THIRD PARTY COVERAGE

William J. Cook, Esquire

III. THIRD PARTY COVERAGE

Duty to Defend and Indemnify

In determining whether an insurance company has a duty to defend its insured, the Florida courts look solely to the four corners of the complaint, not the actual facts or the insured's version of the facts, or the insured's defenses. National Union, 358 So. 2d at 536. The insurer must defend when the complaint alleges facts which fairly and potentially bring the suit within policy coverage. Trizec Properties, Inc. v. Biltmore Constr. Co., 767 F. 2d 810, 811-812 (11th Cir. 1985); Baron Oil Co. v. Nationwide Mutual Fire Ins. Co., 470 So. 2d 810, 813-814 (Fla. 1st DCA 1985). If the allegations of the complaint leave any doubt as to the duty to defend, the question must be resolved in favor of the insured. Trizec Properties, 767 F. 2d at 812; Baron Oil, 470 So. 2d at 814. Further, if it later becomes apparent, such as through an amended complaint, that covered claims not originally within the scope of the pleadings are now being made, the insurer is obligated to defend. Broward Marine, Inc. v. Aetna Ins. Co., 459 So. 2d 330 (Fla. 4th DCA 1984). On the other hand, the duty to indemnify is based on the facts established at trial, not the pleadings. See, e.g., Stevens v. Horne, 325 So. 2d 459, 462 (Fla. 4th DCA 1976).

A. Homeowner's Insurance Policies

1. What Homeowner's Insurance Policies Cover

Typically, a homeowner's insurance policy covers a resident's liability for bodily injury or property damage caused during the policy period. However, a policy may limit insurer liability through its definition of policy terms and exclusion of certain risks from coverage. Additionally, the policy may specify that liability must arise from the ownership, maintenance, or use of the premises. See, e.g., Brown v. Dilworth, 331 So. 2d 379 (Fla. 3d DCA 1976); Financial Fire & Cas. Co. v. Callaham, 199 So. 2d 529 (Fla. 2d DCA 1967).

2. Defining "the Insured"

Homeowner's liability policies often define the "insured" as "you" and resident relatives. See, e.g., Aetna Cas. & Sur. Co. v. Growers Properties, No. 58 Ltd., 542 So. 2d 1028 (Fla. 2d DCA 1989).

Courts consider the policy term, "resident," in its most inclusive sense. See Puente v. Arroyo, 366 So. 2d 857 (Fla. 3d DCA 1979). For example, a relative may live in a separate apartment with no intention of returning home, yet still be found a resident covered by the homeowner's policy, where he treats the home as a permanent residence, maintains a room and possessions there, and obtains all financial support from the homeowner. See Seitlin & Co. v. Phoenix Ins. Co., 650 So. 2d 624 (Fla. 3d DCA 1994) (reviewing residency of law student). However, a homeowner's policy will not afford coverage if no significant connection exists between a person and the insured household. See Puente, 366 So. 2d 857 (holding that a child who visited relatives briefly during summer was not a "resident" of the relatives' household within policy coverage).

3. Coverage Exclusions

a. General Exclusions

Homeowner's policies generally exclude coverage for bodily injury to "any insured person." Aetna Cas. & Sur. Co. v. Growers Properties, No. 58 Ltd., 542 So. 2d 1028 (Fla. 2d D.C.A. 1989). By defining "the insured" to include resident relatives, the insurer greatly limits its liability. Id. Additionally, as with most general liability policies, a homeowner's policy may exclude coverage for injuries or damage that the insured expects or intends. See Prudential Property and Cas. Ins. Co. v. Swindal, 622 So. 2d 467 (Fla. 1993) (requiring both intent to act and specific intent to injure).

b. Business Pursuits Exclusion

A policy may also contain an exclusion for liability for injury or death arising from any business pursuit, or from business activities specified in the policy. The exclusion has been held applicable to deny coverage when, for example, two doctors' argument about treatment of a mutual patient caused personal injuries to one of the doctors. See Liberty

Mut. Ins. Co. v. Miller, 549 So. 2d 1200 (Fla. 3d DCA 1989). On the other hand, the "business pursuits" exclusion did not prevent coverage where an insured allegedly sexually harassed fellow employees, but the acts did not arise out of his profession as a physician. See Scheer v. State Farm Fire & Cas. Co., 708 So. 2d 312 (Fla. 4th DCA 1998).

c. Automobile Exclusion

Homeowner's insurance coverage commonly excludes liability arising out of the ownership, maintenance, or use of a motor vehicle. See Almayor v. State Farm Fire & Cas. Co., 613 So. 2d 526 (Fla. 3d DCA 1993). A typical auto exclusion excludes coverage as follows:

> f. Arising out of:
>
> (1) The ownership, maintenance, use, loading or unloading of motor vehicles or all other motorized land conveyances, including trailers, owned or operated by or rented or loaned to an "insured";

As with most exclusions, the courts strictly construe the auto exclusion to find coverage. See, e.g., Farrer v. U.S. Fidelity & Guar. Co., 809 So.2d 85 (Fla. 4th DCA 2002). By contrast, courts construing virtually identical "arising out of" insuring language in auto policies broadly construe the language to find coverage. See Government Employees Insurance Co. v. Novak, 453 So.2d 1116 (Fla.1984).

On the other hand, the potential for coverage under an auto policy has also been a factor in the decisions, as overlapping coverages are not favored. In other words, if the insured has auto coverage, it is more likely that a court will enforce the exclusion. See Muzzio v. Auto-Owners Ins. Co., 799 So.2d 272 (Fla. 2d DCA 2001). The courts generally try to honor an insurer's underwriting intent that auto and homeowners policies should be complementary. For example, Florida law has recognized that duplicate coverage for an automobile accident injury covered by an automobile policy is not ordinarily available simply by alleging the separate tort of negligent hiring, supervision, and/or retention. See Fidelity & Cas. Co. v. Lodwick, 126 F.Supp.2d 1375, 1378 (S.D.Fla.2000).

The Farrer court set forth a restrictive three-part test to apply the auto exclusion, as follows:

1. The accident must have arisen out of the inherent nature of the automobile, as such;
2. The accident must have arisen within the natural territorial limits of an automobile, and the actual use, loading, or unloading must not have terminated;
3. The automobile must not merely contribute to cause the condition which produces the injury, but must, itself, produce the injury.

Farrer, 809 So.2d at 93 (citing Race v. Nationwide Mutual Fire Ins. Co., 542 So.2d 347, 349 (Fla.1989)).

While the results are not always consistent, most of the cases upholding coverage denials involve some direct involvement, including contact, with a vehicle. See, e.g., Tomlinson v. State Farm Fire & Casualty Co., 579 So.2d 211 (Fla. 2d DCA 1991)(no coverage for alleged negligent supervision of a minor child whose alleged negligent operation of a motorcycle caused the death of a third party); American Sur. & Cas. Co. v. Lake Jackson Pizza, Inc., 788 So.2d 1096 (Fla. 1st DCA 2001)(no coverage for negligent hiring, supervision, and training claims brought by a motorist claiming bodily injury allegedly sustained in an automobile accident with an insured pizza delivery restaurant's employee); Hagen v. Aetna Casualty, 675 So.2d 963 (Fla. 5th DCA 1996) (no coverage for a carpet store in a claim alleging that the business failed to have proper equipment to unload carpet after a delivery man was injured when the store used a vehicle and not a forklift to pull carpet out of the delivery truck); Cesarini v. American Druggist Ins. Co., 463 So.2d 451 (Fla. 2d DCA 1985) (no coverage for allegations that a school board negligently hired and supervised a mechanic who struck the plaintiff with a school bus he was driving to the maintenance garage); Atkins v. Bellefonte Ins. Co., 342 So.2d 837 (Fla. 3d DCA 1977)(no coverage for a claims of a plaintiff struck by a school's auto operated by a school employee who was returning to school with an escaped minor; insured could not

avoid auto exclusion by alleging that the school was negligent in allowing minor to escape).

By contrast, in the cases holding that claims were not excluded, the connection between the injuries and the car was more tenuous. See, e.g., Westmoreland v. Lumbermens Mut. Cas. Co., 704 So.2d 176 (Fla. 4th DCA 1997) (insured and other occupants of insured's house were killed by carbon monoxide fumes from a vehicle left running in closed garage, where the allegations could be read to assert that the deaths were legally or proximately caused not by running engine, but instead by negligently placed air conditioning equipment, or by failure to open garage door or to ventilate garage, or by failure to locate carbon monoxide detection devices throughout house); St. Paul Fire & Marine Ins. Co. v. Thomas, 273 So.2d 117 (Fla. 4th DCA 1973) (plaintiff was injured when her car went out of control when the defendant threw a pop bottle out of the window of his car into the path of the car in which the plaintiff was riding).

