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New Hampshire

REGULATORY LIMITS ON CLAIMS HANDLING

Timing for Responses and Determinations

The New Hampshire Legislature has enacted a "prompt payment" requirement for claims under accident and health insurance policies. This legislation is codified in N.H. Rev. Stat. Ann. § 415:6-h, and it sets forth the relevant time limitations involved with the filing and payment, or denial, of claims. The initial limiting period for insurers is 30 calendar days upon the receipt of a non-electronic claim or 15 calendar days upon receipt of an electronic claim, and insurers must pay the claim, deny it, or seek additional information during those time frames. *See* N.H. Rev. Stat. Ann. § 415:6-h, I. Additionally, there are more general time limits set forth in New Hampshire Code of Administrative Rules, Insurance Department Chapter 1000 *et seq*.

For property and casualty policies, relevant time limits are found in the New Hampshire Code of Administrative Rules, Insurance Department § 1001 and § 1002. Examples: 5 working days to commence investigation after receiving claim (N.H. Code Admin. R. Ann. Ins. §§ 1001.02(b), 1002.05(a)(1)); 10 working days to acknowledge receipt of the claim (*Id*. at § 1002.05(b); and 30 days from receipt of claim to issue a decision regarding coverage or denial, or to notify the claimant that more time is needed (*Id*. at §§ 1001.02(a), 1002.05(c)).

Standards for Determination and Settlements

Claims handling standards for insurers are set forth in the New Hampshire Code of Administrative Rules, Insurance Department Chapter 1000 *et seq.*, although note that there are different standards applicable to property and casualty insurance as opposed to all other types of insurance. *Compare* N.H. Code Admin. R. Ann. Ins. Part 1001 (applicable to all insurers, except property and casualty) *with* N.H. Code Admin. R. Ann. Ins. Part 1002 (applicable only to property and casualty). Penalties for violations of these rules are provided in N.H. Code Admin. R. Ann. Ins. §§ 1001.11, 1002.21.

Additionally, New Hampshire has a liberal rule in civil actions regarding the power of an attorney to bind a client by settlement, which is based upon the premise that it "is essential to the orderly and convenient dispatch of business, and necessary for the protection of the rights of the parties." *Bossi v. Bossi*, 131 N.H. 262, 264, 551 A.2d 978, 979–80 (1988) (quotation omitted). Oral agreements between attorneys are binding in civil actions, *id.*, and an "action taken in the conduct and disposition of civil litigation by an attorney within the scope of his authority is binding on his client," *Manchester Hous. Auth. v. Zyla*, 118 N.H. 268, 269, 385 A.2d 225, 226 (1978).

The standards for handling claims involving minors are set forth in New Hampshire Superior Court Civil Rule 40, which provides that the court must approve settlements involving minors when the net amount of the settlement exceeds $10,000.00. N.H. Super. Ct. Civ. R. 40(b).

PRINCIPLES OF CONTRACT INTERPRETATION

Typically, when interpreting any type of insurance policy, the "fundamental goal" is "to carry out the intent of the contracting parties." *Bartlett v. Commerce Ins. Co.*, 167 N.H. 521, 530, 114 A.3d 724, 732 (2015) (quotations omitted). The court will "first examine the language of the contract itself," looking to the "plain and ordinary meaning of the policy's words in context." *Id.* Terms of the policy are construed objectively and "as would a reasonable person in the position of the insured based upon more than a casual reading of the policy as a whole." *Id.* at 531. "[W]here the terms of a policy are clear and unambiguous, we accord the language its natural and ordinary meaning." *Id.* The court will not "examine the parties' reasonable expectations of coverage when a policy is clear and unambiguous; absent ambiguity, our search for the parties' intent is limited to the words of the policy." *Id.* "The fact that the parties may disagree on the interpretation of a term or clause in an insurance policy does not necessarily create an ambiguity." *Id.* "For an ambiguity to exist, the disagreement must be reasonable." *Id.*

Ambiguity may lie in the definition of a term or in the term's application within the context of the policy. *See State Farm Mut. Ins. Co. v. Pitman*, 148 N.H. 499, 501-02, 809 A.2d 1280, 1281-82 (2002). When determining whether an ambiguity exists, the court will "look to the claimed ambiguity, consider it in its appropriate context, and construe the words used according to their plain, ordinary, and popular definitions." *Bartlett*, 167 N.H. at 531 (quotation omitted). "If one of the reasonable meanings of the language favors the policyholder, the ambiguity will be construed against the insurer . . . in order to honor the insured's reasonable expectations." *Id.* (quotation omitted). However, when the policy language is clear, the court "will not perform amazing feats of linguistic gymnastics to find a purported ambiguity simply to construe the policy against the insurer and create coverage where it is clear that none was intended." *Id.* (quotation omitted).

The doctrine of construing ambiguity against an insurer is based upon the fact that insurers have a better understanding of the terms that they employ. *State Farm Mut. Ins. Co.*, 148 N.H. at 501. The burden is on the insurance carrier to prove a lack of coverage. *See* N.H. Rev. Stat. Ann. § 491:22-a.

Note, though, that "[i]nsurers are free to contractually limit the extent of their liability through use of a policy exclusion provided it violates no statutory provision." *Russell v. NGM Ins. Co.*, 170 N.H. 424, 429, 176 A.3d 196, 200 (2017). "Such language must be so clear, however, as to create no ambiguity that might affect the insured's reasonable expectations." *Id*. (quotation omitted). "The insurer asserting an exclusion of coverage bears the burden of proving that the exclusion applies." *Id*.

CHOICE OF LAW

Generally, "in the absence of an express choice of law validly made by the parties, the contract is to be governed, both as to validity and performance, by the law of the state with which the contract has its most significant relationship." *Cecere v. Aetna Ins. Co.*, 145 N.H. 660, 662, 766 A.2d 696, 698 (2001) (quotation omitted). "Particularly in the context of insurance contracts, . . . the State which is the principal location of the insured risk bears the most significant relationship to the contract, in the absence of an express choice of law by the parties." *Id.* (quotation omitted). "This rule articulates the fundamental contract policy of giving effect to the intention of the parties and their reasonably justified expectations, and promotes predictability of results, which is of foremost concern in contracts cases." *Id.* (quotation and citation omitted). In instances where one policy covers multiple risks in various states, the courts will look to the location of the specific risk at issue, and the law of that state will generally govern. *See Ellis v. Royal Ins. Companies*, 129 N.H. 326, 332, 530 A.2d 303, 307 (1987).

