

# DIGEST OF INSURANCE LAW

## UTAH

Courtesy of  
**Plant, Christensen & Kanell, P.C.**  
Salt Lake City, Utah

### CIVIL JUDICIAL SYSTEM

#### Courts of Original Jurisdiction

District courts have original jurisdiction in all civil matters, with narrow exceptions, and have the power to issue all necessary writs, orders and judgments. Utah Code Ann. §78A-5-102(1),(2) (2008). Circuit Courts which formerly had jurisdiction of disputes involving less than \$20,000, have been phased out. Civil cases from district courts are appealed directly to the Utah Supreme Court or intermediate Court of Appeals depending upon the type of case, issues, etc., as provided by Utah Code Ann. §§78A-3-102 (2008) and 78A-4-103 (2008). Supreme Court may transfer cases to Court of Appeals. Utah Code Ann. §78A-3-102(4) (2008).

#### Courts of Appeals

The Supreme Court of Utah consists of five justices who have appellate jurisdiction over: 1) appeals from district courts in most civil cases, 2) appeals from decisions of Court of Appeals, 3) cases certified by Court of Appeals, 4) final judgments concerning constitutionality of a statute, 5) final orders in cases originating in six state agencies (Public Service Commission, State Tax Commission, School and Institutional Trust Lands Board of Trustees, Board of Oil, Gas, and Mining, state engineer, or executive director of the Department of Natural Resources reviewing actions of Divisions of Forestry, Fire and State Lands). Utah Code Ann. § 78A-3-102 (2009). Supreme Court may transfer appeals in civil cases to Court of Appeals. Utah Code Ann. §78A-3-102(4) (2009).

Court of Appeals of Utah consists of seven judges sitting in panels of three, and has original appellate jurisdiction over orders arising out of all state agencies except six state agencies over which Supreme Court has jurisdiction. Utah Code Ann. §78A-4-102(1), (2) (2008); 78A-4-103(2) (2009). Court of Appeals does not have direct jurisdiction over appeals from district courts in most civil cases, but those cases may be transferred to it from Supreme Court. Utah Code Ann. §78A-3-102(4) (2009). Court of Appeals may also certify matters to Utah Supreme Court any matter over which Court of

Appeals has original appellate jurisdiction. Utah Code Ann. §78A-4-103(4) (2009).

#### United States Courts

Utah constitutes one Federal District with two divisions, Northern and Central. The court sits in Salt Lake City for both Divisions. Clerk's office is Salt Lake City. Utah is in the Tenth United States Circuit, headquartered in Denver.

### LAW

#### Abbreviations

A.L.R. – American Law Reports.  
H.B. – House Bill.  
P. – Pacific Reporter.  
P.2d – Pacific Reporter, Second Series.  
S.B. – Senate Bill.  
Utah – Utah Reports.  
Utah 2d – Utah Reporter, Second Series.  
Utah Code Ann. – Utah Code Annotated 1953, as amended.  
U.R.C.P. – Utah Rules of Civil Procedure.

### ACCIDENT AND HEALTH INSURANCE

Limitations/Exclusions. A health benefit plan may impose a preexisting condition limitation or exclusion consistent with Utah Code Ann. §§31A-22-605.1 (2005) and 31A-30-107.5 (2007). A health benefit plan may impose a preexisting condition exclusion only if the exclusion relates to a preexisting condition for which medical care, diagnosis, care, or treatment was recommended and received by or from a legally licensed or authorized provider within the six month period ending on the enrollment date. Utah Code Ann. §31A-22-605.1(4)(a)(i) (2005). The exclusion period ends no later than 12 months after the enrollment date, or in the case of a late enrollee, 18 months after the enrollment date. Utah Code Ann. §31A-22-605.1(4)(a)(ii) (2005). Also, the exclusion period is reduced by the number of days of creditable coverage the enrollee has as of the enrollment date. Utah Code Ann. §31A-22-605.1(4)(a)(iii) (2005). Amount of creditable coverage allowed is determined by



number of days individual has of one or more types of creditable coverage. Utah Code Ann. §31A-22-605.1(4)(b)(i) (2005). Days of creditable coverage that occur before a significant break in coverage are not counted. Utah Code Ann. §31A-22-605.1(4)(b)(ii) (2005). Days in a waiting period are not counted and days between loss of coverage and first day of second COBRA election period are not counted. Utah Code Ann. §31A-22-605.1(4)(b)(ii)(A)(B) (2005).

**Cancellation.** Generally, no cancellation prior to expiration of agreed term or one year from effective date of policy renewal, whichever is less, except for failure to pay a premium when due or grounds as defined by statute. Utah Code Ann. §31A-21-303(2)(b)(i-ii) (2006). "Grounds" means material misrepresentation; substantial change in risk assumed (unless reasonable to have been foreseen); substantial breach of contractual duties, conditions or warranties; or attainment of age specified as terminal age within policy. Utah Code Ann. §31A-21-303(2)(a)(i-iv) (2006). Cancellation effective not sooner than 30 days after delivery or first class mailing of cancellation. Utah Code Ann. §31A-21-303(2)(c)(i) (2006). A policy issued even though insurer knew that insured's check for first premiums had been dishonored was governed by provision that cancellation cannot take place until ten days after delivery of notice. *Phoenix Indemnity Ins. v. Bell*, 896 P.2d 32 (Utah Ct. App. 1995); Utah Code Ann. §31A-21-303(2)(c)(ii) (2006). Insurer must state grounds for cancellation. Utah Code Ann. §31A-21-303(2)(d)(i) (2006). Common law rescission rights still available. Utah Code Ann. §31A-21-303(1)(d) (2006). Declination or cancellation of temporary insurance must be communicated with clear adequate notice such that applicant is left with no doubt of cancellation and that rejection is effective upon receipt of notice. *Stevenson v. First Colony Life*, 827 P.2d 973 (Utah Ct. App. 1992). Premium Finance Companies who finance insurance premiums subject to a right to cancel the policy may cancel only after a minimum of 10 days advanced written notice to insured, and insurance broker or agent; Insured has a right to cure default within that time period. Utah Code Ann. §31A-21-305(2)(a) (2003). If health insurance policy including medicare supplement policy is cancelled by insurer for reasons other than material misrepresentation, insurer must refund collected premium on a pro-rata basis. Utah Code Ann. §31A-21-315(1) (2009). If policy is cancelled due to material misrepresentation on application all premiums must be refunded minus paid claims. Utah Code Ann. §31A-21-315(2) (2009).

**Renewal.** Right to renew on terms being applied by insurer to similar risks, for same term, if original term one year or less, or for one year if term greater than one year. Utah Code Ann. §31A-21-303(4)(a)(i)-(ii)(A)-(B)

(2006). Right to renew extinguished if insurer sends notice at least 30 days prior to policy expiration or anniversary date, or not more than 45 nor less than 14 days prior to due date of renewal premium and nonpayment. Utah Code Ann. §31A-21-303(4)(b)(i)-(ii)(A)-(B) (2006). Policy may be expressly designated as "nonrenewable." Utah Code Ann. §31A-21-303(4)(b)(iv) (2006). If renewal offers less favorable terms not effective if not sent at least 30 days prior to renewal. Utah Code Ann. §31A-21-303(6)(a)(i) (2006). If not, less favorable terms do not take effect for 30 days after delivery of notice. Utah Code Ann. §31A-21-303(6)(a)(ii) (2006).

Return premiums or additional premium charges are calculated proportionately on basis that old rates apply. Utah Code Ann. §31A-21-303(6)(b)(iii) (2006). Not applicable if only change in rate increase or to conform to Utah law. Utah Code Ann. §31A-21-303(5)(b). Insurer must give written grounds for cancellation or non-renewal. Utah Code Ann. §31A-21-303(7) (2006).

**Excepted Risks.** No policy may contain any provision not fully set forth in the policy or application or other document attached to or made a part of policy at the time of its delivery, unless policy, application or agreement accurately reflects terms of incorporated agreement provision, or attached document. Utah Code Ann. §31A-21-106(1)(a) (2003). Insurer must show exception delivered to insured. *Farmers v. Call*, 712 P.2d 231 (Utah 1985). Policy provisions creating exceptions excluding particular losses from coverage are usually valid unless found to be inconsistent with statutory forms or public policy. *Gee v. Utah State Retirement Bd.*, 842 P.2d 919 (Utah Ct. App. 1992). Clauses in insurance policies which attempt to exclude from coverage certain activities should be strictly construed against insurer. *Dawson v. Dawson*, 841 P.2d 749 (Utah Ct. App. 1992). Reference in step-down clause of a policy to "the limits of the financial responsibility law" was unenforceable under this section. *Cullum v. Farmers*, 857 P.2d 922 (Utah 1993). Modifications to a policy during its term which affect obligations of a party must be in writing and agreed to by the party against whose interest modifications operate. Utah Code Ann. §31A-21-106(2) (2003).

**Notice and Proof of Loss.** Every policy must provide that notice to agent is notice to company. Utah Code Ann. §31A-21-312(1)(a) (1986). Failure to give notice of loss within time specified in policy does not invalidate coverage if not reasonably possible to give notice and notice filed reasonably thereafter. Utah Code Ann. §31A-21-312(1)(b) (1986). If there is failure to give notice, insurer must show prejudice by such failure in order to deny coverage. Utah Code Ann. §31A-21-312(2) (1986). It appears prejudice must be substantial.

*Cf. Oberhansly v. Travelers Ins. Co.*, 295 P.2d 1093 (Utah 1956) (decided prior to current statute). However, in *Amundson v. Mutual Benefit Health & Acc. Assoc.*, 375 P.2d 463 (Utah 1962), Utah Supreme Court upheld trial court's decision that beneficiaries of life insurance policy could not recover against insurer for failure to timely notify latter under life insurance policy. There had been 33-year delay between death and date of claim. Utah Supreme Court found prejudice from facts that: insurer's records had been destroyed, it did not know if it had issued policy or if it was cancelled or paid for, and memories had faded. Court recognized these factors had materially increased risk to insurer. Court went on to hold insured must make demand within reasonable time in order for insurer to investigate claim and before staleness posed substantial obstacle to ascertaining facts regarding occurrence. Statements in proof of loss not necessarily conclusive against insured. *See also AOK Lands v. Shand Morahan*, 860 P.2d 924 (Utah 1993). (Insureds failure to notify insurer of claim until after 8 years of litigation and entry of \$400,000 judgment against insured relieved insurer of its obligations under E&O policy).

Utah Code Ann. §31A-26-301(1)(b)(iii) (2002) authorizes Utah's Insurance Commissioner to set time periods within which an insurer must accept or deny a claim. Minimum standards for claim benefit determination and settlement depend upon type of claim. Utah Admin. Code R590-192-9. All benefit determination time limits begin once insurer receives claim, without regard to whether all necessary information was filed with original claim. In urgent care cases, insurer must notify claimant of insurer's benefit decision, adverse or not, as soon as possible, taking into account medical exigencies of the situation, but no later than 72 hours after receipt of claim. *Id.* Insurer bears duty of determining whether claim is urgent based on information provided by claimant. *Id.* For claims requiring pre-service authorization by insurer, insurer must notify claimant of insurer's benefit decision within 15 days of receipt of request for care. *Id.* Insurer may take 15 additional days provided insurer informs claimant of need for extension prior to expiration of original 15 day limit. *Id.* For claims submitted after service or care rendered, insurer must notify claimant of insurer's benefit decision within 30 days of receipt of request for claim. *Id.* Where insurer cannot make a decision within 30 days due to circumstances beyond insurer's control, such as late receipt of medical records, insurer must notify claimant before expiration of original 30 days of need for extension. Insurer may then take as long as 15 additional days to reach a decision. *Id.*

Utah Code Ann. §31A-26-303 (1987) defines unfair claim settlement practices, however the section does not

create any private cause of action. Utah Code Ann. §31A-26-303(5) (1987).

Proceeds of insurance paid to insured or dependents of insured as a result of bodily injury are exempt from execution to extent proceeds are compensatory. Utah Code Ann. §78B-5-505(1)(a)(x) (2008). Additionally, death benefits payable to spouse or children are exempt provided that contract or policy has been in effect for at least one continuous, unexpired year. Utah Code Ann. §78B-5-505(1)(a)(xii) (2008).

Statute of Limitations. Action on written policy or contract of first-party insurance must be commenced within 3 years after inception of loss. Utah Code Ann. §31A-21-313(1) (2008); *See also Crookston v. Fire Ins. Exchange*, 817 P.2d 789 (Utah 1991). No policy may limit time for beginning of action to less than 3 years, no policy may prescribe what court action may be brought, and no policy may provide that an action cannot be brought. Utah Code Ann. §31A-21-313(3) (2008). Without verified complaint showing prejudice to insured, no action against insurer to compel payment unless 60 days after proof of loss has been furnished, a waiver by insurer of proof of loss or denial of full payment. Utah Code Ann. §31A-21-313(4) (2008). Limitation is tolled during appraisal or arbitration procedures. Utah Code Ann. §31A-21-313(5) (2008). Insurance company's equitable subrogation claim against another insurer may relate back to the filing of original, underlying complaint. *Sharon Steel Corp. v. Aetna Cas.*, 931 P.2d 127 (Utah 1997).

Disability. Policy provisions that disability deemed total where insured becomes wholly disabled by bodily injury or disease so that he is thereby prevented from engaging in any occupation and performing any work for compensation or profit, construed to mean that compensation shall be fairly remunerative and not nominal. *Colovos v. Home*, 28 P.2d 607, 609 (Utah 1934). "Total disability" "gainful occupation" liberally construed. *Gibson v. Equitable Life*, 36 P.2d 105 (Utah 1934). Liberal construction of clause in favor of insured. *Steele v. New York Life*, 48 P.2d 436 (1935); *Colovos*, 28 P.2d 607. Disability deemed permanent when founded upon conditions which render it reasonably certain that it will continue throughout insured's life. *Ralston v. Metropolitan*, 62 P.2d 1119 (Utah 1936). Under health and accident insurance policy, claimant was totally disabled, but was not entitled to award under future disability even though there had been default in one or more payments due under policy, and repudiation is not anticipatory breach of balance of installments due. *Greguhn v. Mutual of Omaha Ins. Co.*, 461 P.2d 285 (Utah 1969).

Disability Incontestability. No statement made by an applicant in an application may be used to deny cov-

erage, except fraudulent misrepresentations, for loss incurred or disability commencing after coverage has been in force for two (2) years. Utah Code Ann. §31A-22-609 (2005). Specified disease policy may not include wording providing a defense based upon disease or physical condition that existed prior to effective date of coverage (except as allowed by Utah Code Ann. §31A-22-605.1(2) (2005)). Utah Code Ann. §31A-22-609(3) (2005). This does not affect insurer's rights under Utah Code Ann. §31A-22-609(1) (2005).

**Disease Induced by Accident.** Recovery allowed for death resulting from sickness induced by accidental injuries. *Armstrong v. West Coast*, 41 Utah 112, 124 P. 518 (1912). See generally, *Browning v. Equitable*, 72 P.2d 1060 (Utah 1937); same case on reh'g, 80 P.2d 348; *Clayton v. Metropolitan*, 85 P.2d 819 (Utah 1938).

**Interpretation of Policy.** Policies for insurance will be interpreted under rules governing interpretation of contracts. *Alf v. State Farm*, 850 P.2d 1272 (Utah 1993); *First Am. Title Ins. Co. v. J.B. Rauch, Inc.*, 966 P.2d 834 (Utah 1998).

Death need not result from medical condition represented, but insurer must show it would not have issued policy if it knew about medical condition. *Berger v. Minnesota Mut.*, 723 P.2d 388 (Utah 1986) (recovery denied where insured failed to disclose diabetes). See also *Fuller v. Dir. of Finance*, 694 P.2d 1045 (Utah 1985) wherein recovery for injuries sustained in California was allowed even though insured stated on application he only did business in Utah. After injury to third parties, no retroactive abrogation of insurance by any agreement between insured and insurer. Utah Code Ann. §31A-22-202 (1985).

