I. REGULATORY LIMITS ON CLAIMS HANDLING

A. Timing for Responses and Determinations

Policyholders are required to timely notify insurers of the occurrence of an event that triggers a coverage obligation. A typical requirement is that notice be given “as soon as practicable.” Gazis v. Miller, 186 N.J. 224, 228-31 (2006). Notice ensures that an insurer will have the opportunity to investigate a claim. If an insured delays in providing notice to the insurer under an “occurrence” policy—as opposed to a “claims-made” policy—the insurer must show “appreciable prejudice” in order to forfeit coverage. Id. (citing Cooper v. Gov’t Employees Ins. Co., 51 N.J. 86, 94 (1968); Zuckerman v. Nat’l Union Fire Ins. Co., 100 N.J. 304, 306-07 (1985)). In contrast, an insurer of a “claims-made” policy will not be required to show prejudice in order to disclaim coverage for untimely notice. Templo Fuente de Vida Corp. v. National Union Fire Ins. Co. of Pittsburgh, 224 N.J. 189, 193 (N.J. 2016). In Templo, the court reasoned that insureds to an “occurrence” policy are typically “unsophisticated consumers unaware of all of the policy’s requirements”, whereas insureds to a “claims-made” policy tend to be “particularly knowledgeable insureds.” Id. at 209. An insurer is not responsible for those costs incurred by the insured prior to notification. SL Industries, Inc. v. Am. Motorists Ins. Co., 128 N.J. 188, 200-01 (1992).

An insured, however, does not lose the right to coverage if he fails to give notice because he reasonably believes, in good faith, that a claim will not arise. Zuckerman v. National Union Fire Ins. Co., 194 N.J. Super. 206 (App. Div. 1984). Such instances occur, for example, if the damage is trivial, or if there is no suggestion in the circumstances that the insured is causally linked to the alleged damages. Id. at 211. Essentially, failure to provide timely notice is not enough to deny coverage; rather, the insurer must demonstrate a breach of the notice provision, as well as that the company suffered appreciable prejudice. Id. However, in the case of a “claims made” policy, which provides coverage when a claim is made against the insured regardless of whether the underlying acts occurred outside of the policy period, the insured must strictly comply with the policy’s notice provision, even if the insured initially has reason to believe that the potential liability for a claim is less than the policy’s deductible. Alpine Home Inspections, LLC v. Underwriters at Lloyd’s London, No. A-1402-07T3, 2008 N.J. Super. Unpub. LEXIS 1892, at **5-6 (App. Div. Nov. 24, 2008).

B. Standards for Determination and Settlements
Insurers are obligated to exercise good faith in evaluating settlement offers. Courvoisier v. Harley Davidson, 162 N.J. 153 (1999); Rova Farms Resort, Inc. v. Investors Ins. Co., 65 N.J. 474 (1974) (questioned on other grounds). A judgment or settlement in excess of an insured’s policy limit is typically the responsibility of the insured. However, since settlement negotiations are usually handled by the insurer, the insurer has a fiduciary obligation to try to settle claims within the policy limits. Courvoisier, 162 N.J. at 162; Rova Farms Resort, Inc., 65 N.J. at 496. In analyzing whether a decision was made in good faith, a court will decide if it was an “honest and intelligent one in light of the company's expertise in the field.” State Nat’l Ins. Co. v. County of Camden, 10 F. Supp. 3d 568, 584 (D.N.J. 2014) (internal citations omitted). In the event an insurer is found to have acted in bad faith in pursuing settlement negotiations and a judgment in excess of policy limits ultimately results, the insurer will have to pay that judgment regardless of its policy limits. Courvoisier, 162 N.J. at 164; Rova Farms Resort, Inc., 65 N.J. at 496.

Alternatively, when an insurer wrongfully denies its defense coverage obligations, the insured may assume control of the defense of the case and settle the case without the input of the insurer. Griggs v. Bertram, 88 N.J. 347, 368 (1982). The insurer is then liable for the settlement amount up to its policy limits as long as the settlement is reasonable in amount and entered into in good faith. Id. The insurer possesses the burden of persuasion in proving that the settlement is unreasonable. Id. at 365.

C. Privacy Protections


The New Jersey Insurance Fraud Prevention Act (IFPA), N.J.S.A. 17:33A-1 et seq. (1994) imposes penalties of $5,000, $10,000 and $15,000 for first, second, third and all subsequent fraudulent acts on insureds who commit insurance fraud against insurers. Where fraud is proven, the IFPA also entitles insurers to recover triple their compensatory damages, which includes the expenses of investigating the claim, costs of suit, and attorneys’ fees.

