

COMMON TYPES OF INSURANCE COVERAGE DISPUTES

by

Matthew J. Devoti

Counsel representing the parties in a dispute involving insurance coverage must have a fundamental understanding of certain concepts. Basic principles underlie all coverage disputes. Yet, application of these principles to a particular claim may vary depending upon the relationship between plaintiff and any insurance coverage which may exist. The purpose of this paper is to set forth those concepts with which counsel must be aware in any policy dispute as well as introduce the lawyer to various contexts in which disputes arise and the distinctions present in each type of claim.

I. Basic Principles Underlying All Coverage Disputes

Insurance is a contract under which an insurer agrees to assume a defined risk possessed by an insured. The insurer agrees to assume the risk for consideration and, upon the happening of the risk, pays the insured a sum of money. Niswonger v. Farm Bureau Town & Country Ins. Co. of Mo., 992 S.W.2d 308, 313 (Mo.App.E.D. 1999); *See* United States v. Conservation Chem. Co., 653 F.Supp. 152, 176 (W.D.Mo. 1986).¹

The law of contracts applies to an insurance policy. Any claim or suit by either party must be based on the policy issued by the insurer. Bartleman v. Humphrey, 441 S.W.2d 335, 342 (Mo. 1969).

Absent public policy considerations, an insured and an insurer are free to define and limit coverage by their insurance agreement. Rodriguez v. Gen. Acc. Ins. Co. of

¹ In Conservation Chem., the district court noted: “[A]s a matter of public policy, Missouri recognizes that the contract of insurance issued to cover a prior loss is generally invalid. . . it being a basic tenet of insurance law that one cannot insure a certainty.” Conservation Chem., 653 F.Supp. at 179.

Am., 808 S.W.2d 379, 383 (Mo.banc 1991). Indeed, the parties may bargain and agree to such terms and provisions so long as the contract is lawful and reasonable. Todd v. Mo. United Sch. Ins. Council, 223 S.W.3d 156, 160 (Mo.banc 2007). The ability to uniquely define the risks insured against and to prescribe exclusions or add endorsements allow an insured to choose the coverage she desires at the lowest possible price. Id. at 161.

Nevertheless, there are a number of provisions that are essential to an insurance policy. Todd, 223 S.W.3d at 160. A policy must identify:

- the “insured” – the individual or entity with the interest at risk;
- the “coverage” or “insuring agreement” – the subject matter and the contingency insured against²;
- the “period” – the dates prescribing the duration of the risk or contingency insured against; and
- the “limits” – the amount the insurer is liable to pay for any given risk up to a specified amount.

Id. An insurance policy also usually includes a number of other categories of terms. “Definitions” are provided for key terms. “Conditions” dictate the parties’ respective obligations. “Exclusions” limit risks that otherwise might have been covered. And, “endorsements” are often made that add coverage of risks that otherwise might not have been covered. Id. These provisions are necessary and, if they are clear and unambiguous within the context of the policy as a whole, are enforceable. Id. at 163.

A. Choice of Law

In Missouri, the law of the state with the “most significant relationship” to the occurrence and the parties involved in the litigation governs the dispute involving parties

² Coverage may be written on an “occurrence” or a “claims made” basis. Those two types of coverage are discussed below, in Sections III and IV.

to an insurance contract. Hartzler v. Am. Fam. Mut. Ins., 881 S.W.2d 653, 655 (Mo.App.W.D. 1994); *See* Kennedy v. Dixon, 439 S.W.2d 173, 184-185 (Mo.banc 1969). Missouri has adopted Section 188 and 193 of the Restatement (Second) of Conflict of Laws. Hartzler, 881 S.W.2d at 655. Section 188 provides that the “most significant relationship” determines the choice of law. Egnatic v. Nguyen, 113 S.W.3d 659, 665 (Mo.App.W.D. 2003); *See also* Frost v. Liberty Mut. Ins. Co., 828 S.W.2d 915, 920 (Mo.App.W.D. 1992). In the context of an insurance contract, Section 193 directs that:

The principal location of the insured risk is given greater weight than any other single contact in determining the state of applicable law provided that the risk can be located in a particular state.

Egnatic, 113 S.W.3d at 665; Restatement (Second) of Conflict of Laws, Section 193.

In Hartzler, the Western District remarked that under Section 193, the applicable law should be the law of the state which the parties contemplated as the principal location of the insured risk. Hartzler, 881 S.W.2d at 655. The principal location of the insured risk is “the state where it will be during at least the major portion of the insurance period.” *Id.*; *See* Egnatic, 113 S.W.3d at 666. In the case of an automobile liability policy, the principal location is “where the vehicle will be garaged during most of the insurance period.” Egnatic, 113 S.W.3d at 666. As such, according to the Western District, the location of the insured risk will be given greater weight than any other single contact in determining the state of applicable law when an insured risk can be principally located in one particular state. Hartzler, 881 S.W.2d at 655. The rationale for the rule, the court remarked, is that:

the principal location of the risk has the ultimate bearing upon the nature and extent of the risk and constitutes a significant factor upon which the terms and conditions of the policy will depend.

Id.

Of course, exceptions to the general rules exist. Missouri courts have refused to apply choice of law principles where the analysis of underlying policy language reveals that the language is ambiguous. Bauer v. Farmers Ins. Co., 270 S.W.3d 491, 498 (Mo.App.W.D. 2008); Williams v. Silvola, 234 S.W.3d 396, 400 (Mo.App.W.D. 2007). In Silvola, Rebecca Jaynes brought suit against her uninsured motorist carrier. Silvola, 234 S.W.3d at 398. Jaynes suffered extensive injuries when the vehicle which she operated was struck from behind by an uninsured motorist. The collision occurred in Missouri. On the date of the crash, Jaynes lived in Kansas with her husband. Jaynes and her husband owned seven vehicles. Farmers insured all seven vehicles. Id.

Jaynes brought suit against the insurer after it refused to permit Jaynes to stack uninsured motorist coverage; the insurer asserted that choice of law principles dictated that Kansas law governed and Kansas law prohibited the stacking of insurance policies. Silvola, 234 S.W.3d at 399. Further, the insurer argued, each of the policies contained provisions expressly prohibiting the stacking of uninsured motorist coverage. Id. at 400. Jaynes disagreed, pointing to a language in the policy directing “[s]ubject to the law of the state of the occurrence”. *See* Id. at 398, 401. That language, Jaynes argued, contradicted the language relied upon the insurer thus creating an ambiguity. The Western District agreed, found the provisions to create uncertainty in the meaning of the words used in the policy, construed the ambiguity against the insurer, and permitted Jaynes to stack the coverages as permitted by Missouri law – “the law of the state” in which the collision occurred. Id. at 404.

Further, Missouri courts have refused to apply the law of another state that runs counter to public policy as established in Missouri. Farmers Ins. Co. v. McFarland, 976 S.W.2d 559, 563, 566 (Mo.App.W.D. 1998). For instance, in McFarland, the Western District refused the attempt of the insurer to seek reimbursement from a personal injury plaintiff for personal injury protection (PIP) benefits paid to the plaintiff as the result of injuries suffered in a collision which occurred in Missouri. McFarland, 976 S.W.2d at

566. The insurer paid David McFarland PIP benefits after he was injured in a collision involving a vehicle in which he was a passenger. The collision occurred in Missouri. The vehicle in which McFarland rode was licensed in Kansas and driven by a Kansas resident. Id. at 560. Recognizing Missouri's public policy prohibiting the assignment of personal injury claims, the court refused to apply Kansas law which permitted reimbursement and denied to enforce the insurer's lien. Id. at 566.

B. Choice of Law in a Diversity Case

In a diversity case, the federal court shall apply the choice of law principles of the forum state – the state in which the district court sits. Highwoods Properties, Inc. v. Executive Risk Indemnity, Inc., 407 F.3d 917, 920 (8th Cir. 2005); Conservation Chemical, 653 F.Supp. at 176.³

C. Burden of Proof

Under Missouri law, the insured possesses the burden of showing by substantial evidence that her claim falls within the coverage provided by the insurance contract. Billings Mut. Ins. Co. v. Cameron Mut. Ins. Co., 229 S.W.3d 138, 145 (Mo.App.S.D. 2007); Southeast Bakery Feeds, Inc. v. Ranger Ins. Co., 974 S.W.2d 635 (Mo.App.E.D. 1998).

D. Statute of Limitations

The timing of the bringing of suit against an insurer is an issue for counsel to be aware. Timing may play an important role in the litigation of an uninsured or underinsured motorist case as the statute of limitation for personal injury and contract

³ Of course, the substantive law of the state in which the district court is located controls a diversity action. St. Paul Fire & Marine Ins. Co. v. Mo. United Sch. Ins. Council, 98 F.3d 343, 345 (8th Cir. 1996).

cases is vastly different. Counsel should remember that actions for injury to the person, not arising out of contract, must be commenced within five years of the date of injury. Section 516.120 R.S.Mo. (2004). Alternatively, actions on a written contract for payment of money shall be commenced within ten years. Section 516.110 R.S.Mo. (2004).

Missouri courts have determined that an insured is not barred from proceeding against her uninsured motorist carrier merely because the five year statute of limitation governing tort claims had expired. Edwards v. State Farm Ins. Co., 574 S.W.2d 505, 506-507 (Mo.App.K.C. 1978). After all, an action on the insurance policy is an action in contract. Hill v. Seaboard Fire & Mar. Ins. Co., 374 S.W.2d 606, 610-611 (Mo.App.K.C. 1963). Accordingly, such claims are governed by the ten-year statute of limitation. Edwards, 574 S.W.2d at 506. Recognizing that an insured must not obtain a judgment against the uninsured motorist to collect under her own policy, the Court in Edwards held that the insured could proceed in a suit against her carrier so long as she could prove in that case that the uninsured motorist would have been liable to her had she pursued the claim. Id. at 506-507; *See also* Messner v. Am. Union Ins. Co., 119 S.W.3d 642, 645-646 (Mo.App.S.D. 2003).

This rule may result in a harsh consequence for the insurer. Should the insured fail to act before the passage of five years, the delay serves to foreclose the insurer from exercising its right to subrogation against the tortfeasor motorist. *See* Edwards, 574 S.W.2d at 508; *See also* Oates v. Safeco Ins. Co. of Am., 583 S.W.2d 713, 717 (Mo.banc 1979). For example, the Supreme Court directed in Oates:

The insured is not barred from his uninsured motorist claim even though the insured's conduct prevents the company from exercising its subrogation right.

Oates, 583 S.W.2d at 717.

E. The Presence of Ambiguity

Occasionally, counsel's analysis of policy language and the facts of a particular loss suggest conflict as to exactly what coverage exists. The presence of duplicitous and conflicting language in the policy may have dramatic consequences on the limit (and extent) of coverage available.

Under Missouri law, the interpretation of the meaning of an insurance policy is a question of law. Seeck v. Geico Gen. Ins. Co., 212 S.W.2d 129, 132 (Mo.banc 2007); Am. Fam. Mut. Ins. Co. v. Turner, 824 S.W.2d 19, 21 (Mo.App.E.D. 1991). The policy must be construed as a whole and every clause must be given meaning if it is reasonably possible to do so. Lincoln Co. Amb. Dist. v. Pac. Employers Ins. Co., 15 S.W.3d 739, 743 (Mo.App.E.D. 1998). Indeed, the court shall enforce an insurance contract as written unless the language of the policy is ambiguous. Seeck, 212 S.W.3d at 132; Hunt v. Everett, 181 S.W.3d 248, 250 (Mo.App.W.D. 2006). And, a court shall not create an ambiguity to distort the language of an unambiguous policy. Lincoln Co., 15 S.W.3d at 743.

