FOR MORE INFORMATION

RYAN SMITH & CARBINE
Rutland, Vermont
www.rsclaw.com

Mark F. Werle
mfw@rsclaw.com

Vermont

REGULATORY LIMITS ON CLAIMS HANDLING

Timing for Responses and Determinations

The Vermont Department of Financial Regulation ("DFR")[1] has issued regulations for fair claims practices, including timing requirements. An insurer or its agent who has a claim shall mail or orally acknowledge receipt of the claim notice directly to the claimant within ten working days. An insurer shall make appropriate written or oral reply within ten working days to any communications from the claimant to address any communication raised by the claimant.

Within fifteen working days after receipt by the insurer of a properly executed proof of loss, the first party claimant shall be advised of the acceptance or denial of the claim by the insurer. The insurer must specify the provision, condition, or exclusion in the policy relied upon in the denial, and must be given to the claimant in writing. The insurer shall retain a copy of the denial in the claim file. If an insurer needs more time to determine whether a first party claim should be accepted or denied, it shall notify the claimant within fifteen working days that more time is needed. If more time is needed to determine a third party claim, the insurer shall notify the third party within thirty working days after receipt of notice that more time is needed. If the investigation remains incomplete, the insurer shall, thirty days from the date of the initial notification and every thirty days thereafter send to such claimant a letter setting forth the reason additional time is needed for investigation. Regulation 79-2, Sept. 1, 1979

Standards for Determination and Settlements

According to Vermont law, unfair claim settlement practices include unfair methods of competition or unfair or deceptive acts or practices in the business of insurance. 8 V.S.A. §§ 4724(9). "Unfair claim settlement practices" can be any of the following:

- misrepresenting pertinent facts or insurance policy provisions relating to coverage at issue;
- failing to acknowledge and act reasonably promptly upon communications with respect to claims arising under insurance policies;
- failing to adopt and implement reasonable standards for the prompt investigation of claims arising under insurance policies;
- refusing to pay claims without conducting a reasonable investigation based upon all available information;
- failing to affirm or deny coverage of claims within a reasonable time after proof

[1] The Department of Financial Regulation was known as the Department of Banking, Insurance, Securities and Health Care Administration (BISCHA) until 2012. Any reference herein to DFR shall refer to the Department and any of its former monikers.

of loss statements have been completed;

- not attempting in good faith to effectuate prompt, fair, and equitable settlements of claims in which liability has become reasonably clear;
- attempting to settle a claim for less than the amount to which a reasonable person would have believed he or she was entitled by reference to written or printed advertising material accompanying or made a part of the application;
- attempting to settle claims on the basis of an application which was altered without notice to, or knowledge or consent of the insured;
- making claim payments to insureds or beneficiaries not accompanied by a statement setting forth the coverage under which the payments are made;
- making known to insureds or claimants a policy of appealing from arbitration awards in favor of insureds or claimants for the purpose of compelling them to accept settlements or compromises less than the amount awarded in arbitration;
- delaying the investigation or payment of claims by requiring an insured, claimant, or the physician of either to submit a preliminary claim report and then requiring the subsequent submission of formal proof of loss forms, both of which submissions contain substantially the same information;
- failing to promptly settle claims where liability has become reasonably clear under one portion of the insurance policy coverage in order to influence settlements under other portions of the insurance policy coverage;
- failing to promptly provide a reasonable explanation on the basis in the insurance policy in relation to the facts or applicable law for denial of a claim or for the offer of a compromise settlement.

Id. The regulations further provide that all claim payments should include an explanation for the basis of the payment (for example, explanation of deduction or depreciations, deductibles, or co-insurance.) Where liability has become reasonably clear, an insurer is prohibited from withholding payment under one portion of a liability claim in order to include the settlement of another liability claim. Regulation 79-2, Sept. 1, 1979

PRINCIPLES OF CONTRACT INTERPRETATION

Vermont follows three primary rules for construction of insurance contracts: "(1) insurance contracts must be interpreted according to their terms and the evident intent of the parties, as gathered from the contract language; (2) any ambiguity in policy language should be resolved in favor of the insured since the insurer is in a better position to avoid the ambiguity; and (3) while insurance policies are to be strictly construed against the insurer, it is not to be deprived of unambiguous provisions placed in a policy for its benefit." *Peerless Ins. Co. v. Wells*, 154 Vt. 491, 494, 580 A.2d 485, 487 (1990) (internal citations and quotations omitted); *DeBartolo v. Underwriters at Lloyd's of London*, 2007 VT 31 ¶ 9.

