La. Claims Association - June 17, 2004 at 9:30 a.m.

Recent Developments in Insurance Coverage

by J. Douglas Sunseri of
Nicaud, Sunseri & Fradella, L.L.C.
Metairie, Louisiana

I. Interpretation of Insurance Policy - General Principles

- Normally a question of law - usually can be resolved on summary judgment.

A. Contract - La. Civil Code Article 2045 - "Determination of the common intent of the parties (insured and insurer)."

- the terms of the contract constitutes the law between the parties;
- interpreted by using ordinary contract principles;
- words and phrases construed using their plain and ordinary meaning unless the words have a technical meaning;
- if the terms of the insurance policy are clear and explicit and lead to no absurd consequences, then the insurance contract must be enforced as written.

B. Insurance Contracts Construed in Favor of the Insured and Against the Insurer

- insureds and insurers are free to contract and limit liability, and to enforce reasonable conditions of the policy;
- insurance policy read broadly in favor of coverage and not denial of coverage;
- any ambiguity in the terms of the insurance contract should be construed against the insurer and in favor of the insured.

C. Exclusions - Strictly Construed

- insurer bears burden of proving loss comes within a policy exclusion;
- any ambiguity in exclusions construed in favor of the insured and against insurer;

- if there are more than two (2) reasonable interpretations of exclusions, the interpretation in favor of coverage must be applied.

D. Duty to Defend - Determined by the Allegations of Plaintiff's Petition

- duty to defend greater and/or broader than the duty to provide indemnity;
- insurer obligated to furnish a defense unless the petition unambiguously excludes coverage;
- the duty to defend is determined solely from the plaintiff's pleadings and the face of the policy without consideration of extraneous evidence;
- where the pleadings allege coverage even though there is no coverage, the insurer may be cast for the insured's expenses in defending the suit.

II. Intentional Act Exclusion

Older insurance policies may contain outdated exclusions for intentional acts which insured subjectively intended to inflict. However, such exclusion was limited in the Louisiana Supreme Court case Breland v. Schilling, 550 So.2d 609 (La. 1989).

In Breland v. Schilling, the Louisiana Supreme Court in interpreting a homeowner's insurance policy, determined that the policy exclusion for bodily injury or property damage which is either expected or intended from the standpoint of the insured was ambiguous and excluded only the injury "which the insured intended and not the injury the insured caused, however intentional the injury producing act." The Court rejected the approach "that an insured intends, as a matter of law, all injuries which flow from an intentional act" (Id. at 613) and that the "subjective intent" and expectation of the insured determine which injuries fall within and which fall beyond the scope of coverage of the policy. (Id. at 611).

In Breland, the Supreme Court noted:

> The purpose of the intentional injury exclusion is to restrict liability insurance coverage by denying coverage to an insured in circumstances where the insured's acts deliberately and intends or expects bodily injury to another. The exclusion is "designed to prevent an insured from acting wrongfully with the security of knowing that his insurance company will "pay the piper" for damages. (Citations omitted.)
>
> The purpose of liability insurance, on the other hand, is to afford the insured protection from damage claims. Policies should be construed to

effect, not deny coverage. (Citations omitted.)

Id. at 610.

The holding in Breland has been limited to its facts since the injuries sustained were far greater than normally expected when punching someone in the jaw. Yount v. Maisance, 627 So.2d 148 (La. 1993).

In response to Breland, many insurance policies modified the language of the intentional act exclusion to exclude any intentional acts whether or not the insured subjectively desired to cause the ultimate injury and/or damage. In applying the intentional act exclusion, it is imperative that the language of the intentional act exclusion is closely examined to determine whether said language was modified in response to Breland.

The facts in Young v. Brown, 846 So.2d 88 (La. App. 2nd Cir. 2003) demonstrate how a shooting is not subject to the intentional act exclusion. Specifically, in Young, plaintiff approached Brown's vehicle and began arguing with Brown's passenger. Brown got out of the vehicle armed with a 22 caliber revolver. As he walked to the front of his truck, Young's friends approached him. Brown fired a warning shot into the pavement. Hearing the shot, Young ran to the front of the truck and collided with Brown. The gun discharged and Young was shot. After Young was shot, his friends ran over to Brown and began beating him. As he was being struck, Brown put the gun away so that no one else would be shot. Young sued Brown's homeowner's insurer and a public liability
carrier. The policies excluded damages resulting from an insured's intentional or criminal acts.