DUTIES IMPOSED BY STATE LAW
Duty to Defend

1. Standard for Determining Duty to Defend

"It is well-settled law in New Hampshire that an insurer's obligation to defend its insured is determined by whether the cause of action against the insured alleges sufficient facts in the pleadings to bring it within the express terms of the policy, even though the suit may eventually be found to be without merit." *Green Mountain Ins. Co. v. Foreman*, 138 N.H. 440, 441–42, 641 A.2d 230, 232 (1994) (quotation omitted). When determining whether a duty to defend exists based upon the sufficiency of the pleadings, the courts will "consider the reasonable expectations of the insured as to its rights under the policy." *N. Sec. Ins. Co. v. Connors*, 161 N.H. 645, 650, 20 A.3d 912, 916 (2011). "An insurer's obligation is not merely to defend in cases of perfect declarations, but also in cases where, by any reasonable intendment of the pleadings, liability of the insured can be inferred, and neither ambiguity nor inconsistency in the underlying writ can justify escape of the insurer from its obligation to defend." *Id.* "In cases of doubt as to whether the writ against the insured alleges a liability of the insurer under the policy, the doubt must be resolved in the insured's favor." *Id.*

However, the "duty of an insurer to defend is not necessarily coextensive with its duty to pay." *U.S. Fid. & Guar. Co. v. Johnson Shoes, Inc.*, 123 N.H. 148, 152, 461 A.2d 85, 87 (1983). There is a distinction between "groundless suits giving rise to the duty to defend, and actions which, even if successful, would not be within the policy and against which the insurer has no duty to defend." *Id.*

2. Issues with Reserving Rights

Generally, an "insurance company remains free to limit its liability through clear and unambiguous policy language." *Weeks v. St. Paul Fire & Marine Ins. Co.*, 140 N.H. 641, 643, 673 A.2d 772, 774 (1996) (quotation omitted); *see also Harrington v. Concord Gen. Mut. Ins. Co.*, 152 N.H. 26, 28, 871 A.2d 54, 56 (2005) (explaining that it "is well settled that absent statutory provisions or public policy to the contrary, insurers have a right to limit their liability by exclusions written in terms that convey their meaning and effect to a reasonable person in the position of the insured"). Although the duty to defend is broader than the duty to indemnify, an insurer's breach should not be used as a method of obtaining coverage for the insured that the insured did not purchase. *See Ross v. Home Ins. Co.*, 146 N.H. 468, 473, 773 A.2d 654, 658 (2001). In other words, "there must always be a nexus between the type of liability alleged against the insured and the type of coverage provided in the policies." *Id.*

Although an insurer has the right to limit its liability, parties to an insurance contract may not by agreement limit the required coverage in contravention of the Financial Responsibility Law under N.H. Rev. Stat. Ann. Chapter 264. *See Wegner v. Prudential Prop. & Cas. Ins. Co.*, 148 N.H. 107, 109, 803 A.2d 598, 600 (2002); *see also* N.H. Rev. Stat. Ann. § 259:61. Note also that when "interpreting policy language that purports to limit liability . . . [courts] construe ambiguities in favor of the insured and against the insurer." *Calabraro v. Metro. Prop. & Cas. Ins. Co.*, 142 N.H. 308, 310, 702 A.2d 310, 312 (1997).

1. Criminal Sanctions

New Hampshire's Criminal Code is, for the most part, contained within N.H. Rev. Stat. Ann. Title 62, Chapters 625 to 651-F. Of note is N.H. Rev. Stat. Ann. § 638:20, which pertains to insurance fraud. Insurance fraud can constitute either a misdemeanor or a felony, depending upon the value of the fraudulent portion of the claim for payment or other benefit pursuant to an insurance policy. N.H. Rev. Stat. Ann. § 638:20, IV.

Additionally, New Hampshire has created the so-called Insurance Fraud Investigation Unit to investigate complaints of insurance fraud. See N.H. Rev. Stat. Ann. §§ 417:23-:31. Further, N.H. Rev. Stat. Ann. § 417:28 requires all insurers to report suspected "insurance fraud or insurance-related criminal activity" to the Insurance Fraud Investigation Unit. Moreover, insurers are required to implement anti-fraud initiatives to "detect, prosecute, and prevent fraudulent insurance acts." N.H. Rev. Stat. Ann. § 417:30, I.

2. The Standards for Compensatory and Punitive Damages

In New Hampshire, when "there has been a bad-faith breach of an insurance contract, the damages recoverable are not limited to the policy limits plus interest." *Jarvis v. Prudential Ins. Co. of Am.*, 122 N.H. 648, 653, 448 A.2d 407, 410 (1982). "The insured may recover specific consequential damages if he can prove that such damages were reasonably foreseeable by the insurance company and that he could not have reasonably avoided or mitigated such damages." *Id.* However, "[r]ecovery of damages for mental suffering and emotional distress that may accompany the economic damage is not . . . permitted in contract actions." *Id.* "Consequential damages are reasonably forseeable losses that flow from a breach of contract." *Drop Anchor Realty Trust v. Hartford Fire Ins. Co.*, 126 N.H. 674, 678, 496 A.2d 339, 342 (1985).

Compensatory damages, on the other hand, are intended to "put the injured party in as good a position, so far as money damages can put him, as he would have occupied had the defendant fully performed" the contract. *Emery v. Caledonia Sand & Gravel Co.*, 117 N.H. 441, 446, 374 A.2d 929, 933 (1977) (quotation omitted). Additionally, New Hampshire recognizes that, under certain circumstances, "enhanced compensatory damages" can be awarded. "When an act is wanton, malicious, or oppressive, the aggravating circumstances may be reflected in an award of enhanced compensatory damages." *Stewart v. Bader*, 154 N.H. 75, 87, 907 A.2d 931, 942 (2006) (quotation omitted). Enhanced compensatory damages, which are also sometimes known as "liberal compensatory damages," are "awarded only in exceptional cases. . . . there must be ill will, hatred, hostility, or evil motive on the part of the defendant." *Id.* (quotations omitted).