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 Vermont Supreme Court has never directly addressed the issue of whether faulty workmanship constitutes an "occurrence" for insurance purposes. However, in 1978 the Vermont Supreme Court determined that a provision of a "builder's risk" policy excluding "any loss caused directly by faulty materials or faulty workmanship or error in design or latent defect" in the construction of wooden arches only excluded coverage for damage resulting from defective materials incorporated into the structures themselves or from weaknesses in product caused by faults in the construction process, but did not exclude coverage for damage caused, at least in part, by negligent practices of the contractor during the construction process. *City of Barre v. New Hampshire Ins. Co.*, 396 A.2d 121 (1978). The *City of Barre* decision implicitly accepts in its reasoning that the negligent practices of the contractor during the construction process constitute occurrences under the policy.

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

   No – Vermont does not have an anti-Indemnity statute. However, Vermont courts have upheld indemnification provisions that indemnify a party for liabilities resulting from the indemnitee's sole negligence are only enforceable where there is a clear expression of that intent within the four corners of the contract. *Tateosian v. State*, 945 A.2d 833 (Vt. 2007).

CHOICE OF LAW

Generally, Vermont courts apply the law of the state with the most significant relationship to occurrence and to the parties. *Myers v. Langlois*, 168 Vt. 432, 434, 721 A.2d 129, 130 (1998); *Miller v. White*, 167 Vt. 45, 47, 702 A.2d 392, 393 (1997). In applying the "significant relationship test", courts look to principles set forth in Restatement (2nd) of Conflict of Laws § 6(2)(a)-(g) (1971). *Myers*, 168 Vt. at 434, 721 A.2d at 130. Depending on the area of law involved, some factors of § 6 carry more weight than others. *Id*. at 435. What these factors are has continued to evolve over time. See e.g. *Martineau v. Guertin*, 170 Vt. 415, 421, 751 A.2d 776, 780 (2000).

DUTIES IMPOSED BY STATE LAW

Duty to Defend

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1. **Standard for Determining Duty to Defend**

   An insurer's duty to defend arises "whenever it is clear that the claim against the insured might be of the type covered by the policy." *Garneau v. Curtis & Bedell, Inc.*, 158 Vt. 363, 366, 610 A.2d

132, 134 (1992) (citing 7C J. Appleman, Insurance Law & Practice § 4684.01, at 99 (1979) ("duty to defend exists if the claim potentially comes within the policy")). The duty to defend is, therefore, broader than the duty to indemnify. *Id.* The existence of the duty is determined by comparing the allegations in the underlying suit to the terms of the coverage in the policy. *City of Burlington v. Nat'l Union Fire Ins. Co.,* 163 Vt. 124, 127, 655 A.2d 719, 721 (1994) (internal citations omitted). Courts will resolve any ambiguity in the insurance contract in favor of the insured; however, the contract will be interpreted according to its terms and the parties' evident intent. *Garneau*, 158 Vt. at 366. (internal citations omitted).

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

2. Issues with Reserving Rights

Generally, providing a defense under a "reservation of rights" requires a bilateral non-waiver agreement with the insured. "[A] bilateral reservation of rights agreement prevents a waiver of the right to dispute coverage." *Vermont Ins. Mgmt., Inc. v. Lumbermens' Mut. Cas. Co*., 171 Vt. 601, 603, 764 A.2d 1213, 1215 (2000); *Beatty v. Employers' Liability Assurance Corp.*, 106 Vt. 25, 34, 168 A. 919, 923 (1933). This can be a trap for insurers that believe they can preserve their rights by sending off a reservation of rights letter; typically, such a letter will not accomplish a reservation.

State Privacy Laws; Insurance Regulatory Issues; Arbitration/Mediation

1. Criminal Sanctions

The Commissioner of the Department of Financial Regulation has the power to order any person to cease violation of a lawful regulation under Title 8 or to "cease engaging in any unsafe of unsound practice." 8 V.S.A. § 11601. Vermont law provides for criminal penalties for negligent and willful violations of an order of the Commissioner. 8 V.S.A. § 11603.

2. The Standards for Compensatory and Punitive Damages

Where the exact computation of damages cannot be calculated, a court's award will withstand review on appeal if the award is not grossly excessive. *Coty v. Ramsey Assocs., Inc*., 149 Vt. 451, 461, 546 A.2d 196, 203 (1988) (citing *Birkenhead v. Coombs*, 143 Vt. 167, 173, 465 A.2d 244, 247 (1983)). The trial court must give a clear statement of method used in assessing damages and the weight given to the various factors in its analysis. *Id*. 149 Vt. At 460, 546 A.2d at 202.