In determining whether to award the recovery of attorney’s fees to successful claimants, federal courts look to determine whether Rule 4:42-9(a)(6) is procedural or substantive. For example, the third circuit reversed a district court ruling that found the recovery of attorney’s fees to be a “hybrid” of procedural and substantive law. First State Underwriters Agency of New England Reinsurance Corp. v. Travelers Ins. Co., 803 F.2d 1308, 1315 (3rd Cir. 1986). The district court held that New Jersey law should apply to the issue of attorney’s fees whereas Pennsylvania law should be applied to the substantive issues in the case. Id. at 1316. Finding the award of attorney’s fees to be a substantive issue, the circuit court reversed the lower court’s decision and denied claimant recovery of attorney’s fees by concluding that “New Jersey courts would consider New Jersey Court Rule 4:42-9(a)(6) as an integral part of its insurance law and apply that body of law to the dispute in toto or not at all.” Id. at 1317. Differently, in Du-Wel Products, Inc. v. U.S. Fire Ins. Co., 236 N.J. Super. 349 (App. Div. 1989), the court found Rule 4:42-9(a)(6) to be purely procedural. The court applied Michigan substantive law to the issues of the case and applied New Jersey law only to the issue of attorney’s fees. The court awarded claimant attorney’s fees and found Rule 4:42-9(a)(6) to be “not only clearly procedural but have expressly been so declared.” Id. See also, Uniroyal Inc. v. American Re-Insurance Co., No. A-6718-02T1, 2005 N.J. Super. Unpub. LEXIS 794, at *68 (App. Div. Sept. 13, 2005)(noting that the lower court was correct in finding that the determination of the award of attorney’s fees is a procedural matter).

II. PRINCIPLES OF CONTRACT INTERPRETATION


Insurance contracts will generally be interpreted according to their ordinary and plain meaning. Pizzullo, 196 N.J. at 270. When an insurance policy is clear and unambiguous, the court is bound to enforce the policy as it is written. Id. The court will not make a better contract for the

Further, the right to submit a claim is not limited solely to an insured and may be assigned following a loss, even in the event the policy expressly includes an anti-assignment clause. Givaudan Fragrances Corp. v. Aetna Cas. & Sur. Co., 227 N.J. 322 (N.J. Feb. 1, 2017). In evaluating the rights of a corporate successor-in-interest through merger, the New Jersey Supreme Court held that “once an insured loss has occurred, an anti-assignment clause in an occurrence policy may not provide a basis for an insurer’s declination of coverage based on insured’s assignment of the right to invoke policy coverage for that loss.” Id.

III. CHOICE OF LAW

It is well-settled that New Jersey courts apply New Jersey choice of law principles to determine which state’s substantive law should apply in interpreting an insurance contract. Erny v. Estate of Merola, 171 N.J. 86, 94 (2001). In New Jersey, a choice of law analysis involves a flexible approach, usually comporting with the law of the place of contract unless the other state has a more dominant relationship or a significant government interest. Sensient Colors, Inc. v. Allstate Ins. Co., 193 N.J. 373, 395 (2008) (noting that principal location of insured risk is most important contact only where principal risk of insured is in one state); Gilbert Spruance Co. v. Penn. Mfr. Ass’n Ins. Co., 134 N.J. 96, 112 (1993) (rejecting mechanical and inflexible lex loci contractus rule).

Ordinarily New Jersey courts look to the Restatement (2d) of Conflicts of Laws § 193 (1971) to make choice-of-law determinations in interpreting casualty insurance contracts. See Gilbert Spruance, 134 N.J. at 112. Pursuant to § 193, the law of the state that the parties understood to be the principal location of the risk governs unless another state has a more significant relationship to the transaction and the parties. Id.