As for punitive damages, New Hampshire has a strong aversion to such damages; N.H. Rev. Stat. Ann. § 507:16 prohibits the award of punitive damages "in any action, unless otherwise provided by statute." *See also Stewart*, 154 N.H. at 88 (explaining that, generally, "[n]o damages are to be awarded as a punishment to the defendant or as a warning and example to deter him and others from committing like offenses in the future"). However, the New Hampshire Supreme Court has held insurance companies "liable for exemplary or punitive damages [even] where fines and penalties are not expressly excluded by the policy language." *Weeks v. St. Paul Fire & Marine Ins. Co.*, 140 N.H.

641, 646, 673 A.2d 772, 775 (1996); *see also American Home Assurance Co. v. Fish*, 122 N.H. 711, 715, 451 A.2d 358, 360 (1982).

3. Insurance Regulations to Watch

New Hampshire's Insurance Department publishes online various pieces of insurance-related information, bulletins, proposed regulations, and more that could be of interest. Such can be located at: https://www.nh.gov/insurance/legal/ (last accessed April 19, 2021).

4. State Arbitration and Mediation Procedures

With few exceptions, Superior Court Civil Rule 32 generally requires all civil actions to be assigned to alternative dispute resolution. Rule 32 contains detailed procedures, as well as specific requirements that the neutral party must meet. *See generally* N.H. Super. Ct. Civ. R. 32. Note that alternative dispute resolution proceedings, and the information related to those proceedings, are generally confidential and not admissible at trial. *See id.* R. 32(d).

Courts can also order parties in any civil action to engage in mediation, per Superior Court Civil Rule 30. Parties may also agree to mediation, arbitration, or some other form of alternative dispute resolution. *See id.* R. 30, 33; *see also In re Appeal of City of Manchester*, 153 N.H. 289, 295, 893 A.2d 695, 700 (2006) (explaining that the "primary purpose of the arbitration process is expeditious and economical dispute resolution").

5. State Administrative Entity Rule-Making Authority

In New Hampshire, the state legislature may "authorize an administrative board or body to adopt ordinances, rules, by-laws, or regulations in aid of the successful execution of some general statutory provision." *In re New Hampshire Dep't of Transp.*, 152 N.H. 565, 571, 883 A.2d 272, 279 (2005) (quotation omitted). "This rule-making authority permits boards to fill in details to effectuate the purpose of the statute." *Id*. (quotation omitted). "Administrative officials, however, do not possess the power to contravene a statute," and "cannot add to, detract from, or in any way modify statutory law." *Id*. (quotations omitted). If an administrative entity acts "beyond the limited discretion granted by the legislature," the courts will declare that regulation or rule invalid. *Id*. In making this determination, the courts will "look first to the intended scope of the rule-making power granted by the legislature" to the administrative entity and look to the purpose of the statute. *Id*. N.H. Rev. Stat. Ann. § 400-A:15 provides the statutory authority for the New Hampshire Insurance Department to promulgate insurance-related rules and regulations.

EXTRACONTRACTUAL CLAIMS AGAINST INSURERS: ELEMENTS AND REMEDIES

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

1. First Party

The New Hampshire Supreme Court has expressly "rejected the argument that an insurer has an independent duty to deal fairly with its insured and [has] held that an insurer's wrongful or bad-

faith refusal to settle or pay a claim pursuant to its contractual obligations d[oes] not give rise to a cause of action in tort." *Jarvis v. Prudential Ins. Co. of Am.*, 122 N.H. 648, 652, 448 A.2d 407, 409 (1982); *see also Bell v. Liberty Mut. Ins. Co.*, 146 N.H. 190, 195, 776 A.2d 1260, 1264 (2001) (refusing to recognize a "tort claim for bad faith delay or refusal to settle a first-party insurance claim"). However, New Hampshire does permit an insured to "maintain an action against an insurer for negligent failure to settle a case without prior payment of or proof of ability to pay the excess judgment." *Dumas v. State Farm Mut. Auto. Ins. Co.*, 111 N.H. 43, 46, 274 A.2d 781, 783 (1971).

Although extra-contractual claims may be limited, an insurer could still be subject to penalties under New Hampshire Administrative Insurance Department Rules. Examples: an insurer or agent that violates certain life insurance related rules by acting in bad faith could be subject to suspension, revocation, or a fine after a hearing (N.H. Code Admin. R. Ann. Ins. § 303.06); violations of rules regarding the sale of insurance by financial institutions subject insurers to similar penalties (*id*. § 3205.02). Additionally, note that insurers have a contractual duty of good faith and fair dealing. *See Jarvis*, 122 N.H. at 652.

2. Third-Party

As to third-party claims in New Hampshire, "an insurer has a duty of reasonable care in the settlement of a third-party liability claim. Therefore, a breach of that duty may give rise to an action in tort." *Bennett v. ITT Hartford Grp., Inc.*, 150 N.H. 753, 757, 846 A.2d 560, 564 (2004). New Hampshire courts recognize an independent cause of action in tort for third-party claims to "address the dilemma presented by the absolute control of trial and settlement vested in the insurer by the insurance contract and the conflicting interests of the insurer and insured." *Id.* (quotation omitted). In a third-party claim, the "insurer is in a position to expose the insured to a judgment in excess of the policy limits through its refusal to settle a case or to otherwise injure the insured by virtue of its exclusive control over the defense of the case." *Id.* at 758. "Because the insurer and the insured have conflicting interests, and the insurer has absolute control over the situation, an insurer has a duty to the insured to act in good faith" in a third-party claim. *Id.*

Fraud

To establish fraud under New Hampshire law, "a plaintiff must prove that the defendant made a representation with knowledge of its falsity or with conscious indifference to its truth with the intention to cause another to rely upon it." *Snierson v. Scruton*, 145 N.H. 73, 77, 761 A.2d 1046, 1049 (2000), as modified (Nov. 22, 2000). "In addition, a plaintiff must demonstrate justifiable reliance." *Id.* "A plaintiff cannot allege fraud in general terms, but must specifically allege the essential details of the fraud and the facts of the defendants' fraudulent conduct." *Id.*; *see also Tessier v. Rockefeller*, 162 N.H. 324, 332, 33 A.3d 1118, 1124 (2011) ("In order to withstand a motion to dismiss, the plaintiff must specify the *essential details* of the fraud, and *specifically allege* the facts of the defendant's fraudulent actions." (Emphasis in original; quotation omitted)).