The cases can be difficult to reconcile, particularly those involving allegations of negligent supervision. For example, under facts similar to those in Lake Jackson Pizza, the court in Smith v. General Accident Ins. Co., 641 So. 2d 123 (Fla. 4th DCA 1994) held that an insurer had a duty to defend allegations that a taxi company negligently hired one of its drivers who was involved in a rear-end collision with the plaintiff. Like Lake Jackson Pizza, Smith involved an automobile collision, but the court nonetheless held that the accident did not arise out of the use of a vehicle because of allegations of negligent supervision. In reaching its conclusion, the Smith court acknowledged that its decision conflicted with Atkins, cited above. In addition, the Lake Jackson court in turn expressly declined to follow Smith.

B. Automobile Insurance Policies

1. What Automobile Insurance Policies Cover: Part I

Typically, automobile liability policies cover bodily injury and property damage "arising out of the ownership, maintenance, or use of a described or insured motor

vehicle,"and which, as "accidents," were neither expected nor intended by the insured. The term, "arising out of" has been broadly construed to require a causal nexus between vehicle and injury. See Government Employees Ins. Co. v. Novak, 453 So. 2d 1116 (Fla. 1984). Under Florida law, the terms "resulting from" and "arising out of" the ownership, maintenance or use of a covered auto are synonymous. See Heritage Mutual Ins. Co. v. State Farm Mutual Automobile Ins. Co., 657 So. 2d 925, 927 (Fla. 1st DCA 1995)(holding that there was no substantive distinction between "arising" and "resulting"). Similarly, policies containing so-called "easy reading" language that simply covers undefined "auto accidents" are construed as if they contain the usual "arising out of" language. See National Merchandise Co., Inc. v. United Service Auto. Ass'n, 400 So.2d 526, 530 (Fla. 1st DCA 1981).

Florida courts liberally construe the term "arising out of" the use of the motor vehicle to extend coverage broadly. There must only be some connection or nexus between the injury and the use of the vehicle. See Government Employees Ins. Co. v. Novak, 453 So. 2d 1116, 1119 (Fla. 1984); Fleming v. Hill, 501 So. 2d 715 (Fla. 5th DCA 1987).

For example, Florida cases hold that both ingress and egress from an insured motor vehicle is an integral part of the use of a motor vehicle and any injuries sustained as a result must be considered as arising out of the use of such vehicle. See Padron v. Long Island Ins. Co., 356 So.2d 1337 (Fla. 3d DCA 1978).

It is not enough, however, that an automobile is the physical situs of an injury or that the injury occurred incidentally to the use of the automobile. There must be a causal connection or relation between the two for liability to exist. Reynolds v. Allstate Ins. Co., 400 So. 2d 496, 497 (Fla. 5th DCA 1981). In Reynolds, an assailant hiding in the back seat of the insured vehicle struck and injured the insured, rendering him unconscious. The assailant then drove the vehicle for several miles, and the insured was thrown from the vehicle causing him further injury. The court affirmed a judgment for the insurance company noting that insurance does not cover every incident that happens in a car.

Most Florida cases dealing with assaults occurring in or around a vehicle typically follow this reasoning. For example, in General Accident, Fire & Life Assurance Corp. Ltd. v. Appleton, 355 So. 2d 1261 (Fla. 4th DCA 1978), the insured had car trouble and accepted a ride from the driver of another vehicle. He was then attacked and robbed by two other passengers. The court held that there was no uninsured motorist coverage because the insured's injuries did not arise out of the ownership, maintenance or use of an uninsured automobile. The injury was caused not by an automobile but by the fists of the criminals who assaulted him, and the automobile was only the physical situs of the attack, not the instrumentality of the assault. Id. at 1262. Similarly, the court in Jones v. State Farm Mutual Automobile Ins. Co., 589 So. 2d 333 (Fla. 5th DCA 1991) held that no PIP coverage existed when an estranged and distraught husband abducted his wife from work and then shot and killed her in the parties' vehicle.

By contrast, in Novak, the court held that coverage existed where the assailant tried to steal the victim's vehicle. Novak, 453 So. 2d at 1119. Notably, the Novak court stated that it did not disapprove Reynolds, discussed above. Rather, the court held that Reynolds was distinguishable on its facts. Id. The Fourth District Court of Appeal explained the distinction in Fortune Ins. Co. v. Exilus, 608 So. 2d 139 (Fla. 4th DCA 1992), when it held that no PIP coverage existed for a driver who was injured when he was shot while pulling away from an intersection. The Exilus court distinguished Novak on grounds that the assailant in Novak tried to steal the car whereas in the case before the court, there was no claim that the vehicle was the focus of the assault. Id. at 143. The Exilus court explained that the cases require more than the insured's simple use of, or presence in, the vehicle at the time of the injury. Id.

In Heritage Mutual, mentioned above, approximately a dozen children were transported in an insured church van to a skating rink. On the return trip, some of the children, who were not wearing available seatbelts, began to engage in horseplay, which included throwing ice and climbing over seats. During this horseplay one of the children was seriously injured when another child hit him in the head. Heritage Mutual, 657 So. 2d

at 926.

The Heritage Mutual court held that the facts of the case satisfied the requirement of causal connection between the van and the injuries. The van was not merely the situs of the injuries. Rather, its purpose was to transport church members, including children, to and from various events, such as the skating rink outing. The court noted that children quickly become rambunctious when confined in a vehicle, and they are unlikely to sit quietly, even with seat belts fastened. Such behavior would be even more likely after an outing to an ice rink. In short, the court held that the van was used for a purpose that would set in motion a chain of events ending in an incident such as one that caused the injuries. Id. at 927.

a. Defining the "Insured" Persons and Vehicles

Automobile insurance policies may cover resident relatives as well as the insured. See Taylor v. USAA, 684 So. 2d 890 (Fla. 5th DCA 1996) (extending coverage to child away at college); Swift v. Century Ins. Co. of N.Y., 264 So. 2d 88 (Fla. 3d DCA 1972) (holding that coverage does not extend to legally separated spouses). However, much like homeowner's policies, an automobile policy will often use a "family exclusion" clause to make coverage inapplicable to bodily injury to the insured and resident relatives. See Auto Owners Ins. Co. v. Van Gessel, 665 So. 2d 263 (Fla. 2d DCA 1995); Mitchell v. State Farm Mutual Auto Ins., 678 So. 2d 418 (Fla. 5th DCA 1996). Additionally, automobile policies may provide coverage to named "omnibus" insureds, who are persons *permitted* to use the motor vehicle. This provision protects the owner from vicarious liability, and the permitted driver from direct liability. If the permitted driver is independently insured, both the owner's and operator's insurers will owe a duty to defend, and indemnification will depend on the respective policies' relevant provisions.

The insured vehicle is that which is listed under the policy. However, the insured persons will also usually receive coverage when operating a temporary, substitute vehicle. See, e.g., Carter v. Peninsular Fire Ins. Co., 411 So. 2d 960 (Fla. 3d DCA

1982) (holding that coverage did not extend to regular use, ten to twenty days per month over a three to four month period, of company vehicle). Moreover, under a common provision called the "automatic insurance clause,"an accident in a newly purchased vehicle will be covered *if* the insured gives written notice of its addition to the insurer within thirty days of purchase. See Rabatie v. U.S. Security Ins. Co., 581 So. 2d 1327 (Fla. 3d DCA 1991).

At least two Florida courts have held that auto policies that left the term "auto" undefined provided coverage for injuries caused by golf carts. See Herring v. Horace Mann Ins. Co., 795 So.2d 209 (Fla. 4th DCA 2001); Fireman's Fund Ins. Cos. v. Pearl, 540 So.2d 883 (Fla. 4th DCA 1989).

1) Rental Vehicles/Coverage Layers

In cases where an alleged active tortfeasor does not own the vehicle that she was negligently operating, Florida's financial responsibility laws mandate that the first layer of coverage must come from the insurer of the owner of the vehicle. These laws, sections 324.151(1)(a) and 324.021(7), Florida Statutes, require that an owner of a motor vehicle in Florida provide a minimum of $10,000 in coverage. Allstate Ins. Co. v. Fowler, 480 So.2d 1287 (Fla.1985). This liability for primary coverage cannot be avoided by a private contract. Roth v. Old Republic Insurance Co., 269 So.2d 3 (Fla.1972).

