

New Hampshire Advanced Insurance Law

A Continuing Legal Education Program



Thursday, April 9, 2026

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New Hampshire Advanced Insurance Law

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NH Bar Association Seminar Room, Concord

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Faculty

Peter E. Hutchins, Program Chair/CLE Committee Member CLE Committee Member, practices plaintiff personal injury litigation at the Law Offices of Peter E. Hutchins in Manchester, NH. He focuses his practice on plaintiffs' auto accident and premises liability injury cases as well as plaintiff's sexual abuse. Prior to opening his own firm in 2010, he practiced as a partner at Wiggin & Nourie, PA. He graduated from Dartmouth College in 1980 and earned his law degree from Boston College Law School in 1983. Peter was the NHBA's president from 2001-02 and served as the Board of Governor's secretary and treasurer for a number of years following his term as president. He is a frequent lecturer and moderator at CLE programs on litigation topics, including the NHBA's Practical Skills program for new admittees.

Matthew V. Burrows is a member of Gallagher, Callahan & Gartrell's litigation team in Concord, NH. His practice focuses on municipal defense in civil rights litigation, business and commercial disputes, and property disputes. He has successfully represented clients in litigation before every New Hampshire state court, the United States District Court for the District of New Hampshire, the United States District Court for the District of Massachusetts, and the First Circuit Court of Appeals. Matt is a member of the Defense Research Institute and presently serves as Chair of the Tri-State Defense Lawyers Association, before which he was President of the New Hampshire leadership team. He also belongs to the Webster-Batchelder American Inn of Court. Matt has served on the steering committee of the Associated Builders and Contractors of NH/VT Young Professionals Group, and he currently serves on the board for the Stephen Cmar ROTC Scholarship Fund. Matt is currently an adjunct faculty member with the Daniel Webster Scholars program and also served as an adjunct professor at the UNH Franklin Pierce School of Law for two semesters, where he taught the Fundamentals of Lawyering to first-year law students. Prior to joining Gallagher, Callahan & Gartrell, he clerked for two years in the New Hampshire Superior Court. Matt earned his BA from Ithaca College and graduated as a Daniel Webster Scholar from the University of New Hampshire School of Law where he was the editor-in-chief of the University of New Hampshire Law Review. While in law school, Matt interned with the Honorable Robert Lynn of the New Hampshire Supreme Court.

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Elizabeth E. Ewing joined Wadleigh, Starr & Peters in Manchester, NH in 2017. Her practice focuses on complex civil litigation encompassing a wide range of subject areas, including professional malpractice, employment, education, and mass torts. Prior to joining the firm, Elizabeth clerked for Justice Gary Hicks at the New Hampshire Supreme Court, interned with Justice Carol Ann Conboy at the New Hampshire Supreme Court, and interned with Chief Judge Joseph Laplante at the United States District Court, District of New Hampshire. She also interned with the Concord City Solicitor's office and was a summer associate at Wadleigh. She graduated from the University of New Hampshire School of Law as a Daniel Webster Scholar.

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NH Bar Association Seminar Room, Concord, NH
Thursday, April 9, 2026

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Business and Commercial Insurance Policies

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PRIMMER PIPER
EGGLESTON &
CRAMER PC

Business and Commercial Insurance

Nicholas J. Deleault
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Business and Commercial Insurance Policies

- Most insurance policies include a declarations page, a policy jacket and amendatory endorsements or forms. The declaration page identifies the named insured, the policy period, the amount of coverage, the vehicles insured and most importantly, those forms or amendatory endorsements that modify the policy language. The policy jacket generally contains granting language, definitions, exclusions and conditions.



First Party Coverage

- First party insurance refers to policies which indemnify the insured for a personal loss he has sustained, as opposed to third party insurance, which refers to policies which protect the insured against liability for injury to the person or property of a third person.

Types of First Party Coverage

Property Coverage

- Requires direct physical loss or damage to Covered Property at the Premises Described in Declarations caused by or resulting from any Covered Cause of Loss". Covered Cause of Loss is generally any direct physical loss unless excluded by the policy.
- **Includes:** Buildings, completed additions, fixtures, personal property and Business Personal Property
- **Does not include:** Aircraft, motor vehicles subject to registration; Money and securities; Contraband; Land; Outdoor property unless provided for in optional coverages; Watercraft; Permanently installed computer; Accounts; Animals; Electronic Data;

Type of First Party Coverage

Business Income Loss

- Pays for the actual loss of Business Income sustained due to the necessary suspension of "operations" during the "period of restoration". The suspension must be caused by direct physical loss of or damage to property at the described premises. The loss or damage must be caused by or result from a Covered Cause of Loss.
- **"Period of restoration"** means the period of time that usually begins 72 hours after the time of direct physical loss or damage for Business Income Coverage caused by or resulting from any Covered Cause of Loss at the described premises. It ends on the earlier of: The date when the property at the described premises should be repaired, rebuilt or replaced with reasonable speed and similar quality; or The date when business is resumed at a new permanent location.

Type of First Party Coverage

Case Law

Schleicher and Stebbins Hotels, LLC v. Starr Surplus Lines Insurance Co. et. al, 175 N.H. 744 (2023).

- The New Hampshire Supreme Court held that the COVID-19 virus' presence on the hotels' premises did not cause "direct physical loss of or damage to property" under the hotels' coverage. In denying coverage, the Court noted that the fact that the property could become a vector for transmission of a virus that poses a risk to human health due to the presence of SARS-CoV-2 in the air at the property is not relevant to the question of whether there has been 'physical loss of or damage to property,' because the policies insure property, not people. Confirms that business interruption coverage still requires direct physical loss to tangible property.

Common Property Coverage Exclusions

“We will not pay for loss or damage caused directly or indirectly by any of the following. **Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss.** These exclusions apply whether or not the loss event results in widespread damage or affects a substantial area.”

Anti-concurrent causation:

- Many exclusionary clauses for property coverage include similar anti-concurrent causation provisions. Anti-concurrent causation language in New Hampshire is generally found to be enforceable absent legislation or public policy which would otherwise limit its application and no such legislation or public policy exists in New Hampshire. *Id* at 154. Amherst Country Club, Inc. v. Harleysville Worcester Ins. Co., 561 F.Supp.2d 138 (2008). See also, Wegner v. Prudential Prop. & Cas. Ins. Co., 148 N.H. 107, 109 (2002).

Common Property Coverage Exclusions

a. **Ordinance or Law:**

b. **Water:** Flood, surface water, waves (including tidal wave and tsunami), tides, tidal water, overflow of any body of water, or spray from any of these, all whether or not driven by wind (including storm surge); Mudslide or mudflow; Water that backs up or overflows or is otherwise discharged from a sewer, drain, sump, sump pump or related equipment; Water under the ground surface pressing on, or flowing or seeping through foundations, walls, floors or paved surfaces, basements, doors, windows;

c. **Fungi:**

d. **Virus:**

e. **Frozen Plumbing**

Common Property Coverage Exclusions

g. **Neglect:** Neglect of an insured to use all reasonable means to save and preserve property from further damage at and after the time of loss.

h. **Other Types of Loss:** Includes wear and tear, rust or other corrosion, decay, deterioration, hidden or latent defect or any quality in property that causes it to damage or destroy itself; smog; Settling, cracking, shrinking or expansion; Nesting or infestation, or discharge or release of waste products or secretions, by insects, birds, rodents or other animals.

i. **Negligent Work:** Faulty, inadequate or defective planning, development, surveying, siting; design, specifications, workmanship, repair, construction, renovation, remodeling, Materials used in repair, construction, renovation or remodeling; or Maintenance

Common Policy Conditions

Appraisal:

- If the insurer and insured disagree on the amount of loss, either may make written demand for an appraisal of the loss; Each party will select a competent and impartial appraiser and the two appraisers will select an umpire. If they cannot agree, either may request that selection be made by a judge of a court having jurisdiction. The appraisers will state separately the amount of loss. If they fail to agree, they will submit their differences to the umpire. A decision agreed to by any two will be binding. Each party will:
- Pay its chosen appraiser; and
- Bear the other expenses of the appraisal and umpire equally.
- If there is an appraisal, the insurer still retains the right to deny the claim.
- *****Appraisal is not intended to include coverage issues, only amounts of loss when the scope loss is agreed upon.*****

Common Policy Conditions

- Duties in the event of Loss:
- An insured must generally:
 - Give prompt notice of the loss or damage, including a description of the property involved;
 - As soon as possible, provide description of how, when and where the loss or damage occurred;
 - Protect Covered Property from further damage;
 - Cooperate with insurers' investigation;
 - Send a signed Proof of Loss within 60 days of request;
 - Resume operations as quickly as possible;

Breach of Policy Conditions

- With respect to the duties to promptly report a loss, the New Hampshire Supreme Court has held that whether an insurer must prove prejudice to deny coverage based on late notice of a claim or loss depends on the type of policy and the type of notice at issue. See, Bates v. Vermont Mut. Ins. Co., 157 N.H. 391, 950 A.2d 186 (2008).
- Other provisions of insurance policies have been found to be conditions precedent to coverage, not requiring a demonstration of prejudice to the insurer. In Krigsman v. Progressive N. Ins. Co., 151 N.H. 643, 864 A.2d 330 (2005), as a matter of first impression, the New Hampshire Supreme Court found that compliance with a policy's Examination Under Oath provision was a condition precedent to filing an action, and thus the insurer was not required to show that it was prejudiced by the insureds failure to submit to an Examination Under Oath.

Insurers Duty of Good Faith and Fair Dealing

- In New Hampshire, there is implied in every contract an obligation of good faith and fair dealing. Burse v. Clement, 118 N.H. 412 (1978).
- The duty of good faith is implied in the contract and does not exist independently of the contract. Lawton v. Great Southwest Fire Ins. Co., 118 N.H. 607 (1978). An insurer's "failure to make prompt payment under the policy" in order to "coerce the insured into accepting less than full performance of the insurer's contractual obligations" breaches the covenant of good faith and fair dealing "implied in every contract." Success on such a claim, sometimes pled as a "bad-faith-breach-of-insurance contract claim," permits an insured to seek an award of consequential damages resulting from the insurer's bad faith breach in addition to the wrongfully withheld coverage amounts.

Insurers Duty of Good Faith and Fair Dealing

Breach?

- The insurer's duty of good faith is, in general terms, the obligation to act fairly and reasonably with the insured in all respects.
- One of the most common examples of breach is the assertion by the insurer of a nonexistent defense. See, e.g. Eckenrode v. Life of America Inc. Co., 470 F.2d 1 (7th Cir. 1972), where ambiguous implications of wrongdoing on the part of the insured, together with offers to settle for less than the amount due under the policy, were held to constitute bad faith.
- The existence of reasonable grounds to contest coverage must be determined as of the time when coverage is denied. Lanier v. Amer. Gas. Co. of Reading, Pa., 226 F. Supp. 630 (D.C. Ga. (1964).

Insurers Duty of Good Faith and Fair Dealing

- In deVries v. St. Paul Fire and Marine Ins. Co., 716 F.2d 939 (1st Cir. 1983), Court approved the following passage from the District Court's jury charge:
 - "Thus only if you are satisfied that the plaintiffs have proved by preponderance of the evidence that the acts of St. Paul Fire and Marine Insurance Company in investigating and adjusting the claim here amounted to a calculated and not inadvertent unreasonable denial of payment, may you find the insurance company to be responsible for the alleged breach of the contractual obligation of good faith and fair dealing."
- The court in deVries accepted "a standard in between negligence and malice."
- An insurer acting in good faith is entitled to make reasonable investigation of claims, and to insist upon judicial determination of open questions of law or fact. Crenshaw v. Great Central Ins. Co., 482 F.3d 1255 (8th Cir. 1973).

Third Party Coverage: Liability Insurance

- **Who is an Insured?**
- CGL's generally define the term "insured" to include persons and organizations named as the insured in the declaration page, as well as volunteers and employees while acting within the scope of his or her employment duties. Occasionally, the definition will also reference family members of the named insured. In 1990, the New Hampshire Supreme Court declared the reference to family members superfluous when the named insured is a corporate or business entity. See, Cutter v. Me. Bonding & Cas. Co., 133 N.H. 569 (1990).

Third Party Coverage: Liability Insurance

- **Coverage Triggers**
- “Bodily injury” or “property damage”:
- In order to trigger coverage under a CGL or BOP, including any duty to defend or indemnify an insured, a Complaint must first allege “property damage” or “bodily injury” caused by an “occurrence” during the policy period and in the “coverage territory.”

Third Party Coverage: Liability Insurance

- **Definitions:**

"Bodily injury" means bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time.

"Property damage" means:

Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or

Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the "occurrence" that caused it.

Property suffers physical, tangible injury "when the property is altered in appearance, shape, color or in some other material dimension." Webster v. Acadia Ins. Co., 156 N.H. 317, 320 (2007).

Third Party Coverage: Liability Insurance

Case Law

A.B.C. Builders, Inc. v. Am. Mut. Ins. Co., 139 N.H. 745 (1995).

- The New Hampshire Supreme Court considered the argument that “tangible property” does not include real property, such as a lawn/yard. The Court rejected this argument, noting that while there is conflict between case law and secondary authorities as to whether “tangible property” includes both real and personal property. When used in the context of insurance, the Court found the term to be ambiguous. Since the term was undefined in the policy and since the insurer could have but did not define the term, the Court affirmed the holding that term “property damage” includes real property. *Id.* at 748. Therefore, for example, a claim of loss of use of the yard may be considered “property damage” for purposes of triggering coverage.

Third Party Coverage: Liability Insurance

Definitions:

Even if “property damage,” or “bodily injury” are alleged, there must still be an “occurrence” as defined by the policy and NH law to trigger an insurer’s duty to defend or indemnify.

- **“occurrence”** means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.

Third Party Coverage: Liability Insurance

“Occurrence” case law:

In High Country Associates v. New Hampshire Insurance Co., 139 N.H. (1994), a condominium homeowner's association sued a builder for breach of warranty and negligence based on allegations that faulty or negligent design. The insurance company argued, among other things, that there had been no “occurrence”. The Court held that since the damage alleged by the association in the underlying lawsuit was unexpected from the standpoint of the insured, and was caused by continuing exposure to moisture seeping through the walls of the units, the allegations of damage fit within its interpretation of “accident” and the definition of “occurrence” within the policy. **While noting that defective work, standing alone, does not trigger an “occurrence” under a commercial general liability policy, it found that faulty work that leads to unintended property damage, such as continuous exposure to moisture due to faulty construction, could be an occurrence.** Id. at 478. The Court rejected the argument that allegations based on the insured's defective workmanship did not constitute an “occurrence” within the meaning of the policy.

Third Party Coverage: Liability Insurance

Coverage Trigger

“Personal and advertising injury”

- In order to trigger coverage under a CGL or BOP, including any duty to defend or indemnify an insured, a Complaint must first allege a “personal and advertising injury” caused by an offense arising out of the insureds business, in the “coverage territory” during the policy period.

Third Party Coverage: Liability Insurance

Definitions:

"Personal and advertising injury" means injury, including consequential "bodily injury", arising out of one or more of the following offenses:

- False arrest, detention or imprisonment;
- Malicious prosecution;
- The wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room, dwelling or premises that a person occupies, committed by or on behalf of its owner, landlord or lessor;
- Oral or written publication, in any manner, of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services;
- Oral or written publication, in any manner, of material that violates a person's right of privacy;
- The use of another's advertising idea in your "advertisement"; or
- Infringing upon another's copyright, trade dress or slogan in your "advertisement".

Liability Exclusions

- **Expected or Intended Injury Exclusion:** "Bodily injury" or "property damage" expected or intended from the standpoint of the insured.
- **Contractual Liability Exclusion:** This exclusion eliminates coverage for liability assumed by the insured under any contract or agreement unless the contract meets the policy definition of an "insured contract".
- **Liquor Liability Exclusion:** This exclusion eliminates coverage for alcohol related injuries. Some CGL carriers will provide liquor liability coverage by endorsement and significant premium adjustments. Liquor liability coverage may also be purchased by separate individual policy.

Liability Exclusions

Exclusions relating to Hazards Typically Covered by Other Types of Policies

Automobile and Aircraft Exclusion:

Eliminates coverage for damages arising out of the operation, maintenance and/or use of an automobile and/or aircraft. The intent of the exclusion is to eliminate coverage for risk and exposure more properly covered under an automobile or aircraft policy.

Worker's Compensation Exclusion:

Eliminates coverage for any obligation the insured may have to an injured employee to pay worker's compensation benefits. The intent of the exclusion is to avoid the duplication of standard benefits provided under a worker's compensation policy and required by statute. See, generally, American Insurance Co. v. Nationwide, 110 N.H. 192 (1970).

Liability Exclusions

Exclusions for Uninsurable Hazards

War Risk Exclusion:

Eliminates liability for expenses associated with war.

Pollution and Contamination Exclusion:

Attempts to eliminate coverage for bodily injury or property damage arising out of the discharge of pollutants or contaminants.

- The New Hampshire Court has restricted the scope of the absolute pollution exclusion to environmental pollutants. *Mellin v. Northern Security Ins. Co.*, 167 N.H. 544 (2015). In *Mellin*, Northern Security attempted to apply an absolute pollution exclusion to a first party property damage claim arising out of interior walls soaked with cat urine. The Court noted that although the definition of pollutant in the policy included any irritant or contaminant, that definition was overly broad outside of the environmental context. The Court refused to apply the pollution exclusion to an everyday household event gone awry, in *Mellin*, urine-soaked walls.

Liability Exclusions

Business Risk Exclusions

It is a fundamental tenant of insurance law that third party insurance coverage is for risks beyond the insured's control. The consequence of not performing well is part of every business venture. The replacement or repair of faulty goods and work is a business expense, to be borne by the insured-contractor in order to satisfy his customers. It is not a risk which the insurance industry intends to insure. It is simply a cost of doing business. Accordingly, the so-called business risk exclusions were added to the CGL. In 1986 the standard CGL form was revised. The new form incorporates the coverage previously provided by the "Board Form Property Damage Endorsement."

