

NEW JERSEY

I. REGULATORY LIMITS ON CLAIMS HANDLING

A. Timing for Responses and Determinations

The New Jersey Unfair Claim Settlement Practices Act, N.J.S.A. 17B:30-13.1 (2013) regulates unfair practices in the insurance industry and states that “failing to acknowledge and act reasonably promptly upon communications with respect to claims arising under insurance policies” would constitute an unfair practice. However, the Act does not provide for the right to file a private right of action. Absent an express right of action “courts have been reluctant to infer a statutory right of action.” *In re N.J. Firemen’s Ass’n Obligation to Provide Relief Applications under Open Pub. Records Act*, 445 N.J. Super. 238, 258 (Super. Ct. App. Div. 2015). Rather, the court should apply a three-part test which would consider if: “(1) plaintiff is a member of the class for whose special benefit the statute was enacted; (2) there is any evidence that the Legislature intended to create a private right of action under the statute; and (3) it is consistent with the underlying purposes of the legislative scheme to infer the existence of such a remedy.” *Id.*

In 2018, the Third Circuit came down with a key decision ruling that New Jersey’s Consumer Fraud Act applied to both the sale of insurance and claims-handling. The case, *Alpizar-Fallas*, stems from an automobile accident and addresses the issues of misconduct and bad faith on the part of the insurance company. An agent from the insurer required the insured to execute documents fraudulently claiming that the insurer would accelerate the claims process. However, the agent withheld pertinent information from the insured in that the documentation effectively released the other driver in the accident from liability, whom was also insured by the insurer. *Alpizar-Fallas*, 908 F. 3d 910 (3d Cir. 2018). This has led to the proposed New Jersey Insurance Fair Conduct Act which, if passed, would provide for a private cause of action for an unreasonable delay in either denying or paying a claim.

With respect to damages following an action against an insurer, New Jersey Court Rule 4:42-9(a) (6) governs awards of attorney’s fees in connection with claims against insurance policies. *212 Marin Blvd., LLC v. Chi. Title Ins. Co.*, No. HUD-L-5801-09, slip op. at 5 (NJ. Super. Ct. Law Div. Jan. 8, 2013) (citing *City of Englewood v. Exxon Mobile Corp.*, 406 N.J. Super. 110, 123 (App. Div. 2009) (internal citations omitted)). Rule 4:42-9(a) (6) permits the award of attorneys’ fees in favor of a successful claimant in an insurance coverage dispute involving liability or indemnity coverage (third-party coverage). See, e.g., *Selective Ins. Co. v. Hojnoski*, 317 N.J. Super. 331, 337 (App. Div. 1998); *Barnett v. Prudential Property & Casualty Co.*, 304 N.J. Super. 573, 578 (App. Div. 1997), certif. denied, 154 N.J. 610 (1998); See also *C.M.S. Inv. Ventures, Inc. v. Am. Eur. Ins. Co.*, No. A-2056-17t3, 2019 WL 2266674, at *5 (App. Div. May 28, 2019); See also

Cooper Hos. Univ. Med. Ctr. By Mecouch v. Selective Ins. Co. of Am., A-0603-19T1, 2020 WL 6778568 (App. Div. Nov. 18, 2020). Attorneys' fees are also available under Rule 4:42-9(a)(6) when the insured successfully prosecutes a separate declaratory judgment action seeking a judicial decree as to the existence of coverage, even if the underlying action terminates in the interim without the insured having gone out-of-pocket to defend or settle the underlying action. *J. Fletcher Creamer & Son, Inc. v. Pennsylvania Mfrs Assoc. Ins. Co.*, No. A-0470-08T3, 2009 NJ Super. Unpub. LEXIS 2106, at **13-14 (App. Div. Aug. 4, 2009). Rule 4:42-9(a) (6) attorneys' fees are also available for attorneys' fees incurred in related litigation in a foreign forum. *Myron Corp. v. Atl. Mut. Ins. Corp.*, 407 N.J. Super. 302, 305 (2009), aff'd, 203 N.J. 537 (2010). However, attorneys' fees under Rule 4:42-9(a) (6) are not available for a policy beneficiary that successfully litigates against an insurer if the beneficiary paid the premium and owned the policy in question. *Shore Orthopaedic Group v. Equitable Life Assurance Soc. of U.S.*, 397 N.J. Super. 614, 625-26 (App. Div. 2008), aff'd, 199 N.J. 310 (2009).

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).