When the tortfeasor is driving a leased vehicle, the lessor may shift the burden of primary insurance coverage to the lessee pursuant to section 627.7263, Florida Statutes (2001). If the lease does not shift coverage, section 627.7263 limits the owner's insurer's responsibility to $10,000 per person, but the owner/lessor must provide the first layer of coverage in this amount. Fowler, 480 So. 2d at 1290; Maryland Casualty Co. v. Reliance Insurance Co., 478 So.2d 1068 (Fla.1985).

As for the second layer of coverage, an insurer of a party who is only vicariously liable and entitled to indemnity is entitled to follow the insurer of the actively negligent party even if the active tortfeasor's policy contains an "other insurance" clause. See

Fowler, 480 So. 2d at 1290.

Some policies contain an "escape clause" that allows a rental company's insurer to avoid secondary coverage. Such a clause covers a person operating a car with the owner's permission, but only where the person has no other valid and collectible insurance was available, either on a primary or excess basis. See Maryland Casualty, 478 So.2d at 1071.

b. Coverage Exclusions

1) Garage Owner's Exclusion

Although an insured certainly "permits" an auto repair shop to operate the insured vehicle, the shop or garage is not among the "omnibus insured" receiving extended coverage. See Dixie Automobile Ins. Corp. v. Mason, 155 So. 2d 172 (Fla. 1st DCA 1963). This exclusion applies to all aspects of the automobile business, including parking operations, leasing, sales, etc. See Colonial Penn Insurance Co. v. Castillo, 362 So. 2d 88 (Fla. 3d DCA 1978). Perhaps surprisingly, if the automobile business does not have its own insurance policy to handle this coverage gap, the business owner's personal automobile policy will not provide coverage. See Dixie Automobile Ins. Corp., 155 So. 2d 172 (Fla. 1st DCA 1963).

2) Employee Exclusion

An insured's employee, including non-regular and incidental employees but not independent contractors, is likely to be independently covered under worker's compensation, and thus excluded from automobile insurance coverage. See Griffin v. Speidel, 179 So. 2d 569 (Fla. 1965). Similarly, an insurance policy may exclude coverage of an insured's employee for bodily injuries caused to or by a fellow employee. See Ron Burton, Inc. v. Vilwock, 477 So. 2d 596 (Fla. 4th DCA 1985); Dodge v. Fidelity & Cas. Co. of N.Y., 424 So. 2d 39 (Fla. 5th DCA 1983); Aetna Fire Underwriters Ins. Co. v. Williams, 422 So. 2d 7 (Fla. 2d DCA 1982).

2. What Automobile Insurance Policies Cover: Part II

Automobile policies are required by Florida Statutes Section 627.727 to give the insured the option of "uninsured and under-insured motorists coverage" ("UM coverage"), in an amount equal to or exceeding the bodily injury coverage purchased by an insured. This means that, unless the insured reduces or waives the coverage, the insurer will compensate the insured for bodily injury or wrongful death caused by UM negligence. See Fla. Stat. § 627.727. Most UM policies specifically extend coverage for "damages for accidents that arise from ownership, maintenance, or use of an uninsured vehicle," and the Supreme Court has construed this clause to cover, additionally, injury due to an uninsured motorist's *intentional* acts. See Race v. Nationwide Mutual Fire Insurance Co., 542 So. 2d 347 (Fla. 1989).

a. Persons Insured

"Class I Insureds" include the named insured and resident relatives, and are covered "whenever and wherever bodily injury is inflicted" upon them. See Mullis v. State Farm Mutual Auto. Ins. Co., 252 So. 2d 229 (Fla. 1971). "Class II Insureds" include permissive operators and occupants of an insured vehicle, and are covered only as to the insured vehicle. See Travelers Ins. Co. v. Pac, 337 So. 2d 397 (Fla. 2d DCA 1976).

b. Basis for Recovery

An insured person may recover UM benefits if (1) he or she was injured by an uninsured motor vehicle and (2) he or she is legally entitled to recover from the uninsured vehicle's operator. See Allstate Ins. Co. v. Boynton, 486 So. 2d 552 (Fla. 1986).

The definition of "uninsured motor vehicle" includes vehicles that carry insufficient coverage in proportion to total legal liability, and those that exclude coverage for non-family member operation of an insured vehicle. See Fla. Stat. § 627.727(3). "Phantom" vehicles, uninsured motorcycles, and vehicles insured by insolvent companies may also fall under the definition of uninsured vehicle. See Brown v. Progressive Mutual Ins. Co., 249 So. 2d 429 (Fla. 1971); Standard Marine Ins. Co. v. Allyn, 333 So. 2d 497 (Fla. 1st DCA 1976). However, UM benefits will not be recoverable if either owner or driver of the at-fault vehicle carries insurance, or if the accident is caused by a self-insured

vehicle or by a combination of insured and uninsured vehicles. See, e.g., McKinnie v. Progressive Amer. Ins. Co., 488 So. 2d 825 (Fla. 1986); Gen'l Acc. Fire & Life Assur. Corp. v. Means, 362 So. 2d 135 (Fla. 2d DCA 1978); Centennial Ins. Co. v. Wallace, 330 So. 2d 815 (Fla. 3d DCA 1976).

Most policies preclude an insured from recovering for both liability and UM coverage under same policy. See Brixius v. Allstate Ins. Co., 589 So. 2d 236 (Fla. 1991) (upholding preclusion as proper). Also, a tortfeasor's absolute statutory immunity from liability will preclude UM benefits, even if the motor vehicle at issue qualifies as uninsured. See Allstate Ins. Co. v. Boynton, 486 So. 2d 552 (Fla. 1986). However, the mere qualified immunity of a tortfeasor is not a sufficient basis for the UM carrier to limit UM benefits. See Michigan Millers Mutual Ins. Co. v. Bourke, 607 So. 2d 418 (Fla. 1992).

C. General Liability

1. What Comprehensive General Liability Policies Cover

CGL policies typically provide two basic coverages, Coverage A, "bodily injury" or "property damage," and Coverage B, "personal and advertising injury."

Coverage A generally provides as follows:

1. Insuring Agreement
    a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. . . .
    b. This insurance applies to "bodily injury" and "property damage" only if:
    (1) The "bodily injury" or "property damage" is caused by an "occurrence" . . . .

An occurrence means an "accident," and refers to events not normally expected, usual, or anticipated. See CTC Development Crp., Inc. v. State Farm Fire & Cas. Co.,

704 So. 2d 579 (Fla. 1st DCA 1997).

Florida appears to follow the majority rule that "bodily injury" encompasses only physical harm. See Allstate Ins. Co. v. Clohessy,32 F.Supp.2d 1333, 1336 (M.D.Fla.1998) (citing Citizen's Ins. Co. of Am. v. Leiendecke, 962 S.W.2d 446, 452 (Mo.App.1998);State Farm Fire & Cas. Co. v. Hiermer, 720 F.Supp. 1310, 1315 (S.D.Ohio 1988); American & Foreign Ins. Co. v. Church Schools in Diocese of Va., 645 F.Supp. 628, 632 (E.D.Va.1986); St. Paul Fire & Marine Ins. Co. v. Campbell Co. Sch. Dist. No. 1, 612 F.Supp. 285, 287 (D.Wyo.1985) Rolette County v. Western Cas. & Sur. Co., 452 F.Supp. 125, 130 (D.N.D.1978); Bowman v. Holcomb, 83 Ohio App.3d 216, 614 N.E.2d 838, 841 (Ohio App.1992); Trinity Universal Ins. Co. v. Cowan, 945 S.W.2d 819, 823 (Tex.1997)).

Florida courts have held that allegations of intentional discrimination are excluded from occurrence-based coverage as well as by Florida public policy. See Ranger Ins. Co. v. Bal Harbour Club, Inc., 549 So. 2d 1005 (Fla. 1989); see also State Farm Fire and Casualty Co. v. Compupay, Inc., 654 So. 2d 944, 946-47 (Fla. 3d DCA 1995) (holding that acts of sexual harassment and discrimination, which were directed toward the injured person, were intentional acts that fell outside the definition of "occurrence"); Windmill Pointe Village Club Ass'n, Inc. v. State Farm General Ins. Co., 779 F. Supp. 596, 597 (M.D. Fla. 1991) (upholding an insurer's coverage denial in a case involving allegations that an insured intentionally violated the Fair Housing Act by discriminating against individuals on the basis of race and familial status).

In Ranger, the Florida Supreme Court held that the public policy of the state of Florida prohibits an insured from being indemnified for a loss resulting from an intentional act of religious discrimination. See id. at 1009. In reaching its holding the court distinguished intentional from unintentional discrimination, finding that unintentional discrimination is clearly a legitimate business risk and as such is insurable. Id. at 1006.