Liability Exclusions

Defective Work and Product Exclusions

Ongoing Operations Exclusions:

Damage To Property

"Property damage" to:

That particular part of real property on which you or any contractor or subcontractor working directly or indirectly on your behalf is performing operations, if the "property damage" arises out of those operations; or

That particular part of any property that must be restored, repaired or replaced because "your work" was incorrectly performed on it. This paragraph does not apply to "property damage" included in the "products-completed operations hazard".

Liability Exclusions

Defective Work and Product Exclusions

Completed Operations Exclusions

Damage To Your Product:

"Property damage" to "your product" arising out of it or any part of it.

Damage To Your Work:

"Property damage" to "your work" arising out of it or any part of it and included in the "products-completed operations hazard". This exclusion does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor.

Liability Exclusions

Defective Work and Product Exclusions

Completed Operations Exclusions

Damage To Impaired Property Or Property Not Physically Injured

"Property damage" to "impaired property" or property that has not been physically injured, arising out of: A defect, deficiency, inadequacy or dangerous condition in "your product" or "your work"; or

- A delay or failure by you or anyone acting on your behalf to perform a contract or agreement in accordance with its terms.
- This exclusion does not apply to the loss of use of other property arising out of sudden and accidental physical injury to "your product" or "your work" after it has been put to its intended use.

Liability Exclusions

Definitions:

"Products-completed operations hazard":

a. Includes all "bodily injury" and "property damage" occurring away from the premises the insured owns or rent and arising out of "your product" or "your work" except:

- Products that are still in the insureds physical possession; or
- Work that has not yet been completed or abandoned. However, "your work" will be deemed completed at the earliest of the following times:
 - When all of the work called for in your contract has been completed.
 - When all of the work to be done at the job site has been completed if your contract calls for work at more than one job site.
 - When that part of the work done at the job site has been put to its intended use by any other person or organization other than another contractor or subcontractor working on the same project.
 - Work that may need service, maintenance, correction, repair or replacement, but which is otherwise complete, will be treated as completed.
- The "bodily injury" or "property damage" must occur away from premises the insured owns or rent, unless its business includes the selling, handling or distribution of "your product" for consumption on premises the insured owns or rents.

Liability Exclusions

Definitions:

"Your work" generally means: Work or operations performed by the insured or on its behalf; and Materials, parts or equipment furnished in connection with such work or operations. Includes:

Warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of "your work"; and The providing of or failure to provide warnings or instructions

"Your product" generally means:

(1) Any goods or products, other than real property, manufactured, sold, handled, distributed or disposed of by:

The insured;

Others trading under the insureds name; or

A person or organization whose business or assets the insured has acquired; and

(2) Containers (other than vehicles), materials, parts or equipment furnished in connection with such goods or products.

"Your product" includes: Warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of "your product"; and The providing of or failure to provide warnings or instructions.

Personal and Advertising Injury Exclusions

Personal And Advertising Injury. Most policies exclude certain "personal and advertising injuries". Most common exclusions:

- Caused by or at the direction of the insured with the knowledge that the act would violate the rights of another and would inflict "personal and advertising injury";
- Arising out of oral or written publication, in any manner, of material, if done by or at the direction of the insured with knowledge of its falsity;
- Arising out of oral or written publication, in any manner, of material whose first publication took place before the beginning of the policy period;
- Arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of "pollutants" at any time;
- Arising out of the wrong description of the price of goods, products or services stated in your "advertisement";
- Arising out of the infringement of copyright, patent, trademark, trade secret or other intellectual property rights.

Liability Coverage - Common Legal Issues

Delays and Consequential Damages

Hutton Construction v. Continental Western Insurance Company, 2022 WL 2440354

- Hutton was GC for a project and hired Frederick Meyer as a subcontractor to construct exterior masonry walls. After Meyer completed a sufficient portion of the exterior masonry work, Hutton began work on the roof and the interior of the building.
- While the work was ongoing, the Ossipee building inspector identified defects in Meyer's masonry work, including a lack of proper grouting of the concrete blocks that formed the walls. After Meyer failed to address the inspector's concerns, he issued a "stop-work order" in October that required all work on the project to cease and remained in place for 13 months. During that time, water seeped into the building through the defective masonry walls and the unfinished roof, damaging Hutton's work on the interior. After the stop-work order was lifted, Hutton needed two additional months to fix the water damage and complete the project. Meanwhile, Meyer fixed the defective masonry at its own expense

Liability Coverage - Common Legal Issues

Delays and Consequential Damages

Hutton Construction v. Continental Western Insurance Company, 2022 WL 2440354

The construction delay left Hutton responsible for stipulated damages of close to half a million dollars. Hutton demand reimbursement from sub for the stipulated damages. Continental Western denied coverage and litigation ensued. The court first determined that the stop work order was not an occurrence as it was not “a happening by chance” but was “naturally to be expected” when Meyer violated the building code. With regard to the stipulated damages imposed throughout the stop work order, the Court found that because Hutton cannot point to an intervening event that fortuitously caused the delay while the stop-work order was in effect, its claim for coverage of the stipulated damages incurred during that period must fail.

Liability Coverage - Common Legal Issues

Delays and Consequential Damages

Hutton Construction v. Continental Western Insurance Company, 2022 WL 2440354

With regard to the stipulated damages for the two months during which Hutton had to repair the water damage occasioned by Meyer's defective work, the Court found that the Continental policy covers any delay damages that Meyer must pay Hutton because of the water damage to Hutton's property. Depending on the factual evidence produced, the policy may cover the delay damages incurred while residual damage to non-defective work is being repaired. If there is covered "property damage" under the policy, delays incurred during the repair of that property damage may be covered.

Liability Coverage - Common Legal Issues

The Duty to Defend:

In New Hampshire, as in many other states, the duty to defend is broader than the duty to indemnify. "[T]he majority of jurisdictions hold that the duty to defend is distinct from, and broader than, the duty to indemnify." *Couch on Insurance 3d, supra* [§ 200:1, at 200-6](#). "The distinction between the duty to defend and the duty to indemnify is based upon the time when the duties are determined.

The duty to defend arises prior to the completion of litigation, and therefore insurers are required to meet their defense obligation before the scope of the insured's liability has been determined. In contrast, the duty to indemnify arises only once liability has been conclusively determined. The duty to defend must be assessed at the very outset of a case, unlike the duty to indemnify, which arises only when the insured's underlying liability is established. 14 *Couch on Insurance 3d, supra* [§ 200:3, at 200-9 to 200-10](#).

Liability Coverage - Common Legal Issues

Defense Under Reservation of Rights:

If a coverage question remains, an insurer is likely to appoint counsel to defend the insured while simultaneously issuing a reservation of rights letter and hiring separate independent coverage counsel to advise the insurer on any and all pending coverage questions. New Hampshire has recognized that a reservation of rights letter is effective to preserve the carrier's rights. See, American Ins. Co. v. Nationwide, 110 N.H. 192 (1970). Reservation of rights letters allow the carrier to avoid arguments of waiver or estoppel with respect to its obligation to provide coverage while it makes its determination of liability to the insured. The reservation of rights letter should fairly inform the insured of the insurer's position, should be specific, should provide a detailed description of all potential defenses to coverage and should inform the insured that the carrier specifically reserves its right to withdraw from providing a defense if it is determined that no coverage exists. See, e.g., Lumbermen Mut. Ins. Co. v. McCarthy, 90 N.H. 320 (1939).

Liability Coverage - Common Legal Issues

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Liability Coverage - Common Legal Issues

Waiver:

Under New Hampshire law an insurance company may waive its right to contest coverage obligations if its action suggests that the company knowingly agreed to forego some coverage defense it otherwise would have. Depending on the evidence of intentional waiver on the part of the company, the New Hampshire Supreme Court has held that a company may be prevented from using the late notice defense because of the waiver doctrine. USF&G v. Kancer, 108 N.H. 450 (1968).

Liability Coverage - Common Legal Issues

Estoppel:

Under the doctrine of estoppel, an insurance company is estopped or prevented from relying on a policy provision which would otherwise allow the carrier to deny coverage. In order to invoke the doctrine of estoppel, however, the insured must show that he or she acted to their detriment based on the company's position that they were not going to rely on a policy defense.

Liability Coverage - Common Legal Issues

Estoppel:

An example of estoppel is where a company denies coverage based on ground (a), the insured disputes its validity and puts substantial time and funds into a declaratory judgment petition only to learn that the company has also denied coverage because of ground (b). Under such circumstances, our Court has previously held that the company is prevented or estopped from relying upon a second ground because of the prejudice that would result to the insured. See Bowan v. Merchants Mut. Cas. Co., 99 N.H. 107 (1954). Please note that the critical element of invoking an estoppel argument is proof of prejudice to the insured.

Liability Coverage - Common Legal Issues

Additional Insured Endorsements:

The New Hampshire Supreme Court has addressed the scope of additional insured status for a potential additional insured. In Pro Con Const. Inc. v. Acadia Ins. Co., 147 N.H. 470, 472 (2002), the Court required a more than tenuous causal nexus between an insured's operations and the alleged injury.

"the policy language at issue here is the portion of the additional insured endorsement that provides coverage to "an additional insured only with respect to liability arising out of your ongoing operations performed for that insured." The phrase "arising out of" has been interpreted as meaning "originating from or growing out of or flowing from." Allstate Inc. Co. v. Crouch, 140 N.H. 329,332 (1995) (quotation omitted). Thus, to warrant coverage ... the ongoing operations need not have been the proximate cause of the injuries but the causal connection between the two must be more than tenuous. Cannon v. Maine Bonding & Cas. Co., 138 N.H. 365, 366 (1994). This **means some causal nexus must link Decorative Concepts' ongoing operations and the injuries before coverage under the additional insured endorsement is triggered.** While the causal connection need not be "proximate" as that term is used in the more demanding evidentiary area of tort law, the causal connection must still exist. "Akerley v. Hartford Ins. Grp., 136 N.H. 433, 439-440 (1992); See also, Pro Con Const. Inc. v. Acadia Ins. Co., 147 N.H. 470, 472 (2002).

Questions?

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Homeowners and Umbrella Policies

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A. OVERVIEW OF HOMEOWNERS AND PERSONAL UMBRELLA POLICIES

Homeowners Insurance and First Party Claims

I. Introduction

Homeowners insurance policies provide two main types of coverage: first, they provide coverage for certain kinds of damage to an insured's personal property or dwelling (known as "first party coverage" as it involves a claim by the insured him or herself), and second, they provide liability coverage for accidents taking place on the insured's premises or for other certain occurrences caused by an insured while away from his or her premises (this is referred to as "third party coverage" as it involves a claim by a third party). As with any other insurance coverage question, the analysis of what sorts of losses or claims might be covered under a homeowners policy begins with a review of the policy language. In New Hampshire, reference should also be made to the statutory requirements for a fire policy discussed in more detail below.

Most insurance policies, even standard form policies, will include a declarations page, a policy booklet or form, and amendatory endorsements. The declaration page will identify the named insured, the policy period, the amount of coverage, the risk insured (for a homeowners policy, usually the location of the home), and also the forms and endorsements that amend the policy.

Review of a homeowners policy typically begins with the language granting coverage for your particular situation (property damage or liability). Once you have determined that your situation seems to fit within the coverage grant, you need to make sure that the policy definition for "insured" can be satisfied and whether there is a claim for covered damage or liability (also defined in the policy). Careful review should also be made of the balance of the policy language, particularly any potentially applicable exclusions, and all endorsements that might change the standard language in the policy form.

II. Statutory Requirements - the Standard Fire Policy

The standard homeowners policy insures dwellings, appurtenant structures and unscheduled personal property against all risk of physical damage or loss unless excluded. In New Hampshire, all policies of fire insurance must comply with

the standard fire policy requirements set forth at RSA ch. 407. RSA 407:22 provides the Standard Policy Form for Fire Policies issued in the state.

One of the statutory form requirements at RSA 407:22 is a limitations period, stating in relevant part that “[n]o suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity unless the requirements of this policy shall have been complied with, and unless commenced within 12 months next after inception of the loss.” RSA 407:15 requires that in order for an insurance company to rely upon this limitations period, it must give the insured notice: “Unless the company shall notify the insured that any action will be forever barred by law if his writ is not served on the company within 12 months next after such notification, he may bring his action at any time.” The Supreme Court has previously construed RSA 407:22 as setting forth a 12-month limitations period and RSA 407:15 as requiring an insurer to give notice of this period before it may rely upon it. *Kierstead v. State Farm Fire & Cas. Co.*, 160 N.H. 681, 686 (2010).

The standard policy requirements also set forth a “valued policy” provision under which “[i]f a building insured for a specified amount... is totally destroyed by fire or lightning without criminal fault on the part of the insured or his assignee, the sum for which such building is insured shall be taken to be the value of the insured's interest therein unless overinsurance thereon was fraudulently obtained.” RSA 407:11, I. Part II of that statute provides that if an insured building is only partially destroyed, the insured shall be entitled to the “actual loss sustained not exceeding the sum insured.” What qualifies as a “total loss” is not always abundantly clear, particularly in situations where useable portions of a structure remain, but it would be cheaper to tear them down and rebuild. Courts have generally relied upon one of three tests to determine when a total loss has occurred: (1) the “identity” test, which looks to whether a building’s essential character was destroyed in the loss; (2) the “restoration” test, which asks whether a reasonably prudent owner would use the remains of the structure after a loss, and (3) the “constructive total loss” test, which occurs when a building cannot be repair or restored because of new building laws or codes. These tests are not mutually exclusive, and are often applied together. The New Hampshire Supreme Court has, for example, previously used all three tests to determine whether a single building should be considered a total loss.

III. Section I Coverage - Property Damage

1. Coverage Grant

As noted above, homeowners policies typically provide coverage for damage to the dwelling and appurtenant structures, personal property, and for loss of use (most commonly additional living expenses, “ALE,” while an insured is displaced from a home following a loss). When a potentially covered loss occurs, one must

look to see whether it falls within the policy's coverage grant, which often requires reference to the list of covered losses set forth in the policy. In some instances, a loss may have been caused by more than one event, not all of them listed as covered losses under the policy. Under such circumstances - where a loss has been caused by a covered event and an uncovered event - New Hampshire follows the "efficient proximate cause" doctrine in determining an insurer's coverage obligations. Under that test, "if the cause which is determined to have set the chain of events in motion, the efficient proximate cause, is covered under the terms of the policy, the loss will likewise be covered." *Amherst Country Club v. Harleysville Ins. Co.*, 561 F.Supp. 2d 138 (D.N.H. 2008). Some exclusions contain language addressing this situation, and use "anti-concurrent causation" language providing something like "we will not pay for loss or damage caused directly or indirectly by any of the following... Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any other sequence to the loss." Such limiting language has been upheld by the New Hampshire Supreme Court. *See Bates v. Phenix Mut. Ins. Co.*, 156 N.H. 719 (2008).

2. Typical Exclusions and Common Issues

As with any policy, a standard homeowners form will contain a number of potentially applicable exclusions. Those exclusions often vary, but will often exclude coverage for:

- A. motorized vehicles, except those used for service of the premises and not licensed for road use;
- B. business property;
- C. property rented or held for rental to others by the insured;
- D. property insured by other insurance;
- E. Water damage, including flood, surface water, drain or sewage overflows;
- F. Faulty or defective maintenance;
- G. Failure to use reasonable efforts to maintain heat; and
- H. Code upgrades or ordinance or law upgrades.

IV. Section II Coverage - Liability

1. Coverage Grant

The typical liability coverage grant is quite broad and provides, subject to policy definitions and exclusions, a defense and indemnity against all claims made or suits brought against an insured for bodily injury or property damage caused by an occurrence. This coverage extends not only to occurrences happening on the insured premises, but also to claims arising away from the premises if caused by an insured. Some are surprised to learn that homeowners policies typically afford coverage to dog bites or other injuries caused by animals owned by an insured, defamation, libel, or slander suits, damage caused by children even while away at school, firearm injuries, and (in New Hampshire) workers' compensation coverage for an insured's "domestic" employees (through a statutorily mandated endorsement, *see* RSA 281-A:6).

A. Definition of "Occurrence"

Under a typical policy, coverage is provided "if a claim is made or suit is brought against an 'insured' for damages because of 'bodily injury' or 'property damage' caused by an 'occurrence.'" In turn, an "occurrence" is often defined to mean "an accident, including continuous or repeated exposure to substantially the same general harmful conditions, which results in 'bodily injury' or 'property damage.'" Whether a particular event is an "accident" giving rise to an "occurrence" is a frequently litigated issue.

The interpretation of the terms "accident" and "occurrence" found within the typical policy have long been settled in New Hampshire. In *Vermont Mut. Ins. Co. v. Malcolm*, Supreme Court set forth two circumstances under which an act could be considered an "occurrence":

If the insured did not intend to inflict the injury on the victim by his intentional act, and the act was not so inherently injurious that the injury was certain to follow from it, the act as a contributing cause of injury would be regarded as accidental and an "occurrence."

128 N.H. 521, 524 (1986). In other words, if the insured (1) acted intentionally, or (2) committed an inherently injurious act, his conduct will not be considered accidental and thus will not constitute an occurrence. *Id.* This determination is to be made by reference to the insured, rather than the victim, since an injury "is always fortuitous to a non-consenting victim." *Id.* at 523. Stated slightly differently, our Supreme Court has developed "two tests to determine whether an insured's act was an accidental cause of injury—one subjective, the other objective." *Amica Mut. Ins. Co. v. Mutrie*, 167 N.H. 108, 112 (2014) (quoting *EnergyNorth*

Natural Gas v. Continental Ins. Co., 146 N.H. 156 at 162 (2001)). Under the first, “an insured’s act is not an accidental contributing cause of injury when the insured actually intended to cause the injury that results.” *Id.* Under the second test, “an insured’s intentional act cannot be accidental when it is so inherently injurious that it cannot be performed without a certainty that some injury will result.” *Id.* With respect to the inherently injurious test – the second test – the analysis is objective and the insured’s intent is irrelevant. *Id.*

The “inherently injurious” element of the *Malcolm* test has been modified slightly over the years to provide that “an act is inherently injurious [and therefore not accidental] if it is certain to result in *some* injury, although not necessarily the particular injury alleged.” *Providence Mut. Ins. Co. v. Scanlon*, 138 N.H. 301, 306 (1994) (emphasis in original). The post-*Scanlon* rule for determining whether an act is “inherently injurious” looks to whether it can be “performed without a certainty that some injury will result.” *Scanlon*, 138 N.H. at 306. In New Hampshire, therefore, if an insured’s conduct is either intentional or unable to be performed without causing some injury (i.e. inherently injurious), then it is not accidental and thus does not constitute an “occurrence.” *Scanlon*, 138 N.H. at 306; *Malcolm*, 128 N.H. at 524.