The issue was whether Brown intended to cause Young's injuries. The court looked to the circumstances of the accident to determine the intent of the actor. In Young, the court found that the conduct and action of Brown indicated he did not possess the requisite intent to consider the shooting intentional and the insurance carrier was held liable for Young's damages.

The court applied the intentional tort exclusions in Jones v. Estate of Santiago, ----- So.2d -----, (La. 2004), whereby a gunshot victim's estate sued defendant's homeowner's insurer. The insured shot his girlfriend in the head and arm after she told defendant that she was returning to her husband. The girlfriend's child testified the shooting was accidental. There was no sign of struggle or defensive wounds. The trial court denied summary judgment on applying the intentional act exclusion. The appellate court denied a supervisory writ by insurer. The Louisiana Supreme Court ruled the intentional act exclusion was applicable since the physical evidence demonstrated the requisite intent to kill by the fact the victim was shot in the head. Interestingly, the Louisiana Supreme Court ignored the testimony of witnesses stating the incident was an accident.

In West v. Turner, 873 So.2d 565 (La. App. 2nd Cir. 4/9/03), the court ruled on summary judgment a shooting was subject to the intentional act exclusion. In West, the children of a manslaughter victim sued insured homeowner after insured's son shot and killed the victim. In

West, defendant was backing his car out of the driveway and stopped along the curb. Victim and two (2) friends approached the vehicle yelling obscenities. In response, defendant fired six (6) shots and three (3) shots hit West and killed him. The insured defendant stated he did not see the victim or his friends with a weapon. Defendant admitted no violence occurred with the victim and his friends previously. Defendant admitted the victim was running from the vehicle at the time of the shooting. Defendant plead to manslaughter whereby he stated his intent to kill the victim in his plea. The insurer obtained the court transcript of his plea of manslaughter from the criminal proceeding for the manslaughter for submission in the civil suit to substantiate the defendant's conduct was intentional. The court in West granted the insurer's summary judgment based on the defendant's admission of specific intent in pleading to manslaughter. Accordingly, in any act involving violation of law, obtain a transcript of any criminal pleas in an effort to demonstrate specific intent.

The court in Henderson v. Sellers, 861 So.2d 923, addressed the intentional act exclusion as well as the applicable homeowner's policy for divorced parents. The case involved a fight between Brian Sellers, a 17 year old minor, and Justin Henderson. Justin and Brian had "bad blood" between them. Brian broke Justin's jaw in a fight. Prior to punching Justin, Brian pushed him to the ground. Justin was walking away when Brian "sucker punched" Justin in the back.

Initially, the court in Henderson had to determine whether the homeowner's policy of the Mom or Dad applied. After their divorce, Mr. and Ms. Sellers were awarded joint custody of Brian with Ms. Sellers as the primary domiciliary parent. In 1998, when Brian was 17 years old, he went to live with Mr. Sellers. Ms. Sellers had weekend visitation. The court dismissed Mr. Seller's homeowner's insurer since Ms. Sellers had physical custody on the night of the fight.

Later, the Henderson court ruled the intentional act exclusion of Ms. Seller's policy applies since her son was a senior and athlete and should have known that a punch in the face could result in a broken jaw. Again, it is advisable to review the court record for any claim against a homeowner's policy of a divorced parent based on the conduct and action of a minor child.

The facts in Inzinnia v. Walcott, 868 So.2d 721 (La. App. 1st Cir. 2003) deal with a classic bar room fight. In Inzinnia, defendant and his friends were consuming adult beverages at the Extra Innings Lounge in Hammond, Louisiana. Plaintiff sent adult beverages to the female patrons in an effort to win the ladies' affections. As per bar room etiquette, it is not a good idea to seek the attention of ladies accompanied by their boyfriends. The bartender identified the plaintiff as the sender of the adult beverages. When defendant went to the bathroom, plaintiff went to talk to the female patrons. When defendant returned, plaintiff was standing in front of the defendant's chair talking to the ladies. Defendant pulled the chair from behind the plaintiff. Unaware that the chair had been moved, plaintiff attempted to sit and fell to the floor. Plaintiff jumped off the ground and shoved the defendant. Next, defendant punched plaintiff in the face. The fight was broken up inside the bar. However, a second altercation ensued outside the bar. Plaintiff filed suit for damages resulting from a broken nose, dislocated shoulder and a chipped

tooth.

