

## Rhode Island

### REGULATORY LIMITS ON CLAIMS HANDLING

#### Timing of Responses and Determinations

Title 230 of Rhode Island Code of Regulation (“RICR”), Chapter 20-40-2, adopted under the authority of R.I. Gen. Laws Chapter 27-9-1, establishes the minimum standards for investigation and disposition of property and casualty claims arising under insurance policies issued to Rhode Island residents. Pursuant to 230-RICR-20-40-2.6, entitled “Failure to Acknowledge Pertinent Communications,” every insurer, within receiving notification of a claim, must within fifteen (15) days acknowledge the receipt of such notice in writing unless payment is made within that period of time. Further, pursuant to 230-RICR-20-40-2.7, entitled “Standards for Prompt, Fair and Equitable Settlements Applicable to All Insurers”, the first party claimant must be advised of the acceptance or denial of the claim by the insurer within twenty-one (21) days after receipt by the insurer of properly executed proofs of loss. If the insurer needs more time to determine whether a first party claim should be accepted or denied, it shall notify the first party claimant within twenty-one (21) days after the receipt of the proof of loss, giving the reasons more time is needed. If the investigation remains incomplete, the insurer shall, forty-five (45) days from the initial notification and every forty-five (45) days thereafter, send to the first party claimant a letter setting forth the reasons additional time is needed for investigation.

In the context of claims for covered health care service, R.I. Gen. Laws § 27-18-61 requires claims to be processed promptly and paid within forty (40) days of receipt of a written claim or thirty (30) days if the claim is electronically filed. Denial of a claim must be made within thirty (30) days of receipt to notify in writing the health care provider or policyholder of any and all reasons for denying or pending the claim and what, if any, additional information is required to process the claim. This same rule is also enunciated pursuant to 230-RICR-20-30-6, entitled “Prompt Processing of Claims.” Section 6.4, “Prompt Processing of Claims,” requires a subject entity to pay all complete claims for health care services submitted to the subject entity by a Rhode Island health care provider or by a Rhode Island policy holder within forty (40) calendar days following the date of receipt of a complete written claim or within thirty (30) calendar days following the date of receipt of a complete electronic claim.

#### Standards for Determination and Settlements

Title 230 of the Rhode Island Code of Regulation, Chapter 20-40-2.7, entitled “Standards for Prompt, Fair and Equitable Settlements Applicable to All Insurers” provides that no insurer shall deny a claim on the grounds of a specific provision, condition, or exclusion unless reference to such provision, condition, or exclusion is included in the denial. The denial must be given to the first party claimant in writing and the claim file of the insurer.

Further, the “Unfair Claims Settlement Practices Act” mandates standards for the investigation and disposition of insurance claims. R.I. Gen. Laws §27-9.1-3 prohibits

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unfair claims settlement practices, §27-9.1-4 defines unfair practices, and §§27-9.1-6, 7 establishes the penalties for engaging in such conduct. The standards contained in the Act and associated regulations are applied in breach of contract and bad faith actions against insurers. For example, the insurer must conduct a “reasonable investigation” into the claims. § 27-9.1-4(a)(6). Additionally, an insurer must attempt “in good faith to effectuate prompt, fair, and equitable settlement of claims submitted in which liability has become reasonably clear.” § 27-9.1-4(a)(4). “[I]n every case, an insurer must determine whether liability is reasonably clear by objective, measurable criteria, engage in settlement negotiations and attempt, in good faith, to resolve the claim so that its insured is relieved from the burden of instituting a suit to recover under the policy.” *Skaling v. Aetna Ins. Co.*, 799 A.2d 997, 1012 (R.I. 2002).

