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# Florida

## REGULATORY LIMITS ON CLAIMS HANDLING

### Timing for Responses and Determinations

With the exception of residential property insurers, Florida statutes relating to the handling of claims for property damage or personal injury liability do not contain specified time limitations within which claims must be paid or denied. Claims must be settled or paid "promptly" or within a "reasonable" time. *Baxter v. Royal Indemnity Co*., 285 So. 2d 652 (Fla. 1st DCA 1973)(Superseded by statute, as stated in *Talat Enterprises, Inc. v. Aetna Cas. and Sur. Co*., 753 So. 2d 1278 (Fla. 2000); *State Farm Mutual Automobile Ins. Co. v. Laforet*, 658 So. 2d 55 (Fla. 1995). While Fla. Stat. § 627.70131 does mandate certain time requirements for residential property insurers to provide responses, conduct an investigation, and pay or deny a claim within 90 days of the notice of claim, this statute expressly does not authorize a private cause of action against an insurer for a violation thereof. *QBE Ins. Corp. v. Dome Condo. Ass'n*, 577 F. Supp. 2d 1256 (S.D. Fla. 2008). Section §627.6131(4)(e), Fla. Stat. also provides that an insurer must pay or deny an electronically submitted claim within 90 days of receipt of the claim. §627.6131(4)(e), Fla. Stat. Failure by the insurer to pay or deny the electronically submitted claim within 120 days after its receipt creates an uncontestable obligation to pay. *Id.* For non-electronically filed claims, payment or denial must occur within 120 days, and a failure to do so within 140 days of receipt triggers the uncontestable obligation to pay. §627.6131(5)(e), Fla. Stat.

Additionally, Fla. Stat. § 627.4137 requires that liability insurers disclose policy limits, a statement of any policy or coverage defense, and/or a copy of the policy within 30 days of the written request from a claimant. Fla. Stat. § 627.4137. There is no private cause of action for an insurer's violation of Fla. Stat. § 627.4137. However, an insurer's failure to comply with the Fla. Stat. § 627.4137 may operate to bar the insurer's affirmative defense that the insured/claimant failed to satisfy all conditions precedent in the policy. *Porcelli v. Onebeacon Ins. Co*., 635 F. Supp. 2d 1312 (M.D. Fla. 2008); *but see Dominion Bus. Fin., LLC v. Nationwide Prop. & Cas. Ins. Co.,* 2010 WL 2179113 (M.D. Fla. 2010); see also *Contreras v. 21st Century Ins. Co.*, 53 So. 3d 1194 (Fla. 5th DCA 2011).

Likewise, Florida statutes require health insurance companies to respond to claims within 45 days of receipt of a claim. The insurer must either pay, or notify the insured that the claim is being contested or denied within 45 calendar days. Failure to comply with time limitations under §627.613, Fla. Stat. subjects an insurer to a 10% per year interest rate on unpaid amounts. Additional penalties for failure to pay claims are found in the Florida Administrative Code 690-142.011, which provides that a knowing and willful violation of §627.613 will result in fines of up to $10,000 per violation, while non-willful violators may be subject to penalties of up to $2,000.

### Standards for Determination and Settlements

The standard for the handling of a claim under a liability policy is that the insurer "owes a duty to the insured to exercise the utmost good faith and a reasonable discretion in

evaluating the claim made against him and in negotiating for a settlement of that claim with the policy limits if such is possible." *Baxter*, 285 So. 2d at 655. The standard for first- or third-party statutory actions for bad faith is set forth in §624.155(1)(b)1, Fla. Stat. An insurer acts in bad faith when "not attempting in good faith to settle claims when, under all the circumstances, it could and should have done so, had it acted fairly and honestly toward its insured and with due regard for her or his interests." *State Farm Mutual Automobile Ins. Co. v. Laforet*, 658 So. 2d 55, 62 (Fla. 1995). The standard is "the totality of circumstances," and while bad faith claims are potentially implicated in any discussion of the standards for settlement, they are examined in detail below. *See also Harvey v. Geico Gen. Ins. Co*., 259 So. 3d 1 (Fla. 2018) (holding Florida's totality of circumstances test is not a mere check list). The insured has the reciprocal obligation to allow the insurer to control the defense and to cooperate with the insurer. *Doe ex rel. Doe v. Allstate Ins. Co*., 653 So. 2d 371, 374 (Fla. 1995).

Also, a health insurer must notify the insured in writing if a claim or portion of a claim is contested specifying the contested portion of the claim and the reasons why the claim is contested. § 627.613(2), Fla. Stat. A notice of contested claim must be accompanied by an itemized list of additional information reasonably required by the insurer to process the claim. Documentation must be produced by a provider within 35 days of receipt of the request, and an insurer may not request duplicate documents. §§ 627.6131(4), (5), Fla. Stat. Every insured has the right, upon the denial of any claim by an insurer as not medically necessary, to appeal the denial of the claim. Appeals are made to the insurer's licensed physician responsible for medical necessity review, and the insurer's physician must respond within a reasonable time, which may not exceed 15 business days. §627.6141, Fla. Stat.

## PRINCIPLES OF CONTRACT INTERPRETATION

An insurance contract must be construed in accordance with the plain language of the policy. *Taurus Holdings, Inc. v. U.S. Fid. & Guar. Co.,* 913 So. 2d 528, 532 (Fla. 2005) (*quoting Swire Pac. Holdings, Inc. v. Zurich Ins. Co.,* 845 So. 2d 161, 165 (Fla. 2003)). The policy terms should be given their plain and unambiguous meaning as understood by the "man-on-the-street." *State Farm Fire & Cas. Co. v. Castillo*, 829 So. 2d 242, 244 (Fla. 3d DCA 2002) (citations omitted). A court may resort to construction of a contract of insurance only when the language of the policy in its ordinary meaning is indefinite, ambiguous or equivocal. If the language employed in the policy is clear and unambiguous, there is no occasion for construction or the exercise of a choice of interpretations. In the absence of ambiguity, it is the function of the court to give effect to and enforce the contract as it is written. *Siegle v. Progressive Consumers Ins. Co*., 819 So. 2d 732, 735 (Fla. 2002) (citations omitted).

However, if the language is ambiguous, the contract should be construed in favor of the insured. *Prudential Property & Casualty Ins. Co. v. Swindal*, 622 So. 2d 467, 470 (Fla. 1993). But, courts may not rewrite contracts, add meaning that is not present, or otherwise reach results contrary to the intentions of the parties. *Harrington v. Citizens Prop. Ins. Corp.*, 54 So. 3d 999, 1002 (Fla. 4th DCA 2010). Because insurance policies are often adhesion contracts, the ambiguities are construed against the insurer who prepared the policy.

Florida courts apply an objective theory of contractual intent when interpreting insurance policies: "'The making of a contract depends not on the agreement of two minds in one intention, but on the agreement of two sets of external signs--not the parties having meant the same thing but on their having said the same thing.'" *State Farm Fire & Cas. Ins. Co. v. Deni Assocs*., 678 So. 2d 397, 400 (Fla. 4th DCA 1996) (citations omitted). "Thus, meaning is derived from the parties' unambiguous language, not from their subjective understandings." *Id*.

If an insurer does not define a policy term, the insurer cannot take the position that there should be a "'narrow, restrictive interpretation of the coverage provided.'" *State Farm Fire & Cas. Co. v. CTC Dev. Corp*., 720 So. 2d 1072, 1076 (Fla. 1998) (citations omitted). Strict construction does not mean that a court must always find

coverage. Indeed, "[s]trict construction does not mean that clear words may be tortured into uncertainty so that new meanings can be added. Where the insurer has defined a term used in the policy in clear, simple, nontechnical language, strict construction does not mean that judges are empowered to give the defined term a different meaning deemed more socially responsible or desirable to the insured." *Deni Assocs*., 678 So. 2d 397 (Fla. 4th DCA 1996).

If more than one interpretation could be given to an insurance policy provision, an ambiguity results. *CTC Dev. Corp*., 720 So. 2d at 1076. If the relevant policy language is susceptible to more than one reasonable interpretation, one providing coverage and another limiting coverage, the insurance policy is considered ambiguous. *Garcia v. Fed. Ins. Co.*, 969 So. 2d 288, 291 (Fla. 2007). To find in favor of the insured on this basis, however, the policy must actually be ambiguous. A provision is not ambiguous simply because it is complex or requires analysis. If a policy provision is clear and unambiguous, it should be enforced according to its terms. *Swire Pac. Holdings, Inc. v. Zurich Ins.* Co., 845 So. 2d 161, 165 (Fla. 2003).

The lack of a definition of an operative term in a policy does not necessarily render the term ambiguous and in need of interpretation by the courts. *Swire Pac. Holdings*, 845 So. 2d at 161. Insurance policy terms must be given their everyday meaning and should be read with regards to ordinary people's skill and experience. *Watson v. Prudential Prop. & Cas. Ins. Co.*, 696 So. 2d 394, 396 (Fla. 3d DCA 1997). Florida courts will often use legal and non-legal dictionaries to ascertain the plain meaning of words that appear in insurance policies. *Harrington*, 54 So. 3d at 1002 (citing *Brill v. Indianapolis Life Ins. Co*., 784 F.2d 1511, 1513 (11th Cir. 1986)).

When courts construe insurance policies, they should read the policies as a whole, thereby giving every provision its full meaning and operative effect. *Gen. Star Indem. Co. v. W. Fla. Vill. Inn, Inc*., 874 So. 2d 26, 30 (Fla. 2d DCA 2004) (citing *Auto-Owners Ins. Co. v. Anderson*, 756 So. 2d 29, 34 (Fla. 2000)). Additionally, a single policy provision should not be considered in isolation, but rather, the contract shall be construed according to the entirety of its terms as set forth in the policy and as amplified by the policy application, endorsements, or riders. *Harrington*, 54 So. 3d at 1002. Like other contracts, a court should only resort to rules of construction in interpreting an insurance contract when the language is ambiguous; otherwise, it should apply the plain and unambiguous meaning of the policy's language. *Sunshine State Ins. Co. v. Jones*, 77 So. 3d 254 (Fla. 4th DCA 2012).

## CONTRACT INTERPRETATION

### Common Issues

#### 1. Faulty Workmanship as an "Occurrence"

As a general rule, defective workmanship that causes "property damage" to something other than the insured's work product, is covered. A majority of courts have held that defective workmanship, standing alone, which results in damage solely to the insured's completed work product, is not an accident, hence, not an "occurrence".

The Florida Supreme Court has held that defective work performed by a subcontractor that damages a general contractor's completed work constitutes "property damage" caused by an "occurrence" under a commercial general liability (CGL) policy. *U.S. Fire Ins. Co. v. J.S.U.B., Inc.*, 979 So. 2d 871 (Fla. 2007). In a companion decision issued on the same day, the Florida Supreme Court held that the costs of repairing or removing the defective work itself do not constitute "property

damage" under a CGL policy. *Auto-Owners Ins. Co. v. Pozzi Window Co.*, 984 So. 2d 1241 (Fla. 2008).

### 2. Does Your State Have an Anti-Indemnity Statute?

Florida's Anti-Indemnification Statute, Section 725.06, Fla. Stat. This section applies to limit indemnification in construction contracts where an indemnitor is required to indemnify an indemnitee for the indemnitee's own negligence unless the contract contains a monetary limitation on the extent of the indemnification that bears a reasonable commercial relationship to the contract. However, Section 725.06 clearly limits its applicability to construction projects impacting a "building, structure, appurtenance, or appliance." While a majority of construction contracts fall squarely within this definition, utility contracts often do not.

## CHOICE OF LAW

In determining which state's law applies to contracts, the Supreme Court of Florida has long adhered to the rule of lex loci contractus. That rule, as applied to insurance contracts, provides that the law of the jurisdiction where a contract was executed governs the rights and liabilities of the parties in determining an issue of insurance coverage. *State Farm Mut. Auto. Ins. Co. v. Roach*, 945 So. 2d 1160, 1163 (Fla. 2006) (citations omitted). When parties come to terms in an agreement, they do so with the implied acknowledgment that the laws of that jurisdiction will control absent some provision to the contrary. *Sturiano v. Brooks*, 523 So. 2d 1126, 1129 (Fla. 1988). The doctrine of lex loci contractus directs that, in the absence of a provision specifying the governing law, the insurance contract is governed by the law of the state in which the contract is made. *Clarendon Am. Ins. Co. v. Miami River Club, Inc.*, 417 F. Supp. 2d 1309, 1317 (S.D. Fla. 2006). Florida respects choice-of-law provisions in insurance contracts. *See Shaps v. Provident Life & Accident Ins. Co.*, 826 So. 2d 250, 254 n.3 (Fla. 2002) (citing *Fioretti v. Mass. Gen. Life Ins. Co.,* 53 F.3d 1228, 1235 (11th Cir. 1995)).