B. Inferred Intent Rule

In New Hampshire, sexual assault upon a minor is considered inherently injurious “in that it cannot be performed without a certainty that some injury will result.” *State Farm Ins. Co. v. Bruns*, 156 N.H. 708, 711 (2008). Our Court has recognized that “[b]ecause the causation of injury is inherent in the commission of [the act], it cannot be regarded as accidental.” *Id.* Courts in other jurisdictions have articulated an “inferred intent” rule based on this “inherently injurious” concept and have applied it to sexual assaults of minors, murder/suicides, simple assaults (punching a person in the face), and other cases in which the *act* was certain to cause injury.

In *Stone v. Kentucky Farm Bureau Mut. Ins.*, for example, the court outlined the origins of the “inferred intent” rule and explained that in certain circumstances, the rule provides that a court is “justified in inferring an intent to harm as a matter of law from the nature of the act.” 34 S.W.3d 809, 812 (Ky. Ct. App. 2000). That rule, explained the *Stone* court, arose in the context of sexual molestation coverage cases because such an act “is so *inherently injurious*, or substantially certain to result in some injury, that the intent to injure, or the expectation that injury will result, can be inferred as a matter of law.” *Id.* (citation omitted) (emphasis in original). Though the New Hampshire Supreme Court has not labelled its “inherently injurious” position as an “inferred intent” rule, its holdings in *Bruns*, *Malcolm*, and *Scanlon* are functionally equivalent and use nearly identical language. In both *Malcolm* and *Bruns*, our Court found that sexual assault on a

minor could not be an accident or “occurrence” as a matter of law because such an act could not “be performed without a certainty that some injury will result.” *Bruns*, 156 N.H. at 711 (quoting *Malcolm*, 128 N.H. at 524). Under those circumstances - where the commission of the act was certain to cause harm - both the New Hampshire Supreme Court and the Kentucky courts have determined that the insured’s *intent* was immaterial. All that matters under those “inherently injurious” or “inferred intent” rules of New Hampshire and Kentucky is that the *act itself* was certain to bring about some harm. Compare *Bruns*, 156 N.H. at 711 with *Stone*, 34 N.H. S.W.3d at 812. New Hampshire’s treatment of occurrence-based policies and inherently injurious acts therefore appears entirely consistent with the “inferred intent” rule articulated by courts in Kentucky. *Scanlon* confirms that like Kentucky, the proper focus in New Hampshire in determining whether an act constitutes an “occurrence” is on the *act itself* and not on the *actor*. *Scanlon*, 138 N.H. at 306.

As another Kentucky court explained,

[t]he inferred intent rule is supported by sound public policy principles, in part because it removes from the trial court the burden of determining an actor’s thought process when engaging in conduct resulting in harm. That is to say, in certain circumstances, one may reasonably infer from the facts that the actor intended the harm, without needing to resort to proof of that intent.

Nationwide Mut. Fire Ins. Co. v. Pelgen, 241 S.W.3d 814, 817 (Ky. Ct. App. 2007). At least with respect to sexual assaults of children, this inferred intent rule appears to be the majority approach. See *Weekly v. Jameson*, 221 Mich. App. 34, 38 (Mich. Ct. App. 1997) (citing *B.B. v. Continental Ins. Co.*, 8 F.3d 1288, 1293 (8th Cir. 1993) (“Generally, the courts reason that the inference of the intent to injure should be applied because the act of child molestation is inherently harmful.”)). That majority position “infers the intent to harm as a matter of law in sexual misconduct liability insurance cases involving minors.” *Weekly*, 221 Mich. App. at 38 (citing *Whitt v. DeLeu*, 707 F.Supp. 1011, 1016 (W.D. Wis. 1989)). As with the New Hampshire Supreme Court’s “inherently injurious” approach in *Malcolm*, *Scanlon*, and *Bruns*, under the inferred intent approach “the actor’s capacity to know the wrongfulness of his acts is immaterial, and it is also immaterial that the actual injury caused is of a different character or magnitude from that intended.” *Weekly*, 221 Mich. App. at 39 (citations omitted).

In Kentucky, at least, that inferred intent rule has been applied in contexts other than sexual assaults of minors. In two cases involving murder/suicide, the Kentucky Court of Appeals has applied the inferred intent rule. See *Stone*, 34 S.W.3d at 812-813; *Pelgen*, 241 S.W.3d at 817-18. In *Pelgen* the court noted that some homicide offenses are punished more severely than sexual molestations, and

so concluded that it would be “illogical... that the inferred intent rule would apply to sexual molestation cases... but not to cases involving the loss of life.” 241 S.W.3d at 817. Likewise, the *Stone* court noted that the rule had been applied to a case involving a punch to the face, so “*a fortiori*, a trial judge may infer intent to harm from the act of pointing and shooting a rifle at an infant at close range.” 34 S.W.3d at 813. This seems entirely consistent with New Hampshire’s focus under the “inherently injurious” standard on the “character of the act” rather than the intent of the insured. See *Scanlon*, 138 N.H. at 306.

C. Residency and Coverage

A policy defines who will be considered an “insured” and generally provides liability coverage to the named insured and any resident relatives. Whether an individual is a “resident” is also frequently litigated. In general, one’s “residence” is “the place where an individual physically dwells, while regarding it as his principal place of abode.” *Belanger v. MMG Ins.*, 153 N.H. 584 (2006). A “household” is considered to be a group of people living under one roof as a family, and whether one is a member of a household is a fact-specific inquiry. *Metropolitan Prop. & Liab. Ins. v. Martin*, 132 N.H. 593 (1989); *Limoges v. Horace Mann Ins.*, 134 N.H. 474 (1991). Children and young adults can be considered a “resident” of more than one household, depending on family dynamics.

2. Commonly Encountered Exclusions

A. *Intentional Act Exclusion.* The Supreme Court has previously indicated that an objective intentional act exclusion would be enforceable. *Allstate Ins. Co. v. Stamp*, 134 N.H. 59 (1991). Such an exclusion typically provides that there is no coverage for bodily injury arising out of “intentional acts or omissions committed by an insured that could reasonably be expected to result in bodily injury or property damage of any kind. This applies whether or not the insured forms the intent to cause bodily injury or property damage.” In the *Stamp* case, the Court held that even if there was no *subjective* intent to cause harm, the intentional act exclusion would apply to preclude coverage if from an *objective* point of view the intentional act was likely to cause harm.

Whether an insured’s insanity would prevent enforcement of such an exclusion has not yet been addressed by our Supreme Court, but those jurisdictions that have considered whether an insured’s mental illness prevents the application of an intentional act exclusion appear split into two camps: those adopting the “liberal” view in which the exclusion does not apply, as a matter of law, “if the injury results from an insane act,” and those following a more “narrow” formulation under which the exclusion can apply to the acts of a mentally ill insured so long as the insured “understands the physical nature and the consequences of the acts and intends to cause injury, though being incapable of distinguishing right from wrong.”

State Farm Fire & Cas. Co. v. Wicks, 474 N.W.2d 324, 327-28 (Minn. 1991) (discussing the debate over application of the exclusion to mentally ill insureds). This author has identified nine jurisdictions which have adopted the “narrow” approach and only six adhering to the liberal view.¹

B. *Criminal Act Exclusion.* A close cousin of the intentional act exclusion, the criminal act exclusion preclude coverage for any injury arising out of “criminal acts or omissions committed by or at the direction of the insured that could reasonably be expected to result in bodily injury or property damage.” Such an exclusion has not been addressed yet by the New Hampshire Supreme Court, but has been upheld by the First. See *Littlefield v. Acadia Ins. Co.*, 392 F.3d 1 (1st Cir. 2004) (finding that similar exclusion unambiguously excluded coverage where insured was convicted without regard to the requisite state of mind required for the crime, but expressly declining to decide whether the exclusion might be ambiguous under other facts such as where the insured cannot be convicted due to lack of criminal intent or mental infirmity). A number of other jurisdictions have held that similar objective criminal act exclusions were unambiguous and excluded coverage for injuries resulting from criminal acts by the insured, regardless of whether he intended to commit the act or cause the harm. See *Cooper v. Allstate Ins. Co.*, 571 So.2d 1001, 1003 (Ala. 1990) (collecting cases). Such exclusions are generally enforceable. See *Cary v. Allstate Ins. Co.*, 130 Wash.2d 335, 350 (Wash. 1996) (citing 7A Appleman’s § 459.09). Most courts refuse to imply any sort of intent requirement for purposes of this exclusion. See *Progressive Norther Ins. Co. v. McDonough*, 608 F.3d 388, 391 (8th Cir. 2010); *American Family Mut. Ins. Co. v. White*, 204 Ariz. 500, 503 (Ariz. Ct. Appl. 2003).

C. *Watercraft Exclusion.* As with automobiles, liability associated with the operation or use of certain watercraft (usually larger or motor powered) is generally excluded from coverage. See *Martenson v. Massie*, 113 N.H. 181 (1973); *Hanover Ins. Co. v. Grondin*, 119 N.H. 394 (1979).

¹ The nine jurisdictions following the majority “narrow” rule holding that insanity does not preclude application of the intentional act exclusion include Florida, Kansas, Kentucky, Michigan, Nebraska, Nevada, Virginia, West Virginia, and Georgia. See *Prasad v. Allstate Ins. Co.*, 644 So.2d 992 (Fla. 1994); *Shelter Mut. Ins. Co. v. Williams*, 248 Kan. 17, 804 P.2d 1374 (1991); *Nationwide Mut. Fire Ins. Co. v. May*, 860 F.2d 219, 223 (6th Cir. 1988) (applying Kentucky law); *Auto-Owners Ins. Co. v. Churchman*, 440 Mich. 560, 489 N.W.2d 431 (1992); *Economy Preferred Ins. Co. v. Mass*, 242 Neb. 842, 497 N.W.2d 6 (Neb. 1993); *Mallin v. Farmers Ins. Exch.*, 108 Nev. 788, 839 P.2d 105 (Nev. 1992); *Johnson v. Insurance Co. of No. America*, 232 Va. 340, 348; *Municipal Mutual Ins. Co. v. Mangus*, 443 S.E.2d 455 (W.Va.1994); *State Auto. Mut. Ins. Co. v. Gross*, 188 Ga. App. 542 (Ga. Ct. App. 1988). The six jurisdictions following the other “liberal” view are Minnesota, Vermont, New Jersey, Arizona, and Ohio.

V. First Party Coverage Disputes

1. Statutory Time Limitations

As noted above, RSA 407:15 and 407:22 provide that if an insurer gives the proper notice, an insured will only have one year from the date of that notice in which to bring a first party contract claim against the insurer. This one-year suit limitation applies not only to breach of contract actions, but also to declaratory judgment petitions.

2. Declaratory Judgment Actions Regarding Coverage

If there is a dispute concerning coverage for a loss or claim, New Hampshire law allows parties to that dispute to file a declaratory judgment action in order to resolve coverage issues. RSA 491:22 provides that “[a]ny person claiming a present legal or equitable right or title may maintain a petition against any person claiming adversely to such right or title to determine the question as between the parties, and the court's judgment or decree thereon shall be conclusive.”

A. Time Limit

It is important to note that RSA 491:22, III provides a very short six month limitation period for the filing of a DJ to determine coverage: “No petition shall be maintained under this section to determine coverage of an insurance policy unless it is filed within 6 months after the filing of the writ, complaint, or other pleading initiating the action which gives rise to the question; provided, however, that the foregoing prohibition shall not apply where the facts giving rise to such coverage dispute are not known to, or reasonably discoverable by, the insurer until after expiration of such 6-month period; and provided, further, that the superior court may permit the filing of such a petition after such period upon a finding that the failure to file such petition was the result of accident, mistake or misfortune and not due to neglect.” The Supreme Court has found that this limitations period does not apply only in two sets of circumstances: (1) where the facts giving rise to the coverage dispute are not known or reasonably discoverable by the insurer during that period; and (2) the failure to file was the result of accident, mistake or misfortune. *Mottolo v. US Fid. & Guar. Co.*, 127 N.H. 279 (1985); *Nat’l Grange Mut. Ins. Co. v. Watterson*, 120 N.H. 141 (1980).

B. Burden of Proof

Under RSA 491:22-a, in any DJ action filed to determine coverage under a liability insurance policy, the insurer shall have the burden of proof, regardless of whether the DJ is initiated by the insurer or the insured.

C. Fee Shifting

If the insured prevails in a DJ filed to determine coverage insurance under RSA 491:22, the insured “shall receive court costs and reasonable attorney’s fees from the insurer.”

Personal Liability Umbrella Coverage

A Personal Umbrella policy sits on top of your other personal liability coverage for your car, home, boat, and other risks. It defends you and pays legal judgments again you when a covered lawsuit exceeds your primary liability insurance limits and it may also provide coverage for other types of lawsuits not covered by your other policies. Umbrella insurance is not intended to cover damage to your own home or possessions, but is rather an extension of the liability coverage that you have through underlying auto or homeowners policies.

A typical personal umbrella policy extends the liability coverage afforded by a homeowners and auto policy (including uninsured motorist coverage, unless the insured opts out of such coverage in New Hampshire, *see* RSA 264:15, I). A typical coverage grant will extend coverage for claims made or suits brought against an insured and provides that if the damages exceed the underlying policy limits or “retained limits,” the umbrella policy will pay those damages up to its extended limit. Such policies are typically subject to the same exclusions found in common homeowners’ and auto policies and serve to extend the liability coverage provided by your underlying insurance.

In the uninsured motorist context (covered in another section of this CLE), providers of “umbrella or excess policies that provide excess limits” to motor vehicle policies are required by RSA 264:15 to “provide [UIM] coverage equal to the limits of liability purchased.” That has been interpreted to mean an insurer that issues an umbrella or excess policy that provides excess coverage to motor vehicle liability policies must provide excess UIM coverage with the same scope. Excess UIM coverage must be available in the same circumstances that excess motor vehicle liability coverage is. *Santos v. Metro. Prop. & Cas. Ins. Co.*, 171 N.H. 682, 693 (2019). The availability of excess/umbrella UIM coverage, the extent of such coverage, the priority of such coverage, and provision of a defense under such coverage are the most frequently litigated issues in New Hampshire with respect to personal liability umbrella coverage policies.

B. ADDITIONAL HOMEOWNERS AND UMBRELLA POLICY TOPICS AND CONCERNS FOR DISCUSSION

- “Direct physical loss” requirements in New Hampshire
 - Does odor suffice?
- Trigger of coverage theories (injury-in-fact, etc.)
- Anti-concurrent causation language and examples
- “Efficient proximate cause” doctrine
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Suits against Municipal and Government Entities

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Claims Against Municipalities and Governmental Units

By Matthew V. Burrows

I. Introduction

Municipalities and governmental units are often the subject of litigation in New Hampshire. These materials will focus on common issues that arise in the course of litigating state-law claims involving municipal entities.¹

II. State Law Claims

A. RSA 507-B.

When a state-law claim is brought against a municipality, the starting point is assessing RSA 507-B. RSA 507-B is a comprehensive statute that governs liability of municipalities and individuals acting on their behalf (or through their employment with the municipality). At the outset, the statutory scheme provides several definitions that must be considered when assessing claims made against municipalities and governmental units. For example, RSA 507-B:1 provides:

- "Governmental unit" means any political subdivision within the state including any county, city, town, precinct, school district, chartered public school, school administrative unit, or departments or agencies thereof, or any other body corporate and politic within the state, but does not include the state or any department or agency thereof.
- "Employee or official of a governmental unit" means any member or officer of its governing board, administrative staff, or agencies, including but not limited to county employees, selectmen, school board members, chartered public school trustees, city councilors and aldermen, town councilors, town and city managers, mayors, regional planning commissioners, town and city health officials, police officers, overseers of public welfare, superintendents of schools, and all other employees and officials whether

¹ Not surprisingly, individuals can assert federal law claims against municipalities and municipal actors. Often, individuals assert that their constitutional rights have been violated. To vindicate a violation of such rights, individuals bring claims against municipalities and municipal officials and employees through 42 U.S.C. § 1983.

elected or appointed, and whether paid or unpaid, provided he or she is acting within the scope of his or her official duties.

- "Action to recover for bodily injury" means an action arising out of bodily injury, including an action brought under RSA 556:9-14, whether brought by or on behalf of the person actually sustaining bodily injury or brought by any other person to whom rights may accrue arising out of such injury, regardless of the nature of the damages claimed.
- "Personal injury" means:
 - (a) Any injury to the feelings or reputation of a natural person, including but not limited to, false arrest, detention or imprisonment, malicious prosecution, libel, slander, or the publication or utterance of other defamatory or disparaging material, invasion of an individual's right of privacy, invasion of the right of private occupancy, wrongful entry or eviction, mental injury, mental anguish, shock, and, except when against the public policy or the laws of New Hampshire, or both, discrimination; and
 - (b) Any injury to intangible property sustained by any person as a result of false eviction, malicious prosecution, libel, slander, or defamation.The term "personal injury" shall not include "bodily injury" or "property damage."
- "Property damage" means a loss through injury to, or destruction of, tangible property or real estate.
- "Pollutant incident" means any emission, discharge, release, or escape of any irritants, noxious substances or radioactive materials, in any physical state, into or upon land, the atmosphere, or any watercourse or body of water, including but not limited to all wastes and materials as defined in RSA 146-A, 147-A, 147-B and 149-M.

