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Overview of State of New Hampshire Court System
A. Trial Courts
The District Courts, known as New Hampshire's "community courts," are located in 36 cities and towns across the state. The District Courts have jurisdiction over cases involving families, juveniles, small claims ($5,000 or less), landlord tenant disputes, minor crimes, and civil cases in which the disputed amount does not exceed $25,000. The Superior Court is the only forum in the state for jury trials and it has jurisdiction over a range of different criminal, domestic relations, and civil disputes valued over $1,500. There are 19 justices of the Superior Court assigned to 11 locations in 10 counties across the state.
A. Appellate Courts
The New Hampshire Supreme Court is the only appellate court in the state. The Supreme Court sits in Concord and hears appeals from the trial courts and administrative agencies.
Procedural
A. Venue
For District Court, suit may be brought in the District Division for the town or city in which either the plaintiff or the defendant resides. N.H. Rev. Stat. Ann. § 502-A:16. For Superior Court, most suits can be brought in the Superior Court for the county in which either party resides. If neither party resides in the state, suit may be

brought in any county. N.H. Rev. Stat. Ann. § 507:9. Suits involving a specific piece of real property must be brought in the county in which that property is located.

B. Statute of Limitations

Real Estate: N.H. Rev. Stat. Ann. § 508:2:

I. No action for the recovery of real estate shall be brought after 20 years from the time the right to recover first accrued to the party claiming it or to some persons under whom the party claims.
II. No action for the recovery of real estate pursuant to rights based on a possibility of reverter, right of re-entry, or executory interest shall be brought after 5 years from the time the right to recover possession or the right of re-entry first accrued to the party claiming it or to some persons under whom the party claims.

All Personal Actions (Including Wrongful Death): N.H. Rev. Stat. § 508:4(I):
I. Except as otherwise provided by law, all personal actions, except actions for slander or libel, may be brought only within 3 years of the act or omission complained of, except that when the injury and its causal relationship to the act or omission were not discovered and could not reasonably have been discovered at the time of the act or omission, the action shall be commenced within 3 years of the time the plaintiff discovers, or in the exercise of reasonable diligence should have discovered, the injury and its causal relationship to the act or omission complained of.
II. Personal actions for slander or libel, unless otherwise provided by law, may be brought only within 3 years of the time the cause of action accrued.

Additionally, for personal claims resulting from conduct which occurred before July 1, 1986, plaintiffs have the benefit of both the common law discovery rule and the 6-year statute of limitations which was in place until June 30, 1986.

Sexual Assault: N.H. Rev. Stat. Ann. § 508:4-g:

A person, alleging to have been subjected to any offense under RSA 632-A or an offense under RSA 639:2, who was under 18 years of age when the alleged offense occurred, may commence a personal action based on the incident within the later of:
I. Twelve years of the person's eighteenth birthday; or

II. Three years of the time the plaintiff discovers, or in the exercise of reasonable diligence should have discovered, the injury and its causal relationship to the act or omission complained of.

Minors and Mentally Incompetent: N.H. Rev. Stat. Ann. § 508:8:

An infant or mentally incompetent person may bring a personal action within 2 years after such disability is removed.

Statute Of Limitations Savings Provision: N.H. Rev. Stat. Ann. § 508:10:

If judgment is rendered against the plaintiff in an action brought within the time limited therefor, or upon a writ of error thereon, and the right of action is not barred by the judgment, a new action may be brought thereon in one year after the judgment.

Insured: N.H. Rev. Stat. Ann. § 407:15

The insurer shall provide written notice to the insured of any denial of coverage. The notice shall inform the insured that any action based upon the denial shall be barred by law if not commenced within 12 months from the date of the written denial.

C. Time for Filing an Answer

Under Superior Court Rule 9(a), a defendant has 30 days after service of process to file an answer.

This new rule eliminated the old practice whereby, in actions at law, the defendant's entry of an appearance operated as a general denial of all allegations of the plaintiff's writ.

D. Dismissal Re-Filing of Suit

The New Hampshire Supreme Court has held that "[b]efore the plaintiff opens his case to the jury, the trial court has discretion to deny a motion for voluntary nonsuit without prejudice unless it would be manifestly unjust to the other side to do so. Cadle Co. v. Proulx, 725 A.2d 670, 671 (N.H. 1999)(referring to Total Service, Inc. v. Promotional Printers, Inc., 525 A.2d 273, 275 (N.H. 1987)). The decision of the

trial court will be upheld absent abuse of discretion. Id.

Additionally, pursuant to N.H. Rev. Stat. Ann. § 508:10:

If judgment is rendered against the plaintiff in an action brought within the time limited therefor, or upon a writ of error thereon, and the right of action is not barred by the judgment, a new action may be brought thereon in one year after the judgment.

Liability

A. Negligence

For a plaintiff to recover from a defendant on a claim for negligence, the plaintiff must establish that (1) the defendant owed the plaintiff a duty; (2) the defendant breached this duty; and (3) the breach proximately caused the plaintiff's injuries. See Coan v. New Hampshire Dep't of Envtl. Servs., 8 A.3d 109, 115 (N.H. 2010).

Comparative Fault: N.H. Rev. Stat. Ann. § 507:7-d provides that:

Contributory fault shall not bar recovery in an action by any plaintiff or plaintiff's legal representative, to recover damages in tort for death, personal injury or property damage, if such fault was not greater than the fault of the defendant, or the defendants in the aggregate if recovery is allowed against more than one defendant, but the damages awarded shall be diminished in proportion to the amount of fault attributed to the plaintiff by general verdict. The burden of proof as to the existence or amount of fault attributable to a party shall rest upon the party making such allegation.

B. Negligence Defenses

Recognized defenses include comparative fault, assumption of risk (express, primary implied and secondary implied), statute of limitations, Sudden Emergency Doctrine, official immunity, and lack of duty.

New Hampshire recognizes the traditional approach to premise liability whereby "a premises owner is subject to liability for harm caused to entrants on the premises if the harm results either from: (1) the owner's failure to carry out his activities with reasonable care; or (2) the owner's failure to remedy or give warning of a

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C. Gross Negligence, Recklessness, willful and wanton misconduct

New Hampshire does not recognize a cause of action for gross negligence.

However, if the defendant's conduct is willful and wanton, this may permit the plaintiff to receive enhanced damages. See Vratsenes v. N. H. Auto, Inc., 289 A.2d 66, 68 (N.H. 1972) ([W]hen the act involved is wanton, malicious, or oppressive, the compensatory damages awarded may reflect the aggravating circumstances.")