As stated above, absent a choice-of-law provision in the insurance contract, the laws of the place in which a contract was made govern matters concerning its execution, interpretation, and validity, unless public policy requires the assertion of Florida's paramount interest in protecting its citizens from inequitable insurance contracts. Florida courts have carved out this narrow exception to the lex loci rule known as the "public policy exception," which results in application of Florida law. The exception requires both a Florida citizen in need of protection, a paramount Florida public policy, and the insurer must be on reasonable notice that its insured is a Florida citizen. *Roach*, 945 So. 2d at 1160.

## DUTIES IMPOSED BY STATE LAW

### Duty to Defend

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

An insurer's duty to defend its insured against legal action is quite broad, and is determined by comparing the allegations contained within the four corners of the most recent amended complaint with the language of the policy. *Jones v. Florida Ins. Guar. Ass'n Inc.*, 908 So. 2d 435, 443 (Fla. 2005); see also *Higgins v. State Farm Fire & Casualty*, 894 So. 2d 5 (Fla. 2004); *Allstate Insurance Co. v. RJT Enterprises, Inc.,* 692 So. 2d 142, 144 (Fla. 1997); *Farrer v. U.S Fidelity & Guaranty Co.,* 809 So. 2d 85, 88 (Fla. 4th DCA 2002). In other words, the duty to defend is

"determined solely from the allegations in the complaint against the insured, not by the true facts of the cause of action against the insured, the insured's version or the facts, or the insured's defenses." *State Farm Fire & Cas. Co. v. Tippett*, 864 So. 2d 31, 33 (Fla. 4th DCA 2003). The insurer must defend if the allegations in the complaint could bring the insured within the policy provisions of coverage. *Grissom v. Commercial Union Ins. Co.,* 610 So. 2d 1299, 1307 (Fla. 1st DCA 1992). The duty to defend arises when the complaint alleges facts that fairly and potentially bring the suit within policy coverage even if the facts alleged are actually untrue or the legal theories are unsound. *Category 5 Mgmt. Group, LLC v. Companion Prop. & Cas. Ins. Co.*, 76 So. 3d 20, 23 (Fla. 1st DCA 2011). If the complaint alleges facts partially within and partially outside of coverage of the policy, the insurer is obligated to defend the entire suit. *Marr Investments, Inc. v. Greco*, 621 So. 2d 447, 449 (Fla. 4th DCA 1993). However, the Florida Supreme Court in *Higgins*, 894 So. 2d at 5, stated in a footnote that there are some "natural exceptions" to the eight corners rule when an insurer disputes its defense obligations based on facts that would not normally alleged in the underlying complaint. *See also Acosta, Inc. v. National Union Fire Insurance Co*., 39 So. 3d 565 (Fla. 1st DCA 2010) (holding that whether facts beyond the policy and underlying complaint can be considered should be "decided on a case-by-case basis" when the "legal issue depends on genuine issues of material fact.").

## 2. Issues with Reserving Rights

An insurer may provide a defense to its insured while reserving the right to later challenge coverage, if timely notice of such reservation is given to the insured. *Giffen Roofing Co., Inc. v. DHS Developers, Inc.*, 442 So. 2d 396, 397 (Fla. 5th DCA 1983). The reservation by the insurer of the right to contest its liability under the policy relinquishes to the insured, at his election, control of the litigation. *BellSouth Telecomms., Inc. v. Church & Tower of Fla., Inc.,* 930 So. 2d 668, 672 (Fla. 3d DCA 2006). Where the insurer refuses to defend and coverage is found, the insured will be entitled to full reimbursement of the insured's litigation costs. *Mid-Continent Cas. Co. v. Am. Pride Bldg. Co., LLC,* 601 F.3d 1143 (11th Cir. Fla. 2010) (an insured may reject a conditional defense after accepting the defense if the insurer changes the terms of the conditional defense in a material way).

There is a split of authority on the issue of whether an insurer who defends while reserving the right to be reimbursed for litigation cost is entitled to recover defense costs if no coverage is found. *Certain Interested Underwriters at Lloyd's v. Halikoytakis*, 2011 WL 7305888, 4-5 (M.D. Fla. Dec. 21, 2011). The majority rule is that that an insurer, having properly sent its insured a reservation of rights letter, is entitled to reimbursement of fees and costs incurred in the defense of the insured if there was no duty to defend or indemnify. *Jim Black & Assocs., Inc. v. Transcontinental Ins. Co.,* 932 So. 2d 516 (Fla. 2d DCA 2006); *Colony Ins. Co. v. G&E Tires & Service, Inc.*, 777 So. 2d 1034 (Fla. 1st DCA 2000). These cases conclude that an insured "necessarily agree[s] to the terms on which [the insurer] extend[s] the offer" when it accepts the defense. *G&E Tires & Service, Inc.,* 777 So. 2d at 1036; *Jim Black & Assocs., Inc.,* 932 So. 2d at 516. In other words, a contract was formed when the insurer agreed to provide a defense on the condition that, if it were later determined that it had no duty to provide a defense, it could recoup what it had paid for the defense, and the insured accepted that conditional offer by allowing the defense to be presented on its behalf.

Conversely, in *Nationwide Mutual Fire Insurance Co. v. Royall*, 588 F.Supp. 2d 1306, 1317 (M.D. Fla. 2008), the Court held that, where the policy is silent, an insurer can recover defense fees and

cost only if the insurer gives the insured a specific, reasonable time (*e.g.,* fifteen days) within which to accept or reject a written offer of a defense conditioned upon the reimbursement of fees and costs. Additionally, in *Pa. Lumbermens Mut. Ins. Co. v. Ind. Lumbermens Mut. Ins. Co.,* 43 So. 3d 182 (Fla. 4th DCA 2010), despite the insured agreeing to the insurer's reservation of rights provision for reimbursement of defense cost in the event of a determination of no coverage and the insured's assignment of its claim to the insurer against a second insurer for wrongfully refusing to provide a defense, the court still held there was no right to reimbursement of defense costs through equitable subrogation between the two insurers. *Id.* Although coverage was eventually determined to rest with the second insurer that wrongfully refused to provide a defense, the Court found both insurers had a duty to defend, thus no right to reimbursement of defense costs was awarded. *Id.*

Pursuant to the Claims Administration Statute, notice of an insurer's reservation of rights to assert a coverage defense must be provided to the insured in writing within 30 days after the insurer knew or should have known of the defense. *See* Fla. Stat. § 627.426(2)(a). If the insurer provides a defense under reservation of rights, it must either obtain from the insured a non-waiver agreement after a full disclosure of the coverage defenses it seeks to preserve or retain independent counsel who is mutually agreeable to the parties. Fla. Stat. § 627.426(2)(b)(2)–(3). Reasonable fees for the counsel may be agreed upon between the parties or, if no agreement is reached, shall be set by the court.

An insurer's failure to comply with the requirements of Fla. Stat. § 627.426(2) will not bar an insurer from disclaiming liability where a policy or endorsement has expired or where the coverage sought is expressly excluded or otherwise unavailable under the policy or under existing law. *AIU Ins. Co. v. Block Marina Invest., Inc.,* 544 So. 2d 998, 999 (Fla. 1989).

Surplus-lines insurance is regulated by Fla. Stat. § 627.426 if a legal action predicated on a violation of the statute was filed on or before May 15, 2009. *Shopping Ctr. Mgmt. v. Arch Specialty Ins. Co.,* 2010 WL 1302967 (S.D. Fla. 2010). If the action was filed after May 15, 2009, Fla. Stat. § 627.426 does not regulate surplus-lines insurance. *Id*.; Fla. Stat. § 626.913(4) ("Except as may be specifically stated to apply to surplus lines insurers, the provisions of chapter 627 do not apply to surplus lines insurance authorized under ss. 626.913-626.937, the Surplus Lines Law").

## State Privacy Laws; Insurance Regulatory Issues; Arbitration/Mediation

### 1. Criminal Sanctions

Below is a sampling of criminal offenses which a person may be prosecuted for if they violate one of Florida's various privacy laws.

Any person who violates the confidentiality provisions of Florida Statute § 381.004, HIV testing, and s. 951.27 commits a misdemeanor of the first degree. Any person who obtains information that identifies an individual who has a sexually transmissible disease including HI or acquired immunodeficiency syndrome, who knew or should have known the nature of the information and

maliciously, or for monetary gain, disseminates this information or otherwise makes this information known to any other person, except by providing it either to a physician or nurse employed by the department or to a law enforcement agency, commits a felony of the third degree.

Any person who willfully, knowingly, and without authorization engages in audio or video surveillance of an individual by accessing any inherent feature or component of a computer, computer system, computer network, or electronic device, including accessing the data or information of a computer, computer system, computer network, or electronic device that is stored by a third party violates Florida's Computer Crimes Act commits a third degree felony. The violation is a second degree felony if the perpetrator: damages a computer, computer equipment or supplies, a computer system, or a computer network and the damage or loss is at least $5,000; commits the offense for the purpose of devising or executing any scheme or artifice to defraud or obtain property; interrupts or impairs a governmental operation or public communication, transportation, or supply of water, gas, or other public service; or intentionally interrupts the transmittal of data to or from, or gains unauthorized access to, a computer, computer system, computer network, or electronic device belonging to any mode of public or private transit. The violation is a first degree felony if the violation endangers human life; or disrupts a computer, computer system, computer network, or electronic device that affects medical equipment used in the direct administration of medical care or treatment to a person. See Fla. Stat. § 815.06.

A person commits the offense of video voyeurism if that person: for his or her own amusement, entertainment, sexual arousal, gratification, or profit, or for the purpose of degrading or abusing another person, intentionally permits and/or uses or installs an imaging device to secretly view, broadcast, or record a person, without that person's knowledge and consent, who is dressing, undressing, or privately exposing the body, at a place and time when that person has a reasonable expectation of privacy; or records under or through the clothing being worn by another person, without that person's knowledge and consent, for the purpose of viewing the body of, or the undergarments worn by, that person. A person also commits the offense of video voyeurism dissemination if that person, knowing or having reason to believe that an image was created in a manner described in this section, intentionally disseminates, distributes, or transfers the image to another person for the purpose of amusement, entertainment, sexual arousal, gratification, or profit, or for the purpose of degrading or abusing another person. Likewise, a person commits the offense of commercial video voyeurism dissemination if that person: knowing or having reason to believe that an image was created in a manner described in this section, sells the image for consideration to another person; or having created the image in a manner described in this section, disseminates, distributes, or transfers the image to another person for that person to sell the image to others. A person who is under 19 years of age and violates Florida Statute § 810.145 for video voyeurism commits a first degree misdemeanor. If the person was over the age of 19, they commit a felony of the third degree. The statute also allows for more severe punishment for other persons as detailed in the statute.

Under the Florida Communications Fraud Act, § 817.568, any person who willfully and without authorization fraudulently uses, or possesses with intent to fraudulently use, personal identification information concerning another person without first obtaining that person's consent, commits a felony of the third degree. Any person who willfully and without authorization fraudulently uses personal identification information concerning a person without first obtaining that person's consent commits a felony of the second degree, if the pecuniary benefit, the value of the services received, the payment sought to be avoided, or the amount of the injury or fraud perpetrated is $5,000 or

more or if the person fraudulently uses the personal identification information of 10 or more persons, but fewer than 20 persons, without their consent. Notwithstanding any other provision of law, the court shall sentence any person convicted to a mandatory minimum sentence of 3 years' imprisonment.

In addition, any person who willfully and without authorization fraudulently uses personal identification information concerning a person without first obtaining that person's consent commits a felony of the first degree, if the pecuniary benefit, the value of the services received, the payment sought to be avoided, or the amount of the injury or fraud perpetrated is $50,000 or more or if the person fraudulently uses the personal identification information of 20 or more persons, but fewer than 30 persons, without their consent. The court shall sentence any person convicted of committing the offense to a mandatory minimum sentence of 5 years' imprisonment. If the pecuniary benefit, the value of the services received, the payment sought to be avoided, or the amount of the injury or fraud perpetrated is $100,000 or more, or if the person fraudulently uses the personal identification information of 30 or more persons without their consent, the court shall sentence any person convicted to a mandatory minimum sentence of 10 years' imprisonment.

## 2. The Standards for Compensatory and Punitive Damages

The most common compensatory damages in Florida are medical expenses, pain and suffering, emotional distress, and lost wages.