"Punitive damages require a showing of essentially two elements. The first is wrongful conduct that is outrageously reprehensible. …. The second is malice, defined variously as bad motive, ill will, personal spite or hatred, reckless disregard, and the like" and "malice must be proven by some showing of bad motive *Beaudoin b/o New England Expedition Limited Partnership II v.* Feldman, 2018 VT 83 ¶18, 196 A.3d 768, 776; *Fly Fish Vt., Inc. v. Chapin Hill Estates, Inc.*, 2010 VT 33 ¶18, 187 Vt. 541, 548, 996 A.2d 1167, 1173 ("The purpose of punitive damages is to punish conduct that is morally culpable to the degree of outrage frequently associated with crime.")(internal citations omitted)

3. State Arbitration and Mediation Procedures

Most Vermont state and federal civil actions are subject to mandatory mediation, or as the local federal district court prefers, "Early Neutral Evaluation." The courts provide lists of approved mediators, but the parties are generally free to choose their own mediator, and usually exercise that freedom.

The Vermont Arbitration Act ("VAA") allows for agreements to arbitrate disputes, with the exception of cases where a person is litigating their civil or constitutional rights. ("Unless otherwise provided in the agreement, a written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to ar arbitration any controversy thereafter arising between the parties creates a duty to arbitrate, and is valid, enforceable and irrevocable, except upon such grounds as exist for the revocation of a contract.") 12 V.S.A. §§ 5652(a), 5653(b). In order for an arbitration clause to be valid, the agreement must be accompanied by a written acknowledgement of arbitration. 12 V.S.A. §§ 5652(b). The language of a proper acknowledgement is found in the statute.

The VAA is generally consistent with the Federal Arbitration Act ("FAA"), which provides that an arbitration agreement shall be "…valid, irrevocable, and enforceable…" To the extent that the VAA is inconsistent with the FAA, the FAA preempts the VAA in cases of maritime transactions or transactions involving foreign commerce. *Little v. Allstate Ins. Co.*, 167 Vt. 171, 172, 705 A.2d 538, 540 (1997).

The VAA does not apply in contracts of insurance. 12 V.S.A. § 5653)(a). "The effect of this provision is to leave the law governing such arbitration agreements to the common law, which allows revocation of such an agreement at any time up to the publication of an award." *Little*, 167 Vt. 171, 172, 705 A.2d 538, 540 (1997) (internal citations omitted). It is worth noting that the common law may be subject to change, particularly in light of Vermont's inclination to allow arbitration of disputes.

4. State Administrative Entity Rule-Making Authority

The Commissioner of Financial Regulation is empowered to adopt rules and orders as shall be authorized or necessary. 8 V.S.A § 15. The Commissioner is also authorized to issue written advisory interpretations, advisory opinions, non-objection letters, and no action letters, whether or not requested by any persons. These interpretations are presumed to be correct unless found to be clearly erroneous by a court of competent jurisdiction. *Id*.

EXTRACONTRACTUAL CLAIMS AGAINST INSURERS: ELEMENTS AND REMEDIES

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

3. First Party

For first-party bad faith claims, a plaintiff must show that (1) the insurance company had no reasonable basis to deny benefits of the policy, and (2) the company knew or recklessly disregarded the fact that no reasonable basis existed for denying the claim. *Bushey v. Allstate Ins., Co.*, 164 Vt. 399, 402, 670 A.2d 807, 810 (1995). An insurance company may challenge claims that are "fairly debatable" and will be found liable only where it has been intentionally denied (or failed to process or pay) a claim without a reasonable basis. *Id.*; *Town of Ira v. Vt. League of Cities & Towns*, 2014 VT 115 ¶ 21. It is not bad faith to deny coverage in circumstances where the policy provides no coverage. *Blake v. Nationwide Ins. Co.*, 2006 VT 48, ¶ 22, 904 A.2d 1071, 1080; *Serecky v. National Grange Mut. Ins.*, 177 Vt. 58, 857 A.2d 775 (2004). A liability insurer that has properly denied coverage has no duty to the insured to disclose that different claims might trigger coverage. *Vermont Ins. Mgmt., Inc. v. Lumbermens' Mut. Cas. Co.*, 171 Vt. 601, 605 (2000).

