I. REGULATORY LIMITS ON CLAIMS HANDLING

A. Timing for Responses and Determinations

All relevant time limitations are found in the Insurance Code Title 24-A, at Sections 2436 and 2436-A, commonly called the Unfair Claims Settlements Act. For example, claims for loss other than by fire are payable within 30 days of proof of loss and fire-related claims have a 60 day limit. 24-A M.R.S.A. § 2436 (1). And an insurer may, at any time within the 30 days, notify the insured that additional reasonable information is needed. A second 30-day clock then begins to run once the insurer has received the requested information. 24-A M.R.S.A. § 2436-A creates a private cause of action for the insured if the insurer fails to adhere to the requirements of § 2436.

B. Standards for Determination and Settlements

Claims handling standards are set forth in the same sections discussed under section A. Note that § 2436-A does create a private right of action for certain specific knowing violations of the Act.

C. Privacy Protections (In addition to Federal Gramm-Leach-Bliley Act)

The Insurance Information and Privacy Protection Act, 24-A M.R.S.A. § 2201 et seq., creates a right of privacy for insured and claimants for information maintained by insurance companies, including claims files. Any discovery order regarding this information must be conditioned on the written consent of the affected parties in response to a request form that meets the requirements of 24-A M.R.S.A. § 2208.

II. PRINCIPLES OF CONTRACT INTERPRETATION


VIII. CHOICE OF LAW AND CONFLICTS OF LAW
In Maine, when determining whether to enforce a choice of law provision in a contract, courts are guided by the choice of law analysis outlined in the Restatement. Pursuant to section 187(2) of the Restatement (Second) of Conflicts of Laws, Maine courts will enforce a contractual choice of law provision "unless either (a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or (b) the application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue . . . .” Schroeder v. Rynel, Ltd., Inc., 1998 ME 259, ¶ 8, 720 A.2d 1164 (quoting Restatement (Second) of Conflicts of Laws § 187(2) (1971)).

Similarly, in the absence of a choice of law provision in an insurance contract, Maine courts apply the Restatement’s “most significant contacts and relationships” approach to conflicts of law. Flaherty v. Allstate Ins. Co., 2003 ME 72, ¶ 16, 822 A.2d 1159, 1165-66 (citing the Restatement (Second) of Conflict of Laws §§ 145, 146 (1971)). Under this approach, Maine courts isolate the issue, identify the policies embraced in the laws in conflict, and examine the contacts with the respective jurisdictions to determine which jurisdiction has a superior interest in having its laws and policies applied. Flaherty v. Allstate Ins. Co., 2003 ME 72, ¶ 19, 822 A.2d 1159 (citing Collins v. Trius, Inc., 663 A.2d 570, 573 (Me. 1995)). In examining the parties’ contacts with the respective jurisdictions, Maine courts consider:

(a) the place where the injury occurred,

(b) the place where the conduct causing the injury occurred,

(c) the domicile, residence, nationality, place of the parties, and

(d) the place where the relationship, if any, between the parties is centered.

Flaherty, 2003 ME 72, ¶ 19, 822 A.2d 1159 (citing the Restatement (Second) of Conflict of Laws § 145 (1971)).

IV. DUTIES IMPOSED BY STATE LAW

A. Duty to Defend

1. Standard for Determining Duty to Defend

An insurer has a duty to defend if the allegations within the complaint create any possibility of a covered award. Union Fire Ins., Co. v. Town of Topsham, 441 A.2d 1012, 1015 (Me. 1982). There is no requirement that the facts alleged in the complaint specifically and unequivocally make out a claim within the coverage. Where there is ambiguity in the language of the policy, the doubt should be resolved in favor of finding that the insurer has a duty to defend. Gibson v. Farm Family Mut. Ins. Co., 673 A.2d 1350, 1351 (Me, 1996). Insurer may not consider facts extrinsic to complaint. See, e.g., Vigna v. Allstate Ins. Co., 686 A.2d 598, 599 (Me. 1996). The duty to defend arises when tender is made and generally continues until the action is concluded, unless the covered and non-covered claims are severable. See generally Travelers Indem. Co. v. Dingwell, 414 A.2d 220 (Me. 1980).

2. Issues with Reserving Rights

In Patrons Oxford Ins. Co. v. Harris, the Maine Law Court held that an insurer who defends under a reservation of rights cannot control the defense. In this situation, the insured can enter into a stipulated judgment with the plaintiff. The plaintiff must, in a separate proceeding, prove that the settlement is reasonable before the insurer can be bound to the settlement. 2006 ME 72, ¶ 22, 905 A.2d 819.

An insurer is not required to expressly reserve its right to pursue a subrogation claim against a third party whose negligence or wrongful act caused the loss. Emery Waterhouse Co. v. Lea, 467 A.2d 986, 994 (Me. 1983).