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. There are several actions by an insurer that would constitute unfair claim settlement practices, some of which include the failure to pursue and prompt investigation, the failure to pursue in good faith the settlement of that claim or failure to provide a reasonable explanation of the basis of the denial of a claim or for the offer of a compromise settlement. *Churchill Corp. Servs., Inc. v. Rockhill Ins Co.*, A-2887-18T1, 2020 WL 2179176, at *4 n.1 (App Div. May 6, 2020).

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.*; See e.g., *Bob Meyer Communities, Inc. v. Ohio Cas. Ins. Co.*, A-4526-18T3, 2020 WL 5887025, at *4 (App. Div. Oct. 5, 2020). The insurer possesses the burden of persuasion in proving that the settlement is unreasonable. *Id.* at 365.

II. PRINCIPLES OF CONTRACT INTERPRETATION

An insurance policy is not an ordinary contract but a "contract of adhesion between parties who are not equally situated." *Pizzullo v. New Jersey Mfrs. Ins. Co.*, 196 N.J. 251, 270 (2008); see also *Evanston Ins. Co. v. A&R Homes Dev., LLC*, A-2328-17T3, 2019 WL 661587 at *4 (App. Div. Feb 19, 2019). An insurance company is considered an "expert in the field," while the prospective layman is "unversed in insurance policies and practices." *Villa v. Short*, 195 N.J. 15, 23 (2008) (internal citations omitted). Thus, courts will interpret policies broadly in favor of coverage. *Zacarias v. Allstate Ins. Co.*, 168 N.J. 590, 596 (2001).

However, in a suit involving a claims-made directors and officers insurance policy, the New Jersey Supreme Court ruled that the insured could not prevail on the theory of unequal bargaining power. *Templo Fuente de Vida Corp. v. National Union Fire Ins. Co. of Pittsburgh*, 224 N.J. 189, 2019 (N.J. 2016). The Court ruled that the insureds were "particularly knowledgeable" and purchased the policy through sophisticated brokers and as such were ruled to be on "equal footing" with the insurer. *Id.*

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 parties than they anticipated. *Id.* See also *Templo*, N.J. at 200. However, when the language of the policy will support more than one meaning, courts should "interpret the contract to comport with the reasonable expectations of the insured." *Id.* at 270-71; see also *Wakefern Food Corp. v. Lib. Mut. Ins. Co.*, 406 N.J. Super. 524, 541 (App. Div. 2009) ("[A]n ambiguous

provision must be construed favorably to the insured”) (citation omitted); *Stafford v. Scottsdale Ins. Co.*, 2010 U.S. Dist. LEXIS 365, 9 (D.N.J. Jan. 4, 2010) (“[I]nsurance-buyers should not be subject to intricate interpretations of an insurance policy.”); see also *Cooper v. CNA Ins. Co.*, A-4824-17T4, 2019 WL 5884584, at *4 (App. Div. Nov. 12, 2019), certif. denied, 241 N.J. 156 (2020). The insured should be entitled to a broad measure of protection in fulfilling these reasonable expectations and technical encumbrances should be construed liberally. *Dunkerly v. Encompass Ins. Co.*, 296 F. Supp. 3d 681, 684, 2017 U.S. Dist. LEXIS 179452, *6. See also, *Abboud v. National Union Fire Insurance Company of Pittsburgh, PA*, 163 A.3d 353, 450 N.J. Super 400 (App. Div. 2017).

An insurance contract is ambiguous “if the phrasing of the policy is so confusing that the average policyholder cannot make out the boundaries of coverage.” *Hawkins v. Globe Life Ins. Co.*, 105 F. Supp. 3d 430, 439 (D.N.J. 2015) (internal citations omitted). However, the court should not manufacture an ambiguity and no such ambiguity exists “merely because two conflicting interpretations of it are suggested by the litigants.” *Oxford Realty Group Cedar v. Travelers Excess & Surplus Lines Co.*, 229 N.J. 196, 199 (2017). In exceptional circumstances, even an unambiguous contract may be interpreted contrary to its plain meaning to effectuate the reasonable expectations of the insured. *Pizzullo*, 196 N.J. at 271; *Evanston Ins. Co. v. Crocilla*, 2012 U.S. Dist. LEXIS 181767, *5 (D.N.J. Dec. 26, 2012) (internal citations omitted).

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 (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 comports 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; see also *Cont’l Ins. Co. v. Honeywell Int’l Inc.*, 234 N.J. 23

(2018). 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 principles in environmental coverage actions, the law of the contaminated site typically governs. See, e.g., *Pfizer, Inc. v. Employers Ins. of Wausau*, 154 N.J. 187 (1998). Yet, this analysis may not readily apply to product liability actions. *NL Industr. v. Commercial Union Ins. Co.*, 65 F.3d 314, 321-323 (3d Cir. 1995).