In addition to the above definitions, RSA 507-B:5 provides that "No governmental unit shall be held liable in any action to recover for bodily injury, personal injury or property damage except as provided by this chapter or as is provided or may be provided by other law." RSA 507-B:2, entitled Liability for Negligence," provides: "A governmental unit may be held liable for damages in an action to recover for bodily injury, personal injury or property damage caused by its fault or by fault attributable to it, arising out of ownership, occupation, maintenance or operation of all motor vehicles, and all premises; provided, however, that the liability of any governmental unit with respect to its sidewalks, streets, and highways shall be limited as

provided in RSA 231 and the liability of any governmental unit with respect to publicly owned airport runways and taxiways shall be limited as set forth in RSA 422.”

The statutory scheme also provides more specific provisions that limit circumstances where a municipal entity may be held liable:

- RSA 507-B:2 discusses claims arising out of snow, ice, and other weather hazards. It states:

Notwithstanding RSA 507-B:2, a governmental unit shall not be liable for damage arising from insufficiencies or hazards on any premises owned, occupied, maintained, or operated by it, even if it has actual notice of them, when such hazards are caused solely by snow, ice, or other inclement weather, and the governmental unit's failure or delay in removing or mitigating such hazards is the result of its implementation, absent gross negligence or reckless disregard of the hazard, of a winter or inclement weather maintenance policy or set of priorities with respect to such premises, adopted in good faith by the official responsible for such policy. All governmental units, officials, and agents shall be presumed to be acting pursuant to such a policy or set of priorities in the absence of proof to the contrary. Municipal winter maintenance programs certified under RSA 489-C:2-a shall be presumed to meet the standards herein for all public roads, parking areas, and walkways in the absence of proof to the contrary.

- RSA 507-B:9 discusses the pollutant liability standard and provides as follows:
 - I. Notwithstanding any other provision of law, the liability of any governmental unit or public employee for any personal injury, bodily injury, or property damage caused by or resulting from pollutant incidents including, but not limited to, per and polyfluorochemical contamination, shall only be based upon a showing by a preponderance of the evidence that the acts or omissions of the governmental unit were unreasonable. The acts or omissions of a governmental unit or public employee shall be conclusively presumed to be reasonable if they are in accord with the generally prevailing state of the art, scientific knowledge, and technology available to

the governmental unit at the time the acts or omissions were undertaken or made by the governmental unit or public employee.

II. If the fault of the governmental unit or public employee arising from a pollutant incident is 50 percent or greater, liability shall be joint and several. Otherwise, governmental units or public employees shall be liable only to the extent that their acts or omissions contributed to the causation of the personal injury, bodily injury, or property damage.

III. The doctrines of strict liability or absolute liability shall not be the basis of liability of a governmental unit or public employee for any personal injury, bodily injury, or property damage caused by pollutant incidents.

- RSA 507-B:11 discusses use of municipal and school district facilities for skateboarding, rollerblading, stunt biking, or rollerskiing, and it provides as follows:

A municipality or school district, which without charge permits any person to use a facility operated by the municipality or school district for the purpose of skateboarding, rollerblading, stunt biking, or rollerskiing, shall not be liable for personal injury or property damage resulting from the person's participation in such activity, in the absence of gross and wanton negligence.

Moreover, the statutory scheme provides a cap on damages and further limits the nature of damages that can be sought. Under RSA 507-B:4, entitled “Limit of Liability,” the statute provides as follows:

I. Liability of a governmental unit for bodily injury, personal injury or property damage sustained by any one person in actions brought under this chapter is limited to \$325,000. Such limit applies in the aggregate to any and all actions to recover for bodily injury, personal injury or property damage sustained by one person in a single incident or occurrence. Liability of a governmental unit for bodily injury, personal injury, or property damage sustained by any number of

persons in a single incident or occurrence is limited to \$1,000,000. The limits applicable to any action shall be the limits in effect at the time of the judgment or settlement.

II. The court shall award no punitive damages against a governmental unit for bodily injury, personal injury or property damage.

III. The jury shall not be informed of the limits in paragraph I but the court shall abate any verdict to the extent it exceeds the limits prescribed in this section. In actions consolidated under RSA 507-B:3, in the event the verdicts exceed the limits prescribed in this section, the verdicts shall be abated pro rata. Interest and costs may be recovered as in any civil action, in addition to the limits prescribed in this section.

IV. If any claim is made or any civil action is commenced against a present or former employee, trustee, or official of a governmental unit seeking equitable relief or claiming damages, the liability of said employee or official shall be governed by the same principles and provisions of law and shall be subject to the same limits as those which govern governmental unit liability, so long as said employee or official was acting within the scope of his or her office and reasonably believed in the legality of his or her actions.

Relatedly, RSA 507-B:7-a contemplates governmental units acquiring a policy of insurance to cover asserted claims. Indeed, the statutory scheme provides that “[i]t shall be lawful for the state or any municipal subdivision thereof, including any county, city, town, school district, school administrative unit or other district, to procure the policies of insurance described in RSA 412. In any action against the state or any municipal subdivision thereof to enforce liability on account of a risk so insured against, the insuring company or state or municipal subdivision thereof shall not be allowed to plead as a defense immunity from liability for damages resulting from the performance of governmental functions, and its liability shall be determined as in the case of a private corporation except when a standard of care differing from that of a private corporation is set forth by statute; provided, however, that liability in any such case shall not exceed the limits of coverage specified in the policy of insurance or as to governmental units defined in RSA 507-B, liability shall not exceed the policy limit or the limit specified in RSA 507-B:4, if applicable, whichever is higher, and the court shall abate any verdict in any such action to the extent that it

exceeds such limit.” In practice, many municipalities are members of a pooled risk management program under RSA 5-B. Courts have concluded that pooled risk management programs organized by RSA 5-B are not considered “insurance” as defined by RSA 412. Martineau v. Antilus, No. 16-cv-541-LM, 2017 WL 2693491, at *5 (D.N.H. June 22, 2017) (“Although PRMPs may provide liability coverage that is comparable to traditional insurance, see RSA 5-B:3, the New Hampshire legislature has chosen to treat PRMPs organized under RSA 5-B differently from providers of insurance policies regulated under RSA 412.”)

There are other practical considerations involved when state law claims are brought against municipalities as well. RSA 507-B provides the time period for when actions need to be commenced against a governmental unit. RSA 507-B:7. Moreover, RSA 507-B:7, I provides, in pertinent part: “As a condition precedent to commencement of the action, the clerk of the governmental unit shall be notified by registered mail within 60 days after the time of the injury or damage or discovery of the injury or damage, if it could not reasonably have been discovered at the time of the occurrence of the injury or damage, as to the date, time and location where the injury or damage occurred, and provided that in any case where lack of written notice, actual knowledge or reasonable opportunity to obtain knowledge of any injury or damage within the 60-day period is alleged by the governmental unit, the burden of proof shall be on the governmental unit to show that it was substantially prejudiced thereby.” Additionally, property of a governmental unit is exempt from attachment pursuant to RSA 507-B:6. Moreover, the statute provides that “[a]ll actions to recover for bodily injury, personal injury or property damage arising out of bodily injury, personal injury or property damage to one person shall be tried together, and not otherwise.” RSA 507-B:3.

The key takeaways in reviewing the foregoing is that RSA 507-B is robust statute that discusses many practical implications associated with claims brought against municipalities, and care must be taken to assert the impact of these provisions on claims asserted against municipalities.

B. RSA 491:24

RSA 491:24 provides procedural requirements for when a municipal official is sued. The statute provides that: “[w]henever a municipal official or individual member of a municipal board or agency, who is subject to good faith immunity under the provisions of RSA 31:104 or

the common law of New Hampshire, is sued personally for money damages and the plaintiff alleges injury or damage resulting from action taken in bad faith or with malice on the part of the official or member when acting in his or her official capacity, the superior court shall hold a preliminary hearing within 90 days of the service date specified by the court on the summons.” RSA 491:24, I. The statute further provides that “[a]t the hearing the plaintiff shall demonstrate that the allegation of bad faith or malice is based upon information and belief formed after reasonable inquiry and well grounded in fact and that there is a substantial likelihood that, following discovery, evidence shall be adduced sufficient to create an issue for determination by the finder of fact. If the plaintiff fails in such demonstration, the action against such official or member shall be dismissed.” RSA 491:24, II. Finally, “[i]f, upon all the evidence presented at the hearing, the court determines that the action is frivolous or intended to harass or to influence the official actions or decisions of the municipal official or board member, the plaintiff shall pay the court costs and reasonable attorneys' fees of the defendant.” RSA 491:24, III.

C. Other State Law Immunities and Defenses

While RSA 507-B is robust and RSA 491:24 provides certain procedural requirements relative to suits against municipal officials, these statutes do not serve as the only basis for assessing the strength and weaknesses of claims against municipal entities. Both New Hampshire statutes and common law provide several immunities and defenses that may apply based on the facts and circumstance presented, including but not limited to the following:

i. RSA 231:90-92

Many claims arise out of injuries sustained on municipal sidewalks or roadways. Below are statutes that impact such claims:

231:90 Duty of Town After Notice of Insufficiency. –

I. Whenever any class IV or class V highway or bridge or sidewalk thereon in any municipality shall be insufficient, any person may give written notice of such insufficiency to one of the selectmen or highway agents of the town, or the mayor or street commissioners of the city, and a copy of said notice to the town or city clerk. The notice shall be signed and shall set forth in general terms of the location of such highway, bridge, or sidewalk and the nature of such insufficiency.

II. For purposes of this subdivision, a highway or sidewalk shall be considered "insufficient" only if:

- (a) It is not passable in any safe manner by those persons or vehicles permitted on such sidewalk or highway by state law or by any more stringent local ordinance or regulation; or
- (b) There exists a safety hazard which is not reasonably discoverable or reasonably avoidable by a person who is traveling upon such highway at posted speeds or upon such sidewalk, in obedience to all posted regulations, and in a manner which is reasonable and prudent as determined by the condition and state or repair of the highway or sidewalk, including any warning signs, and prevailing visibility and weather conditions.

III. A highway or sidewalk shall not, in the absence of impassability or hidden hazard as set forth in paragraph II, be considered "insufficient" merely by reason of the municipality's failure to construct, maintain or repair it to the same standard as some other highway or sidewalk, or to a level of service commensurate with its current level of public use.

231:91 Municipality to Act; Liability. –

- I. Upon receipt of such notice of insufficiency, and unless the highway agents or street commissioners determine in good faith that no such insufficiency exists, the municipality shall immediately cause proper danger signals to be placed to warn persons by day or night of such insufficiency, and shall, within 72 hours thereafter, develop a plan for repairing such highway, bridge, or sidewalk and shall implement such plan in good faith and with reasonable dispatch until the highway, bridge, or sidewalk is no longer insufficient, as defined by RSA 231:90, II.
- II. If the municipality fails to act as set forth in paragraph I, it shall be liable in damages for all personal injury or property damage proximately caused by the insufficiency identified in the notice, subject to the liability limits under RSA 507-B:4.

231:92 Liability of Municipalities; Standard of Care. –

- I. A municipality shall not be held liable for damages in an action to recover for personal injury or property damage arising out of its construction, maintenance, or repair of public highways and sidewalks constructed thereupon unless such injury or damage was caused by an insufficiency, as defined by RSA 231:90, and:
 - (a) The municipality received a written notice of such insufficiency as set forth in RSA 231:90,

but failed to act as provided by RSA 231:91; or

(b) The selectmen, mayor or other chief executive official of the municipality, the town or city clerk, any on-duty police or fire personnel, or municipal officers responsible for maintenance and repair of highways, bridges, or sidewalks thereon had actual notice or knowledge of such insufficiency, by means other than written notice pursuant to RSA 231:90, and were grossly negligent or exercised bad faith in responding or failing to respond to such actual knowledge; or

(c) The condition constituting the insufficiency was created by an intentional act of a municipal officer or employee acting in the scope of his official duty while in the course of his employment, acting with gross negligence, or with reckless disregard of the hazard.

II. Any action to recover damages for bodily injury, personal injury or property damage arising out of municipal construction, repair or maintenance of its public highways or sidewalks constructed on such highways shall be dismissed unless the complaint describes with particularity the means by which the municipality received actual notice of the alleged insufficiency, or the intentional act which created the alleged insufficiency.

III. The acceptance or layout of a private road as a public highway shall not be construed to confer upon the municipality any notice of, or liability for, insufficiencies or defects which arose or were created prior to such layout or acceptance.

IV. The setting of construction, repair, or maintenance standards or levels of service for highways and sidewalks by municipal officials with responsibility therefor, whether accomplished formally or informally, shall be deemed a discretionary, policy function for which the municipality shall not be held liable in the absence of malice or bad faith.

231:92-a Snow, Ice and Other Weather Hazards. – Notwithstanding RSA 231:90-92, a municipality or school district shall not be held liable for damages arising from insufficiencies or hazards on public highways, bridges, or sidewalks, even if it has actual notice or knowledge of them, when such hazards are caused solely by snow, ice, or other inclement weather, and the municipality's or school district's failure or delay in removing or mitigating such hazards is the result of its implementation, absent gross negligence or reckless disregard of the hazard, of a winter or inclement weather maintenance policy or set of priorities adopted in good faith by the officials responsible for such policy; and all municipal or school district employees and officials

shall be presumed to be acting pursuant to such a policy or set of priorities, in the absence of proof to the contrary.

ii. Official Immunity

“Official immunity protects government officials or employees from personal liability for discretionary actions taken by them within the course of their employment or official duties.” *Everitt v. Gen. Elec. Co.*, 156 N.H. 202, 214 (2007). “The goal of official immunity is to protect public officials from the fear of personal liability, which might deter independent action and impair effective performance of their duties.” *Id.* at 215 (quotation omitted). Official immunity often arises in relation to state-law claims against police officers. In assessing whether a police officer has official immunity, a three-prong standard governs: immunity attaches for “decisions, acts or omissions that are (1) made within the scope of [one’s] official duties while in the course of [his] employment; (2) discretionary, rather than ministerial; and (3) not made in a wanton or reckless manner.” *Id.* at 219.

iii. Discretionary Function Immunity

The doctrine of discretionary function immunity “is a judicially created exception to ordinary rules of tort liability, shielding a municipality’s ‘acts and omissions constituting (a) the exercise of a legislative or judicial function, and (b) the exercise of an executive or planning function involving the making of a basic policy decision which is characterized by the high degree of official judgment or discretion.’” *Brodeur v. Claremont Sch. Dist.*, 626 F.Supp.2d 195, 218 (D.N.H. 2009). “Planning or discretionary functions are functions that are ‘characterized by the high degree of discretion and judgment involved in weighing alternatives and making choices with respect to public policy and planning.’” See *Maryea v. Velardi*, 168 N.H. 633, 638 (2016) (quoting *Opinion of the Justices*, 126 N.H. 554, 563 (1985)). Ministerial functions are considered “absolute, certain [,] and imperative, involving merely the execution of a set task.” See *id.* (quoting 14 P. Loughlin, *NEW HAMPSHIRE PRACTICE: LOCAL GOVERNMENT LAW* § 1040, at 2733 (2011)). Notably, discretionary function immunity is “premised upon the notion that certain essential, fundamental activities of government must remain immune from tort liability so that our government can govern.” *In re New Hampshire Dept. of Transp.*, 159 N.H. 72, 74 (2009).

iv. Quasi-Judicial Immunity

“The doctrine of quasi-judicial immunity has long been recognized in this State, and has been explained as the rule of public policy which protects judicial officers and those exercising judicial functions from liability in actions of tort for wrongs committed by them when acting in that capacity.” Suprenant v. Mulcrone, 163 N.H. 529 (2012). “It has been repeatedly decided in this state that when an officer or a board is called upon to pass upon evidence and decide, their conclusion cannot be collaterally attacked, and that they are not liable to answer in a suit for their action. The reason given in the cases is that such action is judicial.” Id. Quasi-judicial immunity extends beyond decisions made in an adversarial context, and it encompasses government boards that must make decisions within the scope of their duties.

v. RSA 31:104

RSA 31:104 provides: “Notwithstanding any provisions of law to the contrary, no member of the governing board of any municipal corporation or political subdivision, no member of any other board, commission, or bureau of any municipal corporation or political subdivision created or existing pursuant to a statute or charter, and no chief executive officer of such municipal corporation or political subdivision, including but not limited to city councilors and aldermen, selectmen, county convention members, members of boards of adjustment, members of planning boards, school board members, mayors, city managers, town managers, county commissioners, regional planning commissioners, town and city health officers, overseers of public welfare, and school superintendents shall be held liable for civil damages for any vote, resolution, or decision made by said person acting in his or her official capacity in good faith and within the scope of his or her authority.”

III. Conclusion

The above is just a sampling of the various statutes and case law that apply in assessing state-law claims against municipalities. Often, the starting point is the statutory schemes referenced above, which can help assess the viability of any claims, including the parameters of the claims.

Automobile Insurance

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NEW HAMPSHIRE AUTO INSURANCE SUMMARY

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HISTORY AND EXPLANATION OF MANDATED PROVISIONS¹

Auto Liability Coverage

A. Required Coverage

1. Financial Responsibility Act.

New Hampshire is not a compulsory insurance state. However, all motor vehicle liability policies issued with respect to a motor vehicle registered or principally garaged in this state must conform to the requirements established by the Financial Responsibility Act, RSA 264 *et seq.* The definition of a Motor Vehicle Liability Policy is found in RSA 259:61. Any effort to reduce liability coverage from what is required in the Financial Responsibility Act is ineffective. *Milwaukee Ins. Co. v. Morrill*, 100 N.H. 239 (1956).

2. The Insured Vehicle.

RSA 259:61 I states that all "motor vehicle liability policies" must provide liability coverage for the protection of the named insured while operating the insured's motor vehicle and it must provide protection for anyone else operating the insured's motor vehicle with the insured's express or implied consent against liability for bodily injury or death in the amount of \$25,000 per person and, subject to the per person limitation, \$50,000 per accident. The policy must also provide coverage for damage to property of others in the amount of \$25,000. This mandatory coverage applies to accidents happening anywhere in the United States of America and Canada.

3. Primary Coverage.

The coverage mandated by the Financial Responsibility Act is, with respect to the insured vehicle, primary coverage. Policy language, such as that found in some policies issued to automobile rental companies, which purports to make the coverage excess, is ineffective. *Universal Underwriters Ins. Co. v. Allstate Ins. Co.*, 134 N.H. 315 (1991); *Liberty Mutual Insurance Co. v. Home Ins. Indemnity Co.*, 116 N.H. 12 (1976).