Subjective standard regarding accident is applied. Accidental is descriptive of the means which produce effects which are not their natural and probable consequences, from the victim's point of view. *Hoffman v. Life Insurance Co. of North Am.*, 669 P.2d 410 (Utah 1983). Test is whether death was expected, not foreseeable. *Id.* Insured's mental disease or defect relevant to issue of whether event was accidental. *Id.* Expected means high degree of certainty. *Hardy v. Beneficial Life*, 787 P.2d 1 (Utah Ct. App. 1990). Fact death resulted from treatment for pre-existing and excluded disease, but which treatment caused totally different illness does not exclude coverage. *Draughon v. CUNA Mut. Ins. Soc'y*, 771 P.2d 1105 (Utah Ct. App. 1989).

Falsehood in insurance application must be made willfully and knowingly in order to defeat claim under accident policy. *Marks v. Continental Cas. Co.*, 427 P.2d 387 (Utah 1967) decided under former statute. Present statute, Utah Code Ann. §31A-21-105(2) (2003), no mis-

representation on breach of an affirmative warranty affects insurer's obligations unless insurer relied on it and it is material or made with intent to deceive or it contributes to loss. Question of intent to defraud is jury question. *Hardy v. Prudential Ins. Co. of Am.*, 763 P.2d 761 (Utah 1988). Materiality is measured at time risk is assumed and not at death. *Berger, supra*.

**Damages.** Damages recoverable include those usually associated with breach of contract claims including general and special damages. *Beck v. Farmers Ins. Exch.*, 701 P.2d 795 (Utah 1985). Consequential damages may also be available but only for breach of implied covenant of good faith and fair dealing. *Id.* See also *Billings v. Union Bankers*, 918 P.2d 461 (Utah 1996).

### ACCIDENTAL MEANS

A person is a victim of an accident when, from victim's point of view, occurrence causing injury or death is not a natural and probable result of victim's own acts. *Hoffman v. Life Ins.*, 669 P.2d 410 (Utah 1983). The test to determine whether an event is accidental is not whether the result is foreseeable, but whether it is expected. To be expected, there must be a high degree of certainty of the outcome. *Hardy v. Beneficial Life Ins. Co.*, 787 P.2d 1 (Utah App. 1990), cert. denied, 795 P.2d 1138 (Utah 1990). In *Sharon Steel Corp. v. Aetna Ins.*, 931 P.2d 127 (Utah 1997) Supreme Court confirmed this definition. They held: the term "accidental" means something akin to unintended or unexpected.

In *Fire Ins. Exch. v. Estate of Therkselsen*, 2001 UT 48, ¶ 15, 27 P.3d 555, the Court distinguished an accident from an intended result. It held: "An effect which is the natural and probable consequence of an act or course of action is not an accident, nor is it produced by accidental means. It is either the result of actual design, or it falls under the maxim that every man must be held to intend the natural and probable consequence of his deeds." *Id.* at 559.

Death from disease itself resulting from accidental bodily injury is within policy insuring against death resulting from injuries caused solely by external, violent, accidental means. *Armstrong v. West Coast*, 41 Utah 112, 124 P. 518 (1912). Death from sunstroke resulting from unexpected extended exposure in desert is death from accidental means. *Richards v. Standard Acc.*, 58 Utah 622, 200 P. 1017 (1921). Rupture sustained by insured in regular course of employment, held caused by accidental means. *Moutzoukos v. Mutual*, 69 Utah 309, 254 P. 1005 (1927). Death from blood poisoning after accidental fall from truck, caused by accidental means. *Billings v. Continental*, 81 Utah 572, 21 P.2d 103 (1933). Insured's death following administration of no-

vocaine as anesthetic in operation was held to be “directly caused by an injury effected by violent, external, and accidental means.” *Handley v. Mutual Life Ins. Co. of New York*, 106 Utah 184, 147 P.2d 319 (1944).

Dentist’s toxemia resulting from accidental disabling sprain is within provision insuring against injuries by accidental means. *Browning v. Equitable*, 94 Utah 532, 72 P.2d 1060 (1937), *reh’g denied*, 80 P.2d 348 (Utah 1938).

Insect bite or sting resulting in death, although name, kind or type of insect is unknown, is bodily injury caused through external, violent and accidental means. *Spackman v. Benefit*, 97 Utah 91, 89 P.2d 490 (1939); *See also Spackman v. Industrial Commission*, 97 Utah 214, 91 P.2d 511 (1939). Death by overdose of drugs by addict was accidental absent showing of intent to commit suicide. *Hardy, supra*. Experts found that death was not caused by pneumonia and, therefore, pneumonia following automobile accident not accidental means. *Yowell v. Occidental*, 100 Utah 120, 110 P.2d 566 (1941); *See also, Tucker v. New York Life*, 107 Utah 478, 155 P.2d 173 (1945).

## ADJUSTERS

**Insurance Adjusters.** An “insurance adjuster” is defined as “a person who directs the investigation, negotiation, or settlement of a claim under an insurance policy other than life insurance or an annuity, on behalf of an insurer, policyholder, or a claimant under an insurance policy.” Utah Code Ann. §31A-1-301(84) (2009). A “company adjuster” is “a person employed by an insurer whose regular duties include insurance adjusting.” Utah Code Ann. §31A-26-102(1) (1995). An “independent adjuster” is “an insurance adjuster required to be licensed under Utah Code Ann. §31A-26-201 (2003), who engages in insurance adjusting as a representative of insurers.” Utah Code Ann. §31A-26-102(2). A “public adjuster” is “a person required to be licensed under Section 31A-26-201, who engages in insurance adjusting as a representative of insureds and claimants under insurance policies.” Utah Code Ann. §31A-26-102(5).

No person may perform, offer to perform, or solicit the opportunity to perform any act of insurance adjusting without a valid license under Section 31A-26-203 (2009); and no person may use insurance adjusting services of another if the person knows or should know that the one providing these services does not have a license as required by law. Utah Code Ann. §31A-26-201(1).

The following are exempt from license requirement when acting in indicated capacities: a person engaged in insurance adjusting, as a regular salaried employee of, and not an independent contractor for an insurer; an arbi-

trator or an umpire selected by claimant and insurer to decide whether claim should be paid; an attorney at law acting in an attorney-client relationship; an insurance producer; a regular salaried employee of a policyholder or claimant under an insurance policy; an employee of a licensed insurance adjuster who provides only administrative or clerical assistance; a person who does not do insurance adjusting under Section 31A-26-102, but who is specially employed to obtain facts about a loss for or furnish technical assistance to a licensed adjuster or a company adjuster; a holder of a group insurance policy; a person engaged in insurance adjusting as a regular salaried employee of an administrator licensed under Chapter 25; and a person who gives advice or assistance without compensation or expectation of compensation, direct or indirect. Utah Code Ann. §31A-26-201(2).

To become licensed, an adjuster must show commissioner of insurance that he or she 1) has good faith intent to engage in the type of business license applied for would permit, 2) is competent and trustworthy, 3) is 18 years of age, 4) has met educational requirements established by commissioner of insurance, 5) has passed an examination established by commissioner, and 6) has paid applicable fees. *See generally*, Utah Code Ann. §31A-26-203, 205 (1986), 206 (2008) and 207 (2001).

Each authorized insurer engaged in insurance adjusting may be required by commissioner of insurance to designate one or more natural persons to whom commissioner or his staff may direct inquiries concerning insurer’s claims adjustments. Utah Code Ann. §31A-26-211 (1986).

Utah has adopted a modified version of the Unfair Claims Settlement Practices Act. *See*, Utah Code Ann. §31A-26-303 (1987).

An insurer may not pay a person, whether an employee or independent contractor, representing it in connection with insurance claim adjustments on any basis that is dependent, in whole or in part, upon amounts paid insureds or claimants under insurance policies. Utah Code Ann. §31A-26-310 (2003).

An insured or claimant under an insurance policy who contracts with a public adjuster to assist in settlement of a claim may rescind that contract by delivering written notice of rescission to the public adjuster within ten days of entering into contract. Utah Code Ann. §31A-26-311 (1986).

“First-party adjusting” occurs when an insured hires a public adjuster for assistance in filing a claim with its insurer. *State Bar v. Summerhayes*, 905 P.2d 867 (Utah 1995). “Third-party adjusting” occurs when an adjuster represents a stranger to insurance contract. *Id.* at 868. The practice of third-party adjusting of personal



injury and property damage claims “requires knowledge and application of legal principles and involves advising, counseling, and assisting clients in connection with their legal rights and duties” so as to constitute the practice of law. *Id.* at 870. The practice of third-party adjusting by public adjusters is the unauthorized practice of law and is not permitted in Utah.

### AGENTS AND BROKERS

“Agent” or “insurance agent” and “broker” have been deleted from the Utah Insurance Code and replaced by “Insurance producer” or “producer,” which means a person licensed or required to be licensed under the laws of this state to sell, solicit, or negotiate insurance. With regards to selling, soliciting, or negotiating of an insurance product to an insurance customer or an insured: “producer for the insurer” means a producer who is compensated directly or indirectly by an insurer for selling, soliciting, or negotiating any product of that insurer. “Producer for the insured” means a producer who (1) is compensated directly and only by an insurance customer or an insured and (2) receives no compensation directly or indirectly from an insurer for selling, soliciting, or negotiating any product of that insurer to an insurance customer or insured. Utah Code Ann. §31A-1-301(88). Non-resident applicants must agree to be subject to the jurisdiction of the commissioner and the Utah Courts. Utah Code Ann. §31A-23a-109(2) (2008).

**Knowledge of Agent.** Any person who shall solicit and procure application for insurance, other than fire, shall as between parties to contract and beneficiary, if any, be held to be company’s agent. Any stipulation may be contained in policy, but policy may provide that no statement made to or by agent, not contained in application shall be considered brought to notice of company. Knowledge of general agent is knowledge of insurer. *Hardy v. Prudential Ins. Co. of Am.*, 763 P.2d 761 (Utah 1988); *West v. Norwich Union*, 10 Utah 442, 37 P. 685 (1894). See also Utah Code Ann. §31A-21-105 (2003) concerning representations not included in policy.

Failure to issue auto insurance policy within 150 days, as specified by statute, after issuance of binder did not invalidate binder where company gave notice of cancellation within 150 days of issuance of binder. *Citizens Cas. Co. v. Hackett*, 17 Utah 2d 304, 410 P.2d 767 (1966). Every contract made through authorized agent of insurance company in Utah deemed to have been made in Utah irrespective of where it is written.

Where insurance agent has apparent and ostensible authority to bind company, binder is effective. *Winger v. Insurance Co. of North Am.*, 22 Utah 2d 73, 448 P.2d 727 (1968).

License and Regulation. Fees charged by department shall be set by legislature. Utah Code Ann. §31A-3-103 (2009).

### ARBITRATION

**Insurance Arbitration Amendments.** This enacts a new section, Utah Code Ann. §31A-22-321 (2008). This section authorizes a party injured in motor vehicle accident to use arbitration to resolve a third party claim if the claimant has 1) previously filed a timely claim in district court, and 2) filed a notice to submit the claim to arbitration while the claim is still pending in district court and within 14 days after complaint has been answered.

The legislation provides procedures for resolving the third party claim through arbitration and provides that an arbitration award may not exceed \$25,000. There is a provision that an arbitration award issued by a single arbitrator or an arbitration panel shall be the final resolution of all claims unless either party files a notice for a trial de novo within 20 days of service of the arbitration award. However, if a plaintiff, as the moving party in a trial de novo, does not receive a verdict that is at least \$5,000 and is at least 20% greater than the arbitration award, the plaintiff is responsible for the non-moving party’s costs. Likewise, if a defendant, as the moving party in a trial de novo, does not receive a verdict that is at least 20% less than the arbitration award, the defendant is responsible for the non-moving party’s costs. Also, the court may award reasonable attorney’s fees, upon motion of the non-moving party, if the court finds that a party’s use of the de novo process was filed in bad faith. If a defendant demands a trial de novo after an arbitration award, the verdict at trial may not exceed \$40,000. If a plaintiff demands a trial de novo after an arbitration award, the verdict at trial may not exceed \$25,000. All arbitration awards shall bear post-judgment interest.

A recent amendment to Utah Code Ann. §78B-11-118(8) (2008) allows attorneys, upon stipulation of the parties, to issue subpoenas for witnesses and evidence in arbitration cases. This amendment becomes significant because of the new section §31A-22-321.

Utah Code Ann. §78B-11-101, *et seq.* (2008) “Utah Uniform Arbitration Act.”

Notice is given by taking action reasonably necessary to inform the other in ordinary course. Utah Code Ann. §78B-11-103 (2008). Arbitration Act applies to all agreements after May 6, 2002, and all agreements before May 6, 2002 fall under Act if parties agree on record. Utah Code Ann. §78B-11-104 (2008). Prior law governs if not agreed on record. Utah Code Ann. §78B-11-131 (2008). Waiver is permitted to extent of law although cannot waive right to notice of initiation of arbitration



proceedings; cannot restrict disclosure rights of neutral arbitrator; or cannot waive right to be represented by lawyer. Utah Code Ann. §78B-11-105 (2008).

App. For judicial relief made by motion to court. Service, same as civil action or actions pending. Utah Code Ann. §78B-11-106 (2008). Arbitration agreements are valid and irrevocable except upon grounds of law or equity for contract revocation. Court has power to decide existence of agreement. Arbitrator decides conditions precedent. If conflict as to existence of agreement, arbitration continues until Court stops it. Utah Code Ann. §78B-11-107 (2008). Court can order arbitration if agreement, and can decide issue if no agreement. Utah Code Ann. §78B-11-108 (2008).

Before arbitrator is chosen, court, upon motion may order provisional remedies to protect arbitration proceedings. After arbitrator chosen, arbitrator may issue provisional remedies or Court may do so if arbitrator cannot act quickly enough. Waiver does not occur with motion to court. Utah Code Ann. §78B-11-109 (2008).

Initiate arbitration by giving notice containing nature of controversy and remedy sought. Appearance at hearing is waiver of lack of notice. Utah Code Ann. §78B-11-110 (2008). Court may consolidate arbitration proceedings if: same people, common issue or transaction. If agreement prohibits consolidation then Court cannot consolidate. Utah Code Ann. §78B-11-111 (2008). Agreement controls method of choosing arbitrator, if method fails Court can choose. Agreement controls what powers arbitrator has. If more than one arbitrator then powers exercised by majority. Arbitrator should have neutral position on outcome. Utah Code Ann. §78B-11-112 (2008). Arbitrator should disclose any relationship or interest in outcome at beginning. Duty to disclose, continuous through arbitration. Objection to disclosure can be grounds to vacate award. If disclosure is not made and should have been, Court can vacate award. Utah Code Ann. §78B-11-113 (2008). Arbitrator has same immunity as Judge. Utah Code Ann. §78B-11-115 (2008). Arbitration may be conducted in manner considered by arbitrator as fair and expeditious. Examination and cross-examination of witness is allowed. Utah Code Ann. §78B-11-116 (2008). Subpoenas may be issued, depositions taken, discovery undertaken by parties and enforced by arbitrator. Protective Orders may be issued, all such costs will be same as civil action, and Court may uphold orders from arbitration proceedings out of state. Utah Code Ann. §78B-11-118 (2008).