An ambiguity exists when contract language is duplicitous, indistinct or uncertain, leaving the provision open to differing reasonable constructions. Hunt, 181 S.W.3d at 250. When interpreting an ambiguous provision, the court shall apply a meaning to the language that would ordinarily be understood by the layman who bought and paid for the policy. Krombach v. Mayflower Ins. Co., 827 S.W.2d 208, 210 (Mo.banc 1992); Hunt, 181 S.W.3d at 250. As such, the court shall construe ambiguous provision of insurance policy against the insurer. Krombach, 827 S.W.2d at 210; Gulf Ins. Co. v. Nobel Broadcast, 936 S.W.2d 810, 814 (Mo.banc 1997); *See also* Hunt, 181 S.W.3d at 250. Indeed, ambiguous provisions designed to cut down, restrict or limit coverage must be strictly construed against the insurer. Krombach, 827 S.W.2d at 210-211.

In Seeck, the Supreme Court held that the presence of an "other insurance" clause would cause an ordinary insured to believe that excess coverage existed where the

insured's injuries exceeded the coverage possessed by the tortfeasor. Seeck, 212 S.W.3d at 131. In that case, the "other insurance" clause provided:

When an insured is occupying a motor vehicle not owned by the insured. . . this insurance is excess over any other insurance available to the insured and the insurance which applies to the occupied motor vehicle is primary.

Id. at 132. According to the Court, a person of average understanding would interpret the provision to mean that once she recovered under the primary policy applicable to the occupied vehicle, she would be entitled to coverage under her own policy to the extent she suffered additional damage. Id. at 132. The Court concluded:

Where, as here, an other insurance clause appears to provide coverage but other clauses indicate that such coverage is not provided, then the policy is ambiguous, and the ambiguity will be resolved in favor of coverage for the insured.

Id. at 134. The Court interpreted the policy's language to extend coverage beyond that contemplated by the insurer.

F. Exclusions

An exclusion provision excludes risk. Powell v. State Farm Mut. Auto. Ins. Co., 173 S.W.3d 685, 689 (Mo.App.W.D. 2005). Rather than endowing coverage, the exclusion limits the obligation of indemnity owed by the insurer. Id.

If an insurer seeks to escape coverage based on an exclusion provision in the policy, the insurer has the burden of proving facts that make the exclusion applicable. Powell, 173 S.W.3d at 689. In fact, an exclusion is an affirmative defense that must be pled and proved by the insurer. Loyd v. State Auto. Property & Cas. Co., 265 S.W.3d

901, 903 (Mo.App.W.D. 2008); Strader v. Progressive Ins., 230 S.W.3d 621, 624 (Mo.App.S.D. 2007). The rule runs contrary to the general rule that the party seeking to establish coverage under a policy possesses the burden of proving that the claim is within the coverage afforded by the policy. Powell, 173 S.W.3d at 689.

Further, an insurer may limit uninsured motorist coverage afforded an insured only so long as the exclusion does not violate Section 379.203 or the public policy underlying the statute. Indeed, exclusions of uninsured motorist coverage contrary to the public policy of the statute are invalid. Adams v. Julius, 719 S.W.2d 94, 96 (Mo.App.E.D. 1986); *See also* Shepherd v. Am. States Ins. Co., 671 S.W.2d 777, 780 (Mo.banc 1984).

G. Payment of the Premium

The payment of the first premium is a condition precedent to validity of the policy. Bartleman, 441 S.W.2d at 342. The delivery of a check to the insurer and his acceptance of the check does not constitute payment of the premium until the check, itself, has been paid. However, a mutual understanding or agreement to accept a check as absolute or unconditional payment of the premium may be implied from the circumstances and conduct of the parties. Id. In any event, the intention of the parties to treat a check as unconditional payment is a jury question. Id. at 343.

II. First-Party Coverage

A “first-party” claim refers to a claim made by an insured against an insurance policy which she purchased. In a first-party claim, the insured brings suit against the insurer who issued the policy in an attempt to collect under the insurance contract.

A. Physical Loss, Tangible Damage and Related Payments

A typical homeowners policy provides the following:

This is a legal contract between **you** and **us**. It is **your** duty to read **your** policy carefully. Let **us** know if **you** have questions about this policy.

The Information Page identifies the insured persons, property insured, amounts of insurance, the level of protection, and valuation methods which apply, the deductible(s), and any optional coverage or policy endorsements which apply.

NOTE: Regardless of any other provisions of this policy, this policy does not apply to punitive or exemplary damages.

INSURING AGREEMENT

We will provide the insurance described in this policy in return for the premium and compliance with policy provisions.

* * *

SECTION I

COVERAGE A – DWELLING

We cover:

1. The described **dwelling** on the **insured premises**.

* * *

COVERAGE C

We cover personal property owned or used by any **insured**. At **your** request, **we** will cover personal property of guests and **domestic employee(s)** while on any party of the **insured premises** occupied by any **insured**.

Farm Bureau Town & Country Ins. Co. of Mo., CU-1060 (07/98) at 2-4 (emphasis in original). Words and terms printed in bold type throughout the policy are defined in a specific section of the policy titled “Definitions”. Id. at 2.

With respect to a physical damage loss, a typical motor vehicle policy directs:

SECTION IV – PHYSICAL DAMAGE COVERAGES

* * *

Loss – means, when used in this section, each direct and accidental loss of or damage to:

1. **your car**;
2. its equipment which is common to the use of **your car** as a vehicle;
3. clothes and luggage insured; and
4. a detachable living quarters attached or removed from **your car** for storage. Detachable living quarters includes its body and items securely fixed in place as a permanent part of the body. **You** must have told us about the living quarters before the loss and paid any extra premium needed.

* * *

COLLISION – COVERAGE G. **You** have this coverage if “G” appears in the “Coverages” space on the declarations page. The deductible amount is shown by the number beside “G”.

We will pay for **loss to your car** caused by **collision** but only for the amount of each such loss in excess of the deductible amount. If the **collision** is with another motor vehicle insured with us, **you** do not pay **your** deductible if its \$100 or less as we pay it.

Collision – means **your car** upset or hit or was hit by a vehicle or other object.

State Farm Mut. Auto. Ins. Co., Policy Form 9825.6 at 15 (emphasis in original).

The policy will set forth the amount the insurer will pay in the event of a covered loss. For instance, a homeowners policy may direct:

2. AMOUNT OF INSURANCE

We will not pay more than the least of the following:

- a. The insurable interest the **insured** has in the property.
- b. The amount of coverage shown on the Information Page.
- c. The amount determined as set forth by the settlement valuation method which applies in this policy.
- d. With respect to a loss to a **dwelling** or other structure under construction, the amount on the Information Page will be reduced to equal the amount actually spent on the **dwelling** or other structure at the time of loss.

3. SETTLEMENT VALUATION

In the event of a partial loss to covered property, at **our** option **we** will pay to **you** the actual cost of the damage or the cost of repairs so that **your** property is returned to the same condition it was prior to the loss. However, **we** will not pay:

- a. Any amount in excess of the amount insurance shown on the Information Page, or
- b. Any increase in loss or expense due to any ordinance or law requiring or regulating the construction, repair, or demolition of a **dwelling** or other structure.

Farm Bureau Town & Country Ins. Co. of Mo., CU-1060 (07/98) at 12-13 (emphasis in original). Counsel must remember that one asserting a cause of action on property under an insurance contract must allege ownership of the property at the “time of loss”.

Duncan v. Andrew Co. Mut. Ins. Co., 665 S.W.2d 13, 16 (Mo.App.W.D. 1983).

Under Missouri law, diminished value is not a covered loss absent a policy provision to the contrary. A first-party claimant is not entitled to recover diminished value in a breach of contract action where full and adequate repairs have been made. Lupo v. Shelter Mut. Ins. Co., 70 S.W.3d 16, 20-21 (Mo.App.E.D. 2002). Only when the

property is inadequately repaired is the measure of damages the difference between the value before the occurrence minus the value when repaired. Id. at 20, 23.

Once at issue, the insured is competent to establish the value of the property loss. The Eastern District concluded:

an owner may testify, without further qualification, about the reasonable market value of his [or her] personal property that has been damaged or destroyed.

Farer v. Benton, 740 S.W.2d 676 (Mo.App.E.D. 1987); *See also* DeWitt v. Am. Family Mut. Ins. Co., 667 S.W.2d 700, 708 (Mo.banc 1984); R & J Rhodes v. Finney, 231 S.W.3d 183, 190 (Mo.App.W.D. 2007). The value of the loss may be established by the owner's testimony alone; "invoices or other documents are not required." Farer, 740 S.W.2d at 676. The absence of professional expertise or other qualifications affects only the weight of the testimony given and not the competence of the witness to testify as to damage. Amish v. Walnut Creek Dev., Inc., 631 S.W.2d 866, 872 (Mo.App.W.D. 1982). The presumption of competency extends to testimony about the value of property in its undamaged as well as its damaged condition. Delgado v. Mitchell, 55 S.W.3d 508 (Mo.App.S.D. 2001); Claas v. Miller, 806 S.W.2d 141, 145 (Mo.App.W.D. 1991).

The presumption of competence is rebuttable by showing "upon a qualifying *voir dire* or upon cross-examination that the owner in fact lacks knowledge of the value at issue, or that his [or her] opinion is based on an improper standard." Henderson v. Smith, 643 S.W.2d 882, 884 (Mo.App.E.D. 1982). Upon such a showing, the trial court may exclude or strike the owner's opinion. Id. However, in Henderson, the Eastern District permitted the owner to testify as to the value of his car and the items inside before and after the collision with no further offer of proof than that testimony required. *See* Henderson, 643 S.W.2d at 884.

With regard to fire losses, Missouri statute provides:

Whenever there is a partial destruction or damage to property covered by insurance, it shall be the duty of the party writing the policies to pay the assured a sum of money equal to the damage done to the property, or repair the same to the extent of such damage, not exceeding the amount written in the policy, so that said property shall be in as good condition as before the fire, at the option of the insured.

Section 379.150 R.S.Mo. (2004)

B. Economic Losses and Business Interruption

An insured may insure against certain business income benefits lost due to a loss. *See Landes v. State Farm Fire & Cas. Co.*, 907 S.W.2d 349 (Mo.App.W.D. 1995) A typical provision directs:

If Loss of Income coverage is shown in the Declaration, we will pay:

1. for the actual loss of “business income” you sustain due to the necessary suspension of your “operations” during the “period of restoration.” The suspension must be caused by accidental direct physical loss to property at the described premises. . .

We will only pay for loss of “business income” or “extra expense” that occurs within 12 consecutive months after the date of accidental direct physical loss caused by an insured loss.

* * *

1. “business income” means the net income (net profit or loss before income taxes) that would have been earned or incurred and

continuing normal operating expenses, including payroll, incurred during the “period of restoration”.

Landes, 907 S.W.2d at 355.

However, an insurer may properly limit its coverage through the insertion of an exclusion provision in the policy. In Landes, the Western District concluded that State Farm precluded coverage for business income damages caused by the cancellation of a commercial lease. Landes, 907 S.W.2d at 358. In that case, Kenneth Landes insured commercial property he owned with State Farm. Landes leased the property to a plumbing supply company. During the lease term, the property burned. When remediation work stalled, the plumbing supply company terminated the lease pursuant to a lease provision. State Farm refused to pay business income payments related to the loss of rental income suffered by Landes once the plumbing supply company terminated the lease. Id. at 352-353. Noting that the policy unambiguously excluded loss of business income damages related to cancellation of a lease, the court held that it must accept the policy as the expression of the agreement of the parties. Id. at 358.

