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Maine

REGULATORY LIMITS ON CLAIMS HANDLING

Timing for Responses and Determinations

All relevant time limitations are found in the Insurance Code, Title 24-A. Sections 2436 and 2436-A, commonly called the Unfair Claims Settlement Practices Act, provide in part that claims for loss other than by fire are payable within 30 days of proof of loss, and fire-related claims have a 60-day limit. 24-A M.R.S. § 2436 (1), 1(A). An insurer may, however, at any time within the 30 days, notify the insured that further proof is needed. A second 30-day clock then begins to run once the insurer has received the requested information, or 60-day clock in the case of fire losses. *Id.* A private cause of action exists for the insured if the insurer fails to adhere to the requirements of Section 2436. *See* 24-A M.R.S. § 2436-A.

Standards for Determination and Settlements

Claims handling standards are set forth in the same sections discussed under section A. Note that § 2436-A does create a private right of action for certain specific knowing violations of the Act. Establishment of a claim under § 2436-A entitles the insured to an award of 1 1/2 % per month interest penalty, costs and attorneys' fees.

PRINCIPLES OF CONTRACT INTERPRETATION

The Law Court applies general principles of contract interpretation. *Barrett v. McDonald Investments, Inc.*, 2005 ME 43, ¶ 17, 870 A.2d 146. A contract of insurance, like any other contract, is to be construed in accordance with the intention of the parties, examining the contract as a whole. *Peerless Ins. Co. v. Brennon*, 564 A.2d 383, 384-85 (Me. 1989). The Law Court interprets a contract according to the plain meaning of its language and will avoid any interpretation that renders a provision meaningless. *Ackerman v. Yates,* 2004 ME 56, ¶ 9, 847 A.2d 418, 422. When a contract is unambiguous, its construction is a question of law. *Am. Prot. Ins. Co. v. Acadia Ins. Co.,* 2003 ME 6, ¶ 10, 814 A.2d 989, 993. When a contract is ambiguous—meaning it is "reasonably susceptible to different interpretations"—its interpretation is a question of fact for the fact finder. *Acadia Ins. Co. v. Buck Const. Co.*, 2000 ME 154, ¶ 9, 756 A.2d 515, 517. Maine follows the bedrock principle of contract law that ambiguities are interpreted against the drafter. *Barrett*, 2005 ME 43 at ¶ 17, 870 A.2d 146.

CONTRACT INTERPRETATION

Common Issues

1. Faulty Workmanship as an "Occurrence" [What is the state of the common law in your state on this subject?]

The Maine Supreme Judicial Court ("Law Court") has not concluded that faulty workmanship qualifies as an occurrence. The Law Court's focus has been on the "business risk exclusion," which is not covered, as opposed to "occurrence of harm risks," which is covered. *See, Lyman Morse Boatbuilding, Inc. v. Northern Assur. Co. of Am.*, 772 F.3d 960, 966 (1st Cir. 2014) (Maine law) (holding there was no coverage for an insured boat building company where the complaint sought damages for replacing defective workmanship, which was a business risk specifically excluded from the policy); *Baywood Corp. v. Maine Bonding & Cas. Co*., 628 A.2d 1029, 1031 (Me. 1993) (finding "because the complaint does not allege actual damage to property, but rather seeks damages for replacing defective workmanship, which is a business risk specifically excluded from the policy, they have no obligation to defend the underlying action . . . ." towards holding that a Commercial General Liability policy covers property damage resulting from "negligent workmanship," but does not cover "repair and replacement of faulty work").

2. Does Your State Have an Anti-Indemnity Statute? [And if so, does it have any notable peculiarities?]

No. Maine courts, however, strictly construe contracts that provide for a party to be indemnified for losses resulting from that party's own negligence. *Emery Waterhouse Co. v. Lea*, 467 A.2d 986, 993 (Me. 1983) ("It is only where the contract on its face by its very terms clearly and unequivocally reflects a mutual intention on the part of the parties to provide indemnity for loss caused by negligence of the party to be indemnified that liability for such damages will be fastened on the indemnitor."); *see also McGraw v. S.D. Warren Co*., 656 A.2d 1222, 1223-24 (Me. 1995) (holding that construction contract did not expressly provide that contractor was to indemnify owner against owner's negligence, thereby precluding owner from seeking indemnification in lawsuit brought by contractor's employees against owner); *Burns & Roe, Inc. v. Cent. Me. Power Co*., 659 F. Supp. 141, 144 (D. Me. 1987) (finding that a contract between engineering firm and power company did not contain an "explicit statement clearly manifesting an intent to indemnify against the indemnitee's own negligence").