Additionally, as discussed above, N.H. Rev. Stat. Ann. § 638:20 pertains to criminal insurance fraud.

Intentional or Negligent Infliction of Emotional Distress

The elements of intentional infliction of emotional distress consist of four elements derived from the Restatement (Second) of Torts § 46: (1) extreme and outrageous conduct; (2) which is intentional or reckless; (3) and causes; (4) severe emotional distress. *Morancy v. Morancy*, 134 N.H. 493, 495-96, 593 A.2d 1158, 1159 (1991). In other

words, one "who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm." *Mikell v. Sch. Admin. Unit No. 33*, 158 N.H. 723, 728, 972 A.2d 1050, 1055 (2009).

"In determining whether conduct is extreme and outrageous, it is not enough that a person has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by 'malice.'" *Id.* at 729 (quotation omitted). "Liability has been found only where the conduct has been 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." *Id.* (quotation omitted).

As for negligent infliction of emotional distress, the elements include: "(1) causal negligence of the defendant; (2) foreseeability; and (3) serious mental and emotional harm accompanied by objective physical symptoms." *Tessier v. Rockefeller*, 162 N.H. 324, 342, 33 A.3d 1118, 1132 (2011) (quotation omitted). The New Hampshire Supreme Court has also held that "the emotional harm must be a significant, painful mental experience with lasting effects"; to "ensure that the emotional injury is sufficiently serious to be afforded legal protection as well as to establish causation, . . . expert testimony is required to prove physical symptoms suffered from alleged negligent infliction of emotional distress." *O'Donnell v. HCA Health Servs. of New Hampshire, Inc.*, 152 N.H. 608, 611–12, 883 A.2d 319, 324 (2005) (quotation omitted).

However, note that "[r]ecovery of damages for mental suffering and emotional distress that may accompany . . . economic damage is not . . . permitted in contract actions." *Jarvis v. Prudential Ins. Co. of Am.*, 122 N.H. 648, 654, 448 A.2d 407, 410 (1982); *see also Lawton v. Great Sw. Fire Ins. Co.*, 118 N.H. 607, 615, 392 A.2d 576, 581-82 (1978) (dismissing plaintiff's request for damages for mental suffering and emotional distress because such "damages are not generally recoverable in a contract action").

State Consumer Protection Laws, Rules and Regulations

Under New Hampshire law, the Consumer Protection Act, which is codified in N.H. Rev. Stat. Ann. § 358-A, permits private actions for unfair or deceptive business practices. The "consumer has the initial burden of establishing the violation, including that the violating practice was in trade or commerce. Once the violation is established, the burden shifts to the business to establish that the transaction was exempt." *McMullin v. Downing*, 135 N.H. 675, 680, 609 A.2d 1226, 1230 (1992); *see also* N.H. Rev. Stat. Ann. § 358-A:3, V.

The statute specifically exempts those engaged in a "[t]rade or commerce that is subject to the jurisdiction of the bank commissioner, the director of securities regulation, the insurance commissioner, the public utilities commission, the financial institutions and insurance regulators of other states, or federal banking or securities regulators who possess the authority to regulate unfair or deceptive trade practices." N.H. Rev. Stat. Ann. § 358-A:3, I. The New Hampshire Supreme Court has affirmed that the insurance industry is not subject to the Consumer Protection Act, explaining that the "regulation of the insurance industry is comprehensive and protects consumers from the same fraud and unfair practices as RSA chapter 358-A." *Bell v. Liberty Mut. Ins. Co.*, 146 N.H. 190, 194, 776 A.2d 1260, 1263 (2001) (quotation omitted).

DISCOVERY ISSUES IN ACTIONS AGAINST INSURERS

Discoverability of Claims Files Generally

Trial courts in New Hampshire have "the inherent authority to exercise [their] sound discretion in matters relating

to pre-trial discovery." *State v. DeLong*, 136 N.H. 707, 709, 621 A.2d 442, 443 (1993); *see Murray v. Developmental Servs. of Sullivan Cty.*, Inc., 149 N.H. 264, 267, 818 A.2d 302, 306 (2003) (explaining that "New Hampshire law favors liberal discovery" and that "[p]re-trial discovery and the admissibility of evidence are generally within the discretion of the trial court"). Discovery in New Hampshire is generally governed by N.H. Super. Ct. Civil Rules 21-29. *See also* N.H. Code Admin. R. Ann. Ins. § 204.14 (governing discovery).

In general, "parties may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party." N.H. Super. Ct. Civ. R. 21(b). "It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." *Id.*

Additionally, a "party may obtain discovery of documents, electronically stored information and tangible things otherwise discoverable and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative . . . only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his or her case and that he or she is unable without undue hardship to obtain the substantial equivalent of the materials by other means." *Id*. at R. 21(e)(1). "In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation." *Id.*

Additionally, parties must automatically disclose, without awaiting a discovery request, the following: (1) the name and, if known, the address and telephone number of each individual likely to have discoverable information that the disclosing party may use to support his or her claims or defenses; (2) a copy of all documents, electronically stored information, and tangible things that the disclosing party has in his or her possession, custody or control and may use to support his or her claims or defenses; (3) a computation of each category of damages claimed by the disclosing party together with all documents or other evidentiary materials on which each computation is based, including materials bearing on the nature and extent of injuries suffered; and (4) for inspection and copying, any insurance agreement or policy under which an insurance business may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment. *Id.* at R. 22(a).

There are also limits on certain types of discovery, such as a presumptive limit of 25 interrogatories and a presumptive limit of 20 deposition hours. *See id.* at R. 23, 26. Courts may also "impose appropriate sanctions against a party or counsel for engaging in discovery abuse." *Id.* at R. 21(d)(1).

