration clause obtained other insurance covering same loss and naming same beneficiary, and upon insured's death collected such other insurance, beneficiary was bound by proration clause, though insured died in ignorance of other insurance. *Gilbert v. Inter-Ocean*, 41 N.M. 463, 71 P.2d 56 (1937).

**Disease Induced by Accident.** Policy which excluded loss caused by disease or by medical procedures therefore excluded coverage for loss of insured's left arm, resulting from improper insertion of I-V needle, although an unintended occurrence or mistake, occurred during medical treatment of insured's diabetic condition. *Castovena v. Colonial Life*, 107 N.M. 460, 760 P.2d 152 (1988).

A third-party healthcare provider is not preempted by 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.** In cases of fraud by insured, substantial prejudice need not be shown. The requirement of substantial prejudice in *Esquibel*, 94 N.M. 132 is not limited to situations where innocent third parties are injured. 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. *Eldin v. Farmers Alliance Mut. Ins.*, 119 N.M. 370, 890 P.2d 823 (App. 1994).

**Fraud.** 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, held to defeat liability for death occurring at subsequent childbirth. *Vigil v. American*, 37 N.M. 44, 17 P.2d 936 (1932).

## ACCIDENTAL MEANS

Liability of insurer under policy for accidental loss of life arose if accident was proximate efficient cause of loss, rather than if accident was literally sole cause. *Armijo v. World Ins. Co.*, 78 N.M. 204, 429 P.2d 904 (1967).

Under Cardozo approach to insurance coverage for injury or death by "accidental means," which New Mexico Supreme Court would continue to follow, attempted distinction between "accidental means" and "accidental results" is rejected as only tending to further confuse law. *Vallejos v. Colonial Life & Acc. Ins. Co.*, 91 N.M. 137, 571 P.2d 404 (1977).

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).

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

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 and hence, as 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).

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

All adjusters must be licensed. N.M. Stat. Ann. §59A-13-3.

“Adjuster” means any person, who or which 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. §59-13-2. 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.

Plaintiffs may pursue a claim against adjuster of insurer for breach of the duty of good faith and fair dealing in handling a claim despite absence of contract between insured and adjuster. Adjuster was an entity related to or in agreement with the insurer issuing the policy who had control over and made ultimate determination regarding the merits of insured’s claim. 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. The entity acts as an insurer and is therefore bound within the special relationship created through the insurance contract. 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. *Dellaira v. Farmers Ins. Exchg.*, 2004 NMCA 132, 102 P.3d 111.

## AGE

See “AUTOMOBILES”; “NEGLIGENCE.”

## AGENTS AND BROKERS

Definition of Agent. Person appointed by insurer authorized to transact insurance in New Mexico, to solicit applications for insurance or annuity contracts on its behalf, etc. N.M. Stat. Ann. §59A-12-2. Agent may employ 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. 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 (1929).

For Whom. test of agent’s authority is not his rank or title but duties assigned to him and authority and obligations which go with such assignment. Issue of extended authority of insurance agent generally, whether actual or apparent, is usually one of fact. *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 (App. 1977).

Fraud. Unless assured by act or neglect aids fraud of insurer’s agents in obtaining life policy on 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 known by agent to be false inserted in application attached to policy, held not binding on assured unless latter participated in fraud. *Gallegos v. Kansas City Life*, 34 N.M. 579, 286 P. 420 (1930). 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).

Broker. (Non-Resident Broker.) 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 broker residing or domiciled in state other than New Mexico or residing or domiciled in foreign country. N.M. Stat. Ann. §59A-12-3.

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); *Jernigan v. New Amsterdam Cas. Co.*, 74 N.M. 37, 390 P.2d 278 (1964); *White v. Calley*, 67 N.M. 343, 355 P.2d 280 (1960); *Stoes Bros. Inc. v. Freudenthal*, 81 N.M. 61, 463 P.2d 40 (App. 1969); *Topmiller v. Cain*, 99 N.M. 311, 657 P.2d 638 (App. 1983). Knowledge or notice of fact to agent received by him while acting in scope of authority is chargeable to insurer if not communicated. *Lumberman’s Mutual v. Bowman*, 313 F.2d 381 (10<sup>th</sup> Cir. 1963).

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).

Representations of general or special agent as to scope or interpretation of insurance contract are not within their scope of authority and are not binding on insurer. *Union Life v. Burk*, 169 F.2d 235 (10<sup>th</sup> Cir. 1948).



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 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).

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 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); interpreting N.M. Stat. Ann. §59-5-37 (1978 Comp.). Agency contracts between insurer and agent of indefinite duration is terminable at will. *Melnick v. State Farm*, 106 N.M. 726, 749 P.2d 1105 (1988).

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. Hurley Motor Co.*, 105 N.M. 803, 737 P.2d 893 (1987).

Agent may bind insurer by oral agreement for insurance that is to be effective immediately if such act is within the actual or apparent authority of agent. *Ellingwood v. New Mexico Investors Life Ins. Co., Inc.*, 111 N.M. 301, 805 P.2d 70 (1991). 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'l Life Ins. Co. v. Reconoci*, 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 contract of insurance. *Cottonwood Enterprises v. McAlpin*, 111 N.M. 793, 810 P.2d 812 (1991). Title company had statutory duty to vendor-title insurance policy purchaser to search real property title and failure to discover defects in title was actionable by vendor even though title company had no contractual duty to search title for vendor. *Ruiz v. Garcia*, 115 N.M. 269, 850 P.2d 972 (1993).

Medical insurer liable to insured employer for employer's costs of defense incurred defending a retaliatory

discharge claim brought by an employee who alleged retaliatory discharge for bringing a workers' compensation claim. Insurer's agent misrepresented that medical insurance policy covered on the job injuries. *Charter Services, Inc. v. Principal Mut. Life Ins. Co.*, 117 N.M. 82, 868 P.2d 1307 (1994).

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 (1997).

#### ARBITRATION

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 (1971).

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.*, 96 N.M. 525, 632 P.2d 1163 (1981).

