Insurance Litigation in Florida: Declaratory Judgments and the Duty to Defend

Gregor J. Schwinghammer Jr.

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Insurance Litigation in Florida: Declaratory Judgments and the Duty to Defend

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After a ten day separation from his family, Osvaldo Conde knocked on Margarita Montero’s bedroom window in the early hours of June 29th. Because Conde had been away, the children were sleeping in the bedroom with Ms. Montero. Lourdes accompanied Ms. Montero as she opened the front door to admit Conde into the home. He followed them back to the bedroom where Lourdes immediately returned to bed. Conde stood to the right of the room (next to the door) with Ms. Montero standing to the left. Conde pulled the gun and, after stating “I’m tired of everything” or “I have come to end it all,” shot Ms. Montero through the chest. He then shot Lourdes in her side as she lay in bed and finally shot Rolddy through the head. He saw Ms. Montero leaving the bedroom and shot her, with his last bullet, through her back. When she didn’t fall, Conde hit her in the head with a bottle stating, “The children are already dead; why do you want to be alive?” Finally, he started “to press on [her] neck” as the police arrived.1

When Ms. Montero sued the man who had shot her children, shot her twice, and then beat and choked her, she alleged negligence. She also alleged intentional harm, but the critical claim was negligence. That claim triggered Conde’s insurance coverage.2

The events leading up to Allstate Insurance Co. v. Conde,3 stated above, are heart-wrenching. The events also clearly resulted from the intentional acts of Osvaldo Conde. Montero alleged negligence, though,

1. Allstate Ins. Co. v. Conde, 595 So. 2d 1005, 1006 (Fla. 5th DCA 1992) (alteration in original) (footnote omitted). This case is discussed in detail infra part III.
2. Id. at 1005-06.
3. Id. at 1005.
because she wanted to recover under Conde's insurance policy, and insurance policies exclude coverage for injuries intentionally caused by the insured.

Because Osvaldo Conde's actions were intentional, the resulting claims were clearly excluded from insurance coverage. The Conde case, which involved the intentional act exclusion, is the paradigm of a problematic type of insurance case. In such cases, an injured party brings an action against the insured alleging a covered claim, when in fact the claim is not covered by the policy. If the insurer is not permitted to prove that the claim is excluded from coverage, then it faces the cost of defending the "negligence" action and, possibly, a subsequent suit to resolve coverage. Faced with this prospect, the insurer may find it economically expedient to settle with the injured party quickly, despite a good faith objection or coverage defense.

The declaratory judgment action is one tool that insurers can use to determine which claims fall outside of coverage. In Conde, the insurer, arguing that it was not liable to defend or indemnify Conde, brought a declaratory action.4 Whether an insurer should be allowed to bring such an action to determine its duties regarding coverage has been a matter of disagreement in Florida.5 Many cases have held that the insurer may not bring a declaratory action until liability in the underlying tort action has been decided. In other cases, including Conde, the courts have allowed such actions.

On the surface, the debate in these cases seems to revolve around timing—at what stage of the proceedings an insurer may bring a declaratory judgment action over coverage defenses. But in reality the debate is more fundamental. The debate involves the manner in which Florida courts determine the insurer's duties, particularly the duty to defend.

This Comment describes that debate, and proposes a rule for declaratory judgment actions that would allow insurers to challenge fictional negligence claims while protecting the rights of the insured. Part I describes the insurer's duties under an insurance policy in Florida. It addresses the duty to defend, as well as the treatment of claims outside of coverage. Part II briefly describes the declaratory judgment action as one of the insurer's options. Part III outlines the use of the declaratory judgment for insurance claims under Florida law, including the recent split of authority among the Florida District Courts of Appeal. Part IV describes the debate over whether the declaratory judgment action may proceed before the underlying liability has been determined. Part V proposes a method for using the declaratory judgment to allow the parties to

4. Id.
5. See infra part III.D.
determine their rights early in litigation, in order to maximize judicial efficiency in Florida's courts.