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

The duty to defend is solely a contractual undertaking governed by the terms of the insurance contract. *Hebela v. Healthcare Ins. Co.*, 370 N.J. Super. 260, 269 (App. Div. 2004); *Horesh v. State Farm Fire & Casualty Co.*, 265 N.J. Super. 32, 38 (App. Div. 1993). The duty to defend is broader than the duty to indemnify. *Rosario ex rel. Rosario v. Haywood*, 799 A.2d 32, 40 (App. Div. 2002). An insurer has a duty to defend if any of the claims would fall within the scope of coverage. *SL Industries, Inc. v. Am. Motorists Ins. Co.*, 128 N.J. 188, 215 (1992). The insurer bears the burden of showing that an exclusion applies; as long as there exists a potentially covered claim, the duty to defend continues. *Flomerfelt v. Cardiello*, 202 N.J. 432, 456 (N.J. 2010). The insurer’s “duty to defend is determined by comparing the allegations in the complaint with the language of the policy.” *Voorhees v. Preferred Mut. Ins. Co.*, 128 N.J. 165, 173

(1992); see also *Grand Cove II Condominium Ass'n, Inc. v. Ginsberg*, 291 N.J. Super. 58, 71 (App. Div. 1996) (noting that duty to defend against claim arises only when allegation in complaint and language in policy correspond); see also *Wear v. Selective Ins. Co.*, 455 N.J. Super. 440, 453 (App. Div. 2018). Such determination should be based on a “side-by-side comparison of the policy and the complaint” and based on the nature of the claim asserted rather than specific details of the claim. *Wear v. Selective Ins. Co.*, 455 N.J. Super. 440, 453 (App. Div. 2018). However, analysis of the allegations is not limited to the complaint; rather “facts outside the complaint may trigger the duty to defend.” *Columbus Farmers Mkt., LLC v. Farm Family Cas. Ins.*, 2006 U.S. Dist. LEXIS 92448, *27 (Dec. 21, 2006); *SL Industries, Inc.*, 128 N.J. at 198. Additionally, “if a complaint includes multiple or alternative causes of action, the duty to defend will attach as long as any of them would be a covered claim and it continues until all of the covered claims have been resolved.” *Flomerfelt*, 202 N.J. at 444. As long as an allegation falls within the scope of coverage, the insurer may not refuse to defend a suit on the ground that the claim asserted cannot possibly succeed because there is no basis for the allegations either in law or in fact. *Burd v. Sussex Mut. Ins. Co.*, 56 N.J. 383, 389 (1970); *L.C.S., Inc. v. Lexington Ins. Co.*, 371 N.J. Super. 482, 490 (App. Div. 2004). However, when the four corners of a complaint are ambiguous, the insurer can successfully deny coverage based on extrinsic evidence discovered after the commencement of a third-party action against the insured. *Palarome Int'l, Inc. v. Greenwich Ins. Co.*, 404 N.J. Super. 241, 276-77 (App. Div. 2008).

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, mathematic 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).

B. Privacy Protections

1. Criminal Sanctions

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.

As discussed above, the *Aplizar-Fallas* ruling has led to the proposal the New Jersey Insurance Fair Conduct Act which, if passed, would provide for a private cause of action for any unreasonable delay in paying a claim or unreasonable denial of a claim. Once a party establishes that a violation has occurred, the plaintiff would be entitled to (i) actual damages, (ii)

prejudgment interest, reasonable attorney's fees, and all reasonable litigation expenses, and (iii) treble damages.

2. The Standard for Punitive Damages

In New Jersey, the Punitive Damages Act ("PDA") controls rules dealing with punitive damages. N.J. Stat. Ann. §§ 2A:15-5.9 to -5.17 (2017). The PDA provides that for a party to recover punitive damages, the party must prove "by clear and convincing evidence, that the harm suffered was the result of the defendant's acts or omissions, and such acts or omissions were actuated by actual malice or accompanied by a wanton and willful disregard of persons who foreseeably might be harmed by those acts or omissions." N.J. Stat. Ann. § 2A:15-5.12(a) (2017). "Actual malice" is "intentional wrongdoing in the sense of an evil-minded act." N.J. Stat. Ann. § 2A:15-5.10 (2017). "Wanton and willful disregard" is "a deliberate act or omission with knowledge of a high degree of probability of harm to another and reckless indifference to the consequences of such act or omission." *Id.*

In addition, punitive damages must be requested clearly and explicitly in a party's pleadings and are only available after the trier of fact determines compensatory damages are available. N.J. Stat. Ann. § 2A:15-5.11(2017) and N.J. Stat. Ann. § 2A:15-5.13(c) (2017). In a multi-defendant proceeding, each request for a punitive damages award must be specific as to each defendant. N.J. Stat. Ann. § 2A:15-5.13(e) (2017).