Trial court had authority to vacate arbitration award pursuant to clause giving automobile insurer right to request trial de novo if arbitration award exceeded minimum limit for bodily injury liability specified by financial responsibility law; parties did not have agreement to be bound by damage award above statutory limit. N.M. Stat. Ann. §44-7-12, A (5). *Bruch v. CNA*, 117 N.M. 211, 870 P.2d 749 (1994). Overruled in *Padilla v. State Farm Mutual*, 2003 NMSC 011, 133 N.M. 661, 68 P.3d 901: The limited de novo appeal provision in the insurance contract at issue in this [and in the *Bruch*] case violates public policy and is void as substantively unconscionable.



Trial court erred in denying insurer trial de novo of arbitration award to insured, by applying doctrine of judicial stacking so arbitration award of \$52,500 did not exceed judicially stacked limit of \$75,000. Held: the policy language referencing the statutory "financial responsibility limits" means the applicable single amount stated in N.M. Stat. Ann. §66-5-208(A) of \$25,000 without reference to judicial stacking. *Allstate Ins. Co. v. Perea*, 8 P.3d 166, 2000 NMCA 70. Overruled in *Padilla v. State Farm Mutual*, 2003 NMSC 011, 133 N.M. 661, 68 P.3d 901.

Under the New Mexico Arbitration Act, NMSA 1978, §§44-7A-1 to -32 (1971, as amended through 2004), the district 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 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).

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 18, 107 P.3d 11.

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 Insur-

ance has approved such an endorsement, New Mexico law does not compel binding arbitration. *McMillan v. Allstate*, 2004 NMSC 2, 135 N.M. 17, 84 P.3d 65.

The "escape hatch" arbitration clause that allows either party to the contract a de novo appeal of awards in excess of the limits of the Mandatory Financial Responsibility Act violates New Mexico public policy. The unequal access to an appeal is unenforceable and that the contract thus provides for voluntary binding arbitration. *Padilla v. State Farm*, 2003 NMSC 011, 133 N.M. 661, 68 P.3d 901.

## ASSIGNMENT

See "FIRE INSURANCE."

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 in retiring indebtedness was to be determined by testator's intent. *Gallagher's Will*, 57 N.M. 112, 255 P.2d 317 (1953).

Secret limitations on agents' authority, inconsistent with his apparent authority, may not defeat validity of agents' agreement to transfer policy to insured's assignee or of endorsement executed by said agent, notwithstanding policy provisions to contrary. *Houtz v. General Bonding*, 235 F.2d 591 (10<sup>th</sup> Cir. 1956). Recognizes validity of oral assignment and assumption of liability policy.

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."

Age. Minimum age is 16, except to graduates of driver training course - 15. Learners permit 14 while enrolled in such course. 13 motor scooters, N.M. Stat. Ann. §66-5-5, chauffeurs - 18. N.M. Stat. Ann. §66-5-7.

Family Purpose Doctrine. Recognized; not restricted to use by minor members of family. *Burkhart v. Corn*, 59 N.M. 343, 284 P.2d 226 (1955); *Pouliot v. Box*, 56 N.M. 566, 246 P.2d 1050 (1952); *Stevens v. Van Deusen*, 56 N.M.128, 241 P.2d 331 (1951).

Guest Cases. 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 (1978). (overruling all cases to contrary).

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

Last clear chance doctrine abolished in *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 therefore, did 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). The omnibus clause of the motor vehicle policy provided coverage to any person using insured car, if use is within scope of consent. Financial Responsibility Act provides that policies shall insure any person using any such motor vehicle with the express or implied permission of the named insured. As long as the vehicle is being used (used as opposed to operated) for the purposes for which initial permission is given, the omnibus clause provides coverage to any person operating the vehicle. *USAA v. National Farmers*, 119 N.M. 397, 891 P.2d 538 (1995).

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. N.M. Stat. Ann. §66-5-301 (A). *Jaramillo v. Providence Washington Ins.*, 117 N.M. 337, 871 P.2d 1343 (1995).

Common carrier is held to highest degree of care. *Cavazos v. Geronimo*, 56 N.M. 624, 247 P.2d 865 (1952); and 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).

Primary business test determines whether entity is a carrier for hire which is subject to Motor Carrier Act. 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. N.M. Stat. Ann. 1978 §§65-2-80 to 65-2-127. *Progressive Northwestern Ins. Co. v. Martinez*, 125 N.M. 46, 956 P.2d 845 (Ct. App. 1998).

Seat Belts. Statute providing 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. N.M. Stat. Ann. §66-7-373 (B). *Mott v. Sun Country*, 120 N.M. 68, 901 P.2d 192 (App. 1995).

Service of Process Upon Non-resident Motorists. 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 state. Statute contemplates all non-residents or their agents operating motor vehicles on public highways in state. N.M. Stat. Ann. §66-5-103.

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 and 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 Mut. Auto. Ins. Co.*, 703 P.2d 882 (1985).

Uninsured and Underinsured. 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 Mut. Auto.* 119 N.M. 467, 892 P.2d 600 (1995). Underinsured motorist under §66-5-301 (b) means, in multiple claimant situation, the insureds are entitled to collect up to the limit of their underinsured policy to the extent that their damages exceed the amount that the tortfeasor's insurance has previously paid to them. *State Farm Mut. Auto v. Valencia*, 120 N.M. 662, 905 P.2d 202 (App. 1995).

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 NMCA 23, 129 N.M. 395, 9 P.3d 639.

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 Mut. Auto. Ins. Co. v. Valencia*, 120 N.M. 662, 905 P.2d 202 (Ct. App. 1995).

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 Mut. Auto. Ins. Co. v. Ballard*, 2002 NMSC 030, ¶ 11, 132 N.M. 696, 54 P.3d 537.

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. Such a modification to our judicially-created stacking doctrine will ensure 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 20, 135 N.M. 681, 92 P.3d 1255.

An insurer must demonstrate it was substantially prejudiced by an insured's breach of a consent-to-settle provision before avoiding liability for paying underinsured motorist benefits. Proof that the insured breached the consent-to-settle provision creates a presumption of substantial prejudice. *State Farm Mut. Auto. Ins. Co. v. Fennema*, 2005 NMSC 10, 110 P.3d 491.