- Compensatory Damages
- Medical Expenses

Florida law allows recovery of the reasonable value or expense of hospitalization and medical care and treatment necessary or reasonably obtained by plaintiff in the past or to be obtained in the future. See Fla. Std. Jury Instr. (Civil) 6.2b. In order to recover the medical expenses, the plaintiff has the burden of "prov[ing] the reasonableness and necessity of medical expenses" and that they are related to the subject accident. Albertson's Inc. v. Brady, 475 So. 2d 986, 988 (Fla. 2d DCA 1985); A.J. v. State, 677 So. 2d 935, 937 (Fla. 4th DCA 1996). "When a plaintiff testifies as to the amount of his or her medical bills and introduces such bills into evidence, it becomes 'a question for a jury to decide, under proper instructions, whether these bills represented reasonable and necessary medical expenses.'" Irwin v. Blake, 589 So. 2d 973, 974 (Fla. 4th DCA 1994) (quoting Garrett v. Morris Kirschman & Co., 336 So.2d at 571 (Fla.1976)); but see Albertson's Inc., 475 So. 2d 986 (distinguishing Crowe v. Overland Hauling, Inc., 245 So. 2d 654 (Fla. 4th DCA 1971) and holding medical bills were improperly admitted into evidence when physicians did not testify that the bills were related to the accident and defendants did not stipulate as to the reasonableness of the bills).

In rebuttal, defendants are allowed to present evidence and testimony that plaintiff's medical bills were not reasonable and necessary. See Irwin, 589 So.2d at 974; also State Farm Mut. Auto. Ins. Co. v. Bowling, 81 So. 3d 538, 542 (Fla. 2d DCA 2012). Moreover, a plaintiff is only entitled to prejudgment interest on past medical expenses when he/she has made "actual out-of-pocket payments on those medical bills at a date prior to the entry of judgment." Alvardo v. Rice, 614 So. 2d 498, 500 (Fla. 1993).

With regard to future medical expenses, "[i]t is a plaintiff's burden to establish that future medical expenses will more probably than not be incurred" based on competent substantial evidence upon which may be submitted to the jury. Montesinos v. Zapata, 43 So. 3d 97, 99 (Fla. 3d DCA 2010) (citations omitted); see also Fla. Std. Jury Instr. (Civ.) 501.2(b). In other words, future medical expenses cannot be grounded on the mere "possibility" or "mere probability" that certain treatments might be obtained. White v. Westlund, 624 So. 2d 1148, 1150-1151 (Fla. 4th DCA 1993).

- Pain and Suffering

  In Florida, juries are allowed "wide latitude in awarding a plaintiff pain and suffering." Collins v. Douglass, 874 So. 2d 629 (Fla. 4th DCA 2004). There is no standard by which the jury has to measure damages for past, present and future pain and suffering. Braddock v. Seaboard Air Line R. Co., 80 So. 2d 662 (Fla. 1955). However, the jury can take into consideration the degree of negligence, extent of injury, and its effect and results to ensure that the amount is fair and just in the light of the evidence. See id.; see also Florida Standard Jury Instruction 501.2(a). But where the evidence is "undisputed or substantially undisputed that a plaintiff has experienced and will experience pain and suffering as a result of an accident, a zero dollar award for pain and suffering is inadequate as a matter of law." Parrish v. City of Orlando, 53 So. 3d 1199 (Fla. 5th DCA 2011); see also Tavakoly v. Fiddlers Green Ranch of Florida, Inc., 998 So. 2d 1183 (Fla. 5th DCA 2009) (holding there was substantial competent evidence from which jury could have concluded that despite plaintiff having sustained permanent injury, she had not proved she would incur future losses for which damages should be awarded).

- Emotional Distress

  In Florida, the "impact rule" provides that there can be no recovery for mental or emotional pain and suffering unconnected with physical injury. For further discussion, see infra, Section C "Intentional or Negligent Infliction of Emotional Distress.

- Lost Wages or Earning Capacity

  "The test for entitlement to an instruction on loss of future earnings is not dependent upon earnings either before or after the injury. Rather, the test is whether the injured party's capacity to labor has been diminished by virtue of the injuries suffered." Hubbs v. McDonald, 517 So. 2d 68, 69 (Fla. 1st DCA 1987). The jury "is not to be concerned with the actual future loss of earnings, but with the loss of the power to earn." W.R. Grace & Co. Conn. v. Pyke, 661 So. 2d 1301, 1304 (Fla. DCA 3d 1995) (citation omitted). In fact, the plaintiff "must demonstrate not only reasonable certainty of injury, but must present evidence which will allow a jury to reasonably calculate lost earning capacity." Id. at 1302. (citations omitted).

  In measuring the loss of wage-earning capacity, no single factor is conclusive. Criteria by which loss of earning capacity may be measured have been

announced in a number of cases decided by this Court. These criteria include:

- (1) Extent of actual physical impairment;
- (2) Claimant's age;
- (3) Industrial history;
- (4) Education of claimant;
- (5) Inability to obtain work of a type which claimant can perform in light of his after-injury condition;
- (6) Wages actually being earned after the injury (a factor entitled to great weight);
- (7) Claimant's ability to compete in the open labor market the remainder of his life, including the burden of pain, or inability to perform the required labor;
- (8) Claimant's continued employment in the same employ.

Walker v. Elec. Products & Eng'g Co., 248 So. 2d 161, 163 (Fla. 1971). After the jury determines the amount, the jury is required to reduce any award for loss of future earning capacity to present value. Pyke, 661 So. 2d at 1302 (citations omitted).

- Punitive Damages

Pursuant to Florida Statute § 768.72, a plaintiff may seek leave from court to amend its complaint to add a count for punitive damages. The Plaintiff must show "a reasonable showing by evidence in the record or proffered . . . which would provide a reasonable basis for recovery of such damages." Stated another way, defendants are not subject to a claim for punitive damages and financial worth discovery, unless the trial court makes a determination that there is a reasonable evidentiary basis to recover punitive damages. The Fourth District Court of Appeals recently opined that Florida statute requires more than mere allegations and that "section 768.72 does not contemplate the trial court simply accepting the allegations in a complaint or motion to amend as true." Bistline v. Rogers, et al, 215 So. 3d 607 (4th DCA 2017). This is because "[u]nder Florida law, the purpose of punitive damages is not to further compensate the plaintiff, but to punish the defendant for its wrongful conduct and to deter similar misconduct by it and other actors in the future." Owens-Corning Fiberglas Corp. v. Ballard, 749 So. 2d 483, 486 (Fla. 1999). "Hence, punitive damages are appropriate when a defendant engages in conduct which is fraudulent, malicious, deliberately violent or oppressive, or committed with such gross negligence as to indicate a wanton disregard for the rights and safety of others." Id. (quoting White Constr. Co., Inc. v. Dupont, 455 So. 2d 1026, 1028 (Fla. 1984)). Indeed, "[P]unitive damages are reserved for particular types of behavior which go beyond mere intentional acts." Weinstein Design Group, Inc. v. Fielder, 884 So. 2d 990, 1001 (Fla. 4th DCA 2004).

Furthermore, Florida limits punitive damages to three times the amount of the compensatory damages or $500,000, whichever is greater. See Fla. Stat. § 768.73(1)(a)(1)-(2). However, the court is not prohibited from exercising its jurisdiction under Florida Statute § 768.74 in

determining the reasonableness of an award of punitive damages that is less than three times the amount of compensatory damages. But, if the defendant's intentional misconduct was motivated purely by the opportunity for unreasonable financial gain and the court determines that the unreasonably dangerous nature of the conduct, together with the high likelihood of injury resulting from the conduct, was actually known by the managing agent, director, officer, or other person responsible for making policy decisions on behalf of the defendant, the court may award punitive damages up to $2 million or four times the amount of the compensatory damages, whichever is greater for each claimant. See id. at (b)(1)-(2). If the fact finder determines that at the time of the injury the defendant had a specific intent to harm the claimant and determines that the defendant's conduct did in fact harm the claimant, there is no cap on punitive damages. Id. at (1)(c).

## 3. Insurance Regulations to Watch

On July 1, 2019, Fla. Stat. 627.7152 went into effect, Florida's new Assignment of Benefits ("AOB") Reform Bill. The AOB bill amended §627.422, Fla. Stat. and created §627.7152 and §627.7153, which provides definitions and required provisions in assignment agreements executed under property insurance policies, in order for the assignment to be valid.

In 2018, there were more than 34,000 AOB lawsuits compared to 405 AOB lawsuits in 2006. Increasing AOB abuse is costing homeowners' insurance rate increases. See www.flchamber.com. Fla. Stat. § 627.7152 was enacted to place restrictions on assignments of benefits for property insurance claims, including post-loss assignments of insurance benefits.

"Some key provisions of the Act impose: procedural requirements that must be met for an assignment of benefits to be valid (Fla. Stat. § 627.7152(2)(a)-(b)); conditions of the insurance policy to which an assignee must adhere (Fla. Stat. § 627.7152(2)(a)-(b)); record-keeping and cooperation duties on the assignee (Fla. Stat. § 627.7152(3)-(4)); notice requirements regarding an assignee's intent to sue (Fla. Stat. § 627.7152(9)); and specific rules regarding an assignee's right to recover attorney's fees (Fla. Stat. § 627.7152(10))." SFR Servs., LLC v. Indian Harbor Ins. Co., 2021 WL 1165185, at *2 (M.D. Fla. Mar. 26, 2021).

## 4. State Arbitration and Mediation Procedures

Florida Statute Section 44.104 provides authority for voluntary binding arbitration, as does Chapter 682 of the Florida Statutes. Then Rule 1.830 of Florida Rules of Civil Procedure governs the procedural aspects of voluntary binding arbitration. The parties may also elect to arbitrate pursuant to the rules and procedures of the American Arbitration Association, or some other procedure. Once the Arbitrator or panel of Arbitrators is selected, there is usually a preliminary hearing held to determine the procedural elements of the case including the scope of discovery along with witnesses and evidence to be relied upon at the final hearing.

Pursuant to Rule of Civil Procedure 1.820, the arbitration hearing be conducted informally, the presentation of testimony is kept to a minimum and facts and issues are to be presented primarily through documents and the statement and argument of counsel. Further, arbitration shall be completed within 30 days of the first arbitration hearing unless extended by order of the court on motion of the chief arbitrator or of a party. F. R. Civ. P. 1.820. No extension of time shall be for a period exceeding 60 days from the date of the first arbitration hearing. See id. Further, upon the completion of the arbitration process, the arbitrator(s) shall render a written decision within 10 days

setting forth the findings of fact and conclusions of law. Id. In the case of a panel, a decision shall be final upon a majority vote of the panel. Id. The arbitrator's decision and the originals of any transcripts shall be sealed and filed with the clerk at the time the parties are notified of the decision. Last, if a motion for trial is not made within 20 days of service on the parties of the decision, the decision shall be referred to the presiding judge, who shall enter such orders and judgments as may be required to carry out the terms of the decision as provided by section 44.103(5), Florida Statutes.

In addition to voluntary binding arbitration, there is a procedure known as "court ordered non-binding arbitration". See Fla. Stat. § 44.103; F. R. Civ. P. 1.820. If a party does not agree with the arbitration award, they are still able to object to the award and litigate the matter in court by way of a trial de novo. However, if the result of the trial is not better than the award for that party, they will be responsible for the non-objecting party's attorney's fees.

Florida Rule of Civil Procedure 1.720 governs mediation procedures in Florida Circuit and County Cases. In cases where there is an order of referral from the court, within 10 days the parties may agree upon a stipulation with the court designating a certified mediator or mediator, other than a senior judge, who is not certified as a mediator but who, in the opinion of the parties and upon review by the presiding judge, is otherwise qualified by training or experience to mediate all or some of the issues in the particular case. Id. If the parties cannot agree upon a mediator within 10 days of the order of referral, the plaintiff or petitioner shall so notify the court within 10 days of the expiration of the period to agree on a mediator, and the court shall appoint a certified mediator selected by rotation or by such other procedures as may be adopted by administrative order of the chief judge in the circuit in which the action is pending. At the request of either party, the court shall appoint a certified circuit court mediator who is a member of The Florida Bar. Id.

Physical presence is required at mediation by the following parties, unless a court order or stipulation by all parties in writing, a party is deemed to appear at a mediation conference if the following persons are physically present otherwise: (1) the party or representative having full authority to settle without consulting with anyone else; (2) the party's counsel of record, if any; and (3) a representative of the insurance carrier for any insured party who is not such carrier's outside counsel, and who has full authority to settle in an amount up to the amount of the Plaintiff's last demand or policy limits, whichever is less, without further consultation. Fla. R. Civ. P. 1.720.