C. Vexatious Refusal

A remedy does exist for an insured when the insurer “has refused to pay a loss without reasonable cause or excuse.” *See* Section 375.420 R.S.Mo. (2004). Section 375.420 permits the insured to recover in such an extraordinary situation. That statute provides:

In any action against any insurance company to recover the amount of any loss under a policy of automobile. . . insurance. . . if it appears from the evidence that such company has refused to pay such loss without reasonable cause or excuse, the court or jury may, in addition to the amount thereof and interest, allow the plaintiff damages not to exceed twenty percent of the first fifteen hundred dollars of the loss, and ten

percent of the amount of the loss in excess of fifteen hundred dollars and a reasonable attorney's fee. . .

Section 375.420. The statute attempts to “make whole” the insured and place her in the position she would have been had the insurance company acted as the insurance contract demanded and had the insured not been forced to hire counsel and incur litigation expense. Overcast v. Billings Mut. Ins. Co., 11 S.W.3d 62, 67 (Mo.banc 2000).

To establish her claim for vexatious refusal, an insured must prove: (1) she had an insurance policy with the defendant insurance company, (2) the insurer refused to pay, and (3) the insurer's refusal was without just cause or excuse. Dhyne v. State Farm Fire & Cas. Co., 188 S.W.3d 454, 457 (Mo.banc 2006). A vexatious refusal claim shall be submitted to the jury when there exists “evidence that an insurer's bad faith efforts have hindered a legitimate insurance claim.” Id. at 458.

These claims often turn on whether the insurance company's refusal to pay its insured was willful and without reasonable cause. Missouri courts have recognized innumerable contexts in which vexatious refusal claims have arose. Dhyne, 188 S.W.3d at 458. Direct and specific evidence of vexatious refusal is not required and

the jury may find vexatious delay upon a general survey and a consideration of the whole testimony and all the facts and circumstances in connection with the case.

Id.

An insurance company may avoid these claims by squarely dealing with its insured once the insured reports a claim. The insurer should do the following:

- inform the insured as to pertinent policy provisions and requirements
- promptly and fully respond to inquiries made by the insured

- accurately advise the insured as to any consequences of pursuing a claim
- act in accord with applicable statutory and common law obligations
- when appropriate, re-evaluate and reconsider the insured's claim
- promptly pay claims when due

D. Limitation of First-Party Actions⁴

The mere failure of the insurer to perform a contract cannot serve as the basis of tort liability unless the breach itself is an independent tort. Ryann Spencer Group, Inc. v. Assurance Co. of America, 275 S.W.3d 284, 290 (Mo.App.E.D. 2008). When the insurer wrongfully refuses payment of a claim to its insured, the insurer has simply breached its contract. Overcast, 11 S.W.3d at 67.

As such, an insured cannot convert her breach of contract claim for failure to pay under the insurance contract into a tort claim. Specifically, an insured cannot assert a claim against an insurer where the facts underlying the claim fall within the causes of action for breach of contract and vexatious refusal. Ryann, 275 S.W.3d at 290. In such a circumstance, the insured's remedy is limited to that provided by the insurance contract plus, if Section 375.420 applies, the enhancements from by the statute. Overcast, 11 S.W.3d at 68.

However, an insurer is not completely immune from tort liability and suit by its insured. *See* Overcast, 11 S.W.3d at 69. In Overcast, the Supreme Court affirmed a jury verdict against an insurance company in a defamation action. Id. at 73. In that case, an

⁴ The subject of "Bad Faith Litigation" will be taken up in another section of the seminar. "Bad faith" liability attaches when an insurer refuses to settle a third-party claim within the policy limits and the insured is subject to a judgment in excess of the limits. The claim is based upon the principle that the insurer acted in bad faith in disregarding the interests of its insured in hopes of escaping its responsibility under the liability policy. *See* Zumwalt v. Utilities Ins. Co., 228 S.W.2d 750 (Mo. 1950).

insurer's manager sent a letter to Henry Overcast denying a fire loss claim that stated "the loss resulted from an intentional act committed by you or at your direction." Id. at 65. Overcast brought suit against the insurer, claiming that the company had denied his claim without cause and, in the process, defamed him by issuing the letter which the manager knew would be published anytime Overcast applied for insurance coverage. Id. at 70. The jury found in favor of Overcast on both the contract and tort claims and the insurer appealed, contending that the defamation claim was preempted by Section 375.420. The Court disagreed, stating:

section 375.420 does not displace or preempt any remedies nor does it provide an immunity from liability. . . There is not a word in the statute to support the notion that section 375.420 "preempts" any claim. . . There is no need for courts to infer a preemption or immunity where the legislature does not say so. To read words and concepts into our statutes that the general assembly did not write shows disrespect both for the general assembly and for the common law, which the legislature has the power expressly to displace.

* * *

. . . the claim for defamation is not based on any of the elements of Overcast's contract claims. . . We conclude that Overcast's claim for defamation was valid and was supported by the evidence.

Id. at 69-70.

III. Third-Party "Occurrence" Coverage

An "occurrence" policy covers negligent acts and omissions occurring within the policy period.⁵ Southeast Bakery Feeds, 974 S.W.2d at 639. "Occurrence" coverage

⁵ *But see* Continental Ins. Cos. v. Northeastern Pharm. & Chem. Co., Inc., 811 F.2d 1180, 1190 (8th Cir. 1987). In that case, the Eighth Circuit remarked: "Under Missouri law, the

provides insurance for events that occur within the period regardless of when the negligent acts or omissions are discovered or whether the claim is made during or after the time period. Todd, 223 S.W.3d at 160; Southeast Bakery Feeds, 974 S.W.2d at 639.

A. Property Damage Claim

A typical liability policy defines “property damage” as “physical injury to or physical destruction of tangible property, including the loss of its use.” Farm Bureau Town & Country Ins. Co. of Mo., CU-1060 (07/98) at 3. With regard to coverage, a characteristic motor vehicle liability policy may direct:

SECTION I – LIABILITY – COVERAGE A

You have this coverage if “A” appears in the “Coverages” space on the declarations page.

We will:

1. Pay damages which an ***insured*** becomes legally liable to pay because of:
 - a. ***bodily injury*** to others, and
 - b. damage to or destruction of property including loss of its use,
caused by accident resulting from the ownership, maintenance or use of ***your car***; and
2. defend any suit against an ***insured*** for such damages with attorneys hired and paid by us. We will not defend any suit

time of an “occurrence” is the time the loss or damage was sustained and not the time when the negligent or wrongful act was committed.” *See also* Conservation Chem., 653 F.Supp. at 195.

after we have paid the applicable limit of our liability for the accident which is the basis of the lawsuit.

* * *

Limits of Liability

* * *

The amount of property damage liability coverage is shown on the Declarations page under “Limits of Liability – Coverage A Property Damage, Each Accident”.

State Farm Mut. Auto. Ins. Co., Policy Form 9825.6 at 7-8 (emphasis in original).

B. Bodily & Personal Injury Claims

A homeowners may provide the following:

LIABILITY COVERAGES – SECTION II COVERAGE F – PERSONAL LIABILITY

We will pay all sums arising out of any one loss caused by accident, which any **insured** becomes legally obligated to pay as damages because of **bodily injury** or **property damage** covered by this policy.

If a claim is made or suit is brought against any **insured** for liability under this coverage, **we** will defend the insured at **our** expense, using lawyers of **our** choice. **We** may investigate or settle any claim or suit as **we** think appropriate.

Farm Bureau Town & Country Ins. Co. of Mo., CU-1060 (07/98) at 15 (emphasis in original). The Farm Bureau policy defines “bodily injury” as:

Bodily injury – means physical harm, physical sickness, or non-communicable physical disease, including physical death that results.

Id. at 2 (emphasis in original). Similarly, the State Farm policy defines “bodily injury” as:

Bodily injury – means bodily injury to a person and sickness, disease or death which results from it.

State Farm Mut. Auto. Ins. Co., Policy Form 9825.6 at 3 (emphasis in original). A typical errors and omissions policy defines “personal injury” as:

False arrest, humiliation, detention or imprisonment, wrongful entry or eviction or other invasion of private occupancy, publication of libel, utterance of slander or other defamatory or disparaging material or a publication or utterance in violation of an individual’s right of privacy.

The Bar Plan Mutual Insurance Co., TBP-2 (1-2009) at 4.

C. Notice

Missouri state regulation directs:

No insurer shall deny any claim based upon the insured’s failure to submit a written notice of loss within a specified time following any loss, unless this failure operates to prejudice the rights of the insurer.

20 Mo.Code Regs. §100-1.020(4). Nevertheless, the usual occurrence policy contains a provision requiring notice. That provision may direct:

REPORTING A CLAIM – INSURED’S DUTIES

1. Notice to Us of an Accident or Loss

The *insured* must give us or one of our agents written notice of the accident or *loss* as soon as reasonably possible. The notice must give us:

- a. *your* name; and
- b. the names and addresses of all *persons* involved; and
- c. the hour, date, place and facts of the accident or *loss*; and
- d. the names and addresses of witnesses.

2. Notice to Us of Claim or Suit

If a claim or suit is made against an *insured*, that *insured* must at once send us every demand, notice or claim made and every summons or legal process received.

* * *

State Farm Mut. Auto. Ins. Co., Policy Form 9825.6 at 5 (emphasis in original).

In Missouri, the purpose of the notice provision in an insurance policy is to prevent prejudice to the insurer, not to “provide a technical escape hatch by which to deny coverage in the absence of prejudice.” Billings Mut. Ins. Co. v. Cameron Mut. Ins. Co., 229 S.W.3d 138, 148 (Mo.App.S.D. 2007). A showing of untimely notice is not sufficient. The insurer must also prove that the company was prejudiced by the late notice. Id. Of course, the burden of demonstrating prejudice rests with the insurer. Id.

Finally, counsel must know that Missouri treats the failure of an insured to provide timely notice as an affirmative defense. Billings, 229 S.W.3d at 143. As such, the insurer possesses the burden to plead and prove the failure of the insured to provide notice. Id.

IV. Third-Party “Claims Made” Coverage

“Claims made” coverage provides insurance for claims that first arise within the time period of the policy, although the event may have occurred at a previous time. Todd, 223 S.W.3d at 160. The policy provides coverage when the act or omission is discovered and brought to the attention of the insurer. When the act or omission occurred is irrelevant to the determination of coverage under a claims made policy. Insurance Placements, Inc. v. Utica Mut. Ins. Co., 917 S.W.2d 592, 596 (Mo.App.E.D. 1996); *See also* St. Paul Fire & Marine Ins. Co. v. Mo. United Sch. Ins. Co., 98 F.3d 343, 345-346 (8th Cir. 1996).

A. Notice

An insurer must not prove prejudice to avoid coverage due to lack of notice under a claims made policy. To excuse a delay in notice beyond the policy period would alter a basic term of the insurance contract because the reporting requirement defines the scope of coverage. Insurance Placements, 917 S.W.2d at 597. Indeed, the timely reporting of claims to the insurer under a claims made policy is an essential party of the insurance contract. Lexington Ins. Co. v. St. Louis University, 88 F.3d 632, 634 (8th Cir. 1996); *See* Highwoods, 407 F.3d at 918-919. The Eighth Circuit succinctly stated:

If the insured does not give notice within the contractually required time period, there is simply no coverage under the policy.