D. Negligent Hiring and Retention

New Hampshire recognizes "a cause of action against an employer for negligently hiring or retaining an employee that the employer knew or should have known was unfit for the job so as to create a danger of harm to third persons." Marquay v. Eno, 662 A.2d 272, 280 (N.H. 1995). This cause of action is distinct from one based upon the doctrine of *respondeat superior* and is a theory of direct, not vicarious, liability. See Cutter v. Town of Farmington, 498 A.2d 316, 320 (N.H. 1985). The New Hampshire Supreme Court has cited Restatement (Second) of Agency § 213 (1958) favorably, which provides that "[a] person conducting an activity through servants or agents is subject to liability for harm resulting from his conduct if he is negligent or reckless ... in the employment of improper persons." Id.

However, "a cause of action for negligent hiring or retention . . . does not lie whenever an unfit employee commits a criminal or tortious act consistent with a known propensity. Marquay, 662 A.2d at 280 (citation omitted). Instead, "the plaintiff must establish some casual connection between the plaintiff's injury and

E. Negligent Entrustment

New Hampshire recognizes a cause of action based on negligent entrustment. The New Hampshire Supreme Court has held that "the owner of a motor vehicle may be held liable for an injury to a third person resulting from the operation of a vehicle which he has entrusted to one whose incompetency to operate it ... is known or should have been known to him." Chalmers v. Harris Motors, 179 A.2d 447, 450 (N.H. 1962). To succeed on a negligent entrustment claim, the plaintiff must prove not only the driver's incompetence, but also the owner's knowledge of that incompetence. Burley v. Hudson, 448 A.2d 375, 377 (N.H. 1982). Evidence of incompetence includes "age, bad habits, dangerous propensities, carelessness, recklessness, or habitual driving while under the influence of alcohol." Hanover Ins. Co. v. Grondin, 402 A.2d 174, 177 (N.H. 1979).

F. Dram Shop

New Hampshire's Dram Shop statute is contained in N.H. Rev. Stat. Ann. §507-F. The statute provides "the exclusive remedy against a defendant for claims by those suffering damages based on the defendant's service of alcoholic beverages." N.H. Rev. Stat. Ann. § 507-F:8. The statute creates two classes of liability: one for negligence and one for recklessness.

Negligence:

N.H. Rev. Stat. Ann. § 507-F:4 provides that:

I. A defendant who negligently serves alcoholic beverages to a minor or to an intoxicated person is liable for resulting damages, subject to the provisions of this chapter.

II. Service of alcoholic beverages to a minor or to an intoxicated person is negligent if the defendant knows or if a reasonably prudent person in like circumstances would know that the person being served is a minor or is intoxicated.

III. Proof of service of alcoholic beverages to a minor without request for proof of age as required by RSA 179:8 shall be admissible as evidence of negligence.

IV. Service of alcoholic beverages by a defendant to an adult person who

subsequently serves a minor off the premises or who is legally permitted to serve a minor does not constitute service to the minor unless a reasonably prudent person in like circumstances would know that such subsequent service is reasonably likely to occur and is illegal.

V. A defendant does not have a duty to investigate whether a person being served alcoholic beverages intends to serve the alcoholic beverages to other persons off the premises.

VI. A defendant is not chargeable with knowledge of a person's consumption of alcoholic beverages or other drugs off the defendant's premises, when the person misrepresents such consumption or the amount of such consumption, unless the defendant's service to such person qualifies as reckless under RSA 507-F:5.

VII. A defendant is not under a duty to recognize signs of a person's intoxication other than those normally associated with the consumption of alcoholic beverages except for intoxication resulting in whole or in part from other drugs consumed on defendant's premises with defendant's actual or constructive knowledge.

Recklessness

N.H. Rev. Stat. Ann. § 507-F:5 provides:

I. A person who becomes intoxicated may bring an action against a defendant for serving alcoholic beverages only when the server of such beverages is reckless. The service of alcoholic beverages is reckless when a defendant intentionally serves alcoholic beverages to a person when the server knows, or a reasonable person in his position should have known, that such service creates an unreasonable risk of physical harm to the drinker or to others that is substantially greater than that which is necessary to make his conduct negligent.

II. A defendant who recklessly provides alcoholic beverages to another is liable for resulting damages.

III. Specific serving practices that are admissible as evidence of reckless conduct include, but are not limited to, the following:

(a) Active encouragement of intoxicated persons to consume substantial amounts of

alcoholic beverages.

(b) Service of alcoholic beverages to a person, 16 years of age or under, when the server knows or should reasonably know the patron's age.

(c) Service of alcoholic beverages to a patron that is so continuous and excessive that it creates a substantial risk of death by alcohol poisoning.

(d) The active assistance by a defendant of a patron into a motor vehicle when the patron is so intoxicated that such assistance is required, and the defendant knows or should know that the intoxicated person intends to operate the motor vehicle.

Defenses

The statute also provides a defense for responsible business practices under N.H. Rev. Stat. Ann. § 507-F:6.

G. Joint and Several Liability

In cases involving multiple defendants, the relative fault of each defendant must be analyzed separately. Under New Hampshire law, the common law of joint and several liability has been modified to provide for several liability only for parties that are less than 50% at fault. Additionally, a defendant can request that the jury apportion fault to a non-party, including an immune tortfeasor or a defendant that settled before trial. See DeBenedetto v. CLD Consulting Engineers, Inc., 903 A.2d 969 (N.H. 2006).

N.H. Rev. Stat. Ann. § 507:7-e provides that:

I. In all actions, the court shall:

(a) Instruct the jury to determine, or if there is no jury shall find, the amount of damages to be awarded to each claimant and against each defendant in accordance with the proportionate fault of each of the parties; and

(b) Enter judgment against each party liable on the basis of the rules of joint and several liability, except that if any party shall be less than 50 percent at fault, then that party's liability shall be several and not joint and he shall be liable only for the

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(c) RSA 507:7-e, I(b) notwithstanding, in all cases where parties are found to have knowingly pursued or taken active part in a common plan or design resulting in the harm, grant judgment against all such parties on the basis of the rules of joint and several liability.