New Hampshire Code of Administrative Rules, Insurance Department § 204.14 also permits parties to engage in discovery in proceedings before the insurance department, although a party must seek leave to do so by motion. N.H. Code Admin. R. Ann. Ins. § 204.14(a). Discovery will be permitted when it "appears that the parties cannot adequately address the factual issues at the time fixed for the presentation of evidence without an opportunity to acquire data pursuant to discovery," the method of discovery is "reasonable and will not cause material unfairness or unreasonable expenses to any party," and the requested discovery "will not unreasonably delay the proceeding." *Id.* at § 204.14(b).

Discoverability of Reserves

Although there does not appear to be any case law, statute, or regulation under New Hampshire law that directly addresses the discoverability of reserves, discovery rules in New Hampshire are generally "given a broad and

liberal interpretation." *New Hampshire Ball Bearings, Inc. v. Jackson*, 158 N.H. 421, 429, 969 A.2d 351, 360 (2009). However, "the trial court has discretion to determine the limits of discovery," and can impose "reasonable limits" on discovery to "avoid 'open-ended fishing expeditions' or harassment to ensure that discovery contributes to the orderly dispatch of judicial business." *Id.* at 429-30. Accordingly, the New Hampshire Supreme Court has upheld limitations that trial courts have imposed upon discovery in insurance-related cases. *See*, *e.g.*, *Ross v. Home Ins. Co.*, 146 N.H. 468, 473, 773 A.2d 654, 658 (2001) (affirming denial of motion to compel discovery of records concerning insurance company's handling of coverage in other cases); *Bennett v. ITT Hartford Grp., Inc.*, 150 N.H. 753, 761, 846 A.2d 560, 567 (2004) (upholding trial court's decision to disallow pretrial discovery of information that was protected by attorney-client privilege and work product doctrine).

Discoverability of Existence of Reinsurance and Communications with Reinsurers

See the discussion set forth above. Note, however, that the New Hampshire Supreme Court has recognized that a "very high level of good faith is required in the relationship between reinsurers and reinsureds." *Certain Underwriters at Lloyd's London v. Home Ins. Co.*, 146 N.H. 740, 742, 783 A.2d 238, 240 (2001) (quotation omitted). Thus, "a reinsurer may be relieved from indemnifying its reinsured if it proves that the reinsured's late notice" in notifying the reinsurer of a potential claim "was due to gross negligence or recklessness, i.e., bad faith." *Id.* at 743-44.

Attorney/Client Communications

Under New Hampshire law, a party may withhold material or other information that may otherwise be discoverable by claiming that it is privileged. *See Hampton Police Ass'n, Inc. v. Town of Hampton*, 162 N.H. 7, 15, 20 A.3d 994, 1001 (2011) (discussing the attorney-client privilege and noting that the "common law rule that confidential communications between a client and an attorney are privileged and protected from inquiry is recognized and enforced in this jurisdiction" (quotation omitted)). However, if a party does so, it "shall promptly and expressly notify the opposing party of the privilege claim and, without revealing the contents or substance of the materials or information at issue, shall describe its general character with sufficient specificity as to enable other parties to assess the applicability of the privilege claim. Failure to comply with this requirement shall be deemed a waiver of any and all privileges." N.H. Super. Ct. Civ. R. 21(c).

Additionally, the New Hampshire Supreme Court has recognized that the attorney-client privilege is not absolute. *See Petition of Dean*, 142 N.H. 889, 890, 711 A.2d 257, 258 (1998). For instance, the privilege can be waived, either expressly or impliedly, by the client. *See id.* An implied waiver can occur when the "asserting party has put the otherwise privileged communications 'at issue' in the present dispute," such as in ineffective assistance of counsel claims. *Id.*

Note also that information may be protected under the work product doctrine. *See Bennett v. ITT Hartford Grp., Inc.*, 150 N.H. 753, 761, 846 A.2d 560, 567 (2004); *see also Riddle Spring Realty Co. v. State*, 107 N.H. 271, 274, 220 A.2d 751, 755 (1966) (discussing the work product doctrine). Such information may only be made available if the party seeking the information "demonstrates a substantial need for the requested materials, and that it could not without undue hardship obtain the materials by other means." *Bennett*, 150 N.H. at 761. It is also possible that a party may be able to trigger in camera review of certain information if it can be established that there is a "reasonable probability" that the documents at issue may contain information that "falls outside the protection of attorney-client privilege and work product." *Id.* at 761-62.

DEFENSES IN ACTIONS AGAINST INSURERS

Misrepresentations/Omissions: During Underwriting or During Claim

Generally, N.H. Rev. Stat. Ann. § 415:9 provides that the "falsity of any statement in the application for any [insurance] policy . . . 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 the insurer." *See also* N.H. Rev. Stat. Ann. § 638:20 (governing insurance fraud).

The New Hampshire Supreme Court has held that the "test under RSA 415:9 of the materiality of a false statement made without actual intent to deceive is whether the statement could reasonably be considered material in affecting the insurer's decision to enter into the contract, in estimating the degree or character of the risk, or in fixing the premium rate thereon." *Mut. Ben. Life Ins. Co. v. Gruette*, 129 N.H. 317, 320–21, 529 A.2d 870, 872 (1987) (quotation omitted). The question of materiality is generally for the trier of fact. *See Taylor v. Metro. Life Ins. Co.*, 106 N.H. 455, 458, 214 A.2d 109, 112 (1965). Fraud, either in fact or by implication, need not be shown, as it is sufficient that the "false statements materially affected either the acceptance of the risk or the hazard assumed by the insurer." *Id.* (quotation omitted).

Additionally, although rescission is an equitable remedy always within the sound discretion of the trial court, an insurer typically "cannot avoid coverage under a compulsory insurance or financial responsibility law because of fraud when the claimant is an innocent third party." *Mooney v. Nationwide Mut. Ins. Co.*, 149 N.H. 355, 357-58, 822 A.2d 567, 569-70 (2003). Although, generally, the insurer rather than innocent third parties bear the risk of intentional material misrepresentations made by the insured, there is no reason in law or policy for the burden of such a risk to be placed on the insurer in preference to the insured who made the intentional material misrepresentations. *Id*. The "same public policy considerations are not present when the claimant is the person who procured the insurance through fraud," and, therefore, the courts will not "permit an insured to benefit from his fraudulent misrepresentations and leave the insurer without a remedy." *Id.* (quotation omitted).