CHOICE OF LAW

In Maine, when determining whether to enforce a choice of law provision in a contract, courts are guided by the choice of law analysis outlined in the Restatement. Pursuant to section 187(2) of the Restatement (Second) of Conflicts of Laws, Maine courts will enforce a contractual choice of law provision "unless either (a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or (b) the application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue . . . ." *Schroeder v. Rynel, Ltd., Inc.*, 1998 ME 259, ¶ 8, 720 A.2d 1164, 1166 (quoting Restatement (Second) of Conflicts of Laws § 187(2) (1971)).

Similarly, in the absence of a choice of law provision in an insurance contract, Maine courts apply the Restatement's "most significant contacts and relationships" approach to conflicts of law. *Flaherty v. Allstate Ins. Co.*, 2003 ME 72, ¶ 16, 822 A.2d 1159, 1165-66 (citing the Restatement (Second) of Conflict of Laws §§ 145, 146 (1971)). Under this approach, Maine courts isolate the issue, identify the policies embraced in the laws in conflict, and examine the contacts with the respective jurisdictions to determine which jurisdiction has a superior interest in having its laws and policies applied. *Flaherty v. Allstate Ins. Co.*, 2003 ME 72, ¶ 19, 822 A.2d 1159 (citing *Collins v. Trius, Inc.*, 663 A.2d 570, 573 (Me. 1995)). In examining the parties' contacts with the respective jurisdictions, Maine courts consider:

- the place where the injury occurred,
- the place where the conduct causing the injury occurred,
- the domicile, residence, nationality, place of the parties, and
- the place where the relationship, if any, between the parties is centered.

Flaherty, 2003 ME 72, ¶ 15, 822 A.2d 1159, 1166 (citing the Restatement (Second) of Conflict of Laws § 145 (1971)).

DUTIES IMPOSED BY STATE LAW

Duty to Defend

1. Standard for Determining Duty to Defend

In determining whether a duty to defense exists, Maine utilizes the comparison test, in which the allegations in a complaint are compared to the insurance policy. *Harlor v. Amica Mut. Ins. Co.*, 2016 ME 161, ¶ 7, 150 A.3d 793, 797. An insurer has a duty to defend if the allegations within the complaint create any possibility of a covered award. *Union Fire Ins., Co. v. Town of Topsham,* 441 A.2d 1012, 1015 (Me. 1982). There is no requirement that the facts alleged in the complaint specifically and unequivocally make out a claim within the coverage. *See Gibson v. Farm Fam. Mut. Ins. Co.*, 673 A.2d 1350, 1352 (Me. 1996) ("An insured is not at the mercy of the notice pleading of the third party suing him to establish his own insurer's duty to defend."). Where there is ambiguity in the language of the policy, the doubt should be resolved in favor of finding that the insurer has a duty to defend. *Id.* (citing *Union Mut. Fire Ins. Co. v. Town of Topsham*, 441 A.2d 1012, 1015 (Me.1982)). An insurer may not consider facts extrinsic to the complaint. *See, e.g., Vigna v. Allstate Ins. Co.*, 686 A.2d 598, 599 (Me. 1996). The duty to defend arises when tender is made and generally continues until the action is concluded, *unless* the covered and non-covered claims are severable. *See generally Travelers Indem. Co. v. Dingwell*, 414 A.2d 220 (Me. 1980). The duty to defend is not absolute, and the Law Court has held that a duty to defend did not arise where the facts alleged in the complaint fell squarely within an exclusion contained in the insurance policy at issue. *Barnie's Bar & Grill, Inc. v. United States Liab. Ins. Co.*, 2016 ME 181, 152 A.3d 613 (observing that the only claims presented were for assault and battery and "[e]ven liberally construing the . . . complaint in favor of [the insured], there is no allegation—or even the hint of an intent to state an allegation—that escapes the . . . policy's exclusions for assault and battery.")