Preaward ruling, if incorporated into final award can be judicially enforced. Utah Code Ann. §78B-11-119 (2008). Award should be made within time dictated by agreement. Award can be extended by agreement of all parties on record, or by Court. Utah Code Ann. §78B-

11-120 (2008). Arbitrator may correct/modify award if: award is not final, correct mathematical error, or to clarify. Notice of motion for modification must be given within 20 days of award. Objections to modification must be made within 10 days of notice. Utah Code Ann. §78B-11-121 (2008). Punitive damages, reasonable expenses, attorneys' fees may be awarded by arbitrator if same could be awarded in civil action. Punitive damages must have basis in law. Utah Code Ann. §78B-11-122 (2008). Party can motion court to confirm award. Utah Code Ann. §78B-11-123 (2008). Motion to court to vacate award must be done within 90 days of notice of award. Court can remand to same or different arbitrator. If motion is denied Court shall confirm award. Utah Code Ann. §78B-11-124 (2008). Motion to court to correct/modify arbitration award must be done within 90 days of notice of award. Utah Code Ann. §78B-11-125 (2008). If Court confirms award then costs and attorneys' fees may be awarded. Utah Code Ann. §78B-11-126 (2008). Court having jurisdiction over controversy and parties may enforce agreement. Utah Code Ann. §78B-11-127 (2008). Venue is county where arbitration hearing is held. If foreign adverse party then venue is any county in state. Utah Code Ann. §78B-11-128 (2008).

Appeals taken as from order or judgment in civil action. Utah Code Ann. §78B-11-129 (2008). Trial court standard of review is very narrow giving considerable leeway to arbitrator. *Buzas Baseball, Inc. v. S.L. Trappers, Inc.*, 925 P.2d 941 (Utah 1996). Trial court cannot substitute own judgment over arbitrators nor change award because trial court disagrees with arbitrator's assessment. *Id.* at 947. Supreme Court standard of review is limited to legal issue of whether trial court correctly exercised its authority confirming, vacating, or modifying an arbitration award. *Intermountain Power Agency v. Union Pac. R.R. Co.*, 961 P.2d 320 (Utah 1998).

Medical Arbitration Utah Code Ann. §78B-3-421 (2008): Patient has 10 days to rescind agreement. One year term, renewed automatically unless canceled in writing. Patient may not be denied healthcare from hospital emergency department on sole basis of refusing to sign arbitration agreement.

## ASSIGNMENT

See "FIRE INSURANCE."

## AUTOMOBILES

See Law Digest Tables.

See also "NEGLIGENCE."

Age. 16 years for operator. (Certain farm exceptions exist). Utah Code Ann. §41-8-1. Drivers under 17



may not drive between 12:00 a.m. and 5:00 a.m. unless accompanied by adult, for employment, own school-sponsored activity, on assignment in an agricultural operation, or in an emergency. Utah Code Ann. §41-8-2 (2006).

Agency. Proof of ownership not sufficient. *New York Plate Glass v. Martines*, 55 Utah 292, 184 P. 819 (1919). Owner in car raises presumption of agency. *Fox v. Lavender*, 89 Utah 115, 56 P.2d 1049 (1936). Presumption can be rebutted. *Morley v. Rodberg*, 7 Utah 2d 299, 323 P.2d 717 (1958).

Negligent Entrustment. Tort is recognized in Utah. Violation of internal company rules against private use of vehicles insufficient to state claim. *Lane v. Messer*, 731 P.2d 488 (Utah 1986). Leaving keys in car on dealer lot when car was later stolen by thief could give rise to liability on part of dealership. *Cruz v. Middlekauff*, 909 P.2d 1252 (Utah 1996). Negligent entrustment will not be imputed up chain of possession without evidence of consent by owner. *Utah Farm Bureau v. Johnson*, 738 P.2d 652 (Utah 1987).

Comparative Fault. Persons that commit torts of any kind have their causative percentage of contribution to injury or damage compared. Plaintiff cannot recover if his negligence is 50% or greater. Each defendant pays for its own contribution to damages. Utah Code Ann. §§78B-5-817 through 823. The fault of an immune employer can be compared. Utah Code Ann. §78B-5-818; *Sullivan v. Scoular Grain*, 853 P.2d 877 (Utah 1993) (rev'd on other grounds). However, for accidents after May 1994, a legislative amendment provides that employers less than 40% at fault have their proportionate share of fault distributed to the remaining parties at fault pro-rata. Utah Code Ann. §§78B-5-817 through 823. The constitutionality of this amendment has not yet been challenged. Jury may apportion fault to any person whether joined as a party to the action or not and whose identity is known or unknown. Utah Code Ann. §78B-5-818.

Compulsory Insurance Coverage. Liability coverage of 25/50/15, or 25/500 for commercial passenger carriers, uninsured motorist coverage of 25/50 underinsured coverage of 10/20 (but both may be expressly waived by insured in writing) and personal injury protection are all required. Utah Code Ann. §31A-22-301, *et seq.*

Alcohol. Utah Code Ann. §32A-14a-102 (2008) imposes liability on any person who, in a commercial setting, gives, sells or otherwise provides intoxicating liquor to person subsequently involved in accident resulting in personal injury or property damage if that person is under 21, known interdicted, or apparently under

the influence of alcohol. State agencies are immune. In non-commercial setting, a person 21 years of age or older is liable under Dram Shop Act if that person gives or otherwise provides an alcoholic beverage to an individual who he knows or should know is under the age of 21. Punitive damage may be allowed on showing of willful or knowingly reckless behavior. Vicarious liability of employer is expressly provided for. Liability is limited to \$500,000 per person and \$1,000,000 per occurrence, for accidents occurring on or after January 1, 1998. The intoxicated person has no cause of action. *Horton v. Royal Order of the Sun*, 821 P.2d 1167 (Utah 1991). The Dram Shop Act imposes potential liability on "any person" who provides "liquor" to a person enumerated in the Act, regardless of whether the liquor is provided at a "location allowing consumption on the premises" or whether the provider is in the business of purveying alcohol. *Stephens v. Bonneville Travel*, 935 P.2d 518 (Utah 1997).

Damages. Future special damages must be proven to a reasonable probability. Punitive damages are allowed on a showing of a knowing and reckless disregard for the safety of others by clear and convincing evidence. Trial to determine amount must be bifurcated. Utah Code Ann. §78B-8-201 (2008). Vicarious liability of employer depends on the "complicity rule" found in the Restatement (Second) of Torts §909. *Johnson v. Rogers*, 763 P.2d 771 (Utah 1988).

Family Purpose Doctrine. Negligence of driver is not imputable to wife who is passenger in car. Utah has no family purpose doctrine. *McFarlane v. Winters*, 47 Utah 598, 155 P. 437 (1916).

Guest Statute in Utah was held unconstitutional as violative of Art. I §24 of Utah Constitution (equal protection - uniform operation) in case of *Malan v. Lewis*, 693 P.2d 661 (Utah 1984).

Imputed Negligence. Owner of automobile who permits operation of vehicle without insurance on public highway is guilty of misdemeanor and loses no-fault immunity. Utah Code Ann. §41-12a-302 (2007); Utah Code Ann. §41-12a-304 (1985). Any negligence or willful misconduct of a minor under 18 years shall be imputed to the person who signed application for the minor's driver's license unless proof of compliance with the financial responsibility laws is provided. Utah Code Ann. §53-3-211 (2008).

Owner of motor vehicle who allows minor under 18 years to drive motor vehicle is jointly and severally liable with minor for damages caused by negligence of minor. Utah Code Ann. §53-3-212 (1993).

Last Clear Chance. Doctrine abrogated and now simply considered as an aspect of comparing negligence.

**Ownership.** An owner can be liable for negligent entrustment doctrine from common law and is jointly and severally liable with minor operating car with permission. Utah Code Ann. §53-3-212 (1993).

**Pedestrians.** Must not leave curb or place of safety to walk or run into path of vehicle close enough to constitute immediate hazard. Utah Code Ann. §41-6a-1002. Vehicles must yield right of way to pedestrians in marked and unmarked crosswalks. Otherwise pedestrians must yield right of way. Utah Code Ann. §§41-6a-1002 & 1003 (2005).

**No-Fault.** See “NO-FAULT.”

**Motorized Bicycles.** Utah Code Ann. §§41-6a-1105 & 1108 (2005) requires mopeds traveling slower than traffic to stay to right edge of roadway, cannot travel more than two abreast and must use bike path if provided.

**Seat Belts.** Seat belts required for all drivers and passengers with certain exceptions. Children under 5 must be in approved restraint device. Children between the ages of 5 and 16 years of age must be restrained by an appropriate child restraint device or seat belt. Utah Code Ann. §41-6a-1803 (2008). Failure to comply is inadmissible in any civil trial. Utah Code Ann. §41-6a-1806 (2005).

**Service of Process on Non-Resident Motorists.** Service made on Division of Corporations and Commercial Code, accompanied by certified mailing by plaintiff of copy of affidavit of compliance with act, notice of service, and process to defendant at his last known address within 10 days. Utah Code Ann. §41-12a-505 (2006). But such service is unconstitutional unless due diligence shown to first locate and serve defendant. *Carlson v. Bos*, 740 P.2d 1269 (Utah 1987).

**Speed Limit.** Cannot travel faster than conditions allow. Special hazards to consider are: crossings, curves, hills, narrow or winding roadways, pedestrians and adverse weather. Maximums are 20 mph in school zones, 25 mph in urban districts, 65/75 on highways as allowed by federal law. Utah Code Ann. §41-6a-601,602. Counties are consulted by Department of Transportation when establishing or changing speed limits for highways in their jurisdiction Utah Code Ann. §41-6a-602 (2008). Minimum speeds required to prevent impeding of traffic. Utah Code Ann. §41-6a-605 (2005). Speed contests are prohibited on highways Utah Code Ann. §41-6a-606 (2006).

**Trailers.** Trailers or semi-trailers may not be occupied while being moved on highways. Utah Code Ann. §41-6a-1706 (2005).

**Uninsured and Underinsured Endorsements.** Uninsured required to limits of \$25,000/\$50,000. Underinsured required to limits of 10,000/\$20,000. May be expressly waived by insured. Utah Code Ann. §31A-22-305 (2008).

Prior to June 1995 stacking of UM and underinsured benefits prohibited. Utah Code Ann. §31A-22-305(6) and (10) (1991). After July 1, 1997, stacking is again prohibited unless the injured party is a named insured under a separate policy which has a UM provision. Utah Code Ann. §31A-22-305(6) (2008).

Uninsured motorist insurance carrier may be permitted to intervene in action by insured against uninsured motorist where carrier has direct interest such that its rights may be affected, where its interests would not adequately be represented, and where it may be bound by judgment. *Lima v. Chambers*, 657 P.2d 279 (Utah 1982), *overruling, Kesler v. Tate*, 28 Utah 2d 355, 502 P.2d 565 (1972).

## AVIATION

Generally speaking, ordinary Utah law on tort and product liability actions applies to aviation actions also. Federal law, statutes and regulations may create duties in tort.

In 1984, the Utah Motor Vehicle Guest Statute was declared unconstitutional by Utah Supreme Court in *Malan v. Lewis*, 693 P.2d 661 (Utah 1984). The *Malan* decision may apply arguably in aviation cases.

## BROKERS

See “AGENTS AND BROKERS.”

## BURGLARY INSURANCE

The insurer is not liable for forcible entry into drawers of inner chest of safe even though there were “visible marks,” where the doors of the safe were opened by use of combination and keys. *Schubach v. American*, 73 Utah 332, 273 P. 974 (1929).

## CANCELLATION

May sue in equity or may impanel jury to decide facts. *New York Life Ins. v. Grow*, 103 Utah 285, 135 P.2d 120 (Utah 1943).

No insurance policy may be cancelled by insurer prior to expiration of agreed term or one year from effective date of policy or renewal, whichever is less, except for insured’s failure to pay premium when due or on grounds stated in the policy. Utah Code Ann. §31A-21-

303(2)(b)(i) (2006). *The State Ins. Fund v. E-Z Way Constr. Inc.*, 620 P.2d 69 (Utah 1980).

Notice of cancellation must strictly comply within provisions of insurance policy. *Diamond T. Utah, Inc. v. Canal Ins. Co.*, 12 Utah 2d 37, 361 P.2d 665 (1961); *Commercial Credit v. Premier Ins. Co.*, 12 Utah 2d 321, 366 P.2d 476 (1961). Loss payable endorsement of automobile policy is separate contract as to conditional vendor or lienholder and notice of cancellation to lienholder must be affirmatively proven. *Bennett Motor Co. v. Lyon*, 14 Utah 2d 161, 380 P.2d 69 (1963).

Where an insurance contract provides that premiums be paid by a certain time, payment is regarded as timely if mailed by the time specified, unless the contract clearly provides otherwise. *Clarke v. American Concept Ins. Co.*, 758 P.2d 470 (Utah App. 1988).

In order to cancel an insurance policy for nonpayment of premium prior to the end of policy's term, insurer must give insured at least ten days notice, accompanied by reason for cancellation. *Godoy v. Farmers Ins. Group*, 759 P.2d 1173 (Utah App. 1988); *Phoenix Indem. Ins. Co. v. Estate of Bell*, 896 P.2d 32 (Utah App. 1995). (Cancellation could not take place until ten days after delivery of cancellation notice despite the insured's premium check being dishonored by the bank). Actual receipt of cancellation notice by the insured is not a condition precedent to the cancellation of the insurance by the insurer, provided the cancellation notice itself contains a fixed date on which the cancellation is to become effective. *Baumgart v. Utah Farm Bureau Ins.*, 851 P.2d 647 (Utah App. 1993), *cert. denied*, 862 P.2d 1356 (Utah 1993).

Insurers acted reasonably in canceling insurance coverage when only one of two insureds requested cancellation, because the insurance salesperson, who was not the agent of insurer, listed insureds on insurance application as individuals doing business as a partnership. *Vina v. Jefferson Ins. Co. of New York*, 761 P.2d 581 (Utah App. 1988).

## CHATTEL MORTGAGE

See "FIRE INSURANCE."

## CONSTRUCTION OF POLICY

Insurance policies are contracts and are interpreted under the same general rules applicable to other contracts. *Phoenix Indem. Ins. Co. v. Estate of Bell*, 896 P.2d 32 (Utah App. 1995); *Gee v. Utah State Retirement Bd.*, 842 P.2d 919 (Utah App. 1992). However, all ambiguities in an insurance contract are construed against the insurer and are resolved in favor of coverage. *USF&G Co. v. Sandt*, 854 P.2d 519 (Utah 1993); *Niel-*

*sen v. O'Reilly*, 848 P.2d 664 (Utah 1992); *Phoenix Indem. Ins. Co. v. Estate of Bell*, 896 P.2d 32 (Utah App. 1995). Likewise, the terms and conditions of a policy are strictly construed in favor of the insured. *Phoenix Indem. Ins. Co. v. Estate of Bell*, 896 P.2d 32 (Utah App. 1995); *Baumgart v. Utah Farm Bureau Ins. Co.*, 851 P.2d 647 (Utah App. 1993), *cert. denied*, 862 P.2d 1356 (Utah 1993).

Application. In the insurance application process, mere falsity of answers to questions propounded is insufficient to defeat coverage if not knowingly made with intent to deceive and defraud. *Hardy v. Prudential Ins. Co. of Am.*, 763 P.2d 761 (Utah 1988); *Burnham v. Bankers Life & Cas. Co.*, 470 P.2d 261 (Utah 1970). A misrepresentation made on an application affects the insurer's obligations under the policy if (1) the insurer relies on it and it is either material or is made with intent to deceive, or (2) the fact misrepresented or falsely warranted contributes to the loss. Utah Code Ann. §31A-21-105(2) (2003).

To void a policy, misrepresentations on an insurance application must materially affect the acceptance of the risk or hazard assumed by the insurer, and be made with the intent to deceive. *Fuller v. Finance*, 694 P.2d 1045 (Utah 1985). Knowledge of a material condition or fact which is not disclosed in reply to specific inquiry, may constitute fraud which could invalidate the policy. *Hardy v. Prudential Ins. Co. of Am.*, 763 P.2d 761 (Utah 1988). Advice from an insurance agent that certain information need not be declared is relevant as to whether the insured had intent to deceive. Information withheld where no inquiry was made may well not be sufficient to void a policy.