Where the activity is predictably multi-state, “the significance of the principal location of the insured risk diminishes.” Id. “[T]he governing law is that of the state with the dominant significant relationship according to the principles set forth in Restatement § 6.” Id. at 112. Restatement § 6 (2) sets forth the following factors to determine the state with the dominant significant relationship: (1) place of contracting; (2) place of negotiation; (3) place of performance; (4) location of the subject matter of the contract; and (5) domicile, residence, nationality, place of incorporation, and place of business of the parties. Although New Jersey courts apply these five

In addition to the principles set forth in Restatement § 6, New Jersey courts also consider the requirements outlined in Restatement § 188 to determine what constitutes a significant relationship. See Polarome Mfg. Co., Inc. v. Commerce & Industr. Ins. Co., 310 N.J. Super. 168, 172 (App. Div. 1998). Restatement § 188 sets forth the following factors: (1) the needs of the interstate and international system; (2) the relevant policies of the forum; (3) the relevant policies of other interested states and the relative interests of those states on the outcome of the case; (4) the protection of justified expectations; (5) the basic policies underlying the particular field of law; (6) certainty, predictability and uniformity of result; and (7) ease in the determination and application of the law to be applied. Restatement (2d) of Conflicts of Laws § 188.

IV. DUTIES IMPOSED BY STATE LAW

A. Duty to Defend

1. Standard for Determining Duty to Defend

An insurer has a duty to pay only those defense costs reasonably associated with claims covered under the policy. SL Industries, Inc., 128 N.J. at 215; Hebela, 370 N.J. Super. at 275. Where defense costs related to covered claims cannot be separated from defense costs related to non-covered claims, the insurer is required to pay all defense costs; however, mathematical certainty in the allocation is not required and a reasonable allocation formula will be accepted by the courts. SL Industries, Inc., 128 N.J. at 215; Hebela, 370 N.J. Super. at 275.

Control of the defense of a case is a primary factor in determining whether the insurer or insured is ultimately liable for costs which are questionably included under the scope of coverage. When the insurer has an obligation to defend, the insurer has a right to control the defense. If the insured does not permit the insurer to control the defense, the insurer will no longer have a defense or indemnity obligation. See Griggs v. Bertram, 88 N.J. 347, 359 (1982).

An insurer is not obligated to defend, nor is the insured required to permit the insurer to defend, where the interests of the insurer and the insured conflict. Griggs, 88 N.J. at 389. Examples of this conflict include when a trial concerning the underlying claim leaves the question of coverage unresolved, or if having the insurer defend the case would prejudice the insured on the issue of coverage. Id. In such cases, the duty to defend translates into a duty to reimburse, assuming, of course, the court later finds that the allegations in the complaint are covered. See, e.g., Morton Int’l, Inc. v. Gen. Accident Ins. Co. of Am., 134 N.J. 1 (1993); Hartford Accident & Indem. Co. v. Aetna Life & Cas. Ins. Co., 98 N.J. 18, 22 (1984); Burd, 56 N.J. at 391. See also The Trustees of Princeton Univ. v. Aetna Cas. & Sur. Co., 293 N.J. Super. 296, 305 (App. Div. 1996) (insurer cannot unilaterally waive conflict of interest).

Where an insured undertakes its own defense because the insurer denies coverage, the insurer has a duty to reimburse an insured for the cost of defending an action if a court ultimately determines that the insured was entitled to a defense. Burd, 56 N.J. at 389; Grand Cove II v. Preferred Mut. Ins. Co., 291 N.J. Super. 58, 73 (App. Div. 1996).

2. **Issues with Reserving Rights**

In cases where coverage of the claim is unclear, and coverage issues will only be determined after the underlying matter is litigated, an insurer may choose to defend the claim on behalf of the insured and reserve the right to ultimately deny coverage. Griggs, 88 N.J. at 356. Since there is a potential conflict of interest, an insurer wishing to control the defense and simultaneously reserve a right to dispute liability, can do so only with the consent of the insured usually via a reservation of rights letter. Id. at 356 (noting that insurer may be obligated to defend if he assumes control of case prior to filing of complaint with knowledge of facts on which to disclaim coverage but fails to issue reservation of rights letter).

An insurer who undertakes a defense of an insured with “knowledge of facts that are relevant to a policy defense or to a basis for noncoverage of the claim,” but without a valid reservation of rights to deny coverage at a later time, is estopped from later denying coverage. Griggs, 88 N.J. at 356. Even if an insurance policy has clear contractual language denying coverage for certain types of claims, an insurance carrier may be estopped from
asserting the application of an exclusion if the insurer undertakes to defend a lawsuit but fails to adequately advise the insured of potential bases for future denial.  Id. at 356. However, an insurer will not be estopped from disclaiming coverage when the putative insured is not actually a covered party under the policy in question. Gen. Sec. Prop. & Cas. Ins. Co. v. N.H. Ins. Co., No. A-2991-08T2, 2010 N.J. Super. Unpub. LEXIS 450, at **7-8 (App. Div. Mar. 4, 2010).