V. EXTRACTIONAL CLAIMS AGAINST INSURERS: ELEMENTS AND REMEDIES
A.  **Bad Faith**

1.  **First Party**

There is no independent tort of bad faith that accompanies an insurer’s breach of the implied covenant of good faith and fair dealing. Marquis v. Farm Family Ins. Co., 628 A.2d 644 (Me. 1993). An insured's “remedies for breach of the duty [are limited] to the traditional remedies for breach of contract . . . .” Id. at 652. Where there is no coverage, there is no breach. See also Colford v. Chubb Life Ins., 687 A.2d 609, 616 (Me. 1996) (“In order to secure emotional distress and punitive damages in this action, [an insured] must demonstrate that [the insurer] committed independently tortious conduct beyond the denial of [the] claim.”

2.  **Third Party**

Third parties are limited to contract remedies. This rule heavily circumscribes liability of insurers as to third parties. See, e.g., Stull v. First American Title Ins. Co., 745 A.2d 975, 980 (Me. 2000) (declining to go beyond the holding of Colford in determining third party rights).

B.  **Fraud**

A defendant is liable for fraud if the plaintiff establishes the following elements by clear and convincing evidence:

- [The defendant] (1) makes a false representation (2) of a material fact (3) with knowledge of its falsity or in reckless disregard of whether it is true or false (4) for the purpose of inducing another to act or to refrain from acting in reliance upon it, and (5) the plaintiff justifiably relies upon the representation as true and acts upon it to his damage.

Letellier v. Small, 400 A.2d 371, 376 (Me. 1979). When clear and convincing evidence is required, plaintiffs bear the burden of persuasion to “place in the ultimate factfinder an abiding conviction that the truth of [their] factual contentions are highly probable.” St. Francis De Sales Federal Credit Union v. Sun Ins., Co. of New York, 2002 ME 127, ¶ 26, 818 A.2d 995 (Me. 2002).

C.  **Intentional or Negligent Infliction of Emotional Distress**

To prevail on a claim of intentional infliction of emotional distress, the plaintiff must show that:

1. the defendant intentionally or recklessly inflicted severe emotional distress or was certain or substantially certain that such distress would result from [the defendant’s] conduct;

2. the conduct was so extreme and outrageous as to exceed all possible bounds of decency and must be regarded as atrocious, utterly intolerable in a civilized community;

3. the actions of the defendant caused the plaintiff’s emotional distress; and

4. the emotional distress suffered by the plaintiff was so severe that no reasonable person could be expected to endure it.

Lyman v. Huber, 2010 ME 139, ¶ 16, 10 A. 3d 707 (quoting Curtis v. Porter, 784 A.2d 18, 22-23 (Me. 2001)). To be liable for NIED, the defendant must (1) have owed a duty to the plaintiff; (2) have breached that duty; (3) such breach resulting in (4) harm to the plaintiff. Curtis v. Porter, 784 A.2d 18, 25 (Me. 2001). A plaintiff pursuing either tort in the context of an insurer/insured relationship must demonstrate independently
tortious conduct beyond the denial of a claim. Colford v. Chubb Life Ins. Co. of America, 687 A.2d 609, 616 (Me. 1996).

The Maine Law Court has not directly addressed the question of whether a plaintiff has an independent action for NIED against an insurer. Presumably the same preconditions apply to that claim as to any other action beyond breach of contract for independent conduct beyond the denial of the claim. cf. Commercial Union Ins. Co. v. Workers' Compensation Bd., 704 A.2d 358, 359 (Me. 1997).

D. State Consumer Protection Laws, Rules and Regulations

Pursuant to Maine’s Unfair Trade Practices Act, 5 M.R.S.A. § 207, et seq., the act, a purchaser of personal, family or household goods, services, or property who suffers any loss of money or property as a result of an unfair or deceptive act committed in the conduct of trade may maintain an action pursuant to the Act. 5 M.R.S.A. §§ 207, 213. In order to recover against an insurer under the act, the plaintiff must establish a loss of money or property as a result of the insurer's actions. Curtis v. Allstate Ins. Co., 787 A.2d 760, 770 (Me. 2002). In that case, the Court held that signing a release in exchange for the settlement did not constitute such a loss. Id. To date, Curtis is the only Law Court case considering the actions of an insurer.

VI. DISCOVERY ISSUES IN ACTIONS AGAINST INSURERS

A. Discoverability of Claims Files Generally

In Maine state courts, claims files are presumed to be prepared in anticipation of litigation and are protected by the work product doctrine. Harriman v. Maddocks, 518 A.2d 1027, 1033 (Me. 1986). The adjuster's file is potentially discoverable, however, upon a particularized showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. Id.

B. Discoverability of Reserves

There have been no decisions from the Law Court on this matter.

C. Discoverability of Existence of Reinsurance and Communications with Reinsurers

There have been no decisions from the Law Court on this matter.