I. DUTIES OF THE LIABILITY INSURER

Although liability insurance is available for many different types of coverage, this Comment primarily addresses the insurer's duties in connection with Commercial General Liability coverage and Homeowners' Liability coverage. In exchange for a premium, the issuer of a standard liability insurance policy makes two promises to the insured. First, the insurer promises to indemnify the insured for any amounts that the insured becomes obligated to pay for covered losses up to the policy limits. Second, the insurer promises to defend the insured if such a claim develops into a lawsuit. These two promises are known, respectively, as the "duty to indemnify" and the "duty to defend." The insurer is obligated to perform these duties only for claims that come within

6. One commentator noted a "very abridged list" which included: accountants' liability, advertising liability, architects' liability, comprehensive general liability, contractors' liability, contractual liability exposure, dentists' professional liability, fiduciary liability, hospital liability, homeowners' liability, lawyers' professional liability, liquor liability, physicians' and surgeons' professional liability, pollution liability, products' liability, and storekeepers' liability. Alan I. Widiss, Abrogating the Right and Duty of Liability Insurers to Defend Their Insureds: The Case for Separating the Obligation to Indemnify from the Defense of Insureds, 51 Ohio St. L.J. 917, 917 n.2 (1990).

7. Known prior to 1986 as Comprehensive General Liability Insurance, Commercial General Liability ("CGL") insurance was developed in the 1940s to allow insureds to combine many types of third-party insurance, including bodily injury, personal injury, advertising liability, and fire liability coverage, into one policy. Edward J. Zuley, Business Liability Insurance: Litigation, Arbitration, and Settlement § 1.08 & n.113 (1994). It is offered to businesses that do not engage in activity presenting unique risks or valuation problems. Cf. Widiss, supra note 6, at 917 (enumerating specific types of liability insurance).

8. In the 1950s insurers developed the homeowners' policy by incorporating several kinds of first-party property coverages into one package. One element of this package is third-party comprehensive personal liability coverage. Robert H. Jerry, II, Understanding Insurance Law 267 (1987). The liability coverage generally provides that the insurer will pay for damages up to the limit of liability for which the insured is legally liable, and will provide a defense, even if the suit is "groundless, false or fraudulent." See Susan J. Miller & Philip Lefebvre, Miller's Standard Insurance Policies Annotated 411 (1995) (sample Commercial General Liability insurance policy).

9. For example, one typical form policy says:

   The company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of
   A. bodily injury or
   B. property damage
to which this insurance applies, caused by an occurrence, and the company shall have the right and duty to defend any suit against the insured seeking damages on account of such bodily injury or property damage, even if any of the allegations of the suit are groundless, false or fraudulent.

Miller & Lefebvre, supra note 8, at 411.
policy coverage. The insurer's duties are not coextensive. The duty to defend is generally considered to be both broader and more difficult to determine than the duty to indemnify. The traditional explanation for this difference is timing. Whereas the duty to indemnify is determined after the facts have been established, the duty to defend is determined at the commencement of the lawsuit, before the facts have been established.

Determining the duty to indemnify is fairly straightforward. If a claim falls within the coverage of the policy and the insured is legally obligated to pay, the insurer must indemnify the insured up to the policy limits. Determining the duty to defend is not as simple, because the facts will not have been established when the defense begins, so the insurer must decide whether to undertake the defense by prospectively analyzing whether the claim might come within coverage. One commentator has suggested that it is better to think of the duty to defend as being keyed to "coverage," rather than "liability," since even a groundless claim triggers the duty to defend if the claim would fall within coverage. He suggests that as a general rule where "the insurer has a duty to defend any lawsuit against its insured where, if liability were later established, the insurer would be required to pay damages on behalf of the insured."14

A. The Duty to Defend

There are two basic tests to determine the duty to defend: the "exclusive pleading" test, and the "factual" or "potentiality" test. Both begin by comparing the allegations of the complaint with the language of the policy. The language of the duty-to-defend clause compels this analysis, as the clause promises to defend "any suit . . . seeking damages" covered by the policy. To determine the damages a plaintiff is seeking one must look to the complaint.

10. Liability policies contain "exclusions" from coverage, for which the insurance does not apply. Damages which the insured intentionally caused are always excluded. CGL policies contain many other exclusions, such as dram shop liability, pollution damage, and workers' compensation. Zulkey, supra note 7, § 1.08.


12. Id. at 143. Professor Fischer supported the policy of treating the duty to defend as broader than the duty to indemnify, but criticized the timing explanation as insufficient. Id. at 142-43. He suggested several public policy reasons for placing the broader duty to defend upon insurers. Id. at 181-83.