### PRINCIPLES OF CONTRACT INTERPRETATION

In Rhode Island, unambiguous contract terms will be given their “plain and ordinary meaning.” *Perry v. Garey*, 799 A.2d 1018, 1023 (R.I. 2002). “The determination of whether a contract’s terms are ambiguous is a question of law to be decided by the court.” *JPL Livery Services, Inc. v. Rhode Island Department of Administration*, 88 A.3d 1134, 1142 (R.I. 2014). “A term in a contract is ambiguous when it is ‘reasonably and clearly susceptible to more than one rational interpretation.’” *Botelho v. City of Pawtucket School Dept.*, 130 A.3d 172, 176 (R.I. 2016) (quoting *Miller v. Saunders*, 80 A.3d 44, 49 (R.I. 2013)). When determining whether language in a contract is ambiguous, courts give words their “plain, ordinary, and usual meaning” and “consider the intent expressed by the language of the contract.” *JPL Livery Services, Inc.*, 88 A.3d at 1142. “[I]n situations in which the language of a contractual agreement is plain and unambiguous, its meaning should be determined without reference to extrinsic facts or aids.” *Furtado v. Goncalves*, 63 A.3d 533, 537 (R.I. 2013). Ultimately where contract terms are found to be unambiguous, “the task of judicial construction is at an end and the parties are bound by the plain and ordinary meaning of the contract.” *Zarella v. Minn. Mut. Life Ins. Co.*, 824 A.2d 1249, 1259 (R.I. 2003). If there is an “ambiguity or omission, the agreement must be construed against the drafting party.” *A.C. Beales Co. v. R.I. Hosp.*, 292 A.2d 865, 872 (R.I. 1972). Further, Rhode Island courts adhere to the parol evidence rule and will not consider “any previous or contemporaneous oral statements that attempt to modify an integrated written agreement.” *National Refrigeration, Inc. v. Standen Contracting Co., Inc.*, 942 A.2d 968, 972 (R.I. 2008).

### CONTRACT INTERPRETATION

#### Common Issues

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

In Rhode Island, “an ‘occurrence’ under a general liability policy takes place when property damage, which includes property loss, manifests itself or is discovered or in the exercise of reasonable diligence is discoverable.” *Textron, Inc. v. Aetna Cas. & Sur. Co.*, 723 A.2d 1138, 1141 (R.I. 1999) (citing *CPC Int'l, Inc. v. Northbrook Excess & Surplus Ins. Co.*, 668 A.2d 647 (R.I. 1995)).

The Rhode Island Supreme Court has not expressly addressed the issue of faulty workmanship as an occurrence, however, the Superior Court has had occasion to do so. See e.g., *Furey Roofing & Constr. Co., Inc. v. Employers Mutual Cas. Co.*, 2010 WL 422253 (R.I. Super. Ct. Feb. 1, 2010) (claim against insured roofing contractor for damage to building, which resulted from leaking roof after work performed, arose

from an “occurrence”); *Aetna Cas. & Sur. Co. v. Consulting Environmental Engineers, Inc.*, 1989 WL 1110231 (R.I. Super. Ct. 1989) (claim against insured engineer for settling of a foundation allegedly caused by improper grading specifications arose out of an “occurrence”).

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

Yes. Rhode Island’s anti-indemnity statute is R.I.G.L. § 6-34-1. The statute applies to construction contracts. Notably, the statute is not applicable in the context of procuring insurance for an entity’s protection, or to construction bonds. Section 6-34-1 reads in full as follows:

(a) A covenant, promise, agreement, or understanding in, or in connection with or collateral to, a contract or agreement relative to the design, planning, construction, alteration, repair, or maintenance of a building, structure, highway, road, appurtenance, and appliance, including moving, demolition, and excavating connected with a building, structure, highway, road, appurtenance, or appliance, pursuant to which contract or agreement the promisee or the promisee’s independent contractors, agents, or employees has hired the promisor to perform work, purporting to indemnify the promisee, the promisee’s independent contractors, agents, employees, or indemnitees against liability for damages arising out of bodily injury to persons or damage to property proximately caused by or resulting from the negligence of the promisee, the promisee’s independent contractors, agents, employees, or indemnitees, is against public policy and is void; provided that this section shall not affect the validity of any insurance contract, worker’s compensation agreement, or an agreement issued by an insurer.

(b) Nothing in this section shall prohibit any person from purchasing insurance for his or her own protection or from purchasing a construction bond. See R.I.G.L. § 6-34-1.

## CHOICE OF LAW

Rhode Island law provides that “[i]n the absence of a contractual stipulation about which law controls, Rhode Island’s conflict-of-laws doctrine provides that the law of the state where the contract was executed governs.” *DeCesare v. Lincoln Benefit Life Co.*, 852 A.2d 474 (R.I. 2004). Under Rhode Island law, parties to a contract are generally free to stipulate which law will govern the terms of their agreement. *DeCesare*, 852 A.2d at 481 (citing *Sheer Asset Management Partners v. Lauro Thin Films, Inc.*, 731 A.2d 708, 710 (R.I. 1999)). “Choice-of-law provisions are valid and enforceable in nearly all jurisdictions that have passed upon them.” *Id.*, at 481. Choice of law provisions are enforceable “if the intention of the parties to stipulate to the jurisdiction is made clear by express language or by the ‘facts and circumstances attending the making of the contract.’” *Id.* (quoting *Owens v. Hagenbeck-Wallace Shows Co.*, 192 A. 158, 164 (R.I. 1937)). “When determining the intent of the parties to bind themselves to a particular forum or jurisdiction, courts employ the standard principles of contract law.” *Id.* at 481-82.