D. Attorney/Client Communications

There have been no cases that specifically address the relationship between the insurer and the insured. It is anticipated, however, that where an insurer retains counsel to represent an insured, insurer and insured are joint clients for purposes of the attorney-client privilege. Each is entitled to disclosure of confidences from the other but neither party may use the privilege as a shield in litigation between insurer and insured.

VII. DEFENSES IN ACTIONS AGAINST INSURERS

A. Misrepresentations/Omissions: During Underwriting or During Claim

Misrepresentations, omissions, concealment of facts and incorrect statements may not prevent a recovery under a policy or contract unless they are either fraudulent, or:

[m]aterial either to the acceptance of the risk, or to the hazard assumed by the insurer, such that the insurer in good faith would either not have issued the insurance or contract, or would not have issued it at the same premium rate, or ... in as large an amount, or
would not have provided coverage with respect to the hazard resulting in the loss, if the true facts had been made known . . . .

24-A M.R.S.A. § 2411.

B. Failure to Comply with Conditions

There are few Law Court decisions on this question, but those that exist are unequivocal. "[A]n insurer must demonstrate prejudice before relying on the insured's breach of a policy provision to deny coverage." Greenvall v. Maine Mut. Fire Ins. Co., 715 A.2d 949, 954 (Me. 1998). For example, when an insured breaches a notice condition, the insurer, to avoid either its duty to defend or its liability thereunder, "must show (a) that the notice provision was in fact breached, and (b) that the insurer was prejudiced by the insured's delay." Ouellette v. Maine Bonding & Cas. Co., 495 A.2d 1232, 1235 (Me. 1985).

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

Most liability policies, through cooperation clauses, seek to bar collusive settlements by barring actions against it until there has been a judgment or a settlement approved by the carrier, barring fraud or collusion. 24-A M.R.S.A. § 2904 provides that, barring fraud or collusion, whenever a party recovers a final judgment against any other person for loss or damage, the judgment creditor shall be entitled to have the insurance money applied to the satisfaction of the judgment by bringing a civil action against the insurer to reach and apply the insurance money if the judgment debtor was insured and had notice of such accident or damage before recovery of the judgment.

Although Maine State courts have consistently stated that insurance contracts will be strongly construed against insurers, Baybutt Construction Corp. v. Commercial Union Ins. Co., 455 A.2d 914 (Me. 1983), local federal precedent indicates an unwillingness to overlook a notice provision with regard to cooperation clauses. See, e.g., Gates Formed Fibre Products, Inc. v. Imperial Cas. & Indemnity Co., 702 F.Supp. 343, 348 (D. Me. 1988). No showing of prejudice on the part of the insurer will be required, absent such language in the contract. Id.

D. Statutes of Limitation

"All civil actions shall be commenced within 6 years after the cause of action accrues and not afterwards, except on actions on a judgment or decree of any court of record of the United States, or of any state or of a justice of the peace in this State, and except as specially provided." 14 M.R.S.A. § 752. This rule applies to all causes of action against insurers qua insurers.

VIII. TRIGGER AND ALLOCATION ISSUES FOR LONG-TAIL CLAIMS

A. Trigger of Coverage

The Law Court has not addressed this issue.

B. Allocation Among Insurers

Policies which are excess to the primary policy will not be applied until the primary limits are met. Cobb v. Allstate Ins. Co., 663 A.2d 38, 40 (Me. 1995) (following a majority of jurisdictions holding the same); cf. Tibbetts v. Dairyland Ins. Co., 2010 ME 61, ¶ 16, 999 A.2d 930 (abrogating the general rule in Cobb as applied in the context of uninsured motorist coverage pursuant to 24-A M.R.S.A. § 2902).

IX. CONTRIBUTION ACTIONS

A. Claim in Equity vs. Statutory

In Maine, contribution actions are suits in equity and the statute of limitations accrues at the entry of judgment. Estate of Dresser v. Maine Medical Center, 2008 ME 183, ¶7, 960 A.2d 1205, 1207; Cyr v. Michaud, 454 A.2d 1376, 1384-85 (Me. 1983).

B. Elements

A right to contribution arises when one obligor pays greater than its share of the liability. Spottiswoode v. Levine, 1999 ME 79, ¶17, 730 A.2d 166, 172. Generally any claims against joint tortfeaser’s must be resolved prior to a contribution action; however, the Maine Law Court has not affirmatively decided this question yet. Estate of Dresser v. Maine Medical Center, 2008 ME 183, ¶6, 10, 960 A.2d 1205, 1207-08.

X. DUTY TO SETTLE

The obligation of good faith and fair dealing requires the insurer to pay a settlement based upon reasonable appraisal of the claim. County Forest Products v. Green Mountain Agency, Inc., 758 A.2d 59, 68 (Me. 2000). Statutory liability is imposed for wrongful refusal to pay a claim within policy limits that is accompanied by sufficient proof. Id.; 24-A M.R.S.A. § 2436-A.