Failure to Comply with Conditions

A cooperation clause of an insurance policy "requires a full, frank and fair disclosure of information in the possession of the insured," and, therefore, a "deliberate and wilful falsification of material facts by the insured constitutes a violation of the terms of a policy." *Employers Mut. Cas. Co. v. Nelson*, 109 N.H. 6, 10, 241 A.2d 207, 210 (1968). However, for there to be a breach by the insured, the inconsistencies in statements by the insured must be (a) material in nature; (b) relied on by the insurer; and (c) be found to be accounted for by wrongful intent on the part of the insured. *See id.* In other words, if the "inconsistency is due to imperfect memory or perception rather than bad faith, the insurer is in no poorer a position to defend than the [in]sured would be himself; and no matter how difficult it makes the defense, the insurer is not relieved of liability." *Id.*

Additionally, in the context of requiring notice to insurers "as soon as practicable," New Hampshire law recognizes that failure to comply with such a requirement in occurrence-based policies "does not necessarily constitute a breach of the policy so as to relieve an insurer of its obligations thereunder. This is so because prejudice is central to a determination of whether failure to report constitutes a material breach of an insurance contract." *Wilson v. Progressive N. Ins. Co.*, 151 N.H. 782, 786, 868 A.2d 268, 271 (2005); *see also Hull v. Hartford Fire Ins. Co.*, 100 N.H. 387, 391, 128 A.2d 210, 213 (1956) (noting that "compliance with the requirement of a policy as to notice of loss is a condition precedent to the insured's right of recovery," but also stating that a "failure to give such notice within the time limited by the policy may, however, 'be excused, where the circumstances are such as to render strict compliance with the requirement impossible or unreasonable and insured has not failed to use due diligence.' . . . In this jurisdiction it has been recognized that strict compliance

with such a condition may be excused on the ground of waiver, . . . estoppel, . . . , or impossibility, . . . or 'for some other good reason'" (quotations and citations omitted)).

Moreover, the New Hampshire Supreme Court has held that other types of conditions, such as a condition to take an examination under oath, is a condition precedent to filing an action under a policy by the insured, and thus an insurer under such circumstances (in contrast to a delay in notice) is not required to show that it suffered actual prejudice from the insured's unexcused refusal to submit to an examination, given that such refusal significantly affects the insurer's investigation of the claim. *See generally Krigsman v. Progressive N. Ins. Co.*, 151 N.H. 643, 864 A.2d 330 (2005).

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

A "final judgment, even by default, made by a court of competent jurisdiction, is conclusive upon an insurer disclaiming coverage and refusing to defend when it had a duty to do so." *White Mountain Cable Const. Co. v. Transamerica Ins. Co.*, 137 N.H. 478, 485, 631 A.2d 907, 911 (1993).

Additionally, a so-called no action clause "is intended to protect the insurer from collusive or overly generous or unnecessary settlements by the insured at the expense of the insurer." *Merchants Mut. Ins. Co. v. Transformer Serv., Inc.*, 112 N.H. 360, 363, 298 A.2d 112, 115 (1972). "An actual trial on the merits or a settlement with the consent of the insurer is required to meet this condition in the absence of waiver or estoppel by the insurer." *Id.* "A denial of all liability by the insurer can render this condition inoperative." *Id.* at 364.

Preexisting Illness or Disease Clauses

There does not appear to be any relevant case law in New Hampshire discussing the construction of pre-existing clauses in insurance policies. The issue of pre-existing illness or disease, however, has been discussed in cases concerning misrepresentations in an application. *See generally Taylor v. Metropolitan Life Ins. Co.*, 106 N.H. 455, 214 A.2d 109 (1965); *Gagne v. Massachusetts Bonding & Ins. Co.*, 78 N.H. 439, 101 A. 212 (1917).

There are statutes, however, pertaining to preexisting conditions. For instance, N.H. Rev. Stat. Ann. § 420-G:7 provides that a "health carrier shall not impose any preexisting condition exclusion with respect to coverage in the individual, small group, or large group market." *See also* N.H. Rev. Stat. Ann. § 415-A:5, III. Note also that N.H. Rev. Stat. Ann. § 415-D:5, III(b) prohibits long term care insurance policies from excluding "coverage for a loss or confinement that is the result of a preexisting condition unless the loss or confinement begins within 6 months following the effective date of coverage of an insured person."

Practitioners should also be aware of New Hampshire's statutory incontestability clause as outlined in N.H. Rev. Stat. Ann. § 415:6.

Statutes of Limitations and Repose

Pursuant to N.H. Rev. Stat. Ann. § 508:4, I, all personal actions, except where otherwise specified, must be brought within three years of the act or omission complained of. However, New Hampshire recognizes the discovery rule, which provides that a personal action may be brought beyond the three-year statute of limitations if the act or omission was not discovered, and could not reasonably have been discovered at the time of the act or omission; if this applies, then the action must be brought within three years of the time the plaintiff discovers, or in the exercise of reasonable diligence should have discovered, the injury and its causal relationship to the act

or omission complained of. N.H. Rev. Stat. Ann. § 508:4, I. New Hampshire also recognizes tolling of the statute of limitations period for certain groups, including minors, incapacitated persons, and out-of-state defendants. *See id.* at §§ 508:3, 508:8, and 508:9.

Note that New Hampshire also has a special statute of limitations applicable in fire insurance contexts. Pursuant to N.H. Rev. Stat. Ann. § 407:15 the "insurer shall provide written notice to the insured of any denial of coverage. The notice shall inform the insured that any action based upon the denial shall be barred by law if not commenced within 12 months from the date of the written denial." *See also* N.H. Rev. Stat. Ann. § 407:22 (providing a standard fire policy form that provides in part that "[n]o suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity unless the requirements of this policy shall have been complied with, and unless commenced within 12 months next after inception of the loss").

Although New Hampshire has statutes of repose for certain claims, including those involving damages related to the construction of real property, *see id.* at § 508:4-b, there do not appear to be any applicable statutes of repose in the insurance context.