II. In all actions, the damages attributable to each party shall be determined by general verdict, unless the parties agree otherwise, or due to the presence of multiple parties or complex issues the court finds the use of special questions necessary to the determination. In any event, the questions submitted to the jury shall be clear, concise, and as few in number as practicable, and shall not prejudice

N.H. Rev. Stat. Ann. § 556:12 provides that:

I. If the administrator of the deceased party is plaintiff, and the death of such party was caused by the injury complained of in the action, the mental and physical pain suffered by the deceased in consequence of the injury, the reasonable expenses occasioned to the estate by the injury, the probable duration of life but for the injury, and the capacity to earn money during the deceased party's probable working life, may be considered as elements of damage in connection with other elements allowed by law, in the same manner as if the deceased had survived.

II. In addition, the trier of fact may award damages to a surviving spouse of the decedent for the loss of the comfort, society, and companionship of the deceased; however, where fault on the part of the decedent or the surviving spouse is found to have caused, in whole or in part, the loss complained of, damages recoverable shall be subject to diminution to the extent and in the manner provided for in RSA 507:7-d (comparative fault statute). In no event shall damages awarded under this paragraph exceed $150,000.

III. In addition, where the decedent is a parent of a minor child or children, the trier of fact may award damages to such child or children for the loss of familial relationship, whether caused intentionally or by negligent interference; where the decedent is a minor child with a surviving parent or parents, the trier of fact may award damages to such parent or parents for the loss of familial relationship, whether caused intentionally or by negligent interference. However, where fault on the part of the decedent or the claimant is found to have caused, in whole or in part, the loss complained of, damages recoverable shall be subject to diminution to the extent and in the manner provided for in RSA 507:7-d. For purposes of this paragraph, loss of familial relationship shall include the loss of the comfort, society, affection, guidance, and companionship of the deceased. In no event shall damages awarded under this paragraph exceed $50,000 per individual claimant.

I. Vicarious Liability

Agency

A principal may be vicariously liable for the actions of an agent under New Hampshire law. Whether an agency relationship has been established is a question

of fact. Herman v. Monadnock PR-24 Training Council, 802 A.2d 1187 (N.H. 2002). "An agency relationship, or lack thereof, does not turn solely upon the parties' belief that they have or have not created one." Id. Rather, the necessary factual elements to establish agency involve: (1) authorization from the principal that the agent shall act for him or her; (2) the agent's consent to so act; and (3) the understanding that the principal is to exert some control over the agent's actions. Id.

Respondeat Superior

An employer may also be vicariously liable for the actions of an employee. In Hunter v. R.G. Watkins & Son, Inc., 265 A.2d 15 (N.H. 1970), the New Hampshire Supreme Court adopted the "totality of the circumstances test," requiring consideration of many factors, including the criteria set forth in Restatement (Second) of Agency § 220 (1958). Noting that the "control factor" had been overemphasized in judicial reasoning, the court in Hunter concluded that the inquiry into whether an employer-employee relationship existed would focus instead on, whether under all of the facts, "the community would consider the person an employee." Hunter, 265 A.2d at 17.

J. Exclusivity of Workers' Compensation

N.H. Rev. Stat. Ann. § 281-A:8 provides that:

I. An employee of an employer subject to this chapter shall be conclusively presumed to have accepted the provisions of this chapter and, on behalf of the employee or the employee's personal or legal representatives, to have waived all rights of action whether at common law or by statute or provided under the laws of any other state or otherwise:

(a) Against the employer or the employer's insurance carrier or an association or group providing self-insurance to a number of employers; and

(b) Except for intentional torts, against any officer, director, agent, servant or employee acting on behalf of the employer or the employer's insurance carrier or an association or group providing self-insurance to a number of employers.

II. The spouse of an employee entitled to benefits under this chapter, or any other person who might otherwise be entitled to recover damages on account of the employee's personal injury or death, shall have no direct action, either at common

law or by statute or otherwise, to recover for such damages against any person identified in subparagraph I(a) or (b).

III. Nothing in this chapter shall derogate from any rights a former employee may have under common law or other statute to recover damages for wrongful termination of, or constructive discharge from, employment. However, if a former employee makes a claim under this chapter for compensation for injuries allegedly caused by such wrongful termination or constructive discharge, the employee shall be deemed to have elected the remedies of this chapter, and to have waived rights to recover damages for such wrongful termination or constructive discharge under common law or other statute. Similarly, if a former employee brings an action under common law or other statute to recover damages for such wrongful termination or constructive discharge, the employee shall be deemed to have waived claims under this chapter for compensation allegedly caused by such termination or discharge.

Damages

A. Statutory Caps on Damages

The New Hampshire Supreme Court has held unconstitutional a $250,000 cap on non-economic damages in medical malpractice cases. Carson v. Maurer, 424 A.2d 825, 836 (N.H. 1980). It has also held unconstitutional an $875,000 cap on non-economic damages in personal injury cases. Brannigan v. Usitalso, 587 A.2d 1232, 1233 (N.H. 1991).

In wrongful death actions, there is a $150,000 cap on damages to surviving spouses of the decedent. Further, if the decedent was a parent, the jury can award additional damages up to $50,000. See N.H. Rev. Stat. Ann. § 556:12.

B. Compensatory Damages for Bodily Injury

Medical Expenses

In terms of medical expenses, plaintiffs are entitled to recover the reasonable value of medical expenses incurred to treat their injuries. Leighton v. Sargent, 31 N.H. 119 (1855).

Lost Earnings

In terms of lost earnings, plaintiffs may recover their lost earnings as of the time of trial and also a sum representing the present value of their future lost earnings. While future lost earnings need not be proven with mathematical certainty, "in order to warrant a recovery for impairment of earning capacity in personal injury

actions, the impairment of earning capacity must be shown with reasonable certainty or reasonable probability, and there must be evidence which will permit the jury to arrive at a pecuniary value of the loss." Vachon v. New England Towing, Inc., 148 N.H. 429, 433, 809 A.2d 771, 776 (2002)(quotations and citation omitted).

Out-of-Pocket Expenses

Lastly, in terms of out-of-pocket expenses, plaintiffs can recover miscellaneous expenses they have incurred as a direct result of the defendant's fault. Accordingly, a plaintiff can recover for damage to a vehicle, personal property, and also necessary travel expenses.

C. Collateral Source

New Hampshire courts recognizes the collateral source rule and hold that damages may not be reduced based on payments received by the injured party from sources independent of the defendant. Collateral sources can include insurance, workers' compensation benefits, or retirement benefits. See e.g., Cyr v. J.I. Case Co., 652 A.2d 685, 689 (N.H. 1994).