Reinstatement of life insurance policy constitutes continuation of original policy and insurer cannot add conditions or restrictions beyond conditions or restrictions of original policy. *Burnham v. Bankers Life & Cas. Co.*, 470 P.2d 261 (Utah 1970).

## DAMAGES

See also, "DEATH."

Desired objective in computing damages, is to evaluate loss suffered by injured party in most direct, practical and accurate method that can be employed. *Even Odds v. Nielson*, 448 P.2d 709 (Utah 1968). Juries are generally allowed wide discretion in assessing damages. *Amoss v. Broadbent*, 514 P.2d 1284 (Utah 1973). An award of damages may not be based on speculation, but where there is some rational basis for the award it is the wrongdoer who must assume the risk of uncertainty. *Bastian v. King*, 661 P.2d 953 (Utah 1983).

**Property Damage.** Standard for awarding damages for property damage is the difference in fair market value of damaged property before and after loss or cost of restoration, whichever is less. *Leishman v. Kamas Valley Lumber Co.*, 427 P.2d 747 (Utah 1967).

**Contract Damages.** Damages for breach of contract are compensatory. They arise naturally from the breach and must have been either within the contemplation of or reasonably foreseeable to the parties. *Robbins v. Finlay*, 645 P.2d 623 (Utah 1982). Nominal damages are recoverable upon a breach of contract if there are no actual or substantial damages resulting from the breach or if the amount of damages has not been proven. *Fashion Place v. Glad Rags*, 754 P.2d 940 (Utah 1988). Consequential damages will be awarded if the losses resulting from a breach were reasonably within the contemplation of the parties when they entered into the contract. *Highland Constr. Co. v. Union Pacific*, 683 P.2d 1042 (Utah 1984).

**Personal Injury.** There is no set formula to compute damages for personal injuries. *Cruz v. Montoya*, 660 P.2d 723 (Utah 1983); *Jorgensen v. Gonzales*, 383 P.2d 934 (Utah 1963). In assessing damages for personal injuries, jury can consider loss of wages, permanent disability, loss of bodily function, disfigurement and prolonged pain and suffering. *Paul v. Kirkendall*, 261 P.2d 670 (Utah 1953). Pain and suffering includes mental reaction to the pain and to the possible consequences of the physical injury. Where a defendant's negligence aggravates or lights up a latent, dormant, or asymptomatic condition, or one to which the injured person is predisposed, the defendant is liable to the injured person for the full amount of damages which ensue, notwithstanding such diseased or weakened condition. *Biswell v. Duncan*, 742 P.2d 80 (Utah App. 1987). Measure of damages for impairment of earning capacity is difference between amount which injured person was capable of earning before his injury and that which he was capable of earning after his injury. *Clawson v. Walgreen*, 162 P.2d 759 (Utah 1945). As of May 4, 1997, spouse of person injured by third party may maintain loss of consortium claim. Joinder of actions is compulsory. Utah Code Ann. §30-2-11. Child has no claim for loss of consortium for injuries to his parents. *Wollam v. Kennecott*, 648 F. Supp. 160 (D. Utah 1986). A statute imposing a limit on the amount of recovery against an uninsured governmental entity (a university hospital) was held to violate the Utah Constitution. *Condemarin v. Univ. Hosp.*, 775 P.2d 348 (Utah 1989). However, where the governmental agency performs a core governmental purpose, the Utah Supreme Court held that a damage cap was constitutional. *Lyon v. Burton*, 2000 UT 55, 5 P.3d 616.

**Emotional Distress.** A tortfeasor who causes emotional distress to a third party by virtue of a tort, is subjected to liability for resulting illness or bodily harm if the person suffering emotional distress is within a "zone of danger" created by the tortfeasor, the person is a relative of the injured person, the actor should have realized that his conduct involved an unreasonable risk of causing the distress and should have realized that the distress might result in illness. *Johnson v. Rogers*, 763 P.2d 771 (Utah 1988).

**Special Damages.** Special damages should be specifically pleaded and proved by evidence showing particular items of damages resulting from circumstances peculiar to case. *Prince v. Peterson*, 538 P.2d 1325 (Utah 1975). Jury should not be instructed on tax consequences of award in wrongful death or personal injury section. *Davidson v. Prince*, 813 P.2d 1225 (Utah App. 1991).

**Punitive Damages.** An award of punitive damages may not be predicated solely upon a finding of ordinary negligence. *Boyette v. L.W. Looney & Son*, 932 F. Supp. 1344 (D. Utah 1996). Except as otherwise provided by statute and for claims arising out of a tortfeasor's operation of a motor vehicle while voluntarily intoxicated or under the influence of any prohibited drug, punitive damages may be awarded only if compensatory or general damages are awarded, *Kilpatrick v. Wiley, Rein & Fielding*, 2001 UT 107, 37 P.3d 1130, and it is established by clear and convincing evidence that the acts or omissions of the tortfeasor are the result of willful and malicious or intentionally fraudulent conduct, or conduct that manifests a knowing and reckless indifference toward, and a disregard of, the rights of others. Utah Code Ann. §78B-8-201. Every case of driving under the influence of alcohol gives rise to punitive damages, as long as the plaintiff can prove he sustained compensatory or general damages, even if such damages are not awardable under no-fault insurance schemes. *C.T. ex rel. Taylor v. Johnson*, 1999 UT 35, 977 P.2d 479. Standard for imposing vicarious liability for punitive damages on employer for tortious acts of employee is the standard set forth in Restatement (Second) Torts §909 (1979); *i.e.*, the employer must have authorized the doing and the manner of the act; or, the employee was unfit and the employer was reckless in employing or retaining him; or, the employee was employed in a managerial capacity and was acting in the scope of employment; or, the employer ratified or approved the act. *Johnson v. Rogers*, 763 P.2d 771 (Utah 1988). It is unlawful for an insurance contract to extend coverage to punitive damages. Utah Code Ann. §31A-20-101(4). Generally punitive damages are not awardable in actions for breach of contract. *Jorgensen v. John Clay & Co.*, 660 P.2d 229 (Utah 1983). However, an award of punitive damages against



an automobile mechanic who exhibited reckless disregard toward the validity of a lien he held upon plaintiff's vehicle and who took advantage of plaintiff's lack of the use of automobile was upheld in *O'Brien v. Rush*, 744 P.2d 306 (Utah App. 1987). An award for punitive damages which is less than \$100,000 will not generally be found to be excessive if the award does not exceed the actual damages by more than a ratio of approximately 3 to 1. Larger awards will be scrutinized more carefully to ensure that the relative wealth of the defendant, the nature of the alleged misconduct, the facts and circumstances surrounding such conduct, the effect thereof on the lives of the plaintiff and others, the probability of future recurrence of the misconduct, the relationship of the parties and the amount of actual damages awarded are clearly considered in reaching the award. *Crookston v. Fire Ins. Exch.*, 817 P.2d 789 (Utah 1991). Awards of punitive damages in excess of the 3 to 1 ratio may still be sustained if the trial court carefully articulates the basis for the award. *Campbell v. State Farm*, 2004 UT 34, 98 P.3d 409 (insurers conduct warranted, punitive damages of nine times compensating and special damages). If a judgment for punitive damages is awarded and paid, 50% of the amount of the punitive damage award in excess of \$20,000, after the payment of attorneys' fees and costs, is to be remitted to the state treasurer for deposit into the General Fund. Utah Code Ann. §78B-8-201(3).

## DEATH

**Abatement and Survival of Actions.** Cause of action for personal injuries shall survive, and shall not abate upon death of injured party or wrongdoer. Utah Code Ann. §78B-3-107(1)(a). If prior to judgment or settlement the injured party dies as a result of a cause other than the injury received as a result of the wrongful act, the heirs have a cause of action only for the special damages suffered as a result of the injury caused by the wrongful act. Utah Code Ann. §78B-3-107(1)(b).

**Action for Wrongful Death.** Parent or guardian may maintain action for wrongful death or personal injury of minor child. Personal representative, for benefit of heirs, or heirs themselves, may bring action for wrongful death of non-minor. Utah Code Ann. §§78B-3-102 and 78B-3-106. Except when statute tolled for disability or some other reason, action must be commenced within two years of death. Utah Code Ann. §78B-2-304.

**Damages.** No statutory limit for most death claims. Utah Code Ann. §78B-3-106. Elements to be considered in amount of damages to be awarded include loss of financial support, loss of affection and counsel, loss of deceased's solicitude for welfare of family, loss of comfort and pleasure, and loss of consortium (effective by

statute 5/97). *In Re Behm's Estate v. Gee*, 213 P.2d 657 (Utah 1950). In action for wrongful death of child, recoverable damages include loss of society, love, companionship, protection and affection. *Jones v. Carvell*, 641 P.2d 105 (Utah 1982). There is no recovery for the mental anguish of decedent's survivors in wrongful death actions. *Webb v. D & RGW R.R. Co.*, 7 Utah 17, 24 P. 616 (1890). Punitive damages may be recovered in appropriate wrongful death action. *Behrens v. Raleigh Hills Hosp.*, 675 P.2d 1179 (Utah 1983). If one is injured by tortfeasor, but later dies from causes other than tortfeasor's act, heirs entitled to no more than out-of-pocket expenses associated with tortfeasor's conduct. Utah Code Ann. §78B-3-107.

Negligence of decedent in causing his injuries is imputed to claimant. If decedent's fault is more than 50%, all recovery is denied. *Kelson v. Salt Lake County*, 784 P.2d 1152 (Utah 1989).

Compensation may be awarded for mother's physical and mental suffering in connection with death of viable fetus, but law is unsettled whether wrongful death action can be maintained for loss of fetus itself. *Nelson v. Peterson*, 542 P.2d 1075 (Utah 1975); *State Farm v. Clyde*, 920 P.2d 1183 (Utah 1996). Jury should not be instructed on tax consequences of award in wrongful death or personal injury action. *Davidson v. Prince*, 813 P.2d 1225 (Utah App. 1991).

Statute of limitations applicable to wrongful death claims caused by malpractice begin to run at time patient or plaintiff discovers or, through use of reasonable diligence should have discovered the injury, whichever first occurs. In an action where it is alleged that patient has been prevented from discovering misconduct on the part of health care provider because that health care provider has affirmatively acted to fraudulently conceal alleged misconduct, claim shall be barred unless commenced within one year after plaintiff or patient discovers, or through use of reasonable diligence, should have discovered fraudulent concealment, whichever first occurs. Utah Code Ann. §78B-3-404. *Jensen v. IHC Hospitals, Inc.*, 944 P.2d 327 (Utah 1997).

Absent any reason to toll two-year statute of limitations governing deceased patient's medical malpractice claims, patient's family could not bring survival claim, where statute had run by time patient died. Utah Code Ann. §§78B-3-107, 78B-2-105, 78B-3-404.

In a wrongful death action, personal representative attorney has fiduciary duty to represent all statutory heirs. However where adversarial relationship develops between personal representative and another heir, duty to other heir should end. *Oxendine v. Overturf*, 1999 UT 4, 973 P.2d 417.

**DISABILITY**

See "ACCIDENT AND HEALTH INSURANCE."

**FINANCIAL RESPONSIBILITY LAW**

See Law Digest Tables.

Utah has adopted a "Financial Responsibility of Motor Vehicle Owners and Operators Act." Utah Code Ann. §41-12a-101, *et seq.* Operating motor vehicle without owner's or operator's security is a misdemeanor. Utah Code Ann. §41-12a-302. No-fault tort immunity ineffective if owners or operator's security not provided. Utah Code Ann. §41-12a-304. Proof of security is required before license or registration may be issued or safety inspection completed. Utah Code Ann. §41-12a-303. Proof of security required to be in immediate possession. Utah Code Ann. §41-12a-303.2. Uninsured drivers required to post post-accident security. Utah Code Ann. §41-12a-501. License suspended with unsatisfied judgment. Utah Code Ann. §41-12a-511. License suspended with conviction of misdemeanor. Utah Code Ann. §41-12a-604. Utah has an uninsured motorist identification database. Utah Code Ann. §41-12a-801.

**FIRE INSURANCE**

Arson. Where no express exclusion applied to exclude coverage for innocent co-insured wife, husband's arson did not void fire policy as to wife. *Error v. Western Home Ins. Co.*, 762 P.2d 1077 (1988). But, where exclusion clearly excludes coverage where an insured commits intentional act, exclusion applies to preclude coverage to innocent co-insured. *Utah Farm v. Crook*, 1999 UT 47, 980 P.2d 685.

Arbitration. Where insured under fraternal insurance policy requested arbitration and insurer failed to consent, insured could sue despite policy provision that no action could be brought unless Board of Arbitration should fail to settle claim. *Bednarek v. Brotherhood of American Yeoman*, 157 P. 884 (Utah 1916). *See also Moran v. Knights*, 151 P. 353 (Utah 1915). Utah has adopted the Uniform Arbitration Act with minor amendments. Arbitration Act only applies to agreements made after May 6, 2002, unless all parties agree otherwise. Utah Code Ann. §78B-11-104.

Any interest in property, be it legal, equitable, qualified, conditional, contingent or absolute or right to use or possess, creates insurable interest in person who has such right. *Hill v. Safeco*, 448 P.2d 915 (Utah 1969). *See also Error v. Western Home*, 762 P.2d 1077 (Utah 1988). Utah Code Ann. §31A-21-104(5) allows court to create constructive trust for benefit of those equitably entitled to proceeds.

Assignment. Insurance company paying claim for destruction of personal property by fire is real party in interest and may sue wrongdoer upon assignment of insured's claim. *National Union Ins. Co. v. D.&R.G.R.*, 137 P. 653 (Utah 1913).

Cancellation. See "CANCELLATION."

Where mortgage debt exceeded loss, mortgagee could sue alone where policy provided "loss, if any, payable to mortgagee as his interest may appear." *Peck v. Girard*, 51 P. 255 (Utah 1897).

Consequential damage to plants and bulbs in greenhouse was not direct loss by fire where motor to furnace burned out producing some "fire" in motor. *Jorgensen v. Hartford*, 373 P.2d 580 (Utah 1962).

Insured's insurable interest in real estate contract of sale not limited to amount paid on contract. *Hartford v. Cagle*, 249 F.2d 241 (10<sup>th</sup> Cir. 1957).

Contract/Policy. Insurance policies are construed as court perceives they would be understood by average, reasonable purchaser of insurance and in accordance with the plain meaning of the words. *Draughon v. CUNA*, 771 P.2d 1105 (Utah App. 1989).

An insurer wishing to limit coverage by an exclusion must employ language clearly identifying scope of limitation. *Draughon v. CUNA*, 771 P.2d 1105 (Utah App. 1989).

Damages. Insureds estimates of her increased food expenses following fire at home were sufficient to support award of damages under fire policy. *Error v. Western Home*, 762 P.2d 1077 (Utah 1988).

**FRAUD**

See "AGENTS AND BROKERS."

Elements of actual fraud are: "(1) a representation; (2) concerning a presently existing material fact; (3) which was false; (4) which the representor either (a) knew to be false, or (b) made recklessly, knowing that he had insufficient knowledge upon which to base such representation; (5) for the purpose of inducing the other party to act upon it; (6) that the other party, acting reasonably and in ignorance of its falsity; (7) did in fact rely upon it; (8) and was thereby induced to act; (9) to his injury and damage." *Dugan v. Jones*, 615 P.2d 1239, 1246 (Utah 1980); *Pace v. Parrish*, 122 Utah 141, 144-145, 247 P.2d 273, 274-275 (1952). "Misrepresentation may be made either by affirmative statement or by material omission, where there exists a duty to speak. Such a duty will not be found where the parties deal at arm's length, and where the underlying facts are reasonably within the knowledge of both parties." *Sugarhouse Fin.*

*Co. v. Anderson*, 610 P.2d 1369, 1373 (Utah 1980) (citations omitted).

