I. REGULATORY LIMITS ON CLAIMS HANDLING

A. Timing for Responses and Determinations

The Vermont Department of Financial Regulation ("DFR")\(^1\) has issued regulations for fair claims practices, including timing requirements. An insurer or its agent who has a claim shall mail or orally acknowledge receipt of the claim notice directly to the claimant within ten working days. An insurer shall make appropriate written or oral reply within ten working days to any communications from the claimant to address any communication raised by the claimant.

Within fifteen working days after receipt by the insurer of a properly executed proof of loss, the first party claimant shall be advised of the acceptance or denial of the claim by the insurer. The insurer must specify the provision, condition, or exclusion in the policy relied upon in the denial, and must be given to the claimant in writing. The insurer shall retain a copy of the denial in the claim file. If an insurer needs more time to determine whether a first party claim should be accepted or denied, it shall notify the claimant within fifteen working days that more time is needed. If more time is needed to determine a third party claim, the insurer shall notify the third party within thirty working days after receipt of notice that more time is needed. If the investigation remains incomplete, the insurer shall, thirty days from the date of the initial notification and every thirty days thereafter send to such claimant a letter setting forth the reason additional time is needed for investigation. Regulation 79-2, Sept. 1, 1979 [http://www.dfr.vermont.gov/sites/default/files/REG-I-79-02.pdf].

B. Standards for Determinations and Settlements

According to Vermont law, unfair claim settlement practices include unfair methods of competition or unfair or deceptive acts or practices in the business of insurance. 8 V.S.A. §§ 4724(9). "Unfair claim settlement practices" can be any of the following:

(A) misrepresenting pertinent facts or insurance policy provisions relating to coverage at issue;

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\(^1\) The Department of Financial Regulation was known as the Department of Banking, Insurance, Securities and Health Care Administration (BISCHA) until 2012. Any reference herein to DFR shall refer to the Department and any of its former monikers.
(B) failing to acknowledge and act reasonably promptly upon communications with respect to claims arising under insurance policies;
(C) failing to adopt and implement reasonable standards for the prompt investigation of claims arising under insurance policies;
(D) refusing to pay claims without conducting a reasonable investigation based upon all available information;
(E) failing to affirm or deny coverage of claims within a reasonable time after proof of loss statements have been completed;
(F) not attempting in good faith to effectuate prompt, fair, and equitable settlements of claims in which liability has become reasonably clear;
(G) attempting to settle a claim for less than the amount to which a reasonable person would have believed he or she was entitled by reference to written or printed advertising material accompanying or made a part of the application;
(H) attempting to settle claims on the basis of an application which was altered without notice to, or knowledge or consent of the insured;
(I) making claim payments to insureds or beneficiaries not accompanied by a statement setting forth the coverage under which the payments are made;
(J) making known to insureds or claimants a policy of appealing from arbitration awards in favor of insureds or claimants for the purpose of compelling them to accept settlements or compromises less than the amount awarded in arbitration;
(K) delaying the investigation or payment of claims by requiring an insured, claimant, or the physician of either to submit a preliminary claim report and then requiring the subsequent submission of formal proof of loss forms, both of which submissions contain substantially the same information;
(L) failing to promptly settle claims where liability has become reasonably clear under one portion of the insurance policy coverage in order to influence settlements under other portions of the insurance policy coverage;
(M) failing to promptly provide a reasonable explanation on the basis in the insurance policy in relation to the facts or applicable law for denial of a claim or for the offer of a compromise settlement.

Id. The regulations further provide that all claim payments should include an explanation for the basis of the payment (for example, explanation of deduction or depreciations, deductibles, or co-insurance.) Where liability has become reasonably clear, an insurer is prohibited from withholding payment under one portion of a liability claim in order to including settlement of another liability claim. Regulation 79-2, Sept. 1, 1979 http://www.dfr.vermont.gov/sites/default/files/REG-I-79-02.pdf.

