

<hr/>		)	SUPERIOR COURT OF NEW JERSEY
COMMISSIONER, NEW JERSEY		)	MIDDLESEX COUNTY – LAW
DEPARTMENT OF BANKING AND		)	DIVISION
INSURANCE,		)	
	<i>Plaintiff</i>	)	DOCKET NO. L-250-12
		)	
v.		)	CIVIL ACTION
		)	
RAISA FISHMAN,		)	<b>BRIEF IN SUPPORT OF</b>
	<i>Defendant</i>	)	<b>MOTION TO DISMISS</b>
		)	<b>THIRD-PARTY COMPLAINT</b>
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		)	
RAISA FISHMAN,		)	
	<i>Third-Party Plaintiff</i>	)	
		)	
v.		)	
		)	
NORTHWESTERN MUTUAL LIFE		)	
INSURANCE COMPANY,		)	
	<i>Third-Party Defendant</i>	)	
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**NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY’S  
BRIEF IN SUPPORT OF MOTION TO DISMISS THIRD-PARTY COMPLAINT**

Third-Party Defendant, NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY (“Northwestern Mutual”), by its attorneys Warren von Schleicher and Jacqueline J. Herring of Smith von Schleicher & Associates, and William J. Martin of Martin, Gunn & Martin, P.A., submits its Brief in Support of its Motion to Dismiss the Third-Party Complaint pursuant to Rule 4:6-2(e).

## INTRODUCTION

In April 2008, Third-Party Plaintiff Raisa Fishman applied for group long-term disability insurance (“Group Plan”) as a benefit for the employees of her business, R&M Business Services, Ltd. (“R&M”). Northwestern Mutual issued the Group Plan effective April 23, 2008. For the Group Plan to remain in force, at least two R&M employees must be eligible for coverage and enrolled in the Group Plan. While evaluating a disability claim submitted by Fishman, Northwestern Mutual discovered that R&M had only one eligible employee since May 1, 2009—Fishman herself—and therefore the Group Plan’s eligibility requirements had not been satisfied. On April 28, 2010, Northwestern Mutual terminated the Group Plan retroactive to May 1, 2009. Fishman has not disputed Northwestern Mutual’s right to terminate the Group Plan.

The Commissioner of the New Jersey Department of Banking and Insurance subsequently initiated this action to impose civil penalties on Fishman for violating New Jersey’s Insurance Fraud Prevention Act, N.J.S.A. 17:33A-1, *et seq.* The Commissioner charges that Fishman misrepresented that her husband was an employee of R&M in order to obtain disability coverage for themselves under the Group Plan. The Commissioner also charges that Fishman misrepresented her income in order to artificially inflate her disability payments under the Group Plan.

On May 7, 2012, more than four years after the Group Plan was issued and more than two years after the Group Plan was terminated, Fishman filed her Third-Party Complaint against Northwestern Mutual. Fishman seeks to shift her liability for statutory penalties for insurance

fraud onto Northwestern Mutual. She accuses Northwestern Mutual of negligently supervising an insurance agent whom she now blames for her violations of the Insurance Fraud Prevention Act. Fishman contends that if she is found guilty of insurance fraud and assessed statutory penalties, Northwestern Mutual should pay her penalties based on theories of negligence and indemnity.

Fishman cannot palm off her liability for insurance fraud under the Act onto Northwestern Mutual. The Insurance Fraud Prevention Act does not provide Fishman with a private right of action to sue a third party to pay her statutory penalties. And she cannot manufacture such a private right of action under the guise of a claim for “indemnity” or “negligence.” Moreover, she fails to allege any agreement with Northwestern Mutual for indemnification, and her negligence theory is barred by the statute of limitations.

If Fishman is found not-guilty of insurance fraud, then she has no penalties to try to foist onto Northwestern Mutual. But if she is found guilty of insurance fraud, she must take responsibility for her conduct and “do the time” by paying a penalty to the State of New Jersey. She cannot be guilty and pass the punishment onto Northwestern Mutual. Fishman’s Third-Party Complaint should be dismissed with prejudice.

### **ARGUMENT**

A motion to dismiss under Rule 4:6-2(e) challenges the sufficiency of the complaint for failure to state a claim upon which relief may be granted. A motion to dismiss “must be evaluated in light of the legal sufficiency of the facts alleged in the complaint.” *Sickles v. Cabot Corp.*, 379 N.J.Super. 100, 106, 877 A.2d 267 (App.Div.), *certif. denied*, 185 N.J. 297, 884 A.2d 1267 (2005).