Circumstances constituting fraud must be pled with particularity. U.R.C.P. 9(b). However, forgery does not need to be pled with particularity under Rule 9(b). *See, Walker Bank and Trust v. Thorup*, 317 P.2d 952 (Utah 1957). Party alleging fraud has burden of proving each essential element of claim by clear and convincing evidence. *Armed Forces Ins. Exchg. v. Harrison*, 70 P.3d 35 (Utah App. 2003); *Pace v. Parrish*, 122 Utah 141, 143, 247 P.2d 273, 274 (1952).

Misrepresentation or breach of affirmative warranty by insured does not affect insurer's obligations under policy unless "(a) the insurer relies on it and it is either material or is made with intent to deceive; or (b) the fact misrepresented or falsely warranted contributes to the loss." Utah Code Ann. §31A-21-105(2). False representations of insured regarding physical condition material to risk and knowingly false where insurer acts solely on such representations are ground for rescission of policy, *Eklund v. Metropolitan Life*, 57 P.2d 362 (Utah 1936). Misrepresentation in insurance application may prevent recovery if material to risk. *Berger v. Minn. Mut. Life*, 723 P.2d 388 (Utah 1986). Materiality is measured by extent to which it influenced insurer to assume risk initially, and not at time of claim. *Id.* Utah Code Ann. §31A-21-105 prevents non clerical alterations of insurance applications and governs insurer's responsibility for its representatives' statements. In deciding whether misstatement in insurance application is material, jury should consider how a reasonable insurer following usual practices would have considered application. *Moore v. Prudential Ins.*, 26 Utah 2d 430, 436, 491 P.2d 227, 231 (1971); *Golden Rule Ins. Co. v. Hughes*, 784 F. Supp. 817 (D. Utah 1992). Fact that another insurance company has refused or declined similar coverage is essential element in estimating the risk and materiality to acceptance of application, where insured concealed prior cancellation of similar insurance. *Prudential v. Mandanlou*, 607 P.2d 291 (Utah 1980).

### GOVERNMENTAL IMMUNITY

Each activity, undertaking or operation of state and local government is legislatively defined as a governmental function. Utah Code Ann. §63G-7-102. Statute not retroactive, constitutionality not resolved. *DeBry v. Noble*, 889 P.2d 428 (Utah 1995).

Utah legislature waived governmental immunity from suit for certain kinds of actions including in part: 1) contractual obligations; 2) recovery of real or personal property; 3) defects in or unsafe highways, roads, streets, tunnels, bridges, public buildings, reservoirs, etc.; 4) negligent destruction of seized property; 5) taking

property without compensation; 6) many negligent acts or omissions of employees; and 7) attorneys fees in certain cases. Utah Code Ann. §63G-7-301(1)-(4). Immunity for negligence of employees is generally waived except in the following instances, among others: 1) discretionary functions; 2) intentional torts; 3) issuance of permits; 4) inspections; 5) institution of judicial or administrative proceedings; 6) misrepresentations; 7) riots; 8) collection of taxes; 9) actions of Utah National Guard; 10) incarceration of persons in Utah prisons; 11) natural conditions on publicly owned/contracted lands; 12) seeding clouds; 13) management of flood waters; 14) flood or storm systems; 15) operation of emergency vehicles; 16) latent defects in public structures, roads, etc.; 17) handling hazardous wastes; 18) police and emergency assistance; and 19) unauthorized access to government records. Utah Code Ann. §63G-7-301(5). Courts will look to the conduct or situation out of which the injury arose, not the theory of liability crafted by the plaintiff on the type of negligence alleged in determining whether or not the above categories apply. *See Wright v. University of Utah*, 876 P.2d 380 (Utah App. 1994).

Notice of Claim must be filed with the appropriate governmental agency within one year after claim arises as prerequisite to filing suit. Utah Code Ann. §63G-7-401-402. Claim is deemed denied if not approved or denied within sixty (60) days. Utah Code Ann. §63G-7-403(1). Action must be begun within one year after claim is denied. Utah Code Ann. §63G-7-403(2).

No judgment for punitive damages allowed. Utah Code Ann. §63G-7-603. Judgment against government or indemnified employee generally limited to \$583,900 per person, \$2,000,000 per occurrence for personal injury, and \$233,600 for property damage unless taken or damaged without just compensation. Utah Code Ann. §63G-7-604. Amounts are adjusted periodically. *Id.* Utah Supreme Court has questioned constitutionality of cap, *Condemarin v. University Hosp.*, 775 P.2d 348 (1989), but has held cap constitutional in negligent road maintenance case not resulting in death. *McCorvey v. UDOT*, 868 P.2d 41 (1993).

### GUEST CASES

In *Malan v. Lewis*, 693 P.2d 661 (Utah 1984), Utah Supreme Court found Guest Statute Unconstitutional. 1998: Guest Statute Repealed.

### HUSBAND AND WIFE

See Law Digest Tables.

Utah is not a community property state. Rather, trial courts are given considerable discretion to divide equitably the financial and property interest of the parties.

*Anderson v. Anderson*, 757 P.2d 476, 479 (Utah App. 1988); *Burnham v. Burnham*, 716 P.2d 781 (Utah 1986). Utah Code Ann. §30-3-5.

Utah law formerly recognized interspousal tort immunity, *Rubalcava v. Gisseman*, 14 Utah 2d 344, 384 P.2d 389 (1963), but courts have consistently chipped away at doctrine. It is not a bar to wrongful death action by estate of one spouse against estate of another. *Hull v. Silver*, 577 P.2d 103 (Utah 1978). Doctrine does not bar suit for intentionally inflicted injuries. *Stoker v. Stoker*, 616 P.2d 590 (Utah 1980). In cases involving negligent torts committed against a spouse, immunity is questionable. Utah Supreme Court has held “that a household or family exclusion clause in an automobile insurance policy is contrary to the public policy of this state and the statutory requirements found in the No-Fault Insurance Act as to the minimum benefits provided by statute.” *Farmers Ins. Exch. v. Call*, 712 P.2d 231, 236 (Utah 1985).

For accidents occurring on or after May 4, 1997, the spouse of the injured person may recover for loss of consortium. Utah Code Ann. §30-2-11(2).

Utah recognizes cause of action for alienation of affections as intentional tort but has abolished tort of criminal conversation. *Nelson v. Jacobson*, 669 P.2d 1207 (Utah 1983).

## INFANTS

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

## LIABILITY INSURANCE

**Cancellation.** Insurers’ limited rights to cancel insurance policies detailed. Utah Code Ann. §31A-21-303. Generally, no insurance policy may be cancelled by insurer prior to expiration of agreed term or one year from effective date of policy or renewal, whichever is less, except for failure to pay a premium when due or on grounds of material misrepresentation, substantial change in risk, substantial breach, revocation of driver’s license on auto policies. Cancellation for nonpayment of premium is effective no sooner than 10 days after delivery or first class mailing (add 3 days for mailing). Notice of cancellation for nonpayment of premium shall include a statement of the reason for cancellation. Cancellation as otherwise provided in Utah Code Ann. §31A-21-303 is effective not sooner than thirty days after the delivery or first class mailing of a written notice to the policy holder. Insurer may not cancel or fail to renew a motor vehicle policy solely on basis of: claim that results from accident where insured is not at fault, and driver is age 21 or older, where it is the only such claim within a 36-

month period; single traffic violation for speeding if it is not in excess of 10 mph over limit, does not violate sections 41-6a-601, 604, 605, driver is not younger than 21, and it is the only such violation within a 36-month period; or claim for damage resulting solely from wind, hail, lightning or earthquake, not preventable by exercise of reasonable care, and it is the only such claim within a 36-month period. Insurer may not cancel or fail to renew homeowner’s policy solely on basis of claim for damage resulting solely from wind, hail or lightning, not preventable by exercise of reasonable care, and it is the only such claim within a 36-month period. Utah Code Ann. §31A-21-303(5).

**Compromise of Claims.** In Utah, first party claims (those claims asserted by insured against insurer based on loss to insured) sound in contract and are subject to implied covenant of good faith to bargain and settle. Damages can include reasonably foreseeable harm (such as bankruptcy) and can exceed contract amounts. *Beck v. Farmers*, 701 P.2d 795, 798-802 (Utah 1985). Third party claims (those claims asserted against insured by third party where insurer has obligation to pay) sound in both contract and tort, due to insurer’s fiduciary duty to defend and protect insured. Punitive damages in bad faith cases available only if independent tort established. Insurer owes duty to insured to accept settlement offer within policy limits when substantial likelihood of excess judgment. *Campbell v. State Farm*, 840 P.2d 130, 138 (Utah App. 1992). Claim for bad faith in refusing to settle within policy limits is not barred by insurer’s eventual payment of excess judgment. Insured’s exposure to excess judgment is not only legally recognizable damage which insured might suffer. *Campbell v. State Farm, Id.* at 139; *Campbell v. State Farm*, 65 P.3d 1134 (Utah 2001); *State Farm v. Campbell*, 123 S. Ct. 1513 (U.S. 2003) (reversing \$145 million punitive damages award as excessive).

**Contribution among Joint Tortfeasors.** Maximum amount for which defendant may be liable to any person seeking recovery is that percentage or proportion of damages equivalent to percentage or proportion of fault attributed to defendant under Utah Code Ann. §78B-5-818. Fault of non-parties, including those immune from suit, is also allocated. If combined percentage of fault to all persons immune from suit is less than 40%, court re-allocates that percentage to other parties in proportion to fault initially attributed to each party. Utah Code Ann. §78B-5-819. Each defendant is liable according to fault allocated to him, and defendant is not entitled to contribution from any other person. Utah Code Ann. §78B-5-820.

**Cooperation of Insured.** For insurance company to avoid policy by invoking noncooperation clause, com-

pany must show it used due diligence in obtaining cooperation of insured, and that company was disadvantaged by lack of cooperation. *Montgomery v. Preferred Risk*, 411 P.2d 488 (Utah 1966). Auto liability insurer has burden of proving reasonable diligence used to obtain insured's cooperation, that cooperation was not given, and lack of cooperation was prejudicial. *Peterson v. Western Cas.*, 425 P.2d 769 (Utah 1967). Lack of cooperation is not a defense to third-party claim against insurer under automobile insurance policy, absent collusion between insured and third person. Utah Code Ann. §31A-22-303(6).

**Coverage.** Utah has no-fault insurance act, Utah Code Ann. §31A-22-301, *et seq.* Motor vehicle liability policy shall insure any person using any named motor vehicle with the express or implied permission of the named insured. Utah Code Ann. §31A-22-303(1). Policy cannot incorporate statute by reference. Utah Code Ann. §31A-21-106. Motor vehicle liability insurance shall cover damages caused by covered driver stricken by unforeseen paralysis, seizure or unconscious condition. Driver's liability is then limited to insurance. Utah Code Ann. §31A-22-303(1)(a)(v). Where claim is brought by a named insured or resident relative, coverage may not be reduced or stepped-down because a permissive user is at fault, or named insured or resident relative driving covered vehicle is at fault. Utah Code Ann. §31A-22-303(1)(a)(iv).

**Direct Action Against Insurer.** Payment by insured of amount of judgment in excess of policy limits is not condition precedent to action against insurer for failure to settle claim within policy limits. *Ammerman v. Farmers*, 450 P.2d 460 (Utah 1969). Action on written policy or contract of first party insurance must be commenced within three years after the inception of loss. Utah Code Ann. §31A-21-313. No policy may limit the right of action against the insurer to less than three years from the date the cause of action accrues. Utah Code Ann. §31A-21-313(3). Insurance policy may not prescribe in what court action may be brought on policy, or provide that no action may be brought, subject to permissible arbitration provisions in contracts. Utah Code Ann. §31A-21-313(3). No direct cause of action by injured party against tortfeasor's insurer. *Campbell v. Stagg*, 596 P.2d 1037 (Utah 1979). Except, every liability policy shall provide that if execution against insured is returned unsatisfied, action may be maintained against insurer to extent liability is covered. Utah Code Ann. §31A-22-201. Declaratory judgment action by injured not ripe for adjudication prior to determination of liability of insured. *Boyle v. National*, 866 P.2d 595 (Utah App. 1993). Person injured in motor vehicle accident may elect to submit all third party claims to arbitration. Particular requirements apply under Utah Code Ann. §31A-22-321. If submitted

to arbitration, award is limited to \$25,000. Arbitration award is final unless either party files notice for trial de novo within 20 days of award. If plaintiff requests trial de novo, and does not obtain a verdict of at least \$5,000 and at least 35% greater than arbitration award, plaintiff is responsible for nonmoving party's costs. If defendant requests trial de novo, and does not obtain a verdict at least 35% less than arbitration award, defendant is responsible for nonmoving party's costs. If defendant requests trial de novo, verdict may not exceed \$40,000. If plaintiff requests trial de novo, verdict may not exceed \$25,000.

**Duty to Defend.** Duty to defend is broader than duty to indemnify. *Deseret Federal v. USF&G*, 714 P.2d 1143 (1986). In determining whether it has a duty to defend, insurer must make good faith determination based on all facts known to it, or which by reasonable efforts could be discovered by it, that there is no potential liability under policy. Insurance contract includes duty to defend even if allegations in suit are groundless, false, or fraudulent. Question is whether allegations, if proved, would result in liability under policy. *Deseret Federal v. USF&G, supra.*; *Pickhover v. Smiths*, 771 P.2d 664 (1989).

**Liability Between Insurers.** When same loss is covered by two policies without intending cumulative coverage, no "other insurance" provision may reduce aggregate coverage below lesser of actual loss or maximum indemnification without regard to "other insurance" clause. Utah Code Ann. §31A-21-307. Liability of primary insurance carrier to secondary insurance carrier for expense of defending. *National Farmers Union v. Farmers*, 377 P.2d 786 (Utah 1963). In seeking resolution of dispute between two insurance companies, where either would be liable if coverage by other did not exist, and when each tried to escape liability by claiming that its policy provided only excess liability coverage, court would regard each insurer as standing in shoes of its own insured and as having same rights and liabilities as its insured had, and would thus determine who would bear loss, if no insurance existed. *Gulf Ins. Co. v. Horace Mann*, 567 P.2d 158 (Utah 1977). Liability insurance of permissive user is primary over that of a motor vehicle business. Utah Code Ann. §31A-22-303(2)(b)(i).

**Exclusions.** Insurer may include in policy any number or kind of exception and limitation to which insured will agree unless contrary to statute or public policy. *Farmers v. Call*, 712 P.2d 231 (1985) (invalidating "household exclusion" clause as to statutorily required minimum benefits). Intentional shooting not occurrence. Also excluded as intentional act. *State Farm v. Geary*, 869 P.2d 952 (Utah App. 1994). Limited permissible exclusions from personal injury protection coverage



benefits in automobile insurance set forth in Utah Code Ann. §31A-22-309. If after issuance of policy insurer acquires knowledge of sufficient facts to constitute general defense to all claims under policy, defense is only available if insurer notifies insured within sixty days after acquiring knowledge of its intention to defend against a claim if one should arise, or within 120 days if insurer considers it necessary to secure additional medical information and is actively seeking information at end of the sixty days. Utah Code Ann. §31A-21-105(5). This provision only applies to knowledge gained by insurer in connection with communications or investigations under policy.

Infants. See "INFANTS."

Insolvency of Insured. Every liability insurance policy shall provide that bankruptcy or insolvency of insured may not diminish any liability of insurer to third parties. Utah Code Ann. §31A-22-201.