Federal Deposit Ins. Corp. v. St. Paul Fire & Marine Ins. Co., 993 F.2d 155, 158 (8th Cir. 1993). This notice requirement applies not just to suits brought but losses known by the insured not yet in litigation. Id.

As such, evidence of notice may prove determinative should an issue exist as to availability of coverage. In Missouri, a presumption exists that a letter duly mailed has been received by the addressee. Insurance Placements, 917 S.W.2d at 595. The

presumption is rebuttable and, when proof of proper mailing is adduced, the proof may be rebutted by evidence that the mailing was not, in fact, received. Id. Evidence of non-receipt, however, does not nullify the presumption but leaves the question for the determination of the jury. Id.

Counsel should note that while timing is important an insured must not provide notice of a claim immediately absent policy provisions directing otherwise. Generally, failure to immediately notify an insurer of a loss does not bar recovery by the insured unless a forfeiture clause in the policy so provides or the insurer suffers prejudice as the result of the delay. Katz Drug Co. v. Commercial Stand. Ins. Co., 647 S.W.2d 831, 836 (Mo.App.W.D. 1983); *See* Lexington Ins. Co., 88 F.3d at 634. Actual prejudice will not be presumed from the mere delay of the insured in providing notice. Katz Drug, 647 S.W.2d at 836.

B. Directors and Officers Liability

A “directors and officers” (D&O) policy serves to insure directors and officers from “wrongful acts” committed during the course of their service to an entity. Generally, the policies are intended “to indemnify the officers and directors for any loss that they are legally obligated to pay by reason of any wrongful act in their capacity as an officer or director.” McAninch v. Wintermute, 491 F.3d 759, 770 (8th Cir. 2007). Typically, however, D&O policies exclude actions designed to gain personal profit or illegal advantage. *See id.* at 769.

Claims under D&O policies generally arise from circumstances that involve allegations that the director or officer has acted wrongfully, either for or against his own profit. Those situations often include claims that the officer acted wrongfully either for the benefit of her company, herself or both. The following is a brief discussion of various fundamental tenants that govern claims made under D&O policies, including claims made against the sovereign for the wrongful act of a public officer.

1. Personal Liability for Corporate Conduct

In Missouri, merely holding a corporate office does not subject one to personal liability for the misdeeds of the corporation. Constance v. BBC Dev. Co., 25 S.W.3d 571, 590 (Mo.App.W.D. 2000). For instance, where a corporate officer makes an authorized contract in the name of the corporation so as to bind the corporation, the contract is with the corporation alone. The corporate officer is not personally liable for breach of corporate contracts. Barker v. Sac Osage Elec. Coop., Inc., 857 F.2d 486, 489 (8th Cir. 1988).

However, a corporate officer may be held individually liable for tortious corporate conduct if the officer has actual or constructive knowledge of, and participated in, an actionable wrong. Constance, 25 S.W.3d at 590.

2. Fiduciary Duty to the Corporation

A fiduciary relationship exists where one party expressly or by clear implication places a special confidence in the other. Constance, 25 S.W.3d at 580. To demonstrate the breach of a fiduciary duty, the plaintiff must show:

- the existence of a fiduciary duty between her and the defending party
- that the defending party breached the duty; and
- that the breach caused the plaintiff to suffer harm.

Zakibe v. Ahrens & McCarron, Inc., 28 S.W.3d 373, 381 (Mo.App.E.D. 2000).

Corporate officers and directors occupy a fiduciary relation to the corporation and its stockholders. Hyde Park Amusement Co. v. Mogler, 214 S.W.2d 541, 543 (Mo. 1948); Zakibe, 28 S.W.3d at 382. The corporate officer or director possesses a fiduciary duty to protect the corporation's interests. Id. The corporate officer is in a position of trust and, as such, remains bound to act with fidelity and subordinate the officer's

personal interest to the interest of the corporation should a conflict arise. Mogler, 214 S.W.2d at 543. The officer or director may breach a fiduciary duty by engaging in undisclosed transactions with another company in which she has an interest which is not fair to the corporation. Zakibe, 28 S.W.3d at 383.

3. Sovereign Immunity

Two Missouri statutes permit a public entity to purchase tort liability insurance. Section 71.185 applies to municipalities. In pertinent part, that statute provides:

Any municipality engaged in the exercise of governmental functions may carry liability insurance and pay the premiums therefore to insure such municipality and their employees against claims or causes of action for property damage or personal injuries, including death, caused while in the exercise of the governmental functions, and shall be liable as in other cases of torts for property damage and personal injuries including death suffered by third persons while the municipality is engaged in the exercise of the governmental functions to the extent of the insurance so carried.

Section 71.185.1 R.S.Mo. (2004). Section 537.610 applies to the State of Missouri and political subdivisions of the State. Section 537.610 directs:

The commissioner of administration, through the purchasing division, and the governing body of each political subdivision of this state, notwithstanding any other provision of law, may purchase liability insurance for tort claims, made against the state or the political subdivision. . . Sovereign immunity for the state of Missouri and its political subdivisions is waived only to the maximum amount of and only for the purposes covered by such policy of insurance purchased pursuant to the provisions of this section. . .

Section 537.610.1 R.S.Mo. (2004).

The purchase of liability insurance shall function as a waiver of sovereign immunity where the policy purchased by the government provides for coverage of liability related to activities other than those entailed in the operation of a motor vehicle or the existence of dangerous defect. Southers v. City of Farmington, 263 S.W.3d 603, 621-622 (Mo.banc 2008); Brennan v. Curators of the University of Mo., 942 S.W.2d 432, 436 (Mo.App.W.D. 1997). If the sovereign has waived its immunity, the sovereign may be vicariously liable for acts and omissions of its officers and directors. Southers, 263 S.W.3d at 622. However, plaintiff must plead the waiver of sovereign immunity in her petition. Brennan, 942 S.W.2d at 436.

C. Errors and Omissions Liability

An “errors and omissions” (E&O) policy generally:

protects against liability based on the failure of the insured, in his or her professional status, to comply with what can be considered in simplistic terms to be the standard of care for that profession.

In re SRC Holding Corp. v. Executive Risk Indem., Inc., 545 F.3rd 661, 664 (8th Cir. 2008).

The typical E&O policy provides coverage as follows:

II. COVERAGE

A. PROFESSIONAL LIABILITY AND CLAIMS-MADE AND REPORTED CLAUSE:

The Company will pay on behalf of an Insured all sums, subject to the Limit(s) of Liability, Exclusions and terms

and conditions contained in this Policy, which an Insured shall become legally obligated to pay as Damages as a result of CLAIMS (INCLUDING CLAIMS FOR PERSONAL INJURY) FIRST MADE AGAINST AN INSURED DURING THE POLICY PERIOD OR ANY APPLICABLE EXTENSION PERIOD COVERAGE AND REPORTED TO THE COMPANY DURING THE POLICY PERIOD, THE AUTOMATIC EXTENDED CLAIM REPORTING PERIOD, OR ANY APPLICABLE EXTENSION PERIOD COVERAGE by reason of any act or omission by an Insured acting in a professional capacity providing Legal Services.

The Bar Plan Mutual Insurance Co., TBP-2 (1-2009) at 4. The exemplar E&O policy defines the scope of the professional services covered under the policy, in this case “Legal Services”. The policy directs:

“**LEGAL SERVICES**” means: Services performed by an Insured in an Insured’s professional capacity as:

1. A lawyer;
2. A non-lawyer who is an employee, leased employee or independent contractor of the Policyholder and who works at the direction of and who is under the supervision of the Policyholder and for whose actions the Policyholder is legally responsible;
3. A notary public;
4. A mediator or arbitrator;
5. An administrator, conservator, executor, guardian, trustee, receiver or any similar fiduciary capacity; or
6. A title insurance agent, broker or producer, but only for title work performed as a partner, member, officer, director, stockholder, Associate, or employee of the Policyholder for clients of the Policyholder. Title

work performed as an agent, broker or producer of a title agency other than the Policyholder is NOT covered under this Policy.

Id. Further, the policy provides extended direction with regard to what action constitutes “notice”. The policy states:

C. DISCOVERY CLAUSE

If during the Policy Period, or any Extended Period elected hereunder, an Insured first becomes aware of a specific incident, act or omission while acting in a professional capacity providing Legal Services, which may give rise to a Claim for which coverage is provided under this Policy, and during the Policy Period or any Extension Period Coverage the Insured gives written notice to the Company of:

1. The specific incident, act, or omission;
2. The injury or damage which has resulted or may result from such incident, act or omission; and
3. The circumstance(s) by which the Insured first became aware of such incident, act or omission;

then any Claim that may subsequently be made against the Insured arising out of such incident, act or omission shall be deemed for the purposes of this insurance to have been made during the Policy Period or any Extension Period elected hereunder.

Id. at 5-6. The policy defines “Claim” as: “Receipt by an Insured of a demand for money or services (including the service of suit or the institution of arbitration proceedings) against the Insured from one other than that Insured.” Id. at 3.

V. Specific Situations

A. Duty to Defend

An insurance company has a duty to defend an insured when the insured is exposed to potential liability. To extricate itself from the duty to defend, the insurer must prove that there is no possibility of coverage. Truck Ins. Exch. v. Prairie Framing, LLC, 162 S.W.3d 64, 79 (Mo.App.W.D. 2005). In such a circumstance, the insurance company possesses the burden of showing the existence of an exclusion under the policy. Id. at 80.

B. The Reservation of Right

Nevertheless, an insurance company may defend its insured but reserve the right to later disclaim coverage upon proper notice to the insured. Truck Ins. Exch., 162 S.W.3d at 88. A reservation of right is an unilateral declaration by the insurer to its insured that the insurer accepts the defense of a tendered claim but reserves its right to later deny coverage on specified grounds. Pink v. Knoche, 103 S.W.3d 221, 228 (Mo.App.W.D. 2003). The reservation of right to contest coverage does not automatically constitute a denial of coverage. Id. at 227-228.

Once the conditional defense is offered, the insured has the option of either accepting the defense under a reservation of rights or refusing the defense. Truck Ins. Exch., 162 S.W.3d at 88. The insured has no obligation to accept the conditional offer of representation. Id. at 91. Indeed, the decision whether to accept a reservation of rights defense is that of the insured; the insurer cannot force its insured to accept the defense. Id. at 88.

Should the insured reject the defense, the insurer has one of three options:

- the insurer may represent insured without a reservation of rights defense;
- the insurer may withdraw from representing the insured altogether; or
- the insurer may file a declaratory judgment action to determine the scope of the policy's coverage.

The insurer loses the right to control the litigation if it withdraws from the representation. Id. at 88.

The refusal to defend is treated as a breach of contract if the decision to defend under a reservation of rights is unjustified. Id. at 89. The insurance company waives its ability to control the defense of the underlying tort action. And, once the insurer has breached its duty to defend, the insured is relieved of its duties and obligations under the policy. The insured may make a reasonable settlement without losing the right to recover on the policy. Id. at 89-90.

C. Non-Cooperation as a Defense to the Duty to Defend

Generally, “cooperation clause” provisions are valid and enforceable. Upon proof of a material breach of the clause by the insured, the insurer may deny liability coverage under the terms of the policy⁶. Hendrix v. Jones, 580 S.W.2d 740, 742 (Mo.banc 1979). However, to do so, the insurer must prove “substantial prejudice” before it can deny coverage because of breach of such a clause. Riffe v. Peeler, 684 S.W.2d 539, 542 (Mo.App.W.D. 1985).