D. Pre-Judgment/Post-Judgment Interest

Pre-Judgment Interest: N.H. Rev. Stat. Ann. § 524:1-a provides that:

In the absence of a demand prior to the institution of suit, in any action on a debt or account stated or where liquidated damages are sought, interest shall commence to run from the time of the institution of suit. This statute shall be inapplicable where the party to be charged pays the money into court in accordance with the rules of the superior court.

Post-Judgment Interest: N.H. Rev. Stat. Ann. § 524:1-b provides that:

In all other civil proceedings at law or in equity in which a verdict is rendered or a finding is made for pecuniary damages to any party, whether for personal injuries, for wrongful death, for consequential damages, for damage to property, business or reputation, for any other type of loss for which damages are recognized, there shall be added forthwith by the clerk of court to the amount of damages interest thereon from the date of the writ or the filing of the petition to the date of judgment even though such interest brings the amount of the judgment beyond the maximum liability imposed by law.

Interest Rate: N.H. Rev. Stat. Ann. § 336:1(II) provides that:

II. The annual simple rate of interest on judgments, including prejudgment interest, shall be a rate determined by the state treasurer as the prevailing discount rate of interest on 26-week United States Treasury bills at the last auction thereof preceding the last day of September in each year, plus 2 percentage points, rounded to the nearest tenth of a percentage point. On or before the first day of December in each year, the state treasurer shall determine the rate and transmit it to the director of the administrative office of the courts. As established, the rate shall be in effect beginning the first day of the following January through the last day of December in each year.

E. Damages for Emotional Distress

Intentional Infliction of Emotional Distress: "In order to make out a claim for intentional infliction of emotional distress, a plaintiff must allege that a defendant by extreme and outrageous conduct, intentionally or recklessly caused severe emotional distress to another." Tessier v. Rockefeller, 33 A.3d 1118, 1131 (N.H. 2011)(quotations and alterations omitted). "In determining whether conduct is extreme and outrageous, it is not enough that a person has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by malice." Mikell v. Sch. Admin. Unit No. 33, 972 A.2d 1050, 1055 (N.H. 2009) (citation and quotations omitted). Instead, "[l]iability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." Id.

Negligent Infliction of Emotional Distress: The elements of a claim for negligent infliction of emotional distress include: "(1) causal negligence of the defendant; (2) foreseeability; and (3) serious mental and emotional harm accompanied by objective physical symptoms." O'Donnell v. HCA Health Servs. of N.H., 883 A.2d 319, 324 (N.H. 2005).

F. Wrongful Death and/or Survival Action Damages

N.H. Rev. Stat. Ann. § 556:12

I. If the administrator of the deceased party is plaintiff, and the death of such party was caused by the injury complained of in the action, the mental and physical pain suffered by the deceased in consequence of the injury, the reasonable expenses occasioned to the estate by the injury, the probable duration of life but for the injury, and the capacity to earn money during the deceased party's probable working life, may be considered as elements of damage in connection with other elements allowed by law, in the same manner as if the deceased had survived.

II. In addition, the trier of fact may award damages to a surviving spouse of the decedent for the loss of the comfort, society, and companionship of the deceased; however, where fault on the part of the decedent or the surviving spouse is found to have caused, in whole or in part, the loss complained of, damages recoverable shall be subject to diminution to the extent and in the manner provided for in RSA 507:7-d (comparative fault statute). In no event shall damages awarded under this paragraph exceed $150,000.

III. In addition, where the decedent is a parent of a minor child or children, the trier of fact may award damages to such child or children for the loss of familial relationship, whether caused intentionally or by negligent interference; where the decedent is a minor child with a surviving parent or parents, the trier of fact may award damages to such parent or parents for the loss of familial relationship, whether caused intentionally or by negligent interference. However, where fault on the part of the decedent or the claimant is found to have caused, in whole or in part, the loss complained of, damages recoverable shall be subject to diminution to the extent and in the manner provided for in RSA 507:7-d. For purposes of this paragraph, loss of familial relationship shall include the loss of the comfort, society, affection, guidance, and companionship of the deceased. In no event shall damages awarded under this paragraph exceed $50,000 per individual claimant.

G. Punitive Damages

N.H. Rev. Stat. Ann. § 507:16 provides that:

No punitive damages shall be awarded in any action, unless otherwise provided by statute.

The following statutes provide for punitive damages:

N.H. Rev. Stat. Ann. § 359-D:11 (credit services organization breach of contract).

N.H. Rev. Stat. Ann. § 638:24 (wireless telephone cloning).

N.H. Rev. Stat. Ann. § 570-A:11 (wiretapping and eavesdropping).

N.H. Rev. Stat. Ann. § 359-B:16 (consumer credit reporting).

Additionally, punitive damages can be awarded in cases involving federal law. See e.g., American Home Assurance Co. v. Fish, 451 A.2d 358, 360 (N.H. 1982).

Further, New Hampshire has adopted the concept of enhanced compensatory damages. "Enhanced compensatory damages allow a factfinder to increase compensatory damages for the resulting actual material loss . . . to compensate for the vexation and distress caused the plaintiff by the character of defendant's conduct." McKinnon v. Harris, CIV. 1:05-CV-93-JAW, 2005 WL 2335350, at *2 (D.N.H. Sept. 21, 2005)(quotations and citation omitted). "The Supreme Court of New Hampshire has limited the availability of enhanced compensatory damages to occasions where the wrongdoers' acts are wanton, malicious, or oppressive." Id. These damages "are awarded only in exceptional cases, and not even in every case involving an intentional tort." Figlioli v. R.J. Moreau Companies, Inc., 866 A.2d 962, 966 (N.H. 2005).

H. Diminution in Value of Damaged Vehicle

New Hampshire courts have yet to address this issue.

I. Loss of Use of Motor Vehicle

The New Hampshire Supreme Court has held that damages for loss of use can only be recovered if a plaintiff can prove actual harm or loss. See e.g., Gelinas v. Mackey, 465 A.2d 498, 501 (N.H.1983).

Evidentiary Issues

A. Preventability Determination

New Hampshire courts have yet to address this issue.

B. Traffic Citation from Accident

Conviction of a traffic offense based on a guilty plea is admissible in a subsequent civil suit arising out of the same incident. See e.g., Weiss v Wasserman, 15 A.2d 861 (N.H. 1940); Public Service Co. v Chancey, 51 A.2d 845 (N.H. 1947).