Notice. Every insurance policy shall provide that when notice of loss is required separately from proof of loss, notice given by or on behalf of insured to any authorized agent of insurer within this state, with particulars sufficient to identify the policy, is notice to the insurer. Utah Code Ann. §31A-21-312(1). Failure to give any notice or file any proof of loss required by policy within time specified in policy does not invalidate a claim made by insured, if insured shows that it was not reasonably possible to give notice or file proof of loss within prescribed time and that notice was given or proof of loss filed as soon as reasonably possible. Utah Code Ann. §31A-21-312(1)(b). Failure to give notice or file proof of loss does not bar recovery under policy if insurer fails to show it was prejudiced by the failure. Utah Code Ann. §31A-21-312(2). Where policy requires that notice be given "soon as practicable", timing requirement depends upon circumstances. Insured not obliged to give notice unless and until reasonable person would know claim could arise against policy. *Johnson v. United Pacific*, 358 P.2d 337 (Utah 1937).

Punitive Damages. No insurer may insure or attempt to insure against punitive damages. Utah Code Ann. §31A-20-101 (or a wager or gaming risk, loss of election, or penal consequences of a crime). Punitive damages in bad faith cases available only if independent tort established. Breach of implied covenant of good faith does not alone give rise to tort action. *Gagon v. State Farm*, 771 P.2d 325 (1988).

#### LIMITATION OF TIME FOR COMMENCEMENT OF ACTION

See Law Digest Tables.

Six months. Action against officer to recover goods seized by him as tax collector, or for recovery of money paid as taxes under protest. Utah Code Ann. §78B-2-301.

One year. Actions under Government Immunity Act and filing of notices of claim for same, *see* Utah Code Ann. §63G-7-401, 402, 403. One year to file notice of claim; suit must be filed within one year of denial of claim. Other one-year statutes: 1) liability created by statutes of foreign state; 2) action upon statute for penalty or forfeiture; 3) action on statute or undertaking in criminal action for forfeiture or penalty to State; 4) action for libel, slander, false imprisonment or seduction; 5) action against sheriff or other officer for escape of prisoner; 6) action against municipal corporation for damages or injuries to property caused by mob or riot; 7) under certain sections of Uniform Fraudulent Transfers Act; 8) except as otherwise expressly provided by statute, against county legislative body or county executive, Utah Code Ann. §78B-2-302; 9) malpractice action where foreign object has been left in patient's body. Limitation begins from date of discovery of foreign object or date foreign object should have been discovered, whichever occurs first. Utah Code Ann. §78B-3-404; 10) malpractice action where malpractice undiscovered because provider fraudulently concealed misconduct. Limitation begins from date of discovery of fraudulent concealment or date fraudulent concealment should have been discovered, whichever occurs first. Utah Code Ann. §78B-3-404.

Two years. 1) action against Marshall, Sheriff, Constable or other officer for liability for act or omission in official capacity; 2) wrongful death; 3) actions against state and employees for injury to personal rights if not otherwise provided by state or federal law; 4) in causes of action against political subdivision of state and its employees, for injury to personal rights of another arising after May 1, 2000, if not otherwise provided by state or federal law. Utah Code Ann. §78B-2-304. Federal courts apply four-year statute to actions under Utah Code Ann. §78B-2-304(3). *Arnold v. Duchesne*, 26 F.3d 982 (10th Cir. 1994). 4) Products liability statute of limitations is two years from time discovered or should have discovered harm and cause. Utah Code Ann. §78B-6-706; 5) Malpractice action against health care provider (defined Utah Code Ann. §78B-3-403). Two-year period of limitation begins from date of discovery of injury or date injury should have been discovered, whichever occurs first, but not to exceed four years after date of alleged malpractice, but see, foreign object and fraudulent concealment exceptions Utah Code Ann. §78B-3-404.

Three years. 1) Any action on written policy or contract of first party insurance must be commenced

within 3 years after inception of loss, Utah Code Ann. §31A-21-313; 2) trespass, waste, or injury to real property; 3) taking, detaining or injuring personal property; 4) fraud or mistake, measured after discovery; 5) liability created by statutes of this State, except for forfeiture or penalty except in special cases with different prescribed statutes; 6) to enforce liability under Utah Code Ann. §78B-3-603 for harm from nuclear incidents, measured from discovery. Utah Code Ann. §78B-2-305; 7) actions against corporate stockholders or directors to recover penalty or forfeiture imposed or to enforce liability created, measured from discovery. Utah Code Ann. §78B-2-306.

Four years. 1) Contractual obligation not in writing; 2) certain actions under Uniform Fraudulent Transfers Act; 3) actions not otherwise provided for including tort actions not controlled by other time limitations. Utah Code Ann. §78B-2-307; 3) Civil Rights actions in Federal Court. *Arnold v. Duchesne Co.*, 26 F.3d 982 (10th Cir. 1994); *Larson v. Snow College*, 189 F. Supp. 2d 1286 (D. Utah 2000). Civil action for sexual abuse of a child, measured after child turns 18 years or from time of discovery if above 18 years of age, whichever is later. Utah Code Ann. §78B-2-308. Actions to enforce child support must be commenced within four years of youngest child reaching majority. Utah Code Ann. §78B-5-202(6).

Five years. Action against surveyor on boundary survey. Utah Code Ann. §78B-2-226.

Six years. 1) Mense profits of real property; 2) action upon contract or obligation or liability founded upon instrument in writing, Utah Code Ann. §78B-2-309; 3) Action by state or any agency or public corporation thereof against any public officer. Utah Code Ann. §78B-2-310; 4) actions related to improvements to real property 6 years from date of completion for contract and warranty claims unless different time set forth, 2 years from date of discovery for other claims regarding improvements to real property, and 9 year repose period. Utah Code Ann. §78B-2-225 (note there are exceptions).

Eight Years. 1) Action upon judgment of any Court of United States or any court of any state or territory within United States. Utah Code Ann. §§78B-2-311 and 78B-5-202.

Defendant's absence from State and plaintiff's periods of disability and minority are excluded. Utah Code Ann. §78B-2-104, 108. Statute of limitations is not tolled by absence from state of non-resident motorist because non-resident motorist act allows service. *Snyder v. Clune*, 390 P.2d 915 (Utah 1964). Statute of limitations is not tolled when defendant is out of state if he has residence in Utah and could be served there. *Lund v.*

*Hall*, 938 P.2d 285 (Utah 1997). However in cases not involving statutorily appointed agent or other agent, an out-of-state defendant is deemed absent and tolling statute applies. *Olseth v. Larsen*, 158 P.3d 532 (Utah 2007).

Where delay in starting suit is induced by conduct of defendant or its adjuster, defendant using it as defense may be estopped based on delay from asserting under Governmental Immunity Act. *Rice v. Granite Sch. Dist.*, 456 P.2d 159 (Utah 1969).

## MEDICAL MALPRACTICE

The Utah Health Care Malpractice Act, 78B-3-401, *et seq.* Utah Code Ann., deals with malpractice actions against health care providers. Two year statute of limitations from discovery of injury, but not to exceed four years after the incident, except one year from discovery for foreign objects or because of fraudulent concealment by health care providers if more than four years have passed since the incident. U.C.A §78B-3-404; *Day v. Meek*, 1999 UT 28, 976 P.2d 1202. The four-year statute of repose has been ruled unconstitutional, only as to minors' claims. *Lee v. Gauffin*, 867 P.2d 572 (Utah 1993).

Statute begins to run when injured person knows or should know that he has suffered legal injury. *Foil v. Ballinger*, 601 P.2d 144 (1979); *Collins v. Wilson*, 984 P.2d 960 (Utah 1999).

Amount of award in all malpractice actions against health care providers shall be reduced by court for amounts paid to plaintiff from all collateral sources available, except where subrogation rights are perfected. U.C.A §78B-3-405.

No liability may be imposed for alleged breaches of guarantee, warranty, contract, or assurance unless the same is set forth in writing and signed by health care provider or agent. Utah Code Ann. §78B-3-408.

No dollar amount shall be specified in the prayer of a complaint filed in a medical malpractice action. Utah Code Ann. §78B-3-409. Non-economic losses for an injured plaintiff in medical malpractice actions are limited to \$250,000 for causes of actions arising before 7/1/01. For causes of action arising on or after 7/1/01 and before 7/1/02, limit is \$400,000, and for causes of action arising on or after 7/1/02, the \$400,000 limit shall be adjusted for inflation. Utah Code Ann. §78B-3-410.

Attorneys' fees in any malpractice action against health care provider is limited to contingent fee of 33 1/3% of amount recovered. Utah Code Ann. §78B-3-411.

No malpractice action against health care provider may be initiated unless at least 90 days prior notice of intent to commence action is given (Utah Code Ann.

§78B-3-412), and unless request for prelitigation panel review with Department of Business Regulation is made within 60 days after filing of Notice of Intent to Commence Action. Utah Code Ann. §78B-3-416. This requirement does not apply to dentists. Utah Code Ann. §78B-3-416(1)(a). Pre-litigation panel's determination as to meritorious or non-meritorious is not binding or subject to judicial or other review, but is condition precedent to commencing litigation. Utah Code Ann. §78B-3-416(1)(c). Evidence related to Pre-litigation Panel proceedings and panel's determination is not admissible in subsequent court proceeding and panelists are immune from civil process. Utah Code Ann. §78B-3-419.

Expert medical testimony is required to establish standard of care, deviation therefrom, and causation by health care provider, unless within *res ipsa loquitur* doctrine. *Baczuk v. Salt Lake Reg. Medical Ctr.*, 8 P.3d 1037 (Utah App. 2000) (patient who was burned on unrelated part of body during surgery did not need expert). Expert witness must show familiarity with standard of care exercised by experts in same field in similar communities. *Swan v. Lamb*, 584 P.2d 814 (Utah 1978). Board certified specialist in nationally organized specialty may be held to same national standard of care adhered to by qualified fellow experts in similar medical centers. *Jenkins v. Parrish*, 627 P.2d 533 (Utah 1981). Expert belonging to a specialty different than defendant is excluded from testifying of standard of care of defendant unless expert provides sufficient foundation to show that treatment is common to both specialties or that expert is knowledgeable about defendant's standard of care. *Arnold v. Curtis*, 846 P.2d 1307, 1310 (Utah 1993); *Burton v. Youngblood*, 711 P.2d 245 (1985).

A cause of action for wrongful pregnancy is recognized in Utah. *See C.S. v. Nielson*, 767 P.2d 504 (1988).

Under Utah Code Ann. §78B-3-406, a presumption exists that the care rendered by health care providers to patients is either expressly or impliedly authorized. To recover damages based upon failure to obtain informed consent, plaintiffs must establish (a) existence of a health care relationship; (b) health care rendered; (c) personal injuries arising out of health care; (d) health care had substantial and significant risk of causing serious harm; (e) patient was not informed of substantial and significant risk; (f) reasonable and prudent person in patient's position would not have consented to health care after having been fully informed as to facts relevant to decision to give consent; and (g) unauthorized health care rendered was proximate cause of personal injuries suffered.

## NEGLIGENCE

See Law Digest Tables.

See "AUTOMOBILES" and "COMPARATIVE FAULT."

A comparative fault system was adopted by Utah and became effective April 28, 1986. Utah Code Ann. §78B-5-817-822. Fault of person seeking recovery does not bar recovery by that person, and she may recover from any defendant or group of defendants whose fault (combined with the fault of immune persons and non-parties to whom fault is allocated) exceeds her own. Utah Code Ann. §§78B-5-818 and 78B-5-819. The maximum amount for which defendant may be liable to any person is percentage of damages equivalent to percentage of that defendant's fault. Utah Code Ann. §78B-5-820. Fault may be allocated to any person whether joined as a party or not for apportionment of fault (retroactive effect of amendment to 3/3/98). If combined percentage of fault attributed to immune persons is less than 40%, that fault is reallocated among the other parties in proportion to their fault. If more than 40% fault is found for immune persons, there is no reallocation. Utah Code Ann. §78B-5-819. Jury may not be advised of effect of allocations of fault to immune persons, but may be advised that fault attributed to immune persons may reduce the award of the person seeking recovery. Utah Code Ann. §78B-5-819(2)(c). No defendant is entitled to contribution from any other person. Utah Code Ann. §78B-5-820. Trial Court must, if requested, instruct jury of effect of its verdict unless instruction would mislead or confuse. *Dixon v. Stewart*, 658 P.2d 591 (1982), *overruling McGinn v. Utah Power & Light*, 529 P.2d 423 (1974).

Intervening Cause. No longer absolute defense to liability of initial tortfeasor. Negligence of subsequent tortfeasor merely considered as part of comparative negligence analysis. *Harris v. Utah Transit Auth.*, 671 P.2d 217 (Utah 1983).

Open and Obvious Danger. Traditional rule under contributory negligence scheme no longer excuses defendant's negligence. However, "open and obvious danger" rule outlined in Restatement (Second) of Torts §§343 and 343A has been adopted in Utah and outlines duty owed by possessor of premises to an invitee. In proper cases, §§343 and 343A can be an absolute bar to recovery if it is determined that the possessor of premises did not owe a duty of care to the invitee. *Hale v. Beckstead*, 2005 UT 24, 116 P.3d 263.

Architect. An architect who by construction contract has authority to stop work until unsafe condition of work is remedied, and who knows or should know excavation trench does not comply with safety regulations,



may be liable to injured employee of contractor, injured by collapse of trench. *Nauman v. Beecher*, 19 Utah 2d 101, 426 P.2d 621 (1967). Liability of architect must be based upon professional negligence, established by those qualified in field of architecture. *Nauman v. Beecher*, 24 Utah 2d 172, 467 P.2d 610 (1970).

In construction contracts, indemnity agreements purporting to indemnify promisee against liability for bodily injury or property damage resulting from sole negligence of promisee, his agents, employees or indemnitee, are against public policy and void. Utah Code Ann. §13-8-1.

Attractive Nuisance. Utah Supreme Court recently adopted attractive nuisance doctrine as set forth in Restatement (Second) of Torts §339, expressly overturning significant body of case law in the process. *Kessler v. Mortenson*, 2000 UT 95, 16 P.3d 1225, 1228. Restatement standard as stated in *Kessler* is: "A possessor of land is subject to liability for physical harm to children trespassing thereon caused by an artificial condition upon the land if (a) the place where the condition exists is one upon which the possessor knows or has reason to know that children are likely to trespass, and (b) the condition is one of which the possessor knows or has reason to know and which he realizes or should realize will involve an unreasonable risk of death or serious bodily harm to such children, and (c) the children because of their youth do not discover the condition or realize the risk involved in intermeddling with it or in coming within the area made dangerous by it, and (d) the utility to the possessor of maintaining the condition and the burden of eliminating the danger are slight as compared with the risk to children involved, and (e) the possessor fails to exercise reasonable care to eliminate the danger or otherwise protect the children." It is important to note that Utah still maintains an exception for irrigation canals from the attractive nuisance doctrine. *Kessler* at ¶¶ 11 and 14.

Landlord and Tenant. Constructive eviction occurs when landlord interferes with tenant's right of possession and enjoyment of leased premises, rendering premises unsuitable for purposes intended. *Brugger v. Fonoti*, 645 P.2d 647 (Utah 1982).

There is no duty of abutter to keep public sidewalk adjoining his premises in repair, and he is not liable for disrepair unless he makes special use or creates dangerous condition. The rule applies even though injured person is business invitee. *Rose v. Provo City*, 2003 UT App. 77, 67 P.3d 1017.

Violation of a statute does not necessarily constitute negligence per se and may be considered only as evidence of negligence. The violation of statute may be re-

garded as *prima facie* evidence of negligence, but is subject to justification or excuse if the evidence is such that it reasonably could be found. *Child v. Gonda*, 972 P.2d 425, 432 (Utah 1998); *Thompson v. Ford Motor Co.*, 16 Utah 2d 30, 395 P.2d 62 (1964). However, violation of a statute involving a dangerous instrumentality may be considered negligence per se. *See, Hall v. Warren*, 632 P.2d 848 (Utah 1981).