⁶ The Court conditioned this statement by adding “unless the insurer has waived its right assert the defense of material breach or is estopped from asserting it. . . .”

D. Assertion of Fifth Amendment

The assertion of an insured's Fifth Amendment right against self-incrimination may amount to a failure to cooperate in the defense. Medical Protective Co. v. Bubenik, 2008 WL 5070042, 26-31 (E.D.Mo. 2008). Nevertheless, a review of reported Missouri cases has failed to reveal any opinion addressing whether exertion of the Fifth Amendment excuses an insured from his contractual duty to cooperate in the investigation and defense of a civil cause. Counsel should note, however, that multiple courts (including the district court cited above) have considered the presence of "prejudice" in conjunction with addressing the issue of whether assertion of the privilege serves to breach the duty to cooperate. See Aetna Cas. & Sur. Co. v. State Farm Mut. Auto. Ins. Co., 771 F.Supp. 704, 708-710 (W.D.Penn. 1991); See also Miller v. Augusta Mut. Ins. Co., 335 F.Supp.2d 727 (W.D.Va. 2004).

E. Waiver of Defense Due to Lack of Timeliness of Reservation of Right

An insurance company must timely notify its insured that the insurer possesses a defense through which it intends to avoid its duties and obligations under the insurance policy. As such, an insurer cannot later escape liability on the basis of a technical defense which the insurer failed to timely raise in the underlying tort action. Kitchen v. McCullough, 428 S.W.2d 907, 909-910 (Mo.App.K.C. 1968).

An insurer may waive its right to assert a defense by its conduct and action in continuing to defend an action. Mut. Managerial Corp. v. Pasqualino, 323 S.W.2d 244 (Mo.App.K.C. 1959). Waiver "is the voluntary or intentional abandonment or relinquishment of a known right, an election not to take advantage of a technical defense". Waiver of a ground for forfeiture of an insurance policy is unilateral in character, resulting from some act or conduct of the insurer. Kitchen, 428 S.W.2d at 910; See also Brown v. State Farm Mut. Auto. Ins. Co., 776 S.W.2d 384, 386 (Mo.banc 1989). According to the Supreme Court:

It is defending an action with *knowledge* of noncoverage under a policy of liability insurance without a non-waiver or reservation of rights agreement that precludes the insurer from subsequently setting up the fact and defense.

Mistele v Ogle, 293 S.W.2d 330, 334 (Mo. 1956). The voluntary relinquishment of the right to rely on a contractual provision forms the basis of the waiver. Brown, 776 S.W.2d at 388. If waiver is implied from conduct, the conduct must clearly and unequivocally show a purpose to relinquish the right. State Farm Mut. Auto. Ins. Co. v. Zumwalt, 825 S.W.2d 906, 909-910 (Mo.App.S.D. 1992).

In Pasqualino, the Court of Appeals held that an insurer waived its coverage defense when the insurer provided a defense to its insured for five months after learning of facts upon which the insurer could have denied coverage. In that case, plaintiffs suffered injury in an automobile collision. Prior to the collision, Missouri Managerial Corporation insured a 1950 Ford owned by the tortfeasor, Michael Gillotte. Eight weeks prior to the collision, Gillotte traded the Ford for a 1954 Mercury. He did not notify the insurer of the exchange. The collision occurred on July 10, 1955; Gillotte operated the Mercury at the time of the collision. The insurer learned of the collision, investigated the crash and, after suit was filed, hired a lawyer to defend the suit. Five months after learning of that Gillotte was operating the Mercury – and not the Ford – at the time of the collision, the insurer secured a “non-waiver agreement” from Gillotte. The defense of the action with knowledge of non-coverage under the policy, the Court held, precluded the insurer from subsequently avoiding liability. The insurer waived the non-coverage defense. Pasqualino, 323 S.W.2d at 250-251.

F. Estoppel

An insurer may also be compelled to accept liability despite a valid policy defense through the doctrine of estoppel. Estoppel requires:

- (1) an admission, statement or act inconsistent with the claim afterwards asserted and sued upon;
- (2) action by the other party on the faith of such admission, statement or act; and
- (3) injury to such other party resulting from allowing the first party to contradict or repudiate the admission, statement or act.

Brown, 776 S.W.2d at 386. While waiver involves the act of only one of the parties to the contract, estoppel involves the act of both parties. Though evidence of intent to mislead is not required, estoppel always involves that one has been misled to his prejudice or into an altered position. Id. at 387. Thus, unlike with waiver, prejudice is a required element of estoppel. Id. at 388; *See also Safeco Ins. Co. of America v. Stone & Sons, Inc.*, 822 S.W.2d 565 (Mo.App.E.D. 1992). The party who asserts estoppel has the burden of establishing the facts upon which estoppel rests by clear and satisfactory evidence. Pasqualino, 323 S.W.2d at 249.

In Kitchen, the Court of Appeals held that an insurer could not, in a garnishment action, escape liability when the insurer asserted for the first time after judgment that its insured failed to cooperate in the defense of the case as required by the policy's cooperation clause. Kitchen, 428 S.W.2d at 910-911. In that case, plaintiff sued defendant to recover for injuries sustained in an automobile collision. Following service, insurer retained counsel and that counsel thereafter took depositions and fully participated in the trial, without reservation. Id. at 910. Plaintiff obtained a verdict and filed a garnishment action against insurer to collect. Insurer defended the garnishment action on the grounds that its insured failed to cooperate with it in the defense of the suit. Id. at 908. Finding that insurer's actions had misled plaintiff into acting at her detriment, the court remanded the case with directions to the trial court to enter judgment against insurer. Id. at 910-911.

G. Settlement Pursuant to Section 537.065

If the insurer refuses to defend, the insured may negotiate a settlement with plaintiff to protect his personal assets and interests. Vaughan v. United Fire & Cas. Co., 90 S.W.3d 220, 228 (Mo.App.S.D. 2002); *See* Section 537.065 R.S.Mo. (2004). Section 537.065 provides one mean through which an insured may act to limit his liability:

Any person having an unliquidated claim for damages against a tort-feasor, on account of bodily injuries or death, may enter into a contract with such tort-feasor. . . whereby, in consideration of the payment of a specified amount, the person asserting the claim agrees that in the event of a judgment against the tort-feasor, neither he nor any person, firm or corporation claiming by or through him will levy execution, by garnishment or otherwise provided by law, except against the specific assets listed in the contract and except against any insurer which insures the legal liability of the tort-feasor for such damage. . .

Section 537.065.

LITIGATING THE INSURANCE CLAIM

by

Matthew J. Devoti

Cases involving a dispute revolving around insurance coverage are much like other cases handled by trial lawyers. However, insurance claims often involve issues particular to that variety of case. The purpose of this paper is to set forth various mechanisms available to counsel to resolve insurance coverage disputes in an efficient and effective manner.

I. Filing the Dispositive Motion

Often, cases involving insurance disputes may be resolved via summary judgment. In such cases, the facts underlying the claim are not in dispute; however, the parties disagree about whether the insurance contract provides coverage under the existing set of circumstances. In that situation, a motion for summary judgment is an effective way to bring an insurance case to a resolution.

A. State Actions

In Missouri, Rule 74.04 governs summary judgment. *See* Rule 74.04. Rule 74.04 directs that both the “claimant” as well as the “defending party” may “move without supporting affidavits for a summary judgment”. Rule 74.04(a)-(b). Rule 74.04(c) sets forth the requirements of a summary judgment motion and the proof necessary to obtain a judgment. *See* Rule 74.04(c).

B. Federal Actions

In federal court, Rule 56 controls summary judgment. *See* Fed.R.Civ.P. 56. Rule 56 also provides a mechanism through which both the insured and the insurer might

move for summary judgment. Fed.R.Civ.P. 56(a)-(b). Much like the Missouri rule, the federal rule provides that:

The judgment sought should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.

Fed.R.Civ.P. 56(c).

Counsel practicing in federal court must be aware that local rules may affect the manner and process utilized in the filing of a summary judgment. Specifically, counsel practicing in the United States District Court, Eastern District of Missouri, should review the local rules posted at: www.moed.uscourts.gov/CMECF/CMECF_loclrule.pdf.

C. Exemplar Pleadings

The legal basis underlying a motion for summary judgment will vary depending upon the circumstances out of which the insurance dispute arises. Nevertheless, the basis for any summary judgment motion must begin with the statement of facts which are not in dispute. More often than not, counsel may agree on these factual statements. In any event, the statement of “uncontroverted material facts” remain central to the propriety of summary judgment.

An exemplar statement of “uncontroverted material facts” may prove beneficial. Find below Statement of Uncontroverted Material Facts recently filed in an underinsured motorist case pending in the Circuit Court of the City of St. Louis. The case involved the availability of underinsured motorist coverage to the family of a fire chief killed during the course of his employment. See Buehne v. State Farm Mut. Auto. Ins. Co., 232 S.W.3d 603 (Mo.App.E.D. 2007). Note that the statements set forth below would, if they had remained uncontroverted, have proved plaintiff’s case.

STATEMENT OF UNCONTROVERTED
MATERIAL FACTS

1. Plaintiff LaDonna Buehne is the widow of Gerald J. Buehne. Exhibit 1 at 2-3.

2. Plaintiffs Timothy Buehne and Cynthia Siegel are the only children of Mr. Buehne. Exhibit 1 at 2-3.

3. On March 10, 2005, Mr. Buehne died as a result of injuries sustained in a motor vehicle collision. Exhibit 2.

4. At the time of the collision, Mr. Buehne operated a 2000 Ford Crown Victoria. Exhibit 3 at 1.

5. Claudex Simmons operated the motor vehicle that struck the motor vehicle operated by Mr. Buehne at the time of the collision. Exhibit 3.

6. Prior to March 10, 2005, Defendant State Farm Mutual Automobile Insurance Company (hereinafter "State Farm") issued to Mr. Buehne a motor vehicle insurance policy, Policy No. 360 4060-E18-25C (hereinafter "Policy"). Exhibit 4, ¶ 5.

7. The Policy provides underinsured motorist coverage with limits of Twenty Five Thousand Dollars (\$25,000.00). Exhibit 4, ¶ 5.

8. The Policy was in full effect at the time of the collision. Exhibit 5; Exhibit 6.

9. That Plaintiffs are insureds as that term is used and defined in the Policy issued to Mr. Buehne. Exhibit 4, ¶ 2; Exhibit 6 at 12.

10. That the Policy uses and defines the term “Underinsured Motor Vehicles” as:

. . . a land motor vehicle:

1. the ownership, maintenance or use of which is insured or bonded for bodily injury liability at the time of the accident; and
2. whose limits of liability for bodily injury liability:
 - (a) are less than the amount of the *insured’s* damages; or
 - (b) have been reduced by payments to *persons* other than the *insured* to less than the amount of the *insured’s* damages.

Exhibit 6 at 12.

11. At the time of the collision, Claudex Simmons was covered under a liability insurance policy issued by American International Group, Inc. and National Union Fire Insurance Co. (hereinafter “AIG/NUFIC”).

Exhibit 1 at 11-12; Exhibit 7.

12. The liability limit of the policy issued by AIG/NUFIC to Claudex Simmons is One Hundred Thousand Dollars (\$100,000.00). Exhibit 1 at 11-12; Exhibit 7 at 1.

13. AIG/NUFIC tendered to Plaintiffs the limits of such policy. Exhibit 1 at 11-12; Exhibit 7 at 1.

14. As a result of the collision, Mr. Buehne and Plaintiffs incurred damages in excess of One Hundred Thousand Dollars (\$100,000.00). Exhibit 1 at 6-7, 10, 12.