The homeowner's insurer, Allstate, contends that defendant's actions were intentional as per the intentional act exclusion. The court in Inzinnia found that defendant had no opportunity for reflection and acted spontaneously and instinctively to a sudden physical encounter without time to form the requisite intent to commit a specific act. The court in Inzinnia found it was never established that defendant formed the intent to strike plaintiff before the punch was thrown. Thus, Allstate failed to prove that the defendant possessed the requisite intent necessary for the intentional act exclusion.

In Flugence v. A&M Farms, Inc., 843 So.2d 1249 (La. App. 3rd Cir. 2003), the court dealt with the issue of whether the intentional act exclusion applies to a tractor intentionally bumping into a car. In Flugence, the plaintiff's tractor was on a scale of a sugar cooperative. The insured's employee intentionally bumped the victim's tractor off the scale. The victim was knocked from his tractor and sustained injuries. The insured's employee thought the plaintiff's tractor cut in line to get weighed. The insured's employee knew the victim was on the tractor. The court characterized the insured's employee's conduct as "slow road rage."

On summary judgment, the court in Flugence ruled the intentional act exclusion applied since the court believed the victim's injuries were substantially certain to follow from insured employee's conduct. The dissenting judge argued that the insured's employee intended to "bump" the tractor hard enough to move it off the scale. The dissenting judge opined there was no evidence to indicate the insured employee intended any physical harm to the victim and there was a question of fact precluding summary judgment.

In Sanchez v. Callegan, 753 So.2d 403 (La. App. 1st Cir. 2000), the parents of a sexually molested child sued the alleged perpetrator, his spouse and their homeowner's insurer. The policy excluded coverage for bodily injury arising from any sexual act. The plaintiff alleged that the homeowner's policy was applicable due to the negligence of the spouse in allowing the sexual acts to occur and allowing access to her husband. The court granted a Motion for Summary Judgment based on the exclusion for damages that "arises out of any sexual act." The trial court held that any negligence on the part of the spouse arose from a sexual act. Simply, the court held there is no damage without the sexual act. The court ruled the act, whether the act or conduct was intentional (i.e. the conduct by the actual perpetrator) or negligent (i.e., the conduct of Mrs. Calletan in failing to deny the perpetrator access to the victim), the policy excluded coverage. The newer insurance policies have added exclusions of any damage arising from sexual act in an effort to avoid ambiguity of the intentional act exclusion.

In Houghtaling v. Richardson, 800 So.2d 1012 (La. App. 5th Cir. 2001), plaintiff sued defendant and his homeowner's insurer after defendant allegedly threw a hammer at plaintiff's car as he drove past defendant's house. Defendant insured alleged throwing the hammer at plaintiff's car in self-defense. The insurer alleged the intentional act exclusion applied and it did not owe a duty of defense. The trial court granted a motion for summary judgment in favor of the insurer. However, the appellate court held the intentional act exclusion did not unambiguously apply and the insurer owed a duty to defend its insured. The court ruled that the

plaintiff's Petition simply alleged that defendant threw a hammer in the direction of the petitioner's car. The court noted the Petition does not state where in the street or how far away from the car the hammer actually landed. Further, it was not undisputed that the hammer made no contact with the petitioner's person or property. Therefore, the court ruled the inclusion of negligence as a cause of action was not unambiguously excluded by the intentional act exclusion.