II. PRINCIPLES OF CONTRACT INTERPRETATION

Vermont follows three primary rules for construction of insurance contracts: “(1) insurance contracts must be interpreted according to their terms and the evident intent of the parties, as gathered from the contract language; (2) any ambiguity in policy language should be resolved in favor of the insured since the insurer is in a better position to avoid the ambiguity; and (3) while insurance policies are to be strictly construed against the insurer, it is not to be deprived of unambiguous provisions placed in a policy for its benefit.” Peerless Ins. Co. v. Wells, 154 Vt. 491, 494, 580 A.2d 485, 487 (1990) (internal citations and quotations omitted).
III. CHOICE OF LAW

Generally, Vermont courts apply the law of the state with the most significant relationship to occurrence and to the parties. Myers v. Langlois, 168 Vt. 432, 434, 721 A.2d 129, 130 (1998); Miller v. White, 167 Vt. 45, 47, 702 A.2d 392, 393 (1997). In applying the “significant relationship test”, courts look to principles set forth in Restatement (2nd) of Conflict of Laws § 6(2)(a)-(g) (1971). Myers, 168 Vt. at 434, 721 A.2d at 130. Depending on the area of law involved, some factors of § 6 carry more weight than others. Id. at 435.

IV. EXTRACONTRACTUAL CLAIMS AGAINST INSURERS: ELEMENTS AND REMEDIES

A. Bad Faith

For first-party bad faith claims, a plaintiff must show that (1) the insurance company had no reasonable basis to deny benefits of the policy, and (2) the company knew or recklessly disregarded the fact that no reasonable basis existed for denying the claim. Bushey v. Allstate Ins. Co., 164 Vt. 399, 402, 670 A.2d 807, 810 (1995). An insurance company may challenge claims that are “fairly debatable” and will be found liable only where it has been intentionally denied (or failed to process or pay) a claim without a reasonable basis. Id.; Town of Ira v. Vt. League of Cities & Towns, 2014 VT 115 ¶ 21. It is not bad faith to deny coverage in circumstances where the policy provides no coverage. Blake v. Nationwide Ins. Co., 2006 VT 48, ¶ 22, 904 A.2d 1071, 1080; Serecky v. National Grange Mut. Ins., 177 Vt. 58, 857 A.2d 775 (2004). A liability insurer that has properly denied coverage has no duty to the insured to disclose that different claims might trigger coverage. Vermont Ins. Mgmt., Inc. v. Lumbermens' Mut. Cas. Co., 171 Vt. 601, 605 (2000).

For liability-policy bad faith claims the liability insurer in control of a defense is held to the standard of a fiduciary. Johnson v. Hardware Mutual Casualty Co., 109 Vt. 481, 490-91, 1 A.2d 817, 820 (1938). Vermont has long recognized a claim by an insured for bad faith against a liability carrier for unreasonably exposing the insured to an excess verdict. Id.; Myers v. Ambassador Ins. Co., 146 Vt. 552, 508 A.2d 689 (1986). These cases are based on “the insurance company’s control of the settlement of a claim brought against the insured” and the necessary conflict of interest that it creates. Myers, 146 Vt. at 555, 508 A.2d at 690.

In Myers the court explained the standard is a high one:

When investigating and considering a settlement offer, the insurer must in good faith take into account the interests of the insured, and will be held liable for a judgment in excess of the policy limits if it intentionally disregarded “the financial interests of [the insured] in the hope of escaping the full responsibility imposed upon it by its policy.” Johnson at 491, 1 A.2d at 820. Good or bad faith is a state of mind, provable by circumstantial as well as direct evidence. Id. 109 Vt. at 494, 1 A.2d at 822.
... The insurer’s fiduciary duty to act in good faith when handling a claim against the insured obligates it to take the insured’s interests into account. The company must diligently investigate the facts and the risks involved in the claim, and should rely only upon persons reasonably qualified to make such an assessment. If demand for settlement is made, the insurer must honestly assess its validity based on a determination of the risks involved. In addition, and more pertinent to this case, the insurer must fully inform the insured of the results of its assessment of the risks, including any potential excess liability, and convey any demands for settlement which have been made. “[T]he insurer ‘must be careful to give its insured full and accurate information as to settlement possibilities,’” for full disclosure allows the insured to assess whether he should move to protect his interests.