TRIGGER AND ALLOCATION ISSUES FOR LONG-TAIL CLAIMS

Trigger of Coverage

The New Hampshire Supreme Court has recognized that there are generally four different approaches to determining how coverage under an insurance policy is triggered: "(1) manifestation; (2) injury-in-fact or actual damage; (3) exposure; and (4) continuous trigger." *EnergyNorth Nat. Gas, Inc. v. Underwriters at Lloyd's*, 150 N.H. 828, 831, 848 A.2d 715, 718 (2004).

"Under a manifestation theory, the date of loss is assigned to the policy period when property damage or actual damage is discovered, becomes known to the insured or a third party, or should have reasonably been discovered." *Id.* (quotation omitted). "The injury-in-fact theory implicates all of the policy periods during which the insured proves some injury or damage." *Id.* (quotation omitted). "Under the exposure theory, all insurance contracts in effect when property was exposed to hazardous waste would be triggered." *Id.* (quotation omitted). "Finally, pursuant to the continuous trigger theory, any policy on the risk at any time during the continuing loss is triggered." *Id.* (quotation and brackets omitted).

Although, generally, there is "little practical difference between the particular theories utilized," the continuous trigger theory "typically maximizes insurance coverage since all policies on the risk from the date of initial exposure through manifestation are triggered regardless of proof of actual property damage during the policy period." *Id.* at 831-32 (quotation omitted).

To determine what trigger of coverage theory applies, the courts will look to the language of the policies in question. *Id.* The general principles of contract interpretation outlined above will then apply. *See id.*

Additionally, in the context of excess insurance, the New Hampshire Supreme Court has held that "the excess insurer's duty to defend is triggered only when the primary's insurer's coverage is exhausted." *Old Republic Ins. Co. v. Stratford Ins. Co.*, 168 N.H. 548, 549, 132 A.3d 1198, 1199 (2016). Thus, when "an insured is covered by both a primary policy and an excess policy the excess liability carrier is not obligated to participate in the defense until the primary policy limits are exhausted." *Id.* at 550 (quotation and ellipsis omitted).

Allocation Among Insurers

The New Hampshire Supreme Court has adopted a "pro rata approach to allocating liability among multiple insurers." *EnergyNorth Nat. Gas, Inc. v. Certain Underwriters at Lloyd's*, 156 N.H. 333, 344, 934 A.2d 517, 526 (2007). According to the New Hampshire Supreme Court, the pro rata allocation is "superior to joint and several allocation" in long tail claims, for a variety of reasons. *Id.* at 344-45. Such reasons include the fact that a pro rata allocation "guarantees that all of the carriers on the risk during a long-tail environmental exposure injury respond to it," and "forces companies to internalize part of the costs of long-tail liability." *Id.* at 344; *see also Case v. Fidelity & Casualty Co.*, 105 N.H. 422, 427, 201 A.2d 897, 900-01 (1964) (concluding that each insurer was liable for its proportionate share of any judgment recovered).

As explained above, excess liability carriers are not obligated to participate in the defense until the primary policy limits are exhausted. *Old Republic Ins. Co. v. Stratford Ins. Co.*, 168 N.H. 548, 549-50, 132 A.3d 1198, 1199 (2016). However, when there are co-primary insurers, both must equally share in the costs of defending the insured(s). *See id.* at 552-53.

CONTRIBUTION ACTIONS

Claim in Equity vs. Statutory

In New Hampshire, statutes have generally superseded common law rules governing contribution actions. *See, e.g.*, *Jaswell Drill Corp. v. Gen. Motors Corp.*, 129 N.H. 341, 343, 529 A.2d 875, 876 (1987) (observing, in regard to tort law, that the "legislature enacted a statute which supersedes the common law rule precluding contribution among tortfeasors").

Elements

A "right to contribution among insurers arises when [a] single insured is covered by concurrent insurance, and one insurer [has] paid all, or greater than its share, of a loss." *In re Liquidation of Home Ins. Co.*, 158 N.H. 677, 682, 972 A.2d 1019, 1023 (2009) (quotation and ellipsis omitted). Unless parties agree to not seek contribution, a contribution claim may be able to be asserted as a setoff under N.H. Rev. Stat. Ann. § 402–C:34, which relates to mutual debts and mutual credits. *See In re Liquidation of Home Ins. Co.*, 158 N.H. at 684.

In a more general sense, a right of contribution exists between two or more persons who are jointly and severally liable, regardless of whether judgment has been recovered against all or any of them. N.H. Rev. Stat. Ann. § 507:7-f, I. Such right may be enforced by a separate contribution action, *id*., and the court must determine each defendant's proportionate share of the obligation to each claimant in accordance with the verdict, *id*. at § 507:7-e, III. *See also Pike Indus., Inc. v. Hiltz Const., Inc.*, 143 N.H. 1, 7, 718 A.2d 236, 239 (1998). If a judgment has been rendered, the action for contribution must be commenced within one year after the judgment becomes final. N.H. Rev. Stat. Ann. § 507:7-g, III.

DUTY TO SETTLE

The New Hampshire Supreme Court has recognized a duty by insurers to use reasonable care in settlement of third-party liability actions. *See generally Dumas v. State Mut. Auto Ins. Co.*, 111 N.H. 43, 274 A.2d 781 (1971); *see also Gelinas v. Metro. Prop. & Liab. Ins. Co.*, 131 N.H. 154, 161, 551 A.2d 962, 966 (1988) (explaining that New Hampshire

has adopted a negligence standard to "determine the liability of an insurer in failing to settle a third-party claim within policy limits").

However, the New Hampshire Supreme Court has refused to extend that duty to first-party claims. *See Lawton v. Great Sw. Fire Ins. Co.*, 118 N.H. 607, 614, 392 A.2d 576, 581 (1978) (holding that "allegations of an insurer's wrongful refusal or delay to settle a first-party claim do not state a cause of action in tort"); *Jarvis v. Prudential Ins. Co. of Am.*, 122 N.H. 648, 652, 448 A.2d 407, 409 (1982) (reiterating holding in *Lawton*); *see also Bell v. Liberty Mut. Ins. Co.*, 146 N.H. 190, 195, 776 A.2d 1260, 1264 (2001) (refusing to "recognize a tort claim for bad faith delay or refusal to settle a first-party insurance claim"). *But see Allstate Ins. Co. v. Reserve Ins. Co.*, 116 N.H. 806, 808, 373 A.2d 339, 340 (1976) (stating that an "insurer owes a duty to its insured to exercise due care in defending and settling claims against the insured, and that a breach of that duty will give rise to a cause of action by the insured").