For liability-policy bad faith claims the liability insurer in control of a defense is held to the standard of a fiduciary. *Johnson v. Hardware Mutual Casualty Co.*, 109 Vt. 481, 490-91, 1 A.2d 817, 820 (1938). Vermont has long recognized a claim by an insured for bad faith against a liability carrier for unreasonably exposing the insured to an excess verdict. *Id.*; *Myers v. Ambassador Ins. Co.*, 146 Vt. 552, 508 A.2d 689 (1986). These cases are based on "the insurance company's control of the settlement of a claim brought against the insured" and the necessary conflict of interest that it creates. *Myers*, 146 Vt. at 555, 508 A.2d at 690.

In *Myers* the court explained the standard is a high one:

> When investigating and considering a settlement offer, the insurer must in good faith take into account the interests of the insured, and will be held liable for a judgment in excess of the policy limits if it intentionally disregarded "the financial interests of [the insured] in the hope of escaping the full responsibility imposed upon it by its policy." *Johnson* at 491, 1 A.2d at 820. Good or bad faith is a state of mind, provable by circumstantial as well as direct evidence. *Id*. 109 Vt. at 494, 1 A.2d at 822.

The insurer's fiduciary duty to act in good faith when handling a claim against the insured obligates it to take the insured's interests into account. The company must diligently investigate the facts and the risks involved in the claim, and should rely only upon persons reasonably qualified to make such an assessment. If demand for settlement is made, the insurer must honestly assess its validity based on a determination of the risks involved. In addition, and more pertinent to this case, the insurer must fully inform the insured of the results of its assessment of the risks, including any potential excess liability, and convey any demands for settlement which have been made. "[T]he insurer 'must be careful to give its insured full and accurate information as to settlement possibilities,'" for full disclosure allows the insured to assess whether he should move to protect his interests. The insurer's duty to protect the insured is ongoing, and the insurer must inform the insured of significant developments as they arise. 146 Vt. at 555-57 (some citations omitted; footnotes omitted).

4. Third-Party

Vermont does not recognize third-party bad faith claims on behalf of the claimant. In *Larocque v. State Farm Insurance Co.*, 163 Vt. 617, 660 A.2d 286 (1995), the Court ruled that liability carriers owe no enforceable statutory or common law duty to injured claimants to settle claims expeditiously and in good faith. Neither the Vermont Consumer Protection Act[2] (9 V.S.A. § 2451, et seq.) nor the Insurance Trade Practices Act (8 V.S.A. § 4721 et seq.) provides a basis for private bad-faith causes of action against an insurer. *City of Burlington v. Hartford Steam Boiler Inspection & Insurance Co.*, 190 F. Supp. 2d 663 (D. Vt. 2002) aff'd 346 F.3d 70 (2d Cir. 2003); *Wilder v. Aetna Life & Cas. Ins. Co.*, 140 Vt. 16, 433 A.2d 309 (1981); but see *Brillman v. New England Guaranty Ins. Co., Inc.*, 2020 VT 16 ¶ 14 and *Greene v. Stevens Gas Service*, 177 Vt. 90, 858 A.2d 238 (2004) (noting without deciding that 1985 amendments may extend the Consumer Protection Act to insurance).

Fraud

"An action for fraud and deceit will lie upon an intentional misrepresentation of existing fact, affecting the essence of the transaction, so long as the misrepresentation was false when made and known to be false by the maker, was not open to the defrauded party's knowledge, and was relied on by the defrauded party to his damage." *Union Bank v. Jones*, 138 Vt. 115, 121, 411 A.2d 1338, 1342 (1980); see also *Bennington Housing Auth. v. Bush*, 2007 VT 60, ¶8, 182 Vt. 133, 933 A.2d 207. Proof that the defendant had actual knowledge of the falsity of the representation is unnecessary if defendant makes a statement in reckless disregard of whether it is true or false. *Follo v. Florindo*, 2009 VT 11 ¶¶29, 30, 970 A.2d 1230. An action for fraud will also lie for failure to disclose a material fact by one with a duty to disclose. *Ianelli v. U.S. Bank*, 2010 VT 34, ¶ 14, 996 A.2d 722*; Sugarline Assocs. v. Alpen Assocs*., 155 Vt. 437, 586 A.2d 1115 (1990); *White v. Pepin*, 151 Vt. 413, 416, 561 A.2d 94, 96 (1989).