C. Failure to Wear a Seat Belt

In Thibeault v. Campbell, 622 A.2d 212, 214 (N.H. 1993), the New Hampshire Supreme court held that "a party's failure to use a seat belt is inadmissible to show negligence where the nonuse may have contributed to the party's injuries but was not a cause of the collision itself."

D. Failure of Motorcyclist to Wear a Helmet

While the New Hampshire Supreme Court has never addressed this issue, based on Thibeault v. Campbell, 622 A.2d 212, 214 (N.H. 1993), evidence of failing to wear a helmet is likely inadmissible.

E. Evidence of Alcohol or Drug Intoxication

N.H. Rev. Stat. Ann. § 265-A:11 provides in pertinent part that:

I. Upon complaint, information, indictment, or trial of any person charged with the violation of RSA 265-A:2, the court may admit evidence of physical testing of the defendant for being under the influence of intoxicating liquor or controlled drugs,

prescription drugs, over-the-counter drugs, or any other chemical substances, natural or synthetic, which impair a person's ability to drive as provided in RSA 265-A:4, and of the controlled drug, prescription drug, over-the-counter drug, or any other chemical substance, natural or synthetic, which impairs a person's ability to drive content of the defendant's blood and the defendant's alcohol concentration, as shown by a test of his or her breath, blood, or urine as provided in RSA 265-A:4. Evidence that there was, at the time alleged, an alcohol concentration of 0.03 or less is prima facie evidence that the defendant was not under the influence of intoxicating liquor. Evidence that there was, at the time alleged, an alcohol concentration of more than 0.03 and less than 0.08 is relevant evidence but is not to be given prima facie effect in indicating whether or not the defendant was under the influence of intoxicating liquor, but such fact may be considered with other competent evidence in determining the guilt or innocence of the defendant. Evidence that there was, at the time alleged, an alcohol concentration of 0.08 or more is prima facie evidence that the defendant was under the influence of intoxicating liquor . . .

Additionally, refusing to submit to a test is also admissible under N.H. Rev. Stat. Ann. § 265-A:10.

F. Testimony of Investigating Police Officer

Admissible, subject to the discretion of the trial judge. See Carignan v. Wheeler, 898 A.2d 1011, 1015 (N.H. 2006).

G. Expert Testimony

The New Hampshire Supreme Court utilizes a four-part test to determine the reliability of expert testimony. This test considers: (1) the presence of objective, quantifiable evaluation results; (2) the existence of a logical nexus between the expert's observations and conclusions; (3) the verifiability of any interpretive steps; and (4) the likely difficulty of effective cross-examination of the expert. State v. Cressey, 628 A.2d 696, 698 (N.H. 1993). The "test differs from the Daubert standard in that it focuses not only upon the reliability of an expert's methodology, but also the reliability of the conclusions and results of that methodology." Baker Valley Lumber, Inc. v. Ingersoll-Rand Co., 813 A.2d 409, 415 (N.H. 2002).

H. Collateral Source

New Hampshire courts recognizes the collateral source rule and hold that damages may not be reduced based on payments received by the injured party from sources independent of the defendant. Evidence of these payments is inadmissible at trial. Collateral sources can include insurance, workers' compensation benefits, or retirement benefits. See e.g., Cyr v. J.I. Case Co., 652 A.2d 685, 689 (N.H. 1994).

I. Recorded Statements

Recorded statements may be admissible under the recorded recollection exception to the rule against hearsay. In order to be admissible, the recorded recollection must meet the following requirements: "(1) the witness once had firsthand knowledge about the event; (2) the witness now lacks sufficient memory of the event to testify fully and accurately; (3) the recorded statement was made at or near the time of the event when the witness had a clear and accurate memory of it; and (4) the recorded statement accurately reflects the witness's knowledge." State v. Reid, 20 A.3d 298, 302 (N.H. 2011); see also N.H. R. Ev. 803(5).

Additionally, N.H. R. Ev. 106 provides that: "When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require at that time the introduction of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it."

The trial court has "discretion under Rule 106 to determine whether 'fairness' requires admission of remaining parts or related documents." State v. Botelho, 83 A.3d 814, 822 (N.H. 2013).

J. Prior Convictions

N.H. R. Ev. 609 governs the admissibility of prior convictions for impeachment. The rule provides:

(a) General rule. For the purpose of attacking the character for truthfulness of a witness,

(1) evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and

(2) evidence that any witness has been convicted of a crime shall be admitted regardless of the punishment, if it readily can be determined that establishing the elements of the crime required proof or admission of an act of dishonesty or false statement by the witness.

(b) Time limit. Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice,

that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than 10 years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

(c) Effect of pardon, annulment, or certificate of rehabilitation. Evidence of a conviction is not admissible under this rule if (1) the conviction has been the subject of a pardon, annulment, certificate or rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has not been convicted of a subsequent crime which was punishable by death or imprisonment in excess of one year, or (2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

(d) Juvenile adjudications. Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

(e) Pendency of appeal. The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible.

K. Driving History

Admissible, subject to the trial court's discretion concerning unfair prejudice and relevance. See State v. Dushame, 616 A.2d 469, 473 (N.H. 1992).

L. Fatigue

No New Hampshire cases specifically address the admissibility of evidence of fatigue.

M. Spoliation

The New Hampshire Supreme Court has not recognized a cause of action for either negligent or intentional spoliation of evidence. However, a party can request a jury instruction which permits the jury to draw an adverse inference from the destruction of evidence.

The New Hampshire Supreme Court has cited approvingly factors laid out by the Second Circuit that warrant such a jury instruction. These factors are: "'(1) that the

party having control over the evidence had an obligation to preserve it at the time it was destroyed; (2) that the records were destroyed with a culpable state of mind; and (3) that the destroyed evidence was relevant to the party's claim or defense such that a reasonable trier of fact could find that it would support that claim or defense.'" New Hampshire Ball Bearings, Inc. v. Jackson, 969 A.2d 351, 363 (N.H. 2009)(quoting Residential Funding Corp. v. DeGeorge Financial, 306 F.3d 99, 107 (2d Cir.2002)).

Settlement

A. Offer of Judgment

New Hampshire does not have a rule of court or statute addressing offers of judgment. For an interesting analysis about the lack of a rule providing for offers of judgment see http://www.nhbar.org/publications/display-news-issue.asp?id=6341.