Dismissal “is mandated where the factual allegations are palpably insufficient to support a claim upon which relief can be granted.” *County of Warren v. State*, 409 N.J.Super. 495, 503, 978 A.2d 312, 316 (App.Div. 2009) (quoting *Rieder v. State*, 221 N.J.Super. 547, 552, 535 A.2d 512 (App.Div. 1987)).

**I. Fishman Has No Private Right Of Action Under The Insurance Fraud Prevention Act.**

Only the Commissioner or an insurance company is authorized to bring a civil action under the New Jersey Insurance Fraud Prevention Act. N.J.S.A. 17:33A-5; N.J.S.A. 17:33A-7. The Legislature specifically elected not to include a private cause of action, which is “reliable evidence that the Legislature neither intended to create such a cause of action by silence nor desired the judiciary to create one by implication.” *Miller v. Zoby*, 250 N.J.Super. 568, 576, 595 A.2d 1104, 1108 (App.Div. 1991). See also *Piscitelli v. Classic Residence by Hyatt*, 408 N.J.Super. 83, 105, 973 A.2d 948, 961 (App.Div. 2009) (“[T]he express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others.”).

Fishman endeavors to manufacture a private right of action under the Act, cloaked as claims for indemnity and negligence, in an attempt to hold Northwestern Mutual liable for any civil penalties imposed upon her. But the true nature of Fishman’s claims is laid bare by the allegations in the Third-Party Complaint: “If Plaintiff, State Commissioner of New Jersey recovers judgment against Third-Party Plaintiff, Raisa Fishman, Third-Party Plaintiff, Raisa Fishman will be entitled to recover from Third-Party Defendant, Northwestern Mutual, the amount of such judgment ....”

(Ex. 1, TP Comp. ¶ 42).<sup>1</sup> That allegation seeks to pass Fishman’s liability under the Insurance Fraud Prevention Act to a third-party, which is forbidden under New Jersey law. See *New Jersey Dental Ass’n v. Metropolitan Life Ins. Co.*, 424 N.J.Super. 160, 165, 36 A.3d 1066 (App.Div. 2012) (“A private cause of action is essential when the plaintiff seeks damages for injury or loss suffered as a consequence of another’s violation of a statute ....”).

Fishman has no private right under the Insurance Fraud Prevention Act to impose her liability onto Northwestern Mutual. Nor can she invent a private right of action under the guise of a claim for indemnity or negligence. Regardless of the label she affixes to her claim, the thrust of Fishman’s allegations is obvious: she wants Northwestern Mutual to pay any civil penalties imposed on her under the Act, which is quintessentially an attempt to assert a private right of action against Northwestern Mutual under the Act. Courts condemn the use of artful pleading practices to fabricate a private right of action where none exists. See e.g., *Warren County Bar Ass’n v. Bd. of Chosen Freeholders of County of Warren*, 386 N.J.Super. 194, 207, 899 A.2d 1028, 1036 (App.Div. 2006) (Plaintiffs “may not otherwise seek to enforce the County’s statutory duty to provide ‘suitable’ court facilities by characterizing this case as an action in lieu of prerogative writs rather than a private right of action under N.J.S.A. 2B:6-1(b).”); *Charlie H. v. Whitman*, 83 F.Supp.2d 476, 503 (D.N.J. 2000) (holding that the absence of a private right of action precluded claims, stating “given that Plaintiffs cannot state a §1983 cause of action upon which relief may be granted under the Adoption Assistance Act or CAPTA, Plaintiffs cannot circumvent the Court’s

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<sup>1</sup> Citations to “TP Comp. ¶ \_” are to the corresponding paragraph of Fishman’s Third-Party Complaint.

holding by asserting a third-party beneficiary claim”); *Henderson v. Hertz Corp.*, No. L-6937-03 (App.Div. June 22, 2006) (slip op. at 5) (“Because her factual assertions are, fundamentally, that Hertz violated IPLA or IPLA (2001) [under which she has no private right of action] they cannot support relief under any of the theories in her complaint.”) (attached as Exhibit 2).

Fishman’s Third-Party Complaint is an action against Northwestern Mutual to pay statutory penalties under the Insurance Fraud Prevention Act, masquerading as claims for indemnity and negligence. Such private rights of action are prohibited by the Act. This basic deficiency should be exposed at the pleading stage—at the point of minimum expenditure of time and money by the parties and the Court—and the Third-Party Complaint should be dismissed with prejudice.