V.  EXTRACONTRACTUAL CLAIMS AGAINST INSURERS: ELEMENTS AND REMEDIES

A.  Bad Faith

The covenant of good faith and fair dealing that is implied in all contractual relationships applies to insurance policies, and requires that insurers not compromise the right of the insured to receive the full benefits of the policy. Price v. N.J. Mfrs. Ins. Co., 182 N.J. 519 (2005); Griggs, 88 N.J. 347. See also N.J.S.A. 17B:30-13.1(f) (insurer must attempt in good faith to effectuate prompt, fair, and equitable settlements of claims in which liability has become reasonably clear).

In determining whether an insurance company has acted in “bad faith,” New Jersey courts use the “fairly debatable” standard. Pickett v. Lloyd’s & Peerless Ins. Agency, 131 N.J. 457, 473 (1993); M&B Apartments v. Teltser, 328 N.J. Super. 265 (App. Div. 2000). Bad faith is established by showing that no debatable reason existed for the denial of benefits. Pickett, 131 N.J. at 481. See also Nationwide Mut. Ins. Co. v. Caris, 170 F. Supp. 3d 740, 748 (D.N.J. 2016) (A plaintiff must show that (1) the insurer lacked a reasonable basis for its denying benefits, and (2) the insurer knew or recklessly disregarded the lack of a reasonable basis for denying the claim. Such claims are analyzed in light of the “fairly debatable” standard.) Under the “fairly debatable” standard, an insured “who could not have established as a matter of law a right to summary judgment on the substantive claim [for insurance benefits] would not be entitled to assert a claim for an insurer’s bad faith refusal to pay the claim.” Wimberly Allison Tong & Goo, Inc. v. Travelers Prop. Cas. Co. of Am., 559 F. Supp. 2d 504, 515 (D.N.J. 2008).

Further, under the “fairly debatable” standard, simple negligence cannot provide for the basis of a bad faith claim against an insurer, nor does the failure to settle a debatable claim by itself constitute bad faith. Badiali v. New Jersey Mfrs. Ins. Group, 220 N.J. 544, 554 (N.J. 2015). For a processing delay, bad faith is established by showing that no valid reason existed for the delay and that the insurance company knew or recklessly disregarded the fact that no valid reason supported the delay. Pickett, 131 N.J. at 474. A bad faith claim for delay will not lie, however, when there is no covered loss. Diebold, Inc. v. Continental Cas. Co., 719 F. Supp. 2d 451, 468 (D. N.J. 2010).

1.  First Party

In general, an insurer’s bad faith towards its insured in the payment of a first-party claim is best understood as one that sounds in contract rather than in tort. Pickett, 131 N.J. at 474-75. Accordingly, an insured can recover direct and foreseeable consequential damages for bad faith conduct in the context of a first-party policy. Id. (damages in excess of policy benefits are appropriate where the failure to pay policy results from denial or withholding of benefits for reasons that are not debatably valid and economic losses sustained by policyholder are clearly within contemplation of insurance company). In bad faith actions concerning first-
party policies, the insured is not permitted to recover punitive damages. See, e.g., Pickett, 131 N.J. at 475; Pierzga v. Ohio Cas. Group of Ins. Cos., 208 N.J. Super. 40 (App. Div. 1986), cert. denied, 104 N.J. 399 (1986) (no right to recover punitive damages under PIP policy). However, egregious or deliberate dishonest conduct in the course of claim administration may give rise to an independent tort action for which punitive or exemplary damages are available. Pickett, 131 N.J. at 475. The insured may also be entitled to compensation for “costs of litigation, including expenses for experts and counsel fees, and prejudgment interest.” Taddei v. State Farm Indemnity Co., 401 N.J. Super. 449, 461 (App. Div. 2008).

2. Third Party


A bad faith claim cannot be premised upon the mere fact that an insurer paid a claim that the insured wished to resist. Frankel v. St. Paul Fire & Marine, 334 N.J. Super. 353, 360, 759 A.2d 869 (App. Div. 2000) (bad judgment on the part of insurer does not constitute bad faith given insurer’s broad discretion in disposing of third party claims). As between excess insurers, it has been held that a second-tier excess carrier has no duty to negotiate and settle in good faith an insured’s first-party property loss claim within limits to protect a third-tier excess carrier. M & B Apartments, Inc., 328 N.J. Super. 265 (App. Div. 2000).