The Vermont Rules of Civil Procedure require that the circumstances constituting alleged fraud must be stated with particularity. V.R.C.P. 9(b). Each of the elements must be proved by clear and convincing evidence. *Poulin v. Ford Motor Co.*, 147 Vt. 120, 125, 513 A.2d 1168, 1172 (1986); but cf. *Sarvis v. Vermont State Colleges*, 172 Vt. 76, 772 A.2d 494 (2001) ("unlike a fraud action seeking damages in tort, a party seeking to rescind a fraudulently induced contract is not required to prove its case by clear and convincing evidence.") Although parties to a commercial transaction can generally exculpate one another from negligence, an exculpatory clause in a commercial lease, that the owner shall not be held liable for any damages to or loss of property from any cause whatsoever, is ineffective to bar fraud, negligent misrepresentation, and consumer fraud claims. *Puro v. Neil Enters.*, Inc., 2009 VT 95, ¶¶ 12–15, 186 Vt. 601, 987 A.2d 935 (mem.).

Intentional or Negligent Infliction of Emotional Distress

Vermont does not recognize a claim for mere negligent infliction of emotional distress, unless accompanied by

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

some physical harm or threat of physical harm. *Goodby v. Vetpharm, Inc.*, 2009 VT 52, 974 A.2d 1269; *Vincent v. DeVries*, 2013 VT 34 ¶ 12, 193 Vt. 574, 579-580; 72 A.3d 886, 891; *Vaillancourt v. Medical Ctr. Hosp. of Vermont*, 139 Vt. 138, 143, 425 A.2d 92, 95 (1980); *Guilmette v. Alexander*, 128 Vt. 116, 117-119, 259 A.2d 12, 13-14 (1969); *Savard v. Cody Chevrolet, Inc.*, 126 Vt. 405, 410, 234 A.2d 656, 660 (1967). To recover for negligence, a claimant who has not suffered a physical impact from an external force must make a threshold showing that: 1) he was within the "zone of danger" of an act negligently directed at him by defendant, 2) he was subjected to a reasonable fear of immediate personal injury, and 3) he in fact suffered substantial bodily injury or illness as a result. *Brueckner v. Norwich University*, 169 Vt. 118, 125, 730 A.2d 1086, 1092 (1999); *DeVries*, 2013 VT 34, ¶ 12, n 2.

To recover for intentional infliction of emotional distress, a claimant must show extreme and outrageous conduct, done intentionally or with reckless disregard of the probability of causing emotional distress that has resulted in the suffering of extreme emotional distress, actually or proximately caused by the outrageous conduct. *Colby v. Umbrella, Inc.*, 2008 VT 20; 184 Vt. 1, 955 A.2d 1082; *Baptie v. Bruno*, 2013 VT 117, 195 Vt. 308, 88 A.3d 1212; *Denton v. Chittenden Bank*, 163 Vt. 62, 66, 655 A.2d 703, 706 (1994); *Crump v. P & C Food Market, Inc.*, 154 Vt. 284, 296, 576 A.2d 441, 448 (1990); *Demag v. American Ins. Cos*., 146 Vt. 608, 611, 508 A.2d 697, 699 (1986).

The Vermont Supreme Court has placed the responsibility on trial courts to acting as gatekeeper with respect to intentional emotional distress claims.

> As a threshold issue, the trial court must determine whether the conduct was so extreme and outrageous that a jury could reasonably find liability. … The standard necessary for establishing “outrageous” conduct is necessarily a high one. The conduct must be “so outrageous in character and so extreme in degree, as to go beyond all possible bounds of decency and … be regarded as atrocious, and utterly intolerable in a civilized community.”

Denton v. Chittenden Bank, 163 Vt. 62, 66, 655 A.2d 703, 706 (1994) (quoting Restatement (Second) of Torts § 46 cmt.d (1965)); see *Cate v. City of Burlington*, 2013 VT 64, 194 Vt. 265; 79 A.3d 854 (merely disciplining an employee is insufficient to support an IIED claim, employee must show termination evinces oppressive conduct and abuse of a position of authority); *Schwartz v. Frankenhoff*, 169 Vt. 287, 733 A.2d 74 (1999) (allegations that lawyers demanded payment from debtors who could not pay “fall far short” of showing the elements of intentional infliction of emotional distress); *Farnum v. Brattleboro Retreat*, 164 Vt. 488, 671 A.2d 1249 (1995) (summoning an employee of sixteen years on his day off by emergency beeper and firing him without warning in a three-minute meeting without giving a reason does not amount to extreme and outrageous conduct); But see *Crump v. P & C Food Mkts., Inc.*, 154 Vt. 284, 296, 576 A.2d 441, 448 (1990) (affirming denial of defendant’s motion for directed verdict and jury verdict for Plaintiff on IIED claim when employee summarily fired after being falsely accused of theft, brought to a 3-hour meeting with no notice, given no opportunity to leave and coerced to sign a confession)