## DUTIES IMPOSED BY STATE LAW

### Duty to Defend

## 1. Standard for Determining Duty to Defend

Rhode Island follows the “pleadings test” when determining whether an insurer has a duty to defend an insured. *Peerless Insurance Co. v. Viegas*, 667 A.2d 785, 787 (R.I. 1995). “That test requires the trial court to look at the allegations contained in the complaint, and ‘if the pleadings recite facts bringing the injury complained of within the coverage of the insurance policy, the insurer must defend irrespective of the insured’s ultimate liability to the plaintiff.’” *Id.* (quoting *Employers’ Fire Insurance Co. v. Beals*, 240 A.2d 397, 402 (R.I. 1968) (abrogated by *Peerless Insurance Co.*, 667 A.2d at 789 on other grounds). “[A]n insurer’s duty to defend hinges not on whether the insured may ultimately be liable, but on whether the complaint in the underlying tort action alleges facts and circumstances bringing the case within the coverage afforded by the policy.” *Flori v. Allstate Insurance Co.*, 388 A.2d 25, 26 (R.I. 1978). When a complaint “contains a statement of facts which bring the case within or potentially within the risk coverage of the policy, the insurer has an unequivocal duty to defend.” *Med. Malpractice Jt. Underwriting Ass’n of Rhode Island v. Charlesgate Nursing Ctr., L.P.*, 115 A.3d 998, 1004 (R.I. 2015) (quoting *Beals*, 240 A.2d at 403). “Conversely, if the alleged facts fail to bring the case within the policy coverage, the insurer is free of its obligation.” *Grenga v. National Surety Corporation*, 317 A.2d 433, 436 (R.I. 1974) (overruled on other grounds).

## 2. Issues with Reserving Rights

“[W]here an insurer refuses to defend an insured pursuant to a general-liability policy, the insurer will be obligated to pay, in addition to the costs of defense and attorneys’ fees, the award of damages or settlement assessed against the insured.” *Conanicut Marine Services, Inc. v. Ins. Co. of North America*, 511 A.2d 967, 971 (R.I. 1986). Instead of a complete refusal to defend, an insurer can (1) “enter[ ] into a nonwaiver agreement with plaintiff whereby it agreed to defend plaintiff and plaintiff recognized the right of defendant to question coverage” or (2) insurer can bring “an action against plaintiff for a declaratory judgment on the question of coverage.” *Id.* (citations omitted).

## State Privacy Laws; Insurance Regulatory Issues; Arbitration/Mediation

### 1. Criminal Sanctions

The Confidentiality of Health Care Communications and Information Act, R.I.G.L. § 5-37.3-1 *et seq.*, prohibits the disclosure of a patient’s confidential health care information without the patient’s written consent. Violators are subject to actual and punitive damages, attorneys fees, and criminal penalties. The Act protects “all information relating to a patient’s health care history, diagnosis, condition, treatment, or evaluation obtained from a health care provider who has treated the patient.” § 5-37.3-3(ii). Pursuant to § 5-37.3-9(b), “[a]nyone who intentionally and knowingly violates the provisions of this chapter shall, upon conviction, be fined not more than one thousand dollars (\$1,000), or imprisoned for not more than six (6) months, or both.”

### 2. The Standards for Compensatory and Punitive Damages

“Compensatory damages are awarded to a person in satisfaction of or in response to a loss or injury sustained.” *Murphy v. United Steelworkers of America Local No. 5705, AFL-CIO*, 507 A.2d 1342, 1346 (R.I. 1986). Compensatory damages should restore a person to the position that he or she was in prior to the harm or loss.

Punitive damages are “awarded, not to compensate a plaintiff for his or her injuries but rather to punish the offender and to deter future misconduct.” *Carrozza v. Voccola*, 90 A.3d 142, 165 (R.I. 2014). The Rhode Island Supreme Court has consistently held that “punitive damages are proper only in situations in which the defendant’s actions are so willful, reckless, or wicked that they amount to criminality and that the question of whether adequate facts exist to meet that standard and support an award of punitive damages is a question of law.” *Id.*

### 3. Insurance Regulations to Watch

Rhode Island is in the process of transitioning insurance regulations to an administrative code system. The Department of Business Regulations has been assigned Title 230 and the Insurance Division has been assigned Chapter 20.