2. Issues with Reserving Rights

In *Patrons Oxford Ins. Co. v. Harris*, the Maine Law Court held that an insurer who defends under a reservation of rights cannot control the defense. In this situation, the insured is permitted to enter into a stipulated judgment with the plaintiff. The plaintiff must, in a separate proceeding, prove that the settlement is reasonable before the insurer can be bound to the settlement. 2006 ME 72, ¶ 22, 905 A.2d 819.

An insurer is not required to expressly reserve its right to pursue a subrogation claim against a

third party whose negligence or wrongful act caused the loss. *Emery Waterhouse Co. v. Lea*, 467 A.2d 986, 994 (Me. 1983).

Whenever an automobile insurer pays its own insured pursuant to medical payments coverage, the insurer has a lien on any funds recovered by its insured in a suit against the tortfeasor. Pursuant to 24-A M.R.S. § 2910-A, the insurer's subrogation right is subject to subtraction to account for the pro-rata share of the insured's attorney's fees incurred in obtaining the recovery from another source. That statute, however, was amended in 2011 to require that an insurer have written approval from the insured to pursue such a claim. *Id.* § 2910-A(1)(B).

State Privacy Laws; Insurance Regulatory Issues; Arbitration/Mediation

The Insurance Information and Privacy Protection Act, 24-A M.R.S. § 2201 *et seq*., creates a right of privacy for insureds and claimants for information maintained by insurance companies, including claims files. Any discovery order regarding this information must be conditioned on the written consent of the affected parties in response to a request form that meets the requirements of 24-A M.R.S. § 2208.

1. Criminal Sanctions

The Maine Insurance Code contemplates civil penalties, not criminal penalties, being assessed against persons who violate the Maine Insurance Code, any law enforced by the superintendent of insurance, or any rule lawfully adopted by the superintendent. 24-A M.R.S. § 12-A (1). In the case of an individual, fines imposed may be not less than $500.00 and not more than $5,000.00 for each violation, and in the case of a violation by a corporation or entity, the fine imposed may be not less than $2,000.00 and not more than $15,000.00 for each violation. *Id.* The Maine Insurance Code also permits the recovery of attorneys' fees and costs in certain situations. 24-A M.R.S. §§ 2108, 2436-A.

2. The Standards for Compensatory and Punitive Damages

With respect to property damage, the standard jury instruction states that a Plaintiff that sustained property damage may recover the "actual cost of repair of the plaintiff's property which was damaged as a result of the accident" or "the difference between the value of the property immediately before the damage occurred and the value of the property immediately after the damage occurred." See Alexander, Maine Jury Instruction Manual § 1-107 (2018-2019 ed.)

With respect to medical expenses, the standard jury instruction states that "Medical expenses includes the reasonable value of medical services . . . shown by the evidence to have been reasonably required and actually used in treatment . . . ." Alexander, Maine Jury Instructions Manual §7-108 (2018 ed). The comment to the above-referenced instruction provides "Medical expense damages may be recovered for charges paid by or for the plaintiff, charges paid by a collateral source or a third party, or charges actually incurred but later written off or otherwise not collected. Mention to the jury of collateral source payments or write-offs should be avoided." The courts in Maine have split on what amount, i.e., the amount billed, the amount paid, or a hybrid of both, is ultimately submitted to the jury. There is a trend in the trial courts to allow the jury to determine what is "reasonable" by allowing evidence of the amount billed and the amount actually paid to be presented in the context

of Medicare, Medicaid, or other government funded insurance programs. Barday v. Donnely v. Megan Berry Third-Party Defendant, No. CV-04-508, 2006 WL 81876 (January 27, 2006) (Order denying Motion for Partial Summary Judgment); Brown v. Poore, Docket No. CV-12-025 (November 6, 2012); Gilbert v. Lembark, No. CV-11-31, 2014 WL 809624 (November 20, 2014). The Law Court, however, has not opined on the issue.

"[P]unitive damages are available based upon tortious conduct only if the defendant acted with actual malice" or where the conduct "is so outrageous that malice toward a person injured as a result of that conduct can be implied." Tuttle v. Raymond, 494 A.2d 1353, 1360-61 (Me 1985). Negligence, gross negligence, and mere reckless conduct are insufficient to form the basis for an award of punitive damages. Id..

