I. REGULATORY LIMITS ON CLAIMS HANDLING

A. Timing for Responses and Determinations

R.I. Gen. Laws § 27-9-1, et seq. provides for casualty insurance. Rhode Island Insurance Regulation 73, which is adopted under The Unfair Claims Settlement Practices Act, R.I. Gen. Laws § 27-9.1-1, establishes the minimum standards for the investigation and disposition of property and casualty claims arising under insurance policies issued to Rhode Island residents.

Pursuant to Insurance Regulation 73, Section 6, entitled “Standards for Prompt, Fair, and Equitable Settlements”, an insurer, within fifteen (15) days after receiving properly executed proofs of loss, the insurer must advise the claimant of whether the claim is going to be accepted or denied. A denial of a claim must be in writing.

If an insurer needs more than fifteen (15) days, the insurer must notify the claimant within that time period with the reason for why more time is needed. If the investigation remains incomplete, the insurer has forty-five (45) days from the initial notification and must notify the insured every forty-five (45) days thereafter until the claim is accepted or denied.

B. Standards for Determination and Settlements

Insurance Regulation 73, Section 6 further provides that when an insurer denies a claim based on a specific provision, condition, or exclusion, the insurer must reference such provision, condition, or exclusion.

The “Unfair Claims Settlement Practices Act” mandates standards for the investigation and disposition of insurance claims. For instance, the insurer must conduct a “reasonable investigation” into the claims. § 27-9.1-4(a)(6). Also, the Act would be violated if an insurer did not attempt “in good faith to effectuate prompt, fair, and equitable settlement of claims submitted in which liability has become reasonably clear.” § 27-9.1-4(a)(4). “[I]n every case, an insurer must determine whether liability is reasonably clear by objective, measurable criteria, engage in settlement negotiations and attempt, in good faith, to resolve the claim so that its insured is relieved from the burden of instituting a suit to recover under the policy.” Skaling, 799 A.2d at 1012.

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


Rhode Island has enacted a statutory cause of action for invasion of privacy. R.I. Gen. Laws § 9-1-28.1, states that "every person in this state shall have a right to privacy." The statute declares that violation of the right to privacy is grounds for suit in superior or district court. The statute details the requirements for claiming a violation of (1) the right to be secure from unreasonable intrusion upon one's physical solitude or seclusion; (2) the right to be secure from an appropriation of one's name or likeness; (3) the right to be secure from unreasonable publicity given to one's private life; and 4) the right to be secure from publicity that reasonably places another in a false light before the public.

Another example of privacy protection is found in R.I. Gen. Laws § 2749-3.1. This statute relates to disclosure of personal information obtained in connection with motor vehicle records, tracking the federal "Driver's Privacy Protection Act of 1994" ("DPPA"). 18 U.S.C. § 2721.

II. Principles of Contract Interpretation

In Rhode Island, unambiguous contract terms will be given their “plain and ordinary meaning.” Perry v. Garey, 799 A.2d 1018, 1023 (R.I. 2002). A contract is ambiguous “only when it is reasonably and clearly susceptible of more than one interpretation.” 799 A.2d at 1023 (quoting Hilton v. Fraioli, 763 A.2d 599, 602 (R.I. 2000)). Ultimately, where contract terms are found to be unambiguous, “the task of judicial construction is at an end and the parties are bound by the plain and ordinary meaning of the terms of the contract.” Zarella v. Minn. Mut. Life Ins. Co., 824 A.2d 1249, 1259 (R.I. 2003). The Court considers “the intent expressed by the language of the contract.” Botelho v. City of Pawtucket, 130 A.2d 172, 176 (R.I. 2016). Moreover, it is well settled under Rhode Island law that if there is an “ambiguity or omission, the agreement must be construed against the drafting party.” A.C. Beales Co. v. R.I. Hosp., 292 A.2d 865, 872 (R.I. 1972). Finally,
Rhode Island courts adhere to the parol evidence rule and will not consider "any previous or contemporaneous oral statements that attempt to modify an integrated written agreement." Nat'l Refrigeration, Inc. v. Standen Contracting Co., Inc., 942 A.2d 968, 972 (R.I. 2008).