### 4. State Arbitration and Mediation Procedures

R.I.G.L. § 10-3-1 *et seq.*, the “Arbitration Act” provides the rules for arbitration. Section 10-3-2 provides that “[w]hen clearly written and expressed, a provision in a written contract to settle by arbitration a controversy thereafter arising out of such contract, or out of the refusal to perform the whole or any part thereof, or an agreement in writing between two (2) or more persons to submit to arbitration any controversy existing between them at the time of the agreement to submit shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract; provided, however, that the provisions of this chapter shall not apply to collective contracts between employers and employees, or between employers and associations of employees, in respect to terms or conditions of employment; and provided further, that in all contracts of primary insurance, wherein the provision for arbitration is not placed immediately before the testimonium clause or the signature of the parties, the arbitration procedure may be enforced at the option of the insured, and in the event the insured exercises the option to arbitrate, then the provisions of this chapter shall apply and be the exclusive remedy available to the insured.” The arbitrator’s award must be in writing and signed by the arbitrators or by a majority of the arbitrators. R.I.G.L. §10-3-10.

Further, R.I.G.L. § 9-19-44 provides that “[a]ll memoranda and other work product, including files, reports, interviews, case summaries, and notes, prepared by a mediator shall be confidential and not subject to disclosure in any subsequent judicial or administrative proceeding involving any of the parties to any mediation in which the materials are generated; nor shall a mediator be compelled to disclose in any subsequent judicial or administrative proceeding any communication made to him or her in the course of, or relating to the subject matter of, any mediation by a participant in the mediation process.”

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

The Rhode Island Administrative Procedures Act (“APA”), R.I.G.L. § 42-35-1 *et seq.*, governs state administrative rulemaking. Every state rulemaking entity is subject to the APA, with the exception of the legislature and judiciary. State agencies must follow a specified process in order to create

regulations. Agencies must designate a rules coordinator who manages the rulemaking process. § 42-35-2.1. Notice of the Proposed Rule and a Public Comment period of at least thirty (30) days is required. § 42-35-2.7-2.8. A Public Hearing is not required, but an agency may choose to hold a hearing or the public may request one, in which it should be held between the period of ten (10) days after the notice and five (5) days before the end of the public comment period. During the regulatory finalization period, the state agencies must consider the submissions from the Public Comment period and will incorporate or reject the comment with the reasons behind their actions. The regulations are submitted to the Office of Regulatory Reform for a final review and then to the Office of the Secretary of State for finalization.

## EXTRACONTRACTUAL CLAIMS AGAINST INSURERS: ELEMENTS AND REMEDIES

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

R.I.G.L. § 9-1-33 allows an insured to make a claim for bad faith by alleging that the insurer wrongfully and in bad faith “refused to pay or settle a claim made pursuant to the provisions of the policy, or otherwise wrongfully and in bad faith refused to timely perform its obligations under the contract of insurance.” This statute does not regulate insurance as required by the McCarran-Ferguson Act and is preempted by ERISA. 3 Am. Jur. Proof of Facts 3d 751. An insured can also make a claim for compensatory damages, punitive damages, and reasonable attorney fees. R.I.G.L. § 9-1-33 does not allow a third-party who has a claim against the insured to assert a claim for bad faith.

*Asermely v. Allstate Ins. Co.*, 728 A.2d 461 (R.I. 1999) found that an insurer owes a fiduciary duty to its insured. This duty includes an obligation to seriously consider a reasonable offer to settle within the policy limits. *Id.* The insurer assumes the risk of miscalculation even if it believes it has a legitimate defense in good faith. *Id.* Therefore, if an insurer rejects an offer to settle within the policy limits, then the policy limits no longer apply and the insurer is responsible to satisfy any judgment against the insured even if it exceeds the policy limits.

*Skaling v. Aetna Ins. Co.*, 799 A.2d 997 (R.I. 2002) established what an insurer must do to avoid a bad faith claim. The Court held that an insurer must be able to show that (1) the claim was fairly debatable, and (2) the claim was evaluated in an appropriate and timely manner. *Id.*

#### 3. First Party

In *Skaling*, the Rhode Island Supreme Court analyzed first-party bad faith claims. 799 A.2d at 997. Insurers doing business in Rhode Island are “obligated to act in good faith in [their] relationship with [their] policyholders,” and that a “violation of this duty will give rise to an independent claim in tort.” *Id.* at 1004 (quoting *Bibeault v. Hanover Ins. Co.*, 417 A.2d 313, 319 (R.I. 1980)).

#### 4. Third-Party

As in first-party insurance claims, “insurers owe their insureds a fiduciary obligation with respect to protecting the insured from excess liability in the context of third party claims, in which the insurer is obligated to defend its insured against liability to third-parties.” *Skaling*, 799 A.2d at 1005. Furthermore, in the context of third-party claims, insurers owe their insureds a fiduciary duty with respect to protecting the insured from excess liability. *Id.* (citing *Fraioli v. Metropolitan Property and Casualty Insurance Co.*, 748 A.2d 273, 275 (R.I. 2000)).