Unlike the general insurance policy, where coverage is stated in very broad terms and subject to clearly defined exceptions, personal injury coverage is "buil[t] from the

ground up and affords coverage only for defined risks." City of Delray Beach, Fla. v. Agriculture Ins. Co., 85 F.3d 1527, 1534 (11th Cir. 1996) (citing County of Columbia v. Continental Ins. Co., 189 A.D.2d 391, 595 N.Y.S.2d 988, 991 (1993)). The typical policy defines "personal and advertising injury" as a list of offenses or torts, such as libel and slander and wrongful eviction.

a. Insured Operations

Some policies limit coverage to occurrences arising out of the insured's operations. The "operations site" is generally construed broadly, including not only the immediate work area, but also the area of performance of a contracted service, routine locations for work completion, necessary travel areas, break rooms, etc. See Container Corp. of America v. Maryland Cas. Co., 707 So. 2d 733 (Fla. 1998). In Brevard Sec. Patrol, Inc. v. Pugh, 462 So. 2d 1170 (Fla. 5th DCA 1984), the court held that a policy did not cover a security company employee who chased a driver who hit his employer's vehicle and fled, because it was not the company's business to chase errant drivers.

The following is an example of an additional insured endorsement to a contractor's policy that limits coverage to the insured's operations:

> WHO IS AN INSURED (Section II) is amended to include as an insured the person or organization shown in the Schedule, but only with respect to liability arising out of your ongoing operations performed for that Insured.

Florida courts have followed cases from other jurisdictions holding that the term "operations" in an additional insured clause is ambiguous, and therefore, must be construed in favor of the insured. Consequently, the courts have not limited coverage to cases where the additional insured would be vicariously liable for the insured's negligence. In other words, additional insured status is afforded even if the named insured is not responsible for the accident. See Florida Power & Light Co. v. Penn America Ins. Co., 654 So. 2d 276, 279 (Fla. 4th DCA 1995), approved, Container Corp. of America v. Maryland Casualty Co., 707 So. 2d 733 (Fla. 1998).

The Florida Power court relied on McIntosh v. Scottsdale Ins. Co., 992 F.2d 251

(10th Cir. 1993), which construed an additional insured provision affording coverage "only with respect to liability arising out of operations performed for [the additional insured] by or on behalf of the named insured." Id. at 254. The facts of McIntosh are instructive.

McIntosh involved a personal injury suit brought by a plaintiff who suffered injuries from a fall on the premises of the City of Wichita's convention facilities during a festival. The festival was run by a non-profit corporation, Wichita Festivals, Inc. ("Festivals"). The City of Wichita ("Wichita") was listed as an additional insured on Festivals's insurance policy. While attending a street dance sponsored by Festivals at Wichita's convention facilities, the plaintiff sought one of the portable toilets Festivals provided for its patrons. In doing so, he left the public pathway to take a more direct route and encountered a low retaining wall, which separated the pathway from the entrance to Wichita's underground garage. The plaintiff jumped over the wall, fell approximately twenty feet, and suffered several injuries. The plaintiff sued Wichita in state court, and Wichita stipulated that it was 100% at fault. Id. at 252.

The McIntosh court held that under these circumstances, Wichita was an additional insured under Festivals's policy. First, the court concluded that the phrase "but only with respect to liability arising out of [Festivals's] operations" was ambiguous as to whose negligence is covered. Consequently, the language had to be construed against the insurer and could not be limited to cases where Wichita was held vicariously liable for Festivals's negligence. The court followed rulings from other jurisdictions holding that additional insurance clauses covered the additional insured for its own negligence. Id. at 254-255 (citing Philadelphia Elec. Co. v. Nationwide Mut. Ins. Co., 721 F. Supp. 740, 742 (E.D. Pa. 1989); Casualty Ins. Co. v Northbrook Property & Casualty Ins. Co., 501 N.E.2d 812, 815 (Ill. App. Ct. 1986); Dayton Beach Park No. 1 Corp. v. National Union Fire Ins. Co., 175 A.D.2d 854, 573 N.Y.S.2d 700, 701 (N.Y. App. Div. 1991)).

The court further concluded that Wichita's liability "arose out of" Festivals's operations. Noting that the phrase imparted a more liberal concept than proximate cause, the court concluded that the facts clearly demonstrated the requisite causal connection. It

was undisputed that the plaintiff was injured while walking from a dance sponsored by Festivals to portable toilets set up by Festivals. Consequently, the injuries and the Wichita's liability "arose out of" Festivals's operations. Id. at 255.

b. Completed Operations

The general comprehensive policy may additionally cover occurrences arising out of completed operations. Similar to a products liability insurance policy, this policy covers materials, parts or equipment provided in connection with the insured's operations, if the injury or damage occurs after completion or abandonment of operations**,** and away from premises owned or rented by the insured. See Greenway Village South Condominium Associations I, II, III, and IV, Inc. v. Roach, 397 So. 2d 954 (Fla. 4th DCA 1981).

d. Unfair Competition

Protection against unfair competition applies only to actions affecting competitors, rather than to any unfair act of any commercial enterprise, which boundless definition would expand liability beyond reason. See Practice Management Assocs., Inc. v. Old Dominion Ins. Co., 601 So. 2d 587 (Fla. 1st DCA 1992).

3. Coverage Exclusions

a. Intentional Acts

Courts typically interpret the intentional acts exclusion in conjunction with the definition of an "occurrence." An incident that does not qualify as an accident often can be excluded as an intentional act. The usual exclusion provides as follows:

> This insurance does not apply to:
>
> a. Expected or Intended Injury
>
> "Bodily injury" or "property damage" expected or intended from the standpoint of the insured. . . .

Difficult coverage questions arise in cases of negligent supervision or retention. In State Farm Fire & Casualty v. Compupay, Inc., 654 So. 2d 944 (Fla. 3d DCA 1995), an insured employer was sued for negligent retention of one of its male supervisors.

The plaintiff alleged that the employer knew that the supervisor sexually harassed other employees. According to the complaint, the plaintiff had allegedly repeatedly complained to the employer about the harassment and, despite such complaints, the employer had acted with deliberate indifference to the situation. In finding that the insurer had no duty to defend, the court concluded that the employer's alleged history of deliberate indifference to a known wrong being perpetrated against the plaintiff foreclosed the employer's contention that the harassment was "unexpected" and hence, an "occurrence" under the policy.

In Sunshine Birds & Supplies, Inc. v. United States Fidelity & Guaranty Co., 696 So. 2d 907 (Fla. 3d DCA 1997), the same court reached the opposite conclusion under similar facts. In that case, the parents of two minor children sued USF&G's insured alleging that two of the insured's employees sexually molested the children on the insured's business premises during non-business hours. The complaint alleged, among other things, that the insured employer either knew of the potential for child abuse and acted indifferently, or alternatively, the employer had no actual knowledge of the abuse but could have learned of it and taken remedial steps with the exercise of due care. See id. at 908, 911. The plaintiffs also brought claims for negligent hiring, retaining, training, and supervising the employees. See id. at 908.

USF&G sought a declaratory judgment and asserted that the allegations of its insured's actual knowledge of the abuse precluded such acts from being an "occurrence" and that the intentional acts exclusion barred coverage. Citing Compupay, the court first held that if discovery revealed that the insured had actual knowledge of the abuse, there would be no duty to indemnify. If, however, the insured had no actual knowledge but acted negligently in failing to learn of the abuse, the policy would provide coverage since the allegations were simple negligence. Because the complaint alleged both covered and non-covered scenarios, the insurer owed a duty to defend. See id. at 907 (citing Grissom v. Commercial Union Ins. Co., 610 So. 2d 1299, 1307 (Fla. 1st DCA 1992) (insurer must defend where complaint alleges facts that are partially within

coverage and partially outside coverage)).

Thus, the rule, if any, to be gleaned from the two cases is that if the employer allegedly had actual knowledge of the propensity for misconduct, there likely is no coverage in accordance with the Compupay decision. If, on the other hand, the employer allegedly had no actual knowledge of misconduct but unreasonably failed to discover it, there could be a covered occurrence under Sunshine Birds.

b. Pollution Exclusion

CGL policies commonly provide an absolute pollution exclusion, which denies coverage for personal injuries caused by, for example, "the discharge, dispersal, release or escape" of any "irritant" or "contaminant." See Deni Associates of Florida, Inc. v. State Farm Fire & Cas. Ins. Co., 711 So. 2d 1135 (Fla. 1998) (upholding policy as unambiguous despite failure to define irritant or contaminant). The absolute pollution exclusion is not limited to environmental or industrial pollution, or to generally toxic substances, but may include non-environmental routine accidents and substances that are only toxic under special circumstances. Id.