## **II. Fishman Cannot State A Claim To Obtain “Indemnification” Of Her Liability Under The Insurance Fraud Prevention Act.**

The absence of a private right of action under the Insurance Fraud Prevention Act alone is sufficient to warrant dismissal of the Third-Party Complaint in its entirety. Notwithstanding Fishman’s lack of a private remedy under the Act, she still fails to state a claim for “indemnity” under New Jersey law. A claim for indemnification must be based on either an express agreement to indemnify, or a special legal relationship sufficient to trigger a common law right to indemnification for vicarious liability, such as the relationship between a principal and agent. *Estate of Spencer v. Gavin*, 400 N.J.Super. 220, 257, 946 A.2d 1051 (App.Div. 2008); *Pingaro v. Rossi*, 322 N.J.Super. 494, 509-510, 731 A.2d 523 (App.Div. 1999).

Fishman fails to allege that Northwestern Mutual entered an express contract to indemnify her from civil liability under the Insurance Fraud Prevention Act. She fails to allege that she and Northwestern Mutual have a special relationship, akin to principal and agent, triggering a common law duty to indemnify. She merely alleges that “but for” Northwestern Mutual’s purported negligence, the Insurance Commissioner would not have brought a civil action against her for insurance fraud. (Ex. 1, TP Comp. ¶¶ 41, 42).

Fishman’s theory of “but for” causation does not precipitate a duty to indemnify her for liability under the Act. Fishman’s allegations fail to establish the special legal relationship necessary to impose a duty to indemnify. See *Estate of Spencer*, 400 N.J.Super. at 257 (affirming dismissal of a claim for indemnity, holding that “Averna’s liability, if it is proven on remand, arises from his own independent breach of a duty, not from the application of principles of vicarious responsibility”); *Miller v. Hall Bldg. Corp.*, 210 N.J.Super. 248, 251, 509 A.2d 316 (1985) (“The contractual relationship between the parties is not enough, in itself, to establish the type of relationship from which an implied obligation to indemnify might arise.”).

Moreover, a party who is at fault cannot obtain common law indemnification for her own acts. The party seeking indemnification must be free of fault. “[L]iability must be merely constructive, secondary or vicarious in order to make a claim for indemnification.” *Port Authority of N.Y. & N.J. v. Honeywell Prot. Serv’s, Honeywell, Inc.*, 222 N.J.Super. 11, 20, 535 A.2d 974 (App.Div. 1987) (quoting *New Milford Bd. of Ed. v. Juliano*, 219 N.J.Super. 182, 186, 530 A.2d 43 (App.Civ. 1987)). See also *Miller*, 210 N.J.Super. at 252 (“[I]t is well settled that indemnity may

not be obtained by a party who has been at fault, *absent an express indemnification agreement.*”) (emphasis in original) (citing *Cartel Capital Corp. v. Fireco of New Jersey*, 81 N.J. 548, 566, 410 A.2d 674 (1980)).

Fishman’s liability under the Insurance Fraud Prevention Act is neither constructive nor vicarious. The Act imposes liability only on those who “knowingly” provide false or misleading information or “knowingly” fail to disclose information in an effort to obtain insurance benefits. N.J.S.A. 17:33A-4. If Fishman is found to have violated the Act, she is not free of fault. Her liability would be based on her own knowing actions and would not be merely constructive, secondary or vicarious. Indemnification is not available to Fishman for her intentional acts. See *Cartel Capital Corp.*, 81 N.J. at 566 (“It would be inequitable to permit an active wrongdoer in the absence of a contractual understanding between the parties to obtain indemnity from another wrongdoer and thus escape any responsibility.”). If Fishman is free from fault and not guilty of insurance fraud, then she would not have any civil penalties for which to obtain indemnification.

Fishman fails to allege any contractual or common law basis for indemnity and cannot obtain indemnification for her own unlawful conduct. Consequently, Fishman fails to state a cognizable claim for indemnity. See *Hoffman v. Hampshire Labs, Inc.*, 405 N.J.Super. 105, 112, 963 A.2d 849, 853 (App.Div. 2009) (“A complaint may be dismissed for failure to state a claim if it fails ‘to articulate a legal basis entitling plaintiff to relief.’”) (quoting *Sickles*, 379 N.J.Super. at 106).