Unless otherwise stipulated by the parties, each party, 10 days prior to appearing at a mediation conference, shall file with the court and serve all parties a written notice identifying the person or persons who will be attending the mediation conference as a party representative or as an insurance carrier representative, and confirming that those persons have the authority required. Id.

If a party fails to appear at a noticed mediation conference without good cause, the court, upon motion, shall impose sanctions, including award of mediation fees, attorneys' fees, and costs, against the party failing to appear. The failure to file a confirmation of authority required under subdivision (e), or failure of the persons actually identified in the confirmation to appear at the mediation conference, shall create a rebuttable presumption of a failure to appear. Id.

The mediator may adjourn the mediation conference at any time and may set times for reconvening the adjourned conference notwithstanding Rule 1.710(a). No further notification is required for parties present at the adjourned conference. Id.

## 5. State Administrative Entity Rule-Making Authority

The Florida Administrative Procedure Act ("APA") applies when an agency, as defined by the act, acts pursuant to powers other than those derived from the constitution. Fla. Stat. § 120.52. The APA states that agency rules must be prospective only. Fla. Stat. § 120.54(1)(f). Even if the agency's intent is to clarify existing law, unless such power is expressly authorized by statute, a rule is not allowed to be retrospective. Further, each agency rule may contain only one subject. Fla. Stat. § 120.54(2)(b). Before an agency adopts a rule, it is required to choose the regulatory alternative "that does not impose regulatory costs on the regulated person, county, or city which could be reduced by the adoption of less costly alternatives that substantially accomplish the statutory objectives." Fla. Stat. § 120.54(1)(d).

Any person regulated by an agency or with a substantial interest in an agency rule may petition the agency to adopt, amend, or repeal a rule. Fla. Stat. § 120.54(1)(7). The agency must then respond to the petition and agree to initiate rulemaking procedures or deny same with a written statement of its reasons. Id. Pursuant to Florida Statute § 120.68, an agency's decision on a petition to initiate rulemaking is final agency action that may be appealed.

An agency must publish a notice of a proposed rule in the Florida Administrative Weekly. Fla. Stat. § 120.54(2)(a). The notice must state the subject area to be addressed, provide a short, plain explanation of the effect of the proposed rule, cite the specific legal authority for the proposed rule, and include the preliminary text of the proposed rule, if available, or a statement of how a person may obtain a draft of the rule. Id. Further, an agency is required to hold a public workshop on the proposed rule if requested in writing by an affected person, unless the agency explains in writing why the workshop would not be effective. Fla. Stat. § 120.54(2)(c).

Thereafter, the final version of the agency's rule must published in the Florida Administrative Weekly. Fla. Stat. § 120.54(3)(a). Among other things, the agency's notice also must state the procedure for requesting a public hearing on the proposed rule. If an affected person requests a public hearing, the agency is required to hold one. Id.

Any person substantially affected by a rule or a proposed rule may seek an administrative determination of its invalidity on grounds that it is an "invalid exercise of delegated legislative authority" by filing a rule challenge petition with the Division of Administrative Hearings and same will be heard by an administrative judge. See Fla. Stat. §120.52(8). The judge's order is final agency action that may be appealed to a district court of appeal pursuant to Fla. Stat. §120.68. Moreover, in a proposed rule challenge the agency has the burden of proving by a preponderance of the evidence that the proposed rule is not an invalid exercise of delegated legislative authority. Fla. Stat. § 120.56(2). However, in an existing rule challenge, the challenger has the burden of proof. Fla. Stat. § 120.56(3).

## EXTRACONTRACTUAL CLAIMS AGAINST INSURERS: ELEMENTS AND REMEDIES

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

In circumstances in which bad faith is found, plaintiffs may be entitled to both compensatory and punitive damages. Punitive damages will be allowed when the conduct at issue is wanton or outrageous, or based upon moral turpitude or malice. *Campbell v. Government Employees Ins. Co.*, 306 So. 2d 525, 532 (Fla. 1974); *see Winn & Lovett Grocery Co. v. Archer,* 171 So. 214 (Fla. 1936). Where an insurer's conduct involves concealment or misrepresentation, punitive damages may be awarded. *Id.*; *see also* Fla. Stat. § 768.72 (authorizing punitive damages). In *Hogan v. Provident Life & Accident Ins. Co.,* 665 F. Supp. 2d 1273 (M.D. Fla. 2009), the insured pled punitive damages using Fla. Stat. § 768.72 for its common law claims and Fla. Stat. § 624.155 for the bad faith claims. The *Hogan* Court did not find the pleading of both statutory and common law claims were duplicative. Rather, Fla. Stat. § 624.155(8) was interpreted to only prevent a plaintiff from obtaining judgments under both common law and statutory remedies for the same injury. *Id.*

Attorney fees are authorized under Fla. Stat. § 624.155(4). *See Allstate Ins. Co. v. Jenkins*, 32 So. 3d 163 (Fla. 5th DCA 2010). The insured in *Jenkins* attempted to recover attorney fees arising from the underlying action under Fla. Stat. 768.79, which conditions recovery upon receiving a judgment sufficiently exceeding the amount of a party's demand for settlement by 25%, and attorney fees pursuant to Fla. Stat. § 624.155(4) for a bad faith claim filed in a subsequent supplemental proceeding to the underlying action. *Id.*

Attorney fees may also be awarded under Fla. Stat. § 627.428 in the insured's breach of contract action if it was reasonably necessary for the insured to file a court action in order to have the insurer comply with its policy obligations. *See Travelers of Fla. v. Stormont*, 43 So. 3d 941 (Fla. 3rd DCA. 2010). The insured in *Stormont* prematurely filed its complaint when the insurer was still in compliance with the policy. However, as litigation progressed, the insurer subsequently failed to comply with the policy, and the lawsuit became necessary to compel the insurer for appraisal. Consequently, upon final judgment in favor of the insured, the Court awarded attorney fees pursuant to Fla. Stat. § 627.428 only for the phase of the litigation where the lawsuit was actually necessary to compel the insurer to comply with the policy. *Id.*; *see also Clifton v. United Cas. Ins. Co. of Am.,* 31 So. 3d 826 (Fla. 2d DCA 2010)(disagreed with by Johnson v. Omega Inc. Co., 200 So. 3d 1207 (Fla. 2016)); *Hill v. State Farm Fla. Ins. Co.,* 35 So. 3d 956 (Fla. 2d DCA 2010); *Beverly v. State Farm Fla. Ins. Co.,* 50 So. 3d 628 (Fla. 2d DCA. 2010); *Lewis v. Universal Prop. & Cas. Ins. Co.,* 13 So. 3d 1079 (Fla. 4th DCA. 2009); *but see Pineda v. State Farm Fla. Ins. Co.,* 47 So. 3d 890, 892 (Fla. 3d DCA 2010) ("attorney's fees are not awardable where, as here, the appraisers fail to agree on the appointment of an umpire and it becomes necessary for one or both parties to file suit to ask the court to make the appointment").

Where an insurer pays policy proceeds after suit has been filed but before judgment has been rendered, the payment of the claim constitutes the functional equivalent of a confession of judgment or verdict in favor of the insured, thereby entitling the insured to attorney's fees. *Barreto v. United Servs. Auto. Ass'n,* 82 So. 3d 159 (Fla. 4th DCA 2012). A trial court should award attorney's fees to an insured pursuant to § 627.428, Fla. Stat. when it appears as though the insurer would not have paid the insured the proper amount of the loss without judicial intervention. *Id.*

The fact that an insurer is the party seeking attorney's fees under § 627.428, Fla. Stat. does not, by itself, preclude recovery. Despite the express limitations in § 627.428 as to the class of designated entities entitled to recover attorney's fees, the Supreme Court of Florida has previously approved an award of attorney's fees to an insurer in situations where policy coverage was obtained through an assignment from an insured. *Ind. Lumbermens Mut. Ins. Co. v. Pa. Lumbermens Mut. Ins. Co.,* 125 So. 3d 263 (Fla. 4th DCA 2013).

In *Grider-Garcia v. State Farm Mut. Auto., Etc.,* 14 So. 3d 1120 (Fla. 5th DCA 2009), the Court declined to award attorney fees under Fla. Stat. § 627.428 to the insured for the certiorari proceeding relating to the ultimate determination whether the insured was the prevailing party in the breach of contract action against the insurer. *Id.*

### 3. First Party

There is no common law first-party bad-faith action in Florida. QBE Ins. Corp. v. Chalfonte Condo. Apt. Ass'n, 94 So. 3d 541 (Fla. 2012). First-party claims for breach of the implied warranty of good faith and fair dealing are actually statutory bad-faith claims that must be brought under § 624.155, Fla. Stat.

Insurers are liable to civil suit for violation of several statutory provisions. In addition, insurers may be subject to civil actions for not attempting to settle claims in good faith. §624.155(b)(1), Fla. Stat. An insured may bring a civil action against an insurer for "[n]ot attempting in good faith to settle claims when, under all circumstances, it could and should have done so, had it acted fairly and honestly toward its insured and with due regard for her or his interests." See Time Insurance Co. v. Burger, 712 So. 2d 389 (Fla. 1998);Superseded by statute, as stated in Fridman v. Safeco Ins. Co. of Illinois, 185 So.3d 1214 (Fla. 2016).

Section 624.155, Florida Statutes specifically provides that any person damaged by certain enumerated acts of an insurer may bring a civil action against that insurer. As to third-party claims, the statute provides a "cumulative and supplemental remedy." Hollar v. Int'l Bankers, Ins. Co., 572 So. 2d 937, 939 (Fla. 3d DCA 1990). Actions brought under Fla. Stat. § 624.155 are referred to as "statutory bad faith actions," and the enumerated acts include violations of certain statutes, principally §§ 626.9541; 626.9551; 626.9705; 626.9706; 626.9707; or 627.7283. Moreover, Fla. Stat. § 624.155 allows a civil remedy for bad faith failure to settle, making claim payments without stating the coverage under which payments are made, and failing to promptly settle claims under one portion of an insurance policy to influence settlements under other portions of the insurance policy. These are set forth more specifically in the discussion of the consumer protection statutes below. Fla. Stat. § 624.155 establishes certain procedural conditions precedent to bringing an action for statutory bad faith.

The legal duty created under Fla. Stat. § 624.155 is separate and independent of the contractual obligation. Opperman v. Nationwide Mutual Fire Ins. Co., 515 So. 2d 263, 267 (Fla. 5th DCA 1987). The statutory civil remedy does not preempt other statutory or common law remedies. Fla. Stat. § 624.155(7). However, it also does not create any new common law remedies. No person may obtain a judgment under both the common law remedy and the statutory remedy. Fla. Stat. § 624.155(7); Dunn v. National Security Fire & Casualty Co., 631 So. 2d 1103 (Fla. 5th DCA 1993)(Receded from by Boozer v. Stalley, 146 So.3d 139 (Fla. 5th DCA 2014).

In statutory bad faith actions, an insurer has 60 days to cure the wrongful conduct. The party seeking relief is required to file a notice of violation, commonly referred to as a "civil remedy notice," with the Florida Department of Financial Services. The insurer is required to respond within 60 days after the notice is accepted by the Department of Financial Services. The insurer has the opportunity to "cure" the circumstances giving rise to the violation within the 60 day period. If the insurer does not respond within the 60-day period, a presumption of bad faith arises that shifts the burden to the insurer to show why it did not respond. Imhof v. Nationwide Mutual Ins. Co., 643 So. 2d 617, 619 (Fla. 1994)(receded from by State Farm Mut. Auto Ins. Co. v.

Laforet, 658 So. 2d 55 (Fla. 1995)). No statutory bad faith action may be brought if the insurer "cures" the circumstances giving rise to the violation within 60 days. Talat Enterprises, Inc., 753 So. 2d at 1278; Franklin v. Minnesota Mutual Life Ins. Co., 97 F. Supp. 2d 1324, 1327 (S.D. Fla. 2000).

Florida courts are undecided as to the specificity required in the Civil Remedy Notice. In Heritage Corp. v. National Union Fire Insurance Company, 580 F. Supp. 2d 1294 (S.D. Fla. 2008), the Court held that a Civil Remedy Notice was fatally defective due to the absence of a specific claim for relief. The opposite result was reached in Porcelli v. OneBeacon Insurance Company, 635 F. Supp. 2d 1312 (M.D. Fla. 2008); See also O'Leary v. First Liberty Ins. Corp., 2010 WL 3610446 (M.D. Fla. 2010). In Rousso v. Liberty Surplus Ins. Corp., 2010 WL 7367059 (S.D. Fla. 2010), the Court found that common allegations such as "claim delay," "claim denial," "unfair trade practice," "unsatisfactory settlement offer," are uninformative recitations and do not meet the requirements of Fla. Stat. § 624.155. The allegations do not specifically inform the insurer of the facts underlying the alleged violations or the corrective action that the insurer needed to take to remedy the alleged violation. Id.