B. Liens

Child Support

Under N.H. Rev. Stat. Ann. § 161-C:3-f:

Child Support Insurance Settlement Intercept. – The department may provide certain information to public agencies or its contracted agents in order to intercept insurance settlement payments or judgments claimed by individuals who are subject to a child support lien pursuant to RSA 161-C and who owe past-due support. The department may identify such individuals by name, last 4 digits of the individual's social security number or other taxpayer identification number, date of birth, last known address, employer, or any combination thereof. Any information provided by the department in accordance with this section shall remain the property of the state of New Hampshire and shall be purged by any public agency or contracted agent receiving said information upon completion of the data match exchange. The department may perform an audit to insure that any public agency or contracted agent has purged said information. The specific penalty for failure to purge the information shall be set forth in any contract or agreement between the department and any public agency or contracted agent made pursuant to this section. Any transaction cost incurred by the department related to the data match exchange shall be directly recovered by the department from any insurance settlement or judgment proceeds. Insurance settlement payments for casualty loss to personal or real property, past or future medical treatment, and a pro-rated amount equal to 185 percent of the self-support reserve defined in RSA 458-C:2, X for the period of lost work for which the settlement or judgment constitutes recovery shall be exempt from this section. Reasonable attorney fees and expenses related to obtaining the insurance settlement or judgment shall be exempt from this

section pursuant to RSA 311:13. Any settlement, payment, or judgment received under the provision of this section shall be held by the department for 60 days prior to its release or distribution unless otherwise agreed to by the parties.

Additionally, under N.H. Rev. Stat. Ann. § 508:20:

No parent shall receive any portion of an award of damages or an out-of-court settlement resulting from any claim or action for wrongful death on behalf of such parent's dependent child, until such parent has paid in full any child support arrearages owed, if such parent:

I. Was convicted of nonsupport of such child under RSA 639:4;

II. Failed to comply with a legal order for support of such child under RSA 161-B; or

III. Was otherwise ordered to pay support for such child by a court or administrative agency in this state or another state, and failed to comply with such order.

Workers' Compensation

An employer or employer's insurance carrier has a lien against all settlements or recoveries under N.H. Rev. Stat. § 281-A:13. The New Hampshire Supreme Court has held that this lien arises by operation of law. See In re Scofield, 821 A.2d 1011 (N.H. 2003). The lien applies to all liability and uninsured motorist recoveries. Under N.H. Rev. Stat. Ann. § 281-A:13, the employer or insurance carrier's lien is reduced by its pro rata share of expenses and attorney's fees sustained by the employee in bringing the case.

Medical Liens

Under N.H. Rev. Stat. Ann. § 448-A:1:

Every individual, partnership, firm, association, corporation, institution or any governmental unit or combination or parts thereof maintaining and operating a hospital licensed in the state of New Hampshire which shall furnish medical or other service to any patient injured by reason of an accident not covered by the workers' compensation act or any home health care provider licensed under RSA 151 who furnishes medical or other services to any patient injured by reason of an

accident not covered by the workers' compensation act shall, if such injured patient shall assert or maintain a claim against another for damages on account of such injuries, have a lien upon that part going or belonging to such patient, or to the person responsible for the payment of such patient's bills, of any recovery or sum had or collected or to be collected by such patient or by the person responsible for the payment of such patient's bills, or by his heirs or personal representatives in the case of his death, whether by judgment or by settlement or compromise, to the amount of the reasonable and necessary charges of such hospital or home health care provider for the treatment, care and maintenance of such patient by the hospital or by the home health care provider up to the date of payment of such damages. The provisions of this chapter shall not be applicable to accidents and injuries within the purview of the workers' compensation law.

Medicaid Liens

Medicaid liens are governed by N.H. Rev. Stat. Ann. § 167:14-a. Under this statute, the plaintiff's lawyer must provide written notice of a third party claim to the commissioner of health and human services at least 30 days before trial, ADR hearing, or settlement conference. Next, the commissioner must inform the plaintiff's counsel of the amount of the Medicaid lien within 21 days.

C. Minor Settlement

N.H. Rev. Stat. Ann. § 464-A:42 provides that:

Settlements, judgments, or decrees of any suit or claim brought on behalf of a minor by a parent or next friend shall be approved by the superior or district court in which the action is pending or to which a writ may be made returnable as follows:

I. If the net amount, as defined in RSA 463:2, VI, or the portion thereof, to be paid to the minor while still a minor, exceeds $10,000:

(a) Superior court or district court approval of settlements, including structured settlements, is required. The superior or district court shall require proof in the form of a certified statement from the probate court that the guardian ad litem, parent, next friend, or other person who receives money on behalf of the minor has been appointed guardian of the estate of such minor and is subject to the duties prescribed under RSA 463:19.

(b) In the case of a judgment or decree, the superior or district court shall, before

making any orders for payment, require proof in the form of a certified statement from the probate court that the guardian ad litem, parent, next friend, or other person who receives money on behalf of the minor has been appointed guardian of the estate of such minor and is subject to the duties prescribed under RSA 463:19.

II. For any net amount, as defined in RSA 463:2, VI, which is to be paid to the minor after the minor attains the age of majority:

(a) The superior court or district court may require approval, for good cause shown, of settlements, including structured settlements.

(b) The superior court or district court may make further orders regarding said distribution for good cause shown in the case of a judgment or decree.

D. Negotiating Directly with Attorneys

Pursuant to N.H. R. RPC 4.3:

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

E. Confidentiality Agreements

In the employment context, confidentiality agreements are generally permissible. Glynn v. Impact Sci. & Tech., Inc., 807 F. Supp. 2d 391, 423 (D. Md. 2011)(applying New Hampshire law).

In the context of settlements, confidentiality agreements embedded within settlements that restrict the disclosure of facts or terms of the settlement are acceptable and do not violate New Hampshire's Professional Rules of Conduct. However, conditioning a settlement on opposing counsel's agreement to forego disclosure of publicly available information violates Rule 5.6(b). See Ethics Committee Opinion # 2009-10/6, Settlement Agreements and Restrictions on the Right to Practice, NHBAR, available at https://www.nhbar.org/uploads/pdf/EthicsOpinion2009-10-6.pdf.

F. Releases

Enforceability

Although New Hampshire law generally prohibits releases of liability or exculpatory contracts, they will be enforced as long as: "(1) they do not violate public policy; (2) the plaintiff understood the import of the agreement or a reasonable person in his position would have understood the import of the agreement; and (3) the plaintiff's claims were within the contemplation of the parties when they executed the contract." Dean v. MacDonald, 786 A.2d 834, 838 (N.H. 2001).