III. CHOICE OF LAW

Rhode Island law provides that "[i]n the absence of a contractual stipulation about which law controls, Rhode Island’s conflict-of-laws doctrine provides that the law of the state where the contract was executed governs." 852 A.2d at 483-84. Under Rhode Island law, parties to a contract are generally free to stipulate which law will govern the terms of their agreement. DeCesare v. Lincoln Benefit Life Co., 852 A.2d 474, 481 (R.I. 2004). Further, courts have observed that "[c]hoice-of-law provisions are valid and enforceable in nearly all jurisdictions that have passed upon them." DeCesare, 852 A.2d at 481. Choice of law provisions are enforceable "if the intention of the parties to stipulate to the jurisdiction is made clear by express language or by the facts and circumstances attending the making of the contract.’” 852 A.2d at 481 (quoting Owens v. Hagenbeck-Wallace Shows Co., 192 A. 158, 164 (R.I. 1937)). In order to ascertain the intent of the parties to “bind themselves to a particular forum or jurisdiction, courts employ the standard principles of contract law.” 852 A.2d at 481-82.

IV. DUTIES IMPOSED BY STATE LAW

A. Duty to Defend

1. Standard for Determining Duty to Defend

Rhode Island follows to so-called "pleadings test" in determining whether a duty to defend exists. Employers' Fire Insurance Company v. Beals, 240 A.2d 397, 402 (R.I. 1968)(overruled on other grounds). Under Rhode Island law, an insurer's duty to defend a suit brought against one of its policyholders is determined by the allegations contained in the complaint, and if the pleadings recite facts which bring the complained injury within coverage of the insurance policy, then the insurer must defend. Peerless Ins. Co. v. Viegas, 667 A.2d 785, 787 (R.I. 1995). When the allegations and facts contained in the pleadings allege an injury covered under the insurance policy, "'the insurer must defend irrespective of the insured's ultimate liability to the plaintiff.'" Id. (quoting Beals, 240 at 402). "Thay duty, when blindly applied, may certainly result in the defense of groundless, false, or fraudulent suits, but the insurer is duty bound nonetheless." Id. (internal quotation marks omitted).

The Rhode Island Supreme Court has stated that, "'[c]onversely, if the alleged facts [in the underlying tort complaint] fail to bring the case within the policy coverage, the insurer is free of its obligation" to provide a defense for its insured. Grenga v. National Surety Corporation, 317 A.2d 433, 436 (R.I. 1974)(overruled on other grounds).

2. Issues with Reserving Rights

"[W]here an insurer refuses to defend an insured pursuant to a general-liability policy, the insurer will be obligated to pay, in addition to the costs of defense and attorneys' fees, the award of damages or settlement assessed against the insured." Connacit Marine Services, Inc. v. Ins. Co. of North America, 511 A.2d 967, 971 (R.I. 1986). The Court has indicated that,
instead of running the risk of a complete refusal to defend, the more appropriate course would be to enter into a non-waiver agreement with an insured agreeing to defend, with the insured recognizing the right of defendant to question coverage, or, in the alternative, an insurer can bring an action against an insured for a declaratory judgment on the question of coverage. Id.

V. EXTRAContractUAL CLAIMS AGAINST INSURERS: ELEMENTS AND REMEDIES

A. Bad Faith

R.I. Gen. Laws § 9-1-33 allows an insured to make a claim for bad faith by alleging that the insurer wrongfully and in bad faith "refused to pay or settle a claim made pursuant to the provisions of the policy, or otherwise wrongfully and in bad faith refused to timely perform its obligations under the contract of insurance." A plaintiff can claim compensatory and punitive damages, as well as reasonable attorney fees.

Asermely v. Allstate Ins. Co., 728 A.2d 461 (R.I. 1999) found that an insurer owes a fiduciary duty to its insured. This duty includes an obligation to seriously consider a reasonable offer to settle within the policy limits. The insurer assumes the risk of miscalculation even if it believes it has a legitimate defense in good faith.

Skaling v. Aetna Ins. Co., 799 A.2d 997 (R.I. 2002) established what an insured must do to avoid a bad faith claim. The Court stated that an insurer must be able to show that (1) the claim was fairly debatable, and (2) the claim was evaluated in an appropriate and timely manner.

1. First Party

In Skaling, the Rhode Island Supreme Court analyzed first party bad faith claims. 799 A.2d at 997. Insurers doing business in Rhode Island are "obligated to act in good faith in [their] relationship with [their] policyholders," and that a "violation of this duty will give rise to an independent claim in tort." Id. (quoting Bibeault v. Hanover Ins. Co., 417 A.2d 313,319 (R.I. 1980)).