The Supreme Court clarified application of the "cure provision" in 624.155, Fla. Stat., in Macola v. Gov't Employees. Ins. Co., 953 So. 2d 451 (Fla. 2006). There the Supreme Court held that tender of the policy limits to an insured in response to the filing of a civil remedy notice under Fla. Stat. § 624.155 by the insured, after the initiation of a lawsuit against the insured but before entry of an excess judgment, did not preclude a common law cause of action against the insurer for third-party bad faith. Id. at *20.

In a case of first impression for the state, the Fourth District Court of Appeal in Contreras v. U.S. Sec. Ins. Co., 927 So. 2d 16 (Fla. 4th DCA 2006), underscored that the actions of the insurer in fulfilling its obligation to the insured, not that of the claimant, are the focus in a bad faith claim. The court found bad faith where an insurer refused to settle with a claimant who offered to release one insured and not the other.

### 4. Third-Party

Florida has long allowed third-party bad faith claims against insurance companies under the common law. See Time Insurance Co. v. Burger, 712 So. 2d 389 (Fla. 1998). In considering whether bad faith exists, courts have applied a totality of the circumstances analysis. State Farm Mut. Auto. Ins. Co. v. Laforet, 658 So. 2d 55 (Fla. 1995); see also Harvey, 2018 WL 4496566 (Fla. 2018) (holding Florida's totality of the circumstances test is not a mere check list). Negligence and reasonable diligence are material to the issue of bad faith. See Campbell, 306 So. 2d at 530.

In Auto Mutual Indemnity Co. v. Shaw, 184 So. 852 (Fla. 1938), the Florida Supreme Court for the first time recognized that in a third-party liability setting, an implied covenant of good faith and fair dealing exists between the insured and its liability insurer. The insurer, in settling claims and conducting a defense, has a duty to exercise that degree of care which a person of ordinary care and prudence would exercise in the management of his own business. This good faith duty obligates the insurer to advise the insured of settlement opportunities, to advise as to the probable outcome of litigation, to warn of the possibility of an excess judgment, and to advise the insured of any steps he might take to avoid same. The insurer must investigate the facts, give fair consideration to a settlement offer that is not unreasonable under the facts, and settle, if possible,

where a reasonably prudent person, faced with the prospect of paying the total recovery, would do so. Boston Old Colony Ins. Co. v. Gutierrez, 386 So. 2d 783, 785 (Fla. 1980); see also Harvey, 2018 WL 4496566 (Fla. 2018) (holding that the duty to act in good faith "continued through the duration of the claims process"). A cause of action for an insurer's bad faith failure to settle a third party claim may not be maintained until a judgment in excess of the policy limits has been entered against the insured. GEICO Gen. Ins. Co. v. Harvey, 109 So. 3d 236 (Fla. 4th DCA 2013).

A common law third-party bad faith claim may be brought either by the insured or by a third-party judgment creditor standing in the insured's shoes. See Travelers Indemnity Co. v. Butchikas, 313 So. 2d 101 (Fla. 1st DCA 1975); Thompson v. Commercial Union Co. of N.Y., 250 So. 2d 259 (Fla. 1971). The third-party judgment creditor's action is derivative of the insured's and is not a separate claim. Fidelity & Cas. Co. of New York v. Cope, 462 So. 2d 459 (Fla. 1985).

Third-party bad faith claims often arise from an excess judgment entered against an insured. In such cases, the issue is whether the insurance company should have resolved the case within policy limits if it had acted fairly and honestly towards its insured with due regard for his or her interest. In North American Van Lines, Inc. v. Lexington Ins. Co., 678 So. 2d 1325 (Fla. 4th DCA 1996), the court noted that an insurance carrier must evaluate settlement proposals as though it alone carried the entire risk of loss. Insurance companies have to fulfill their fiduciary obligation to an insured by making decisions that are in the insured's best interest. Insurers should be careful to evaluate settlement offers from the perspective of whether an insured with unlimited assets would have tried to resolve the case for an amount within the applicable policy limits. If so, the insurance company in good faith should resolve the case within policy limits. See Campbell v. Government Employees Ins. Co., 306 So. 2d 525 (Fla. 1974).

In Perera v. United States Fid. & Guar. Co., 35 So. 3d 893 (Fla. 2010) the Florida Supreme Court analyzed four basic scenarios that can result in a common law third-party bad faith claim against an insurer for damages sustained as a result of the insurer's bad faith: (1) the classic bad-faith situation where an excess judgment is entered against the insured; (2) stipulations known as Cunningham agreements, which have been held to be the "functional equivalent" of an excess judgment; (3) Coblentz agreements, and (4) where the primary insurer refuses to settle and the excess carrier brings a bad-faith claim against a primary insurer by virtue of equitable subrogation. Id. See also Vigilant Ins. Co. v. Cont'l Cas. Co., 33 So. 3d 734 (Fla. 4th DCA 2010).

The nonjoinder statute, § 627.4136(1), Fla. Stat. (2006), prevents a third party from pursuing a direct action against an insurer for a cause of action covered by liability insurance unless the third party has first obtained a settlement or jury verdict against the insured. Once a settlement or verdict has been obtained against an insured, § 627.4136(4), Fla. Stat. (2006) permits joinder of the insurer solely for the purposes of entering final judgment or enforcing the settlement. Section 627.4136(4), Fla. Stat. (2006) expressly excludes joinder of an insurer as a party defendant when the insurer has denied coverage.

## Fraud

The essential elements of a fraud claim in Florida are: (a) a false representation of fact, known by the party making it to be false at the time it was made; (b) that the representation was made for the purpose of inducing another to act in reliance on it; (c) actual reliance on the representation; and (d) resulting damage to the plaintiff. *Essex Ins. Co. v. Universal Entertainment & Skating Ctr.,* 665 So. 2d 360, 362 (Fla. 5th DCA 1995); *S.H. Inv. & Dev. Corp. v. Kincaid*, 495 So. 2d 768 (Fla. 5th DCA 1986), *rev. denied*, 504 So. 2d 767 (Fla. 1987); *Poliakoff v. National*

*Emblem Insurance Co*., 249 So. 2d 477 (Fla. 3d DCA), cert. denied, 254 So. 2d 790 (Fla. 1971).

## Intentional or Negligent Infliction of Emotional Distress

Florida has adopted the Restatement (Second) of Torts' definition of a claim for intentional infliction of emotional distress. *Eastern Airlines, Inc. v. King*, 557 So. 2d 574 (Fla. 1990); *Metropolitan Life Insurance Co. v. McCarson*, 467 So. 2d 277 (Fla. 1985). The elements of the cause of action are: (1) The wrongdoer's conduct was intentional or reckless, that is, he intended his behavior or should have known that emotional distress would likely result; 2) The conduct was outrageous, that is, as to go beyond all bounds of decency, and to be regarded as odious and utterly intolerable in civilized communities; (3) The conduct caused emotional distress; and (4) The emotional distress was severe. *LeGrande v. Emmanuel*, 889 So. 2d 991, 994 (Fla. 3d DCA 2004). A plaintiff need not have suffered any physical injury to succeed in a claim for intentional infliction of emotional distress. *R.J. v. Humana of Florida, Inc.,* 652 So. 2d 360 (Fla. 1995).

In claims of negligent infliction of emotional distress, Florida's "impact rule" provides that a plaintiff's emotional distress suffered must be in conjunction with or flow from physical injuries sustained by the plaintiff. *R.J*., 652 So. 2d at 360. The elements of the cause of action are: (1) The plaintiff must suffer physical injury; (2) The plaintiff's physical injury must be caused by the psychological trauma; (3) The plaintiff must be involved in the event causing the negligent injury to another; and (4) The plaintiff must have a close personal relationship to the directly injured person. *Zell v. Meeks*, 665 So. 2d 1048, 1054 (Fla. 1996).

Florida's Supreme Court has held, however, that in cases of claims against health insurers, the common law impact requirement has been superseded by Fla. Stat. § 624.155, which allows for various statutory claims against insurers. *Time Insurance Co. v. Burger*, 712 So. 2d 389 (Fla. 1998). However, because the statute is in derogation of common law and must therefore be strictly construed, and because the statute does not provide specific standards for recovery on such claims, the court has set forth standards by which a plaintiff may recover. In cases where proof of bad faith by an insurer is evident, and where the insurer's conduct results in an insured not receiving health care, an insured may recover for emotional distress if the insured can prove the following: (1) that the bad faith conduct resulted in the insured's failure to receive necessary or timely health care; (2) that, based upon a reasonable medical probability, this failure caused or aggravated the insured's medical or psychiatric condition; and (3) that the insured suffered mental distress related to the condition or the aggravation of the condition. The plaintiff/insured must additionally substantiate these allegations with the testimony of a qualified health care provider, not a mere lay witness. *Id*. at 393.

## State Consumer Protection Laws, Rules and Regulations

As noted in the discussion of bad faith claims above, Florida provides a first party, statutory cause of action against insurers. Any person may bring a civil action against an insurer who violates the following statutes: 626.9541(1)(i), (o) or (x); 626.9551; 626.9705; 626.9706; 626.9707; 627.7283. *See* Fla. Stat. §624.155(1)(a).

- Florida Statute §626.9541(1)(i) for unfair claim settlement practices includes as violations attempts to settle claims based on documents altered without the knowledge or consent of the insured, material misrepresentations made to the insured with the intent to settle at terms less favorable to the insured, or committing or performing with such frequency as to indicate a general business practice any of the following:

- Failing to adopt and implement standards for the proper investigation of claims;
- Misrepresenting pertinent facts or insurance policy provisions relating to coverages at issue;
- Failing to acknowledge and act promptly upon communications with respect to claims;
- Denying claims without conducting reasonable investigations based upon available information;
- Failing to affirm or deny full or partial coverage of claims, and, as to partial coverage, the dollar amount or extent of coverage, or failing to provide a written statement that the claim is being investigated, upon the written request of the insured within 30 days after proof-of-loss statements have been completed;
- Failing to promptly provide a reasonable explanation in writing to the insured of the basis in the insurance policy, in relation to the facts or applicable law, for denial of a claim or for the offer of a compromise settlement;
- Failing to promptly notify the insured of any additional information necessary for the processing of a claim; or
- Failing to clearly explain the nature of the requested information and the reasons why such information is necessary.
- An insurer violates Florida Statute § 626.9541(1)(o) for illegal dealings in premiums; excess or reduced charges for insurance by charging reduced or excess rates for insurance. Further provisions within this section relate to motor vehicle insurance, not applicable here.
- Pursuant to Florida Statute § 626.9541(1)(x), an insurer violates this section when it refuses to insure an individual based upon race, color, creed, marital status, sex, or national origin. Further prohibited reasons for a refusal to insure include the fact that the individual is a public official, has previously been refused insurance coverage, fails to purchase non-insurance service or commodities or services from the insurer, or the individual's age, residence, or lawful occupation.
- Section 626.9551 prohibits favoring insurers or carriers or coercing debtors.
- Section 626.9705 prohibits refusal to provide life or disability insurance to an individual on the basis that the individual suffers from a severe disability.
- Section 626.9706 prohibits the denial of life insurance coverage to an individual on the basis of the sickle cell trait.
- Section 626.9707: Prohibits the denial of disability insurance to an individual on the basis of the sickle cell trait.
- Section 627.7283: Relates to return of premiums for canceled motor vehicle insurance.

## DISCOVERY ISSUES IN ACTIONS AGAINST INSURERS

### Discoverability of Claims Files Generally

In actions seeking benefits under an insurance contract, the insurer's claim file is not subject to discovery as it is irrelevant and not reasonably calculated to lead to the discovery of admissible evidence. *See State Farm Florida*

*Ins. Co. v. Gallmon*, 835 So. 2d 389 (Fla. 2d DCA 2003) (claim file irrelevant and protected work product in action seeking additional payment under homeowner's policy). The holding in *Gallmon* as to relevance is a bright line ruling that does not differentiate among the various items that might be contained in a claim file. *See also, State Farm Fire & Casualty Co. v. Valido*, 662 So. 2d 1012 (Fla. 3d DCA 1995) and *Scottsdale Ins. Co. v. Camara De Comercio Latino-Americana de Los Estados Unidos, Inc.*, 813 So. 2d 250 (Fla. 3d DCA 2002).