13. Jerry, supra note 8, at 562.

14. Id. (emphasis omitted).

15. See supra note 9 for standard policy language.
The difference between the tests is whether the parties may consider facts extrinsic to the complaint to determine the duty to defend. The "exclusive pleading" test holds that "the insurer's duty to defend depends solely on the scope of the allegations against the insured." Justice Learned Hand described this test in *Lee v. Aetna Casualty & Surety Co.*, in which the court stated:

This language means that the insurer will defend the suit, if the injured party states a claim, which, qua claim, is for an injury "covered" by the policy; it is the claim which determines the insurer's duty to defend; and it is irrelevant that the insurer may get information from the insured, or from any one else, which indicates, or even demonstrates, that the injury is not in fact "covered."

Because the insurer promises to defend against even "groundless, false, or fraudulent" claims, when such a claim is asserted the insurer must undertake the defense and dismiss the action on the merits, rather than refuse to defend on the basis that the claim actually falls outside of coverage.

The other approach, called the "factual" or "potentiality" test, requires an insurer to defend if the claims may come within coverage, even if the complaint does not clearly allege coverage. "[I]t extends the duty to defend to asserted claims outside coverage based on the prospect that unasserted claims within coverage may be brought against the insured." This test requires insurers to examine the facts independently and determine whether covered claims could be asserted. One court even implied that the insurer should investigate extrinsic facts to determine whether it must defend, stating, "Where the insurer knows or could reasonably ascertain facts that, if proven, would be covered by its policy, the duty to defend is not dismissed because the facts alleged in a third-party complaint appear to be outside coverage, or within a policy exception to coverage."

The potentiality test also addresses the possibility that asserted claims that seem to be outside of coverage are actually within coverage. This not only requires insurers to defend asserted claims that are within

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17. 178 F.2d 750 (2d Cir. 1949) (L. Hand, J.).

18. Id. at 751.

19. See, e.g., Marr Invs., Inc. v. Greco, 621 So. 2d 447 (Fla. 4th DCA 1993).


coverage, i.e., claims that meet the exclusive pleading test, but also requires insurers to defend if there is any possibility that the asserted claims may come within coverage.\(^{24}\)

Many courts\(^{25}\) and commentators\(^{26}\) have stated that if the complaint alleges a claim within coverage, the insurer may not use extrinsic facts to avoid its obligation to defend. This conclusion follows from the policy language, in which the insurer agrees to defend "groundless" suits. Some argue that under the potentiality test, the extrinsic facts can operate only as a "one-way ratchet," in that an insurer's knowledge may bring a poorly pleaded claim into coverage, but will not excuse the insurer from defending a claim which has alleged coverage.\(^{27}\)

Florida purports to follow the "exclusive pleading" test, whereby an insurer's duty to defend arises from the allegations in the complaint.\(^{28}\) Under Florida law, the duty to defend is "distinct from and broader than" the duty to indemnify.\(^{29}\) If a complaint alleges some claims which are within coverage and some claims outside of coverage, the question of defense must be resolved in favor of the insured, and the insurer must provide a defense for the entire action.\(^{30}\) If the original complaint does

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\(^{26}\) JERRY, supra note 8, at 565; see also Fischer, supra note 11; Garbett, supra note 16; Note, Liability Insurer's Duty to Defend: American Policyholders' Ins. Co. v. Cumberland Cold Storage Co., 30 Me. L. Rev. 295 (1979).

\(^{27}\) Fischer, supra note 11, at 152. \(\text{But see} \) Consolidated Mut. Ins. Co. v. Ivy Liquors, Inc., 185 So. 2d 187 (Fla. 3d DCA 1966) (where the allegations of the complaint did not fall within coverage, but insurer assumed the defense and subsequently conducted an investigation, the insurer properly withdrew from the defense without waiving its coverage defenses when the investigation demonstrated that no coverage existed); ROBERT E. KEETON, BASIC TEXT ON INSURANCE LAW 466-68 (1971) (arguing that if an insurer can prove that an allegation necessary for coverage, such as whether the defendant is an insured under the policy, is false or unclear, the insurer should be relieved of the duty to defend).

Whether limiting the "ratchet" to only one direction is the best solution will be discussed further supra part IV.