15. As a result of the collision, Mr. Buehne and Plaintiffs incurred damages in excess of One Hundred Fifty Thousand Dollars (\$150,000.00). Exhibit 1 at 6-7, 10, 12.

II. Successful Strategies in Insurance Coverage Cases

The fundamental strategies employed by counsel in an insurance coverage case vary little from those utilized by lawyers in any other tort or contract case. However, certain issues particular to this type of litigation demand special knowledge and care.

A. Choosing Evidence and Experts

In a typical case involving a dispute about insurance coverage, the investigation and choice of experts and evidence to be used at trial varies little from the traditional contract case. Many of the same options and decisions present themselves to counsel in both cases. However, the practitioner will want to consider the use of several items particular to cases involving an insurance company.

First, utilize the policy of insurance. The policy is, of course, a contract – an agreement which binds the insured as well as the insurer. The policy must always be obtained from the insurer during the course of discovery. And, the trial lawyer should always show to the jury any terms or conditions of the policy at issue – as well as those not at issue. These provisions may include those defining:

- coverage
- insured
- terms at issue - such as uninsured or underinsured motor vehicle
- the provision(s) directing what the insurer “will pay”
- exclusions
- any provision particular to the issues in your case

Second, utilize requests to admit to narrow the issues for the fact-finder. Identify issues in your case early in the litigation process. Serve discovery on opposing counsel aimed at establishing facts helpful to your case. Sample requests might demand:

1. All statements of Plaintiff, including any written, recorded, transcribed, videotaped, and/or photographed statements.

2. All damage repair estimates of the extent of damage to the underinsured motor vehicle.

3. All statements of any of the witnesses to the occurrence mentioned in the Petition.

4. All photographs, films, videotapes, and motion pictures of Plaintiff.

5. All photographs, films, videotapes, and motion pictures of the vehicles and/or objects involved in the collision or the scene of the occurrence.

6. All medical records and reports regarding the care, treatment, and/or treatment of Plaintiff.

7. All employment records regarding Plaintiff.

8. Copies of all summons, tickets, pleas of guilty, and/or documents regarding charges brought against Defendant and/or the owner and/or operator of the underinsured motor vehicle or their conviction for any traffic tickets given as a result of the collision mentioned in the Petition.

9. Complete copy of any policy of insurance, including the declarations page, that provided coverage, including underinsured motorist coverage on the vehicle Plaintiff was operating on February 2, 2005.

10. All documents relating to any investigation conducted by this Defendant, its agents, servants, or employees, concerning the events mentioned in the Petition for Damages.

11. The file(s) of any adjuster involved in the processing, oversight, supervision, or other handling of the claims made by Plaintiff mentioned in the Petition for Damages.

12. This Defendant's file concerning Claim No. 10080304.

* * *

Finally, enlist the assistance of the appropriate expert to aid your case. Depending upon the context of the dispute, the type of expert required may vary from a physician to an individual knowledgeable about the insurance field.

As in any personal injury case, the observations and opinions of the treating physician in an uninsured or underinsured motorist case carry a great deal of weight. Contact the physician early – if possible, before the case is filed. Discuss with the doctor his observations of the insured, any inconsistencies noticed in your review of the medical records and statements made by the insured at deposition or during conference. Also, provide the doctor with any records not then in his possession and request that the doctor provide to you a brief written report setting forth opinions that he possesses.

If the doctor is not supportive of your case, retain the services of a physician to review the medical records. The review will assist you in your prosecution or defense of the case by providing insight into medical issues not noticed or completely understood or appreciated by you. Meet in person with the retained physician. Demand that the doctor examine the insured if you plan on requesting the doctor to testify at trial.

If your case involves the criticism of actions taken by the insurer, counsel may want to seek the assistance of an individual who has worked and labored in the insurance industry. Such a person should review the insurance policy and the file of the insurer (and, if applicable, counsel), constructively criticize the actions of the insured and review

all applicable pleadings. Such an expert may be able to explain the actions (and omissions) of the insurer in the context of the insurance contract and opine as to the reasonableness of the insurer's conduct.

B. A Prosecutor's Blueprint for a Successful Trial

The blueprint for any successful trial begins with the opening of the file. Identify potential issues. Review any documents describing the preliminary investigation. Prepare a list of things to accomplish during discovery. Do those things. And, perhaps most importantly, draft your Verdict Director as soon as possible.

1. Pack Power into Opening Statements and Closing Arguments

The differentiating factor between trying these claims and a customary contract dispute or motor vehicle liability case is the fact that "insurance" and insurance coverage is mentioned, discussed and argued before the jury. That fact is crucial. Plaintiff's counsel is not concerned about how reluctant a jury may be to award damage against a "regular guy" who may or may not possess sufficient coverage to cover the damage suffered by the plaintiff. Indeed, counsel should take every opportunity to remind the jury that he represents a human being in a contractual dispute with an insurer who has in the past accepted premiums without equivocation but is now disputing payment.

Of course, moderation is key. And, counsel must be prepared from *voir dire*, through opening statement, his case, and closing argument to put forward evidence justifying his presence and that of his client in court as well as the position conveyed during closing argument. Again, preparation coupled with knowledge of applicable law and relevant facts and defenses is vital to any counsel's success – whether the lawyer is representing the insurer or its insured.

2. Ready-to-Use Jury Instructions

As with any case, the Missouri Approved Instructions serves as the foundation for jury instructions. In an uninsured motorist case, the insured will want to prepare and submit the following base instructions:

- MAI 2.01 (Explanatory Instruction)
- MAI 2.03 (Order of Instructions)
- MAI 2.02 (Facts Not Assumed)
- MAI 3.01 (Burden of Proof)
- MAI 33.11 (Verdict Director) – in those cases where the insurer is the only defendant OR
MAI 33.12 (Verdict Director) – in those cases where the insurer and the tortfeasor motorist are joined
- MAI 12.01 (Definition of Uninsured Motor Vehicle)
- MAI 11.03 (Definition of Negligence)
- MAI 4.11 (Damage in Suit against Uninsured Motor Vehicle Insurer only)
- MAI 2.04 (Return of Verdict)
- MAI 36.14 (Verdict Form) – in those case where the insurer is the only defendant OR
MAI 36.13 (Verdict Form) – in those cases where the insurer and the tortfeasor motorist are joined

Attached to this paper you will find exemplar instructions for your consideration. These instructions were submitted in an uninsured motorist case pending against only the uninsured motorist carrier in the Circuit Court of the City of St. Louis. Counsel will want to adapt the instructions submitted to fit your fact pattern and disputed issues present in your case. See MAI, “How to Use this Book” at XLVII-LIII.

The verdict director proposed by plaintiff in a vexatious refusal case will differ from that submitted in the straight-forward uninsured motorist case. Counsel should be

aware that no MAI instruction exists in the vexatious refusal context. However, the Supreme Court approved the following instruction:

Your verdict must be for plaintiff if you believe that defendant State Farm Fire and Casualty refused to pay uninsured motorist benefits without reasonable cause or excuse.

Dhyne v. State Farm Fire & Cas. Co., 188 S.W.3d 454, 459 (Mo.banc 2006). In approving the instruction, the Court remarked that it is “generally sufficient to couch a verdict directing instruction substantially in the language of the statute.” Id.

The instructions submitted in a case brought against an insurer to recover under an insurance policy on property (for instance, a homeowners policy) vary slightly. In such a case, the insured will want to prepare and submit the following instructions in addition to the foundational instructions:

- MAI 31.09 (Verdict Director)
- MAI 4.02 (Damage – Property)
- MAI 16.02 (Definition of Fair Market Value)
- MAI 10.08 (Damage – Vexatious Refusal)
- MAI 36.10 (Verdict Form)

Again, counsel will want to adapt the instructions submitted to fit your fact pattern and disputed issues present in your case.

III. How to Strategically Handle Bifurcation During Trial

Section 510.263 provides, in pertinent part:

All actions tried before a jury involving punitive damages, including tort actions based upon improper health care, shall be conducted in a bifurcated trial before the same jury if requested by any party.

Section 510.263.1 R.S.Mo. (2004). The statute provides for the splitting, or bifurcation, of a cause of action where plaintiff seeks punitive damages. In the first stage of the trial, the jury shall determine:

- liability for compensatory damage
- the amount of compensatory damage, including nominal damage
- the liability for punitive damage

Section 510.263.2. The statute further directs:

If during the first stage of a bifurcated trial the jury determines that a defendant is liable for punitive damages, that jury shall determine, in a second stage of trial, the amount of punitive damages to be awarded against such defendant.

Section 510.263.3; *See also Gilliland v. Mo. Athletic Club*, 273 S.W.3d 516, 519-520 (Mo.banc 2009).

IV. Contribution Protection

Contribution refers to the practice of one insurer seeking “contribution” from another for a loss covered under policies issued by each. A typical contribution provides:

If the *insured* sustains *bodily injury* while *occupying* a vehicle not owned or leased by *you, your spouse* or any *relative*, this coverage applies:

- a. as excess to any underinsured motor vehicle coverage which applies to the vehicle as primary coverage. . .

* * *

If coverage under more than one policy applies as excess:

* * *

- b. we are liable only for our share. Our share is that per cent of the damages that the limit of liability of this coverage bears to the total of all underinsured motor vehicle coverage applicable as excess to the accident.

State Farm Mut. Auto. Ins. Co., Policy Form 9825.6 at 14 (emphasis in original).

V. Declaratory Action

From time to time, insurance companies utilize a declaratory action to determine in as efficient a manner as possible their liability for coverage.

A. State Actions

In Missouri, Rule 87 permits a party to file an action for the purpose of obtaining an order from the court declaring its rights, responsibilities and obligations. *See* Rule 87.01.

Specifically, Rule 87.02 provides the mechanism for the bringing of an action to determine the rights and responsibilities of a party. That rule directs:

Any person interested under a deed, will, written contract or other writings constituting a contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder.

Rule 87.02. The rule further directs that a “contract may be construed either before or after there has been a breach”. Rule 87.03.

Importantly, counsel must recognize that a judgment entered in a declaratory action possesses: “the force and effect of a final judgment or decree.” Rule 87.08.

B. Federal Actions

A statute provides the basis for bringing a declaratory action in federal court. *See* 28 U.S.C. § 2201. In pertinent part, that statute provides:

In a case of actual controversy within its jurisdiction. . . any court of the United States, upon filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

28 U.S.C. § 2201(a). Pursuant to Rule 57, the federal rules of civil procedure govern declaratory actions brought under the statute. *See* Fed.R.Civ.P. 57.

VI. Alternative Dispute Resolution and Other Settlement Options

Engaging in alternative dispute resolution proceedings with an insurer may be one of the most frustrating experiences for an insured and her counsel. Unlike a case pending against an individual or business, a case seeking to recover against an insurance contract involves no threat of exposing an insurer’s insured to excess liability or accusations of “bad faith” negotiating. In this context, the insurer focuses on the bottom line – the extent of its financial liability. Yet, the insured and her counsel do possess one solid positive; the defendant is an insurance company to which few jurors will give any compassion or sympathy.

A. Actions to Take Prior to Alternative Dispute Resolution

Cases which revolve around a coverage dispute often resolve in one of two extremes – judgment in favor of the insurer or judgment in favor of the insured for a significant portion of the policy’s coverage. In this circumstance, counsel’s job is to demonstrate to the insurance company the potential cost of litigating the case to a resolution favorable to the insured. Like any other case, counsel must engage in discovery to identify the strengths and weaknesses of his client’s position.