3. Insurance Regulations to Watch

In 2021, the Maine Legislature's Committee on Judiciary considered a bill, L.D. 1160, which would have made a number of significant changes to the insurance law landscape in Maine. LD 1160 sought to increase pre-judgment and post-judgment interest rates to 10%, amend the law regarding subrogation on certain casualty insurance policies, and, most significantly, amend 24-A M.R.S. § 2436-A to create a cause of action for unfair claims settlement practices directly against a 3rd party liability insurer. However, after a strong lobbying effort from members of the insurance industry and other advocates, the Committee removed all of the insurance-related provisions from the bill. L.D. 1160 retained only the provision regarding a pre- and post-judgment interest rate increase, and it was ultimately vetoed by the Governor.

This session, there is one bill in particular pending consideration by the Committee on Health Coverage, Insurance, and Financial Services that would have an impact on insurance coverage in Maine. L.D. 1244 seeks to amend 24-A M.R.S. § 2436(3) by increasing the interest rate an insurer owes on any past due, undisputed claims from 1 ½ % per month to 10% per month.

4. State Arbitration and Mediation Procedures

In Maine, arbitration procedures are governed by the Uniform Arbitration Act. See 14 M.R.S. § 5927 et seq. The Uniform Arbitration Act provides that "[a] written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract." Id. § 5927. Although the Maine Insurance Code does not specifically address arbitration, pursuant to the Uniform Arbitration Act parties may contract to submit a dispute to arbitration before a lawsuit can be commenced.

Most civil lawsuits in Maine are subject to Alternative Dispute Resolution. Maine Rule of Civil Procedure 16B provides that the parties must confer and promptly select an alternative dispute resolution process, whether mediation, early neutral evaluation, or other nonbinding ADR, and notify the court of that selection within 60 days of the issuance of the scheduling order. ADR must be conducted within 120 days of the issuance of the scheduling order, but can be enlarged to 180-days as a matter of course upon agreement by the parties. See M.R. Civ. P. 16B.

5. State Administrative Entity Rule-Making Authority

The Maine Administrative Procedure Act, 5 M.R.S. §§ 8001 *et seq*. sets forth the procedures for

administrative rule making. Subject to those provisions, the Insurance Superintendent "may adopt, amend and rescind reasonable rules to aid in the administration or effectuation of any provision of [the Maine Insurance Code] or of any other state or federal statutes to the extent administered or enforced by the superintendent."

EXTRACONTRACTUAL CLAIMS AGAINST INSURERS: ELEMENTS AND REMEDIES

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

3. First Party

There is no independent tort of bad faith that accompanies an insurer's breach of the implied covenant of good faith and fair dealing. Marquis v. Farm Family Ins. Co., 628 A.2d 644 (Me. 1993). An insured's "remedies for breach of the duty [are limited] to the traditional remedies for breach of contract . . . ." Id. at 652. Where there is no coverage, there is no breach. See also Colford v. Chubb Life Ins., 687 A.2d 609, 616 (Me. 1996) ("In order to secure emotional distress and punitive damages in this action, [an insured] must demonstrate that [the insurer] committed independently tortious conduct beyond the denial of [the] claim.").

However, Maine does provide a private cause of action for violation of the Unfair Claims Settlement Practices Act, 24-A M.R.S. § 2436-A, for the following violations:

- Knowingly misrepresenting to an insured pertinent facts or policy provisions relating to coverage at issue;
- Failing to acknowledge and review claims, which may include payment or denial of a claim, within a reasonable time following receipt of written notice by the insurer of a claim by an insured arising under a policy;
- Threatening to appeal from an arbitration award in favor of an insured for the sole purpose of compelling the insured to accept a settlement less than the arbitration award;
- Failing to affirm or deny coverage, reserving any appropriate defenses, within a reasonable time after having completed its investigation related to a claim; or
- Without just cause, failing to effectuate prompt, fair and equitable settlement of claims submitted in which liability has become reasonably clear.

As stated above, violation entitles the insured to damages, 1 1/2 % per month interest penalty, costs and attorneys' fees.

4. Third-Party

Third parties are limited to contract remedies. This rule circumscribes liability of insurers as to third parties. See, e.g., Stull v. First American Title Ins. Co., 2000 ME 21, ¶ 17, 745 A.2d 975, 981.