However, in bad faith claims, the Florida Supreme Court applied a different rule as to the discoverability of claim files. *Allstate Indem. Co. v. Ruiz*, 899 So. 2d 1121 (Fla. 2005). In Florida all claim files and materials involved in claims processing, which are created up to and including the date of the resolution of the underlying claim pertaining in any way to coverage, benefits, liability or damages, are now discoverable in both first-party and third-party bad faith claims. *Id.* at 1129-1130. Notwithstanding, a party is not entitled to discovery of an insurer's claim file or documents relating to the insurer's business policies or practices regarding the handling of claims in an action for insurance benefits combined with a bad faith action until the insurer's obligation to provide coverage has been established. *Liberty Mut. Ins. Co. v. Farm, Inc.*, 754 So. 2d 865 (Fla. 3d DCA 2000) (holding that a discovery order in a bad faith action requiring disclosure of the insurer's business practices was premature without a determination of the coverage issue); *American Bankers Ins. Co. of Fla. v. Wheeler,* 711 So. 2d 1347, 1348 (Fla. 5th DCA 1998) (holding that in a bad faith action, when the issue of coverage has not been determined, it is a departure from the essential requirements of the law to order disclosure of the insurer's claims file and the insurer's claims handling manuals and materials); *State Farm Fire & Cas. Co. v. Martin*, 673 So. 2d 518, 519 (Fla. 5th DCA 1996); *see also Blanchard v. State Farm Mut. Auto. Ins. Co.,* 575 So. 2d 1289 (Fla. 1991).

Where both the coverage and bad faith claims are filed simultaneously, the appropriate step is to abate the bad faith action until coverage and damages have been determined, and use in-camera inspection to ensure full and fair discovery. *See State Farm Mut. Auto. Ins. Co. v. Tranchese,* 49 So. 3d 809 (Fla. 4th DCA 2010) (When the bad faith claim is abated pending the determination of coverage and damages, a party is not entitled to discovery related to the claims files or to the insurer's business policies or practices regarding handling of claims). However, the trial court has the discretion to dismiss the action without prejudice. *GEICO General Ins. Co. v. Harvey*, 109 So. 3d 236, 239 (Fla. 4th DCA 2013).

Although a District Court will not review denial of a motion to dismiss a bad faith claim based on arguments that the same is premature, it can review a discovery order requiring production of the claim file. In such a case, an order compelling discovery is a departure from the essential requirements of the law and is properly quashed. *State Farm Mutual Automobile Insurance Company v. O'Hearn*, 975 So. 2d 633, 637 (Fla 2d DCA 2008).

## Discoverability of Reserves

While no Florida cases directly discuss the discoverability of reserve information, case law suggests that such information is not discoverable in first party cases because it is immaterial to the analysis of coverage. *See U.S. v. Pepper's Steel & Alloys, Inc.*, 132 F.R.D. 695, 700 n. 4 (S.D. Fla. 1990); *see also Gallmon,* 835 So. 2d at 389; *Homeowners Choice Property and Casualty Ins. Co., Inc. v. Avila*, 248 So. 3d 180, 186 (Fla. 3rd DCA 2018) (J. Logue concurring holding that "In addition to work product, claim files usually contain confidential and proprietary claims handling materials such as . . . reserve placed on the claim. . . . These claims handling materials, while discoverable in a bad faith suit, are not discoverable in a first or third party claim for damages based on the policy.) (citations omitted).

## Discoverability of Existence of Reinsurance and Communications with Reinsurers

A reinsurance contract provides that one insurer (the "ceding insurer" or "reinsured") cedes all or part of the risk it underwrites, pursuant to a policy or group of policies, to another insurer. *American Bankers Ins. Co. of Florida v. Northwestern Nat. Ins. Co.,* 198 F.3d 1332, 1333 (11th Cir.). Pursuant to the contract, the reinsurer agrees to indemnify the ceding insurer on the transferred risk. *Id*. Reinsurance information is relevant and discoverable in a third party bad faith action. *American Fidelity & Cas. Co. v. Greyhound Corp.,* 258 F.2d 709, 712 (5th Cir. 1958). In *Simon v. ProNational Ins. Co.,* 2007 WL 4893477 (S.D. Fla. Nov. 1, 2007), the court in a first-party statutory bad-faith action granted an order compelling the insurer to identify its reinsurer so that plaintiff could subpoena the communications between the reinsurer and the insurer regarding the insurer's "evaluation of the claim" and its "decision to proceed in a course of conduct that injured its insured." *Id*. However, in *Emplr. Reinsurance Corp. v. Laurier Indem. Co.,* 2006 WL 532113 (M.D. Fla. Mar. 3, 2006), the court denied a motion to compel communications between the insurer and reinsurer in a declaratory judgment action on the basis of the work-product and/or attorney-client privilege.

## Attorney/Client Communications

An attorney representing an insured and insurer, in the absence of conflict between them, has dual clients, the insurer and the insured. The insured's interest must be paramount, and the primary client is the insured. Where an insurer retains counsel to represent its insured, communications between the insured and his counsel that pertain to the common interest held by the insured and the insurer-- i.e., the defense of the claim-- are available to the insurer, even after the insured and the insurer's interests become adverse. *Springer v. United Services Auto. Ass'n,* 846 So. 2d 1234, 1235 (Fla. 5th DCA 2003). By the same token, communications concerning matters not pertaining to the defense or resolution of the liability case, such as a discussion of coverage issues or how to proceed if the case could not be settled within the policy limits, may be privileged. *Id*. Prior to a lawyer's representation of an insured at the expense of an insurer, the insured shall be provided with the Statement of Insured Client's Rights, which sets forth the insured's rights with respect to the representation and explains that certain information may be shared with the insurer. Rule 4-1.8 of Rules Regulating the Florida Bar.

In *Genovese v. Provident Life & Accident Ins. Co.,* 74 So. 3d 1064 (Fla. 2011), the Florida Supreme Court held an insured (first party) asserting a bad faith claim against its insurer generally may not discover the privileged communications that occurred between the insurer and its counsel during the underlying action. *Id.* Nevertheless, the Court cautioned there may be circumstances where an insurer hires an attorney to investigate both the underlying claim and render legal advice. *Id.* Consequently, the materials requested by the opposing party may implicate both the work product doctrine and the attorney-client privilege, and the trial court should conduct an in-camera inspection to determine whether the sought-after materials are truly protected by the attorney-client privilege. *Id*. If the trial court determines that the investigation performed by the attorney resulted in the preparation of materials that are required to be disclosed pursuant to *Ruiz* and did not involve the rendering of legal advice, then that material is discoverable. *Id*. *Genovese* also contemplated that discovery of attorney-client privileged communications between an insurer and its counsel is permitted when the insurer raises the advice of its counsel as a defense in the action and the communication is necessary to establish the defense. *Id*.; *See also State Farm Fla. Ins. Co. v. Puig*, 62 So. 3d 23 (Fla. 3d DCA. 2011).

## Misrepresentations/Omissions: During Underwriting or During Claim

Florida Statue § 627.409(1) provides the following representations in applications; warranties:

- All statements and descriptions in any application for an insurance policy or annuity contract, or in negotiations therefor, by or in behalf of the insured or annuitant, shall be deemed to be representations and not warranties. Misrepresentations, omissions, concealment of facts, and incorrect statements shall not prevent a recovery under the policy or contract unless:
    - They are fraudulent;
    - They are material either to the acceptance of the risk or to the hazard assumed by the insurer; or
    - The insurer in good faith would either not have issued the policy or contract, would not have issued it at the same premium rate, would not have issued a policy or contract in as large an amount, or would not have provided coverage with respect to the hazard resulting in the loss, if the true facts had been made known to the insurer as required either by the application for the policy or contract or otherwise.

Materiality is more than a subjective question of whether the insured would have issued the policy, as that scenario is adequately addressed in Fla. Stat. § 627.409(1)(c). *Singer v. Nationwide Mutual Fire Insurance Co.,* 512 So. 2d 1125, 1128 (Fla. 4th DCA 1987). A misrepresentation is considered material if it "does not enable a reasonable insurer to adequately estimate the nature of the risk in determining whether to assume the risk." *Id.* at 1129 (citing *Mutual Life Insurance Co. v. Denton,* 112 So. 53 (Fla. 1927)). Materiality under Fla. Stat. § §627.409(1)(b) is considered an objective test, and therefore a question of law. *Id.* The materiality of a misrepresentation is a question of fact where a dispute exists as to questions asked by an agent, the accuracy of answers provided, and the nature of the insured's misrepresentation. *Cox v. American Pioneer Life Insurance Co.*, 626 So. 2d 243, 244-245 (Fla. 5th DCA 1993) (citing *Patterson v. Cincinnati Ins. Co.,* 564 So. 2d 1149 (Fla. 1st DCA 1990); *Preferred Risk Life Ins. Co. v. Sande*, 421 So. 2d 566 (Fla. 5th DCA 1982); *Beneby v. Midland Nat. Life Ins. Co.,* 402 So. 2d 1193 (Fla. 3d DCA 1981); *Travelers Ins. Co. v. Zimmerman*, 309 So. 2d 569 (Fla. 3d DCA 1975)).

If an insurer is on notice that it should investigate further, the insurer is bound by what a reasonable investigation would have uncovered. Misrepresentations on an application by an insured; therefore, may not provide grounds for denial of coverage where the insured has provided an agent with information that placed the insurer on notice. *Cox*, 626 So. 2d at 246. However, an insurer is not required to investigate the condition of the property insured. Where a policy contains a warranty that the property complies with all applicable laws, a building code violation increases the hazard insured and constitutes a breach of the warranty. *Clarendon American Insurance Company v. Bayside Restaurant, LLC,* 567 F. Supp. 2d. 1379, 1385 (M.D. Fla. 2008)(citing *Fla. Power & Light Co. v. Foremost Ins. Co.*, 433 So. 2d 536 (Fla. 4th DCA 1983)).

Where questions in an insurance contract contain prefatory language that states "to the best of my knowledge and belief" in regard to answers by the insured, the insurer will be bound by that lower standard of accuracy and cannot be protected by the more stringent statutory requirements regarding misrepresentations. *Green v. Life & Health of America*, 704 So. 2d 1386 (Fla. 1998).

If the insured's conduct is a material misrepresentation pursuant to Fla. Stat. § 627.409, then the insurer's failure to rescind a policy in accordance with Fla. Stat. § 627.728 does not preclude or abrogate the insurer's ability to void the policy ab initio pursuant to § 627.409. *United Auto. Ins. Co. v. Salgado*, 22 So. 3d 594 (Fla. 3d DCA 2009).

## Failure to Comply with Conditions

The prevailing rule in Florida is that compliance with the various clauses in an insurance policy will be considered a condition precedent to the insurer's liability, even if the policy does not contain an express statement to this effect. *American Fire and Cas. Co. v. Collura*, 163 So. 2d 784, 791 (Fla. 2d DCA 1964). Therefore, an insurer is relieved of all liability under an insurance policy where the insured fails to comply with a notice of claim provision contained within the policy and the insurer has been prejudiced by such failure. *Liberty Mut. Ins. Group v. Cifuentes,* 760 So. 2d 230, 231 (Fla. 3d DCA 2000)(citations omitted).

As a presumption exists that the insurer has been prejudiced by the insured's failure to provide timely notice, the burden is on the insured to show that his late notice did not cause prejudice. *Holinda v. Title and Trust Co. of Florida*, 438 So. 2d 56, 57 (Fla. 5th DCA 1983). In addition, the failure of an insured to cooperate with his insurer in its investigation will release the insurer from liability if the failure constitutes material breach and substantially prejudices the rights of the insurer in defense of the cause. *Ramos v. Northwestern Mut. Ins. Co*., 336 So. 2d 71, 75 (Fla. 1976). Contrary to the law governing the condition precedent of notice; however, the insurer bears the burden to prove that it was prejudiced by an insured's breach of his duty to cooperate. *Robinson v. Auto Owners Ins. Co.*, 718 So. 2d 1283, 1285 (Fla. 2d DCA 1998).

An insured is not entitled to indemnification when it enters into a settlement agreement with a claimant without insurer's consent where insurer has not violated its duty to defend. *Am. Reliance Ins. Co. v. Perez*, 712 So. 2d 1211, 1212-1213 (Fla. 3rd DCA 1998). An insured who settles a claim without the consent of an insurer who is defending under a reservation of rights has been found to violate the cooperation obligation under a policy, relieving the insurer of the obligation to indemnify. *First Am. Title Ins. Co. v. Nat'l Union Fire Ins. Co.*, 695 So. 2d 475, 477 (Fla. 3d DCA 1997).