The insurer’s duty to protect the insured is ongoing, and the insurer must inform the insured of significant developments as they arise.

146 Vt. at 555–57 (some citations omitted; footnotes omitted).

B. Fraud

An action for fraud and deceit will lie upon an intentional misrepresentation of existing fact, affecting the essence of the transaction, so long as the misrepresentation was false when made and known to be false by the maker, was not open to the defrauded party’s knowledge, and was relied on by the defrauded party to his damage.” Union Bank v. Jones, 138 Vt. 115, 121, 411 A.2d 1338, 1342 (1980); see also Bennington Housing Auth. v. Bush, 2007 VT 60, ¶ 8, 182 Vt. 133, 933 A.2d 207. Proof that the defendant had actual knowledge of the falsity of the representation is unnecessary if defendant makes a statement in reckless disregard of whether it is true or false. Follo v. Florindo, 2009 VT 11 ¶¶ 29, 30, 970 A.2d 1230. An action for fraud will also lie for failure to disclose a material fact by one with a duty to disclose. Ianelli v. U.S. Bank, 2010 VT 34, ¶ 14, 996 A.2d 722; Sugarline Assocs. v. Alpen Assocs., 155 Vt. 437, 586 A.2d 1115 (1990); White v. Pepin, 151 Vt. 413, 416, 561 A.2d 94, 96 (1989).

Vermont Rules of Civil Procedure require that the circumstances constituting alleged fraud must be stated with particularity. V.R.C.P. 9 (b). Each of the elements must be proved by clear and convincing evidence. Poulin v. Ford Motor Co., 147 Vt. 120, 125, 513 A.2d 1168, 1172 (1986); but cf. Sarvis v. Vermont State Colleges, 172 Vt. 76, 772 A.2d 494 (2001) (“unlike a fraud action seeking damages in tort, a party seeking to rescind a fraudulently induced contract is not required to prove its case by clear and convincing evidence.”) Although parties to a commercial transaction can generally exculpate one another from negligence, an exculpatory clause in a commercial lease, that the owner shall not be held liable for any damages to or loss of property from any cause whatsoever, is ineffective to bar fraud, negligent misrepresentation, and consumer fraud claims. Puro v. Neil Enters., Inc., 2009 VT 95, ¶ 12-15, 186 Vt. 601, 987 A.2d 935 (mem.).
C. **Intentional Infliction of Emotional Distress and/or Outrage**

Vermont does not recognize a claim for mere negligent infliction of emotional distress, unless accompanied by some physical harm or threat of physical harm. Goodby v. Vetpharm, Inc., 2009 VT 52, 974 A.2d 1269; Vincent v. DeVries, 2013 VT 34 ¶ 12, 193 Vt. 574, 579-580; 72 A.3d 886, 891; Vaillancourt v. Medical Ctr. Hosp. of Vermont, 139 Vt. 138, 143, 425 A.2d 92, 95 (1980); Guilmette v. Alexander, 128 Vt. 116, 117-119, 259 A.2d 12, 13-14 (1969); Savard v. Cody Chevrolet, Inc., 126 Vt. 405, 410, 234 A.2d 656, 660 (1967). To recover for negligence a claimant who has not suffered a physical impact from an external force must make a threshold showing that: 1) he was within the "zone of danger" of an act negligently directed at him by defendant, 2) he was subjected to a reasonable fear of immediate personal injury, and 3) he in fact suffered substantial bodily injury or illness as a result. Brueckner v. Norwich University, 169 Vt. 118, 125, 730 A.2d 1086, 1092 (1999); DeVries, 2013 VT 34, ¶ 12, n 2.


The Vermont Supreme Court has placed the responsibility on trial courts to acting as gatekeeper with respect to intentional emotional distress claims.