Fraud

A defendant is liable for fraud if the plaintiff establishes the following elements by clear and convincing evidence:

> [The defendant] (1) makes a false representation (2) of a material fact (3) with knowledge of its falsity or in reckless disregard of whether it is true or false (4) for the purpose of inducing another to act or to refrain from acting in reliance upon it, and (5) the plaintiff justifiably relies upon the representation as true and acts upon it to his damage.

Letellier v. Small, 400 A.2d 371, 376 (Me. 1979). When clear and convincing evidence is required, plaintiffs bear the burden of persuasion to "place in the ultimate factfinder an abiding conviction that the truth of [their] factual contentions are highly probable." *St. Francis De Sales Federal Credit Union v. Sun Ins., Co. of New York*, 2002 ME 127, ¶ 26, 818 A.2d 995. *See also* Unfair Claims Settlement Practices Act, 24-A M.R.S. § 2436-A.

Intentional or Negligent Infliction of Emotional Distress

To prevail on a claim of intentional infliction of emotional distress, the plaintiff must show that:

- the defendant intentionally or recklessly inflicted severe emotional distress or was certain or substantially certain that such distress would result from [the defendant's] conduct;
- the conduct was so extreme and outrageous as to exceed all possible bounds of decency and must be regarded as atrocious, utterly intolerable in a civilized community;
- the actions of the defendant caused the plaintiff's emotional distress; and
- the emotional distress suffered by the plaintiff was so severe that no reasonable person could be expected to endure it.

Lyman v. Huber, 2010 ME 139, ¶ 16, 10 A. 3d 707, 711 (quoting *Curtis v. Porter*, 784 A.2d 18, 22-23 (Me. 2001)).

To be liable for negligent infliction of emotional distress, the Plaintiff must establish that:

- The defendant owed Plaintiff a duty of care;
- The defendant breached that duty;
- The Plaintiff suffered severe emotional distress;
- That was caused by the Defendant's breach of duty.

Ocianic Inn, Inc. v. Sloan's Cove, LLC, 2016 ME 34, ¶ 23, 133 A.3d 1021. "[A] duty to act reasonably and avoid emotional harm to others [has been recognized] in very limited circumstances: first, in claims commonly referred to as bystander liability actions; and second, in circumstances in which a special relationship exists between the actor and the person emotionally harmed." *Id.*

A plaintiff pursuing either intentional infliction of emotional distress or negligent infliction of emotional distress in the context of an insurer/insured relationship must demonstrate independently tortious conduct beyond the denial of a claim. *Colford v. Chubb Life Ins. Co. of America*, 687 A.2d 609, 616 (Me. 1996).

The Maine Law Court has not directly addressed the question of whether a plaintiff has an independent action for NIED against an insurer. Presumably, the same preconditions apply to that claim as to any other action beyond breach of contract for independent conduct beyond the denial of the claim. *cf. Commercial Union Ins. Co. v. Workers' Compensation Bd.,* 704 A.2d 358, 359 (Me. 1997).

In the context of a wrongful death claim, the Law Court has also explicitly held that a claim for NIED possessed by

the beneficiary of a decedent's estate can only be asserted as part of that wrongful death claim. *See Carter v. Williams*, 2002 ME 50, ¶¶ 14, 19, 792 A.3d 1093. That is, the beneficiary of an estate cannot bring NIED claims separate from the underlying wrongful death claim. *Id.*

State Consumer Protection Laws, Rules and Regulations

Pursuant to Maine's Unfair Trade Practices Act, 5 M.R.S. § 205-A, et seq., ("the Act") a purchaser of personal, family or household goods, services, or property who suffers any loss of money or property as a result of an unfair or deceptive act committed in the conduct of trade may maintain an action pursuant to the Act. *See* 5 M.R.S. §§ 207 and 213. In order to recover against an insurer under the Act, the plaintiff must establish a loss of money or property as a result of the insurer's actions. *Curtis v. Allstate Ins. Co.*, 2002 ME 9, ¶ 38, 787 A.2d 760 (Me. 2002). In that case, the Court held that signing a release in exchange for the settlement did not qualify as loss of money or property as required by the Act. *Id.*

DISCOVERY ISSUES IN ACTIONS AGAINST INSURERS

Discoverability of Claims Files Generally

In Maine state courts, claims files are presumed to be prepared in anticipation of litigation and are protected by the work product doctrine. *Harriman v. Maddocks*, 518 A.2d 1027, 1033 (Me. 1986). The adjuster's file is potentially discoverable, however, upon a particularized showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. *Id.* The *Harriman* ruling only applies to third-party claims. The Law Court has yet to render a decision on discoverability of claim files in the first-party context. At least one superior court case held that claim files are discoverable in the first-party context.