In *Rolyn Cos. v. R & J Sales of Tex., Inc.,* 412 Fed. Appx. 252 (11th Cir. Fla. 2011), the Eleventh Circuit held that the policy's voluntary-payment provision precluded the insured from indemnity for repair costs because the insured did not seek the insurer's consent before voluntarily incurring the costs. The Court ruled that the action of the insured was a failure to cooperate, which substantially prejudiced the rights of the insurer in defense of the cause and released the insurer of its obligation to pay.

Moreover, Florida Statute § 627.727(6)(a) requires prior notice to a uninsured/underinsured carrier of an intent to settle. Failure to give notice creates a rebuttable presumption of prejudice. *Muth v. Allstate Insurance Company,* 982 So. 2d 749 (Fla 4th DCA 2008).

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

Insurance policies commonly provide that a claim is not payable for a stated period of time after a proper claim is made. *Blue Cross and Blue Shield of Florida, Inc. v. Ming*, 579 So. 2d 771, 772 (Fla. 5th DCA 1991). Such "no action" clauses customarily provide that no action may lie against the insurer until the insured's obligation to pay has finally been determined, either by judgment against him after trial or by written agreement entered into by the insurer. *Steil v. Florida Physicians' Ins. Reciprocal*, 448 So. 2d 589, 590 (Fla. 2d DCA 1984). Accordingly, where the insurer has not declined to provide a defense to a suit, the insured is ordinarily not free to independently

engage in settlements without the insurer's consent. *Perez*, 712 So. 2d at 1212-1213. Indeed, violation of a settlement provision voids coverage unless the insured can conclusively overcome a presumption of prejudice to the insurer—a mere denial is insufficient. *New Hampshire Ins. Co. v. Knight*, 506 So. 2d 75, 78 (Fla. 5th DCA 1987).

## Preexisting Illness or Disease Clauses

Exclusionary clauses of any kind in insurance contracts are strictly construed against the insurer. *See Prudential Prop. & Cas. Ins. Co. v. Swindal*, 622 So. 2d 467 (Fla. 1993). Insurance policies are construed in the broadest fashion to provide the greatest coverage. *Hudson v. Prudential Prop. & Cas. Ins. Co.,* 450 So. 2d 565, 568 (Fla. 2d DCA 1984).

Florida statutes require that preexisting condition clauses in insurance contracts may not preclude coverage for more than 24 months after the effective date, and may only relate to "(a) Conditions that, during the 24-month period immediately preceding the effective date of coverage, had manifested themselves in such a manner as would cause an ordinarily prudent person to seek medical advice, diagnosis, care, or treatment or for which medical advice, diagnosis, care, or treatment was recommended or received; or (b) a pregnancy existing on the effective date of coverage." § 627.6045(1), Fla. Stat.

Moreover, the statute mandates that if an insured was covered by a previous policy with similar or greater coverage, the insured must be credited for the time covered under the previous policy, so long as the previous coverage ended not more than 62 days before the effective date of the new coverage. § 627.6045(2), Fla. Stat.

Short-term, nonrenewable health insurance policies of no more than a 6-month policy term do not qualify as previous coverage to exempt the insured from having to meet the preexisting requirements. However, those policies must clearly disclose to the insured in both advertising and the application itself, in 14-point contrasting type, that it does not meet the requirement of § 627.6699, and that "[a]s a result, if purchased in lieu of a conversion policy or other group coverage, [the insured] may have to meet a preexisting condition requirement when renewing or purchasing other coverage." § 627.6045(3), Fla. Stat.

The PPACA may preempt some of these regulations, including prohibiting health insurance policies from excluding coverage for any pre-existing condition; these issues have not yet been addressed by Florida courts.

## Statutes of Limitations and Repose

When a claim against an insurer is based on a written contract, an insured has a five-year period in which to bring suit. Fla. Stat. § 95.11(2)(b). When a claim sounds in tort, is based upon statutory liability, or is a contract action not founded on a written instrument, Florida provides a four-year statute of limitations for the action. Fla. Stat. § 95.11(3). In any event, in claims against insurers, the limitations period begins to run from the date of the alleged breach. *Saenz v. State Farm Fire & Cas. Co*., 861 So. 2d 64 (Fla. 3d DCA 2003) (citing *State Farm Mut. Auto. Ins. Co. v. Lee*, 678 So. 2d 818, 821 (Fla. 1996)).

The incontestability clause of Fla. Stat. §627.455 acts as a statute of limitations and once effective, bars the insurer from any attempt to rescind or cancel the policy for any grounds, other than those specifically enumerated in the statute, including imposter fraud. *Allstate Life Ins. Co. v. Miller,* 424 F.3d 1113, 1115 (11th Cir. 2005) (applying Florida law); *see also Pruco Life Ins. Co. v. Brasner,* 2011 WL 134056 (S.D. Fla. Jan. 7, 2011) (discussing the issue of whether an incontestability clause bars the claim/defense that a contract is void ab initio). Again, some of these health insurance regulations may now be preempted by PPACA.

# TRIGGER AND ALLOCATION ISSUES FOR LONG-TAIL CLAIMS

## Trigger of Coverage

"Claims-made" policies trigger coverage if the negligent act or omission is discovered and brought to the attention of the insurer within the policy term. *Gulf Ins. Co. v. Dolan, Fertig & Curtis,* 433 So. 2d 512, 514 (Fla. 1983). "Occurrence" policies, on the other hand, trigger the insurer's liability if the negligent act or omission occurs during the period of policy coverage, regardless of the date of discovery or the date the claim is made or asserted. *Id*.

## Allocation Among Insurers

Most insurance policies contain "other insurance" clauses that attempt to limit the insurer's liability to the extent that the other insurance covers the same risk. Such clauses attempt to control the manner in which each insurer contributes to or shares a covered loss. *St. Paul Fire and Marine Insurance Company v. Lexington Insurance Company,* 2006 WL 1295408 (S.D. Fla. April 4, 2006), *see generally Twin City Fire Ins. Co. v. Fireman's Fund Ins. Co.,* 386 F.Supp.2d 1272 (S.D. Fla. 2005).

Florida adheres to the rule of "mutual repugnancy." *See Travelers Ins. Co. v. Lexington Ins. Co.,* 478 So. 2d 363, 365 (Fla. 5th DCA 1985) (Where two policies cover the same occurrence and both contain other insurance clauses, the excess insurance provisions are mutually repugnant and must be disregarded. Each insurer is then liable for a pro rata share of the settlement or judgment.); *see also Allstate Ins. Co. v. Executive Car & Truck Leasing*, Inc., 494 So.2d 487, 489 (Fla. 1986). Florida law does not recognize a "super excess" other insurance clause. *See Am. Cas. Co. of Reading, Pa. v. Health Care Indem., Inc.,* 613 F. Supp. 2d 1310 (M.D. Fla. 2009).

As a general proposition, where each of two liability insurance policies issued by different carriers provides primary coverage to the same insured and the policies contain mutually consistent 'other insurance' provisions . . . , the insurer paying more than its share of the claim is ordinarily entitled to recover from the other insurer for the excess so paid." *St. Paul Fire*, 2006 WL 1295408 at *17. However, this general rule is subject to an exception where a right of indemnification exists between the parties insured under the respective policies of insurance. In this circumstance, Florida courts give controlling effect to the indemnity obligation of one insured to the other insured over the "other insurance" or similar clauses in the policies of insurance. *Continental Casualty Co. v. City of South Daytona Florida*, 807 So.2d 91 (Fla. 5th DCA 2002) (little league association's specific and contractual obligation of indemnification in favor of city shifted entire exposure of loss from city's own liability insurer to association's liability insurer, such that association's insurer had primary obligation to defend city in tort action arising out of use of association's use of city facilities); *see also Emplrs. Ins. Co. of Wausau v. Nat'l Union Fire Ins. Co.*, 2008 WL 1777807 (M.D. Fla. 2008).

# CONTRIBUTION ACTIONS

## Claim in Equity vs. Statutory

There is no common law or statutory right for contribution between primary or co- insurers for defense costs and attorneys' fees expended on a mutual insured. *Argonaut Ins. Co. v. Md. Casualty Co.,* 372 So. 2d 960 (Fla. 3d DCA 1979). The duty to defend is personal to the particular insurer. The primary or co-insurers are not entitled to

divide that duty with or require contribution from each other. *Cont'l Casualty Co. v. United Pac. Ins. Co.,* 637 So. 2d 270 (Fla. 5th DCA 1994); *See also Pa. Lumbermens Mut. Ins. Co.,* 43 So. 3d at 186 ("[T]here is no right of reimbursement to defense costs between primary insurers of a common insured."); *Am. Cas. Co. of Reading Pennsylvania v. Health Care Indem., Inc.,* 613 F. Supp. 2d 1310, 1322 (M.D. Fla. 2009) (same).

If an insurance company refuses to defend or provide contractual coverage to its insured, then it may expose its policy limits to a third party and faces a breach of contract suit with other statutory remedies by the insured, such as Fla. Stat. § 624.155. Thus, Florida courts and the legislature have reasoned it is unnecessary to provide the right of contribution between insurers for defense costs of a mutual insured. *Argonaut Ins. Co.*, 372 So. 2d at 960. The Legislature has not seen fit to allow statutory contribution for costs or attorney fees between primary or co-insurers on the basis that if contribution for costs were allowed between primary or co-insurers, then there would be multiple claims and law suits and the insurance companies would have no incentive to settle and protect the interest of the insured since another law suit would be forthcoming to resolve the coverage dispute between the insurance companies. *Pa. Lumbermens Mut. Ins. Co.*,43 So. 3d at 182 (insurer was not entitled to reimbursement of attorney's fees and costs from co-insurer expended in defense even though it was eventually determined that the claim was not covered by its own policy).

With respect to indemnity payments made by an insurer, a common law cause of action for contribution exists against another co-insurer where the policies each contain similar “other insurance” clauses and proration according to the policy limits is the proper method of determining the liability of the respective insurers. *Gulf Ins. Corp. v. Continental Casualty Co.,* 464 So. 2d 207 (Fla. 3d DCA 1985).

Florida Statute § 768.31 also provides that an insurer may subrogate for contribution against a joint tortfeasor for payments made by the insurer to discharge the liability of its insured-tortfeasor: “a liability insurer who by payment has discharged in full or in part the liability of a tortfeasor and has thereby discharged in full its obligation as insurer is subrogated to the tortfeasor’s right of contribution to the extent of the amount it has paid in excess of the tortfeasor’s pro rata share of the common liability." Fla. Stat. § 768.31.

## Elements

However, Florida courts do recognize a right of equitable subrogation between primary and excess insurers for defense costs and attorneys’ fees expended on a mutual insured. *See Am. & Foreign Ins. Co. v. Avis Rent-A-Car Sys.,* 401 So. 2d 855 (Fla. 1st DCA 1981) (expenses incurred by a secondarily liable carrier in the defense of its insured have been universally awarded when that company sues a primary insurer of the same insured, which should have undertaken that defense); *Phoenix Ins. Co. v. Fla. Farm Bureau Mut. Ins. Co.,* 558 So. 2d 1048 (Fla. 2d DCA 1990)(same); *Galen Health Care, Inc. v. Am. Cas. of Reading Pa.,* 913 F. Supp. 1525, 1534 (M.D. Fla. 1996)(same). Moreover, in *Cont'l Cas. Co. v. City of S. Daytona,* 807 So. 2d 91 (Fla. 5th DCA 2002), the indemnity agreement between the insureds designated whose insurance should provide primary coverage and the court upheld an award recovering defense attorneys’ fees and costs for the designated excess insurer that provided the only defense to the insured; the language of both policies provided for primary coverage. *Id.* Accordingly, an insured’s indemnity agreement and the policies’ “other insurance” clauses are key issues to examine and plead when asserting the right of equitable subrogation for defense costs/fees between primary and excess insurers or contribution for indemnity payments between co-insurers. *Certain Underwriters at Lloyds v. Waveblast Watersports, Inc.,* 80 F. Supp. 3d 1311 (S.D. Fla. 2015); *Allstate Ins. v. Fowler,* 480 So. 2d 1287 (Fla. 1985); *St. Paul Fire & Marine Ins. Co.,* 2006 WL 1295408.

