I. REGULATORY LIMITS ON CLAIMS HANDLING

A. Timing for Responses and Determinations

The Vermont Department of Financial Regulation ("DFR") 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 monikera.
(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.

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

The Vermont DFR has issued privacy regulations for insurance providers as required under the federal Gramm Leach Bliley Act. Whereas federal Gramm Leach Bliley Act has an “opt-out” for sharing information about insureds, the Vermont regulations have an “opt-in” requirement under which insureds must affirmatively consent to the release of information about them. Regulation IH-2001-01, Privacy of Consumer Financial and Health Information Regulation. http://www.dfr.vermont.gov/sites/default/files/REG-IH-01-01.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. DUTIES IMPOSED BY STATE LAW

A. Duty to Defend

1. Standard for Determining Duty to Defend

An insurer’s duty to defend arises “whenever it is clear that the claim against the insured might be of the type covered by the policy.” Garneau v. Curtis & Bedell, Inc., 158 Vt. 363, 366, 610 A.2d 132, 134 (1992) (citing 7C J. Appleman, Insurance Law & Practice § 4684.01, at 99 (1979) (“duty to defend exists if the claim potentially comes within the policy”)). The existence of the duty is determined by comparing the allegations in the underlying suit to the terms of the coverage in the policy. City of Burlington v. Nat’l Union Fire Ins. Co., 163 Vt. 124, 127, 655 A.2d 719, 721 (1994) (internal citations omitted). Courts will resolve any ambiguity in the insurance contract in favor of the insured, however, the contract will be interpreted according to its terms and the parties’ evident intent. Garneau, 158 Vt. at 366. (internal citations omitted).

There might be circumstances in which an insurer may base its coverage (duty to defend) decision on matters outside the complaint. For example, if an exclusion is triggered by facts that would not have to be determined in the underlying claim against the insured, then the insurer may rely on extraneous evidence for its coverage determination. See Blake v. Nationwide Ins. Co., 2006 VT 48, 180 Vt. 14, 904 A.2d 1071. In Blake, the policy excluded bodily injury resulting from the insured’s operation of a motor vehicle in the course of employment. Whether the insured was operating the vehicle in the course of employment was irrelevant to plaintiff’s claim against the insured, so the insurer could rely on evidence other than the complaint to determine that the insured was operating the vehicle in the course of employment, and to conclude that the policy did not apply to the claim.
2. Issues with Reserving Rights


V. EXTRACONTRACTUAL CLAIMS AGAINST INSURERS: ELEMENTS AND REMEDIES

A. Bad Faith

1. First Party

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).

2. Third-Party


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

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2 The Act was formerly called the Consumer Fraud Act. Any reference herein to Consumer Protection shall mean the Act and any of its former names.

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 1115 (2000) (“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 or Negligent Infliction of Emotional Distress

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. Foti 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.

VI. DISCOVERY ISSUES IN ACTIONS AGAINST INSURERS

A. Discoverability of Claims Files Generally

The Vermont Supreme Court has not ruled on the discoverability of the claims file, and therefore it is still an open question of law in Vermont. In one trial court decision, H.P. Cummings Const. Co., Inc. v. East Shore Drywall, Inc., 1495-06 CnC, Jul. 14, 2008 (Katz, J.), the court denied discovery of thirteen pages of Defendant’s insurance adjuster’s notes, including communications with in-house counsel. Based on the language of V.R.C.P. 26 and V.R.E. 502, the trial court found that adjuster claim files, especially those containing communications with in-house counsel, are protected from discovery by the attorney work product doctrine and the attorney-client privilege. This case is not binding on Vermont trial courts.

B. Discoverability of Reserves

The Vermont Supreme Court has not ruled on the discoverability of reserves. This is an open question of law in Vermont.
C. **Discoverability of Existence of Reinsurance and Communications with Reinsurers**

Pursuant to V.R.C.P.26(b)(2), “[a] party may obtain discovery of the existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered or to indemnify or reimburse for payments made to satisfy the judgment.” The insurance application is not treated as part of an “insurance agreement.”