III. Business Pursuits Exclusion - Homeowner's

Generally, homeowner's policies contain a "Business Pursuits" exclusion precluding coverage for acts furthering the insured's business pursuits. The scope of Business Pursuits exclusion is addressed in Haveline v. Walker, 846 So.2d 263 (La. App. 2nd Cir. 2004), whereby Walker filed a sexual harassment suit against the owners of Haveline clothing store. The suit was dismissed as a matter of law because the store did not employ at least 15 employees. An employer must employ 15 or more employees in order to be subjected to federal and/or state employment discrimination law. Subsequently, Haveline's filed a defamation suit against Walker and her homeowner's insurer. Insurer moved for summary judgment based on an exclusion for personal injury arising out of business pursuits of any insured. The court held the exclusion did not apply since Walker was not employed at the time she allegedly communicated the defamatory remarks in the Petition for Damages in the dismissed sexual harassment lawsuit.

Another application of the "Business Pursuits" exclusion in a property damage claim is addressed in LeCompte v. Lafayette Insurance Co., 813 So.2d 432 (La. App. 1st Cir. 2001). The plaintiffs in LeCompte filed suit against Lafayette Insurance Co. and Walter Sawyer on January 13, 1998, alleging that their minor daughter, Taylor Nicole, suffered personal injuries to her foot from a nail protruding from a fishing wharf attached to insured's property. Said property was rented by Curt and Sonya Matherne but owned by Walter Sawyer.

The disputed issue involved an exception to an exclusion whereby coverage was provided if the insured property was rented to others on an "occasional" basis. In considering the exclusion, the court found the purpose of the exclusion was to provide homeowners with lower insurance rates because insuring commercial activities requires specialized rating and underwriting and was more expensive. The court ruled Sawyer's rentals of the property at issue did not establish a pattern of rentals so uninterrupted, so unbroken, or so persistently repeated at short intervals as to constitute virtually unbroken series. Further, the court ruled Sawyer's lease of the property to the Mathernes was not so connected, extended, or prolonged without cessation or interruption to any prior or subsequent rental of the premises. The attempts to sell intervened broken any series of events. Therefore, the court concluded the rental to the Mathernes was made on an "occasional" basis.

The scope of the "Business Pursuits" exclusion for an automobile claim is addressed in McPherson v. Viola, 593 So.2d 1370 (La.. App. 5th Cir. 1992) whereby defendant was to transport plaintiff's horses from her farm in Bush, Louisiana to New Orleans, Louisiana. Plaintiff agreed to pay defendant a $45.00 fee prior to the trip. After loading the horses in defendant's trailer, defendant drove away from the farm in Bush, Louisiana with the plaintiff following. About three (3) minutes into the trip, the horse fell within the trailer. Defendant stopped the vehicle and both plaintiff and defendant went into the trailer to attempt to right the horse. The plaintiff caught her right ring finger between the horse and the partition of the trailer causing a partial amputation.

The court granted the insurer's Motion for Summary judgment based on the "cars for hire" exclusionary clause. The court opined plaintiff was excluded coverage because the vehicle was being used at the time of the accident to carry property for a fee. Please note, the court may not have applied the business pursuits exclusion if the fee was classified as reimbursement of gasoline and mileage.

IV. Automobile Insurance

There are numerous disputes regarding the applicability of the "permissive user" provision of automobile policies whereby coverage is provided for drivers using the vehicle with the permission of the insured.

The court in Adams v. Thomas, 729 So.2d 1041 (La. 1999) addresses issue of coverage for a permissive user without a valid driver's license. In Adams, Kenyetta Brown was driving her mother's car insured by Automotive Casualty Company. Ms. Brown collided with a car driven by plaintiff. Plaintiff filed suit against Kenyetta and Automotive Casualty Company. Automotive Casualty asserted Ms. Brown did not have permission, either express or implied, to operate her mother's vehicle. Further, the automobile insurer alleged Ms. Brown was not covered under the policy since the permissive user did not possess a valid drivers license. The trial court in Adams held that Kenyetta was an omnibus insured under the policy because she was instructed by her mother to use the car on the day of the accident.

The Louisiana Supreme Court ruled excluding coverage for a permissive user without a valid driver's license is invalid. The Supreme Court reasoned denying coverage to persons

injured by the insured vehicle is against the legislative intent of the liability insurance policy. Focus is not on the illegal act but on the insured party to be covered by the liability policy. The purpose of the compulsory automobile liability insurance law is not to protect the owner or operator against liability but to provide compensation for person injured by the operation of insured vehicles. Please note, an insured and insurer may by written agreement exclude from coverage any named person who is a resident of the same household as the named insured.