Insurers are obligated to exercise good faith in evaluating settlement offers. Courvoisier v. Harley Davidson, 162 N.J. 153 (1999); Rova Farms Resort, Inc. v. Investors Ins. Co., 65 N.J. 474 (1974) (questioned on other grounds). A judgment or settlement in excess of an insured’s policy limit is typically the responsibility of the insured. However, since settlement negotiations are usually handled by the insurer, the insurer has a fiduciary obligation to try to settle claims within the policy limits. Courvoisier, 162 N.J. at 162; Rova Farms Resort, Inc., 65 N.J. at 496. The right to a trial by jury attaches to a claim that an insurer acted in bad faith in pursuing settlement. Wood v. New Jersey Mfrs. Ins. Co., 206 N.J. 562, 565 (N.J. 2011). In the event an insurer is found to have acted in bad faith in pursuing settlement negotiations and a judgment in excess of policy limits ultimately results, the insurer will have to pay that judgment regardless of its policy limits. Courvoisier, 162 N.J. at 164; Rova Farms Resort, Inc., 65 N.J. at 496. This rule does not apply to an insurer’s bad faith in connection with first party claims. Taddei, 401 N.J. Super at 458-59.

B. Fraud

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Insurers may deny coverage if the insured committed fraud. See e.g., *Equitable Life Assurance Soc’y v. New Horizons*, 28 N.J. 307, 314 (1958). Legal fraud consists of: (1) a material misrepresentation of a presently existing or past fact; (2) made with knowledge of its falsity (scienter); (3) with the intention that the other party rely thereon; (4) resulting in reliance by the other party; (5) to the other party’s detriment. *Gennari v. Weichert Co. Realtors*, 148 N.J. 582, 610 (1997).

New Jersey distinguishes between legal and equitable fraud. The elements of equitable fraud include proof of (1) a material misrepresentation of a presently existing or past fact; (2) the maker’s intent that the other party rely on it and (3) detrimental reliance by the other party. *Liebling v. Garden State Indem.,* 337 N.J. Super. 447, 453 (App. Div. 2001). The elements of scienter are not essential if the plaintiff seeks to prove that a misrepresentation constituted an equitable fraud. See *Rolnick v. Rolnick*, 262 N.J. Super. 343, 362-363 (App. Div. 1993); *Equitable Life Assurance Soc’y*, 28 N.J. at 314. See also *Bonnco Petrol, Inc. v. Epstein*, 115 N.J. 599, 609 (1989) (stating that demonstrating scienter is not necessary where party seeks only equitable remedies).


C. **Intentional Infliction of Emotional Distress and/or Outrage**

To prevail on a claim for intentional infliction of emotional distress in New Jersey, a plaintiff must establish (i) that the defendant acted intentionally or recklessly, (ii) the conduct was extreme and outrageous, (iii) proximate cause and (iv) that the distress was severe. *Taylor v. Metzger*, 152 N.J. 490, 527 (N.J. 1998). The defendant must “intend both to do the act and to produce emotional distress” or act so “recklessly in deliberate disregard of a high degree of probability that emotional distress will follow.” *Buckley v. Trenton Sav. Fund Soc’y*, 111 N.J. 355, 364 (1988). The conduct of the defendant must be “so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.” *Buckley* 111 N.J. at 355.

D. **State Consumer Protection Laws, Rules, and Regulations**

The New Jersey Consumer Fraud Act (“NJCFA”) provides that “[t]he act, use or employment by any person of any unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation, or the knowing, concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in
connection with the sale or advertisement of any merchandise or real estate, or with the subsequent performance of such person as aforesaid, whether or not any person has in fact been misled, deceived or damaged thereby, is declared to be an unlawful practice . . . .” N.J.S.A. 56:8-2. The NJCFA protects consumers from deception and misrepresentations even when they are made in good faith. Gennari, 148 N.J. at 604; Ji v. Palmer, 333 N.J. Super. 451, 461, 755 A.2d 1221 (App. Div. 2000).

The NJCFA has been construed to apply to the sale of insurance policies. Lemelledo v. Beneficial Mgmt. Corp. of Am., 150 N.J. 255, 265, 696 A.2d 546 (1997) (insurance policies are goods and services that are marketed to consumers within the definitions applicable to the NJCFA). The standard of proof that governs a private claim under the NJCFA is a preponderance of the evidence. Liberty Mut. Ins. Co. v. Land, 186 N.J. 163, 892 A.2d 1240 (2006); Sabelli v. All American Chevrolet, Inc., 2007 WL 92609 (N.J. Super. A.D. 2007).