### III. Fishman's Negligence Claim Is Barred By The Statute of Limitations.

Fishman's "negligence" claim is another attempt to circumvent the Insurance Fraud Prevention Act's prohibition on private causes of action. She cannot repackage her claim to recover civil penalties for insurance fraud under the Act as a claim to recover damages for negligence. Fishman's negligence theory also is barred by New Jersey's two-year statute of limitations governing negligence claims. N.J.S.A. 2A:14-2. A cause of action for negligence accrues on the date of the negligent act or omission. *Beauchamp v. Amedio*, 164 N.J. 111, 116-117, 751 A.2d 1047, 1050 (2000).

Fishman contends that Northwestern Mutual negligently supervised an insurance agent by failing to ensure that the Group Plan provided suitable coverage to her and her husband (a non-employee). (Ex. 1, TP Comp. ¶¶ 5-21, 31-36). The alleged negligent acts occurred no later than April 23, 2008, when Northwestern Mutual issued the Group Plan. Fishman's purported "negligence" claim accrued no later than April 23, 2008.<sup>2</sup>

Fishman knew or should have known of the purported negligence on April 23, 2008, when the Group Plan was issued. The Group Plan plainly defines the persons eligible for coverage as employees of R&M working 30 or more hours per week (which would not include Fishman's non-

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<sup>2</sup> The Group Plan is attached as Exhibit 3, and may be considered in deciding this motion to dismiss because it is expressly referred to in Fishman's Third-Party Complaint. See *E. Dickerson & Son, Inc. v. Ernst & Young, LLP*, 361 N.J.Super. 362, 365, n.1, 825 A.2d 585, 587 (App.Div. 2003) ("Since the engagement letters are referenced in the complaint, they could be considered without converting the motion into one for summary judgment."); see also *N.J. Sports Prod., Inc. v. Bobby Bostick Promotions, LLC*, 405 N.J.Super. 173, 178, 963 A.2d 890 (Ch.Div. 2007).

employee husband). (Ex. 3, Plan, pg. NML12-01240-00006). The Group Plan specifies that the Maximum Benefit is “60% of your Predisability Earnings,” which are defined for “Sole Proprietors, Partners, and S-Corporation Shareholders” as “your average monthly compensation from your Employer [R&M] during the Employer’s prior tax year” and for “All Other Members” as “your monthly rate of earnings from your Employer.” (Ex. 3, Plan, pgs. NML12-01240-00007, 00014).

Fishman is charged with knowledge of the contents of the Group Plan. See *Morrison v. American Intern. Ins. Co. of Am.*, 381 N.J.Super. 532, 542, 887 A.2d 166, 173 (App.Div. 2005). Fishman knew or should have known on April 23, 2008 that the Group Plan did not provide the coverage she now claims she desired. Fishman failed to file her Third-Party Complaint until more than four years later on May 7, 2012, after the limitations period had expired.

Despite the clear terms of the Group Plan, Fishman alleges that “upon learning” the Group Plan did not provide the desired coverage, she “immediately cancelled the wrongfully issued disability policy” (Ex. 1, TP Comp. ¶ 21). The Group Plan was terminated on April 28, 2010. (Ex. 4, Termination Letter). Yet Fishman failed to file her Third-Party Complaint until May 7, 2012, more than two years *after* the date on which Fishman admits she had knowledge that the Group Plan did not provide the coverage she claims she desired. By her own admission, Fishman pleads her negligence claim out of court as barred by the statute of limitations.

New Jersey law allows Fishman two years in which to commence a legal action for negligence. Fishman failed to file her lawsuit until May 7, 2012, more than four years after her

cause of action accrued and more than two years after the Group Plan was terminated. The statute of limitations bars Fishman's first cause of action for negligent supervision. Where "it is clear that the complaint states no basis for relief and that discovery would not provide one, dismissal of the complaint is appropriate." *County of Warren*, 409 N.J.Super. at 503 (citing *Sickles*, 379 N.J.Super. at 106).

### CONCLUSION

The Insurance Fraud Prevention Act does not provide Fishman with a private right of action to sue a third party to pay her statutory penalties. Fishman cannot impose her liability under the Act onto Northwestern Mutual. Nor can she manufacture a private right of action under the guise of a claim for "indemnity" or "negligence." Fishman fails to allege any agreement with Northwestern Mutual for indemnification, and her negligence theory is barred by the statute of limitations. Fishman's Third-Party Complaint should be dismissed with prejudice for failure to state a cognizable claim.

Respectfully submitted,

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