In order for a party to collect punitive damages, the party must fulfill two elements. First, the trier of fact must decide whether punitive damages are available. In making this determination, the trier of fact is required to consider (i) the likelihood of serious harm, (ii) defendant's awareness of that likelihood, (iii) defendant's conduct upon learning that its initial conduct is likely to cause harm, and (iv) any efforts towards concealment. N.J. Stat. Ann. § 2A:15-5.12(b) (2017). Second, the trier of fact must decide on the amount of such damages. The PDA caps punitive damage awards to five times compensatory damages or \$350,000.00, whichever is greater. N.J. Stat. Ann. § 2A:15-5.14(b) (2017).

3. Insurance Regulations to Watch

Currently, the only remedy available to a New Jersey insured is to file suit against its insurer under New Jersey common law for bad faith, as addressed below. This cause of action, if successful, can only yield consequential damages. However, based on *Aplizar-Fallas*, as discussed above, New Jersey has proposed the New Jersey Insurance Fair Conduct Act, passed by the Senate. The Act would allow for a private cause of action for any unreasonable delay in paying a claim or unreasonable denial of a claim. The act provides no definition for "unreasonable." Once a party establishes that a violation has occurred, the plaintiff will be entitled to (i) actual damages, (ii) prejudgment interest, reasonable attorney's fees, and all reasonable litigation expenses, and (iii) treble damages. The bill was passed by the New Jersey Senate and as of January 29, 2021, it was received in the assembly and then referred to the Assembly Financial Institutions and Insurance Committee.

4. State Arbitration and Mediation Procedures

Arbitration is a method of alternative dispute resolution in which a dispute is submitted to an impartial third person. The arbitrator is selected directly by the parties. The public policy of New Jersey favors arbitration as a means of settling disputes that otherwise would be litigated in court. *Cty. Coll. of Morris Staff v. Cty. Coll. of Morris Staff Ass'n*, 100 N.J. 383, 390, 495 A.2d 865 (1985). Arbitration is required when the parties have contracted for that dispute resolution procedure or when a statute or regulation requires arbitration. *State Farm Guar. Ins. Co. v. Hereford Ins. Co.*, 454 N.J. Super. 1, 5, 183 A.3d 946, 948, 2018 N.J. Super. LEXIS 43, *4, 2018 WL 1308853.

While interstate commerce matters are governed by the Federal Arbitration Act (“FAA”), intrastate matters in New Jersey are governed by the Arbitration Act. 9 U.S.C.A. §§ 1 to 16; N.J.S.A. 2A:23B-3; *see also Martindale v. Sandvik, Inc.*, 173 N.J. 76, 83-86, 800 A.2d 872 (2002). The Arbitration Act provides that an arbitrator “may conduct an arbitration in such a manner as the arbitrator considers appropriate for a fair and expeditious disposition of the proceeding.” N.J.S.A. 2A:23B-15(a). An arbitrator is not required to conduct a hearing, however, if a hearing is provided, the parties have a right to “be heard, to present evidence material to the controversy, and to cross-examine witnesses appearing at the hearing.” N.J.S.A. 2A:23B-15(c) to (d). In addition, the Arbitration Act, does not specify that an arbitration hearing must be “in-person” and it does not define whether “in-person” means at a physical location, telephonically, or otherwise” *State Farm Guar. Ins. Co. v. Hereford Ins. Co.*, 454 N.J. Super. 1, 6, 183 A.3d 946, 949, 2018 N.J. Super. LEXIS 43, *7, 2018 WL 1308853.”The Act [also] grants an arbitrator significant discretion over evidentiary matters in order to advance the goal of quick and fair disposition of the parties’ dispute.” *Kernahan v. Home Warranty Administrator of Florida, Inc.*, 236 N.J. 301, 324 (2019).

“The duty to arbitrate, and the scope of the arbitration, are dependent solely on the parties’ agreement. The parties may shape their arbitration in any form they choose and may include whatever provisions they wish to limit its scope. The parties have the right to stand upon the precise terms of their contract; the court may not rewrite the contract to broaden the scope of arbitration or otherwise make it more effective.” *Badiali v. New Jersey Mfrs. Ins. Group*, 220 N.J. 544, 556, 107 A.3d 1281, 1289, 2015 N.J. LEXIS 133, *22. However, when a policy’s arbitration clause is ambiguous, the courts will limit an attempt to reject an arbitration award and continue de novo.