Discoverability of Reserves

There have been no decisions from the Law Court on this matter.

Discoverability of Existence of Reinsurance and Communications with Reinsurers

There have been no decisions from the Law Court on this matter.

Attorney/Client Communications

There have been no cases that specifically address the relationship between the insurer and the insured in the attorney client context. It is anticipated, however, that where an insurer retains counsel to represent an insured, the insurer and insured are joint clients for purposes of the attorney-client privilege. Each is entitled to disclosure of confidences from the other but neither party may use the privilege as a shield in litigation between insurer and insured.

DEFENSES IN ACTIONS AGAINST INSURERS

Misrepresentations/Omissions: During Underwriting or During Claim

Misrepresentations, omissions, concealment of facts, and incorrect statements may not prevent a recovery under a policy or contract unless they are either fraudulent, or:

> [m]aterial either to the acceptance of the risk, or to the hazard assumed by the insurer, such that the insurer in good faith would either not have issued the insurance or contract, or would not have issued it at the same premium rate, or ... in as large an amount, or would not have provided coverage with respect to the hazard resulting in the loss, if the true facts had been made known . . . .

24-A M.R.S. § 2411. An insurer must prove that the misrepresentation was both fraudulent and material. *See Liberty Ins. Underwriters, Inc. v. Estate of Faulkner*, 2008 ME 149, ¶ 14, 957 A.2d 94, 99. Merely establishing one or the other is insufficient. *Id.*

Failure to Comply with Conditions

There are few Law Court decisions on this question, but those that exist are unequivocal. "[A]n insurer must demonstrate prejudice before relying on the insured's breach of a policy provision to deny coverage." *Greenvall v. Maine Mut. Fire Ins. Co.*, 715 A.2d 949, 954 (Me. 1998). For example, when an insured breaches a notice condition, the insurer, to avoid either its duty to defend or its liability thereunder, "must show (a) that the notice provision was in fact breached, and (b) that the insurer was prejudiced by the insured's delay." *Ouellette v. Maine Bonding & Cas. Co.,* 495 A.2d 1232, 1235 (Me. 1985); *see also State Farm Mut. Auto Ins. Co. v. Lucca*, 838 F. Supp. 670, 671 (D. Me. 1993) (granting summary judgment for insurer where affidavit from insurer's investigator establishing prejudice resulting from insured's failure to comply with notice requirements was not contradicted by insured).

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

Most liability policies, through cooperation clauses, seek to bar collusive settlements by barring actions against it until there has been a judgment or a settlement approved by the carrier, barring fraud or collusion. Title 24-A M.R.S. § 2904 provides that, barring fraud or collusion, whenever a party recovers a final judgment against any other person for loss or damage, the judgment creditor shall be entitled to have the insurance money applied to the satisfaction of the judgment by bringing a civil action against the insurer to reach and apply the insurance money if the judgment debtor was insured and had notice of such accident or damage before recovery of the judgment. When a default judgment has been obtained against an insured, in order for the judgment creditor to reach and apply the insurance proceeds the insurer must have had notice and an opportunity to defend its interests prior to the entry of the default judgment. *Jacques v. American Home Assur. Co.*, 609 A.2d 719, 721 (Me. 1992).

Although Maine State courts have consistently stated that insurance contracts will be strongly construed against insurers, *Baybutt Construction Corp. v. Commercial Union Ins. Co.,* 455 A.2d 914 (Me. 1983), local federal precedent indicates an unwillingness to overlook a notice provision with regard to cooperation clauses. *See, e.g., Gates Formed Fibre Products, Inc. v. Imperial Cas. & Indemnity Co.,* 702 F.Supp. 343, 348 (D. Me. 1988). No showing of prejudice on the part of the insurer will be required, absent such language in the contract. *Id.*

Preexisting Illness or Disease Clauses

Generally, a health insurance contract must contain a provision stating that "[n]o claim for loss incurred or disability, as defined in the policy, commencing after 3 years from the date of the issue of this policy shall be reduced or denied on the ground that a disease or physical condition not excluded from coverage by name or specific description effective on the date of loss had existed prior to the effective date of coverage of this policy." *See* 24-A M.R.S. § 2706(2)(b). Notwithstanding the language required by Section 2706(b), there are certain situations defined by statute that permit clauses excluding coverage for preexisting medical conditions. *See* 24-A M.R.S. §§ 2696, 2850.