### Fraud

In order to prove a claim of common law fraud in Rhode Island, the plaintiff must prove each of the following four elements: (1) false representation; (2) defendant's knowledge of the statement's falsity; (3) intent to induce reliance by defendant; and (4) plaintiff's detrimental reliance. *Women's Dev. Corp. v. City of Central Falls*, 764 A.2d 151, 160 (R.I. 2001). Further, Rule 9(b) of the Rhode Island Superior Court Rules of Civil Procedure provides that "circumstances constituting fraud or mistake shall be stated with particularity" in plaintiff's complaint.

### Intentional or Negligent Infliction of Emotional Distress

There are four elements necessary for a plaintiff to prove an intentional infliction of emotional distress, also known as the tort of outrage: (1) the conduct must be intentional or in reckless disregard of the probability of causing emotional distress; (2) the conduct must be extreme and dangerous; (3) there must be a causal connection between the wrongful conduct and the emotional distress; and (4) the emotional distress in question must be severe. *Swerdlick v. Koch*, 721 A.2d 849, 862 (R.I. 1998). The conduct at issue must be "so outrageous in character and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community." *Id.* at 863. "[P]hysic as well as physical injury claims must be supported by competent expert medical opinion regarding origin, existence and causation." *Vallinoto v. DiSandro*, 688 A.2d 830, 839 (R.I. 1997).

While Rhode Island typically requires proof of medically established physical symptoms for both intentional and negligent infliction of emotional distress, the Rhode Island courts have recognized some exceptions to the requirement of physical symptoms. *See Jalowy v. The Friendly Home, Inc.*, 818 A.2d 698 (R.I. 2003); *see also Adams v. Uno Restaurants, Inc.*, 794 A.2d 489 (R.I. 2002). For example, in *Adams*, the Court found the physical symptoms requirement was inappropriate for emotional distress claimed as a result of a humiliating arrest and loss of military privileges because of the available objective facts. *Id.*

Only two classes of people in Rhode Island may bring a claim for the negligent infliction of emotional distress: those within the "zone-of-danger" who are physically endangered by the acts of a negligent defendant, and bystanders related to a victim whom they witness being injured. *Jalowy*, 818 A.2d at 698; *DiBattista v. State*, 808 A.2d 1081 (R.I. 2002).

### State Consumer Protection Laws, Rules and Regulations

R.I.G.L. § 6-13.1-1 *et seq.* is known as the "Unfair Trade Practice and Consumer Protection Act." The statutory scheme defines terms, prohibits general practices, as well as those particular to specific industries, and sets forth the penalties and enforcement procedures for unfair trade practices. The Rhode Island Attorney General also has a consumer protection unit.

R.I.G.L. § 27-58-1 *et seq.* is known as the "Banking and Insurance Consumer Protection Act" and as the "Financial Institution Insurance Sales Act." Section 27-58-2's purpose is to "regulate financial institutions in the conduct of the business of insurance in this state."

R.I.G.L. § 27-9.1-1 *et seq.* is known as the "Unfair Claims Settlement Practices Act." § 27-9-1.3 prohibits unfair claims settlement practices, § 27-9-1.4 defines unfair practices, and § 27-9.1-6, 7 establishes the penalties for engaging in such conduct. While the statute does not create a private cause of action, the findings of the Insurance Commissioner can be used as evidence in bad faith claims. *Skaling*, 799 A.2d at 997.

Title 230 of the Rhode Island Code of Regulation, Chapter 20-60-7, *et seq.*, "Privacy of Consumer

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Information,” “governs the treatment of nonpublic personal financial information about individuals by all insurance licensees of the Rhode Island Department of Business Regulation.” It “(1) Requires a licensee to provide notice to individuals about its privacy policies and practices; (2) Describes the conditions under which a licensee may disclose nonpublic personal financial information about individuals to affiliates and nonaffiliated third parties; and (3) Provides methods for individuals to prevent a licensee from disclosing that information.”

### DISCOVERY ISSUES IN ACTIONS AGAINST INSURERS

#### Discoverability of Claims Files Generally

Rule 26(b)(2) of the Rhode Island Rules of Civil Procedure specifically pertain to insurance agreements and provides that

A party may obtain discovery of the existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment. Information concerning the insurance agreement is not by reason of disclosure admissible in evidence at trial. For purposes of this paragraph, an application for insurance shall not be treated as part of an insurance agreement.