Mediation is governed by N.J. Court Rules, R. 1:40, the Mediation Act, N.J.S.A. 2A:23C-1 to -13. Mediation is a process in which an impartial third party facilitates communication between disputing parties for the purpose of assisting them in reaching a mutually acceptable agreement. The primary role of a mediator is to facilitate a voluntary resolution of the dispute, allowing the parties the opportunity to consider all options for settlement. The communications made by either party during the course of mediation is confidential and cannot be disclosed unless consented to by both parties. Rule 1:40-4. In order for a mediation agreement to be

binding, the agreement must be reduced to writing, signed by each party, and furnished to each party. Rule 1:40-4(i).

5. State Administration Entity Rule-Making Authority

The Department of Banking and Insurance Act of 1996 merged the Department of Banking and Department of Insurance. The Department of Banking and Insurance is charged with the execution of all laws relative to insurance, banking, savings, trust, guarantee, safe deposit, indemnity, mortgage, investment and loan corporations. The Division of Insurance of the Department of Banking and Insurance offers assistance to insurance consumers including the inquiry and investigation of insurance company malfeasance and is also tasked with the enforcement of the State's insurance laws.

V. EXTRA CONTRACTUAL CLAIMS AGAINST INSURERS: ELEMENTS AND REMEDIES

A. Bad Faith Claim Handling/ Bad Faith Failure to Settle Within Limits

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 fairly 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 Claims

In general, a claim based on an insurer's bad faith towards its insured in the payment of a first-party claim will be governed by contract law rather than tort law. *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), certif. 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 Claims

In contrast to first-party claims, a claim based on an insurer's bad faith claim towards its insured in the payment of a third-party claim sounds in tort and therefore may include recovery of punitive damages. *Id.* at 476. Typically, these cases involve third-party claims that contain the likelihood of an excess verdict. *Am. Hardware Mut. Ins. Co. v. Harley Davidson of Trenton, Inc.*, 124 Fed. Appx. 107, 2005 U.S. App. LEXIS 3166 (3d Cir. 2005); *Universal-Rundle Corp. v. Commercial Union Ins. Co.*, 319 N.J. Super. 223, 725 A.2d 76 (App. Div. 1999). Accordingly, an insurance company that does not reasonably engage in settlement negotiations with a third-party claimant who is willing to settle within the policy limits may be subject to a finding of bad faith and the award of punitive damages in excess of the policy limits. *Am. Hardware Mut. Ins. Co.*, 124 Fed. Appx. at 112. A primary insurer may also face liability to an excess insurer for failure to settle a third-party claim within the primary insurance policy limits. *N.J. Mfrs Ins. Cop. v. Nat'l Cas. Co.*, 393 N.J. Super. 340, 354-55 (App. Div. 2007).

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. 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. 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).

B. Fraud

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 *Bonngo Petrol, Inc. v. Epstein*, 115 N.J. 599, 609 (1989) (stating that demonstrating scienter is not necessary where party seeks only equitable remedies).

Additionally, as noted above, the New Jersey Insurance Fraud Prevention Act ("IFPA") imposes penalties on insureds who commit insurance fraud against insurers. N.J.S.A. 17:33A-1 et seq. (1994). Unlike common law fraud, a finding of "scienter" is not necessary to prove fraud under the Act. *N.J. Citizens United Reciprocal Exchange v. Georgallis*, 2007 WL 655312 (N.J. Super. A.D.) (per curiam). Further, under the IFPA, proof of reliance on the fraudulent statement or resulting damages are not required elements to a claim of fraud. *Citizens United Reciprocal Exchange v. Meer*, 321 F. Supp. 3d 479 (2018). The IFPA entitles insurers to recover triple its compensatory damages, which includes (1) reasonable investigation expenses (2) costs of suit and (3) attorney's fees. The standard of proof that governs a private claim under the IFPA is a preponderance of the evidence. *Liberty Mut. Ins. Co. v. Land*, 186 N.J. 163 (2006); *Sabelli v. All American Chevrolet, Inc.*, 2007 WL 92609 (N.J. Super. A.D. 2007). Insurance companies must

commence the action within six years of when the cause of action accrued. N.J.S.A. §17:33A-7(e).