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 14, 135 N.M.452, 90 P.3d 471.

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. N.M. Stat. Ann. §66-5-301. *Guess v. Gulf Ins. Co.*, 96 N.M. 27, 627 P.2d 869 (1981).

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); *Lopez v. Foundation Res. Ins. Co. Inc.*, 98 N.M. 166, 646 P.2d 1230 (1982); *Sloan v. Dairyland Ins. Co.*, 86 N.W. 65, 519 P.2d 301 (1974).

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).

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. Turnacliff*, 107 N.M. 382, 758 P.2d 796 (1988).

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, overruling *Gruger v. Western Cas. & Sur.*, 89 N.M. 562, 555 P.2d 683 (1976); *USAA v. National Farmers Union*, 119 N.M. 397, 891 P.2d 538 (1995).

## 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.

Since "airworthiness certification" is not an "airworthiness certificate," nor are they identical, "certification" exclusion in liability policy was not governed by federal aviation regulations which applied to an "airworthiness certificate." *Security Mutual v. O'Brien*, 99 N.M. 759, 662 P.2d 639 (1982). 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 per-



form a timely annual inspection on aircraft, which resulted in termination of both airworthiness certificate and certification. *Security Mutual v. O'Brien*, 99 N.M. 638, 662 P.2d 639 (1983).

### BROKERS

See "AGENTS, BROKERS AND SOLICITORS."

### CANCELLATION

When insurance carrier has certified motor vehicle policy under N.M. Stat. Ann. §66-5-219 using financial responsibility insurance certificate, insurance so certified shall not be cancelled or terminated until at least ten days after notice of cancellation or termination of certified policy is filed in division, except that such policy subsequently procured and certified shall, on effective date of its certification, terminate insurance previously certified with respect to any motor vehicles designated in both certificates. N.M. Stat. Ann. §66-5-223.

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).

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).

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).

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. Esquibel*, 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'l v. Receconi*, 113 N.M. 403, 827 P.2d 118 (1992).

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

N.M. Stat. Ann. §59A-18-29, ten day requirement of notice to insured of cancellation does not apply to life insurance. 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).

### CONSTRUCTION OF POLICY

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. *Yarborough v. State Farm*, 730 F. Supp. 1061 (D.C. N.M. 1990). Policy clause excluding injury or damage intended or expected by insured construed to exclude harm of same general type intended by insured. Policy may exclude injuries arising from intentional acts if exclusionary clause is clear and does not conflict with statute. *Knowles v. USAA*, 113 N.M. 703, 832 P.2d 394 (1992). Policy that violates statute protecting insureds is enforceable against insurer. *Jackson Nat'l v. Receconi*, 113 N.M. 403, 827 P.2d 118 (1992).

Homeowners 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).

Decedent sent application to insurer to portate group life policy to individual policy. Insurer mailed notice to pay premium which insured failed to pay; however, insurer failed to notify insured of amount of the conversion premium. Held that insurer had duty to notify insured of amount of conversion premium after application to portate 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. *Estate of Griego v. Reliance Standard Life Ins. Co.*, 997 P.2d 150, 2000 NMCA 22.

Where insurance policies involved contain "other" or "excess" insurance clauses, which are in conflict with each other in that each attempts to make the other insurer primarily liable, and such "other" insurance clauses would leave an insured without any coverage, the policies are held to be "mutually repugnant" and cancel each other out. In such a case, the test to apply in determining which insurer is primary and which is secondary is the "closest to the risk" test discussed in *Branchal v. Safeco Ins. Co. of Am.*, 106 N.M. 70, 71, 738 P.2d 1315, 1316 (1987). The insurer that is closest to the risk is the primary insurer. The *Branchal* 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 was, therefore, 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 Fire & Cas. Co., v.*



*Farmers Alliance Mut. Ins. Co.*, 2004 NMCA 101, 134 N.M. 194, 75 P.3d 410.

Ambiguity of Terms. Although ambiguities in insurance policy must be liberally construed in favor of insured, clause is ambiguous only if it is reasonably and fairly susceptible of different constructions. *State Farm v. Blystra*, 883 F. Supp. 583 (D. N.M. 1995). 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). Under New Mexico law, exclusions are to be construed narrowly and will not be enforced where they irreconcilably conflict with insuring clause. *Western Heritage v. Chava Trucking*, 991 F.2d 651 (10th Cir. 1993). 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). When exclusionary clause nullifies coverage of granting clause instead of creating specific exception to it, court should refuse to apply clause that deprives insured of coverage reasonably understood to be provided and no construction is required. *Knowles v. USAA*, 113 N.M. 703, 832 P.2d 394 (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. New Mexico Investors Life*, 111 N.M. 301, 805 P.2d 70 (1991).

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).

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).

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 not a family member is seeking coverage under a policy not purchased by such third party. *Overruling Horn v. USF&G*, 109 N.M. 786 791 P.2d 61 (1990); *Jaramillo v. Providence Washington Ins. Co.*, 117 N.M. 337, 871 P.2d 1343 (1994).

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).

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).

Marital settlement agreement (MSA) requiring former husband to insure his life and name child as beneficiary, created a vested interest in favor of the child and precluded former husband from adding beneficiaries unilaterally and without written agreement of parties, thereby diluting the child's policy benefits in violation of MSA, even though MSA failed to specifically identify the life insurance policy that was to be kept in effect. 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 (1997).

Determining whether contract is ambiguous is question of law for court. Automobile insurance policy's limitations of recovery of uninsured motorist (UM) benefits which were \$100,000 per person and \$200,000 per accident, 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).