Contrast this exclusion with the much-litigated exclusion allowing coverage if the damage-causing release of pollutants is "sudden and accidental," i.e., abrupt and unexpected. See Dimmitt Chevrolet, Inc. v. Southeastern Fidelity Ins. Corp., 636 So. 2d 700 (Fla. 1993); Hudson Ins. Co. v. Double D Management Co., Inc., 768 F.Supp. 1549 (M.D. Fla. 1991). Under Florida law, the actual discharge, not the resulting contamination or damages, must occur "suddenly and accidentally" in order for the exception to apply. See LaFarge Corp. v. Travelers Indem. Co., 118 F.3d 1511 (11th Cir. 1997).

c. Inadequate Performance Exclusion

Many policies exclude liability resulting from defective workmanship, construction, or breach of warranty by the insured. See U.S. Fire Ins. Co. v. Meridian of Palm Beach Condominium Ass'n, Inc., 700 So. 2d 161 (Fla. 4th DCA 1997); see also Hawk Termite & Pest Control, Inc. v. Old Republic Ins. Co., 596 So. 2d 96 (Fla. 3d DCA

1992) (construing policy exclusion based on failure of insured's work to satisfy "the level of performance, quality, fitness, or durability warranted or represented by the insured"). In Liberty Mut. Ins. Co. v. Capaletti Bros. Inc., 699 So. 2d 736 (Fla. 3d DCA 1997), the court reviewed a policy endorsement that excluded liability arising out of any act or omission of the additional insured other than its general supervision of work by the named insured, and found that coverage did not extend to a general contractor's non-supervisory acts of negligence.

d. Impaired Property Exclusion

An impaired property exclusion prevents the insured from claiming economic losses caused by insured's work or work product. The exclusion applies if the complaint alleges solely economic damages resulting from an impaired product, if the complaint does not allege damage to other property, and if the economic loss did not result from sudden and accidental injury to the product. See Transcontinental Ins. Co. v. Ice Systems of America, Inc., 847 F. Supp. 947 (M.D. Fla. 1994). In a case involving defective bobbin sleeves, for instance, the costs of replacing the sleeves themselves were properly excluded, but costs of segregating, de-sleeving and re-sleeving the yarns were not. See Aetna Cas. & Sur. Co. v. Monsanto Co., 487 So. 2d 398 (Fla. 1st DCA 1986).

e. Hazards Exclusions

1) Products Hazards

A comprehensive general liability policy specifically denies the coverage usually assumed under products liability policies through a "products hazards exclusion." See Transcontinental Ins. Co. v. Ice Systems of America, Inc., 847 F. Supp. 947 (M.D. Fla. 1994). For the exclusion to apply: (1) the merchandise involved must be a "product"; (2) the insured must relinquish possession of the product; and (3) injury or damage must occur away from the insured's premises. See Old Republic Ins. Co. v. Sheridan, 407 So. 2d 619 (Fla. 4th DCA 1981) (holding that land is not a "product"); Miller Electric Co. v. Employers Liability Assur. Corp., 171 So. 2d 40 (Fla. 1st DCA 1965); K-C Manufacturing Co. v. Shelby Mutual Ins. Co., 434 So. 2d 1004 (Fla. 1st DCA 1983).

2) Completed Operations Hazards

The "completed operations hazard exclusion" differs from the products hazard exclusion only in that it does not require the existence of a "product," but rather depends on completion of the more general "operations." See Greenway Village South Condominium Ass'n. I, II, II, and IV, Inc. v. Roach, 397 So. 2d 954 (Fla. 4th DCA 1981) (holding that exclusion did not apply where actual damage occurred before last nail was driven in building construction).

3) Collapse Hazards

General comprehensive liability policies intended for construction companies often seek to exclude coverage for damages caused by the collapse of a building. See Florida Ins. Guar. Ass'n v. Sechler, 478 So. 2d 365 (Fla. 5th DCA 1985). However, a policy excluding "collapse hazards" from coverage must expressly and clearly define the types of structural property damage to be excluded. See id. (holding exclusion applied because the policy specifically listed excavation and pile-driving among hazards); see also Fontainebleau Hotel Corp. v. United Filigree Corp., 298 So. 2d 455 (Fla. 3d DCA 1974) (holding exclusion did not apply where "premature removal of shoring" was not listed among the hazards).

f. Designated Premises Exclusion

Similar to the insured operations coverage, some policies will exclude coverage for accidents not occurring on the insured's "designated premises." Florida courts addressing this exclusion have focused on the issue of whether an incident arose out of operations that did not take place on the designated premises, but allegedly were incidental to the ownership, maintenance or use of those premises.

In Southeast Farms, Inc. v. Auto-Owners Ins., 714 So.2d 509 (Fla. 3d DCA 1998), the court decided the issue against an insurer. In Southeast Farms, a truck carrying a load of potatoes, which the insured had brokered, was involved in a fatal accident in Virginia. The insured asked the insurer to provide a defense. The insurer refused, asserting that it had no duty to defend under the terms of an endorsement to the broker's commercial

general liability policy entitled "Limitation of Coverage to Designated Premises or Project." The policy provided that the insurance applied only to bodily injury, property damage, personal injury, advertising injury and medical expenses arising out of "[t]he ownership, maintenance or use of the premises shown in the Schedule and operations necessary or incidental to those premises[.]" The only premises listed in the insurance contract were the insured's two offices in Hastings and Florida City, both in Florida.

The trial court found that the policy was a designated premises policy. The trial court also found that the automobile accident did not involve ownership, maintenance or use of the "premises" specified in the policy and it was not incidental to the insured's business of acting as produce brokers. Therefore, the court concluded that the insurer had no duty to defend or indemnify the insured and entered summary judgment accordingly.

The appellate court reversed, holding that the policy was ambiguous. The court stated that the root of the problem was the lack of clarity as to whether the policy was a general liability policy or a premises liability policy. The court stated that while the policy was labeled a commercial general liability policy, the insurer attempted to turn it into a premises liability policy by endorsement. The court held that the ambiguity surrounding the endorsement must be resolved in favor of coverage. The court then reversed the trial court's entry of summary judgement and remanded for entry of judgment in favor of the insured.

The Southeast Farms decision depended in large part on the insurer's concession that the policy provided coverage for matters incidental to the insured's business, as opposed to operations on the insured premises. See id. at 511. In light of this concession, the court had little difficulty finding that the act of obtaining transportation for brokered potatoes in an incident of potato brokering. Id.

Other courts have held that coverage is excluded. Parliament Ins. Co. v. Bryant, 380 So.2d 1088 (Fla. 3d DCA 1980) involved an injury arising out of an insured marine company's demonstration boat ride. The policy at issue was an "owners', landlords', and tenants'" policy. The language of the policy was virtually identical to that contained in

the Southeast Farms policy. However, the policy had an additional exclusion which stated specifically that the policy did not apply to injury or damage which occurred away from the insured premises.

The issue was whether the boat ride, which of necessity occurred away from the insured's premises, was covered under the policy. The court found the exclusion language to be clear and unambiguous and excluded coverage for situations where the insured was engaged in activities away from the insured's premises. The court pointed out that the policy at issue was not a general liability policy, but a premises liability policy which set out the premium based on the 5,000 square feet of land upon which the marine company conducted business.

Home Ins. Co. of Manchester v. Phillips, 815 F. Supp. 1471 (S.D. Fla. 1993), affirmed, 26 F.3d 1121 (11th Cir. 1994), involved an "Owners', Landlords' and Tenants'" insurance policy for an airport's designated premises. The only issue before the court was whether the insurance policy covered injuries sustained when an airplane crashed outside the premises of the airport.

The injured parties argued that the policy covered their injuries because the crash was an occurrence arising out of the operations necessary and incidental to the use of the property. They argued that the maintenance, service and inspection of the aircraft are operations necessary and incidental to the use of the airport. Because the crash resulted from the negligent maintenance, service and inspection of the aircraft, the injured parties concluded that their injuries should be covered by the policy.

The court found that because the actions taken on the premises were not an immediate cause of the injuries, the policy did not provide coverage for their injuries. The court noted that the "necessary or incidental" language could not be used to convert a premises liability policy to a general liability policy.

D. Directors & Officers Liability Policies

1. What Directors & Officers Liability Policies Cover

Typically, a directors & officers ("D&O") policy compensates directors and officers of a business entity, who are not otherwise insured by the company, for financial loss that results from the rendering of professional services within the scope of their respective duties. See Lime Tree Village Community Club Ass'n, Inc. v. State Farm General Ins. Co., 980 F.2d 1402 (11th Cir. 1993); U.S. Fidelity and Guar. Co. v. Buckner, 425 So. 2d 1160 (Fla. 3d DCA 1983).