Pets. Dog owners are strictly liable for injuries caused, regardless of whether dog had known vicious propensity. Utah Code Ann. §18-1-1. However, dog owners must only pay percentage of damages determined under comparative fault statute. *S.H. ex rel. Robinson v. Bistryski*, 923 P.2d 1376 (Utah 1996). Other pet owners, including horse owners, are only liable for foreseeable injuries caused by pet. *Pullan v. Steinmentz*, 2000 UT 103, 16 P.3d 1245. Harm from cat bites are not generally foreseeable if cat has no known propensity to attack people. *Jackson v. Mateus*, 2003 UT 18, 70 P.3d 78.

In medical malpractice action, upon motion of either party, court may try negligence and statute of limitations questions separately. Utah Code Ann. §78B-2-114.

#### NO-FAULT

"Utah Automobile No-Fault Insurance Act" is embodied in §31A-22-306 through §31A-22-309 of the Utah Code. Act provides that all motor vehicles, except motorcycles, off highway vehicles, street legal all-terrain vehicles, trailers, and semi trailers shall maintain personal injury insurance for insured, resident relatives, pedestrians and persons injured by insured vehicle. Personal injury protection provides payments to insured and to all persons suffering personal injury arising out of motor vehicle accident in following minimum amounts: (a) Medical benefits, not less than \$3,000 per person; (b) Disability benefits: (i) the lesser of 85 percent of loss of gross income and loss of earning capacity per person or \$250 per week, disability obligations commence 3 days subsequent to accident and continue for a maximum of 52 consecutive weeks thereafter, 3-day period not applicable if disability continues for longer than 2 consecutive weeks after injury; (ii) \$20 per day per person commencing 3 days subsequent to injury for maximum 365 days thereafter as reimbursement for household services actually rendered or reasonably incurred for services that but for injury, injured person would have performed; 3-day period not applicable if disability continues for longer than two consecutive weeks after injury; (c) Funeral benefit, not to exceed \$1,500 per person; (d) Survivors' benefit payable to decedent's heirs in total of \$3,000. *See Utah Code Ann. §31A-22-307* (2005). Under certain circumstances, insured can waive loss of



gross income benefits for insured and insured's spouse. *See* Utah Code Ann. §31A-22-307(4).

Security required shall be provided by insurance policy or by another method which meets requirements of Utah code. United States may, and other states shall under certain circumstances, maintain such security. *See* Utah Code Ann. §§41-12a-101 to -606.

Policies of insurance can provide coverages greater than those specified by statute. Utah Code Ann. §31A-22-307(5) (2005). Primary coverage is to be afforded by policy insuring motor vehicle involved in the accident. Benefits payable to injured persons are reduced by any benefits payable under Worker's Compensation or from United States or any of its agencies because of military services. Utah Code Ann. 31A-22-309(3).

Reasonable value of medical expenses shall be determined by relative value studies conducted every two years made by Utah Insurance Department of medical charges in most populous county of state to assign a unit value and determine the 75<sup>th</sup> percentile charge for each type of service and accommodation. Utah Code Ann. §31A-22-307(2).

Since amendment in 1989, deductibles are prohibited for no-fault coverage. *See* Utah Code Ann. §31A-22-307(6).

The Act applies only to personal injury claims.

Benefits under act are payable monthly as expenses are incurred, and benefits are overdue 30 days after insurer receives reasonable proof with expenses bearing interest thereafter of 1 ½ percent per month, plus attorney's fees if action brought. *See* Utah Code Ann. §31A-22-309(5).

Limitation on Tort Actions. No person covered by personal injury protection can maintain cause of action for general damages caused by automobile accident, except where following have occurred: (a) Death; (b) Dismemberment; (c) Permanent disability or permanent impairment based upon objective findings; (d) Permanent disfigurement; or (e) Medical expenses in excess of \$3000.00. Utah Code Ann. §31A-22-309(1). This limitation does not apply to a person making an uninsured motorist claim. Utah Code Ann. §31A-22-309(1)(b). There is no immunity for those who fail to maintain requisite security. *See* Utah Code Ann. §41-12a-304.

Exclusion from Coverage. Any insurer may exclude benefits: (a) for any injury sustained by insured while occupying vehicle owned by or furnished for the regular use of the insured or resident family member of the insured not insured under the policy; (b) for any unauthorized operator of insured's vehicle; (c) to any injured person who contributed to his injury by intentionally caus-

ing injury to himself or, while committing felony; (d) for injury arising from the use of a vehicle as a residence and (e) for injuries from war, revolution and toxic or hazardous materials. Utah Code Ann. §31A-22-309(2)(a). Coverage is reduced by benefits which are received or to which a claimant is entitled under workers compensation. *See* Utah Code Ann. §31A-22-309(3). However, no-fault insurers, including self-insurers, are required to pay PIP benefits to injured employees to the extent those benefits exceed workers' compensation benefits. *Neel v. State*, 889 P.2d 922 (Utah 1995).

Subrogation Rights. Every insurer agrees that, as condition of writing insurance required by this Act, it will reimburse other insurers for payment of benefits for which the insured is or would be held legally liable. Issue of liability and amount of reimbursement shall be decided by mandatory binding arbitration between insurers. Utah Code Ann. §31A-22-309(6).

Intent of No-Fault Act was to provide benefits to those sustaining less serious injuries in automobile accidents, in lieu of right to litigate, and to allow those sustaining more serious injuries right to proceed against party at fault without limitation as to amounts recoverable, but that person would not be entitled to double recovery under No-Fault Act and suit against and recovery from tortfeasor. *Jones v. Transamerica Ins. Co.*, 592 P.2d 609 (1979).

Tortfeasor who has required security is not liable either to injured party or to no-fault insurer for reimbursement of PIP payments paid. *Laub v. South Central Utah Tel. Assoc.*, 657 P.2d 1304 (1982).

No-fault insurer has no right of subrogation against no-fault insured to recover PIP payments from any settlement or judgment received from tortfeasor. *Laub v. South Central Utah Tel. Assoc.*, 657 P.2d 1304 (1982); *Allstate Ins. Co. v. Ivie*, 606 P.2d 1197 (1980).

Where tortfeasor's insurer bargains with injured party who accepts full settlement with knowledge that PIP payments are included, tortfeasor's insurer may withhold that portion of settlement intended as reimbursement to PIP insurer. *Christensen v. Farmers Ins. Exch.*, 669 P.2d 1236 (1983); *Jaramillo v. Farmers Ins. Group*, 669 P.2d 1231 (1983).

"Disability" refers to inability to work. If a person is not "disabled" as to loss of earnings, neither is he disabled for household services benefits. *Jones v. Transamerica*, 592 P.2d 609 (1979). Household or family exclusions are invalid up to the statutory minimum requirements. *Farmers Ins. v. Call*, 712 P.2d 231 (1985). However, they are valid in excess of statutory minimum requirements. *State Farm v. Maustbaum*, 748 P.2d 1042 (1987).

As to §31A-22-307 (1)(b)(ii) of the Utah Code, which deals with household benefits, the Utah Court of Appeals has stated that the Utah legislature intended that provision to establish the minimum household service benefit as \$20 per day of disability, up to a maximum of 365 days of disability. *Tanner v. Phoenix Ins. Co.*, 799 P.2d 231, 233 (Utah App. 1990). In a footnote, the Tanner court indicated that, although the insurer had allowed claims for such services and the trial court did not rule on the question, they agreed with the contention that services performed by a family member and the labor portion of restaurant meals are reimbursable under Utah Code Ann. §31A-22-307(1)(b)(ii). *Id.* at 232, n. 3.

### PRIVILEGED COMMUNICATIONS

**Husband and Wife.** Utah has enacted a common law marriage statute that, under certain circumstances, validates marriages not solemnized. Utah Code Ann. §30-1-4.5. Neither wife nor husband may be examined as to communication between them during marriage or afterwards, without the consent of the other. Utah Code Ann. §78-24-8(1)(a). Does not apply to: (a) civil action by one against the other; (b) for crime committed by one against the other; (c) for deserting or neglecting spouse/child support; (d) for civil or criminal abuse or neglect committed against the child of either; (e) or if specifically provided by law. Utah Code Ann. §78-24-8(1)(b).

**Attorney and Client.** Attorney cannot be examined as to any communication with client without consent of client. Also applies to attorney's secretary, stenographer and clerk. Utah Code Ann. §78-24-8(2). Daughter of parents who was present for conversations between parents and retained counsel was determined to be "client's representative" under Utah R. Evid. 504 where daughter was also an attorney. *Mohler v. CW Mgmt.*, 2008 UT 46.

**Priest and Penitent.** Clergymen cannot be examined as to confession without consent of penitent. Utah Code Ann. §78-24-8(3).

**Physician and Patient.** Without consent of patient, physician cannot be examined in civil action as to any information acquired in attending the patient which was necessary in treating the patient. Deemed waived by patient in action where patient puts his medical condition in issue. Utah Code Ann. §78-24-8(4).

**Public Officer.** A public officer cannot be examined as to communications when public interests would suffer by disclosure. Utah Code Ann. 78-24-8(5).

**Sexual Assault Counselor and Victim.** No examination without consent of victim. Utah Code Ann. §78-24-8(6). Except as provided in U.S. Constitution and Utah State Constitution, no person has privilege to withhold

evidence except as provided by Utah Rules of Evidence, rules adopted by Utah Supreme Court, or by existing statutory provisions not in conflict with them. Utah R. Evid. 501.

Waiver of privilege in insurance application enforced, and doctor's evidence regarding patient's condition admissible. *Hassing v. Mutual Life*, 159 P.2d 117 (Utah 1945). If presence of third person reasonably necessary during communications between attorney and client, there is no waiver of privilege. *Hofmann v. Conder*, 712 P.2d 216 (Utah 1985).

### PRODUCT LIABILITY

Products liability causes of action are governed by Utah Product Liability Act. Utah Code Ann. §78-15-1, *et seq.* Product liability issues are subject to comparative fault law. Products liability statute of limitations is two years from the time cause of action discovered, or in the exercise of due diligence, both the harm and its cause should have been discovered. Utah Code Ann. §78-15-3.

Strict liability does not apply to purchaser who knows or should have known of defect. *Perkins v. Fit-Well Artificial Limb Co.*, 514 P.2d 811 (Utah 1973); *See also Ernest W. Hahn v. Armco Steel*, 601 P.2d 152 (Utah 1979) (adopting §402A of Restatement (Second) of Torts regarding strict product liability).

**Sensitivity.** Manufacturer not liable where product is ordinarily safe, but where injury results from personal idiosyncrasy of user and where injury was not foreseeable. *Bennett v. Pilot Products Co.*, 235 P.2d 525 (Utah 1951), *cited with approval by Creamer v. Ogden Union Ry. & Depot Co.*, 242 P.2d 575 (1952).

**Vendor,** though not manufacturer, may be held liable if he, by exercise of reasonable care, could have discovered defect and repaired or warned of it. *Palmer v. Wasatch Chemical Co.*, 353 P.2d 985 (Utah 1960).

**Assumption of risk** is defense to strict liability. *Ernest W. Hahn v. Armco Steel*, 601 P.2d 152 (Utah 1979). Misuse defined as assumption of the risk in *Hahn. Supra.* However, pure comparative negligence has been adopted and applied in strict liability for product defects. Although offset is allowed for misuse, negligence or assumption of risk, recovery cannot be completely barred. *Mulherin v. Ingersoll-Rand Co.*, 628 P.2d 1301 (Utah 1981).

**Retailer Liability in Strict Liability.** Retailer, as a passive retailer and not a manufacturer, does not owe duty to customers to warn of manufacturing defect that it did not know of itself. *Sanns v. Butterfield Ford*, 94 P.3d 301 (Utah App. 2004). Utah Liability Reform Act precluded strict liability claim against retailer when manu-

facturer was named in suit and when there was no evidence that retailer knew or contributed in any way to product's defective condition. *Id.*

If a manufacturer introduced a defective product into the stream of commerce, it is liable for the retailer's attorney fees, costs, and expenses. *Hanover Ltd. v. Cessna*, 758 P.2d 443 (Utah App. 1988). In products liability case, plaintiff must prove that there was duty owed by defendant to plaintiff, that duty was breached, and that conduct complained of was cause in fact of the injury. The plaintiff must prove that product was defective at the time it left manufacturer's hands, that defect rendered the product unreasonably dangerous and that the unreasonably dangerous defect was a proximate cause of plaintiff's injuries. *Lamb v. B&B Amusements Corp.*, 869 P.2d 926, 929 (Utah 1993).

### PRODUCT LIABILITY AND COMPARATIVE FAULT

In *S.H. v. Bistryski*, 923 P.2d 1376 (Utah 1996), Utah Supreme Court addressed interplay between strict liability and comparative fault. The defendant in a dog bite claim asserted that his liability, if any, was limited to that percentage or proportion of damages proven by plaintiff which was equivalent to percentage or proportion of fault, as defined in Utah Code Ann. §78-27-37(2), attributed to this defendant. Utah Code Ann. §78-27-40. The trial court agreed and allowed apportionment of fault between the defendant and the plaintiff's mother. Plaintiff was a minor and too young to be at fault.

In appealing from resulting jury verdict and judgment, plaintiff raised issue of whether comparative fault provisions of Utah's Liability Reform Act apply to §18-1-1 of Utah Code, strict liability dog bite statute. Plaintiff argued on appeal that trial court erred in applying comparative fault principles to Utah Code Ann. §18-1-1 because comparative fault does not apply to strict liability statutes. Bistryski argued, on the other hand, that comparative fault may be applied to strict liability cases on the basis of the explicit language of the Liability Reform Act and Utah case law.

Section 18-1-1 of the Utah Code establishes that dog owners are strictly liable for injuries committed by their dogs. However, the dog bite statute simply provides that owner of dog shall be liable in damages for injury committed by the dog. It does not state that owner shall be liable for all damages. The Court held that while owner is liable, other parties may also be liable or may have proximately contributed to the injury.

Utah's Liability Reform Act specifies that a defendant's liability for damages be limited to proportion of fault attributed to that defendant. §78-27-37 of the Utah

Code defines "fault" to include strict liability. In affirming that portion of the verdict, the Utah Supreme Court held that by including "strict liability" in the definition of fault, the legislature clearly intended comparative fault principles to be applied to strict liability claims.

Consequently, in Utah, even in products liability claims, defendants can have the jury consider comparative fault of all who may have contributed to plaintiff's injuries.

### RELEASE

Release given by person seeking recovery to one or more defendants does not discharge any other defendant unless the release so provides. Utah Code Ann. §78-27-42.

Release entered into within 15 days from injury, or prior to discharge from hospital or sanitarium, is voidable by injured person by notice and remittance of any consideration paid if notice and remittance made within 15 days of injury or discharge from continuous custody in hospital or sanitarium to party to whom release given. Utah Code Ann. §78-27-32. Provisions of voidability not applicable if at least five days prior to signing release, the injured party signs statement indicating willingness to settle. Utah Code Ann. §78-27-34. Voidable where based on mutual mistake of fact. *Campbell v. Stagg*, 596 P.2d 1037 (Utah 1979).

Clear, unequivocal, and convincing evidence is required to set aside release. *Jiminez v. O'Brien*, 213 P.2d 337 (Utah 1949). Release of employee not necessarily also release of employer. *Krukiewicz v. Draper*, 725 P.2d 1349 (1986). Generally if servant released after paying full amount of plaintiff's damages, all liability is satisfied and there is no cause of action against master. *Nelson v. Corp., Latter-Day Saints*, 935 P.2d 512 (Utah 1997).

### SERVICE OF PROCESS

If action commenced by filing complaint, summons with copy of complaint must be served no later than 120 days after filing complaint. Summons must be served on at least one defendant to action within 120 days after filing complaint, and others may be served anytime prior to trial. U.R.C.P. 4(b). Service within the state or any other state or territory may be accomplished by any person 18 years of age or older and not a party to the action or a party's attorney. U.R.C.P. 4(d).