However, unlike other contract or tort cases, claims involving insurance coverage disputes demand additional discovery. Counsel must identify the provision at issue under the policy, relevant facts that support his interpretation of coverage as well as pertinent law. Counsel may serve requests to admit that, when answered, assist him in narrowing the scope of the dispute. And, once obtained, those responses may be combined with other information learned through discovery to draft an appropriate motion for partial summary judgment. The motion for summary judgment should be aimed at obtaining direction from the trial court as to the dispute. Carefully drafted, the motion serves to put the insurer (or its insured) on notice as to the strengths and weaknesses of each case.

B. The Mediation Process

During mediation, counsel should talk to the insurer’s representative about the strengths of his case. Counsel should be prepared to draw analogies between the provision at issue, his position and case law interpreting the same or similar provisions in other policies. Copies of pertinent cases should be available to provide to the insurer and its counsel, if asked. Counsel must be well versed, of course, in the fundamentals of basic contract law, insurance policy interpretation and in whose favor Missouri courts resolve ambiguities (generally, in favor of the insured and against the insurer).

Further, counsel must be prepared to talk about damages – the best (or worst) case scenario – in the event the fact-finder find in favor of one’s client. Like any other action,

counsel must know the insured's history, the injury or damage sustained, the diagnosis or analysis of the damage suffered by the insured's physicians or the appropriate expert witness, any assistance, remediation, renovation or treatment provided to or obtained by the insured, the prognosis or plan for further work and recovery, the cost of past (and future) medical care or work and any subrogation claims or liens asserted against the matter.

C. Settle More Claims Outside of Court

Obviously, settlement of any claim prior to the expenditure of significant litigation expense is desirable. The fact that counsel represents a party to an insurance coverage dispute does not change that reality. These claims, however, pose unique challenges due to their inherent complexity and compartmental nature. As such, counsel will want to consider several issues when resolving all – or portions – of these claims.

1. Consent Before Settlement

Insurance coverage dispute often arise in the context of claims involving uninsured and underinsured motorists. The typical motor vehicle insurance policy contains a provision providing for “subrogation”. But, what is subrogation?

Subrogation is a principle that permits one party to succeed to the rights of another in relation to a debt. Messner v. Am. Union Ins. Co., 119 S.W.3d 642, 648 (Mo.App.S.D. 2003). As such, a party who has, pursuant to a legal obligation, paid for a loss or injury resulting from a wrong or default of another succeeds to the rights of the damaged person in relation to her claim against the party who caused the wrong. Id. at 648-649.

Subrogation originated as a common law equitable doctrine; its intent was to prevent injustice and windfall in the event a wronged party obtained a recovery from multiple sources. Messner, 119 S.W.3d at 649; Keisker v. Farmer, 90 S.W.3d 71, 75

(Mo.banc 2002). However, the right to subrogate may also be established by contract. Messner, 119 S.W.3d at 649. When subrogation is established by an insurance policy, the insured retains legal title to the claim. Keisker, 90 S.W.3d at 74. By paying the insured, the insurer obtains the right to subrogation. Id. The exclusive right to pursue the tortfeasor remains with the insured, which holds any proceeds recovered for the benefit of the insurer. Id.

2. The Scope of Subrogation

Recall, however, that Missouri law prohibits the assignment of a cause of action for personal injury. Travelers Indem. Co. v. Chumbley, 394 S.W.2d 418, 424 (Mo.App.Spring. 1965). Accordingly, Missouri courts have long recognized the general rule that an insurer does not possess the ability to subrogate against an insured's claim for personal injury. Id. at 424-425. Therefore, in Chumbley, the Missouri Court of Appeals held that an insurer could not recover from its insured benefits paid under a medical payments policy after the insured settled his personal injury case. Id. at 425.

However, the General Assembly created an exception to the general rule for those insurers who provide uninsured motorist coverage. The exception was created in the statute mandating that insurers provide uninsured motorist coverage to an insured that purchases a motor vehicle liability policy. *See* Section 379.203 R.S.Mo. (2004). Section 379.203 requires all motor vehicle policies issued in the State of Missouri to contain a minimum amount of uninsured motorist coverage. Section 379.203.1.

That statute grants to the insurer a right of subrogation upon payment of uninsured motorist benefits to its insured. Section 379.203.4; *See* Schaeffer v. Am. Motorists Ins. Co., 973 S.W.2d 180, 182 (Mo.App.E.D. 1998); *See also* Roberts v. Progressive Northwestern Ins. Co., 151 S.W.3d 891, 899 (Mo.App.S.D. 2004). In pertinent part, Section 379.203.4 directs:

In the event of payment to any person under the coverage required by this section, and subject to the terms and conditions of such coverage, the insurer making such payment shall, to the extent thereof, be entitled to the proceeds of any settlement or judgment resulting from the exercise of any right of recovery of such person against any person or organization legally responsible for the bodily injury for which such payment is made, including proceeds recoverable from the assets of the insolvent insurer. . .

Section 379.203.4.

Pursuant to the statute, the insurer does not require authorization from the insured to exercise its subrogation rights. Schaeffer, 973 S.W.2d at 182. Yet, the right to subrogate is not without limits. Missouri courts have held that an insurer's subrogation rights extend *only to claims by the insured against the uninsured motorist*. Id.; Waldrop v. Shelter Mut. Ins. Co., 221 S.W.3d 401 (Mo.App.W.D. 2006). As a result, the insurer is not entitled to insist that its insured execute a release that might be read to grant to the insurer more extensive subrogation rights than the law provides. Schaeffer, 973 S.W.2d at 182. Specifically, in Schaeffer, the Eastern District held that an uninsured motorist carrier is only entitled to a release that makes clear the insured will make no further claim against uninsured motorist coverage relating to the collision giving rise to the claim. Id. at 182-183.

3. The Responsibility of the Insured

Counsel for an injured party must keep in mind the insurer's right to subrogate in those instances in which the injured person wishes to resolve her claim against the uninsured motorist. A typical policy provision directs:

There is no coverage under [the uninsured motor vehicle coverage]:

1. For any insured who, without our written consent, settles with any person or organization who may be liable for the bodily injury and thereby impairs our right to recover our payments. . .

State Farm Mutual Automobile Insurance Company, Policy Form 9825.6 at 13-14.

Another typical provision directs:

C. Exclusions

1. Any claim settled without our consent, if the settlement or judgment prejudices our right to recover payment. . .

Continental Western Insurance Company, Policy Form CA 21 04 04 01 at 1.

In this context, counsel should not permit his client to settle with nor fully release a tortfeasor in such a manner as to foreclose the insurer's right to subrogation. When an insured acts without the insurer's knowledge or consent to resolve her claim with the tortfeasor so as to extinguish the insurer's subrogation right, the insured acts in contravention of her contract with the insurer thereby precluding her right of recovery under the policy. Roberts, 151 S.W.3d at 900; *See also* Lebs v. State Farm Mut. Auto. Ins. Co., 568 S.W.2d 592, 593 (Mo.App.K.C. 1978). Of course, the insurer cannot unreasonably withhold its consent of a settlement between its insured and the tortfeasor. Rister v. State Farm Mut. Auto. Ins. Co., 668 S.W.2d 132, 136 (Mo.App.S.D. 1984). And, there exists no prohibition against the tortfeasor settling with the insured for an amount over and above the amount the insurer has paid or may become obligated to pay in the future so long as the tortfeasor is aware of the insurer's subrogation interest. Roberts, 151 S.W.3d at 900; *But see* Seeck v. GEICO Gen. Ins. Co., 212 S.W.3d 129 (Mo.banc 2007).

4. The Exclusion

Insurance contracts typically require an insured provide written notice of intent to resolve a claim against a tortfeasor – particularly in those endorsements which provide underinsured motorist coverage. Absent the procurement of consent, the policies direct, coverage is excluded. The reason for “consent exclusion” provisions is to keep the insured from striking a settlement with the tortfeasor which would impair the insurer’s right to subrogation. Tegtmeyer v. Snellen, 791 S.W.2d 737, 739 (Mo.App.W.D. 1990). Again, Missouri courts will generally uphold such exclusion “unless consent is unreasonably withheld.” Id. at 740; Rister, 668 S.W.2d at 136.

A typical exclusion present in an underinsured motorist policy demanding notice directs:

We will pay under this [underinsured motorists]
coverage only if a. or b. below applies:

* * *

b. A tentative settlement has been made
between an “insured” and the insurer of the “underinsured
motor vehicle” and we:

(1) Have been given prompt written notice of
such tentative settlement; and

(2) Advance payment to the insured in an
amount equal to the tentative settlement within 30 days
after receipt of notification.

Continental Western Insurance Company, Policy Form CA 31 04 04 01 at 1. Despite the presence of the provision, the insurance company cannot avoid liability merely because the insured fails to procure the insurer’s consent; to successfully escape liability, the insurer must demonstrate that it suffered some prejudice. Tegtmeyer, 791 S.W.2d at 740.

5. The Execution of the Release

Once consent is obtained from the insurer, counsel must give care to the drafting of the settlement documents. Language in the release must be tailored to accurately reflect settlement only of the claim resolved. The release shall be titled correctly and must contain language specifically identifying: (1) the claim(s) settled, (2) the parties released, (3) the claim(s) remaining, and (4) the parties against whom such claims exist.

An exemplar of an acceptable release may direct as follows:

**RELEASE OF CLAIMS AGAINST UNDERINSURED
MOTORIST ONLY**

FOR THE SOLE CONSIDERATION OF One
Hundred Thousand and 00/100 Dollars (\$100,000.00)
receipt of which I acknowledge, I fully and forever release
and discharge UNDERINSURED MOTORIST, his heirs,
administrators, executors, successors and assigns, from
claims for damages which I sustained as the result of an
accident which occurred on or about February 2, 2005, at
East Highway 50 and Monroe Street in Jefferson City,
Missouri.

It is understood and agreed that this is a full and
final release, in compromise settlement of all tort claims of
every nature and kind whatsoever only against
UNDERINSURED MOTORIST and his insurer, and
release all tort claims whether known or unknown,
suspected or unsuspected, against UNDERINSURED
MOTORIST and his insurer only.

By executing this release, I intend and agree that this release applies to all my claims against UNDERINSURED MOTORIST arising from said accident, present and future, including, but not limited to, damage to or destruction of property; claims for known or unknown injuries, developments, consequences and permanency of those injuries; and there is no misunderstanding in this regard.

It is understood that the aforesaid One Hundred Thousand Dollars (\$100,000.00) represents the full applicable liability policy limits of UNDERINSURED MOTORIST through UNDERINSURED MOTORIST'S LIABILITY INSURER and does not necessarily represent the full value of the undersigned's claim against UNDERINSURED MOTORIST.

It is specifically understood by all parties hereto that this is a release of all tort claims against UNDERINSURED MOTORIST and his insurer only. This release, however, does not purport to be and does not release any claim which the undersigned may have against UNDERINSURED MOTORIST INSURER under the provisions of its Policy No. XXXX which provides, among other things, underinsured motorist coverage in an amount in excess of UNDERINSURED MOTORIST's policy limits.

I acknowledge the sum paid shall not be construed as an admission of any liability by and of the parties released.

I agree that if more than one person has executed the release, the consideration paid shall apply jointly to all such persons. All other provisions shall apply separately to each such person. The word "person" as used in this paragraph includes natural persons, firms, associations, organizations and corporations.