2. Who is "an Insured"?

The D&O liability policy covers both the business entity itself and its subsidiary entities, as well as directors and officers of the insured. Typical policy language may define directors and officers, in the context of both publicly-held and private corporations and other entities, as "all past, current or prospective duly elected or appointed directors and officers of the insured corporation and their foreign equivalents for the company's operations outside the United States, including their estates, heirs, legal representatives, or assigns in the event of their death, incapacity or bankruptcy." A spouse of a director or officer may also be covered for claims based (1) on the spouse's legal status or joint ownership of property and (2) on the director's or officer's wrongful act. For purposes of a securities claim, coverage extends to all past, present, and future company employees.

3. Defining "loss"

A policy may appropriately define "loss" as any amount the insureds are legally obligated to pay for claims of "wrongful acts," defined as any alleged or actual breaches of duties. See International Ins. Co. v. Johns, 74 F.2d 1447 (11th Cir. 1989); Lime Tree Village Community Club Ass'n, Inc., 980 F.2d 1402 (11th Cir. 1993) (requiring insurer to defend where factual allegations suggested liability could be based on error or breach of duty rather than intentional acts and discrimination). Additionally, a "loss" may exist where officers and directors receive undue profit, or where their obligation to pay a settlement shortens employment, translating to reduced compensation. See International Ins. Co. v. Johns, 74 F.2d 1447 (11th Cir. 1989) (holding that a policy's exclusion for

"losses resulting from remuneration received without shareholder approval" was inapplicable where a disinterested board's ratification negated need for shareholder approval).

D&O policies typically cover claims for breach of fiduciary duty, securities claims, certain employee-related claims, antitrust violations, and breaches of contract. In short, the policies are a type of errors and omissions coverage for corporate directors and officers.

4. Common Policy Exclusions

a. Illegal, Fraudulent, or Ultra Vires Acts

D&O insurance policies will not extend coverage to directors and/or officers who act illegally, fraudulently, and outside of company authority to commit wrongful acts. See U.S. Fidelity and Guar. Co. v. Buckner, 425 So. 2d 1160 (Fla. 3d DCA 1983) (upholding coverage denial for allegations that board members conspired to injure medical practice of plaintiff physicians). Application of this exclusion does not require criminal conviction unless the exclusion's terms are specifically conditioned on a judgment or other final adjudication. See Gardner v. Cumis Ins. Soc. Inc., 582 So. 2d 1094 (Ala. 1991) (finding that exclusion applied because fiduciary duty was breached, even though corporate officer was acquitted of criminal charges); Graham v. Preferred Abstainers Ins. Co., 689 So. 2d 188 (Ala. Civ. App. 1997).

b. Dishonest Acts

Similarly, a "dishonesty exclusion" will allow an insurer to avoid liability for a loss that is contributable to an officer's or director's dishonest acts. See First Nat. Bank Holding Co. v. Fidelity and Deposit Co. Of Maryland, 885 F. Supp. 1533 (N.D. Fla. 1995) (holding that policy precluded coverage for losses of bank holding company where principal's dishonesty contributed to claim).

E. Professional Liability Policies

1. What Professional Liability Insurance Policies Cover

The typical professional liability policy covers claims arising from professional services. An example of common policy language reads as follows:

> To pay on behalf of the insured all sums which the insured shall become obligated to pay by reason of the liability imposed upon him by law for damages resulting from any claim made against the insured arising out of the performance of professional services for others in the insured's capacity as a lawyer . . . and caused by any act, error or omission of the insured or any other person for whose acts the insured is legally liable.

Jefferson-Pilot Fire & Casualty Co. v. Boothe, Prichard & Dudley, 638 F.2d 670, 673-674 (4th Cir. 1980).

a. What are "professional services"?

The courts have construed these policies to provide coverage to lawyers for acts or omissions in addition to traditional malpractice. For example, the court in Boothe, Prichard held that a professional liability policy covered allegations that a law firm violated antitrust laws by conspiring with other attorneys to fix fees by adhering to a local fee schedule. Id. at 674. As one Florida court noted in holding that a policy covered a doctor's suit against a lawyer for failing to pay an expert witness fee, the policy requires the insurer to defend and indemnify not only against suits for something the lawyer should or should not have done, but also for something he should have done and did do while representing a client. Transamerica Ins. Co. v. Rutkin, 218 So. 2d 509, 510 (Fla. 3d DCA 1969).

Covered "professional services" do not include providing investment advice and acting as a business agent. General Accident Ins. Co. V. Namesnik, 790 F.2d 1397 (9th Cir. 1986). Similarly, it has been held that allegations that an insured failed to pay another lawyer outstanding fees did not arise out of the insured's acts or omissions in rendering professional services. Cohen v. Empire Casualty Co., 771 P.2d 29 (Colo. App. 1989). On the other hand, if investing or handling clients' funds is connected with legal representation, the activity may be covered. See Continental Casualty v. Burton, 795 F.2d 1187 (4th Cir. 1986) (holding that a policy covered a claim arising out of a lawyer's conduct in investing his clients' funds in connection with settling an estate); Regas v. Continental Casualty Co., 487 N.E.2d 105 (Ill. App. 1985) (holding that lawyers' conduct

in writing an escrow check for their client was covered).

In addition, allegations that a lawyer engaged in sexual assault likely will not be covered. Bertignolli v. Ass'n of Trial Lawyers Assurance, 934 P.2d 916 (Colo. App. 1997).

Sanctions against a lawyer also are not typically covered. The definition of "damages" in professional liability policies usually specifically excludes sanctions. See, e.g., Dixon v. Home Indemnity Co., 426 S.E.2d 381 (Ga. App. 1992).

b. Typical Exclusions

1) Fraud or dishonesty

Most professional liability policies exclude from coverage "any dishonest, fraudulent, criminal act or omission of the insured . . ." Continental Casualty Co. v. Burton, 795 F.2d 1187, 1191 (4th Cir. 1986). An example of excluded dishonest conduct is found in Federal Deposit Ins. Corp. V. Mmahat, 907 F.2d 546 (5th Cir. 1990), where a jury held that a law firm breached its fiduciary duty in advising its savings and loan client to make bad loans. The court held that the firm acted dishonestly and its conduct was therefore excluded from coverage.

This exclusion is narrowly construed. See Boothe, Prichard, 638 F.2d at 674 (holding that antitrust allegations did not necessarily fall within the exclusion). There usually must be some clear allegation of fraud or dishonesty. In Sibley v. National Union Fire Ins. Co., 921 F. Supp. 1526 (E.D. Tex. 1996) for example, the court held that a lawyer's alleged RICO violations based on predicate violations of bankruptcy fraud and mail fraud did not obligate an insurer to defend, but allegations that the lawyer violated the Louisiana Unfair Trade Practices Act, which does not require a showing of fraud, obligated the insurer to provide a defense.

2) Business enterprise

Another common exclusion precludes coverage when a lawyer is sued in his capacity as a partner, owner, officer, director or employee of a separate business. This exclusion is intended to prevent an attorney from suing himself for professional errors that

he committed while performing professional services for a business that he owned or controlled. Continental Casualty Co. v. Cole, 809 F.2d 891, 896 (D.C. Cir. 1987). When claims are based upon business transactions not associated with the practice of law, courts typically find that liability for such claims is excluded. See Home Ins. Co. v. Walsh, 854 F. Supp. 458 (S.D. Tex. 1994) (holding that a claimant's loss, if any, was caused by his lawyer's company's failure to fund a loan, not from any special risks inherent in the practice of law); Potomac Ins. Co. v. McIntosh, 804 P.2d 759 (Ariz. Ct. App. 1990) (holding that losses attributable to a partnership's failure were excluded).

c. Claim Must Be Made and Reported in the Policy Period

Professional liability policies are usually "claims made" policies, as opposed to "occurrence" policies. That is, the policy provides coverage only when a claim is made against the insured during the policy period, regardless of when the conduct actually occurred. See Nat'l Union Fire Ins. Co. v. Baker & McKenzie, 997 F.2d 305 (7th Cir. 1993). A formal lawsuit is usually not required to constitute a claim, but there must be more than a request for an explanation of the lawyer's conduct. See Phoenix Ins. Co. v. Sukut Constr. Co., 136 Cal. App. 3d 673, 186 Cal. Rptr. 513 (1982).

When a claim is made, most policies require the lawyer to report it to the insurer within the policy period. In Baker & MacKenzie, the court held that there was no coverage for a claim made during the policy period because the lawyers did not report the claim until after the policy period. See Baker & MacKenzie, 997 F.2d at 307.