\(^{28}\) National Union Fire Ins. Co. v. Lenox Liquors, Inc., 358 So. 2d 533, 536 (Fla. 1977); State Farm Fire and Casualty Co. v. Edgewater, 471 So. 2d 209, 210 (Fla. 1st DCA 1985) (error for trial judge to consider testimony from declaratory judgment action in determining the duty to defend, because the allegations of the complaint control); Tropical Park, Inc. v. United States Fidelity and Guar. Co., 357 So. 2d 253, 256 (Fla. 3d DCA 1978).

\(^{29}\) See also Baron Oil Co. v. Nationwide Mut. Fire Ins. Co., 470 So. 2d 810, 813 (Fla. 1st DCA 1985); Marr Ins., Inc. v. Greco, 621 So. 2d 447 (Fla. 4th DCA 1993); Grissom v. Commercial Union Ins. Co., 610 So. 2d 1299, 1307 (Fla. 1st DCA 1992).

\(^{30}\) Grissom, 610 So. 2d at 1307; Baron Oil, 470 So. 2d at 813-14; Tropical Park, 357 So. 2d at 256.
not allege claims within coverage, but the insured amends the pleadings to allege such claims, then upon notification the insurance carrier is obliged to provide a defense.\footnote{Baron Oil, 470 So. 2d at 814-15; C.A. Fielland, Inc. v. Fidelity & Casualty Co. of N.Y., 297 So. 2d 122, 127 (Fla. 2d DCA 1974).}

While the emphasis that Florida courts place upon the allegations in the complaint suggest that Florida follows the "exclusive pleading" test, the matter is not so straightforward. In Tropical Park, Inc. v. United States Fidelity & Guaranty Co.,\footnote{357 So. 2d 253 (Fla. 3d DCA 1978).} the court stated that the complaint must allege facts which "fairly bring the cause within the coverage of the insurance contract even though ultimately there is no liability."\footnote{Id. at 256 (emphasis added).} The case involved an injury to a person who was described in the complaint as a "free-lance jockey" but was actually an exercise boy. The policy excluded coverage for injury to persons practicing for any athletic contest.\footnote{Id. at 255.} After the exercise boy was injured and brought an action against the park, the insurer refused to defend the park.\footnote{Id. at 257.} The District Court of Appeal held that the mistaken allegation that the exercise boy was a jockey did not place the claim within the exclusion, and the complaint "fairly" brought the claims within coverage, therefore the insurer was obliged to defend the action.\footnote{Id. at 255.} Thus the court looked to the complaint to determine the duty to defend, but the court found a duty to defend by reading the complaint expansively, which seems more like the potentiality test. The U.S. Court of Appeals for the Eleventh Circuit applied this expansive reading in two decisions that cited Tropical Park. In Trizec Properties, Inc. v. Biltmore Construction Co.,\footnote{767 F.2d 810 (11th Cir. 1985).} the court stated, "Because the complaint alleges facts 'which fairly bring the cause within the coverage of the insurance contract,' ... there is a potential for coverage" and the insurer must defend the action.\footnote{Id. at 813 (emphasis added) (citation omitted).} Later, in Lime Tree Village Community Club Ass'n v. State Farm General Insurance Co.,\footnote{980 F.2d 1402 (11th Cir. 1993).} the court stated, "The insurer must defend when the complaint alleges facts which fairly and potentially bring the suit within policy coverage."\footnote{Id. at 1405 (emphasis added).}

Thus, although in Florida the insurer's duty to defend is determined from the complaint, courts will look for potential coverage in the allegations. "If, when applying the 'exclusive pleadings' test, a court may..."
indulge in the most liberal interpretation of the allegations to which they are susceptible, then the differences between the [potentiality] test and the ‘exclusive pleadings’ test would be nonexistent in most cases and small in the remainder.” The line between the exclusive pleading test and the potentiality test in Florida is thereby blurred, and perhaps nonexistent.

B. Duties Regarding Claims Outside of Coverage

Florida law tends to resolve doubts and ambiguities in favor of the insured. Nevertheless, there are many situations in which the insurer is not required to defend or indemnify, such as where the party demanding a defense is not insured, or where the claim alleged is not covered, or is specifically excluded by the policy.

Obviously, a party demanding a defense is not entitled to one if he is simply not an insured, such as if his policy has expired. Similarly, if the insured’s policy does not cover a vehicle involved in an accident, the insurer will have no duty to defend or indemnify. Further, the insured has no right to a defense if the complaint alleges injuries which are not covered by the policy. This can happen if, for example, the complaint alleges personal injuries but the insurance policy only provides for bodily injury and property damage.