A delay in payment or refusal to settle might, nonetheless, constitute a breach of contract or a violation of the duty of good faith and fair dealing that is implied in every contract, such that damages may be awarded. *See, e.g.*, *Lawton*, 118 N.H. at 612.

Additionally, the New Hampshire Code of Administrative Rules Insurance Department Chapter 1000 sets forth a claims settlement procedure. This procedure imposes, among other things, time limits on the various stages of the claims settlement process, and requires settlement offers to be made when there is no dispute as to an element of a claim. *See generally* N.H. Code Admin. R. Ann. Ins. Parts 1001 and 1002.

LH&D BENEFICIARY ISSUES

Change of Beneficiary

Generally, "[m]odification of an insurance contract must be by the mutual agreement of the parties." *Maville v. Peerless Ins. Co.*, 141 N.H. 317, 319, 686 A.2d 1165, 1167 (1996). The intent of the parties, as evidenced by the terms of the modification via the change form or the accompanying letter, may determine the effective date of any such modification. *Id.* at 319-20.

As to the changing of a beneficiary, an "insured has the right to change the designation of a policy's beneficiary" at any time, "if the policy reserves this right to the insured," and provided that the "insured has not contracted away this right." *Dubois v. Smith*, 135 N.H. 50, 56, 58, 599 A.2d 493, 497-98 (1991). Additionally, the New Hampshire Supreme Court adheres "to the traditional rule that the policy holder has the burden of effecting a change of beneficiaries." *Frederick v. Frederick*, 141 N.H. 530, 532, 687 A.2d 711, 713 (1996); *see In re Estate of McIntosh*, 146 N.H. 474, 478, 773 A.2d 649, 652 (2001) (noting that it "is the originator's burden to change the named beneficiary"). "Placing the obligation to change the beneficiary designation on the policy holder ensures a smooth transfer of funds in the difficult period following the policy holder's death, and reduces the incentives for costly and divisive litigation." *Frederick*, 141 N.H. at 532.

Effect of Divorce on Beneficiary Designation

Upon a final decree of divorce and unless the decree specifically provides otherwise, if one spouse is a member of a group health insurance policy, the former spouse remains eligible for group benefits and coverage as a family member until the earliest of the following events: the three-year anniversary of the divorce, the remarriage of either spouse, the death of the member, or such earlier time as provided by the final divorce decree. N.H. Rev.

Stat. Ann. § 415:18, VII-b. If the divorced spouse is 55 years of age or older, however, coverage will continue until that spouse becomes eligible in another employer-based group plan or becomes eligible for Medicare. *Id.* at § 415:18, XVI(c)(5).

In regard to life insurance, an insured has the right to change the designation of the policy's beneficiary, so long as the policy reserves this right. *See Dubois v. Smith*, 135 N.H. 50, 56, 599 A.2d 493, 497 (1991). Unless that right was contracted away in a divorce stipulation, it is "not usually affected by the divorce or marriage of the insured, no matter how the personal or legal relationship of the insured to the beneficiary changes." *Id.* In other words, "a divorce decree may only change a beneficiary designation when it expressly states that the parties intend such a result." *Frederick v. Frederick*, 141 N.H. 530, 532, 687 A.2d 711, 713 (1996).

Additionally, an anti-hypothecation order, which restrains parties in a divorce proceeding from transferring real or personal property, does not restrict the insured from changing the beneficiary of a life insurance policy during the divorce. *See generally Elter-Nodvin v. Nodvin*, 163 N.H. 678, 48 A.3d 908 (2012).

INTERPLEADER ACTIONS

Availability of Fee Recovery

The New Hampshire Supreme Court has held that costs, as well as reasonable fees, are allowable to the party asserting the interpleader action. *See Manchester Fed. Sav. & Loan Ass'n v. Emery-Waterhouse Co.*, 102 N.H. 233, 239, 153 A.2d 918, 922 (1959); *but see Fid. & Cas. Co. of N.Y. v. LePage*, 105 N.H. 327, 329, 200 A.2d 12, 13 (1964) (observing that "provisions for counsel fees allowable as taxable costs have been and continue to be totally unrealistic," and noting that the "need for overhaul is long overdue").

Differences in State vs. Federal

In New Hampshire, a "bill of interpleader is a proper and appropriate remedy to pursue where the insurance proceeds are inadequate to satisfy pending claims. It enables a liability insurer to effect a ratable allocation of the proceeds of its policy among all the claimants in order to avoid any contention of negligence, bad faith or preferential treatment on its part in making a settlement with any of the claimants." *Fid. & Cas. Co. of N.Y. v. LePage*, 105 N.H. 327, 328, 200 A.2d 12, 13 (1964).

The First Circuit has similarly explained that in "interpleader, the plaintiff ordinarily is a mere stakeholder who solicits the assistance of a court in order to avoid potentially inconsistent liabilities." *Hudson Sav. Bank v. Austin*, 479 F.3d 102, 107 (1st Cir. 2007).

Additionally, federal courts, like those in New Hampshire, have "discretion to award costs and counsel fees to the stakeholder in an interpleader action whenever it is fair and equitable to do so." *Sun Life Assur. Co. of Canada v. Sampson*, 556 F.3d 6, 8 (1st Cir. 2009) (quotation and ellipsis omitted). "The test for awarding fees and costs is a typical equitable one that is very similar to the standard used to determine whether interpleader relief ought to be granted-should the interpleading party be required to assume the risk of multiplicity of actions and erroneous election." *Id.* (quotation omitted). "If not, then the stakeholder should be made whole." *Id.* (quotation omitted). "The test is not satisfied if the stakeholder has contributed to the need for interpleader by acting in bad faith or by unduly delaying in seeking relief." *Id.* (quotation omitted).