D. **Attorney/Client Communications**

Vermont’s Lawyer-Client privilege states: “A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client (1) between himself or his representative and his lawyer or his lawyer's representative, (2) between his lawyer and the lawyer's representative, (3) by him or his representative or his lawyer, or a representative of the lawyer to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein, (4) between representatives of the client or between the client and a representative of the client, or (5) among lawyers and their representatives representing the same client.” V.R.E. 502.

The Vermont Supreme Court has not ruled whether an insurer is a “representative” of the lawyer, V.R.E. 502(b)(3), or a “representative of the client” pursuant to V.R.E. (b)(4). As mentioned, at least one trial court has explained that V.R.E. 502 could extend to communications between the insurer and insured, based on the reasoning that “the insurance company is required to take statements from its insureds to prepare a defense, and is normally required to provide defense counsel to the insured as part of its coverage. Any statements made by the insured in this context are in essence communications intended for defense counsel.” H.P. Cummings Const. Co., Inc. v. East Shore Drywall, Inc., 1495-06 CnC, Jul. 14, 2008 (Katz, J.) (quoting Dennis v. State Farm Ins. Co., 757 N.E.2d 849, 854 (Ohio App. 2001)).

VII. **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. Failure to Comply with Conditions


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

Vermont law requires each insurance policy issued and delivered in the State shall, in substance, contain a “no action” clause, stating that “no action shall lie against the [insurer] to recover for any loss under [the] policy, unless brought within one year after the amount of such loss is made certain either by judgment against the insured after final determination by the litigation or by agreement between the parties with the written consent of the [insurer.]” 8 V.S.A. § 4203(2).

D. Statutes of Limitation


VIII. TRIGGER AND ALLOCATION ISSUES FOR LONG-TAIL CLAIMS

A. Trigger of Coverage

In a case involving environmental damage by way of pollution which had occurred during several policy periods of occurrence policy, the Vermont Supreme Court adopted the “continuous trigger” theory. Towns v. N. Sec. Ins. Co., 2008 VT 98, 184 Vt. 322, 964 A.2d 1150 (rejecting manifestation trigger). The “continuous trigger” theory “recognizes coverage for... damage that occurs continuously from the date of exposure or initial injury through successive policy periods even if the damage is not manifested until after the policy has expired.” Id.

B. Allocation Among Insurers
Applying the continuous trigger theory to a pollution claim, the Vermont Supreme Court has held that insurers share responsibility based on their respective “time on the risk” relative to the number of years coverage was triggered. *Bradford Oil Co. v. Stonington Ins. Co.*, 2011 VT 108, 190 Vt. 330, 54 A.3d 983 (rejecting joint and several liability).

**IX. CONTRIBUTION ACTIONS**

**A. Claim in Equity vs. Statutory**

Vermont has no statute governing contribution claims between insurers. Vermont does not allow contribution among joint tortfeasors. A claim for contribution by one insurer against another insurer that is claimed to be jointly liable for a claim is governed by general equitable principles. *Miller v. Sawyer*, 30 Vt. 412, 417 (1858)

**B. Elements**

While Vermont law does not have any case law regarding contribution per se in an insurance contract, it does recognize contribution in other areas. See *Bellows v. Blake*, 106 Vt. 204, 170 A. 906, 907 (1934) (“When one joint maker of a note is required to pay the whole amount due on the note, he is entitled to recover contribution from his co-maker on a count for money paid.”); *Mills v. Hyde*, 19 Vt. 59, 64 (1846) (“The liability of co-sureties and joint contractors to each other is said not to be founded on contract, but to be the result of the fixed principle of justice, that those, who have a common interest and benefit, ought to share in the common burden; and it is on the ground of an equitable obligation to pay money, that the law raises an implied promise of contribution. The equitable obligation to share in the loss occasioned by the inability of one co-surety to contribute is just as strong, as that which arises on the failure of the principal to pay; and the promise may as well be implied in the one case, as the other.”) The courts would likely be guided by these principles in construing contribution in an insurance contact.

**X. DUTY TO SETTLE**