C. Intentional or Negligent Infliction of Emotional Distress

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 (“NJCA”) 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 NJCA 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 NJCA 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 NJCA). The standard of proof that governs a private claim under the NJCA 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)

Consumer Fraud Act violations are divided into three broad categories: affirmative acts, knowing omissions, and regulatory violations. *Cox v. Sears Roebuck & Co.*, 138 N.J. 2, 17, 647 A.2d 454 (1994). For an “affirmative act” or misrepresentation, knowledge or intent is not an essential element. *Cox*, 138 N.J. at 17-18; *Ji*, 33 N.J. Super. at 461. If the alleged fraud is based upon a claim of omission, then the plaintiff must prove that the defendant acted with knowledge and intent. *Cox*, 138 N.J. at 18; *Feinberg v. Red Bank Volvo Inc.*, 331 N.J. Super. 506, 752 A.2d 720 (App. Div. 2000). In the event of a regulatory violation, strict liability is imposed. *Cox*, 138 N.J. at 18-19.

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.

The NJCFA authorizes a private cause of action when a plaintiff has suffered an “ascertainable loss of moneys or property, real or personal” as a result of a practice in violation of the Act. *Thiedemann v. Mercedes-Benz USA, LLC*, 183 N.J. 234, 872 A.2d 783 (2005). However, mere proof of a regulatory violation is enough to establish wrongful conduct under the Act. *Cox*, 138 N.J. at 18-19; *Sprenger v. Trout*, 375 N.J. Super. 120, 866 A.2d 1035 (App. Div. 2005). Moreover, the mere refusal by an insurer to pay a valid claim does not give rise to a cause of action under the NJCFA. *Daloisio v. Liberty Mut. Fire Ins. Co.*, No. 10-3758, 2010 U.S. Dist. LEXIS 130008, at *6 (D. N.J. Dec. 9, 2010). Remedies under the NJCFA include mandatory trebling of damages and the award of attorneys’ fees. *Cox*, 138 N.J. at 24.

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 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. Tpk. Auth.*, 148 N.J. 524, 535 (N.J. 1997). The discoverability of an insurer’s claim file would depend on whether the insured’s intends to pursue a claim of bad faith against the insurer in addition to the underlying claim. In the event a bad faith claim is pursued, the claims file would not be subject to discovery in the underlying claim and a “severed bad faith claim would then be activated triggering the possibility for the right to discovery, motions, and if necessary, a separate trial.” *Taddei v. State Farm Indemnity Co.*, 401 N.J. Super. 449, 950 (App. Div. 2008). This acts so as to preserve the insured’s bad faith claim 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 faith claim.” *Procopio v. Government Employees Ins. Co.*, 433 N.J. Super. 377, 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.* The right of discovery of an insurer’s claim file is limited by the law of summary judgement as well. A motion for summary judgment may not be deemed premature even if discovery has not been completed, so long as the plaintiff has failed to demonstrate the likelihood that further discovery

would “supply the missing elements of the cause of action.” *Badiali*, 220 N.J. at 555. Further, a claim file may be further protected under the common-interest doctrine which extends privilege of attorney work product to the attorney of a third-party if the work product is shared “in a manner calculated to preserve their confidentiality, in anticipation of litigation, and in furtherance of a common purpose.” *O’Boyle v. Borough of Longport*, 218 N.J. 168, 176 (2014).

B. Discoverability of Reserves

Reserve calculations are generally not discoverable in New Jersey. New Jersey courts have held that allowing discovery of reserves does not further the purpose of discovery. *Leksi, Inc. v. Federal Ins. Co.*, 129 F.R.D. 99, 106 (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 decision 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 Env’tl. Ins. Declaratory Judgment Actions*, 259 N.J. Super. 308, 319 (App. Div. 1992). Such documents 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

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

In situations where the insured controls the defense of a claim and settles the claim, 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.

Notwithstanding policies that contain a "No Action" clause, 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. Preexisting Illness or Disease Clauses

An insurer does not have a duty to investigate the accuracy of the information given by an insurance applicant, and the duty to investigate further arises only when independent investigation discloses sufficient facts to seriously impair the value of an application. *Ledley v. William Penn Life Ins. Co.*, 138 N.J. 627, 639 (1995) (internal citation omitted). Even if a disease is readily discernable at the time of the application, an insurer may later deny coverage for that pre-existing disease. *Kissil v. Beneficial Nat'l. Life Ins. Co.*, 64 N.J. 555, 319 A.2d 67 (1974). However, absent an ability to rescind the policy based upon a misrepresentation in the policy application, a denial of coverage for a pre-existing condition is only warranted where the policy contains such an exclusion. See *Paul Revere Life Ins. Co. v. Haas*, 137 N.J. 190, 644 A.2d 1098 (1994).