As a threshold issue, the trial court must determine whether the conduct was so extreme and outrageous that a jury could reasonably find liability. ... The standard necessary for establishing "outrageous" conduct is necessarily a high one. The conduct must be "so outrageous in character and so extreme in degree, as to go beyond all possible bounds of decency and ... be regarded as atrocious, and utterly intolerable in a civilized community." Denton v. Chittenden Bank, 163 Vt. 62, 66, 655 A.2d 703, 706 (1994) (quoting Restatement (Second) of Torts § 46 cmt.d (1965)); see Cate v. City of Burlington, 2013 VT 64, 194 Vt. 265; 79 A.3d 854 (merely disciplining an employee is insufficient to support an IIED claim, employee must show termination evinces oppressive conduct and abuse of a position of authority); Schwartz v. Frankenhoff, 169 Vt. 287, 733 A.2d 74 (1999) (allegations that lawyers demanded payment from debtors who could not pay "fall far short of showing the elements of intentional infliction of emotional distress); Farnum v. Brattleboro Retreat, 164 Vt. 488, 671 A.2d 1249 (1995) (summoning an employee of sixteen years on his day off by emergency beeper and firing him without warning in a three-minute meeting without giving a reason does not amount to extreme and outrageous conduct); But see Crump v. P & C Food Mkts., Inc., 154 Vt. 284, 296, 576 A.2d 441, 448 (1990) (affirming denial of defendant’s motion for directed verdict and jury verdict for Plaintiff on IIED claim when employee summarily fired after being falsely accused of theft, brought to a 3-hour meeting with no notice, given no opportunity to leave and coerced to sign a confession).
D. State Consumer Protection Laws, Rules and Regulations

The Vermont Consumer Protection Act prohibits “unfair or deceptive acts or practices in commerce,” 9 V.S.A. § 2453(a). It authorizes the “consumer” to recover damages caused by the violation, reasonable attorney’s fees, and exemplary damages not exceeding three times the value of the consideration. 9 V.S.A. § 2461(b). The Act defines “consumer” to include businesses with respect to purchases of goods or services made for the business, as opposed to goods or services purchased for resale. 9 V.S.A. § 2451a(a). It is an open question whether the Act applies to insurance transactions. Compare Wilder v. Aetna Life & Cas. Ins. Co., 140 Vt. 16, 433 A.2d 309 (1981) with Greene v. Stevens Gas Service, 2004 VT 67, ¶ 10, 177 Vt. 90, 858 A.2d 238.


To establish a “deceptive act or practice” under the Act requires three elements: (1) there must be a representation, omission, or practice likely to mislead consumers; (2) the consumer must be interpreting the message reasonably under the circumstances; and (3) the misleading effects must be material, that is, likely to affect the consumer’s conduct or decision regarding the product. PH West Dover Prop. v. Lalancette Eng’rs, 2015 VT 48, ¶ 11, Vastano v. Killington Valley Real Estate, 2007 VT 33, ¶ 7, 182 Vt. 550, 929 A.2d 720.

Plaintiff does not have to be a direct purchaser to sue. Elkins v. Microsoft Corp., 174 Vt. 328, 817 A.2d 9 (2002). The defendant, however, must be a seller, solicitor, or other violater under the act. Madowitz v. Woods at Killington Owners’ Ass’n, 2014 VT 21, 93 A.3d 571 (2014). Deception is measured by an objective standard, looking to whether the representation or omission had the “capacity or tendency to deceive” a reasonable consumer; actual injury need not be shown. Bisson v. Ward, 160 Vt. 343, 351, 628 A.2d 1256, 1261 (1993). Materiality is also generally measured by an objective standard, premised on what a reasonable person would regard as important in making a decision. Carter v. Gugliuzzi, 168 Vt. 48, 716 A.2d 17 (1998).

Under the Consumer Protection Act, a private cause of action exists not only when a consumer “contracts for goods or services” but also when a consumer sustains damages or injury as a result of any prohibited false or fraudulent representations or practices. 9 V.S.A. § 2461(b). However, mere breach of contract is not actionable under the Consumer Protection Act. Poti Fuels, Inc. v. Kurrle Corporation, 2013 VT 111; 95 Vt. 524; 90 A.3d 885 (2013); Winey v. William E. Dailey, Inc., 161 Vt. 129, 136, 636 A.2d 744, 749 (1993).