The court in Williams v. Watson, 798 So.2d 55 (La. 2001) addresses the scope of excluded drivers. In Williams, the plaintiff 's vehicle was struck from behind by a vehicle driven by Donald Watson. Watson's vehicle was a leased vehicle that his mother had rented because her van was being repaired. Declining the option to purchase additional insurance in the rental agreement, his mother opted to have her own Allstate policy cover the rented vehicle. Allstate, as alleged insurer of the rented vehicle, was named as a defendant. Allstate filed a motion for summary judgment on the basis the named driver was specifically excluded in the policy. Allstate's policy specifically excluded both Watson and his sister as drivers. Both were under the age of 25, unmarried and residents of their mother's household.

The court in Williams had ruled once an insured and insurer validly agree to exclude a named driver who was a resident of the insured's household that named driver's subsequent residency status was neither essential nor material to the validity of the exclusion. First, the court held whether or not the excluded person was a resident of the household at the time of an accident should be immaterial as long as he was a resident at the time the contract of insurance was confected." Id. Second, the sole purpose for this type of exclusion is premium reduction. Failing to recognize the validity of the exclusion results in imposing on the insurer a coverage obligation that is not commensurate with the premium paid. The court ruled it would be improper to allow an insured to expand coverage based simply on the driver's alleged relocation of residence. Third, the court opined the general rule that obligations in an insurance contract were fixed at the time the contract was executed. Fourth, the enforcement provisions mandate that any named excluded driver be listed on the Certificate of Insurance, which is required to be carried on the insured vehicle and which alerts law enforcement officers to a particular driver's insured status.

Further, in Process v. Safeway, 782 So.2d 34 (La. App. 3rd Cir. 2001) the court ruled coverage provided by automobile owner's liability insurance policy was excluded for negligence of passenger in supervising her mother in the operation of owner's vehicle. Though passenger was a named insured, the mother was listed as a named excluded driver of the vehicle under the policy exclusion.

The business exclusion was limited in Marcus v. Hanover Insurance Company, 740 So.2d 603 (La. 1999). In Marcus, plaintiff was injured in a rear-end collision. In the accident, the defendant-driver was operating his personal vehicle in the course and scope of his employment. Plaintiff sued the defendant's automobile liability insurer, American Deposit Insurance Company and his employer's commercial automobile liability insurer, Hanover Insurance Company. The American policy provided coverage for $100,000/$300,000. American, however, denied coverage based on the business exclusion which excludes coverage for damages resulting from the operation of "any vehicle, including your insured car, in any business other than an auto business." In its Motion for Declaratory Judgment/Motion for Summary Judgment against

American, Hanover asserted that American's business exclusion was contrary to public policy and invalid. The trial court granted summary judgment in favor of Hanover finding that American's business exclusion was contrary to Louisiana's public policy when applied to a person driving the insured vehicle in the course and scope of his employment. The trial court held that American's policy could not validly exclude coverage for the accident and therefore provided primary coverage for the plaintiff's damages.

The appellate court concluded American's policy was contrary to public policy as it violated the Louisiana Motor Vehicle Safety Responsibility Law, La. R.S. 32:851 et seq. The appellate court concluded the policy limits of $100,000/$300,000 rather than the statutory minimum applied of $10,000/$20,000 since the policy amounts were specifically selected by the parties to the insurance contract.

The Louisiana Supreme Court agreed with the appellate court that the business exclusion is unenforceable. However, the Louisiana Supreme Court ruled that the applicable limits of coverage should be the minimum required by statute ($10,000/$20,000) and not $100,000/$300,000. The Louisiana Supreme Court reasoned that the liability insurance law required issuance of the liability insurance at $10,000/$20,000 limit because American had no intention to thwart such law and the public policy supporting it.

The duty of the insured to report accurate information regarding a loss is addressed in Ho v. State Farm Mutual Ins. Co., 862 So.2d 1278 (La. App. 3rd Cir. 2003). In Ho, plaintiff reported his car stolen to the Breaux Bridge City Police Department. According to plaintiff, there was another key to the car which was in magnetic key box underneath the car. The car was found with a bird nest in the speedometer. An adjuster inspected the car and noticed the bird nest which indicated to him that the car was stolen significantly before the plaintiff reported the stolen vehicle. State Farm denied coverage because plaintiff intentionally made misrepresentations with the intent to deceive and defraud with respect to reporting his car stolen.