Certain reports prepared by an insurer are entitled to protection from discovery in a breach-of-contract action under Rule 26(b)(2). *Bartlett v. John Hancock Mut. Life Ins. Policy*, 538 A.2d 997 (R.I. 1988) (overruled on other grounds). Statements immediately after an accident are in anticipation of litigation and thus enjoy protection as a qualified, but not absolute, privilege. *Id.*

Claim files are discoverable for bad faith claims against insurers, but not until the resolution of the underlying contract claim. *Skaling*, 799 A.2d at 997

When a breach of contract claim is brought simultaneously with a bad faith claim, the insurer is entitled to qualified privilege against discovery on the breach of contract claim, pursuant to Rule 26(b)(2) of the Rhode Island Rules of Civil Procedure, in regards to all of the materials in the claim file that the insurer can prove were prepared in anticipation of litigation. It is suggested that when such two claims are brought together, that the judges, pursuant to Rule 42(b) sever the contract claim from the bad faith claim and limit discovery only to the contract claim until the contract claim is resolved. *Bartlett*, 538 A.2d at 1002.

#### Discoverability of Reserves

Rhode Island has not issued any written decisions regarding the discoverability of reserve information, although presumably the same rules would apply as discussed in Section VI (A). Under Rhode Island’s Rules of Civil Procedure, reserve information is not discoverable.

#### Discoverability of Existence of Reinsurance and Communications with Reinsurers

Rhode Island courts have not addressed the issue of the discoverability of reinsurance information, although presumably the same rules would apply as discussed in Sections VI(A) and VI(B), *supra*. Pursuant to Rhode Island’s Rules of Civil Procedure, information relating to reinsurance is not discoverable.



## Attorney/Client Communications

Communications made by a client to an attorney for professional advice, as well as the responses by the attorneys, are privileged communications not subject to disclosure. *Callahan v. Nystedt*, 641 A.2d 58 (R.I. 1994). In order to invoke the privilege, the party seeking to prevent discovery must establish that (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client. *Id.*

## DEFENSES IN ACTIONS AGAINST INSURERS

### Misrepresentations/Omissions: During Underwriting or During Claim

In the insurance context, in order to establish a prima facie case of negligent misrepresentation, the plaintiff must establish, “(1) a misrepresentation of a material fact; (2) the representor must either know of the misrepresentation, must make the misrepresentation without knowledge as to its truth or falsity or must make the representation under circumstances in which he ought to have known of its falsity; (3) the representor must intend the representation to induce another to act on it; and (4) injury must result to the party acting in justifiable reliance on the misrepresentation.” *Zarella v. Minnesota Mut. Life Ins. Co.*, 824 A.2d 1249, 1258 (R.I. 2003).

A material misrepresentation in an insurance application is any representation that induces the insurer to insure the applicant. *Evora v. Henry*, 559 A.2d 1038, 1040 (R.I. 1989). A material misrepresentation in an insurance application makes the policy voidable without a concomitant demonstration of fraud. *Id.*

### Failure to Comply with Conditions

Ordinarily, an insured's failure to comply with a condition, such as a cooperation clause, creates a question of fact about whether the insurer has been so prejudiced by the insured's non-cooperation, or non-compliance with the condition, so as to permit the insurer to void the policy of insurance. *Ogunsuada v. Gen'l Acc. Ins. Co. of America*, 695 A.2d 996 (R.I. 1997).

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

Rhode Island courts have not specifically addressed this issue in the context of property or casualty insurance. However, by analogy, Rhode Island courts have held that the plaintiff's failure to obtain consent to settle from an underinsurance motorist coverage company bars the plaintiff's right to recovery under a policy. *See Manzo v. AMICA Mut. Ins. Co.*, 666 A.2d 417 (R.I. 1995). That failure to obtain consent may also result in the reduction of an arbitration award. *Sunderland v. Allstate Ins. Co.*, 717 A.2d 53 (R.I. 1998).

### Preexisting Illness or Disease Clauses

In order to comport with the federal Patient Protection and Affordable Care Act, R.I. Gen. Laws § 27-18.6-3(a)(1)

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provides that “a group health plan and a health insurance carrier offering group health insurance coverage shall not deny, exclude, or limit benefits with respect to a participant or beneficiary because of a preexisting condition exclusion.”

The exceptions to this mandate are if

(i) The exclusion relates to a condition (whether physical or mental), regardless of the cause of the condition, for which medical advice, diagnosis, care, or treatment was recommended or received within the six (6) month period ending on the enrollment date; (ii) The exclusion extends for a period of not more than twelve (12) months (or eighteen (18) months in the case of a late enrollee) after the enrollment date; and (iii) The period of the preexisting condition exclusion is reduced by the aggregate of the periods of creditable coverage, if any, applicable to the participant or the beneficiary as of the enrollment date.