The breach of contract exception applies to coverage denials. In Greene v. Stevens Gas Service, 2004 VT 67, 177 Vt. 90, 858 A.2d 238, an insured sued a homeowners’ insurer to recover for breach of contract, consumer fraud, and
bad faith in connection with the denial of a claim for damage to his home. The Vermont Attorney General, as friend of the court, argued that after 1985 amendments, the Consumer Fraud Act applies to insurance, notwithstanding Wilder v. Aetna Life & Cas. Ins. Co., 140 Vt. 16, 433 A.2d 309 (1981). Without deciding if the Consumer Fraud Act now applies to insurance, the Supreme Court held the insured had not shown consumer fraud. A denial of coverage cannot be consumer fraud, because it is akin to a mere breach of contract that is not sufficient to show consumer fraud. Greene, 2004 VT 67 ¶15, 177 Vt. at 97.

See also the Insurance Trade Practices Act, 8 V.S.A. §§ 4721-4726, and Reg. 79-2.

E. State Class Actions

Vermont has a class action rule that mirrors Fed.R.Civ.Proc. 23.1. There is limited case law construing it. E.g. Wright v. Honeywell Int'l, Inc., 2009 VT 123, 187 Vt. 123, 989 A.2d 539 (in antitrust case under the Vermont Consumer Fraud Act, it was error to deny class certification by essentially requiring plaintiff's expert to prove plaintiff's case at the certification stage); Salatino v. Chase, 2007 VT 81, 182 Vt. 267, 939 A.2d 482 (affirming denial of limited-fund class-certification, and reversing decision to provide notice of the class-certification denial to putative class members).

F. State Privacy Laws, Rules and Regulations

1. Criminal Sanctions

The Commissioner of the Department of Financial Regulation has the power to order any person to cease violation of a lawful regulation. 8 V.S.A. § 11601. Vermont law provides for criminal penalties for negligent and willful violations of an order of the Commissioner. 8 V.S.A. § 11603.

2. The Standards for Compensatory and Punitive Damages

Where the exact computation of damages cannot be calculated, a court’s award will withstand review on appeal if the award is not grossly excessive. Coty v. Ramsey Assocs., Inc., 149 Vt. 451, 461, 546 A.2d 196, 203 (1988) (citing Birkenhead v. Coombs, 143 Vt. 167, 173, 465 A.2d 244, 247 (1983)). The trial court must give a clear statement of method used in assessing damages and the weight given to the various factors in its analysis. Id. 149 Vt. At 460, 546 A.2d at 202.

“Punitive damages require a showing of essentially two elements. The first is wrongful conduct that is outrageously reprehensible. ... The second is malice, defined variously as bad motive, ill will, personal spite or hatred, reckless disregard, and the like.” Fly Fish Vt., Inc. v. Chapin Hill Estates, Inc., 2010 VT 33 ¶18, 187 Vt. 541, 548, 996 A.2d 1167, 1173 (internal citations omitted).

3. Insurance Regulations to Watch

None at this time.
4. **State Arbitration and Mediation Procedures**

The Vermont Arbitration Act ("VAA") allows for agreements to arbitrate disputes, with the exception of cases where a person is litigating their civil or constitutional rights. ("Unless otherwise provided in the agreement, a written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties creates a duty to arbitrate, and is valid, enforceable and irrevocable, except upon such grounds as exist for the revocation of a contract.") 12 V.S.A. §§ 5652(a),5653(b). In order for an arbitration clause to be valid, the agreement must be accompanied by a written acknowledgement of arbitration. 12 V.S.A. §§ 5652(b). The language of a proper acknowledgement is found in the statute.

The VAA is generally consistent with the Federal Arbitration Act ("FAA"), which provides that an arbitration agreement shall be "...valid, irrevocable, and enforceable..." To the extent that the VAA is inconsistent with the FAA, the FAA preempts the VAA in cases of maritime transactions or transactions involving foreign commerce. Little v. Allstate Ins. Co., 167 Vt. 171, 172, 705 A.2d 538, 540 (1997).