# DUTY TO SETTLE

An insurer, in handling the defense of claims against its insured, has a duty to use the same degree of care and diligence as a person of ordinary care and prudence should exercise in the management of his or her own business, which amounts to a fiduciary duty requiring the exercise of good faith. *Doe v. Allstate Ins. Co.*, 653 So. 2d 371, 374 (Fla. 1995). In executing its good faith duty of diligence, the insurer must investigate the facts, give fair consideration to a settlement offer that is not unreasonable under the facts, and settle, if possible, where a reasonable prudent person, faced with the prospect of paying the total recovery, would do so. *Berges v. Infinity Ins. Co.,* 896 So. 2d 665 (Fla. 2004).

Furthermore, the insurer has a continuous duty to negotiate and settle in good faith and to advise the insured of settlement opportunities and possible outcomes of the litigation, including the possibility of an excess judgment, as well as any steps which may be taken to avoid such excess judgment. *Boston Old Colony Ins. Co. v. Gutierrez*, 386 So. 2d 783 (Fla. 1980); *Contreras v. U.S. Sec. Ins. Co*., 927 So. 2d 16 (Fla. 4th DCA 2006). Tort liability is imposed on an insurer for not attempting in good faith to settle claims when, under all the circumstances, it could and should have done so, had it acted fairly and honestly toward its insured and with due regard for his interests. *See* Fla. Stat. §624.155(1)(b)(1); *see also Aboy v. State Farm Mut. Auto. Ins. Co*., 394 Fed. Appx. 655 (11th Cir. Fla. 2010); *Gutierrez v. Yochim*, 23 So. 3d 1221 (Fla. 2d DCA 2009).

When the insured has surrendered to the insurer all control over the handling of the claim, including all decisions with regard to litigation and settlement, then the insurer must assume a duty to exercise such control and make such decisions in good faith and with due regard for the interests of the insured. *United Auto. Ins. Co. v. Estate of Levine*, 87 So. 3d 782 (Fla. 3d DCA 2011).

Bad faith may be inferred from a delay in settlement negotiations which is willful and without reasonable cause. *Goheagan v. Am. Vehicle Ins. Co*., 107 So. 3d 433 (Fla. 4th DCA 2012). Where liability is clear, and injuries so serious that a judgment in excess of the policy limits is likely, an insurer has an affirmative duty to initiate settlement negotiations. *Id.*

Florida also imposes additional duties upon insurers when settling claims where the multiple claims are involved. When faced with multiple, competing claims, insurers must exercise extreme caution. Indeed, insurers can be found liable for prematurely settling some claims and leaving others with no coverage. *Farinas v. Florida Farm Bureau Gen. Ins. Co*., 850 So. 2d 555 (Fla. 4th DCA 2003), rev. denied, (Fla. March 17, 2004). In *Farinas*, the court determined that the insurer has three specific duties. First, the insurer is required to "fully investigate all the claims at hand to determine how to best limit the insured's liability." *Id*. at 560. The court noted, however; that an insurer does have some "discretion in how it elects to settle claims, and may even choose to settle certain claims to the exclusion of others, provided this decision is reasonable and in keeping with its good faith duty." *Id*. at 561. However, the insurer should seek "to settle as many claims as possible within the policy limits." *Id*. at 560. The insurer also has a "duty to avoid indiscriminately settling selected claims and leaving the insured at risk of excess judgments that could have been minimized by wiser settlement practice." *Id*. Accordingly, when faced with multiple claims, insurers should (among other things) request specific information from each claimant, attempt to settle claims on a global basis, and allow claimants to negotiate amongst themselves regarding distribution of policy limits.

## LH&D BENEFICIARY ISSUES

### Change of Beneficiary

The right to change the beneficiary of a life insurance policy depends on the contract between the insurer and the

insured as expressed in the insurance policy. *Cooper v. Muccitelli*, 661 So. 2d 52 (Fla. 2d DCA 1995). Where the right to change the beneficiary rests solely with the insured, the beneficiary acquires no vested right or interest during the life of the insured, but only an expectancy. Section 627.423, Fla. Stat. (2004) requires that a change-of-owner or change-of beneficiary request must be in strict compliance with the terms of the policy. *Id.*; *see also Brown v. Di Petta*, 448 So. 2d 561, 562 (Fla. 3d DCA 1984).

A life insurance provision that gave the insured the right to change the beneficiary designation while he was alive could not be used to defeat the beneficiary change where the change of beneficiary form was executed while the insured was alive, but transmitted to the insurer after the insured's death. If the insured has complied with the terms of the policy, the fact that the change of beneficiary form was not transmitted until after the insured's death is immaterial. *Martinez v. Saez*, 650 So. 2d 668 (Fla. 3d DCA 1995). The insured's failure to comply with procedures of the insurance company required to effectuate a change of beneficiary is fatal. The mere intent to change the beneficiary of the policy is legally insufficient absent an effective designation of beneficiary on the form required by the insurer. *Di Petta*, 448 So. 2d at 562. A change of beneficiary request need only contain enough information to allow the insurance company to act on the request. *O'Brien v. McMahon*, 44 So. 3d 1273, 1279 (Fla. 1st DCA 2010).

There is no Florida authority establishing that a life insurance company has a duty to notify an insured or a substitute beneficiary that its change of beneficiary request is unacceptable. To the contrary, some courts have found that it is the duty of the insured to make certain that his life insurance company acts upon his change of beneficiary request. Where an insured hears nothing from insurance company and takes no further action, the insured abandons the change of beneficiary request. *United States Life Ins. Co. v. Logus Mfg. Corp.,* 845 F. Supp. 2d 1303 (S.D. Fla. 2012).

If an insured dies before the insurer endorses a change of beneficiary on an insurance policy pursuant to prior notice by the insured, the change is ineffective under a policy which provides that such change shall take effect only upon such endorsement. Under the same set of facts, when a policy provides that, the change is effective endorsement, the change shall relate back and take effect as of the date the insured executed the change of beneficiary notice. *Shuster v. New York Life Ins. Co*., 351 So. 2d 62 (Fla. 3d DCA 1977) (Quashed by *N.Y. Life Ins. Co. v. Shuster*, 373, So. 2d 916 (Fla. 1979) on different grounds).

## Effect of Divorce on Beneficiary Designation

Absent the marital settlement agreement providing who is or is not to receive the death benefits or specifying who is to be the beneficiary, courts should look no further than the insurance contract- named beneficiary. *Crawford v. Barker*, 64 So. 3d 1246 (Fla. 2011) (citations omitted). General language in a marital settlement agreement, such as language stating who is to receive ownership, is not specific enough to override the plain language of the beneficiary designation. Magic words are not required; however, if the parties wish to specify in a marital settlement agreement that a spouse will not receive the death benefits or wish to specify a particular beneficiary, this should be done clearly and unambiguously. *Id*.

A marital settlement agreement that specifically requires one of the parties to maintain a named individual as beneficiary will control the disposition of proceeds upon notice to the insurer. Without specific reference in a property settlement agreement to life insurance proceeds, the beneficiary of the proceeds is determined by looking only to the insurance contract. *Id*. When a marital settlement agreement mentions the disputed policy or plan, but does not specifically mention who should receive the death benefits or does not require a spouse to name a particular beneficiary as a condition of dissolution of marriage, the reviewing court should look no further than the beneficiary designation. *Id*.

Where the settlement agreement contains no mention of the life insurance policy, but rather only general releases, the owner of the policy can designate whomever he or she wishes as the beneficiary, and the beneficiary designation controls. *Id.* The spouse, who owns the policy, plan, or account, is free to name any individual as the beneficiary unless the marital settlement agreement requires a spouse to name a particular beneficiary as a condition of a dissolution of marriage. *Id*.

## INTERPLEADER ACTIONS

### Availability of Fee Recovery

Pursuant to Florida Rule of Civil Procedure 1.240, persons having claims against the plaintiff may be joined as defendants and required to interplead when their claims are such that the plaintiff is or may be exposed to double or multiple liability. It is not ground for objection to the joinder that the claim of the several claimants or the titles on which their claims depend do not have a common origin or are not identical but are adverse to and independent of one another, or that the plaintiff avers that the plaintiff is not liable in whole or in part to any or all of the claimants. A defendant exposed to similar liability may obtain such interpleader by way of crossclaim or counterclaim. The provisions of this rule supplement and do not in any way limit the joinder of parties otherwise permitted. Fla. R. Civ. P. 1.240.

The plain language of Fla. R. Civ. P. 1.240 clearly articulates but one requirement for the commencement of an interpleader action: that the stakeholder is or may be exposed to double or multiple liability. Florida courts continue to recite the four common law requirements for interpleader. However, the only absolute requirement remaining under Fla. R. Civ. P. 1.240 is that the stakeholder is or may be exposed to double or multiple liability for competing claims to a single fund. A party may not object to interpleader on the grounds that one of the remaining three common law requirements is not met. The sole requirement for the maintenance of an interpleader action is that the stakeholder is or may be exposed to double or multiple liability with respect to the interpleaded fund or res.

Importantly, as is demonstrated by the inclusion of the word "may," Fla. R. Civ. P. 1.240 is forward-looking, contemplating interpleader based on potential liability. Such potential is; however, constrained by reason and good faith. While a stakeholder need not assess the threat of multiple liability to a level of certainty or even probability, he must have a reasonable and bona fide fear of exposure to multiple liability at the time interpleader is sought. In other words, a stakeholder may not interplead based on an unreasonable fear of a merely hypothetical claim that lacks merit grounded in law or in fact. *Rainess v.Estate of Machida*, 81 So. 3d 504 (Fla. 3d DCA 2012).

A party who is entitled to sue in interpleader is ordinarily permitted to recover reasonable attorney's fees from the interpleaded fund. As a general rule, to be entitled to attorney's fees, a stakeholder must prove his total disinterest in the stake he holds other than that of bringing it into court so that conflicting claims thereto can be judicially determined and show that he did nothing to cause the conflicting claims or to give rise to the peril of double vexation. *Rainess*, 81 So. 3d at 504. Florida case law also requires an interpleader to make a showing that he has "not instituted the action for its own protection." *Ray v. Travelers Ins. Co.*, 477 So.2d 634, 637 (Fla. 5th DCA 1985). Florida's Third District Court of Appeal held that "a plaintiff in interpleader is not entitled to attorneys' fees when the interpleader action is brought after he has been sued by one of the defendants in the interpleader proceeding." *Rafter v. Miami Gables Realty, Inc.,* 428 So. 2d 351, 353 (Fla. 3d DCA 1983). The *Rafter* court went on to explain that "because the [interpleader company] had waited until after it had been sued before filing its claim

in interpleader, the interpleader action was one brought for [its] own protection, disentitling it to fees and costs." *Id.* at 354.

There are circumstances under which a party may properly sue in interpleader and yet be denied attorney's fees if the need for interpleader was unnecessarily precipitated by his conduct. *Bache Halsey Stuart Shields v. Witous,* 411 So. 2d 1324 (Fla. 2d DCA 1982). The award of attorneys' fees and costs lies within the sole discretion of the court given that it is not expressly authorized under Fla. R. Civ. P. 1.240, Fed. R. Civ. P. 22, or the federal interpleader statute 28 U.S.C. § 1335. *Campbell v. N. Am. Co. for Life & Health Ins.,* 2007 WL 2209249 (M.D. Fla. July 30, 2007).

Courts often use their discretion to exclude insurance companies from recovering attorneys' fees based on the "disinterested plaintiff" rule. First, courts have found that insurance companies should not be compensated merely because conflicting claims to proceeds have arisen during the normal course of business. Second, courts have denied them an award of attorneys' fees because insurance companies, by definition, are interested stakeholders; filing the interpleader action immunizes the company from further liability under the contested policy. Third and finally, some courts have denied attorneys' fees based on the policy argument that such an award would senselessly deplete the fund that is the subject of preservation through interpleader. *Campbell*, 2007 WL 2209249 (M.D. Fla. July 30, 2007).

In *Am. Nat'l Ins. Co. v. Glass,* 2008 WL 2950111 (M.D. Fla. July 31, 2008), the Court held the insurer was not entitled to an award of fees and costs because the insurer contributed to the necessity for filing this case due to an ambiguous beneficiary designation form and the amount of fees and costs requested would have seriously depleted the interpleader funds by 1/3. *Id*. Conversely, in *Nat'l Life Ins. Co. v. Southeast First Nat'l Bank*, 361 So. 2d 432 (Fla. 4th DCA 1978), the Court upheld an award of attorneys' fees because it found only that the insurer desired to have conflicting claims judicially determined and did nothing to cause the conflicting claims. *Id*.

## Differences in State vs. Federal

The Florida interpleader rule, Fla. R. Civ. P. 1.240, is virtually identical to Fed. R. Civ. P. 22(a), and cases interpreting the federal rule are persuasive in cases arising under the Florida rule. *Rainess*, 81 So. 3d at 504.