In an action brought under the NJCFA, reliance need not be shown. Gennari, 148 N.J. at 607-608; Varacallo v. Mass. Mut. Life Ins. Co., 332 N.J. Super. 31, 43, 752 A.2d 807 (App. Div. 2000). The plaintiff must, however, demonstrate a causal relationship between the act or omission and the damages sustained. Feinberg, 331 N.J. Super. at 511; Varacallo, 332 N.J. Super. at 43. In Varacallo, for example, the court held that if the defendant withheld material information in its literature, which it intended consumers to rely upon, any consumer who saw the literature and subsequently purchased a policy would have prima facie proof of causation without the need to establish actual reliance. Varacallo, 332 N.J. Super at 49.


VI. DISCOVERY ISSUES IN ACTIONS AGAINST INSURERS

A. Discoverability of Claims Files Generally

The New Jersey Court Rules state that “Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter

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involved in the pending action. N.J. Court Rules, R. 4:10-2. Such rules are
to be applied liberally in favor of broad pre-trial discovery. Payton v. N.J.
insurer’s claim file rests on the severability of the initial claim from the
bad faith claim against an insurer. Taddei v. State Farm Indemnity Co., 401
trigger the right to discovery and “the insurer would not be required to
produce its claim file prematurely”. Id. This approach “avoids the premature
disclosure of arguably privileged materials to the prejudice of the insurer’s
defense while, at the same time, preserving the insured’s pursuit of its bad
381 (App. Div. 2013). To establish a right to discovery of a claims file “a
plaintiff must first show that he or she is entitled to recover on the
contract before he or she can prove that the insurer dealt with him or her in
bad faith. Id.

B. Discoverability of Reserves

Reserve calculations are generally not discoverable in New Jersey. New
Jersey courts have held that allowing discover of reserves does not further
(D.N.J. 1989). The court further stated that the reserve information was
“only tenuously relevant”. Id.

C. Discoverability of Existence of Reinsurance and Communications
   with Reinsurers

Whether an insurer has sought reinsurance is a business decisions and
therefore generally not discoverable in an action against the insurer. Id. The existence of reinsurance is not a matter of policy interpretation and its
relevance is therefore very tenuous. Id.

D. Attorney/Client Communications

The New Jersey Rules provide that “communications between a lawyer and
his client in the course of that relationship and in professional confidence,
are privileged, and a client has a privilege (a) to refuse to disclose any
such communication, and (b) to prevent his lawyer from disclosing it, and (c)
to prevent any other witness from disclosing such communication if it came to
the knowledge of such witness (i) in the course of its transmittal between
the client and the lawyer, or (ii) in a manner not reasonably to be
anticipated, or (iii) as a result of a breach of the lawyer-client
relationship, or (iv) in the course of a recognized confidential or
privileged communication between the client and such witness. N.J. Stat.
§2A:84A-20. The right to privileged communications “may be pierced when
confidential communications are made a material issue by virtue of the
allegations in the pleadings and where such information cannot be secured
from any less intrusive source.” United Jersey Bank v. Wolosoff, 196 N.J.
Super. 553 (App. Div. 1984). A party subject to the discovery request would
only be required to produce evidence for which there is a substantial need
and would cause undue hardship in obtaining. In re Envtl. Ins. Declaratory
would be subject to an in camera review for determination of their privileged
status and such documents “which are strictly mental impressions,
conclusions, opinions, or legal theories of an attorney or other
representative of a party concerning the litigation are privileged and
protected from disclosure except when they are the subject of the controversy itself. Id.

VII. DEFENSES IN ACTIONS AGAINST INSURERS

A. Misrepresentation/Omissions: During Underwriting or During Claim

A material misrepresentation made by the insured in either the policy itself or in the application for insurance is a basis for rescission of the policy by the insurer if it is: (1) untruthful; (2) material to the risk assumed by the insurer; and (3) actually and reasonably relied upon by the insurer in the issuance of the policy. First Am. Title Ins. Co. v. Lawson, 177 N.J. 125, 827 A.2d 230 (2003); Allstate Ins. Co. v. Meloni, 98 N.J. Super. 154, 158-59 (App. Div. 1967). In Mass. Mutual Life Ins. Co. v. Manzo, 122 N.J. 104, 115 (1991), the court adopted a broad materiality test under which the insurer may rescind coverage if the false concealment naturally and reasonably influenced the judgment of the underwriter in issuing the policy, in estimating the degree or character of the risk, or in fixing the rate of premium. See also Citizens United Reciprocal Exchange v. Perez, 223 N.J. 143 (N.J. 2015) (Rescission may be justified if the insurer relied on the misrepresentation in determining whether to issue the policy). In Ledley v. William Penn Life Ins. Co., 138 N.J. 627 (1995) the court found that even an innocent misrepresentation can constitute equitable fraud justifying rescission and the insurer need not show that the insured had the intent to deceive.