I further agree that any claim of whatever kind or nature the above named parties might have or hereafter have growing out of the above accident, is hereby expressly reserved to them.

I understand this release contains the entire agreement between the parties. I have carefully read this Release, and know the contents, and I sign as my own free act.

All medical bills are to be paid from this settlement amount.

Signed and sealed at _____

In the Presence of Witnesses Signed Below:

* * *

D. Steps You Must Take Prior to a Demand for Arbitration

Beg, beg and beg if you want to arbitrate.

Under Missouri law, a contract cannot oust jurisdiction from the courts as to a determination of liability. State ex rel. State Farm Mut. Auto. Ins. Co. v. Craig, 364 S.W.2d 343 (Mo.App.Spring. 1963). *See also* Hill v. Seaboard Fire & Marine Ins. Co., 374 S.W.2d 606 (Mo.App.K.C. 1963).

EXEMPLAR UNINSURED MOTORIST INSTRUCTIONS

INSTRUCTION NO. ____

Your verdict must be for Plaintiff Jackie Gegg if you believe:

First, Cecil B. Greene was the operator of an uninsured motor vehicle, and

Second, Cecil B. Greene's automobile came into collision with the rear of Plaintiff's automobile, and

Third, Cecil B. Greene was thereby negligent, and

Fourth, such negligence directly caused or directly contributed to cause damage to Plaintiff.

The phrase "uninsured motor vehicle" as used in this instruction means a motor vehicle which has no bodily injury liability insurance applicable at the time of the collision.

The term "negligent" or "negligence" as used in this instruction means the failure to use the highest degree of care. The phrase "highest degree of care" means that degree of care that a very careful person would use under the same or similar circumstances.

M.A.I. No. 31.11 [1996 Revision]
M.A.I. No. 12.01 I [1988 Revision]
M.A.I. No. 17.16 [1973 Revision]
M.A.I. No.11.03 [1996 Revision]
M.A.I. No. 19.01 [1986 Revision]
Offered by Plaintiff

INSTRUCTION NO. ____

(1) GENERAL—JURY INSTRUCTIONS

This instruction and other instructions that I will read to you near the end of this trial are in writing. All of the written instructions will be handed to you for guidance in your deliberation when you retire to the jury room. They will direct you concerning the legal rights and duties of the parties and how the law applies to the facts that you will be called upon to decide.

(2) OPENING STATEMENTS

The trial may begin with opening statements by the lawyers as to what they expect the evidence to be. What is said in opening statements is not to be considered as proof of a fact. However, if a lawyer admits some fact on behalf of his client, the other party is relieved of the responsibility of proving that fact.

(3) EVIDENCE

After the opening statements, the plaintiff will introduce evidence. The defendant may then introduce evidence. There may be rebuttal evidence after that. The evidence may include the testimony of witnesses who may not appear personally but whose testimony may be read or shown to you and exhibits, such as pictures, documents and other objects.

(4) OBJECTIONS

There may be some questions asked or evidence offered by the parties to which objections may be made. If I overrule an objection, you may consider that evidence when you deliberate on the case. If I sustain an objection, then that matter and any matter I order to be stricken is excluded as evidence and must not be considered by you in your deliberations.

(5) RULINGS OF LAW AND BENCH CONFERENCES

While the trial is in progress, I may be called upon to determine questions of law and to decide whether certain matters may be considered by you under the law. No ruling or remark that I make at any time during the trial will be intended or should be considered by you to indicate my opinion as to the facts. There may be times when the lawyers come up to talk to me out of your hearing. This will be done in order to permit me to decide questions of law. These conversations will be out of your hearing to prevent issues of law, which I must decide, from becoming mixed with issues of fact, which you must decide. We will not be trying to keep secrets from you.

(6) OPEN MINDS AND NO PRELIMINARY DISCUSSIONS

Justice requires that you keep an open mind about the case until the parties have had the opportunity to present their case to you. You must not make up your mind about the case until all evidence, and the closing arguments of the parties, have been seen or heard. You must not comment on or discuss with anyone, not even among yourselves, what you hear or learn in trial until the case is concluded and then only when all of you are present in the jury room for deliberation of the case under the final instructions I give to you.

(7) OUTSIDE INFLUENCES

During the trial you should not remain in the presence of anyone who is discussing the case when the court is not in session. Otherwise some outside influence or comment might influence a juror to make up his/her mind prematurely and be the cause of a possible injustice. For this reason, the lawyers and their clients are not permitted to talk with you until the trial is completed.

(8) JUROR RESEARCH PROHIBITED

Your decision must be based only on the evidence presented to you in the proceedings in this courtroom. You should not conduct your own research or investigation into any issues in this case. You should not visit the scene of any of the incidents described in this case. You should not conduct any independent research of any type by reference to textbooks, dictionaries, magazines, the use of the Internet or any other means.

(9) FINAL INSTRUCTIONS

After all of the evidence has been presented, you will receive my final instructions. They will guide your deliberations of the issues of fact you are to decide in arriving at your verdict.

(10) CLOSING ARGUMENTS

After you have received my final instructions, the lawyers may make closing arguments. In closing arguments, the lawyers have the opportunity to direct your attention to the significance of evidence and to suggest the conclusions that may be drawn from the evidence.

(11) DELIBERATIONS

You will then retire to the jury room for your deliberations. It will be your duty to select a foreperson, to decide the facts and to arrive at a verdict. When you enter into your deliberations, you will be considering the testimony of witnesses as well as other

evidence. In considering the weight and value of the testimony of any witness, you may take into consideration the appearance, attitude and behavior of the witness, the interest of the witness in the outcome of the case, the relation of the witness to any of the parties, the inclination of the witness to speak truthfully or untruthfully and the probability or improbability of the witness' statements. You may give any evidence or the testimony of any witness such weight and value as you believe that evidence or testimony is entitled to receive.

(12) NOTETAKING

Each of you may take notes in this case, but you are not required to do so. I will give you notebooks. Any notes you take must be in those notebooks only. You may not take any notes out of the courtroom before the case is submitted to you for your deliberations. No one will read your notes while you are out of the courtroom. If you choose to take notes, remember that notetaking may interfere with your ability to observe the evidence and witnesses as they are presented.

Do not discuss or share your notes with anyone until you begin your deliberations. During the deliberations, if you choose to do so, you may use your notes and discuss them with other jurors. Notes taken during trial are not evidence. You should not assume that your notes, or those of other jurors, are more accurate than your own recollection or the recollection of other jurors.

After you reach your verdict your notes will be collected and destroyed. No one will be allowed to read them.

INSTRUCTION NO. ____

In returning your verdict you will form beliefs as to the facts. The court does not mean to assume as true any fact referred to in these instructions but leaves it to you to determine what the facts are.

INSTRUCTION NO. _____

As you remember, the court gave you a general instruction before the presentation of any evidence in this case. The court will not repeat that instruction at this time. However, that instruction and the additional instructions, to be given to you now, constitute the law of this case and each such instruction is equally binding upon you. You should consider each instruction in light of and in harmony with the other instructions, and you should apply the instructions as a whole to the evidence. Words or phrases which are not otherwise defined for you as part of these instructions should be accorded their ordinary meaning. The order in which the instructions are given is no indication of their relative importance. All of the instructions are in writing and will be available to you in the jury room.

INSTRUCTION NO. ____

The verdict form included in these instructions contains directions for completion and will allow you to return the permissible verdict in this case. Nine or more of you must agree in order to return any verdict. A verdict must be signed by each juror who agrees to it.

INSTRUCTION NO. _____

In these instructions, you are told that your verdict depends on whether or not you believe certain propositions of fact submitted to you. The burden is upon the party who relies upon any such proposition to cause you to believe that such proposition is more likely to be true than not true. In determining whether or not you believe any proposition, you must consider only the evidence and the reasonable inferences derived from the evidence. If the evidence in the case does not cause you to believe a particular proposition submitted, then you cannot return a verdict requiring belief of that proposition.

INSTRUCTION NO. _____

If you find in favor of plaintiff, then you must find plaintiff's damages in such sum as you believe will fairly and justly compensate plaintiff for any damages you believe she sustained and is reasonably certain to sustain in the future that the collision directly caused or directly contributed to cause.

VERDICT

Note: Complete this form by writing in the name required by your verdict.

On the claim of plaintiff Jackie Gegg for personal injuries against defendant State Farm Fire & Casualty Company, we, the undersigned jurors find in favor of:

(Plaintiff Jackie Gegg) or (Defendant State Farm Fire & Casualty Company)

Note: Complete the following paragraph only if the above finding is in favor of plaintiff Jackie Gegg.

We, the undersigned jurors, find plaintiff was damaged in the sum of

\$ _____ (*stating the amount*).

Note: All jurors who agree to the above findings must sign below.

_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____

EXEMPLAR BREACH OF INSURANCE POLICY
INSTRUCTIONS

INSTRUCTION NO. _____

Your verdict must be for plaintiffs if you believe:

First, defendant issued its policy to plaintiffs on 12494 Eveningshade Road covering loss due to water, and

Second, such property was damaged by water, and

Third, the policy was in force on the date of such loss

Unless you believe plaintiffs are not entitled to recover by reason of Instruction No. ____.

INSTRUCTION NO. _____

If you find in favor of plaintiffs, then you must award plaintiffs such sum as you may find from the evidence to be the difference between the fair market value of 12494 Evening Shade Road and the contents thereof before they were damaged and their fair market value after they were damaged, plus such sum as you may find from the evidence will fairly and justly compensate plaintiff for the loss of use thereof during the time reasonably necessary for the property to be repaired or replaced. If you find that plaintiffs failed to mitigate damages as submitted in Instruction No. ____, in determining plaintiffs' total damages you must not include those damages that would not have occurred without such failure.

The phrase "fair market value" as used in this instruction means the price which the property in question would bring when offered for sale by one willing but not obliged to sell it, and when bought by one willing or desirous to purchase it but who is not compelled to do so.

In determining fair market value you should take into consideration all the uses to which the property may best be applied or for which it is best adapted, under existing conditions and under conditions to be reasonably expected in the near future.

INSTRUCTION NO. _____

If you find in favor of plaintiffs on the claim on the insurance policy, and if you believe that defendant insurance company refused to pay without reasonable cause or excuse, then, in addition to any amount you may award on the insurance policy under Instruction No. _____, you may award plaintiffs an additional amount as a penalty not to exceed twenty percent of the first \$1,500.00 of the award on the policy not including interest and ten percent of the remainder of such award and you may award plaintiff a reasonable sum for attorney's fees.

VERDICT

Note: Complete this form by writing in the name required by your verdict.

On the claim of plaintiffs R. Ross Pool and Tammie Pool for insurance benefits, interest, penalties and attorney fees against defendant Farm Bureau Town & Country Insurance Company of Missouri, we, the undersigned jurors, find in favor of:

(Plaintiffs R. Ross Pool and Tammie Pool) or (Defendant Farm Bureau Town & Country Ins. Co. of Missouri)

Note: Complete the following paragraph only if your verdict is in favor of plaintiffs R. Ross Pool and Tammi Pool.

We, the undersigned jurors, assess the damages of plaintiffs R. Ross Pool and Tammie Pool as follows:

On the policy \$_____ (*stating the amount*).

For interest \$_____ (*stating the amount or, if none, write the word "none"*).

For penalty \$_____ (*stating the amount or, if none, write the word "none"*).

For attorney fees \$_____ (*stating the amount or, if none, write the word "none"*).

Note: All jurors who agree to the above findings must sign below.