¹ Gordon Rehnberg prepared these cle materials in 2003. They have been updated annually with his consent by Doreen Connor.

4. Non-Owned Vehicles.

RSA 259:61 II states that all motor vehicle liability policies must provide liability insurance coverage with limits of \$25,000/\$50,000/\$25,000 for the named insured, any relative of the named insured by marriage, blood or adoption who is a resident of the same household or any domestic servant acting within the scope of employment of any such insured with respect to liability arising from motor vehicle accidents which occur in the United States or Canada while the person is operating a non-owned vehicle. This section applies only when there is no other valid and collectible insurance available to the insured.

5. Suspended or Revoked Licenses.

The Financial Responsibility Act, RSA 259:61 III, was amended effective July 31, 2004 to provide that motor vehicle liability policies need not provide coverage, except the minimum amount required by the Financial Responsibility Act, when the insured operator's license has been suspended or revoked.

Under RSA 259:61—medical payment and uninsured motorist coverage may be denied to the insured operator whose license has been suspended or revoked if the policy so provides.

An insurer, however, must include language within its policy restricting coverage due to a suspended/revoked license to deny coverage.

B. Type of Use Covered

1. In order for liability insurance coverage to apply, the bodily injury or property damage complained of must arise out of the "ownership, maintenance or use" of a motor vehicle. It is not necessary that the injury be directly and proximately caused by the use or maintenance of the vehicle. It is sufficient that the accident is "causally connected" with the "ownership, maintenance or use" of a vehicle. *Union Mutual Fire Ins. Co. v. King*, 113 N.H. 39 (1973); *Case v. Fidelity & Casualty Co. of New York*, 105 N.H. 422 (1964); *American Motors Ins. Co. v. Nashua Lumber Co.*, 103 N.H. 147 (1961); *Carter v. Bergeron*, 102 N.H. 464 (1960). *But see, Metropolitan Property and Liability Ins. Co. v. Cote*, 122 N.H. 832 (1982).

2. The term "use" is not without limit. There must be more than a tenuous connection between the vehicle and the injuries to trigger coverage. *Wilson v. Progressive Northern Ins. Co.*, 151 N.H. 782 (2005); *Lebroke v. U.S.F. & G. Insurance Co.*, 146 N.H. 249 (2001); *Cannon v. Maine Bonding & Casualty Co.*, 138 N.H. 365 (1994); *Akerley v. Hartford Ins. Group*, 136 N.H. 433 (1992).
3. The New Hampshire Supreme Court has suggested that the "vehicle orientation" test might be controlling. The vehicle orientation test requires that the activity be "essential to the use of a vehicle." If the activity is vehicle oriented, then it constitutes an activity that is covered under the automobile policy. *State Farm Mutual Automobile Insurance Co. v. Cookinham*, 135 N.H. 247 (1992). See also *Miller v. Amica Mutual Insurance Co.*, 156 N.H. 117 (2007); *D'Amour v. Amica Mutual Insurance Co.*, 153 N.H. 170 (2006).

C. Definition of Motor Vehicle

1. The Financial Responsibility Act requires that "motor vehicle liability policies" extend coverage to all motor vehicles, not just automobiles. A motor vehicle is defined as "any self-propelled vehicle not operated exclusively upon stationary tracks, except farm tractors, crawler-type tractors, electric bicycles and mopeds" RSA 259:60 III. This definition includes motorcycles. *Hartford Accident & Indemnity Co. v. Come*, 100 N.H. 177 (1956).
2. The term "motor vehicle" is not without limit even under the Financial Responsibility Act. In *Concord General Ins. Co. v. McCarty*, 135 N.H. 316 (1992), the New Hampshire Supreme Court held that a 61,000 pound excavator which was on wheels and which could achieve a top speed of 1.9 m.p.h. did not qualify as a "motor vehicle."
3. Some policies attempt to restrict liability insurance coverage, at least with respect to the use of non-owned vehicles, to "automobiles" which is often defined in such a way as to exclude motorcycles and other vehicles. Other policies purport to extend coverage only to vehicles described in the policy and certain other private passenger automobiles, pickup trucks and vans. These definitions, to the extent they conflict with the Financial Responsibility Act, are of limited effectiveness at least insofar as Financial Responsibility Act coverage is concerned.

D. Persons Insured

1. Liability insurance coverage provides protection for "persons insured" within the meaning of the insurance policy or as required by the Financial Responsibility Act. The persons for whom an insurance company is required to provide coverage differ depending upon whether the motor vehicle involved is an "owned" vehicle, a "non-owned" motor vehicle, or neither. Other policies distinguish between the "covered auto" and other vehicles.
2. Owned Motor Vehicles.
 - a. Some policies define "owned" or "covered" motor vehicles as the vehicles specifically described in the policy, vehicles, which replace the described vehicles, newly, acquired vehicles and temporary substitute vehicles. Vehicles described in the policy are those vehicles for which a specific premium charge is made. A replacement vehicle is one, which replaces a specifically described vehicle. Coverage is typically available for newly acquired vehicles if, at the time of acquisition, the company insures all of the insured's owned vehicles and the insured notifies the company to add the replacement vehicle to his/her policy within a specified time frame, usually 20-30 days. A temporary substitute vehicle is one which is not owned by the named insured but which is being used by him or her while the insured's "owned" vehicle is temporarily withdrawn from use because of breakdown, repair, servicing, loss or destruction.
 - b. Almost all policies provide coverage to the named insured and any relatives of the named insured who live in the named insured's household. There is no requirement that the named insured or relative have a driver's license. Resident relatives generally need not have permission to operate an owned vehicle in order to have coverage.
 - c. It is clear that a person may be a "resident" of more than one household for the purposes of automobile insurance coverage. The concept of dual residency thus far, has been limited to children of the named insured. In *Limoges v. Horace Mann Ins. Co.*, 134 N.H. 474 (1991), the Court held that a college student who lived primarily with his mother was also a "resident" of his father's household even though the indicia of residency in his father's household were minimal at best. In *Concord Group Ins. Co. v. Sleeper*, 135 N.H. 67 (1991), the Court suggested that an insurance company might have considerable difficulty denying that an unemancipated minor was a resident in his parent's household even

if the minor no longer lived with his parents nor had any intention of doing so. *See also Belanger v. MMG Insurance Co.*, 153 N.H. 584 (2006).

- d. Standard policies also provide coverage to "any other person" using an owned or covered motor vehicle so long as the person using the vehicle is doing so with the permission of the named insured and the actual use is within the scope of the permission granted.
- e. New Hampshire has adopted the so-called "initial permission rule." This rule provides that, at least with respect to accidents occurring in the State of New Hampshire, there is coverage for anyone operating an insured's motor vehicle so long as that person has obtained possession or control of the vehicle with the insured's "express or implied consent" even though that person's use might exceed the scope of the authority granted. Furthermore, the New Hampshire Supreme Court has held that an insurance company must extend financial responsibility act coverage to an operator who is using the vehicle with the permission of someone other than the owner so long as it reasonably appears that the person giving the permission has the authority to do so. However, this coverage does not extend to a person who steals the automobile or one who has no reasonable expectation he/she is entitled to operate the auto. *Progressive Northern Ins. Co. v. Concord Gen. Mut. Ins. Co.*, 151 N.H. 649 (2005). RSA 264:18 VI. *Government Employers Insurance Co. v. Johnson*, 118 N.H. 899 (1978). *See also, Concord General Mutual Ins. Co. v. Haynes*, 110 N.H. 76 (1969); *Allstate Ins. Co. v. Page*, 105 N.H. 410 (1964); *Travelers Ins. Co. v. Kipp*, 105 N.H. 200 (1963); *Merchants Mutual Casualty Co. v. Tuttle*, 98 N.H. 349 (1953); *Davy v. Merchants Mutual Casualty Co.*, 97 N.H. 236 (1952).

3. Non-Owned Vehicles.

- a. Policies provide coverage to the named insured (this includes the person listed on the Declarations page and his or her spouse) while operating a non-owned motor vehicle if it is used with the owner's permission.
- b. Coverage is also provided for the named insured's relatives while operating non-owned vehicles. Coverage is only available if the "relative" is using the non-owned automobile with the permission, or reasonably believed to be with the permission, of the vehicle's owner and within the scope of that permission. *Amica Mutual Ins. Co. v. Zinck*, 130 N.H. 357 (1988).

- c. RSA 259:61 II provides that with respect to non-owned automobiles and with respect to accidents that occur in the United States or Canada, insurance policies must extend coverage to the "named insured, any relative of the named insured by marriage, blood or adoption who is a resident of the same household, or any domestic servant acting within the scope of the employment of any such named insured or resident insured." It is not necessary that the non-owned vehicle be operated with the owner's consent in order for there to be coverage under the Financial Responsibility Act. *Peerless Ins. Co. v. Vigue*, 115 N.H. 492 (1975). This mandatory insurance applies only to vehicles "not owned in whole or in part by such insured" Finally, this section applies only when there is no other valid or collectible insurance available to the insured. *Merchants Mutual Ins. Co. v. Bean*, 119 N.H. 561 (1979); *Davy v. Merchants Mutual Casualty Co.*, 97 N.H. 236 (1952).
- 4. Personal auto policies extend coverage to the named insured and any family member while using any auto and they provide coverage to any other person while using a "covered auto."
 - a. A covered auto is defined as the vehicle shown in the Declarations, newly acquired vehicles if the insured asks for coverage within 30 days after acquisition of the vehicle, and replacement vehicles.
 - b. Personal auto policies tend to limit the grant of coverage through a series of exclusions. There is no coverage for liability arising out of the use of vehicles, other than "covered autos" which are owned by the insured or which are "furnished or available" for the insured's regular use. The New Hampshire endorsement modifies that exclusion to vehicles "furnished" for the insured's regular use.
 - c. Personal auto policies exclude coverage to anyone while using a vehicle "without a reasonable belief that [the person] is entitled to do so." *Progressive N. Ins. Co. v. Concord Gen. Mut. Ins. Co.*, 151 N.H. 649, 652 (2005).
 - d. Some personal auto policies purport to exclude liability coverage for damages arising out of the ownership, maintenance or use of motorized vehicles having "fewer than four wheels." This exclusion seems to violate the Financial Responsibility Act, at least to the extent of Financial Responsibility Act coverage.

- e. Liability coverage is also available to persons or organizations vicariously liable for the negligent operation of anyone else who is otherwise insured under the policy. For example, if the named insured were operating his or her private passenger automobile for a non-excluded business activity, then the person's employer would be entitled to coverage under the insured's policy.
5. The Financial Responsibility Act does not require that insurance carriers extend coverage for the operation of vehicles acquired after the inception of the insurance policy. *Wescott v. Lumberman's Mutual Casualty Co.*, 111 N.H. 10 (1971). However, many liability policies provide some sort of coverage, by their terms, for newly acquired vehicles. *But see, Farm Bureau Automobile Ins. Co. v. Martin*, 97 N.H. 196 (1951).
6. Certain motor vehicles may not qualify as either "owned" or "non-owned". Some policies define "non-owned" vehicles as those vehicles that are neither owned nor furnished for the regular use of either the named insured or any relative. A vehicle that is not owned by an insured but which is available for his regular use does not qualify as an "owned" or "non-owned" vehicle and is not covered. *Spaulding v. Concord General Mutual Ins. Co.*, 122 N.H. 515 (1982). *See also, Volpe v. Prudential Property and Cas. Ins. Co.*, 802 F.2d 1 (1st Cir.1986).
7. In order to qualify as a "relative" who is entitled to insurance, most policies require that the person reside in the same household as the named insured. *Connolly v. Galvin*, 120 N.H. 219 (1980). However, the New Hampshire Supreme Court has adopted the principle that a person may have more than one residence, at least for insurance purposes, and it has shown a willingness to liberally construe the concept of residence at least in the context of minor children of divorced parents. *Limoges v. Horace Mann Ins. Co.*, 134 N.H. 474 (1991).

E. Intentional Acts

Most policies contain some sort of intentional act exclusion. This exclusion is inconsistent with the Financial Responsibility Act, which obligates a company to provide coverage for personal injuries arising from an accident even if the collision giving rise to the accident was caused deliberately, and with intent. *Hartford Accident & Indemnity Co. v. Wolbarst*, 95 N.H. 40 (1948).

F. Property of Others

The property damage portion of the liability policy generally excludes coverage with respect to property of others "in charge of the insured." This exclusion has been upheld. *MacDonald v. Hardware Mutual Casualty Co.*, 105 N.H. 458 (1964).

G. Liability to Employees

Most policies exclude liability for bodily injury to an employee of a person seeking coverage. This exclusion is consistent with the Financial Responsibility Act.

H. Business Exclusion

Some policies exclude liability coverage for accidents occurring while the insured is using the vehicle in his or her employment. However, the exclusion usually does not apply if the named insured (or certain others) is using a private passenger automobile in his or her employment. Other policies exclude coverage for liability arising out of the operation of a vehicle while it is being used to carry persons or property "for a fee." The exclusion is not applied to a "share-the-expense carpool." Still other policies exclude coverage if the insured is employed or otherwise engaged in the business of selling, repairing, servicing, storing or parking vehicles.

I. Absolute Liability

All insurance policies contain certain terms and conditions that must be complied with in order for the insurance company to be obligated to provide liability insurance coverage. For example, the insured must report an accident as soon as possible after it occurs, and must cooperate with the insurance company. The violation of these terms and conditions can enable the company to avoid coverage under the terms of its policy. However, the Financial Responsibility Act provides that, at least with respect to accidents that occur in the State of New Hampshire, coverage becomes absolute at the time of the accident, but only in the amount of the minimum coverage required by the Act. RSA 264:18. *Merchants Mutual Ins. Co. v. Bean*, 119 N.H. 561 (1979); *American Mutual Ins. Co. v. Commercial Union Ins. Co.*, 116 N.H. 210 (1976)(overruled on unrelated grounds, 144 N.H. 170 (1999)); *Farm Bureau Auto Ins. Co. v. Martin*, 97 N.H. 196 (1951). This requirement does not apply to policies not in existence at the time of the loss but which are negotiated after the loss. *Farm Bureau Ins. Co. v. Geer*, 107 N.H. 452 (1966).

J. Reimbursement Provision

Many policies provide that if an insurance company is obligated to provide coverage because of the Financial Responsibility Act, but would not otherwise be required to provide coverage under the terms of the policy it make seek reimbursement from the insured. This provision is permitted by statute. RSA 264:14. *Lumbermens Mutual Casualty Co. v. Gilcrest*, 110 N.H. 53 (1969). In the absence of an express policy

reimbursement clause, the insurer will not be able to recover any payments it is required to make solely because the insurer becomes liable under the Financial Responsibility Act.

K. Financial Responsibility Reporting Requirements

RSA 264:3 IV provides that after an accident the person involved must file an accident report (FR21) with the Division of Motor Vehicles. The report contains a place for the person to list his or her insurance carrier. The FR21 form is often sent to the insurance company and the insurance company has 15 days in which to disclaim coverage. If there is no disclaimer within 15 days, the Division of Motor Vehicles "may assume" that the policy is in effect.

1. If a carrier fails to disclaim coverage in 15 days after it receives notice from the DMV, it is estopped from doing so thereafter. *Auclair v. Allstate Ins. Co.*, 118 N.H. 626 (1978).
2. The 15-day requirement starts to run when the insurance company receives notice from the Division of Motor Vehicles. RSA 264:3 IV.
3. The estoppel set up by the failure of the insurer to notify the Division of Motor Vehicles within 15 days does not apply with respect to coverage not mandated by the Financial Responsibility Act, to policies not in effect at the time of the accident and in situations where the information contained in the FR21 is incorrect. *Concord Group Ins. Companies v. Lumbermens Mutual Casualty Co.*, 124 N.H. 440 (1984); *Shelby Mutual Ins. Co. v. Carrier*, 122 N.H. 754 (1982); *Berkshire Mutual Ins. Co. v. Glover*, 122 N.H. 369 (1982).

L. Limits of Coverage

1. Most New Hampshire automobile policies contain split limit coverage. The Financial Responsibility Act obligates companies to provide at least \$25,000 with respect to personal injuries sustained by any one person and, subject to that limit, at least \$50,000 of coverage for all persons injured in the accident. In addition, the policy must provide a minimum of \$25,000 for damage to property of others. RSA 259:61 I. Single limit coverage has become more common and is often seen in the commercial coverage context. Single limit policies can cause problems when it comes to settling cases with multiple plaintiffs.
2. In those situations where one person is injured and where another person is entitled to recover derivative consequential damages or loss of consortium, the total amount available to the claimants under a split limit policy is the single "per person" limit as set forth

therein. *Guilfoy v. USAA*, 153 N.H. 461 (2006)(loss familial relationship); *Bean v. Miller*, 122 N.H. 681 (1982)(loss of consortium).

M. Duty to Defend

1. The insurance company, in addition to providing liability insurance coverage, must also provide the person or persons insured under the policy with a defense. The insurer cannot avoid its obligation to defend merely by electing to pay at the outset the full amount of its liability coverage. *Sutton Mutual Ins. Co. v. Rolph*, 109 N.H. 142 (1968); *Lumbermens Mutual Casualty Co. v. McCarthy*, 90 N.H. 320 (1939).
2. Most policies provide that the duty to defend ends when the liability coverage has been exhausted. This is probably applicable only in situations where the coverage has been exhausted by the payment of a settlement or judgment and another injured person then commences a subsequent action.
3. Where there is a primary and an excess automobile insurance carrier, the duty to defend rests solely with the primary carrier until the primary's coverage is exhausted. *Old Republic Ins. Co. v. Stratford Ins. Co.*, 168 N.H. 548 (2016).

N. Supplemental Coverage

Most policies normally provide supplemental payments under the liability portion of the policy for such things as bail bonds. Coverage is provided, in addition to the coverage limits, for post-judgment interest on the full amount of the judgment after entry of judgment but before the company has paid or tendered or deposited in court that portion of the judgment which does not exceed the limits of the company's liability coverage. Most policies also provide coverage for prejudgment interest to the extent that the interest is within the policy limits. There are some minor differences between the other supplemental coverages contained the various automobile policies in effect in New Hampshire.