Ambiguities arise when separate sections of policy appear to conflict with one another, when language of provision is susceptible to more than one meaning, when structure of contract is illogical, or when particular matter of coverage is not explicitly addressed by policy. If any provisions of insurance policy appear questionable or ambiguous, Supreme Court will first look to whether their meaning and intent are explained by other parts of policy. Court's construction of policy will be guided by reasonable expectations of insured. Ambiguity in insur-



ance contract is usually construed against insurer, but mitigating this rule is requirement that courts adopt interpretation that is most in accord with reason and probable expectations of parties. 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. Threshold of excess liability insurance policy was reached despite underlying insurer's settlement for less than its policy limits after judgement was entered against insured for more than underlying policy limits. Nothing in excess policy precluded underlying insurer, once it has been held liable to pay, from settling for amount less than policy limits and receiving credit for the balance. 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. Silence of excess liability policy regarding allocation of punitive damages covered by the underlying insurance, not excess policy, was not patent ambiguity apparent on face of policy, but was latent ambiguity in which otherwise clear policy language appeared ambiguous upon application to particular circumstance. *Rummel v. Lexington Ins. Co.*, 123 N.M. 752, 945 P.2d 970 (1997).

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).

State statute 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, 132 N.M. 171, 45 P.3d 891.

## CONTRIBUTION

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

Uniform Contribution Among Tortfeasors Act adopted §41-3-1 to 18, N.M. S.A. 1978.

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 and, 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 (1980).

Evidence and questions for jury. See *Fireman's Fund Am. Ins. Cos. v. Phillips, Carter, Reister & Assoc., Inc.*, 89 N.M. 7, 546 P.2d 72.

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 (1983).

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 (App. 1982).

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. 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 in-



cluding parties and nonparties. Joint liability returned 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 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 the 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.

### 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 (App. 1983).

Punitive Damages. May be awarded only when conduct of wrongdoer may be said to be maliciously, intentional, fraudulent, oppressive, or committed recklessly or with wanton disregard of plaintiff's rights. "Malice" means intentional doing of wrongful act without just cause or excuse and means that defendant not only intended to do act which is wrongful but knew that act was wrong when he did it. *Loucks v. Albuquerque Nat'l Bank*, 76 N.M. 735, 418 P.2d 191 (1966); *Hood v. Fulkerson*, 102 N.M. 677, 699 P.2d 608 (1985).

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. To the extent *Teague-Strebeck* would, in every insurance bad faith case, require a showing of an additional culpable mental state to permit an instruction on punitive damages, *Teague-Strebeck* is overruled. In so holding, we reaffirm our statement in *Jessen v. National Excess Ins. Co.*, 108 N.M. 625, 627, 776 P.2d 1244, 1246 (1989) that "[b]ad faith supports punitive damages upon a finding of entitlement to compensatory damages." Accordingly, an instruction on punitive damages will ordinarily be given whenever the plaintiff's insurance-bad-faith claim is allowed to proceed to the jury. *Sloan v. State Farm*, 2004 NMSC 4, 135 N.M. 106, 85 P.3d 230.

On July 1, 2001, a new Uniform Arbitration Act, NMSA 1978, §§44-7A-1 to -32 (2001) became effective. Under the new Act, "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 otherwise applicable to the claim." NMSA 1978, §44-7A-22(a) (2001). See *Aguilera, v. Palm Harbor Homes, Inc.*, 2002 NMSC 029, 132 N.M. 715, 54 P.3d 993.

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. An appellate court is thus confronted with a grave responsibility—armed with the power to strike down an award on a *de novo* basis, the court must actually conduct an analysis of the reasonableness of the jury verdict. 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, 132 N.M. 401, 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 citing with approval U.S. Supreme Court's decision in *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 424-25 (2003), 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.

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. 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 (1974). Exemplary damages are authorized by statute. N.M. Stat. Ann. §41-2-3.

See New Mexico Uniform Jury Instructions—Civil, Ch. 18, Damages.



Joint and several liability is not to be retained in New Mexico's pure comparative negligence system. Defendant is not liable for entire damage caused by defendant and another concurrent tortfeasor. Defendant is liable for proportion of damages which corresponds to his proportion of negligence. *Bartlett v. New Mexico Welding Supply, Inc.*, 98 N.M. 152, 646 P.2d 579 (1982).

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 *Severally Liability Act*, N.M. Stat. Ann. §41-3A-1 *et seq.*

Defendant takes victim as he finds him and is liable for damages defendant causes, unless damages caused by plaintiff's failure to care for his own safety. *Thomas v. Henson*, 102 N.M. 417, 696 P.2d 1010 (App. 1984).

## DEATH

See Law Digest Tables.

Presumption of from specified period of unexplained absence. Persons 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 death statute is exception to general death statute; therefore, when recovery is had under former, no additional cause of action will lie under latter. *Tilly v. Flippin*, 237 F.2d 364 (10th Cir. 1956); *In Re Rielly's Estate*, 63 N.M. 352, 319 P.2d 1069 (1957).

Remedy provided by common carrier death statute is not exclusive remedy; manufacturer of defective public conveyance can be sued under general wrongful death statute. *Langhour v. Beech Aircraft Corp.*, 88 N.M. 516, 543 P.2d 484 (1975).

## DISABILITY

Partial/Total—What Constitutes. Assured 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).

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).

Workers' Compensation Act N.M. Stat. Ann. §52-1-1 *et seq.*, defines "total disability" as an impairment to the worker arising out of and in the course of employment which prevents the worker from engaging, for enumeration or profile, in any occupation for which he is or becomes fitted by age. Training or experience.

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

N.M. Stat. Ann. §66-5-205, effective January 1, 1984. No owner shall permit operation of uninsured motor vehicle, or motor vehicle for which evidence of financial responsibility as was affirmed to division is not currently valid, upon streets or highways of New Mexico unless vehicle is specifically exempted from provisions of Mandatory Financial Responsibility Act.

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

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 was proper in accident victim's suit against tortfeasor; coverage was mandated by law, benefited public, and Mandatory Financial Responsibility Act did not imply that such direct actions were improper. N.M. Stat. Ann. 1978, §§66-5-201 to 66-5-239. *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, pro tanto. *Fire Association v. Patton*, 15 N.M. 304, 107 P. 679 (1910).

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 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 mortgage shall not be invalidated by any act or neglect 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 (App. 1983).

Contribution Between Companies. None where there are several policies each stipulating to pay proportion of loss based on total insurance; and settlement on one policy does not affect 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 (1901).