Many policies also contain an "awareness provision" which extends coverage for claims made outside the policy period if, during the policy period, the insured notifies the insurer of acts, errors or omissions which would reasonably be expected to give rise to a claim. U.S. Liability Ins. Co. v. Johnson & Lindberg, P.A., 617 F. Supp. 968, 971 (D. Minn. 1985).

In addition, some insurers allow insureds, for a substantial premium, to purchase an endorsement for an "extended discovery period." Insureds typically are permitted to purchase these endorsements only near the end of the policy period. This extended

discovery period permits the insured to continue coverage for claims made after the policy period but which arise out of acts, errors or omissions that took place during the policy period. Id.

VI. ETHICAL CONSIDERATIONS

A. Rules of Professional Conduct

Under the Florida Bar's Rules of Professional Conduct, a lawyer must fully disclose to the client the ramifications the lawyer-insurer relationship, protect client confidentiality, and avoid conflicts of interest.

Rule 4-1.8(j) mandates that attorneys who represent insureds at the expense of an insurance company must provide the insured with a "Statement of Insured Client's Rights" at the commencement of representation. This statement applies to personal injury and property damage tort cases, including product liability cases. The lawyer must sign the statement, certifying the date it was provided to the insured, and retain a copy of the signed statement for six years after the completion of the representation. Although the insured client is not required to sign the statement, a lawyer is wise to obtain a signature to avoid future disputes. The model provided by the Florida Bar reads as follows:

STATEMENT OF INSURED CLIENT'S RIGHTS

An insurance company has selected a lawyer to defend a lawsuit or claim against you. This Statement of Insured Client's Rights is being given to you to assure that you are aware of your rights regarding your legal representation. This disclosure statement highlights many, but not all, of your rights when your legal representation is being provided by the insurance company.

1. *Your Lawyer*. If you have questions concerning the selection of the lawyer by the insurance company, you should discuss the matter with the insurance company and the lawyer. As a client, you have the right to know about the lawyer's education, training, and experience. If you ask, the lawyer should tell you specifically about the lawyer's actual experience dealing with cases similar to yours and give you this information in writing, if you request it. Your lawyer is responsible for keeping you reasonably informed regarding

the case and promptly complying with your reasonable requests for information. You are entitled to be informed of the final disposition of your case within a reasonable time.

2. *Fees and Costs*. Usually the insurance company pays all of the fees and costs of defending the claim. If you are responsible for directly paying the lawyer for any fees or costs, your lawyer must promptly inform you of that.

3. *Directing the Lawyer*. If your policy, like most insurance policies, provides for the insurance company to control the defense of the lawsuit, the lawyer will be taking instructions from the insurance company. Under such policies, the lawyer cannot act solely on your instructions, and at the same time, cannot act contrary to your interests. Your preferences should be communicated to the lawyer.

4. *Litigation Guidelines*. Many insurance companies establish guidelines governing how lawyers are to proceed in defending a claim. Sometimes those guidelines affect the range of actions the lawyer can take and may require authorization of the insurance company before certain actions are undertaken. You are entitled to know the guidelines affecting the extent and level of legal services being provided to you. Upon request, the lawyer or the insurance company should either explain the guidelines to you or provide you with a copy. If the lawyer is denied authorization to provide a service or undertake an action the lawyer believes necessary to your defense, you are entitled to be informed that the insurance company has declined authorization for the service or action.

5. *Confidentiality*. Lawyers have a general duty to keep secret the confidential information a client provides, subject to limited exceptions. However, the lawyer chosen to represent you also may have a duty to share with the insurance company information relating to the defense or settlement of the claim. If the lawyer learns of information indicating that the insurance company is not obligated under the policy to cover the claim or provide a defense, the lawyer's duty is to maintain that information in confidence. If the lawyer cannot do so, the lawyer may be required to withdraw from the representation without disclosing to the insurance company the nature of the conflict of interest which has arisen. Whenever a waiver of the lawyer-client confidentiality privilege is needed, your

lawyer has a duty to consult with you and obtain your informed consent. Some insurance companies retain auditing companies to review the billings and files of the lawyers they hire to represent policyholders. If the lawyer believes a bill review or other action releases information in a manner that is contrary to your interests, the lawyer should advise you regarding the matter.

6. *Conflicts of Interest*. Most insurance policies state that the insurance company will provide a lawyer to represent your interests as well as those of the insurance company. The lawyer is responsible for identifying conflicts of interest and advising you of them. If at any time you believe the lawyer provided by the insurance company cannot fairly represent you because of conflicts of interest between you and the company (such as whether there is insurance coverage for the claim against you), you should discuss this with the lawyer and explain why you believe there is a conflict. If an actual conflict of interest arises that cannot be resolved, the insurance company may be required to provide you with another lawyer.

7. *Settlement*. Many policies state that the insurance company alone may make a final decision regarding settlement of a claim, but under some policies your agreement is required. If you want to object to or encourage a settlement within policy limits, you should discuss your concerns with your lawyer to learn your rights and possible consequences. No settlement of the case requiring you to pay money in excess of your policy limits can be reached without your agreement, following full disclosure.

8. *Your Risk*. If you lose the case, there might be a judgment entered against you for more than the amount of your insurance, and you might have to pay for it. Your lawyer has a duty to advise you about this risk and other reasonably foreseeable adverse results.

9. *Hiring Your Own Lawyer*. The lawyer provided by the insurance company is representing you only to defend the lawsuit. If you desire to pursue a claim against the other side, or desire legal services not directly related to the defense of the lawsuit against you, you will need to make your own arrangements with this or another lawyer. You also

may hire another lawyer, at your own expense, to monitor the defense being provided by the insurance company. If there is a reasonable risk that the claim made against you exceeds the amount of coverage under your policy, you should consider consulting another lawyer.

10. *Reporting Violations*. If at any time you believe that your lawyer has acted in violation of your rights, you have the right to report the matter to the Florida Bar, the agency that oversees the practice and behavior of all lawyers in Florida. For information on how to reach the Florida Bar call (850) 561-5839 or you may access the Bar at www.FlaBar.org. IF YOU HAVE ANY QUESTIONS ABOUT YOUR RIGHTS, PLEASE ASK FOR AN EXPLANATION.

CERTIFICATE

The undersigned hereby certifies that this Statement of Insured Client's Rights has been provided to (name of insured/client(s)) by (mail/hand delivery) at (address of insured/client(s) to which mailed or delivered) on (date).

_____

[Signature of Attorney]

_____

[Print/Type Name]

Florida Bar No.:_____

B. The Tripartite Relationship

The insurer and the assigned attorney, along with the insured, form a tripartite relationship. The assigned attorney, as well as the insurer and its agents, act as fiduciary agents of the insured. See State Farm Mutual Automobile Ins. Co. v. LaForet, 658 So. 2d 55 (Fla. 1995); F.D.I.C. v. Martin, 801 F.Supp. 617 (M.D. Fla. 1992). Fiduciary responsibilities include: (1) placing the insured's interests foremost and above those of the fiduciary agent; (2) acting in accordance with the insured's interests; and (3) avoiding self-dealing without full disclosure to the insured. Id. Naturally, ethical questions that

are complex between two parties take on even greater complexity when three parties are involved. Attorneys can best perform their roles if they understand the distribution of responsibilities among all parties.

1. Duty to Defend

One of the most basic duties in an insurance liability dispute is the insurer's broad duty to defend the insured. See First American Title Ins. Co. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa., 695 So. 2d 475 (Fla. 3d DCA 1997) (holding that duty to defend is separate and distinct from, and more extensive than, duty to indemnify). An insurer must defend a claim even if it is uncertain whether coverage exists under its policy; however, it may provide the defense under a reservation of rights. See Trizec Properties, Inc. v. Biltmore Const. Co., Inc., 767 F.2d 810 (11th Cir. 1985); First American Title Ins. Co. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa., 695 So. 2d 475 (Fla. 3d DCA 1997). "Reservation of rights" refers to the insurer's right to later challenge its policy's coverage of the insured after it has given the insured notice of such intentions. See Giffen Roofing Co., Inc. v. DHS Developers, Inc., 442 So. 2d 396 (Fla. 5th DCA 1983). All doubts as to whether the duty to defend exists must be resolved against the insurer and in favor of the insured. See Allstate Ins. Co. v. Myers, 951 F.Supp. 1014 (M.D. Fla. 1996); MCO Environmental, Inc. v. Agricultural Excess & Surplus Ins. Co., 689 So. 2d 1114 (Fla. 3d DCA 1997).