O. Foreign Policies

The restrictions contained in the Financial Responsibility Act and its requirements only apply to policies issued or delivered in New Hampshire or which insure vehicles

principally garaged or registered in this state and do not generally apply to foreign policies. *Vigneault v. Travelers Ins. Co.*, 118 N.H. 75 (1978).

P. Primary and Excess

As a general rule, the coverage provided by the policy insuring the vehicle involved in the accident will be primary coverage. Coverage available to an insured while operating a non-owned automobile will be excess. The Financial Responsibility Act requires that liability coverage for the owned vehicle must be primary. *Universal Underwriters Insurance Co. v. Allstate Ins. Co.*, 134 N.H. 315 (1991); *Liberty Mutual Insurance Co. v. Home Ins. Indemnity Co.*, 116 N.H. 12 (1976). In *Old Republic Ins. Co. v. Stratford Ins. Co.*, 168 N.H. 548 (2016) the Court overruled *Universal* and held the excess carrier has no duty to contribute to the insured's defense until the primary carrier's policy is exhausted.

Q. Stacking of Liability Coverage

The policy issued in connection with the vehicle involved in the accident provides primary coverage and the driver's policy provides excess coverage. When an individual owns multiple vehicles, which he or she chooses to insure with separate insurance policies, that person can generally not stack liability coverage while operating one of the owned vehicles. Liability coverage may, however, be stacked if the insured is operating a non-owned automobile.

R. Misrepresentations With Respect to Residency

RSA 412:9 provides that auto insurance policies as defined in RSA 417-A shall only be issued to residents of New Hampshire or to individuals whose autos are exclusively garaged in New Hampshire. If an insurance company issues a policy based upon a false affidavit of residency the company still must provide liability and uninsured motorist coverage to all third parties. The company may seek reimbursement from the named insured and the company is not required to pay any first party claims made by the policyholder who furnished the false residency statement.

MEDICAL PAYMENTS COVERAGE

A. Required Coverage.

The Financial Responsibility Act requires that all policies covering "a private passenger automobile" must provide medical payments coverage of at least \$1,000 per person for medical costs incurred as a result of injuries sustained in an accident involving the insured vehicle by the driver and passenger of the vehicle. The medical payments coverage applies to medical costs incurred three years following the date of the accident. RSA 264:16. This coverage is not required for motorcycles or other than "private passenger automobiles." Most policies extend this coverage to the insured when involved

in a motor vehicle accident while occupying a non-owned vehicle or as a pedestrian and most policies pay for medical costs incurred within three years of the accident.

B. Stacking of Medical Payments Coverage.

When a single policy covers more than one automobile whether the insured may stack his/her medical payments coverage depends upon the policy language and the insured's location at the time of the accident.

1. When the insured is occupying one of the vehicles covered by the insurance policy, stacking may be excluded. *Eckert v. Green Mountain Ins. Co.*, 118 N.H. 701 (1978).
2. When the insured is a passenger in a non-owned vehicle he/she may stack the coverage provided under multiple policies. *Shea v. United States Automobile Assoc.*, 120 N.H. 106 (1980). Stacking is probably also permitted under the *Shea* rationale if the named insured is a pedestrian at the time of the accident.
3. With respect to the named insured, most policies provide coverage when the named insured is occupying an automobile or "through being struck by any automobile or by a trailer of any type." In dicta, the New Hampshire Supreme Court suggested that the "through being struck by an automobile" provision is limited to situations where the insured is "not occupying a motor vehicle." *Foley v. Horace Mann Mutual Ins. Co.*, 121 N.H. 976 (1981).

C. Equivalent Medical Coverage.

Until January 1, 1998, the Financial Responsibility Act permitted insurance companies to exclude medical payments coverage in those situations where the insured had "equivalent medical coverage." RSA 264:16 (Federal Medicare Benefits constitute such "equivalent medical coverage." *Jolicoeur v. Colonial Penn Ins. Co.*, 121 N.H. 793 (1981). Workers' Compensation benefits are also considered "equivalent medical coverage." *Fadden v. Metropolitan Property & Casualty Co.*, 138 N.H. 654 (1994). This exception was removed by the legislature effective January 1, 1998.

D. No Coordination of Benefits.

Health care insurance companies frequently try to coordinate the benefits contained in their policies with the insured's automobile payments coverage. Many health care insurance policies have a provision that provides that the health care insurance policy with make no

payments until the injured person's automobile medical payments coverage has been exhausted. Effective July 13, 2007 these coordination clauses are contrary to the law and unenforceable. RSA 264:16 II.

E. Medical Payments Coverage is not Assignable.

Medical payments coverage is no assignable. RSA 264:16 III. Doctors, hospitals and other health care providers cannot take assignments of the injured person's automobile medical payments coverage.

F. Election.

The insured has the right to decide whether to submit medical bill to his or her automobile insurer or health care insurer. The insured, however, is not entitled to duplicate payments for the same medical expense. RSA 264:16 IV. In *Langevin v. Travco Ins. Co.*, 170 N.H. 660 (2018) the Court held that an insured could apply any unused medical payment coverage toward the health insurer's lien without violating the duplicate payment clause in RSA 264:16. The Court did not decide whether the health insurer's lien constituted a "medical expense" under the Travco policy or the statute however as that issue had not been developed at the trial court level.

G. Subrogation.

Automobile insurance companies cannot bring subrogation actions to recover for medical payment made pursuant to the statute. RSA 264:17.

H. Not Applicable to Commercial Policies

RSA 264:16 does not apply to any commercial policy insuring more than four automobiles nor commercial policies issued to a garage, auto sales, auto repair or service station.

UNINSURED MOTORIST COVERAGE

Introduction

1. In 1957, New Hampshire became the first state in this country to require insurance companies to provide uninsured motorist coverage. The coverage was required on all automobile policies "issued or delivered" in the State of New Hampshire and covering motor vehicles principally used or garaged in this state. 1 *Widiss, Uninsured and Underinsured Motorist Insurance* 1.11 (2005).

2. In 1987, the New Hampshire Supreme Court held that insurance policies, which were neither issued nor delivered within the State of New Hampshire did not have to comply with the uninsured motorist coverage requirements of the Financial Responsibility Act even in those situations where the policies covered vehicles registered or garaged in New Hampshire. *Ellis v. Royal Ins. Co.*, 129 N.H. 326 (1987). In response to that decision, the legislature amended the Financial Responsibility Act. Our Financial Responsibility Act now provides that no policy may be issued "with respect to a vehicle registered or principally garaged in this state" unless it provides the uninsured motorist coverage mandated by the statute. RSA 264:14.
3. The Financial Responsibility Act requirement relative to uninsured and hit-and-run motor vehicle coverage is codified in RSA 264:15.
4. Insurance policies which are issued and delivered in states other than New Hampshire and which cover vehicles, which are neither registered nor principally garaged in New Hampshire, need not comply with the New Hampshire Financial Responsibility Act requirements regarding uninsured motorist coverage with respect to accidents occurring in New Hampshire. *Hein v. Nationwide Mut. Ins. Co.*, 106 N.H. 378 (1965).
5. RSA 264:15 requires all insurers who issue umbrella or excess policies to offer uninsured motorist coverage but gives the insured the option of rejecting the coverage. To be effective the rejection must be in writing. A written rejection governs policy renewals and amendments. *O'Donnell v. Allstate Indem. Co.*, 173 N.H. 295 (2020).
6. The Financial Responsibility Act does not require "self-insureds" to provide uninsured motorist benefits to person occupying their motor vehicles. If a vehicle belonging to a self-insured is involved in an accident, the self-insured must provide liability insurance coverage as mandated by the Financial Responsibility Act. However, the occupants of the vehicle are not entitled to uninsured motorist benefits from the self-insured entity. *Coltey v. New England Telephone & Telegraph Co.*, 135 N.H. 223 (1991); *Dionne v. City of Manchester*, 134 N.H. 225 (1991).
7. Uninsured motorist coverage contained in New Hampshire insurance policies must provide coverage for accidents occurring anywhere in the United States or Canada. Any additional coverage is gratuitous and not governed by the Financial Responsibility Act. *Gissoni v. State Farm Mutual Automobile Ins. Co.*, 141 N.H. 518 (1996). *State Farm Mutual Automobile Insurance Co. v. Cabuzzi*, 123 N.H. 451 (1983).

INTERPRETING UIM EXCLUSIONS AND LIMITATIONS OF COVERAGE

A. What Limits did the Insured Purchase

No policy shall be issued under the provisions of RSA 264:14, with respect to a vehicle registered or principally garaged in this state, unless coverage is provided therein or supplemental thereto at least in amounts or limits prescribed for bodily injury or death for a liability policy under this chapter, for the protection of persons insured thereunder who are legally entitled to recover damages from owners or drivers of uninsured motor vehicles, and hit-and-run vehicles because of bodily injury, sickness, or disease, including death resulting therefrom.

When an insured elects to purchase liability insurance in an amount greater than the minimum coverage required by RSA 259:61, the insured's uninsured motorist coverage shall automatically be equal to the liability coverage elected. For the purposes of this paragraph umbrella or excess policies that provide excess limits to policies described in RSA 259:61 shall also provide uninsured motorist coverage equal to the limits of liability purchased, unless the named insured rejects such coverage in writing. Rejection of such coverage by a named insured shall constitute a rejection of coverage by all insureds, shall apply to all vehicles then or thereafter eligible to be covered under the policy, and shall remain effective upon policy amendment or renewal, unless the named insured requests such coverage in writing. RSA 264:15

Under RSA 264:15 upon renewal, a motor vehicle insurer may not restrict or limit coverage unless it has provided a summary of the new restrictions to the insured.

B. Situations Involving Multiple Defendants

1. It is not uncommon to have cases where the injured plaintiff has two tortfeasors against whom he may recover. Frequently, one of the tortfeasors is insured while the other is uninsured. In those situations, the injured plaintiff may look to the insured tortfeasor and recover the full amount of that tortfeasor's liability coverage and then look to his own company for uninsured motorist benefits payable on account of the uninsured motorist's negligence. The uninsured motorist carrier is not entitled to a reduction in coverage with respect to the insured defendant's liability coverage. However, the uninsured motorist carrier is entitled to a set off as against damages. *Gay v. Preferred Risk Mutual Ins. Co.*, 114 N.H. 11 (1974); *Raitt v. National Grange Mutual Ins. Co.*, 111 N.H. 397 (1971).
2. If the injured person recovers damages from a co-tortfeasor and then proceeds to claim uninsured motorist benefits on account of the fault of another, uninsured tortfeasor, the money recovered from the first tortfeasor serves as an offset on damages and reduces the amount of money that the uninsured motorist carrier is obligated to pay. However, the money received from the first tortfeasor does not reduce the uninsured

motorist carrier's coverage exposure. *Anderson v. Fidelity & Casualty Co. of New York*, 134 N.H. 513 (1991).

3. An uninsured motorist carrier acquires subrogation rights against the uninsured motorist and any other person or organization legally responsible for the accident that caused the damages. Those subrogation rights extend to all tortfeasors and not just the uninsured motorist on account of whose negligence the uninsured motorist carrier is obligated to make payments. However, with respect to these "other" tortfeasors, the subrogation rights can be exercised only in situations where the injured person would otherwise make a double recovery. *Prudential Property and Casualty Ins. Co. v. Dumont*, 136 N.H. 569 (1992); *Bonte v. American Global Ins. Co.*, 136 N.H. 528 (1992); *Anderson v. Fidelity & Casualty Co. of New York*, 134 N.H. 513 (1991).
4. The New Hampshire Supreme Court changed many of the rules pertaining to uninsured motorist coverage in situations where there are multiple tortfeasors, some of whom are insured and some uninsured. No longer is the uninsured motorist carrier the last source of recovery in situations where the uninsured motorist is fifty percent or more at fault. *DeBenedetto v. CLD Consulting Engineers*, 153 N.H. 793 (2006); *Nilsson v. Bierman*, 150 N.H. 393 (2003).

C. **Exhaustion Requirement**

1. Most policies contain a clause which provides that before uninsured motorist coverage is triggered, the tortfeasor's liability coverage must be exhausted either through the payment of a judgment or through settlement. That exhaustion provision was upheld by the New Hampshire Supreme Court in *Amica Mutual Ins. Co. v. Morrison*, 130 N.H. 250 (1987).
2. The exhaustion requirement does not apply in those situations where the tortfeasor has liability insurance coverage but the liability insurance carrier has become insolvent. Furthermore, the liability insurance coverage provided by the New Hampshire Insurance Guaranty Association is excess over the injured person's own uninsured motorist coverage. RSA 404-B:12.
3. Whether an uninsured motorist carrier can require the claimant to first exhaust his or her rights against an insured co-defendant is unclear.

D. Permission to Settle

1. All policies require the insured to obtain consent from his or her own company before entering into any settlements with any person or organization legally liable for the accident. If an insured settles with the tortfeasor without the uninsured motorist carrier's consent, then the injured person waives his or her rights to recover uninsured motorist benefits. This policy provision was upheld by the New Hampshire Supreme Court in *Charest v. Union Mutual Ins. Co.*, 113 N.H. 683 (1973). It is clear that the insurance company need not show prejudice. *Harrington v. Concord Gen. Mut. Ins. Co.*, 152 N.H. 26 (2005); *Stevens v. Merchants Mutual Ins. Co.*, 135 N.H. 26 (1991).
2. The consent to settle requirement extends to all of the tortfeasors, not just the specific uninsured or underinsured tortfeasor on behalf of whose negligence uninsured motorist coverage is sought. *Prudential Property and Casualty Ins. Co. v. Dumont*, 136 N.H. 569 (1992).
3. The "consent to settle" requirement is often not found in so-called "underinsured" motorist endorsements. Instead there is usually a provision entitled "Additional Duty" which obligates the insured to give the insurance company 30 days' notice in the event a tentative settlement is negotiated between the injured person and the tortfeasor's liability insurer. The uninsured motorist carrier then has to either approve the settlement or advance an amount of money equal to the settlement to the injured person if the uninsured motorist carrier wants to preserve its subrogation rights.

POLICY PROVISIONS

A. The Coverage Grant, "Legally Entitled to Recover"

1. It is important to note that uninsured motorist coverage is not "no-fault coverage." The uninsured motorist portion of a policy obligates the insurance company to pay all damages, which the insured "shall become legally entitled to recover as damages from the owner or operator of an uninsured automobile" In order for the insured to recover, it must be established that the owner or operator of the uninsured motor vehicle was negligent and that his or her negligence caused or contributed to cause the injuries complained of. 1 *Widiss, Uninsured and Underinsured Motorist Coverage* 7.2.
2. There must be more than a tenuous connection between the use of the uninsured motor vehicle and the injuries to trigger uninsured motorist

coverage. *Concord General Mut. Ins. Co. v. Doe*, 161 N.H. 73 (2010); *Hartley v. Electric Ins. Co.*, 154 N.H. 687 (2007); *Cannon v. Maine Bonding & Casualty Co.*, 138 N.H. 365 (1994), *Akerley v. Hartford Insurance Group*, 136 N.H. 433 (1992).

3. The "fault" requirement generally means that the uninsured or underinsured tortfeasor must be susceptible to being sued in a court of competent jurisdiction. When the uninsured tortfeasor enjoys immunity from suit the circumstances of that immunity must be examined to determine whether the injured person may recover uninsured motorists benefits on account of that person's negligence. *Matarese v. New Hampshire Municipal Association Property-Liability Ins. Trust, Inc.*, 147 N.H. 396 (2002). When the uninsured tortfeasor cannot be sued because of the bar created by the Workers Compensation Act or because of the fireman's rule or similar immunity then that person's conduct cannot be the basis for recovering uninsured motorists benefits.
4. However, if the uninsured tortfeasor cannot be sued because of a foreign statute or foreign court rule, and if the immunity is one, which conflicts with the public policy of New Hampshire, then the injured person may recover uninsured motorists benefits. For example, if the tortfeasor cannot be sued because of another state's no-fault law the injured person may still recover uninsured motorists benefits since no-fault laws conflict with New Hampshire public policy. *Matarese v. New Hampshire Municipal Association Property-Liability Ins Trust, Inc.*, 147 N.H. 396 (2002); *Green Mountain Ins. Co. v. George*, 138 N.H. 10 (1993).

B. Uninsured Versus Underinsured Motorist Coverage

1. A person injured in an accident caused by the negligence of another operator is entitled to recover up to the amount of coverage contained in his or her uninsured motorist policy. If the uninsured motorist coverage is greater than the tortfeasor's liability coverage, then the uninsured motorist carrier is required to make up the difference in the coverages. *Descoteaux v. Liberty Mutual Ins. Co.*, 125 N.H. 38 (1984); *Courtemanche v. Lumbermens Mutual Casualty Co.*, 118 N.H. 168 (1978); *Vigneault v. Travelers Ins. Co.*, 118 N.H. 75 (1978).
2. All New Hampshire insurance policies contain endorsements which change the standard definition of the term "uninsured" motor vehicles to include "underinsured" motor vehicles.