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 for fire insurance between assured and agent of company is enforceable. *Harden v. St. Paul*, 51 N.M. 55, 178 P.2d 578 (1947).

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 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).

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), *appeal after remand*, 86 N.M. 299, 523 P.2d 543 (1974).

Settlement that is product of fraud or collusion at expense of nonparticipating liability insurer would release that insurer from any obligation under the settle-

ment. *Rummel v. Lexington Ins. Co.*, 123 N.M. 752, 945 P.2d 970 (1997).

## HOSPITALS

Immunity. Courts have followed common law immunity rules as to non profit hospitals whether patient pays or not. Liability to extent of insurance. *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 prior to disbursement of proceeds. After perfection any person disbursing without payment of lien is liable to hospital. Applies only to hospitals located in state. N.M. Stat. Ann. §48-8-1.

Consent. In absence of employer-employee relationship, hospital does not share in responsibility to advise patients of novelty and risks of particular medical treatment. *Cooper v. Curry*, 92 N.M. 417, 589 P.2d 201 (App. 1978).

## HUSBAND AND WIFE

See Law Digest Tables.

Community Property. Is in effect in New Mexico.

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). (cases to contrary overruled).

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 and §40-3-10.

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).

Husband may sue for loss of consortium and wife may sue for loss thereof resulting from intentional or malicious tort, but wife may not sue for loss of same resulting from negligence. *Roseberry v. Starkovich*, 73 N.M. 211, 387 P.2d 321 (1963). Spouse does not have claim for loss of consortium based on negligent injury to other spouse. *Tondre v. Thurmond*, 103 N.M. 292, 706



P.2d 156 (1985). Overruled by *Romero v. Byers*, 117 N.M. 422, 872 P.2d 840 (1994). *Romero* recognized the existence of a wife's cause of action for negligent loss of consortium because of the death of her husband, holding that "[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."

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 of the state where the accident occurred recognized loss of consortium as a separate claim not included in the bodily injury liability limits of the policy; 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. N.M. Stat. Ann. 1978, §66-5-209. *Nollen v. Reynolds*, 125 N.M. 387, 962 P.2d 633 (Ct. App. 1998).

Household exclusion of husband's automobile policy barring wife from recovering for injuries suffered in accident caused by husband's negligence was void as against public policy. *Estep v. State Farm Mut. Auto Ins. Co.*, 770 P.2d 917 (10<sup>th</sup> Cir. 1985).

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).

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 (1980).

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).

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 Service Station, Inc.*, 109 N.M. 509, 787 P.2d 428 (1990).

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, 124 N.M. 324, 950 P.2d 297.

## INFANTS

See "AUTOMOBILES, Age"; "NEGLIGENCE, Age."

## INLAND MARINE

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).

Section 59A-18-29(F) NMSA 1978 states: "This section shall not apply as to life insurance or annuity contracts, health insurance contracts, title insurance, inland marine insurance contracts, or to any insurance policy which by its terms is not cancellable during the term of the policy at the option of the insurer." *Chavez v. America Life and Cas. Ins. Co.*, 117 N.M. 393, 872 P.2d 366 (1994).

## LIABILITY INSURANCE

Bad Faith. Under New Mexico law, good faith requirement imposes duty on insurer to settle claim against insured if possible. *Torrez v. State Farm Mut. Auto. Ins. Co.*, 705 F.2d 1192 (10<sup>th</sup> Cir. 1982). 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. *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'l v. Receconi*, 113 N.M. 403, 827 P.2d 118 (1992).

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 citing with approval U.S. Supreme Court's decision in *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 424-25 (2003), stat-



ing 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.” *Atter v. Murphy Enters., Inc.*, 2005 NMCA 6, 104 P.3d 1092.

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).

Unfair Insurance Practices Act, N.M. Stat. Ann. §59A-16-1 *et seq.*, Comp., 1987 Amendment, intended to broaden the Workers’ Compensation Act so as to provide a separate tort action against insurers who in bad faith refuse to pay compensation benefits. *Russell v. Protective Ins. Co.*, 107 N.M. 9, 751 P.2d 693 (1988).

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).

Compromise of Claims—Duty to Act in Good Faith. Implied covenant of good faith and fair dealing could be enforced against carriers for failure to disclose third party claims administrator’s inadequate administration. 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 (App. 1994).

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 lim-

its. Claimant may reasonably refuse to release subrogated claims during settlement negotiations, if such release may cause claimant to lose substantial portion of his or her 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 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. To the extent *Teague-Strebeck* would, in every insurance-bad-faith case, require a showing of an additional culpable mental state to permit an instruction on punitive damages, *Teague-Strebeck* is overruled. In so holding, we reaffirm our statement in *Jessen v. National Excess Ins. Co.*, 108 N.M. 625, 627, 776 P.2d 1244, 1246 (1989) that “[b]ad faith supports punitive damages upon a finding of entitlement to compensatory damages.” Accordingly, an instruction on punitive damages will ordinarily be given whenever the plaintiff’s insurance-bad-faith claim is allowed to proceed to the jury. *Sloan v. State Farm*, 2004 NMSC 4, 135 N.M. 106, 85 P.3d 230.

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).

Victims sued insureds and insurer for damages arising from auto accidents and alleging insurer did not make good faith efforts to settle the victims’ claims. The trial court dismissed the claims, finding that Section 59A-16-30, NMSA 1978 did not create a right of action for third-parties against insurers. The NM Supreme Court reversed, holding that unfair claims practices under Section 59A-16-30, NMSA 1978 Comp. created a right of action for “any person” who suffered damages as a result of violation of the Trade Practices and Fraud Article. *Hovet v. Allstate Ins. Co.*, 2004 NMSC 10, 89 P.3d 69.

Duty to Defend. If complaint upon its face alleges facts which come within coverage of liability policy,



insurer is obligated to assume defense of action. *American Employers' Ins. Co. v. Continental Cas. Co.*, 85 N.M. 346, 512 P.2d 674 (1973). Duty to defend arises 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 false or fraudulent. *Satterwhite v. Stolz*, 79 N.M. 320, 442 P.2d 810 (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 insured in primary action until court hearing in such action found that insurer was relieved of liability under noncoverage 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). 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 (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. N.M. Stat. Ann. §15-7-3, (A) (7) (b). *Board of County Comm'rs. v. Risk Mgt. Div.*, 120 N.M. 178, 899 P.2d 1132 (1995). Under New Mexico law, 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).