Defining the precise time that an illness comes into existence has been a matter for debate, as a disease frequently exists for some time prior to manifesting any overt symptoms. The view in New Jersey is that coverage will be enforced where the first symptoms of disease are manifested after the policy goes into effect. For example, in *Kissil* the Court evaluated whether a child's cystic fibrosis was a disease "contracted and commencing" before or after the policy's 15-day waiting period. *Kissil*, 64 N.J. 555. The parties agreed that congenital cystic fibrosis is present at birth, but that symptoms may not appear for years. The Court held that the policy should be read as the ordinary policyholder would understand it, and defined "contracted and commencing" to mean "that coverage would exist where the first positive symptoms of the disease did not manifest with reasonable certainty within the first fifteen days" of the child's life. *Id.* at 561; See also *American Nurses Ass'n v. Passaic Gen'l Hosp.*, 98 N.J. 83, 484 A.2d 670 (1984) (interpreting malpractice liability insurance clause as ordinary policyholder would understand it).

E. Statute of Limitations

There is a six-year statute of limitations under New Jersey law for causes of action based in contract theory and for claims for damage to tangible property. See N.J.S.A. 2A:14-1¹. See also *Azze v. Hanover Ins. Co.*, 336 N.J. Super. 630, 765 A.2d 1093 (App. Div. 2001); *Garcia v. Snedeker*, 199 N.J. Super. 254, 261, 489 A.2d 175 (App. Div. 1985) (discussing applicability of six-year statute of limitations in action to recover insurance proceeds). The six-year statute of limitations also applies to certain actions based in tort, including a claim of bad faith settlement practices

¹ As of October 29, 2020, a bill was introduced to adjust the statute of limitation on damage claims for construction defects in common interest communities.

against an insurer. There is a two-year statute of limitations for bodily injury claims. N.J.S.A. 2A:14-2. The statute of limitations for claims against a property insurance policy cannot be less than one year but it can be more if the policy so provides. N.J. Stat. Ann. § 17:36-5.20 (West 2014).

The statute of limitations on a claim against a property policy 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).

New Jersey courts will uphold a clause in an insurance policy which reduces the time for bringing an action to less than what is prescribed by N.J.S.A. 2A:14-1, provided that the stipulated period is reasonable and does not violate public policy. *Eagle Fire Prot. Corp. v. First Indem. of Am. Ins. Co.*, 145 N.J. 345, 678 A.2d 699 (1996); *A.J. Tenwood A. v. Orange Senior Citizens Housing*, 200 N.J. Super. 515, 523-524, 491 A.2d 1280 (App. Div. 1985).

F. Insured’s Failure to Provide Timely Notice

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 Fir 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* at 193. 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).

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:

[r]eturning 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 Bellmawr*, 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.

The liability of insurers for a continuous trigger tort has been further extended by eliminating from the allocation coverage block, years that coverage was not reasonably available in the market. *Cont'l Ins. Co. v. Honeywell Int'l Inc.*, 234 N.J. 23 (2018). In the *Honeywell* case, the insured maintained insurance coverage for many years that included coverage for asbestos liability. Asbestos coverage was no longer available after 1986 following an industry wide exclusion. The asbestos injuries manifested nearly twenty-five years following such exclusion. The Court ruled that since the lack of coverage in the later years was not the results of the insured's decision to forego insurance, but rather was caused by the insurance industry's refusal to write such insurance, in determining the coverage block over which the losses would be allocated, the insureds would not be liable for years when the coverage was unavailable and, instead, those years would be eliminated from the coverage block thereby increasing the insurers' share of the loss. *Id.*

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

A. Claim in Equity vs. Statutory

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.*

B. Elements

In a contribution claim filed by one insurer against another, the insurer has a direct right of action against the co-insurer. *Id.* In determining the allocation of liability amongst the insurers, the court would apply the test set forth in *Owens-Illinois. Id.*

X. DUTY TO SETTLE

In New Jersey there is an inherent duty on the insurer to settle claims. *Lieberman 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.

XI. LIFE, HEALTH & DEATH BENEFICIARY ISSUES

A. Change of Beneficiary

N.J.S.A. 17B:24-4 states that the terms of the insurance contract are controlling in changing the beneficiary or assigning the rights to a policy. "It is well-settled that a change of beneficiary can only be effected so as to bind the insurance company if it is accomplished in substantial

compliance with the policy requirements.” *Hirsch v. Travelers Ins. Co.*, 153 N.J. Super. 545, 555 (App. Div. 1977). See also *Haynes v. Metropolitan Life Ins. Co.*, 166 N.J. Super. 308, 313, 399 A.2d 1010 (App. Div. 1979) (finding “substantial compliance” when a written request of an insured to change his beneficiary designations from his estranged wife to other relatives, even though the contract required that the policy itself accompany the written request, because the estranged wife had control of the policies and refused to relinquish them). “Substantial compliance” will generally be found if “the court can be convinced that the insured made every reasonable effort to effect a change of beneficiary.” *DeCeglia v. Estate of Colletti*, 265 N.J. Super. 128, 134 (App. Div. 1993) (internal citation omitted).