Statutes of Limitations and Repose

"All civil actions shall be commenced within 6 years after the cause of action accrues and not afterwards, except on actions on a judgment or decree of any court of record of the United States, or of any state or of a justice of the peace in this State, and except as specially provided." 14 M.R.S. § 752.

In actions brought directly against foreign insurers by an insured, Maine law provides that "[n]o conditions, stipulations, or agreements in a contract of insurance shall . . . limit the time for commencing an action against such insurers to a period of less than 2 years from the time when the cause of action accrues." 24-A M.R.S. § 2433. A foreign insurer must provide at least two years for an insured to file a lawsuit against it for a violation of the applicable policy. *See L & A United Grocers, Inc. v. Safeguard Ins. Co.*, 460 A.2d 587, 589 (Me. 1983) (Time limit for bringing suit to enforce coverage on multiple-peril business insurance policy issued by foreign insurer was governed by statute providing that minimum period for bringing actions against foreign insurers is two years, not six, since policy's provision declaring limit of twelve months in which to bring suit was invalid under that statute). Title 24-A M.R.S. § 3002, containing the standard fire provision for an insurance policy, provides "No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity unless all the requirements of this policy shall have been complied with, and unless commenced within two years next after inception of the loss." Per statute, for foreign insurers, the limitations period appears to begin from the date of denial or other breach, and for domestic insurers it begins from the date of the loss.

Recently, the Federal District Court for the District of Maine considered the issue of whether 24-A M.R.S. § 2433 violates the Dormant Commerce Clause given the statute's disparate treatment of foreign insurers. The Court concluded that Maine's foreign-insurer statute of limitations is protected by the McCarran-Ferguson Act, and is therefore not in violation of the Dormant Commerce Clause. *Martin v. Nat'l Gen. Ins. Co.*, 570 F. Supp. 3d 1, 7 (D. Me. 2021). However, the District Court presently has under advisement a Motion for Summary Judgment regarding whether the disparate treatment of foreign insurers violates the Equal Protection Clause.

TRIGGER AND ALLOCATION ISSUES FOR LONG-TAIL CLAIMS

Trigger of Coverage

The Law Court has not addressed this issue. However, the United States District Court for the District of Maine in *Honeycomb Systems, Inc. v. Admiral Ins. Co.*, 567 F.Supp.1400 (1983) held that the general rule is that an occurrence under an insurance policy happens when injurious effects of occurrence become "apparent" or "manifest themselves." The burden is on the insured to establish that the damages for which coverage is sought falls within the scope of the insurance contract at issue. *See Pelkey v. General Elec. Capital Assur. Co.*, 2002 ME 142, ¶ 10, 804 A.3d 385

Allocation Among Insurers

Generally speaking, equitable principles will be applied, *see Globe Indem. Co. v. Jordan,* 634 A.2d 1279 (Me. 1993), and costs between two or more primary carriers will be prorated. *See York Mut. Ins. Co. v. Continental Ins. Co.*, 560 A.2d 571, 573 (Me. 1989); *see also State Farm Mut. Auto Ins. Co. v. Universal Underwriters Ins. Co.*, 513 A.2d 283, 286-87 (Me. 1986) (when both policies' pro rata clauses required same apportionment of liability loss between primary insurers in proportion to the respective coverage afforded by them to the insured, equitable principles required that legal fees be apportioned accordingly). Generally speaking, "allocation of risk to insurers through waivers of subrogation are encouraged by law [because a waiver] anticipate[s] risks," thereby avoiding future litigation. *Acadia Ins. Co. v. Buck Constr. Co.,* 2000 ME 154, ¶ 18, 756 A.2d 515.

Policies which are excess to the primary policy will not be applied until the primary limits are exhausted. *See Tibbetts v. Dairyland Ins. Co.*, 2010 ME 61, ¶ 16, 999 A.2d 930.