State Consumer Protection Laws, Rules and Regulations

The Vermont Consumer Protection Act prohibits “unfair or deceptive acts or practices in commerce,” 9 V.S.A. § 2453(a). It authorizes the “consumer” to recover damages caused by the violation, reasonable attorney’s fees, and exemplary damages not exceeding three times the value of the consideration. 9 V.S.A. § 2461(b). The Act defines “consumer” to include businesses with respect to purchases of goods or services made for the business, as opposed to goods or services purchased for resale. 9 V.S.A. § 2451a(a). It is an open question whether the Act applies to insurance transactions. Compare *Wilder v. Aetna Life & Cas. Ins. Co*., 140 Vt. 16, 433 A.2d 309 (1981) with *Greene v. Stevens Gas Service*, 2004 VT 67, ¶ 10,177 Vt. 90, 858 A.2d 238.

The Act provides “a much broader right than common law fraud.” *Poulin v. Ford Motor Co.*, 147 Vt. 120, 124, 513 A.2d 1168, 1171 (1986). Intent to deceive and bad faith are not elements under the Consumer Protection Act. *Carter v. Gugliuzzi*, 168 Vt. 48, 716 A.2d 17 (1998); Gregory v. Poulin Auto Sales, Inc., 2012 VT 28, ¶ 14; 191 Vt. 611 (2012). Representations capable of multiple reasonable interpretations may violate the Act as long as one of those interpretations is false. *Inkel v. Pride Chevrolet-Pontiac, Inc.*, 2008 VT 6, ¶ 10, 183 Vt. 144, 945 A.2d 855. In construing section 2453(a), Vermont courts must follow the construction of those terms under the Federal Trade Commission Act, 15 U.S.C.A. § 45, 9 V.S.A. §2353(b).

To establish a “deceptive act or practice” under the Act requires three elements: (1) there must be a representation, omission, or practice likely to mislead consumers; (2) the consumer must be interpreting the message reasonably under the circumstances; and (3) the misleading effects must be material, that is, likely to affect the consumer’s conduct or decision regarding the product. *PH West Dover Prop. v. Lalancette Eng'rs*, 2015 VT 48, ¶ 11, *Vastano v. Killington Valley Real Estate*, 2007 VT 33, ¶7, 182 Vt. 550, 929 A.2d 720.

The plaintiff does not have to be a direct purchaser to sue. *Elkins v. Microsoft Corp.*, 174 Vt. 328, 817 A.2d 9 (2002). The defendant, however, must be a seller, solicitor, or other violator under the act. *Madowitz v. Woods at Killington Owners' Ass'n*, 2014 VT 21, 93 A.3d 571 (2014). Deception is measured by an objective standard, looking to whether the representation or omission had the “capacity or tendency to deceive” a reasonable consumer; actual injury need not be shown. *Bisson v. Ward*, 160 Vt. 343, 351, 628 A.2d 1256, 1261 (1993). Materiality is also generally measured by an objective standard, premised on what a reasonable person would regard as important in making a decision. *Carter v. Gugliuzzi*, 168 Vt. 48, 716 A.2d 17 (1998).

Under the Consumer Protection Act, a private cause of action exists not only when a consumer “contracts for goods or services” but also when a consumer sustains damages or injury as a result of any prohibited false or fraudulent representations or practices. 9 V.S.A. § 2461(b). However, mere breach of contract is not actionable under the Consumer Protection Act. *Foti Fuels, Inc. v. Kurrle Corporation*, 2013 VT 111; 95 Vt. 524; 90 A.3d 885 (2013); *Winey v. William E. Dailey*, *Inc.*, 161 Vt. 129, 136, 636 A.2d 744, 749 (1993).