C. Who Qualifies as a Person Insured with Respect to Uninsured Motorist Coverage?

1. The New Hampshire Financial Responsibility Act simply says that all liability policies must provide uninsured motorist coverage for "persons insured there under." RSA 264:15.
2. The case of *Turner v. St. Paul Property & Liability Ins. Co.*, 141 N.H. 27 (1996) confirms that the coverage need only extend to the named insured and spouse while occupying the insured vehicle.
3. Despite the ability to restrict uninsured motorist coverage to covered vehicle occupants, most policies extend uninsured motorist coverage to three separate classes of individuals. Broadest coverage is extended to the "named insured and any relative." With respect to those insureds, there is no requirement that they be occupying a motor vehicle at the time of the accident. Those persons are insured for the purposes of uninsured motorist benefits while occupying an insured automobile or while occupying someone else's motor vehicle or if they are injured as a pedestrian.
4. To qualify as a "relative" of the named insured, a person seeking coverage must be related and he or she must be a "resident" of the named insured's household. *Belanger v. MMG Ins. Co.*, 153 N.H. 584 (2006). The term "resident" is subject to a fairly expansive interpretation. It is clear that in certain situations, such as children of divorced parents, an insured may reside in more than one household. Furthermore, it is difficult for insurance companies to deny residency for unemancipated children of an insured even if the child does not physically reside in the parent's household. *Concord Group Ins. Co. v. Sleeper*, 135 N.H. 67 (1991); *Limoges v. Horace Mann Ins. Co.*, 134 N.H. 474 (1991).
5. The second class of persons insured under most policies is "any other person while occupying an insured automobile." The term "insured automobile" means vehicles described in the policy, newly acquired vehicles and temporary substitute vehicles. It is important to note that most older insurance policies include within the definition of the term "insured automobile" non-owned automobiles while operated by the named insured.
6. The New Hampshire Supreme Court has concluded that the term "occupying" is ambiguous in certain situations. In *State Farm Mutual Automobile Insurance Co. v. Cookinham*, 135 N.H. 247, 248 (1992), the term "occupying" was defined as "in or upon or entering into or alighting from the insured vehicle." The Court seems to have adopted a vehicle orientation test. It concluded that the term "upon" was ambiguous and it

held that physical contact with the insured vehicle was not necessary to constitute "occupying." See *Miller v. Amica Mutual Insurance Co.*, 156 N.H. 117 (2007); *D'Amour v. Amica Mutual Insurance Co.*, 153 N.H. 170 (2006).

7. Coverage is also typically provided to "any person, with respect to damages he is entitled to recover because of bodily injury" sustained by one of the previously mentioned categories of "insureds." This section provides coverage for consequential damages and loss of consortium arising out of bodily injuries sustained by the named insured, his or her spouse, any relative and any other person entitled to uninsured motorist coverage.

D. What Constitutes an Uninsured Motor Vehicle?

1. An uninsured motor vehicle is one where the liability insurance coverage available to the tortfeasor is less than the uninsured motorist coverage available to the injured person. *Descoteaux v. Liberty Mutual Ins. Co.*, 125 N.H. 38 (1984); *Vigneault v. Travelers Ins. Co.*, 118 N.H. 75 (1978).
2. Historically it was the amount of coverage contained in the tortfeasor's liability policy that determined whether the vehicle was underinsured. *Allstate Ins. Co. v. Armstrong*, 144 N.H. 170 (1999); *Concord General Mutual Ins. Co. v. Mitchell*, 138 N.H. 229 (1994).

Effective January 1, 2015 the Legislature amended the definition of an "uninsured motor vehicle" in RSA 259:117 to include vehicles to which the available liability insurance has been reduced by payments to others injured in the accident to an amount less than the limits of the insured's own uninsured motorist coverage. Under the amended definition the amount of liability coverage received determines whether the insured may advance an underinsured motorist claim.

3. "Hit-and-run" vehicles are considered to be uninsured motor vehicles. Some policies contain a physical contact requirement, which provides that there must be physical contact between the hit-and-run vehicle and the insured or the insured's automobile. The New Hampshire Supreme Court invalidated this physical contact requirement. *Merchants Mutual Ins. Group v. Orthopedic Professional Assoc.* 124 N.H. 648 (1984); *Soule v. Stuyvesant Ins. Co.*, 116 N.H. 595 (1976).
4. Many policy forms speak in terms of uninsured "automobiles." The Financial Responsibility Act requires that coverage apply with respect to the operation of all uninsured "motor vehicles." Accordingly, motorcycles qualify as uninsured motor vehicles. *Chakalos v. Phoenix Ins. Co.*, 110 N.H. 321 (1970).

5. The term "motor vehicle" is not without limits. *Concord General Mutual Insurance Co. v. McCarthy*, 135 N.H. 316 (1992).
6. If a tortfeasor has liability insurance coverage but that company denies coverage, then the tortfeasor is considered to be an uninsured motorist.
7. Our Court has not addressed whether the "government vehicle" exclusion within most policy definitions of the term "uninsured motor vehicle" violates the Financial Responsibility Act. *See Estate of Libby v. State Farm Auto Ins. Co.*, 147 N.H. 616 (2002).
8. Our Court has enforced policy language excluding the covered auto from the definition of an uninsured auto, except when liability coverage for the covered auto is also excluded. *Rivera v. Liberty Mut. Fire Ins. Co.*, 163 N.H. 603 (2012).

E. When Does an Accident Arise out of the Ownership, Use and Maintenance of an Un/Underinsured Motor Vehicle?

In *Walsh v. Amica Mutual Insurance Co.*, the Supreme Court interpreted the phrase "[a]rising out of" an automobile's use to mean "originating from, or growing out of, or flowing from the use." *Walsh v. Amica Mut. Ins. Co.*, 141 N.H. 374, 375, (1996) (brackets and quotation omitted). The Court explained that "[t]he term 'use' refers to use of the automobile in its inherent nature as a vehicle." *Id.* Thus, to warrant coverage, "the operator must have been using his vehicle or behaving as a motorist at the time the plaintiff was injured." *Id.* (quotation omitted).

A causal connection must exist between the use of the vehicle and the resulting harm in order to invoke coverage. *Akerley v. Hartford Ins. Group*, 136 N.H. 433 (1992). Although proximate causation is not required, a tenuous connection with an automobile is not sufficient for coverage. *Id.* "The fact that the vehicle may have served as the situs of [the] injury does not make such use of the vehicle one which would be sufficient to warrant coverage." *Id.* at 440. Thus, in *Walsh*, the Court concluded that where the operator of the vehicle got out of the car and used the windshield to steady his weapon as he shot at the plaintiff, that use was "not a normal use for which a vehicle is intended; consequently, any connection to the plaintiff's injuries is too tenuous to warrant coverage." *Walsh*, 141 N.H. at 376.

In *Lebroke v. USF&G*, 146 N.H. 249 (2001) the intervenor was bitten by the plaintiff's dog as she loaded brochures into the plaintiff's automobile. The Supreme Court found no coverage because the intervenor's injury did not arise from an "auto accident," which requires, "at the very least, the involvement of an automobile." *Id.* at 250. Although the injury occurred while the intervenor was loading items into the automobile, there was no causal connection between the

automobile and the injury. Because the automobile was merely the situs of the injury, the Court concluded that the dog bite could not be considered an “auto accident.” *Id.* at 251. *Accord, St. Pierre v. State Farm Ins. Co., N.H. Supreme Ct.*, 2014-0225 (Nov. 21, 2014)

Conversely, in *Wilson v. Progressive N. Ins. Co.*, 151 N.H. 782 (2005), our Court found the driver's negligence in closing a taxi door upon a dog's tail, causing it to bite the plaintiff was sufficient to establish more than a tenuous connection between the use of the vehicle and the injury to the plaintiff.

F. Uninsured Motorist Coverage Pertains to Bodily Injury Only

Uninsured motorist coverage compensates an insured for bodily injury caused by an uninsured motorist. The only exception is in situations where the tortfeasor's liability insurer becomes insolvent. In those situations, the uninsured motorist coverage must provide property damage coverage of at least \$25,000.

G. Amount of Coverage

1. As a general rule, the amount of coverage available under an uninsured motorist policy is the amount set forth in the Declarations page. If the tortfeasor has liability insurance, then the uninsured motorist coverage is reduced by the amount of liability coverage that is available to the tortfeasor unless the insured's allocation of liability insurance is less than his/her UIM limits. *See* RSA 259:117 overruling *Allstate Ins. Co. v. Armstrong*, 144 N.H. 170 (1999). *Deyette v. Liberty Mutual Ins. Co.*, 142 N.H. 560 (1997). *Descoteaux v. Liberty Mutual Ins. Co.*, 125 N.H. 38 (1984); *Hartford Ins. Co. v. White*, 125 N.H. 767 (1984). *But see Kelly v. Prudential Prop. & Cas. Ins. Co.*, 147 N.H. 642 (2002) and *Barbuto v. Peerless Insurance Co.*, 156 N.H. 565 (2007).
2. The credit available to the uninsured motorist carrier or carriers applies only once. The total amount of liability coverage is subtracted from the total amount of uninsured motorist coverage.
3. If the injured person has multiple insurance policies providing uninsured motorist coverage, then the uninsured motorist carriers are entitled to a pro rata share of the credit available from the tortfeasor's liability policy. Where the uninsured motorist coverage is provided on a different basis (one being primary and one being excess) the pro rata sharing of credits is based on the amount of money each uninsured motorist carrier is obligated to pay rather than on the amount of coverage contained in the various uninsured motorist policies. *Ellis v. Royal Ins. Co.*, 129 N.H. 326 (1987).

4. In those situations where one person is injured and where another person is entitled to uninsured motorist benefits for consequential damages or loss of consortium, the total amount available to the two claimants is the single "per person" limit as set forth in a split limit policy. *Guilfoy v. USAA*, 153 N.H. 461 (2006); *New Hampshire Ins. Co. v. Bisson*, 122 N.H. 747 (1982).

H. Inter-Policy Stacking

1. The "other" insurance clause contained in the old family auto policy purports to prohibit inter-policy stacking. The New Hampshire Supreme Court found it to be ineffective in *Courtemanche v. Lumberman's Mutual Casualty Co.*, 118 N.H. 168 (1978). However, the public policy position against prohibiting inter-policy stacking articulated in *Courtemanche* has effectively been overruled. That leaves unsettled the issue of whether the language found in a particular "other insurance" clause is clear and unambiguous.
2. The New Hampshire Supreme Court has stated that inter-policy stacking of uninsured motorist coverage can be prohibited by the use of clear and unambiguous language. *Cacavas v. Maine Bonding & Casualty Co.*, 128 N.H. 204 (1986). In *Calabraro v. Metropolitan Prop. & Cas. Ins. Co.*, 142 N.H. 308 (1997), the Court upheld an exclusion that limited underinsured motorist coverage to the single highest policy limits.
3. Some policies make no effort to prevent inter-policy stacking while others have added endorsements that purport to either eliminate or restrict inter-policy stacking.

I. Intra-policy Stacking

1. The old family auto policy purports to prohibit the intra-policy stacking of uninsured motorist coverage. This language was found to be unclear and ambiguous and therefore ineffective. *Cacavas v. Maine Bonding & Casualty Co.*, 128 N.H. 204 (1986).
2. More modern policies contain language that clearly and unambiguously prohibits the intra-policy stacking of uninsured motorist coverage. *Gelinas v. Metropolitan Property & Liability Ins. Co.*, 131 N.H. 154 (1988).
3. In order for a company to rely upon restrictive endorsements, it must prove that the endorsement was sent to its insured. *Green Mountain Ins. Company v. Bonney*, 131 N.H. 762 (1989).

J. Situations Involving Multiple Defendants

1. It is not uncommon to have cases where the injured plaintiff has two tortfeasors against whom he may recover. Frequently, one of the tortfeasors is insured while the other is uninsured. In those situations, the injured plaintiff may look to the insured tortfeasor and recover the full amount of that tortfeasor's liability coverage and then look to his own company for uninsured motorist benefits payable on account of the uninsured motorist's negligence. The uninsured motorist carrier is not entitled to a reduction in coverage with respect to the insured defendant's liability coverage. However, the uninsured motorist carrier is entitled to a set off as against damages. *Gay v. Preferred Risk Mutual Ins. Co.*, 114 N.H. 11 (1974); *Raitt v. National Grange Mutual Ins. Co.*, 111 N.H. 397 (1971).
2. If the injured person recovers damages from a co-tortfeasor and then proceeds to claim uninsured motorist benefits on account of the fault of another, uninsured tortfeasor, the money recovered from the first tortfeasor serves as an offset on damages and reduces the amount of money that the uninsured motorist carrier is obligated to pay. However, the money received from the first tortfeasor does not reduce the uninsured motorist carrier's coverage exposure. *Anderson v. Fidelity & Casualty Co. of New York*, 134 N.H. 513 (1991).
3. An uninsured motorist carrier acquires subrogation rights against the uninsured motorist and any other person or organization legally responsible for the accident that caused the damages. Those subrogation rights extend to all tortfeasors and not just the uninsured motorist on account of whose negligence the uninsured motorist carrier is obligated to make payments. However, with respect to these "other" tortfeasors, the subrogation rights can be exercised only in situations where the injured person would otherwise make a double recovery. *Prudential Property and Casualty Ins. Co. v. Dumont*, 136 N.H. 569 (1992); *Bonte v. American Global Ins. Co.*, 136 N.H. 528 (1992); *Anderson v. Fidelity & Casualty Co. of New York*, 134 N.H. 513 (1991).

K. Owned but Uninsured Motor Vehicles

1. The family auto policy provides that there is no uninsured motorist coverage available to an insured that is "occupying an automobile (other than an insured automobile) owned by the named insured or any relative, or through being struck by such an automobile." The validity of this

exclusion was upheld by the New Hampshire Supreme Court in *Beliveau v. Norfolk & Dedham Mutual Fire Ins. Co.*, 120 N.H. 73 (1980).

2. The exclusion is inapplicable when the owned but uninsured vehicle is a motorcycle unless the exclusion talks in terms of owned but uninsured "motor vehicles" as opposed to "automobiles." *Boucher v. Employers Mutual Casualty Co.*, 121 N.H. 524 (1981).
3. This owned but uninsured motor vehicle exclusion is clearly applicable in situations where the owned vehicle is in fact "uninsured." In certain situations, an insured owns multiple vehicles that are insured under different policies. Whether or not this exclusion prohibits stacking in those cases depends on the precise wording found in the exclusion. The only exclusion reviewed by the New Hampshire Supreme Court was in the case of *State Farm Mutual Automobile Ins. Co. v. Desfosses*, 130 N.H. 260 (1987). The court found that exclusion to be ambiguous. However, it made it clear that companies could prohibit that sort of stacking through the use of clear and unambiguous language. *See also, Limoges v. Horace Mann Ins. Co.*, 134 N.H. 474 (1991).

L. Worker's Compensation Setoff

1. Most policies provide that the uninsured motorist coverage shall be reduced by any benefits received by the insured pursuant to any worker's compensation law. This exclusion was found to be invalid in *Merchants Mutual Ins. Group v. Orthopedic Professional Association*, 124 N.H. 648 (1984).
2. The New Hampshire Worker's Compensation Act was amended as of January 1986 to give worker's compensation insurance carriers a lien against uninsured motorist benefits in appropriate situations. RSA 281-A:13. *Carter v. Liberty Mutual Ins. Co.*, 135 N.H. 406 (1992). *See also Rooney v. Fireman's Fund Ins. Co.*, 138 N.H. 637 (1994).

M. Statute of Limitations

Uninsured motorist claims are contractual in nature. If the UIM contract does not contain a statute of limitations the Court will apply a three year statute that is triggered by the carrier's breach or anticipatory breach of the contract. *Metropolitan Property & Liability Insurance Co. v. Walker*, 136 N.H. 594 (1993). In *Pelissier v. GEICO Gen. Ins. Co.*, 177 N.H. 63 (2024) the Court invalidated a three year UIM statute that ran from the date of the underlying accident. The Court reaffirmed that UIM claims are contract claims and the statute of limitations is not triggered until the insurer denies the claim.

N. Processing Uninsured Motorist Claims

1. Historically, insurance policies required that disputed uninsured motorist claims be resolved through binding arbitration. Beginning in 2013 most uninsured motorist policies have eliminated or modified the arbitration provision. Many policies now provide that disputes regarding uninsured motorist coverage will be resolved by arbitration only if both the insurance company and the insured agree to do so. Otherwise, the insured is required to file suit against the insurance company. *Funai v. Metropolitan Property and Casualty Co.*, 145 N.H. 642 (2000). The resolution method is governed by the policy language.
2. If the claim is prosecuted in arbitration, the policy, in addition to the provisions of RSA 542, permits the insurance company to conduct standard pre-trial discovery such as interrogatories and depositions.
3. Insurance companies have a right to have the claimant examined by a doctor of their choosing. See *Vanhaaren v. State Farm Mutual Automobile Ins. Co.*, 989 F.2d 1 (1st Cir. 1993).
4. Most policies provide that any judgments obtained by the injured person against the uninsured motorist are not binding against the company unless entered into with the insurance company's written consent. It is clear that any judgment that an insured obtains is binding against the insured. Furthermore, an insurance company, if it is not extremely careful, can find that it has waived this provision and is bound by any judgment that its insured obtains if it becomes aware that the insured has brought an action and does nothing to alert the insured of the policy provision or otherwise express its unwillingness to be bound by the judgment. *National Grange Mutual Ins. Co. v. Smith*, 133 N.H. 279 (1990).
5. Interest does not attach to arbitration awards until the date of the award. *Ellis v. Royal Ins. Co.*, 129 N.H. 326 (1987). But see, *Metropolitan Property & Liability Ins. Company v. Ralph*, 138 N.H. 378 (1994); *Cookson v. New Hampshire Ball Bearings, Inc.*, 147 N.H. 352 (2001).

Bad Faith & Dumas and Ethical Considerations

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INSURER BAD FAITH AND *DUMAS* CLAIMS IN NEW HAMPSHIRE

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THE *DUMAS* DOCTRINE – WHAT IT IS AND WHEN TO USE IT

(1) No Meaningful Third Party “Bad Faith” Law in NH Re: Injury and Tort Cases

-*Lawton v. Great Southwest Fire Ins. Co.*, 118 NH 607 (1978) (failure of insurer to pay property damage after a fire loss – limited to a contract action, no tort of bad faith like other jurisdictions – no damages for emotional distress)

-- We [have] held that allegations of an insurer's wrongful refusal to settle or delay in settling a first-party claim do not **state** a cause of action in tort.”
Bennett v. ITT, 150 NH 753, 757(2004), *citing Lawton*

-*Drop Anchor Realty Trust v. Hartford Fire Ins. Co.*, 126 NH 647 (1985) (wind and water damage to hotel at Hampton Beach during blizzard of 1978 – award consequential contract damages if bad faith, plus attorney fees – involved delays in payments, loss of business)

(2) Standard for Finding Contractual Bad Faith

The standard for contractual bad faith against insurers is described in *Drop Anchor*, 126 NH at 679:

“Where an individual is forced to seek judicial assistance to secure a clearly defined and established right, which should have been freely enjoyed without such intervention, an award of counsel fees on the basis of bad faith is appropriate.”
Harkeem v. Adams, 117 N.H. 687, 691, (1977). Thus, we have held that an ‘insured is entitled to attorney's fees ‘if the insurer acted in bad faith in promoting unnecessary litigation.’ *Johnson v. Phenix Mut. Ins. Co.*, 122 N.H. 389, 394, (1982) (*quoting Lawton v. Great Southwest Fire Ins. Co.*, 118 N.H. 607, 615, (1978)). ‘Whether the defendant's delay was in fact in bad faith ... [is a] question [-] for the jury.’ *Lawton v. Great Southwest Fire Ins. Co.*, *supra* at 612-13.