The plaintiff in Ho was required to prove by a preponderance of evidence the cause of the loss; mere suspicion or speculation as to the cause of the loss was not enough. Evidence that a loss or injury has occurred is not enough to afford coverage under a policy of insurance where the evidence merely shows the occurrence of a loss or injury. Mere disappearance is not sufficient evidence of theft. However, when an insurer seeks to limit or relieve its liability under a policy, the burden of proving the essential facts necessary to relieve or limit the liability rests upon the insurer. The court in Ho ruled the circumstances surrounding the theft of the vehicle forced plaintiff to prove that the vehicle was stolen by more than just a police report. The defendant showed substantial evidence that the vehicle was not stolen.

V. Insured's Duty to Cooperate

The court in Brantley v. State Farm Ins. Co., 865 So.2d 265 (La. App. 2nd Cir. 2004), addressed the applicability of a thirty (30) day vacancy exclusion on a homeowner's policy. In Brantley, plaintiff owned rental property which had a tenant dwelling policy issued by State Farm. In March 1996, the property was seized by the sheriff pursuant to foreclosure proceedings. Three (3) days before the scheduled sheriff's sale, a suspicious fire caused damage

to the insured house. The house was then sold at sheriff's auction. The plaintiff submitted a claim to State Farm for the damages caused by the fire. The claims adjuster met with the fire marshal and both inspected and photographed the premises. The house appeared to be vacant at the time of the fire. The insurer denied coverage because the policy contained a thirty (30) day vacancy clause and because plaintiffs failed to perform the requisite duties outlined in the policy with regard to cooperating with the investigation of claims. The vacancy clause excluded coverage if the property was vacant for thirty (30) days prior to a claim. The policy also outlined the insured duties of filing a claim including preparing inventories, providing receipts for goods contained in the claim, etc. The Brantley's failed
to cooperate with the adjuster and thus State Farm barred coverage. The court ruled insurance coverage was properly denied to the Brantley's for failure to comply with duties outlined in policy with regard to claims and for allowing the house to remain vacant for more than thirty (30) days prior to the loss.

VI. Duty to Defend

The worker's compensation carrier's duty to defend a tort suit in district court is addressed in Quick v. Roland Adams Contractor, 861 So.2d 278 (La. App. 5th Cir. 2003). Eagle Insurance Company issued both a Worker's Compensation Policy and Employer's Liability Policy to Presco Amphibious Equipment, Inc. (Presco). Plaintiff sued his employer, Presco, in tort in state district court for injuries sustained in the course and scope of his employment at Presco based on negligence. Further, the plaintiff pled in his Petition that the plaintiff's injuries were substantially certain to occur due to defendant's conduct. The plaintiff's Petition failed to specifically reference the term "intentional tort." Previously, the plaintiff was awarded worker's compensation benefits by the Office of Workers' Compensation. Presco filed a Third Party Demand against Eagle alleging it had a duty to defend and/or provide coverage to Presco for the tort claim of plaintiff. Eagle filed a Motion for Summary Judgment against Presco alleging two (2) exclusions involving matters covering worker's compensation and another based on intentional acts. The court ruled Eagle was obligated to provide defense since plaintiff's Petition did not specifically allege an intentional tort but stated injuries were "substantially certain to happen." The court ruled the mere recitation of the words "substantially certain" in the Petition does not equate as to an intentional tort for purposes of the exclusion.

A liability insurer has a duty to defend its insured notwithstanding another policy also may provide indemnity and/or defense for a particular claim. This is addressed in Yarbrough v. Federal Land Bank of Jackson, 731 So.2d 482 (La. App. 2 N.D. Cir. 1999), whereby a lessee brought an action against a lessor, its officers and directors, (D&O) indemnity insurer and the comprehensive general liability (CGL) insurer for the lessor's refusal to honor a right of refusal in the lease. The lessor allegedly refused to honor a lessee's right of first refusal related to a loan transaction. Thus, it is alleged the lessor's refusal could be a loan personal injury within the personal injury coverage added by an endorsement to the CGL insurance policy. The endorsement defined "loan personal injury" as personal injury arising out of or in connection with the wrongful act relating to the loan. The court in Yarbrough held the CGL insurer owed a duty to defend its lessee's allegations in the complaint notwithstanding the D&O policy provides the same coverage. Further, the court held that the employer's alleged refusal to honor the right of the first refusal could be a loan personal injury within the personal injury coverage added by

the endorsement of the CGL policy. Accordingly, the duty to defend cannot be denied based on the applicability of another policy providing defense and/or indemnity.