The breach of contract exception applies to coverage denials. In *Greene v. Stevens Gas Service*, 2004 VT 67,177 Vt. 90, 858 A.2d 238, an insured sued a homeowners’ insurer to recover for breach of contract, consumer fraud, and bad faith in connection with the denial of a claim for damage to his home. The Vermont Attorney General, as friend of the court, argued that after 1985 amendments, the Consumer Fraud Act applies to insurance, notwithstanding *Wilder v. Aetna Life & Cas. Ins. Co.*, 140 Vt. 16, 433 A.2d 309 (1981). Without deciding if the Consumer Fraud Act now applies to insurance, the Supreme Court held the insured had not shown consumer fraud. A denial of coverage cannot be consumer fraud, because it is akin to a mere breach of contract that is not sufficient to show consumer fraud. *Greene*, 2004 VT 67 ¶15, 177 Vt. at 97.

See also the Insurance Trade Practices Act, 8 V.S.A. §§ 4721–4726, and Reg. 79-2.

DISCOVERY ISSUES IN ACTIONS AGAINST INSURERS

Discoverability of Claims Files Generally

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

Discoverability of Reserves

The Vermont Supreme Court has not ruled on the discoverability of reserves. This is an open question of law in Vermont.

Discoverability of Existence of Reinsurance and Communications with Reinsurers

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

Attorney/Client Communications

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

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

DEFENSES IN ACTIONS AGAINST INSURERS

Misrepresentations/Omissions: During Underwriting or During Claim

Misrepresentations are grounds for declaring policy void if there is a nexus between the false statements and the decision to issue the policy. *McAllister v. Avemco Ins.*, 148 Vt. 110, 528 A.2d 758 (1987). The statute provides: "The falsity of a statement in the application for a policy covered by such provisions shall not bar the right to recovery thereunder unless such false statement was made with actual intent to deceive or unless it materially affected either the acceptance of the risk or the hazard assumed by insurer." 8 V.S.A. § 4205. The focus under this section is on the nexus between the false statement and the insurer's decision to issue a policy, not between the false statement and the ultimate loss.

Failure to Comply with Conditions

The Vermont Supreme Court has ruled that an insurer attempting to avoid its coverage obligations based on an insured's breach of certain conditions of coverage has the burden of demonstrating breach and the actual prejudice resulting therefrom. *Smith v. Nationwide Mut. Ins. Co.*, 2003 VT 61, ¶ 10, 175 Vt. 355, 359, 830 A.2d 108, 112 (2003) (noncooperation); *Coop. Fire Ins. Ass'n of Vermont v. White Caps, Inc.*, 166 Vt. 355, 362, 694 A.2d 34, 38 (1997) (prompt notice).

An insurer may avoid coverage obligations because of an insured's failure to cooperate during the handling of the claim, but only if the insured's noncooperation actually prejudices the insurer's defense of the underlying claim. See *American Fidelity Co. v. Kerr*, 138 Vt. 359, 362, 416 A.2d 163, 165 (1980); cf. *Progressive Ins. Co. v. Wasoka*, 2005 VT 76 (belated non-cooperation argument rejected because it was initially presented only as part of unsuccessful defense of fraud in the inducement).

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

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

The Vermont Supreme Court has not ruled directly on consent-to settle clauses. However, in *Travelers Indem. Co. v. Eitapence*, 924 F.2d 48 (2d. Cir. 1991), the Second Circuit confronted the issue on appeal from District Court Judge Franklin S. Billings, who had been the Chief Justice of the Vermont Supreme Court from 1982-1984. The Second Circuit affirmed Judge Billings' ruling that a "wish you luck" letter did not waive the consent-to-settle clause as to an insured motorist and that such clauses do not violate Vermont public policy when applied to the insured (as opposed to other parties). *Eitapence* at 50-51. Further, the Vermont Supreme Court did determine that similar "consent-to-assignment clauses" were not effective post-loss, writing:

> Although anti-assignment clauses in insurance policies are enforceable against "attempted transfers of the policy itself before a loss has occurred," such a provision "does not in any way limit the policyholder's power to make an assignment of the rights under the policy—consisting of the right to receive the proceeds of the policy—after a loss has occurred. *In re Ambassador Ins. Co., Inc.*, 2008 VT 15 ¶12, 184 Vt. 408, 965 A.2d 486.

The critical difference between pre-loss and post-loss consent-to-assignment clauses in the Court's opinion was "the purpose of the no-assignment clause in insurance contracts, which is to protect the insurer from increased liability." *Id*. To the extent, therefore, that consent-to-settle clauses are applied only to the insured and will protect the insurer from increased liability, then, the Court appears to imply that they would be enforceable.