2. Third-Party

As in first party insurance claims, "insurers owe their insureds a fiduciary obligation with respect to protecting the insured from excess liability in the context of third party claims, in which the insurer is obligated to defend its insured against liability to third-parties." Skaling, 799 A.2d at 1005. Furthermore, in the context of third party claims, insurers owe their insureds a fiduciary duty with respect to protecting the insured from excess liability. Id.; see also Fraioli, 748 A.2d at 275.

B. Fraud

In order to prove a claim of common law fraud in Rhode Island, the plaintiff must prove each of the following four elements: 1) false representation; 2) defendant's knowledge of the statement's falsity; 3) intent to induce reliance by defendant; and 4) plaintiff's detrimental

Rule 9(b) of the Rhode Island Superior Court Rules of Civil Procedure provides that "circumstances constituting fraud or mistake shall be stated with particularity."

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

To hold a defendant liable for the tort of intentional infliction of emotional distress, sometimes known as the tort of outrage, a plaintiff is obligated to prove four elements: 1) the conduct must be intentional or in reckless disregard of the probability of causing emotional distress; 2) the conduct must be extreme and outrageous; 3) there must be a causal connection between the wrongful conduct and the emotional distress; and 4) the emotional distress in question must be severe. The conduct at issue 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 atrocius and utterly intolerable in a civilized community." Swerdlick v. Koch, 721 A.2d 849, 863 (R.I. 1998). Typically, Rhode Island requires proof of medically established physical symptoms for both intentional and negligent infliction of emotional distress. See Jalowy v. The Friendly Home, Inc., 818 A.2d 698 (R.I. 2003); Wright v. Zielinski, 824 A.2d 494 (R.I. 2003).

Recently, however, Rhode Island courts have recognized some exceptions to the requirement of physical symptoms. The use of that requirement to weed out exaggerated claims was found to be inappropriate for emotional distress claimed as a result of a humiliating arrest and loss of military privileges in Adams v. Uno Restaurants, Inc., 794 A.2d 489 (R.I. 2002), because of available objective facts.

Only two classes of people in Rhode Island may bring a claim for the negligent infliction of emotional distress: those within the "zone-of-danger" who are physically endangered by the acts of a negligent defendant, and bystanders related to a victim whom they witness being injured; negligent infliction of emotional distress also requires proof of medically established physical symptoms. Jalowy v. The Friendly Home, Inc., 818 A.2d 698 (R.I. 2003); DiBattista v. State, 808 A.2d 1081 (R.I. 2002).

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

R.I. Gen. Laws § 6-13.1-1 et seq. is known as the "Unfair Trade Practice and Consumer Protection Act." The statutory scheme defines terms, prohibits general practices, as well as those particular to specific industries, and sets forth the penalties and enforcement procedures for unfair trade practices. The Rhode Island Department of the Attorney General also has a consumer protection unit, which can be reached at (401) 274-4400, or at http://www.riag.state.ri.us

R.I. Gen. Laws § 27-58-1 et seq. is known as the "Banking and Insurance Consumer Protection Act" and as the "Financial Institution Insurance Sales Act." According to R.I. Gen. Laws § 27-58-2, the purpose of the act is to
"regulate financial institutions in the conduct of the business of insurance in this state."


Regulation 99, "Privacy of Consumer Financial Information," “governs the treatment of nonpublic personal financial information about individuals by all insurance licensees of the Rhode Island Department of Business Regulation.” It “(1) Requires a licensee to provide notice to individuals about its privacy policies and practices; (2) Describes the conditions under which a licensee may disclose nonpublic personal financial information about individuals to affiliates and nonaffiliated third parties; and (3) Provides methods for individuals to prevent a licensee from disclosing that information.”

VI. DISCOVERY ISSUES IN ACTIONS AGAINST INSURERS

A. Discoverability of Claims Files Generally

Rule 26(b)(2) of the Rhode Island Rules of Civil Procedure specifically pertain to insurance agreements and provides that,

"[a] party may obtain discovery of the existence and contents of any insurance agreement under which any person carrying on any insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment. Information concerning the insurance agreement is not by reason of disclosure admissible in evidence at trial. For purposes of this paragraph, an application for insurance shall not be treated as part of an insurance agreement."