2. Duty of Loyalty

Legal malpractice (and insurer bad faith) concerns often arise when coverage attorneys and retained defense counsel stray from their respective roles. Defense counsel, who owe a strict duty of loyalty to the insured, should never become involved in coverage issues. An attorney simply cannot represent an insurer seeking to avoid liability under a policy while also defending its insured, particularly when coverage depends on facts developed in the underlying litigation. See Harvey v. Allstate Ins. Co., 1993 U.S. App. LEXIS 33865 (10th Cir. Dec. 21, 1993). In Harvey, the court upheld a $34,000.00 jury verdict against an insurer for providing a "sham defense." The court observed, among

other things, that the attorney retained by the insurer worked on a coverage issue while he was supposedly defending the insured. Id. at *12. The court stated that the jury could well have concluded that Allstate acted in bad faith in hiring a lawyer who would help the company avoid liability rather than provide an adequate defense, and Allstate was fortunate to have avoided punitive damages and sanctions. Id. at *16.

Although the insurer was the subject of the lawsuit in Harvey, lawyers can also have liability in such situations. See, e.g., Betts v. Allstate Ins. Co., 154 Cal. App. 3d 688, 201 Cal. Rptr. 528 (1984) (affirming bad faith verdicts rendered against both an insurer and retained defense counsel).

3. Duty of Good Faith and Fair Dealing

"An insurance company owes a duty of good faith and fair dealing to its insured under the terms of the insurance policy." See O'Shields v. United Automobile Ins. Co., 790 So. 2d 570 (Fla. 3d DCA 2001) (citing North American Van Lines, Inc. v. Lexington Ins. Co., 678 So. 2d 1325 (Fla. 4th DCA 1996); see also State Farm Mutual Automobile Ins. Co. v. LaForet, 658 So. 2d 55 (Fla. 1995) (holding that standard for evaluating bad faith claims against insurers is whether insurer acted fairly and honestly toward its insured with due regard for insured's interests). In O'Shields, where the insurance policy gave the insured a right to be informed of and involved in the settlement process, the insurer's payment for loss did not vitiate its failure to cooperate and provide requested settlement information, i.e., deal fairly and in good faith. See 790 So. 2d 570 (Fla. 3d DCA 2001). An attorney should counsel clients to read the provisions of insurance policies carefully; if the policy provides for the insured's participation in settlement decisions, the attorney will need to discuss the possible consequences with the client.

C. Conflicts of Interest

Lawyers must be aware of the potential for one client's representation to be adversely affected by, or cause adverse affect to, another client's representation. Conflicts of interest commonly occur when an attorney represents multiple parties, or

when a current representation conflicts with a former representation. See Fla. Bar R. Prof. Conduct 4-1.7, 4-1.8, and 4-1.9. In the insurance context, these conflict-of-interest dilemmas may arise in a number of situations, including: (1) when multiple parties to an accident are insured by the same insurer; (2) when the insurer subrogates against a policyholder to whom it has denied coverage; (3) when a parent is a joint tortfeasor for direct acts or for negligent supervision in a claim against a child; (4) when the insurer insures its own employees; and (5) when a lawyer becomes a fact witness in a subsequent extra-contractual or bad faith case. A lawyer should keep in mind that where an insurer's interests coincide with its insured's, the insurer may be a "virtual party" to a lawsuit involving the insured, even if the insurer is not named as a party. See Massey v. David, 831 So. 2d 226 (Fla. 1st DCA 2002) (noting that judgment for the insured may redound to the insurer's benefit).

According to Rule 4-1.7, a lawyer may properly represent a client in spite of potential conflict if (1) the lawyer reasonably believes the representation will not adversely affect the lawyer's responsibilities and relationship with the other client and (2) each client consents after consultation. See Legion Ins. Co. v. Bank of America, N.A., 807 So. 2d 690 (Fla. 2d DCA 2002) (holding that any conflict of interest from insurer's attorney's representation of opposing party's former employee was resolved when former employee, after consultation, signed affidavit stating she waived any possible conflict and gave fully informed consent to her attorney's representation of insurer).

However, notification of conflict does not constitute consent to representation. For instance, in Florida Ins. Guar. Ass'n v. Carey Canada, Inc., the court held that a lawyer's conflict notification to a FIGA claims adjuster did not rise to level of consent, where FIGA took over the insolvent insurers' claims against the client. 749 F. Supp. 255 (S.D. Fla. 1990) (granting FIGA's motion for disqualification of counsel).

D. Entitlement to Independent Counsel

Conflicts of interest can arise between counsel retained by the insurer and the insured when coverage issues exist. This conflict stems from the principle that the

insurer's duty to defend is broader than the duty to indemnify. If the "four corners" of the complaint indicate that coverage exists, the insurer must defend, even if ultimately it is determined that no coverage in fact exists. See, e.g., Accredited Bond Agencies, Inc. v. Gulf Ins. Co., 352 So. 2d 1252 (Fla. 1977).

Insurers, therefore, often provide a defense subject to a reservation of rights when coverage is questionable. That is, the insurer notifies the insured that it will retain counsel to provide a defense, but it reserves the right to deny coverage at a later date. In such cases, the courts have often held that an insured has the right to independent counsel at the expense of the insurer. See, e.g., San Diego Navy Federal Credit Union v. Cumis, 162 Cal. App. 3d 358, 208 Cal. Rptr. 494 (1984).

Under section 627.426, Florida Statutes (2003), the insurance claims administration statute provides that retaining independent counsel is one of three options an insurer has when it defends pursuant to a reservation of rights as to coverage defenses. An insurer waives coverage defenses in a reservation of rights letter unless:

> (b) Within 60 days of [issuing a proper reservation of rights letter] or receipt of a summons and complaint naming the insured as defendant, whichever is later, but in no case later than 30 days before trial, the insurer:
>
> 1. Gives written notice to the named insured by registered or certified mail of its refusal to defend the insured;
>
> 2. Obtains from the insured a nonwaiver agreement . . . ; or
>
> 3. Retains independent counsel which is mutually agreeable to the parties. Reasonable fees for the counsel may be agreed upon by the parties or, if no agreement is reached, shall be set by the court.

§ 627.426(2)(b), Fla. Stat. (2003).

It should be noted that the claims administration statute requires a reservation of rights only when the insurer knew or should have known of a coverage defense. Accordingly, while failing to comply with the statute precludes an insurer from disclaiming liability based on such coverage defenses, an insurer can still assert that no

coverage exists under the policy. See AIU Ins. Co. v. Block Marina Investment, Inc., 544 So. 2d 998 (Fla. 1989).

Even when the claims administration statute does not apply, however, insurers (and their attorneys) should carefully consider whether to provide independent counsel to resolve potential conflicts of interest that arise out of coverage issues. For example, one court held that independent counsel is necessary where the question of insurance coverage is "intertwined" with the question of the insured's liability. Golotrade Shipping & Chartering, Inc. v. Travelers Indemnity Co., 706 F. Supp. 214 (S.D.N.Y. 1989). Also, in cases of multiple claims, independent counsel likely will be necessary where the defense attorney's duty to the insured would require the attorney to defeat liability on any ground, while his duty to the insurer would require him to defeat liability only on grounds which would render insurer liable. Public Service Mut. Ins. Co. v. Goldfarb, 425 N.E.2d 810 (N.Y. 1981).

E. Selection of Independent Counsel

The claims administration statute clearly states that independent counsel must be mutually agreed upon. Consequently, if an insurer selects independent counsel without securing an explicit agreement from the insured, the insurer violates the statute and risks waiving viable coverage defenses. One court held that by unilaterally retaining counsel to represent its insured under a reservation of rights, an insurer was required to pay an unauthorized settlement after a default judgment even though the insured did not object to the insurer's choice of counsel. American Empire Surplus Lines Ins. Co. v. Gold Coast Elevator Co., 701 So. 2d 904 (Fla. 4th DCA 1997). See also Continental Ins. Co. v. City of Miami Beach, 521 So. 2d 232 (Fla. 3d DCA 1988) (holding that an insurer violated the claims administration statute by appointing counsel without asking for the insured's approval even though the insured apparently acquiesced in the appointment.)

By the same token, counsel must be truly "independent." See State Farm Mut. Auto. Ins. v. Brown, 767 F. Supp. 1151 (S.D. Fla. 1991) (denying an insured's motion for summary judgment but observing that the insured presented effective evidence that

counsel retained by the insurer was not independent, including evidence that the lawyer repeatedly divulged privileged material to the insurer). For this reason, insurers should not require independent counsel to submit their bills or other information to third party auditors. Among other things, such audits risk disclosure of confidential and attorney-client privileged information. In addition, a bill audit most likely would be unnecessary, as the claims administration statute specifically provides that the court may determine counsel's fees if the parties cannot agree. § 627.426(2)(b)3., Fla. Stat. (2003).