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.*, 993 P.2d 751, 1999 NMCA 3.

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 18. *But see Wilson v. Galt*, 100 N.M. 227, 668 P.2d 1104 (1983).

Determination where exclusionary provision in automobile policy applied had to be determined in primary action and not in declaratory judgment action brought by insurer who was under duty to defend insured in primary action until court hearing 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 such suit is groundless, false, or fraudulent." *Foundation Reserve Ins. Co., Inc. v. Mullenix*, 97 N.M. 618, 642 P.2d 604 (1982). Exclusionary provisions of auto policies that purport to deny stacking have been held void as against public policy of compensating innocent victims. Insured allowed to stack 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 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).

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. 457, 892 P.2d 600 (1995).

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 (1980).

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).

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 Employees Ins. Co. v. Welch*, 2004 NMSC 14, 135 N.M.452, 90 P.3d 471.

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).

Whether insurer has duty to defend depends on whether allegations of petition filed against insured are sufficient to state a claim within the terms of the policy. *Western Commerce Bank v. Reliance Ins. Co.*, *supra*.

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).

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).

Exclusions - 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).

New Mexico law applies to interpret a step down provision in a Georgia automobile liability insurance policy. The non-resident insureds were injured in a one-vehicle accident in New Mexico through no fault of any New Mexico citizen and the insureds received significant medical care in New Mexico paid for by the county Indigent Hospital and County Health Care Act. Under New Mexico law, the family exclusion step down provision contained in the Georgia policy is invalid. The *lex loci contractus* rule does not apply under these facts and Georgia law does not determine whether the step down provision is valid. The intra-family tort exclusion provisions is offensive to New Mexico public policy. Therefore, New Mexico law should apply to interpret the step down provision in the Georgia automobile liability insurance policy. *State Farm v. Ballard*, 2002 NMSC 030, 132 N.M. 696, 54 P.3d 537.

When a defendant's liability insurance company is joined as a nominal party under *Raskob v. Sanchez*, 1998 NMSC 45, P3, 126 N.M. 394, 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, how should the trial court prevent the jury from learning of the presence of the insurer? A trial court ought to bifurcate the trial and otherwise prevent the jury from hearing about the presence of insurance at the first stage. *Martinez v. Reid*, 2002 NMSC 015, 132 N.M. 237, 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 (torts) is based on time of injury, not wrongful act and expires in three years. N.M. Stat. Ann. §37-1-8. Disability; for minor or incapacitated the limitations period is tolled 1 year after termination of incapacity. N.M. Stat. Ann. §37-1-10.

No policy of life insurance shall be issued or delivered in this state of 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.

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

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 Service, Inc.*, 101 N.M. 545, 685 P.2d 953 (1984).

Time to Sue. 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).

Twelve months limitation for commencement of action in fire policy held valid. *Electric v. Firemen's*, 39 N.M. 13, 39 P.2d 1024 (1935).

Provision in livestock transportation policy providing that no suit on policy would be sustainable unless commenced with 12 months after loss occurred was not unenforceable as against public policy. *Wiseman v. Arrow Freightways, Inc.*, 89 N.M. 392, 552 P.2d 1240, (App. 1976).

Time-to-sue provision of public employee blanket bonds covering state employees faithful performance of their duties were valid absent unconscionability, contract of 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).

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. (N.M. 1995).

The two-year statute of limitations in Section 41-4-15(A) (of the New Mexico Tort Claims Act) as applied to a medical malpractice claim against a state employed health care provider, was held to be an occurrence rule, not a discovery rule and the district court's summary judgment dismissing the plaintiff's claim was affirmed. *Maestas v. Zager*, 2005 NMCA 13, 105 P.3d 317.

The doctrine of fraudulent concealment tolls the three-year medical malpractice statute of repose, NMSA 1978, §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 20, 116 P.3d 105.

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. *Lib-*

*erty 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 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, 126 N.M. 807, 38 N.M. St. B. Bull. 15, 975 P.2d 1279.

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## 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 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 in *Scott v. Rizzo, Id.*

Duty. Defined as legal obligation to conform to a standard of conduct to reduce risk of harm to individual or class of persons. 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). 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. Restatement (Second) of Torts §449. *Reichert v. Atler*, 1117 N.M. 623, 875 P.2d 379 (1994).

Imputed Negligence. Negligence of operator not imputed to passenger unless they are 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). Discussion of imputed negligence. *LeDoux v. Martinez*, 57 N.M. 86; 254 P.2d 685 (1953).

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).

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), 31 A.L.R.2d 1439.

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. *Shephard v. Graham Bell*, 56 N.M. 293, 243 P.2d 603 (1952).

Intervening Cause. One which might not reasonably have been anticipated and which will 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 (App. 1995).

Last Clear Chance Doctrine. Abolished in *Scott v. Rizzo, supra.*

Negligence Per Se. Negligence as a matter of law exists when 1) applicable statute prescribe 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). Restatement (Second) of Torts §286. *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), 15 A.L.R.2d 407; *Zamora v. J. Korber & Co.*, 59 N.M. 33, 278 P.2d 569 (1954).

Premises Liability. Landowner or occupier of premises must act as reasonable person in maintaining prop-



erty 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.** A risk is not made reasonable simply because it is made open and obvious to persons exercising ordinary care; *overruling Skyhook Corp.*, 560 P.2d 934 and *Garrett*, 498 P.2d 1539. *Klopp v. Wackenhut*, 113 N.M. 153, 824 P.2d 293 (1992).

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, 134 N.M. 43, 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. SCRA 1986, Civ. UJI 13-305. *Tafoya v. Seay Bros.*, 119 N.M. 350, 890 P.2d 803 (1995).