Preexisting Illness or Disease Clauses

The Vermont Supreme Court has affirmed DFR's refusal to approve a life insurance policy because it excluded coverage for death from cancer, cardiovascular disease, and conditions related to AIDS. DFR acted under a statute allowing it to disallow policies with deceptive terms, stating that "consumers of life insurance policies expect to be covered as long as they do not commit suicide." *In re UNUM Life Ins. Co.*, 162 Vt. 201, 207, 647 A.2d 708, 712 (1994).

Federal law limiting preexisting condition exclusions in health insurance has been incorporated by reference into Vermont statutes. 8 V.S.A. § 4062(c). A variety of other statutes regulate limitations on coverage of preexisting conditions in health insurance and long-term care insurance plans.

Statutes of Limitations and Repose

The statute of limitations for a direct action against a liability insurer on a judgment against the insured is one year. 8 V.S.A. § 4203(2*); Copeland & Sons v. Kansa General Insurance Co.*, 171 Vt. 189, 762 A.2d 471 (2000); *Korda v. Chicago Ins. Co.,* 2006 VT 81 ¶17, 180 Vt. 173, 908 A.2d 1018.

Other limitations periods to consider include Vermont's general six-year statute of limitations. 12 V.S.A. § 511. The statute of limitations for injury to person or injury to personal property is three years. 12 V.S.A. § 512. Shorter contractual limitation periods contained in a policy may be enforceable if they exceed one year. See 8 V.S.A. § 3663; 12 V.S.A. § 465; *Greene v. Stevens Gas Service*, 2004 VT 67 ¶18-29,177 Vt. 90, 858 A.2d 238 (2004); *Gilman v. Maine Mut. Fire Ins. Co.*, 2003 VT 55, ¶ 9, 175 Vt. 554, 830 A.2d 71 (mem.); *Springfield Coop. Freeze Locker Plant, Inc. v. Wiggins*, 115 Vt. 445, 447, 63 A.2d 182, 184 (1949).

TRIGGER AND ALLOCATION ISSUES FOR LONG-TAIL CLAIMS

Trigger of Coverage

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

Allocation Among Insurers

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

CONTRIBUTION ACTIONS

Claim in Equity vs. Statutory

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

Elements

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

DUTY TO SETTLE

"An insurance carrier owes a duty to its insured when considering whether to settle a claim within policy limits. This duty stems from an 'insurance company's control of the settlement of a claim brought against the insured,' and the necessary conflict of interest that it creates." *Larocque v. State Farm Ins. Co.*, 163 Vt. 617, 618, 660 A.2d 286, 288 (1995) (citing *Myers v. Ambassador Ins. Co.*, 146 Vt. 552, 555, 508 A.2d 689, 690-91 (1986). Insurers owe no duty to a claimant to act in good faith because their relationship is by nature adversarial. *Id*. (But note that this concept does not extend to Workers' Compensation carriers. V.S.A. 21 § 693; *Marsigli's Estate v. Granite City Auto Sales, Inc.,* 124 Vt. 95, 106, 197 A.2d 799, 807 (1964) ("Under our workmen's compensation act, the liability of an insurance carrier who undertakes to protect an employer is more than that of a mere indemnitor. Its liability is primary and direct.") Thus, an injured worker is treated like a first-party claimant for purposes of Workers' Compensation, and Vermont imposes a duty to pursue settlement in good faith.)

LH&D BENEFICIARY ISSUES

Change of Beneficiary

In change-of-beneficiary cases, literal compliance with the terms of the policy is not required to effectuate change; substantial compliance is deemed sufficient. *Messier v. Metro. Life Ins. Co.*, 154 Vt. 406, 409–10, 578 A.2d 98, 100 (1990) (internal citations omitted). In *Messier*, the Vermont Supreme Court adopted a rule for substantial compliance that the change of beneficiary must be shown by intent, accompanied by a reasonable effort to change the beneficiary. *Id*.

Effect of Divorce on Beneficiary Designation

Vermont does not have a statute regarding the effect of divorce on beneficiary designation, nor has the Vermont Supreme Court ruled directly on the issue. Likely, the "substantial compliance" test, as articulated in *Messier v. Metro. Life Ins. Co.*, 154 Vt. 406, 409–10, 578 A.2d 98, 100 (1990) would apply.

INTERPLEADER ACTIONS

Availability of Fee Recovery

Vermont Rule of Procedure 22 governs interpleader actions. The Rule does not provide for fee recovery.

Differences in State vs. Federal

There are no substative differences between state and federal practice: V.R.C.P 22 mirrors the content of F.R.C.P 22(a)(1) and(a)(2).