(3) **Regulation 1000 (Claim Settlement) and RSA 714 (Unfair Insurance Practices Act)**

- a) **NH Insurance Regulation 1000** provides some administration regulatory rules pertaining to claims settlement. These include deadlines regarding communicating with insureds and claimants; a 30 day requirement to make a determination of coverage; providing insureds with reasons for a denial of coverage; the “30 day letter” requirement; requirements to notify claimants or insureds of reasons for a delay in settlement; etc. *See* relevant provisions attached.

Although there is no private cause of action for violations of Regulation 1000, it can be a useful tool in the event insurers are not responsive to pending demands or are otherwise secretive or vague with respect to coverage denials. In addition, there are regulations relative to the determination and payment of property damage / auto damage claims.

- b) **RSA 417 is the Unfair Insurance Practices Act.** The Act in many ways traces many of the requirements and/or prohibitions of the Consumer Protection Act (RSA 358-A). However, there is no private right of action for violations of the statute. It does provide for penalties and sanctions, including awards of attorney fees and actual economic losses to consumers not to exceed \$2,500.00. RSA 417:4(XV) delineates specific unfair claims settlement practices, *see* attached.

Although Reg 1000 and RSA 417 do not provide for an independent civil cause of action, they do provide bases for the filing of a complaint with the NH Insurance Department.

(4) **Controlling Cases for the Legal Basis and Procedural Application of the “Dumas Doctrine”**

- a) *Dumas v. Hartford Accident & Indemnity Co.*, 92 NH 140 (1942) (*Dumas I*) (court dismissed complaint against insurer for negligent failure to settle due to insufficiency of specific allegations of negligence against carrier)

- policy limit was \$5,000
- pedestrian case, some dispute on liability
- jury verdict \$12,000
- Hartford paid the \$5,000 plus costs, suit for \$7,000

- b) *Dumas v. Hartford*, 94 NH 484 (1948) (*Dumas II*) (cause of action for negligent failure to settle an auto injury case within the policy limits)

“The obligation of the defendant to use due care arose out of its policy, under the terms of which it had control over the settlement of claims. That obligation (to use care) is ordinarily imposed by law upon all who undertake a service.

“The duty of the insurer was not only to pay on behalf of the insured all sums the latter should become obligated to pay because of bodily injury within the policy limit of \$5,000, but also to save the insured harmless from any and all liability caused by accident and arising out of the ownership, maintenance or use of his automobile in so far as it could do so by a reasonable performance of its service to settle claims.” *Dumas* 94 N.H. 484, 56 A.2d 57 (N.H. 1948)

- c) *Dumas v. State Farm*, 111 NH 43 (1971)(auto accident, policy limit \$10,000; federal court verdict of \$25,000)

--Stands for proposition that it is irrelevant whether an insured in an overage verdict case has paid or can pay the excess verdict

- d) *Gelinas v. Metropolitan*, 131 NH 154 (1988) (auto accident, \$100,000 in liability coverage – pre-trial offers of \$15,000 to \$40,000 - jury verdict of \$200,000 – court upheld verdict in underlying case in *Gelinas v. Mackey*, 123 NH 690 (1983))

--affirmed NH uses a negligence standard, and the determination of whether an insurer acted as “a reasonable man may act under the same circumstances,” is determined by making a “slow motion rerun of the insurer’s actions leading up to the verdict.”

--In the subsequent negligence trial the court ruled that the insurance carrier’s actions in pre-trial settlement negotiations and its evaluation of the plaintiff’s case was reasonable, and that “it was not responsible for the overage.” The Supreme Court affirmed.

---*Gelinas* is a long opinion, and contains a very interesting analysis of how a *Dumas* case is presented, and questions of admissibility of testimony of the initial trial judge, lawyers during pre-trial

negotiations, and how the claims representative and defense lawyer evaluated the claim and presented offers.

--of note, Tom Craig represented the plaintiff, Bill Orcutt the insured Mackay, and Jim Muirhead represented Metropolitan. Judge Flynn was the trial court judge, Justice Dalianis was the *Dumas* trial judge, Bob Chiesa was designated as an expert in the *Dumas* trial, and Justice Stephen Thayer wrote the Supreme Court opinion for the majority

(5) **Basic Principles**

--*Dumas* essentially establishes a duty on the part of insurers to act reasonably in evaluating and settling claims against their insureds

--the standard is one of negligence, and not strict liability: "For the same reason we have refused to impose strict liability in the case of an insurer who has failed to settle a case within its policy limits." *Moulton v. Groveton Papers Co.*, 112 NH 50, 54 (1972), citing *Dumas v. State Farm*, 111 NH 43 (1971).

--"The insurer, having undertaken the defense of the case, was obligated to conduct the defense with due regard for all the interests of the insureds." *Foster v. Calderwood*, 118 NH 508, 511 (1978), citing *Dumas v. State Farm*.

--"The dilemma presented by the absolute control of trial and settlement vested in the insurer by the insurance contract and the conflicting interests of the insurer and insured" in the third-party claim requires that the insurer recognize the conflict and give due regard to the interests of the insured. *Dumas v. State Mut. Auto Ins. Co.*, *supra* 111 N.H. at 46, 274 A.2d at 783." *Lawton*, 118 NH at 614.

--"The policy limits restrict the amount the insurer may have to pay in the performance of the contract, not the damages that are recoverable for its breach." *Lawton* at 611 (citations omitted).

--The most relevant application is in the context of the failure of an insurer to resolve a case for or within the policy limits when a reasonable person may do so

--It is based upon the insurer's duty of good faith dealing to its insured, not the plaintiff

--A failure to settle for the policy limits exposes the insured to pay an excess verdict from their own finances

--Irrelevant whether insured is judgment proof

--"Under *Dumas*, an insured may maintain such an action when the insured has an outstanding judgment against him for an amount in excess of the policy limits, and the case *could* have been settled within the policy limits. In such a case, an insured tortfeasor may assign his *Dumas* claim against the insurer to the victim." *In re O'Meara*, 164 NH 170, 177 (2012).

(6) **Dumas Demands - When to Use Them, When Not to Use Them**

--case clearly worth more than policy limits

--sufficient info has been provided to insurance carrier

--insurance carrier has had a reasonable and sufficient time to respond

--you are ready to back up a threat

--sometimes use with out of state adjusters while making a policy limit demand if adjuster from or used to a state that has strong bad faith law for insurers, i.e, Massachusetts MGL 176D and 93A

(7) **Sample *Dumas* Language for a Demand Letter or Mediation Summary**

"The value of this claim greatly exceeds your insured's policy limits of \$250,000.00. Special damages (medical bills and wages) alone total **\$256,103.98**. Liability is clear, medical causation is established, and Mr. Plaintiff's economic and non-economic losses will continue indefinitely into the future.

As you are aware, under New Hampshire law, Mount Washington owes to its insured the obligation to safeguard his personal assets by tendering policy limits in cases where the likely verdict of a jury would exceed those limits. *See Dumas v. Hartford Ins.*, 94 NH 484 (1947); *Dumas v. State Farm Mut. Auto Ins. Co.*, 111 NH 43 (1971); *Gelinas v. Metropolitan*, 131 NH 154 (1988).

Should Mount Washington fail to tender the policy limits in this case within thirty (30) days, the demand will be withdrawn, and we will file suit and proceed

to trial. We will seek collection of the excess verdict against your insured's personal assets.

Again, this demand is subject to final verification that your insured has no other applicable liability or excess coverage available above the \$250,000.00 auto liability limits with Mount Washington.

Thank-you, and I look forward to hearing from you."

(8) Procedural Application of the *Dumas* Doctrine

--maintain a thorough record of all settlement negotiations

--make sure insurer as all damage information and evidence you intend to produce to a jury at trial

--must go to trial and obtain overage verdict

--obtain an assignment from insured defendant of their contract / *Dumas* rights against their own insurer

--file suit against the insurer

--The *Gelinas* case provides some good guidance on how this is done and how these cases are litigated

(9) Obtain Your Client's Authorization or Bad Things may Happen

--As with any demand, make sure your client understands and authorizes a *Dumas* demand, and in particular, would accept the policy limit if tendered.

--The disciplinary case of *In re O'Meara*. 164 NH 170, 177 (2012) featured the disbarment of an attorney who demanded \$11m to settle a personal injury claim which was ultimately accepted by the insurance company. Issue was that the client had not authorized the demand nor a settlement of \$11m if tendered.

Attorney O'Meara's demand read: "As I have indicated on numerous occasions previously, this is a policy limits case. If said limits are not paid, the Conant family has instructed me to proceed to trial.' However, O'Meara was not authorized to settle the case for the insurance policy limits, and he sent the December 8 letter knowing that he lacked this authority." *Id* at 173.

Bottom line – the Supreme Court disbarred Attorney O'Meara.

(10) Doctrine of Negligent Failure to Settle Runs to Excess Carriers

In the case of *Allstate v. Reserve Insurance*, 116 NH 806 (1977), the Supreme Court ruled that a right of subrogation existed on the part of an excess carrier against a primary carrier for negligent failure to settle resulting in financial loss to the excess carrier:

“ The question presented is one of first impression in this jurisdiction: Whether an insurance company providing excess coverage to its insured has a cause of action against the primary carrier for its negligent failure to settle a case within the primary policy limits.” *Id* at 808.

The Court reasoned that while a primary carrier does not owe a duty of care to an excess carrier, the excess carrier may take an assignment of the cause of action from the insured under the doctrine of equitable subrogation.

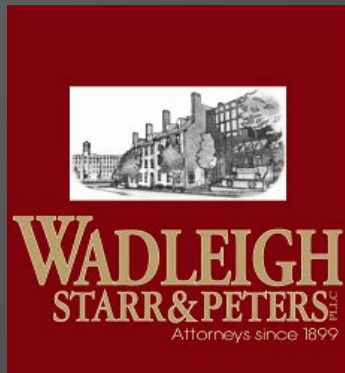
Professional Liability Policies

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ADVANCED ISSUES IN PROFESSIONAL LIABILITY INSURANCE COVERAGE

May 9, 2026



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ROADMAP

- ◎ New Hampshire MPL market snapshot
- ◎ Common MPL coverage disputes
- ◎ Trends impacting MPL insurance
- ◎ Takeaways

New Hampshire MPL Market: Concentrated & “Noncompetitive”

- ⦿ Market has been treated as “noncompetitive” for many years
- ⦿ A small number of carriers write a large share of the business
- ⦿ Larger institutions “self-insured”

Typical Limits & Excess Availability

- ◎ Common primary limits:
 - \$1M / \$3M
 - \$2-\$4M, with excess
- ◎ Excess coverage availability varies by insured and specialty
- ◎ Policy structure matters
 - Aggregates
 - Defense cost treatment

Common MPL Coverage Disputes

- ◉ Notice and reporting
- ◉ Intentional acts/criminal conduct allegations
- ◉ Professional services and the duty to defend
- ◉ Insured cooperation and consent judgments
- ◉ Tail coverage (extended reporting) and retro dates
- ◉ Defense costs: eroding vs. non-eroding limits
- ◉ Consent-to-settle
- ◉ Excess exposure and bad faith settlement risk

Notice: When Does the Reporting Duty Start?

- ⦿ Notice disputes are frequent in claims-made MPL policies
- ⦿ Reporting duties may arise when the insured becomes aware of a claim or potential claim
- ⦿ Delay can jeopardize defense and indemnity even if the lawsuit was later served

Mixed Allegations: Intentional Acts vs. Covered Professional Services

- ⦿ Some complaints plead both negligent care and intentional/criminal conduct
- ⦿ Key fight: whether any allegations potentially fall within “professional services” coverage
- ⦿ Duty to defend can be broader than duty to indemnify

Insured Cooperation

- ⦿ Common flashpoints: incomplete reporting, missed deadlines, and unilateral settlements
- ⦿ Consent judgments (or side deals)
 - Prejudice risk
- ⦿ Cooperation provisions often tie directly to defense control and settlement authority

Tail Coverage/Extended Reporting: Avoiding the “Coverage Cliff”

- ⦿ Claims-made structure: claim must be made and reported during the policy period (or ERP)
- ⦿ Risk moments: provider retirement, employer change, practice sale, carrier switch
- ⦿ Negotiation points: who pays, retroactive date, ERP duration, scope (individual vs group)

Defense Costs: Eroding v. Non-Eroding Limits

- ⦿ Inside-the-limits: defense spend reduces limits available for settlement/verdict
- ⦿ Outside-the-limits: defense costs paid in addition to limits
- ⦿ High-cost defense environments (experts, long timelines) can materially change exposure

Consent to Settle

- ⦿ Some policies give the insured a veto; others impose consequences for refusal
- ⦿ Typical structure: if insured won't consent, insurer's liability may cap at the proposed settlement amount (plus defense costs to date, depending on wording)
- ⦿ Settlement dynamics can be shaped by licensing, credentialing, and reporting concerns

Excess Verdict Exposure: Settlement Conduct & Bad Faith Risk

- ⦿ Excess exposure disputes often turn on:
 - Reasonable settlement opportunities + communication + documented evaluation
- ⦿ Carrier interests vs. insured protection: conflicts can arise as exposure approaches limits
- ⦿ Risk Area: failure to keep the insured informed about risk

Trends Impacting MPL Insurance

- ⦿ Verdict severity and social inflation
- ⦿ Renewed tort reform activity
- ⦿ AI and “silent AI” coverage uncertainty
- ⦿ Advanced practice providers (APPs) and expanding exposure

Verdict Severity & “Social Inflation”

- ⦿ Increases in very large verdicts
 - “Nuclear” = \$10M+
 - “Thermonuclear” == \$100M+
- ⦿ Drivers beyond medical-cost inflation?
 - Jury attitudes, “corporatization,” litigation financing
 - Reptile theory, anchoring, other cultural touchpoints (sports, music, etc.)
- ⦿ Impacts:
 - Pricing, underwriting, and claims handling
 - Limits adequacy, exhaustion fights, and settlement strategy scrutiny

Tort Reform

- ⦿ Some states are revisiting tort reform in response to perceived verdict severity
- ⦿ Common proposals: venue rules, expert standards, collateral source, periodic payments for future damages, damages requests in closing argument

Artificial Intelligence

- ⦿ Legacy MPL forms may not clearly address AI-assisted care
 - Risk: coverage grants/exclusions may apply by accident rather than design
- ⦿ Potential dispute areas: who is responsible (clinician, institution, vendor)

Advanced Practice Providers (APPs): Expanding Exposure

- ⦿ APP scope-of-practice expansion is changing risk profiles
 - Claim frequency and severity increasing
- ⦿ Coverage issues
 - Scope-of-practice
 - Supervision requirements
 - Whether APPs are properly scheduled/endorsed
- ⦿ Implications for naming defendants?
 - Separate limits?
 - Vicarious liability?

Takeaways

- ◉ Confirm policy type (claims-made) and reporting pathways; treat “potential claim” triggers seriously
- ◉ Insured roster and scope: entities, physicians, and APPs (including additional insured status)
- ◉ The program structure: self-insured layers, aggregates, and what counts toward exhaustion?
- ◉ Know your limits mechanics: defense inside vs outside limits; consent-to-settle consequences
- ◉ Emerging risks: AI tools, vendors, and incident characterization
- ◉ Be aware of potential Locums Tenens providers
- ◉ Who to name in a suit/how many defendants v. the statute of limitations and “Debenedetto” risk?

Legal Professional Liability Insurance: Agenda

- ⦿ Rules related to legal malpractice insurance
- ⦿ Influencing the cost of coverage
- ⦿ Mind the gap

Rules of Professional Conduct

- ⦿ Rule 1.19 – Disclosure of Information to the Client
- ⦿ Rule 1.8(h) – Conflict of Interest:
 - Current Clients: Specific Rules

Rule 1.19 : Disclosure of Information to the Client

(a) A lawyer shall inform a client at the time of the client's engagement of the lawyer or at any time subsequent to the engagement of the lawyer if the lawyer does not maintain professional liability insurance in the amounts of at least one hundred thousand dollars per occurrence and three hundred thousand dollars in the aggregate or if the lawyer's professional liability insurance ceases to be in effect. The notice shall be provided to the client on a separate form set forth following this rule and shall be signed by the client.

Rule 1.19 : Disclosure of Information to the Client

- (b) A lawyer shall maintain a copy of the notice signed by the client for five years after termination of representation of the client.
- (c) The notice required by paragraph (a) of this rule shall not apply to a lawyer who is engaged in either of the following:
 - 1) Rendering legal services to a governmental entity that employs the lawyer;
 - 2) Rendering legal services to an entity that employs the lawyer as in-house counsel.

Rule 1.8(h) – Conflict of Interest: Current Clients: Specific Rules

A lawyer shall not:

- (1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement; or
- (2) settle a claim or potential claim for such liability with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel in connection therewith.

Influencing the Cost of Coverage

- ◎ **Limit of liability:**
 - **Size of firm**
 - **Areas of practice**
 - **Number of attorneys**
 - **Number of non-attorney employees**
- ◎ **Deductible:**
 - **Funds available**
 - **Risk tolerance**
- ◎ **Credits:**
 - **CLE attendance**
 - **“No-claims bonus”**
 - **Engagement letters**
 - **New client screening process**
 - **Mediations**



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Mind the Gap

- ⦿ **Claims made v. occurrence**
- ⦿ **New attorneys – named insureds?**
- ⦿ **Death, disability, retirement**
- ⦿ **Exclusions**
 - **AI?**

AI and Information Security

- ⦿ Identifying risk
- ⦿ Auditing information security
- ⦿ Minimizing exposure
 - Best practices
 - Policies