Unless the owner of the policy changes the beneficiary in the manner provided by the policy, the insurer is obligated to pay the proceeds to the named beneficiary, in accordance with the language of the policy. See *Vasconi v. Guardian Life Ins. Co.*, 124 N.J. 338, 342 (N.J. 1991). N.J.S.A. 17B:24-5 protects the insurer from liability when it pays the policy proceeds to the named beneficiary. See also *Hirsch*, 153 N.J. at 549. (“If payments have been made in accordance [with the policy's beneficiary designation], the [insurance] companies are absolved from further liability.”).

B. Effect of Divorce on Beneficiary Designation

The provision within a life insurance policy naming an ex-spouse as a beneficiary is automatically revoked pursuant to divorce or annulment. N.J.S.A. 3B:3-14; see also *Hadfield v. Prudential Ins. Co.*, 408 N.J. Super. 48, 51 (App. Div. 2009) (construing the provisions of N.J.S.A. 3B:3-14 to cover life insurance policies). The statute had previously only covered probate property such as wills, but was amended in 2005 to explicitly cover non-probate property such as life insurance. N.J.S.A. 3B:3-14 now states in pertinent part:

Except as provided by the express terms of a governing instrument, a court order, or a contract relating to the division of the marital estate made between the divorced individuals . . . a divorce or annulment . . . revokes any revocable . . . dispositions . . . made by a divorced individual to his former spouse in a governing instrument. . . . In the event of a divorce or annulment, provisions of a governing instrument are given effect as if the former spouse . . . disclaimed all provisions revoked by this section. . . .

N.J.S.A. 3B:1-1 was simultaneously amended to include a life insurance policy within the definition of “governing instrument.”

Additionally, the N.J. Supreme Court previously had held that a beneficiary designation in a life insurance policy is superseded by the provisions of a property settlement agreement pursuant to a divorce. *Vasconi*, 124 N.J. at 347. When a divorce agreement provides for the mutual release of “any claim or right” concerning “all of the items of property, real, personal, and

mixed, of any kind, nature or description” of the other spouse, it creates a rebuttable presumption that the agreement was meant to include beneficiary designations of life insurance policies. *Id.* at 346.

XII. INTERPLEADER ACTIONS

A. Availability of Fee Recovery

Interpleader allows a stakeholder that admits that it is liable to one of the claimants, but fears the possibility of multiple liability to file suit, deposit the property with the court, and withdraw from the proceedings. *Prudential Ins. Co. of Am. V. Hovis*, 553 F.3d 258, 262 (3d Cir. 2009). The competing claimants are left to litigate the status of the property between themselves. *Amethyst Int’l, Inc., v. Duchess*, No. 13-04287 (FLW) (LHG), 2014 U.S. Dist. LEXIS 21089, at *13-14 (D. N.J. Feb. 20, 2014). When the proceeds of a life insurance policy are in dispute it is common for insurers to file interpleader actions, thus asking the court to determine which party should receive the policy proceeds. *Prudential*, 553 F.3d at 258.

An interpleader action proceeds in two distinct stages. *NY Life Distribs. v. Adherence Group*, 72 F.3d 371, (3d Cir. 1995); *Prudential*, 553 F.3d at 262. During the first stage a court must determine whether the interpleader complaint was properly brought and whether to discharge the stakeholder from further liability to the claimants. *Id.* The second stage requires that a court determine the respective rights of the claimants to interplead the funds. *Id.*

Additionally, valid interpleader actions may protect a stakeholder from further liability with respect to counterclaims brought by claimants where (1) a stakeholder bears no blame for the existence of the ownership controversy and (2) the counterclaims are directly related to the stakeholder’s failure to resolve the underlying dispute in favor of one of the claimants. *Amethyst*, 2014 U.S. Dist. LEXIS 21089, at *25.

B. Differences in State vs. Federal

The Federal Rules of Civil Procedure do not expressly provide for a right to an award of attorney’s fees in an interpleader action. Fed. R. Civ. P. 22. It is within the discretion of the court to award the stakeholder costs, including reasonable attorney’s fees.” *Frontier Ins. Co. v. Mission Carrier, Inc.*, 1992 U.S. Dist. LEXIS 12904 (D.N.J. Aug. 24, 1992).