Joint Tortfeasors

Pursuant to N.H. Rev. Stat. Ann. § 507:7-h:

A release or covenant not to sue given in good faith to one of 2 or more persons liable in tort for the same injury discharges that person in accordance with its terms and from all liability for contribution, but it does not discharge any other person liable upon the same claim unless its terms expressly so provide. However, it reduces the claim of the releasing person against other persons by the amount of the consideration paid for the release.

G. Voidable Release

New Hampshire courts have long held that"[t]he right of a minor to disaffirm his contract on reaching his majority is well recognized . . . ." Porter v. Wilson, 209 A.2d 730, 732 (N.H. 1965).

Transportation Law

A. State DOT Regulatory Requirements

The New Hampshire Department of Transportation has established a number of laws and procedures which govern motor vehicles. For more information about these laws, please visit http://www.nh.gov/dot/laws/index.htm.

B. State Speed Limits

The highest speed limit in the state is 70 m.p.h.

C. Overview of State CDL Requirements

The New Hampshire Department of Safety, Division of Motor Vehicles lists the State's CDL Requirements as follow:

CDL Classifications
The following CDL classifications are based on the Gross Vehicle Weight Rating (GVWR) of the vehicle being driven. Each class description includes a list of the minimum tests required to obtain that class of license in New Hampshire.

- **Class A**: Any combination of vehicles with a GVWR of 26,001 or more pounds provided the GVWR of the vehicle(s) being towed is in excess of 10,000 pounds. Tests required for a Class A license in New Hampshire:
  - General CDL Knowledge Test.
  - Combinations Knowledge Test.
  - Air Brakes Knowledge Test.
  - Road Skills Test in a Class A vehicle.
- **Class B**: Any single vehicle with a GVWR of 26,001 or more pounds, or any such vehicle towing a vehicle not in excess of 10,000 pounds GVWR. Tests required for a Class B license in New Hampshire:
  - General CDL Knowledge Test.
  - Air Brakes Knowledge Test.
  - Road Skills Test in a Class B vehicle.
- **Class C:** Any single vehicle, or combination of vehicles, that does not meet the definition of Class A or Class B, but is either designed to transport 16 or more passengers, including the driver, is required to be placarded for hazardous materials or meets the definition of a "tank" vehicle. Required for a Class B license in New Hampshire:
  - General CDL Knowledge Test.
  - Completion of all requirements for one of the following endorsements:
    - Passenger Endorsement.
    - Hazmat Endorsement.

CDL Endorsements

In addition to the weight-related classifications listed above, commercial drivers can apply for different endorsements based on the type of vehicle they intend to operate. Additional testing is required to obtain each of the following endorsements:

- **Hazardous Materials or Hazmat (H-endorsement):** Required in order to drive any commercial vehicle which transports hazardous materials and is placarded under State or Federal regulations. To obtain or renew this endorsement drivers must pass:
  - Transportation Safety Administration (TSA) Background Check prior to applying and
  - Hazmat Knowledge Test
- **Tank Vehicles (N-endorsement):** Required to drive any commercial vehicle designed to transport liquid in a tank that is either permanently or temporarily attached to the vehicle or the chassis, or any liquid or liquefied gaseous material in a permanent tank that requires placards.

    - Tank Knowledge Test.
- **Passenger Vehicles (P-endorsement):** This endorsement is required to drive any commercial vehicle designed to transport 16 or more passengers including the driver. Applicants for this endorsement must pass:
    - Passenger Transport Knowledge Test.
    - Passenger Transport Road Skills Test. Skills test must be taken in a passenger-type vehicle representative of the desired CDL class.
- **Double/Triple Trailers (T endorsement):** This endorsement is needed to legally haul double or triple trailers. Although it is illegal to operate triple trailers in New Hampshire, this endorsement will allow the holder to haul a triple trailer in those states which allow such vehicles. Applicants for this endorsement must pass:
    - Doubles/Triples Knowledge Test.
- **School Bus (S endorsement):** This endorsement is required to drive a school bus designed to transport 16 or more persons, including the driver. To obtain this endorsement drivers must pass:
    - School Bus Knowledge Test.
    - School Bus Road Skills Test.

To drive a school bus in New Hampshire, drivers must also have a School Bus Certificate.

CDL Restrictions

CDL licenses can be restricted in the following ways:

- B Restriction - Corrective Lenses are required while operating a motor vehicle.
- C Restriction - A mechanical aid is required to operate a commercial vehicle.
- D Restriction - A prosthetic aid is required to operate a commercial vehicle.
- E Restriction - The driver may only operate a commercial vehicle with an automatic transmission.
- F Restriction - An outside mirror is required on the commercial vehicle.
- G Restriction - The driver of a commercial vehicle is only allowed to operate during daylight hours.
- K Restriction - Intrastate Only: Drivers are authorized to drive a commercial vehicle within the state of New Hampshire only. This restriction applies to any holder of a New Hampshire CDL license who is under 21 years old.
- L Restriction - Air Brakes: Drivers are restricted from operating a commercial vehicle with air brakes. This restriction is issued when a driver either fails the air brake component of the general knowledge test or performs the road skills test in a vehicle not equipped with air brakes.

- M Restriction - CDL-A holders may operate CDL-B school buses only.
- N Restriction - CDL-A and CDL-B holders may operate CDL-C school buses only.
- O Restriction - Except Tractor Trailers: Driver limited to pintail hook trailers only.
- T Restriction - 60-day temporary license.
- Z Restriction - Alcohol Interlock Device required in the commercial vehicle.

Insurance Issues

A. State Minimum Limits of Financial Responsibility

While New Hampshire does not require automobile insurance, it does require that drivers demonstrate they have sufficient funds to meet New Hampshire's Motor Vehicle Financial Responsibility Requirements. Pursuant to N.H. Rev. Stat. Ann. § 259:61, these requirements are:

-$25,000 because of bodily injury to or death of one person in any one accident
-$50,000 because of bodily injury to or death of two or more persons in any one accident, subject to the $25,000 per person limit
-$25,000 because of injury to or destruction of property of others in an accident.
-$1,000 per accident for medical payments.

B. Uninsured Motorist Coverage

In 1957, New Hampshire became the first state to require uninsured motorist coverage in all automobile policies issued or delivered in the state. The law, codified in N.H. Rev. Stat. § 264:15, provides:

I. 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.

II. In the event of insolvency on the part of the liability insurer which prevents such insurer from paying the legal liability of its insured within the limits of the coverage provided, if no other insurance applies, uninsured motorist coverage shall provide for no less than $25,000 coverage for injury to or destruction of property in any one accident.