Personal service shall be made upon a person of 14 years or over by delivering a copy to her personally or by leaving a copy at her usual residence with a person of suitable age or discretion residing there or to agent authorized to receive summons. U.R.C.P. 4(d). Service



upon governmental entities must be made upon specified individuals. *Id.*

Utah Long-arm Statute. Non-resident who transacts business, contracts to supply goods or services, causes any injury, whether tortious or by breach of warranty, owns, uses or possesses real estate within the state, contracts to insure risks within state, maintains matrimonial domicile at time claim arose or at time of commission of act giving rise to claim, or commits sexual intercourse giving rise to paternity suit is subject to service of process outside the state. Utah Code Ann. §78-27-24 (1998); *but see*, Utah Code Ann. §16-10a-1501 (defining activities that do not constitute “transacting business”).

If requirements and timely issuance and service of summons under U.R.C.P. 4(b), are met as to one defendant, other defendants whether named in original complaint or brought in by amendment may be served anytime before trial. *Valley Asphalt, Inc. v. Eldon J. Stubbs Constr., Inc.*, 714 P.2d 1142 (Utah 1986).

Resident motorists who have departed state after accident are subject to process in same manner as non-resident motorists involved in accidents in state. For process see Utah Code Ann. §41-12A-505 (1989).

Upon Non-Resident Motorists. See “AUTOMOBILES.”

### SUBROGATION

No-fault insurer who has paid personal injury protection benefits to its insured is not entitled to subrogation; insurer’s remedy is limited to binding arbitration between insurance companies (pursuant to Utah Code Ann. §31A-22-309(6)(b) (1999)). *Allstate Ins. Co. v. Ivie*, 606 P.2d 1197 (Utah 1980).

Settlement between tortfeasor and insured did not relieve insurer of liability for PIP benefits under policy. *Bear River Mut. Ins. Co. v. Wall*, 937 P.2d 1282 (Utah Ct. App. 1997), *aff’d*, 1999 UT 33, 978 P.2d 460.

Insurer may bring subrogation action in name of insured. Utah Code Ann. §31A-21-108 (1986). When any surety on an undertaking on appeal executed to stay proceedings upon a money judgment pays the judgment, after its affirmance by appellate court, the surety is subrogated to the judgment creditor’s rights and is entitled to enforce the judgment as its own. Utah Code Ann. §78-27-17 (1953).

In the absence of specific contractual terms in the settlement agreement, release, or insurance policy, the insured must be made whole prior to any recovery by the insurer against the tortfeasor. *Hill v. State Farm Mut. Auto Ins. Co.*, 765 P.2d 864 (Utah 1988); *see also*, *State*

*Farm Mut. Auto. Ins. Co. v. Green*, 2003 UT 48, 89 P.3d 97.

Collision. Insurer which refused to join in insured’s action for personal injury and deductible portion of collision loss arising out of auto accident precluded from later maintaining action as subrogee against owner of other vehicle. *Raymer v. Hi-Line Transp.*, 15 Utah 2d 427, 394 P.2d 383 (1964). Insurer’s pursuit of subrogation claim not bad faith if issues are “fairly debatable.” *Hill v. State Farm*, 829 P.2d 142 (Utah Ct. App. 1992).

Before a court will grant subrogation relief of an insurer seeking recovery from a second insurer who was primarily liable to defend or pay any claims on behalf of insured, but who has denied coverage, there must be an obligation that subrogee was not primarily liable. Subrogee must have made payment to protect own rights or interest, not acted merely as volunteer and the entire debt must have been paid. *State Farm v. Northwestern Nat’l Ins.*, 912 P.2d 983 (Utah 1996).

In third party insurance contexts, where an insured settles with tortfeasor, and tortfeasor or its insurer was on notice of subrogation right of other insurer, then settlement release will not destroy the insurer’s right of subrogation. *Educators Mut. Ins. v. Allied Property*, 890 P.2d 1029 (Utah 1995).

### SUICIDE

No defense after second policy year against payment of life insurance policy, no matter whether suicide was voluntary or involuntary, or policyholder sane or insane; provision does not apply to accident only policies nor double indemnity provisions. Utah Code Ann. §31A-22-404 (2002). *See also Kansas City Life Ins. Co. v. Bowns*, 129 F.2d 287 (10th Cir. 1942), and *MacKenzie v. Mutual Benefit Life Ins. Co.*, 528 P.2d 150 (Utah 1974). If suicide occurs within the two-year period, insurer must pay at least amount of premiums paid. Utah Code Ann. §31A-22-404 (2002).

Presumption against suicide can be overcome by circumstantial evidence only if such quality and weight as to negate every reasonable inference of death by accident. *Carter v. Standard Acc. Ins. Co.*, 65 Utah 465, 238 P. 259 (1925).

### WAIVER AND ESTOPPEL

Entry of appearance for insured by insurer does not constitute waiver of defenses, for insurer is entitled to reasonable time to investigate facts. *State Farm Mut. Auto Ins. v. Kay*, 487 P.2d 852 (Utah 1971), *overruled on other grounds*, *Farmers Ins. Exch. v. Call*, 712 P.2d 231 (Utah 1985).



Automobile insurer has duty immediately and thoroughly to investigate insured and can not rescind policy on misrepresentation without showing adequacy of investigation. *State Farm Mut. Auto Ins. Co. v. Wood*, 483 P.2d 892 (Utah 1971).

General agent of fire insurance company is agent of company and his acts performed within scope of authority are binding upon principal and his knowledge and consent are that of principal. *West v. Norwich Union Fire Ins. Soc'y*, 37 P. 685 (Utah 1894). Sworn statement of loss held waived under automobile conversion policy based on actions of insurer. *Miller v. Manhattan Fire & Marine Ins. Co.*, 290 P. 937 (Utah 1930). Where insurers' agent through mistake indorsed on policy "Expires Sept. 25, 1909" when it should have read "September 25, 1907" it was held insurer was not estopped from asserting endorsement was mistake. *Evans v. Glens Falls Ins. Co.*, 113 P. 1019 (Utah 1911). Denial of liability on other grounds constitutes waiver of proof of loss. *Stewart v. Commerce Ins. Co.*, 198 P.2d 467 (Utah 1948). Agent, attempting to collect past due premium, held to have waived forfeiture. *Loftis v. Pacific Mut. Life Ins. Co.*, 114 P. 134 (Utah 1911).

Company, which by course of conduct causes insured honestly and reasonably to believe that policy provision requiring prompt payment of premium will not be strictly followed, waives right to forfeit policy for non-payment of premium. *Ballard v. Beneficial Life Ins. Co.*, 21 P.2d 847 (Utah 1933); *Cooper v. Foresters Underwriters, Inc.*, 275 P.2d 675 (Utah 1954). Acts or conduct which wrongfully induce party to believe settlement of claim will be made may create estoppel against plea of statute of limitations. Adjuster lulled claimant into believing settlement would be made and statute of limitations period expired but court held that trier of fact could reasonably conclude that defendant was estopped to plead statute because of conduct of insurer. *Rice v. Granite Sch. Dist.*, 456 P.2d 159 (Utah 1969).

Equitable estoppel is established by proof of three essential elements: 1) a party's statement, admission, act or failure to act that is inconsistent with the later-asserted claim; 2) reasonable action or inaction by a second party, taken on the basis of the first party's statement, admission, act or failure to act; 3) injury to the second party resulting from allowing the first party to repudiate its statement, admission, act, or failure to act. *Mendez v. State Dep't of Social Svcs.*, 813 P.2d 1234, (Utah Ct. App. 1991).

Party claiming estoppel cannot rely on representations or acts if they are contrary to his own knowledge of the truth or if he had means by which with reasonable diligence he could ascertain the true situation. *Perkins v. Great-West Life Assur. Co.*, 814 P.2d 1125 (Utah Ct.

App. 1991). See also *Larson v. Wycoff Co.*, 624 P.2d 1151 (Utah 1981). Equitable estoppel cannot apply unless party claiming such can show that under the circumstances they have acted in a reasonable manner. *Warren v. Provo City Corp.*, 838 P.2d 1125 (Utah 1992). Insurance company can be estopped from invoking boilerplate non-waiver provisions if insured reasonably relied on agents representations to contrary. *Hardy v. Prudential Ins.*, 763 P.2d 761 (Utah 1988). Generally speaking a party may not assert doctrine of estoppel against government. *Prows v. State*, 822 P.2d 764 (Utah 1991).

The determination of equitable estoppel is a highly fact-dependent question and trial court granted broad discretion. *Trolley Square Assocs. v. Nielson*, 886 P.2d 61 (Utah Ct. App. 1994).

The general rule is that a governmental agency acting in a governmental capacity cannot be estopped. *Vigos v. Mountainland Builders*, 2000 UT 2, 993 P.2d 207.

Laches has two elements: 1) lack of diligence on the part of the claimant and 2) an injury to the defendant because of the lack of diligence. *Plateau Mining Co. v. Utah Div. of State Lands*, 802 P.2d 720, 731 (Utah 1990).

A waiver is the intentional relinquishment of a known right. The intent to waive may be inferred from the circumstances. *Soter's, Inc. v. Deseret Fed. Sav. & Loan Ass'n*, 857 P.2d 935, 942 (Utah 1993).

The doctrine of election of remedies is a technical rule of procedure and its purpose is not to prevent recourse to any remedy, but to prevent double redress for a single wrong. Doctrine presupposes 1) a choice between inconsistent remedies, 2) knowledgeable selection free of fraud or imposition, and 3) a resort to the chosen remedy evincing a purpose to forego all others. *Royal Resources v. Gibraltar Fin. Corp.*, 603 P.2d 793, 796 (Utah 1979).

## WORKERS' COMPENSATION

See Law Digest Tables.

Automobiles. Employee required by employer to bring his own automobile to place of business for use in business, that employee is covered by compensation act while driving to and from work in that vehicle. *Bailey v. Utah State Industrial Comm'n*, 398 P.2d 545 (Utah 1965). But see *VanLeeuwen v. Industrial Comm'n*, 901 P.2d 281 (Utah Ct. App. 1995), cert. denied, 910 P.2d 426 (Utah 1995). Copy of accident report must be given by employer to employee involved. Utah Code Ann. §34A-2-407 (2004). The coming and going rule distinguished from its special errand exception. Injury the employee suffered when his van exploded into flames as he

drove home was not compensable because the employee did not confer a substantial benefit on his employer by traveling long distances to or from temporary construction sites. *Cross v. Industrial Comm'n*, 824 P.2d 1202, 1205 (Utah Ct. App. 1992). See also *Drake v. Industrial Comm'n*, 939 P.2d 177 (Utah 1997).

Actions brought against third parties - distribution of recovery. Utah Code Ann. §34A-2-106 (1997). Uninsured motorists benefits recovered by injured employee not deductible from amounts employer required to pay under worker's compensation act of Utah, so long as they are sought from someone other than employer. *Southeast Furniture v. Barrett and Industrial Comm'n*, 465 P.2d 346 (Utah 1970). Industrial Commission did not have discretionary power to allow credit against medical expense payments and temporary total disability compensation to employer for amounts received by injured employee from no-fault insurer absent specific statutory provision granting such discretionary authority. *Bevans v. Industrial Comm'n*, 790 P.2d 573 (Utah Ct. App. 1990). Industrial Commission has continuing jurisdiction over injury Utah Code Ann. §34A-2-420 (1997). Rules of Civil Procedure do not apply in workers compensation cases. *Frito-Lay v. Utah Labor Com*, 2009 UT 71. Application for award must be made within 6 years of accident date. Utah Code Ann. §34A-2-417. Written notice of accident must be filed within 180 days of accident. Utah Code Ann. §34A-2-407 (2004).

Once a compensable injury occurs, no limitation as to time during which all medicals resulting from that injury will continue to be paid. *Mountain States Casing Svc. v. McKean*, 706 P.2d 601 (Utah 1985); see also, Utah Code Ann. §34A-2-418.

Medical expenses resulting from subsequent injury, which is natural result of work-related injury, are responsibility of the employer. *Mountain States Casing Svc. v. McKean*, 706 P.2d 601 (Utah 1985). For the period 7-1-88 to 5-1-2007, medical benefit entitlement ceases after three consecutive years of not incurring medical expenses related to accident. Utah Code Ann. §34A-2-417 (1999). Accidents after 5-1-2007 have no time limitation on medical expenses. §34A-2-417 (2007).

Claims for compensation must be filed within 6 years, but within 12 years from accident date employee must establish compensation is due. Utah Code Ann. §34A-2-417 (1999). Employer's first report of injury, or analogous documents and various medical reports filed with Commission were sufficient to constitute notice of claim under pre - 1981 amendment to §35-1-99. *Mecham v. Industrial Comm'n*, 692 P.2d 783 (Utah 1984). The 1981 amendment enhanced guidelines for tolling time to file claim and for determining whether informal

notice of injury exception to three year statute of limitations exists. *United Parcel v. Industrial Comm'n*, 809 P.2d 139 (Utah Ct. App. 1991).

In permanent total disability cases, the Second Injury Fund (now known as Employers Reinsurance Fund) is liable only in cases where employee has permanent impairment of at least 10% of whole body. Once that threshold is reached, ERF must pay 50% (156 weeks) of permanent total disability claim and 50% of all medical expenses in excess of \$20,000. Injuries cannot be combined to meet 10% requirement. *Hall v. Industrial Comm'n*, 710 P.2d 175 (Utah 1985). Employers Reinsurance Fund abolished for accidents after 7-1-94. Permanent total disability proof required direct cause or substantial impairment. Utah Code Ann. §34A-2-413 (1997). Cooperation required by injured employee for rehabilitation. Utah Code Ann. §34A-2-413 (1997).

Utah Supreme Court has given definition of accident. In *Allen v. Industrial Comm'n*, 729 P.2d 15 (Utah 1986), Utah Supreme Court described accident as "unexpected or unintended occurrence that may be either cause or result of injury. We thus necessarily abandon the analysis of "by accident" in the Redman line of cases which predicates the "accident" determination upon the occurrence of an unusual event." Court also gave guidelines for evaluating preexisting conditions by analyzing legal and medical cause of injury and resulting disability.

Contractor sued by injured employee of subcontractor permitted to maintain claim against subcontractor under indemnity agreement. *Shell Oil v. Brinkerhoff*, 658 P.2d 1187 (Utah 1983). Subcontractor's employee is employee of general contractor for purposes of Workers Compensation Act if general contractor retains ultimate control over project; right to supervise or control ultimate performance of subcontractor is determinative. Utah Code Ann. §34A-2-103 (2001); *Jacobsen v. Industrial Comm'n*, 738 P.2d 658 (Utah Ct. App. 1987). Injured employee of subcontractor may sue general contractor and other subcontractors in tort for damages and is not bound by exclusive remedy provisions of Workers' Compensation Act. *Pate v. Marathon Steel*, 777 P.2d 428 (Utah 1989).

Hearing loss treated as accident. Utah Code Ann. §34A-2-503 (1997). Uninsured Employers' Fund. Utah Code Ann. §34A-2-704 (2002). Occupational disease defined Utah Code Ann. §34A-3-101, *et seq.* Utah Code Ann. §34A-3-106 (1997) provides for mental stress claims under the workers' compensation system. Death claims defined. Utah Code Ann. §34A-2-414 (1997). Utah Code Ann. §34A-3-110 defines wage replacement and medical benefits as compensation requiring prora-

tion with preexisting conditions. *Ameritech v. Utah Labor Com.* 2009 UT 20.

Abnormal reaction to normal events is not compensable under worker's compensation statute, where abnormality is created by non-work-related incidents. *Stokes v. Board of Review*, 832 P.2d 56 (Utah Ct. App. 1992).

Workers' Compensation Act applies to "work at home" situations. *AE Clevite, Inc. v. Labor Comm'n*, 2000 UT App. 35, 996 P.2d 1072.

Personal representative may adjudicate claim if employee filed claim before death. Utah Code Ann. §34A-2-423 (2003). Compensation ends at date of death, and is in addition to death benefits of §34A-2-414. *Id.*