Certain reports prepared by an insurer are entitled to protection from discovery in a breach-of-contract action under Rule 26(b)(2). Bartlett v. John Hancock Mut. Life Ins. Policy, 538 A.2d 997 (R.I. 1988) (overruled on other grounds). Statements immediately after an accident are in anticipation of litigation and thus enjoy protection as a qualified, but not absolute, privilege. Id.

Claims files are discoverable for bad faith claims against insurers, but not until the resolution of the underlying contract claim. Skaling v. Aetna Ins. Co., 799 A.2d 997 (R.I. 2002).

When a breach of contract claim is brought simultaneously with a bad faith claim, the insurer is entitled to qualified privilege against discovery on the break of contract claim, pursuant to Rule 26(b)(2) of the Rhode Island Rules of Civil Procedure, in regards to all of the materials in the claim.
file that the insurer can prove were prepared in anticipation of litigation. It is suggested that when such two claims are brought together, that the judges, pursuant to Rule 42(b) sever the contract claim from the bad faith claim and limit discovery only to the contract claim until the contract claim is resolved. Bartlett, 538 A.2d at 1002 (R.I. 1988)

B. Discoverability of Reserves

Rhode Island has not issued any written decisions regarding the discoverability of reserve information, although presumably the same rules would apply as discussed in Section VI(A), supra. Under Rhode Island's Rules of Civil Procedure, reserve information is not discoverable.

C. Discoverability of Existence of Reinsurance and Communications with Reinsurers

Rhode Island courts have not addressed the issue of the discoverability of reinsurance information, although presumably the same rules would apply as discussed in Sections VI(A) and VI(B), supra. Pursuant to Rhode Island's Rules of Civil Procedure, information relating to reinsurance is not discoverable.

D. Attorney/Client Communications

Communications made by a client to an attorney for professional advice, as well as the responses by the attorneys, are privileged communications not subject to disclosure. Callahan v. Nystedt, 641 A.2d 58 (R.I. 1994). In order to invoke the privilege, the party seeking to prevent discovery must establish that (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client. Id.

VII. DEFENSES IN ACTIONS AGAINST INSURERS

A. Misrepresentations/Omissions: During Underwriting or During Claim

In the insurance context, in order to establish a prima facie case of negligent misrepresentation, the plaintiff must establish, “(1) a misrepresentation of a material fact; (2) the representor must either know of the misrepresentation, must make the misrepresentation without knowledge as to its truth or falsity or must make the representation under circumstances in which he ought to have known of its falsity; (3) the representor must intend the representation to induce another to act on it; and (4) injury must result to the party acting in justifiable reliance on the misrepresentation.” Zarrella v. Minnesota Mut. Life Ins. Co., 824 A.2d 1249, 1258 (R.I. 2003).

A material misrepresentation in an insurance application is any representation that induces the insurer to insure the applicant. Evora v. Henry, 559 A.2d 1038, 1040 (R.I. 1989). A material misrepresentation in an
insurance application makes the policy voidable without a concomitant demonstration of fraud. Id.

R.I. Gen. Laws § 27-18-16, which relates to accident and health insurance policies, states that "[t]he falsity of any statement in the application for any policy covered by this chapter may not bar the right to recovery under the policy unless the false statement materially affected either the acceptance of the risk or the hazard assumed by the insurer."

B. Failure to Comply with Conditions

Ordinarily, an insured's failure to comply with a condition, such as a cooperation clause, creates a question of fact about whether the insurer has been so prejudiced by the insured's non-cooperation, or non-compliance with the condition, so as to permit the insurer to void the policy of insurance. Ogunsuada v. Gen'l Acc. Ins. Co. of America, 695 A.2d 996 (R.I. 1997).

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

Rhode Island courts have not specifically addressed this issue in the context of property or casualty insurance. However, by analogy, Rhode Island courts have held that the plaintiff's failure to obtain consent to settle from an underinsurance motorist coverage company bars the plaintiff's right to recovery under a policy. See Manzo v. AMICA Mut. Ins. Co., 666 A.2d 417 (R.I. 1995). That failure to obtain consent may also result in the reduction of an arbitration award. Sunderland v. Allstate Ins. Co., 717 A.2d 53 (R.I. 1998).