III. An insurer's extension of coverage, as provided in paragraph II, shall be applicable only to accidents occurring during a policy period in which its insured's uninsured motor vehicle coverage is in effect and where the liability insurer of the tort-feasor has been declared to be insolvent by a court of competent jurisdiction as of the accident date, or has been declared to be insolvent by a court of competent jurisdiction within 3 years after the accident date. Nothing herein contained shall be construed to prevent any insurer from extending coverage under terms and conditions more favorable to its insureds than is provided hereunder.

IV. In the event of payment to any person under the coverage required by this section and subject to the terms and conditions of such coverage, the insurer making such payment shall, to the extent thereof, be entitled to the proceeds of any settlement or judgment resulting from the exercise of any rights of recovery of such person against any person or organization legally responsible for the bodily injury for which such payment is made, including the proceeds recoverable from the assets of the insolvent insurer; provided, however, with respect to payments made by reason of the extension of coverage described in paragraphs II and III, the insurer making such payment shall not be entitled to any right of recovery against such tort-feasor in excess of the proceeds recovered from the assets of the insolvent insurer of said tort-feasor.

V. Every document tendered to settle a claim for bodily injury which may be the subject of coverage under this section shall prominently contain the following language, which shall be read and signed by the releasing party or parties:

WARNING
“IF YOU SIGN THIS RELEASE YOU MAY FORFEIT YOUR RIGHT TO UNINSURED MOTORIST INSURANCE BENEFITS FROM YOUR OWN AUTOMOBILE INSURANCE POLICY. CONSULT WITH YOUR INSURANCE AGENT, YOUR AUTOMOBILE INSURANCE COMPANY, OR

YOUR ATTORNEY BEFORE SIGNING."
I certify that I have read the above warning and fully understand it.

_____

Signature

C. No Fault Insurance

No fault insurance is not required.

D. Disclosure of Limits and Layers of Coverage

N.H. Rev. Stat. Ann. § 498:2-a provides that:

At any time after suit for negligence and an appearance on behalf of the defendant have been filed, the named defendant, or his or her insurance carrier if he or she is insured as to the claim, shall disclose only to the claimant or his or her counsel the policy limits of the policy or policies of all liability insurance applicable to the defendant as to such claim.

E. Unfair Claims Practices

New Hampshire has enacted an Unfair Insurance Claims Practices law, codified in N.H. Rev. Stat. Ann. § 417. The law provides fourteen acts which, "if committed without just cause and not merely inadvertently or accidentally, shall constitute unfair claim settlement practices."

Under the law, a consumer is only permitted to file a private action for damages after the State Insurance Commissioner finds a violation of the trade practices law. See Hunt v. Golden Rule Ins. Co., 638 F.3d 83, 88 (1st Cir. 2011)(applying New Hampshire law).

F. Bad Faith Claims

Third-Party Claims

New Hampshire courts hold that there is a common law duty to act in good faith implied into every insurance contract issued in the state. See Bursey v. Clement, 387 A.2d 346, 347-48 (N.H. 1978). In Lawton v. Great Sw. Fire Ins. Co., 392 A.2d 576, 581 (N.H. 1978), the New Hampshire Supreme Court held that insurance carriers have a duty to exercise reasonable care in settling third-party claims and that a breach of that duty may give rise to an action in tort. For third-party claims, an independent action in tort exists to address the "dilemma presented by the absolute control of trial and settlement vested in the insurer by the insurance contract and the conflicting interests of the insurer and insured." Bennett v. ITT

Hartford Grp., Inc., 846 A.2d 560, 564 (N.H. 2004)(internal citation and quotations omitted). "[R]easonableness is the touchstone for determining whether an insurer has breached its obligation of good faith and fair dealing." deVries v. St. Paul Fire & Marine Ins. Co., 716 F.2d 939, 943 (1st Cir. 1983)(applying New Hampshire law). An insured who proves a breach of this obligation by the insurer may recover damages in excess of the policy limits. Lawton, 392 A.2d at 580.

First-Party Claims

In Lawton, the New Hampshire Supreme Court also held that "allegations of an insurer's wrongful refusal or delay to settle a first-party claim do[es] not state a cause of action in tort." Lawton, 392 A.2d at 581. Instead, such suits sound only in contract law. The "underlying factor in determining whether there has been a bad-faith breach of contract is whether the terms of the insurance policy cover the services" in dispute. Jarvis v. Prudential Ins. Co. of Am., 448 A.2d 407, 410 (N.H. 1982).

In terms of damages, "[t]he insured may recover specific consequential damages if he can prove that such damages were reasonably foreseeable by the insurance company and that he could not have reasonably avoided or mitigated such damages." Id. at 410. The plaintiff must also prove that his consequential damages "were sustained as a result of the defendant's breach." Bell v. Liberty Mut. Ins. Co., 776 A.2d 1260, 1263 (N.H. 2001).

However, in Bennett, the court recognized that an independent action in tort may lie in a first-party claim against an insurer under unique and narrow circumstances. See Bennett, 846 A.2d at 565.

G. Coverage-Duty of Insured

Under New Hampshire law, "[a] cooperation clause does not impose an obligation upon the insured to take an active role in defeating a claim, but only to 'assist' and 'cooperate' with the insurer in its defense of a claim." Am. Policyholder's Ins. Co. v. Baker, 409 A.2d 1346, 1348 (N.H. 1979). Failure to cooperate is an affirmative defense with the burden on the insurer. Employers Mut. Cas. Co. v. Nelson, 241 A.2d 207, 213 (N.H. 1968).

If the policy contains a cooperation clause, the law requires "a full, frank and fair disclosure of information in the possession of the insured." Id. at 210. "Where . . . inconsistencies in statements by the insured are relied upon by the insurer to establish a breach of the policy, they must be material in nature, and found to be

accounted for by wrongful intent on the part of the insured." Id.

H. Fellow Employee Exclusions

Under the exclusivity provision contained in N.H. Rev. Stat. Ann. § 281-A:8, employees are barred from bringing negligence actions against both employers and fellow employees. However, employees can assert claims for intentional torts against co-employees. See e.g., Young v. Conductron Corp., 899 F. Supp. 39, 41 (D.N.H. 1995)(under New Hampshire's Workers' Compensation Act, "employees are precluded from asserting negligence claims, but still may assert intentional tort claims, against co-employees").