**Res Ipsa Loquitur.** 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 (App. 1995). Under New Mexico law, negligence may be inferred when plaintiff can prove that injury or damage was proximately caused by instrumentality or occurrence under exclusive control and management of defendant, and that event causing injury or damage was of kind which does not ordinarily occur in absence of negligence on part of person in control of instrumentality. *Black Hills Aviation v. United States*, 34 F.2d 968 (10<sup>th</sup> Cir. 1994).

**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 con-

fusing to jury, and conducive to overemphasizing one party's theory of case. SCRA 1986, Civ. UJI 13-1617. *Dunleavy v. Miller*, 116 N.M. 353, 827 P.2d 102 (1992).

## 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), in which lessor of vehicle was found strictly liable in tort for death and injuries resulting from automobile accident which occurred when tire blew out on vehicle. In *Skyhook Corp. v. Jasper*, 89 N.M. 98, 547 P.2d 1140 (App. 1976), court held that 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. Failure to incorporate into product safety feature or device may constitute defer to his property.

**Defenses.** 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). (See *Bendorf* case for discussion of misuse as defense).

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 (1983).

**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, 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 (App. 1975).

In action against city, manufacturer of volleyball net standard, and sporting goods store which sold standard to city for damages arising from accident in which volleyball net standard fell and severely injured plaintiff's foot, allocating one-half of damages against city and one-half of damages against manufacturer and sporting good store was proper as two active torts were involved, namely manufacture of defective product by manufacturer and negligent use of apparatus by city, and liability of sporting goods store was purely technical, not founded on negligence but derived solely from strict li-



ability. *Aalco Mfg. Co. v. City of Espanola*, 95 N.M. 66, 618 P.2d 1230 (1980).

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 (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 (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).

Misuse as a defense in strict products liability. *Van de Valde v. Volvo*, 106 N.M. 457, 744 P.2d 930 (1987).

## RELEASE

See Law Digest Tables.

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 and 41-1-2.

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*, 42 N.M. 35, 75 P.2d 320 (1938).

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 (1950), 15 A.L.R.2d 407.

In New Mexico release constitutes complete defense. *Thomas v. Barber's Super Markets*, 74 N.M. 720, 348 P.2d 51 (1964). Only exception may be if release was obtained by fraud, undue influence or legal mistake. *Moruzzi v. Federal Life & Cas. Co.*, 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 (10<sup>th</sup> Cir. 1968).

Insured's settlement with and/or release of tortfeasor, tortfeasor's estate, or tortfeasor's insurance carrier in violation of express policy provisions destroys subroga-

tion rights of insurer. *March v. Mountain States Mut. Cas. Co.*, 101 N.M. 689, 687 P.2d 1040 (1984).

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. N.M. Stat. Ann. §41-1-1, 41-1-2, *Ratzlaff v. Seven Bar Flying Svc. Inc.*, 98 N.M. 159, 646 P.2d, 586 (1982).

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 with respect to bodily injury claims under uninsured motorist protection policy, in that such acknowledgment was integral part of contract, and was restrictive safeguard which did not prevent insurer from obtaining valid release; 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 Mut. Auto. Ins. Co.*, 89 N.M. 586, 555 P.2d 707 (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. Reconni*, 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

Subrogation is generally not allowed where one of-ficiusly 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 (App. 1976).

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).

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).

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).

By using truck of independent contractor at time of accident damaging independent contractor's truck, 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).

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 Mut. Auto. Ins. Co.*, 83 N.M. 280, 491 P.2d 168 (1971).

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 bene-

fits 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 NM, Inc. v. Harrell*, 125 N.M. 189, 958 P.2d 1239 (1998).

When insurance company has paid its insured and proceeds against a tortfeasor in subrogation, the limitation period for the insurance company is the same as the limitation for its insured. *Liberty Mutual v. Warren*, 119 N.M. 429, 891 P.2d 570 (App. 1995).

An insurer with a subrogated interest in a portion of insured's settlement is required to pay a proportional share of insured's attorney fees incurred in settling the claim. Two exceptions 1) insurer actively participated in or substantially contributed to recovery; 2) attorney fee is unfair. *Amica Mutual v. Maloney*, 120 N.M. 523, 903 P.2d 834 (1995); *Silva v. Farmers*, 120 N.M. 523, 903 P.2d 834 (1995).

## UNINSURED MOTORIST

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. (N.M. Stat. Ann. §66-55-30); *Lopez v. Foundation Reserve Ins. Co., Inc.*, 98 N.M. 166, 646 P.2d 1230 (1983).

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. Such a modification to our judicially-created stacking doctrine will ensure 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 20, 135 N.M. 681, 92 P.3d 1255.

Direct actions by claimant against automobile insurer, uninsured motorist benefits is permissible. Where claimant for uninsured motorist coverage may claim under policy which specified that matters upon which in-



surer 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).

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).

An insurer must demonstrate it was substantially prejudiced by an insured's breach of a consent-to-settle provision before avoiding liability for paying underinsured motorist benefits. Proof that the insured breached the consent-to-settle provision creates a presumption of substantial prejudice. *State Farm Mut. Auto. Ins. Co. v. Fennema*, 2005 NMSC 10, 110 P.3d 491.

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

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

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).

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; 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.*, 892 P.2d 598 (N.M. 1995).

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 (UM) 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 (UIM) 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 (1997).

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 Mut. Auto. Ins. Co. v. Valencia*, 120 N.M. 662, 905 P.2d 202 (Ct. App. 1995).

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. N.M. Stat. Ann. §66-5-301. Insureds' rejection of uninsured motorist coverage was valid and effective, even though 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, 124 N.M. 324, 950 P.2d 297.

## WAIVER AND ESTOPPEL

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

"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 but for his reliance on conduct of another resulting in him taking position to his prejudice or detriment. *Capo v. Century Life Ins. Co.*, 94 N.M. 373, 610 P.2d 1202 (1980).



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).

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 (1911).

Insurance company held to have waived defense to action on policy by retention of premiums. *Miller v. Phoenix*, 52 N.M. 68, 191 P.2d 993 (1948).

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).