B. Failure to Comply with Conditions

An insured must avoid independent action which will contravene any of the essential terms of the policy; compliance with such provisions is a condition precedent to recovery under the policy and their breach can cause a forfeiture of coverage Griggs at 359-360. (citing Kindervater v. Motorists Casualty Ins. Co., 120 N.J.L. 373, 375, 199 A. 606 (E. & A.1938)) (breach of the covenants to cooperate and not to "voluntarily assume any liability ... or interfere in any negotiations for settlement or legal proceedings" operates "as an avoidance of the insurer's contractual liability.") In this setting, an insured cannot take any meaningful steps toward an early settlement of the claim without risking loss of coverage pursuant to the provision prohibiting it from voluntarily compromising liability or independently settling the claim. Id.

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

An insurer may challenge a settlement based upon unreasonableness or bad faith. The insured is presumed to possess all essential information necessary to make such a determination. Griggs at 367-68. Accordingly, the insured is charged with the initial burden of production and/or the burden to produce evidence to support the reasonable and good faith nature of the settlement. While the insured is initially charged with the burden of production, an insurance policy is a contract of adhesion, and as such, the insurer (as the dominant party) ultimately has the burden of persuasion. The insurer is not liable if the settlement is either unreasonable, or was reached in bad faith. Griggs at 365-68.

In insurance policies that contain "No Action" Clauses, a declaratory judgment action can be sought to establish the insured’s rights under the policy. The Appellate Division in Crest-Foam Corp. v. Aetna Ins. Co., 320 N.J.
Super. 509, 517 (App.Div. 1999) held that the declaratory judgment action is a viable method of establishing plaintiff’s rights under a policy with a no action clause, and unless the time provided in the clause is triggered as expressly provided therein, the statute of limitations cannot be asserted as a defense. The no action clause may prevent or delay an action for indemnification, but it also prevents the assertion of the statute of limitations defense to a declaratory judgment action before it is triggered and for six years thereafter.

D. Statute of Limitations


The statute of limitations for breach of an insurance policy by an insurer begins to run from the date the casualty occurs. Peloso v. Hartford Fire Ins. Co., 56 N.J. 514, 521 (1970). The statute of limitations is tolled from the time an insured provides notice of the casualty to the insurer until liability is formally declined by the insurer. Id. Additionally, the statute of limitations may be tolled when a party is “insane” within the meaning of N.J.S.A. 2A:14-21; Todish v. CIGNA Corp., 206 F.3d 303 (3d Cir. 2000).


VIII. TRIGGER AND ALLOCATION ISSUES FOR LONG-TAIL CLAIMS

A. Trigger of Coverage

Owens-Illinois, Inc. v. United Ins. Co., 138 N.J. 437 (1994) is the seminal New Jersey case regarding trigger of coverage and allocation issues. The New Jersey Supreme Court held that when progressive indivisible injury or damage occurs, courts may treat the injury or damage as an occurrence within each year of every insurance policy issued to the insured during the period of continuous injury, triggering the insurer’s obligations to respond. Id. at 478-79. This “continuous trigger theory” is particularly applicable in situations involving environmental pollution and toxic-tort property damage claims. Quincy Mut. Fire Ins. Co. v. Borough of Bellmawr, 172 N.J. 409, 422 (2002). Additionally, the New Jersey Supreme Court has expanded the scope of an occurrence under a commercial general liability policy. In an action brought by a condominium association against a developer, the court ruled that consequential damages as a result of the faulty workmanship of a
subcontractor constituted property damage and the cause of the damage was an “occurrence” under the policy. Cypress Point Condo. Ass’n v. Adria Towers, L.L.C., 226 N.J. 403, 408 (N.J. 2016). The court acknowledged that faulty workmanship should not be limited to the work product itself but any consequential property damages caused by the deficiencies of such work product, and relied upon the assertion that the faulty workmanship is a “foreseeable to the insured developer because damage to any portion of the completed project is the normal, predictable risk of doing business.” Id. at 422 and 427.