§ 27-18.6-3(a)(1)(i)-(iii).

Additionally, R.I. Gen. Laws § 27-41-81, “Prohibition on preexisting condition exclusion” provides that

- A health insurance policy, subscriber contract, or health plan offered, issued, issued for delivery, or issued to cover a resident of this state by a health insurance company licensed pursuant to this title and/or chapter:
  - Shall not limit or exclude coverage for an individual under the age of nineteen (19) by imposing a preexisting condition exclusion on that individual.
  - For plan or policy years beginning on or after January 1, 2014, shall not limit or exclude coverage for any individual by imposing a preexisting condition exclusion on that individual.
- As used in this section:
  - “Preexisting condition exclusion” means a limitation or exclusion of benefits, including a denial of coverage, based on the fact that the condition (whether physical or mental) was present before the effective date of coverage, or if the coverage is denied, the date of denial, under a health benefit plan whether or not any medical advice, diagnosis, care or treatment was recommended or received before the effective date of coverage.
  - “Preexisting condition exclusion” means any limitation or exclusion of benefits, including a denial of coverage, applicable to an individual as a result of information relating to an individual's health status before the individual's effective date of coverage, or if the coverage is denied, the date of denial, under the health benefit plan, such as a condition (whether physical or mental) identified as a result of a pre-enrollment questionnaire or physical examination given to the individual, or review of medical records relating to the pre-enrollment period.
- This section shall not apply to grandfathered health plans providing individual health insurance coverage.
- This section shall not apply to insurance coverage providing benefits for: (1) Hospital confinement indemnity; (2) Disability income; (3) Accident only; (4) Long-term care; (5) Medicare supplement; (6) Limited benefit health; (7) Specified disease indemnity; (8) Sickness or bodily injury or death by accident or both; and (9) Other limited benefit policies.

## Statutes of Limitations and Repose

R.I.G.L. § 9-1-13 sets the statute of limitations for contract actions at ten (10) years from the alleged breach.

R.I.G.L. § 9-1-14 sets the statute of limitations for an action sounding in tort at three (3) years. Pursuant to R.I.G.L. § 9-1-14.1, an action for medical, veterinarian, accounting, or insurance or real estate agent or broker malpractice shall be commenced within three (3) years from the time of the occurrence of the incident that gave rise to the action or within three (3) years of the time that the act or acts of malpractice should, in the exercise of reasonable diligence, have been discovered.

## TRIGGER AND ALLOCATION ISSUES FOR LONG-TAIL CLAIMS

### Trigger of Coverage

The trigger of coverage under general liability insurance policy occurs when property damage (1) manifests itself; (2) is discovered; or (3) in the exercise of reasonable diligence is discoverable. *Textron, Inc. v. Aetna Cas. and Sur. Co.*, 723 A.2d 1138 (R.I. 1999).

### Allocation Among Insurers

The Rhode Island Supreme Court has addressed multiple insurer coverage disputes. Implicit in all of the opinions are a concern for assisting an insured as expeditiously as possible and a disdain for resolving conflicts between boilerplate insurance provisions that seek to limit liability for the insurers. Pursuant to *Ferreira v. Mello*, 811 A.2d 1175 (R.I. 2002), not all disputes will be resolved simply by resorting to the pro rata method. For example, if the policies can be applied in the manner that they were bargained for, the Court does not need to interfere. Pursuant to *Brown v. Travelers Ins. Co.*, 610 A.2d 127 (R.I. 1992), when the policies, if enforced, would be irreconcilable with each other and a forfeiture of coverage for the insured would result, the pro rata method will be employed. Finally, when there is a coverage dispute between more than one policy, and each policy would provide primary coverage but for the existence of the other policy, the responsibility is allocated on a pro rata basis, according to the rule set forth in *Hindson v. Allstate Ins. Co.*, 694 A.2d 682 (R.I. 1997). Therefore, in sum, pro rata apportionment of responsibility has been used when it is needed to resolve disputes, but it is not necessarily used in all cases.

## CONTRIBUTION ACTIONS

### Claim in Equity vs. Statutory

Rhode Island enacted a right of contribution among joint tortfeasors through statute when it adopted the Uniform Contribution Among Joint Tortfeasors Act (“UCAJTA”) in 1940. R.I. Gen. Laws 10-6 *et seq.* Liability is allocated in accordance with a tortfeasor's pro rata share of liability. However, the General Assembly recently amended Rhode Island's contribution statute so that credit received by a joint tortfeasor is now limited to the amount paid by the released tortfeasor without regard to findings of fault. R.I.G.L. § 10-6-7. Previously, the remaining tortfeasors would receive the greater benefit of the sum paid by a released tortfeasor or the percentage of fault attributed to the released tortfeasor. *Id.* Importantly, a joint tortfeasor's settlement with a plaintiff without a properly drafted release bars claims for contribution.