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 (1924). *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; is conclusive evidence of payment in absence of fraud, in action on policy, where insurer interposes defense of non-payment of premium. *Krisberg v. Inter-Ocean*, 39 N.M. 107; 41 P.2d 519 (1935); *Patten v. Santa Fe*, 47 N.M. 202, 138 P.2d 1019 (1943).

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).

Insurance company is bound to make such inquiry as is reasonable in order to assess its risk when given sufficient information to alert it of 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.

1988, 1989, 1990 and 1991 sessions of New Mexico Legislature substantially amended the New Mexico Workers' Compensation Act. N.M. Stat. Ann. §52-1-1 *et seq.*

Liability of employer, subject to New Mexico Workers' Compensation Act, is limited and determinate

under said Act, and said employer is not subject to any other liability for injuries to his employees, in absence of contract of indemnity between said employer and third party attempting to impose additional liability. *Beal v. Southern*, 62 N.M. 38, 304 P.2d 566 (1956); *Hill Lines v. Pittsburg Plate Glass*, 222 F.2d 854 (10<sup>th</sup> Cir. 1955).

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 Public Schs.*, 92 N.M. 112, 583 P.2d 976 (App. 1976).

When workers' compensation insurer contract 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.*, 894 P.2d 1026 (N.M. App. 1995).

Benefits - Future Medical. Because worker's disability was caused by both 1991 accident at Aztec and 1992 accident at Precision, the Workers' Compensation judge erred in ruling that future medical care could not be the responsibility of Aztec, even in part. *McMains v. Aztec Well Svc.*, 119 N.M. 22, 888 P.2d 468 (App. 1994).

Employment Defined. 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. The prisoner was employee as a matter of law. The car company told the prisoners what needed to be done, checked on their work, provided equipment, kept daily payroll records and paid wages. There was an implied employment contract. *Benavidez v. Sierra Blanca Motors*, 120 N.M. 837, 907 P.2d 1018 (App. 1995).

Distinction between a special employer and a statutory employer. Madden had a contract with Sagebrush to provide temporary workers on as-needed basis. Madden provided Rivera, who was doing Sagebrush work when injured. The contract between Madden and Sagebrush provided that Madden charge Sagebrush for workers' compensation insurance and that Sagebrush would not be responsible for an injury suffered by a Madden employee. The contract between them didn't absolve Sagebrush of responsibility for workers' compensation coverage, rather Sagebrush paid Madden for the cost of the coverage so Sagebrush didn't waive the exclusivity provision of N.M. Stat. Ann. §52-1-8. Sagebrush was



Rivera's special employer at time of injury, not a statutory employer under N.M. Stat. Ann. §52-1-22. *Rivera v. Sagebrush Sales, Inc.*, 118 N.M. 676, 884 P.2d 832 (App. 1995).

Exclusive Remedy. *Montoya v. AKAL Security Inc.*, 114 N.M. 354 (1992), *rev'd, Castro v. Bass*, 74 N.M. 254 (1964). Castro held that a workers' compensation claimant who settled with a third party tortfeasor freed the employer from paying further workers' compensation benefits. Montoya applied the statutory language prohibiting double recovery "to the extent of payment" by the employer. Montoya is to be applied retroactively; Castro was still in effect when the accident and third party settlement occurred. Settlement amounts to 38% of worker's total damage, but there was no claim that the settlement was unfair or an inequitable compromise of the third party claim. There is to be a "pro tanto" reimbursement, thus reversing the WCJ's "equitable" holding that employer could recover only 38% of its overpayout. *Gutierrez v. City of Albuquerque*, 121 N.M. 172, 909 P.2d 732 (App. 1995). Employees of the Public Defender, injured on the job, could not recover from the Highway Dept. in tort for its 10% negligence; the exclusivity provision of Workers' Compensation Act controls. *Singhas v. New Mexico State Hwy. Dept.*, 120 N.M. 474, 902 P.2d 1077 (App. 1995).

Arising out of and in the course of. Worker not entitled to workers' compensation for injury suffered during self-directed, off-duty athletic activity. The injury occurred while jogging, it didn't arise out of or in the course of employment. *Meeks v. Eddy County Sheriff's Dept.*, 118 N.M. 643, 884 P.2d 534 (App. 1994).

Mental Injury. The 1987 statute enacted N.M. Stat. Ann. §52-1-24 (b), primary mental impairment and (c), secondary mental impairment. The workers' compensation judge found that worker suffered from a psychological condition known as Ganser's Syndrome and that

this mental condition was casually related to the same accident which resulted in worker's shoulder injury. On the basis of statutory definitions, a 2-1 opinion holds no compensation for the mental condition. *Chavez v. Mountain State Constr.*, 119 N.M. 792, 895 P.2d 1333 (App. 1995).

Pre-Existing Injury. Employer loses on its false application defense, as it existed in the 1991 statute, because the statute was directed to the withholding of information as to medical condition and the warning from employer had to be explicit. Employer's warning was too general to permit an employee to lose because he withheld information as to prior condition. *Pena v. Phelps Dodge*, 119 N.M. 735, 895 P.2d 257 (App. 1995).

Liens. Insurance company filed a claim of lien for unpaid workers' compensation premiums for workers' compensation insurance provided on behalf of workers at a potash mine. Workers' compensation premiums are not lienable under N.M. Stat. Ann. §48-2-2 because neither labor, equipment nor materials. "Performing labor" under N.M. Stat. Ann. §48-2-2 is limited to doing work. *The CIT Group v. Horizon Potash*, 118 N.M. 665, 884 P.2d 821 (App. 1994).

Attorneys Fees. Remand for determination of a reasonable attorney's fee award consistent with the actual benefits secured by worker's attorney. *County of Bernalillo v. Sisneros*, 119 N.M. 98, 888 P.2d 980 (App. 1994).

The 1991 statute, which placed a cap on the amount of attorney fees a worker can recover, is held to be a violation of equal protection under the Court of Appeals heightened rational-basis "intermediate scrutiny" test adopted by the New Mexico Supreme Court, pointing out that Supreme Court has never used the Court of Appeals' created test. *Corn v. New Mexico Ed. FCU*, 119 N.M. 199, 889 P.2d 234 (App. 1994).