The VAA does not apply in contracts of insurance. 12 V.S.A. § 5653)(a). "The effect of this provision is to leave the law governing such arbitration agreements to the common law, which allows revocation of such an agreement at any time up to the publication of an award." Little v. Allstate Ins. Co., 167 Vt. 171, 172, 705 A.2d 538, 540 (1997) (internal citations omitted). It is worth noting that the common law may be subject to change, particularly in light of Vermont’s inclination to allow arbitration of disputes.

5. **State Administrative Entity Rule-Making Authority**

The Commissioner of Financial Regulation is empowered to adopt rules and orders as shall be authorized or necessary. 8 V.S.A § 15. The Commissioner is also authorized to issue written advisory opinions, whether or not requested by any persons. These interpretations are presumed to be correct unless found to be clearly erroneous by a court of competent jurisdiction. Id.

V. **DEFENSES IN ACTIONS AGAINST INSURERS**

A. **Misrepresentations/Omissions: During Underwriting or During Claim**

Misrepresentations are grounds for declaring policy void if there is a nexus between the false statements and the decision to issue the policy. McAllister v. Avemco Ins., 148 Vt. 110, 528 A.2d 758 (1987). The statute provides: "The falsity of a statement in the application for a policy covered by such provisions shall not bar the right to recovery thereunder unless such false statement was made with actual intent to deceive or unless it materially affected either the acceptance of the risk or the hazard assumed by insurer." 8 V.S.A. § 4205. The focus under this section is on the nexus between the false statement and the insurer’s decision to issue a policy, not between the false statement and the ultimate loss.

An insurer may also avoid coverage obligations because of an insured's failure to cooperate during the handling of the claim, but only if the
insured's noncooperation actually prejudices the insurer's defense of the underlying claim. See American Fidelity Co. v. Kerr, 138 Vt. 359, 362, 416 A.2d 163, 165 (1980); cf. Progressive Ins. Co. v. Wasoka, 2005 VT 76 (belated noncooperation argument rejected because it was initially presented only as part of unsuccessful defense of fraud in the inducement).

B. Preexisting Illness or Disease Clauses

The Vermont Supreme Court has affirmed DFR's refusal to approve a life insurance policy because it excluded coverage for death from cancer, cardiovascular disease, and conditions related to AIDS. DFR acted under a statute allowing it to disallow policies with deceptive terms, stating that "consumers of life insurance policies expect to be covered as long as they do not commit suicide." In re UNUM Life Ins. Co., 162 Vt. 201, 207, 647 A.2d 708, 712 (1994).

Federal law limiting preexisting condition exclusions in health insurance has been incorporated by reference into Vermont statutes. 8 V.S.A. § 4062c. A variety of other statutes regulate limitations on coverage of preexisting conditions in health insurance and long term care insurance plans.

C. Statutes of Limitations and Repose


VI. BENEFICIARY ISSUES

A. Change of Beneficiary

In change-of-beneficiary cases, literal compliance with the terms of the policy are not required to effectuate change; substantial compliance is deemed sufficient. Messier v. Metro. Life Ins. Co., 154 Vt. 406, 409-10, 578 A.2d 98, 100 (1990) (internal citations omitted). In Messier, the Vermont Supreme Court adopted a rule for substantial compliance that the change of beneficiary must be shown by intent, accompanied by a reasonable effort to change the beneficiary. Id.

B. Effect of Divorce on Beneficiary Designation

Vermont does not have a statute regarding the effect of divorce on beneficiary designation, nor has the Vermont Supreme Court ruled directly on the issue. Likely, the “substantial compliance” test, as articulated in

VII. INTERPLEADER ACTIONS

A. Availability of Fee Recovery

Vermont Rule of Procedure 22 governs interpleader actions. The Rule does not provide for fee recovery.

B. Differences in State vs. Federal

V.R.C.P 22 mirrors the content of to F.R.C.P 22(a)(1) and(a)(2).