D. Statutes of Limitation

R.I. Gen. Laws § 9-1-13 sets the statute of limitations for contract actions at ten (10) years from the alleged breach. R.I. Gen. Laws § 9-1-14 sets the statute of limitations for an action sounding in tort at three (3) years. Pursuant to R.I. Gen. Laws § 9-1-14.1, an action for insurance agent malpractice must be brought within three (3) years of the time that the act of malpractice should have been discovered in the exercise of reasonable diligence.

VIII. TRIGGER AND ALLOCATION ISSUES FOR LONG-TAIL CLAIMS

A. Trigger of Coverage

The trigger of coverage under general liability insurance policy occurs when property damage (1) manifests itself; (2) is discovered; or (3) in the exercise of reasonable diligence is discoverable. Textron, Inc. v. Aetna Cas. and Sur. Co., 723 A.2d 1138 (R.I. 1999).

B. Allocation Among Insurers

The Rhode Island Supreme Court has addressed multiple insurer coverage disputes. Implicit in all of the opinions are a concern for assisting an insured as expeditiously as possible and a disdain for resolving conflicts between boilerplate insurance provisions that seek to limit liability for the
insurers. Pursuant to Ferreira v. Mello, 811 A.2d 1175 (R.I. 2002), not all disputes will be resolved simply by resorting to the pro rata method. For example, if the policies can be applied in the manner that they were bargained for; the Court does not need to interfere. Pursuant to Brown v. Travelers Ins. Co., 610 A.2d 127 (R.I. 1992), when the policies, if enforced, would be irreconcilable with each other and a forfeiture of coverage for the insured would result, the pro rata method will be employed. Finally, when there is a coverage dispute between more than one policy, and each policy would provide primary coverage but for the existence of the other policy, the responsibility is allocated on a pro rata basis, according to the rule set forth in Hindson v. Allstate Ins. Co., 694 A.2d 682 (R.I. 1997). Therefore, in sum, pro rata apportionment of responsibility has been used when it is needed to resolve disputes, but it is not necessarily used in all cases.

IX. CONTRIBUTION ACTIONS

A. Claim in Equity vs. Statutory

Rhode Island enacted a right of contribution among joint tortfeasors through statute when it adopted the Uniform Contribution Among Joint Tortfeasors Act in 1940. R.I. Gen. Laws 10-6 et seq. Liability is allocated in accordance with a tortfeasor's pro rata share of liability. The pro rata share of liability is determined by assessing each tortfeasor's relative degree of fault. A joint tortfeasor's settlement with a plaintiff without properly drafted release bars claims for contribution. However, any judgment against a non-settling tortfeasor is reduced by the amount of the settlement or the settling tortfeasor's pro rata share of liability, whichever is greater.

There also exists the common law right of indemnity, in which a person or entity who is without fault, is compelled to pay damages due to the negligence of another. Hawkins v. Gadoury, 713 A.2d 799, 803 (R.I. 1998).

B. Elements

“[C]ontribution seeks to allocate fault proportionally among joint tortfeasors.” Hawkins, 713 A.2d at 803. A cause of action for contribution is a separate and distinct action from the underlying tort. Id. The statute of limitations applying to tort actions does not apply to the contribution action.

X. DUTY TO SETTLE

Insurers have a duty beyond acting in good faith. “An insurance company’s fiduciary obligations include a duty to consider seriously a plaintiff’s reasonable offer to settle within the policy limits. Accordingly, if it has been afforded reasonable notice and if a plaintiff has made a reasonable written offer to a defendant’s insurer to settle within the policy limits, the insurer is obligated to seriously consider such an offer.” Asermely b. Allstate Ins. Co., 728 A.2d 461, 464 (R.I. 1999).

“If the insurer declines to settle the case within the policy limits, it does so at its peril in the event that a trial results in a judgment that exceeds the policy limits, including interest.” Id. The insurer is liable for the amount that exceeds the policy limits, unless the insurer can
demonstrate that the insured was unwilling to accept the offer of settlement. *Id.*; see also R.I. Gen. Laws 27-2-2.2.

“The insurer’s duty is a fiduciary obligation to act in the best interest of the insured. Even if the insurer believes in good faith that it has a legitimate defense against the third party, it must assume the risk of miscalculation if the ultimate judgment should exceed the policy limits.” *Id.*