In the context of an uninsured motorist claim involving joint tortfeasors, the Law Court has held that there is no right to contribution from a UM carrier where sufficient coverage exists between the joint tortfeasors. *Peerless Ins. Co. v. Progressive Ins. Co.*, 2003 ME 66, 822 A.2d 1125. Specifically, the Court in *Peerless* observed that "[w]hile the twenty-five-percent-responsible tortfeasor may seek contribution from the seventy-five-percent-responsible tortfeasor for anything over its share of the damages, that twenty-five-percent-responsible tortfeasor bears the risk that the joint tortfeasor will be judgment proof." *Id.* ¶ 9. "[T]he fact that [injured insured] had uninsured/underinsured motorist (UIM) insurance does not change that result." *Id.* This is because a UM carrier "d[oes] not insure [the uninsured tortfeasor] and it d[oes] not provide some kind of 'uninsured joint tortfeasor coverage'—coverage in the event a joint tortfeasor happens to be uninsured." *Id.*

CONTRIBUTION ACTIONS

Claim in Equity vs. Statutory

In Maine, contribution actions are suits in equity, and the statute of limitations accrues at the entry of judgment. *Estate of Dresser v. Maine Medical Center*, 2008 ME 183, ¶ 7, 960 A.2d 1205; and *Cyr v. Michaud*, 454 A.2d 1376, 1384-85 (Me. 1983).

Elements

A right to contribution arises when one obligor pays greater than its share of the liability. *Spottiswoode v. Levine*, 1999 ME 79, ¶ 17, 730 A.2d 166. Generally, any claims against joint tortfeasors must be resolved prior to a contribution action; however, the Maine Law Court has not yet affirmatively decided this question. *Estate of Dresser v. Maine Medical Center*, 2008 ME 183,¶ 6, 10, 960 A.2d 1205, 1207-08.

DUTY TO SETTLE

The obligation of good faith and fair dealing is a covenant implicit in the provisions of the insurance contract, and when an insurer breaches the covenant of good faith and fair dealing traditional remedies for breach of contract are available. *Linscott v. State Farm Mut. Auto. Ins. Co.*, 368 A.2d 1161, 1163 (Me. 1977). The obligation of good faith and fair dealing requires the insurer to pay a settlement based upon reasonable appraisal of the claim. *County Forest Products v. Green Mountain Agency, Inc.*, 2000 ME 161, 758 A.2d 59. Statutory liability is imposed for

wrongful refusal to pay a claim within policy limits that is accompanied by sufficient proof. *Id.*; 24-A M.R.S. § 2436-A.

LH&D BENEFICIARY ISSUES

Change of Beneficiary

Maine, like many jurisdictions, recognizes that a change form/change of beneficiary is effective when the insured has substantially complied with an insurer's requirements for changing a named beneficiary. *Clark v. Metro. Life Ins. Co.*, 126 Me. 7, 135 A. 357, 359 (1926). The Law Court has held that, as a general rule, if "the insured has taken all necessary steps, and otherwise done all in his power to effect a change of beneficiary, and all that remains to be done is some purely ministerial duty on the part of the [insurer], then the change will be regarded as complete." *Id.*

Effect of Divorce on Beneficiary Designation

Under Maine law, the fact that the named beneficiary has been divorced from the insured does not affect the beneficiary's rights to insurance proceeds. *Lamarche v. Metro. Life Ins. Co.*, 236 F. Supp. 2d 34, 43-44 (D. Me. 2002).

INTERPLEADER ACTIONS

Availability of Fee Recovery

The Federal District Court for the District of Maine has explained that the standard for determining who pays costs and attorney's fees in an interpleader action is whether the disinterested stakeholder was subjected to the claims through no fault of its own: "An interpleader fee is usually awarded out of the fund to compensate a totally disinterested stakeholder who has been, by reason of the possession of the fund, subjected to conflicting claims through no fault of his own." *Centex-Simpson Const. Co. v. Fidelity & Deposit Co. of Maryland*, 795 F.Supp. 35, 41-42 (D. Me. 1992) (citing *Ferber Co. v. Ondrick*, 310 F.2d 462, 467 (1st Cir. 1962), *cert. denied*, 373 U.S. 9111, 83 S. Ct 1300 (1963)).

Differences in State vs. Federal

Interpleader is governed by Rule 22 of the Maine Rules of Civil Procedure and largely mirrors Rule 22 of the Federal Rules of Civil Procedure.