In KLL Consultants, Inc. v. Aetna, 738 So.2d 691 (La. App. 5th Cir. 1999), an insured brought action against a CGL insurer for breach of the duty to defend and indemnify the insureds against an engineering consultant's allegations that the insured negotiated with a county to provide engineering services. Plaintiffs were made a defendant in a lawsuit in Jackson, Mississippi. Plaintiffs subsequently notified Aetna of the suit and demanded Aetna to defend and indemnify them under the policy of insurance. The insurer indicated it could not provide a defense until it researched the coverage issue and instructed the plaintiffs to provide their own defense. Plaintiffs retained counsel. Subsequently, plaintiffs made formal demand for defense and indemnity which was rejected by the insurer.

Plaintiffs were accused of interfering with a contract to provide professional engineering services for the water and sewerage system improvements in West Jackson County, Mississippi. The Mississippi suit contends that plaintiff negotiated with the county for engineering services although it knew that a contract for those services had been awarded to a third party. The plaintiffs alleged coverage should be provided based on the advertisement and personal injury provisions of the policy. The court ruled that the insurer did not have an obligation to provide a defense for the Mississippi lawsuit. The court ruled that the "advertising injury" did not apply since there was not an allegation of libel, slander or disparagement of a person or organization, a violation of right to privacy, misappropriation of advertising ideas or business infringement. Further, the court ruled that the Petition did not allege any type of allegation applicable to the "Personal Injury" provision of the policy. The dissent indicated that the allegations in the Mississippi lawsuit were merely as "notice pleadings" and there was no Mississippi jurisprudence indicating tortious interference with a contract not included in the definition of advertising injury.

In Carnival Brands, Inc. v. American Guaranty and Liability Insurance Company, 726 So.2d 496 (La. App. 5th Cir. 1999), the Court found an insurer had a duty to defend based on an allegation in its Petition that the defendant misappropriated the Carnival's trade name. The court ruled this conduct was provided for in the policy under the "infringement of copyright, title or slogan" and/or the "misappropriation of advertising ideas or style of doing business" provisions. The Petition in Carnival disclosed the possibility of liability under the policy. Therefore, the court ruled that the insurer was obligated to provide a defense.

VII. Homeowners' Insurance

The scope of the exclusion applicable to damage from water outside the plumbing system is addressed in Polk v. City of Mansfield, 782 So.2d 106 (La. App. 2nd Cir. 2001). In Polk, the insureds sued the homeowner's insurer to recover for flooding from water and sewerage that backed up from the sewer system and overflowed through the bath tub and toilets. This event occurred during a rainstorm. The insurer alleged the coverage was precluded for damage caused by water from outside the plumbing system that entered through the sewer or drains. The insurer contended the water backing up from the City's sewerage system was "outside" from the plaintiff's plumbing system and that the "sewers or drains" refers to those of the insured.

However, the trial court ruled that coverage would apply when there was an accidental discharge of water and sewerage from within the plaintiff's plumbing system caused by pressure resulting from a backup in the City's sewer line.

VIII. Conclusion

The following are actions to be taken in an effort to determine the applicability of coverage:

1. Read the insured's insurance application to ascertain whether the information is consistent with the information obtained in the investigation of the claim;

2. For intentional acts, always check criminal court records for admissions in testimony to substantiate a claim for intentional act;

3. For claims involving conduct and action of minors, check to determine whether the minor's parents are divorced and obtain any type of court documents establishing custody and control;

4. Closely scrutinize the definitions sections of the insurance policy to determine the scope of terms of art;

5. Check the definition of intentional act to determine whether language changed to counter the holding in Breland.