There is also the common law right of indemnity, in which a person or entity who is without fault, is compelled to

pay damages due to the negligence of another. *Hawkins v. Gadoury*, 713 A.2d 799, 803 (R.I. 1998).

### Elements

"[C]ontribution seeks to allocate fault proportionally among joint tortfeasors." *Hawkins*, 713 A.2d at 803. A cause of action for contribution is a separate and distinct action from the underlying tort. *Id.* The statute of limitations applying to tort actions does not apply to the contribution action.

### DUTY TO SETTLE

Rhode Island's policy "is always to encourage settlement. Voluntary settlement of disputes has long been favored by the courts." *Homar, Inc. v. North Farm Associates*, 445 A.2d 288, 290 (R.I. 1982).

Further, insurers have a duty beyond acting in good faith. "An insurance company's fiduciary obligations include a duty to consider seriously a plaintiff's reasonable offer to settle within the policy limits. Accordingly, if it has been afforded reasonable notice and if a plaintiff has made a reasonable written offer to a defendant's insurer to settle within the policy limits, the insurer is obligated to seriously consider such an offer." *Asermely*, 728 A.2d at 464.

"If the insurer declines to settle the case within the policy limits, it does so at its peril in the event that a trial results in a judgment that exceeds the policy limits, including interest." *Id.* The insurer is liable for the amount that exceeds the policy limits, unless the insurer can demonstrate that the insured was unwilling to accept the offer of settlement. *Id.*; see also R.I.G.L. §27-2-2.2.

"The insurer's duty is a fiduciary obligation to act in the best interest of the insured. Even if the insurer believes in good faith that it has a legitimate defense against the third party, it must assume the risk of miscalculation if the ultimate judgment should exceed the policy limits." *Id.*

### LH&D BENEFICIARY ISSUES

#### Change of Beneficiary

As a general rule in Rhode Island, "[a]n insured may change the beneficiary of an insurance policy by complying substantially with the procedures required by the policy." *Souza v. R.I. Pub. Transit Auth.*, No. 92-3226, 1994 WL 930890, at \*4 (R.I. Super.Ct. Jan. 6, 1994) (citing *Confederation Life Association v. Allinson*, 95 R.I. 402, 410-11 (R.I. 1963)). Courts recognize that where the right to change the beneficiary is reserved to the insured, beneficiaries lack any vested interest and may not hinder the right of the insured to effect a change in beneficiaries in accordance with policy terms. See *Metro. Life Ins. Co. v. Sandstrand*, 82 A.2d 863, 865 (R.I. 1951). To "comply substantially" with the terms of an insurance policy, the insured must "do all that he [or she] reasonably could be expected to do in the circumstances in order to effectuate his [or her] intention to change the beneficiary in the policy." *Id.* at 866.

## Effect of Divorce on Beneficiary Designation

R.I. Gen. Laws § 15-5-14.1(f) provides that once a divorce complaint is served, an insured does not have the right as a sole policy owner to change the beneficiary during a pending divorce action. *See Loppi v. United Investors Life Ins. Co.*, 126 A.3d 458, 462 (R.I. 2015).

## INTERPLEADER ACTIONS

### Availability of Fee Recovery

Although Rhode Island's Rules of Civil Procedure is silent on the issue, courts have held that they have discretion to award attorneys' fees. However, the court will deny costs and fees to a party who seeks to interplead without a sufficient basis for believing that it will be subject to multiple lawsuits. Courts will also refuse to grant attorneys' fees in circumstances where the party filing the interpleader action has a substantial interest in the litigation. In addition, courts will exercise their discretion in denying interpleader to a party whose interest in the underlying litigation is "substantial". *See, e.g., DeMarco v. Travelers*, 26 A.3d 585 (R.I. 2011).

### Differences in State vs. Federal

R.I. Civ. P. 22 authorizes an interpleader action when claims of interpleader defendants are such that the plaintiff is or may be exposed to double or multiple liability, regardless of whether the claims of the interpleader defendant have a common origin, so long as they are adverse to and independent of each other. Interpleader is often used by insurers in circumstances where there are multiple claimants or a question as to the proper beneficiary of the proceeds of a policy. Rhode Island's statutory rule is the same as the Federal Rule.