B. **Allocation Among Insurers**

The New Jersey Supreme Court also allocated liability among primary insurers in proportion to the degree of risk transferred or retained by each insurer during the years of exposure. Owens-Illinois, Inc., 138 N.J. at 475. Losses were allocated by the Court on the basis of the risk assumed, i.e., “proration on the basis of policy limits, multiplied by years of coverage.” Id.

To illustrate its allocation analysis, the Court provided a hypothetical, making the following assumptions: (1) a nine-year period over which the loss occurred; (2) in years one through three coverage was provided by one insurer in the amount of two million dollars per year; (3) in years four through six coverage was provided in the amount of three million dollars per year by another insurer; and (4) in the years seven through nine the insured was self-insured for four million dollars per year. Under an allocation method based upon the degree of risk transferred or retained during the years of exposure, the insurer in years one through three would bear 6/27ths of the loss, the insurer in years four through six would shoulder 9/27ths of the loss, and the insured in years seven through nine would be responsible for 12/27ths of the loss. Id. at 476.

The New Jersey Supreme Court revisited the issue of allocation where, over the course of many years, multiple layers of insurance provided coverage for a long-tail risk. Carter-Wallace, Inc. v. Admiral Ins. Co., 154 N.J. 312 (1998). The Court reiterated its commitment to apportioning damages among the triggered policy years based upon time on the risk and policy limits. Id. at 326. The Court held that after assigning a portion of a loss to a policy year, each layer of excess coverage must be depleted before the next level is pierced. Id. The Carter-Wallace Court extended the Owens-Illinois calculation to make the further assessment of responsibility borne by each year of continuous trigger. The Court stated:

> returning to our example, carriers in the first year would be responsible for 2/27ths of the loss, carriers in the second year for 2/27ths, and carriers in the third year for 2/27ths. Id. at 326-27 (citations omitted). The Court then applied a vertical allocation for each year, starting from the primary policy and proceeding upward to the umbrella policies for that year. Id.

In Quincy Mutual Fire Ins. Co. v. Borough of Bell Mawr, 172 N.J. 409 (2002) the Court extended its allocation analysis. The Court held that where necessary, allocation among insurers may be reflected in days on the risk, rather than years. Id. at 437. Further, in order to allocate a pro rata allocation to the insured, one must prove that the insurance could have been
purchased to cover the risk that developed—not only that the insurance was available. Champion Dyeing v. Continental Ins., 355 N.J. Super. 262, 810 A.2d 68 (App. Div. 2002). The test is objective; therefore, the insurer does not need to prove that a particular insured knew about available coverage. Id. at 271.

Even if the policy includes a non-cumulation clause to limit the exposure to arising out of one occurrence, such a provision is unenforceable. Spaulding Composites Co. v. Aetna Cas. & Sur. Co., 176 N.J. 25, 819 A.2d 410 (2003). Finally, the full per-occurrence deductible in each triggered policy must be satisfied before the insured is entitled to indemnity. Benjamin Moore v. Aetna Cas. & Sur. Co., 179 N.J. 87, 106-07 (2004).

IX. CONTRIBUTION ACTIONS

In New Jersey, an insurer can seek contribution from a co-insurer for defense costs incurred in litigation arising from property damage manifested over a period of several years, during which a policyholder was insured by successive carriers. Potomac Ins. Co. of Illinois ex rel. OneBeacon Ins. Co. v. Pennsylvania Mfrs. Ass’n Ins. Co., 215 N.J. 409 (2013). Additionally, a signed release negotiated between an insured and a co-insurer does not bar the co-insurer’s contribution claim against a co-insurer that was not a party to the release. Id. Public policy supports the allocation of costs among insurance carriers. If a carrier believes it may be responsible for a portion of the defense costs, that carrier will likely invest in a more rigorous defense. Id. at 425. Last, allocation promotes early settlement and creates prompt and proactive involvement on behalf of insurance carriers. Id.

X. DUTY TO SETTLE

In New Jersey there is an inherent duty on the insurer to settle claims. Liberman v. Employers Inc. of Wausau, 84 N.J. 325 336 (N.J. 1980). “The relationship of the insurance company to its insured regarding settlement is one of fiduciary obligation” and the insureds interests must come first. Id. In determining whether an insurer has satisfied its fiduciary obligation the court would apply the bad faith analysis on a case by case basis. Badiali, 220 N.J. at 554.