Perhaps the most frequently litigated disputes regarding the insurer’s duties involve exclusions to coverage. An insurer is relieved of any obligations to defend or indemnify by many types of exclusions, such as the “business pursuits” exclusion in a homeowner’s policy, the criminal acts exclusion, and commercial policy exclusions related to violations of alcoholic beverage laws. The paradigmatic case, however, involves the intentional injury exclusion.

41. Fischer, supra note 11, at 162-63.
42. See, e.g., Independent Fire Ins. Co. v. Paulekas, 633 So. 2d 1111, 1112-13 (Fla. 3d DCA 1994) (purchase date of boat “vital” to determine whether the boat came under the homeowner’s insurance policy).
43. Insurance law defines “personal injuries” as harm from such sources as libel, slander, or false arrest. The tort law concept of personal injury, including physical bodily harm, is referred to in insurance law as “bodily injury.”
44. See, e.g., Landis v. Allstate Ins. Co., 546 So. 2d 1051, 1053 (Fla. 1989) (holding that the activity of insureds who operated day-care center in home and were accused of sexual molestation fell under business pursuits exclusion; the activity in which they were engaged was “babysitting,” which was a business pursuit, not “molesting children,” which is not a business pursuit).
45. See Baker v. Casualty Indem. Exch., 561 So. 2d 1314 (Fla. 4th DCA 1990) (holding that insurer had no duty to defend restaurant owner where complaint alleged violation of Florida alcoholic beverage laws, which was specifically excluded by policy).
46. Earlier versions of the CGL policy placed this exclusion in the “Definitions” section, by defining an “occurrence” which would trigger coverage as being “neither expected nor intended from the standpoint of the insured.” Comprehensive General Liability Policy, Insurance Services
The intentional acts exclusion usually appears in cases of assault and battery under homeowners' policies, and in commercial cases where an insured did not intend harm, but the activity was likely to cause harm. All liability policies exclude intentional acts from coverage, because covering such acts would frustrate the insurer's ability to calculate fair rates, and because public policy forbids relieving a person of the consequences of his own willful acts. While no one seriously disputes that intentional acts should be excluded from coverage, there is considerable dispute over what acts are "intentional." For instance, assuming

Office, Inc. (1973). More recent versions have moved the intentional injury exclusion to the "Exclusions" section of the policy. Commercial General Liability Policy, Insurance Services Office, Inc. (1988). In either case, the effect of the clause is the same—no coverage for an injury that the insured intentionally caused.

47. This exclusion is referred to as either the "intentional acts exclusion" or the "intentional injury exclusion." While the term "intentional acts" would suggest a broader definition of the exclusion, because any act resulting in injury could be excluded, the label is not dispositive. One must look to the substantive law of the jurisdiction to determine the scope of the exclusion, regardless of the label the courts use.


49. JERRY, supra note 8, at 304.

50. One such dispute involves the problem of the insane tortfeasor. See generally Catherine A. Salton, Mental Incapacity and Liability Insurance Exclusionary Clauses: The Effect of Insanity upon Intent, 78 CAL. L. REV. 1027 (1990) (discussing two lines of authority, one holding that an insane act does not trigger the intentional act exclusion, and the other excluding coverage where the insane person understands the physical nature and consequences of the act).

Under Florida law, an act committed by an insane individual is not subjectively "intentional" within the meaning of the intentional act exclusion. Arkwright-Boston Mfrs. Mut. Ins. Co. v. Dunkel, 363 So. 2d 190, 193 (Fla. 3d DCA 1978); George v. Stone, 260 So. 2d 259, 262 (Fla. 4th DCA 1972); see also S. Sue Robbins et al., The Insane Tortfeasor and Liability Insurance Coverage Exclusions, 58 FLA. B.J. 213 (1984). However, where an insurance policy described an objective standard, excluding coverage for "bodily injury which may reasonably be expected to result from the intentional... acts of an insured," one court held that the acts of an insane man who shot several people in a shopping center excluded coverage. Allstate Ins. v. Cruse, 734 F. Supp. 1574, 1579 (M.D. Fla. 1989). Thus, if the insured intends to cause injury and understands the physical consequences of his actions, then the act will trigger the intentional injury exclusion, even if the insured was insane. See Johnson v. Insurance Co. of N. Am., 350 S.E.2d 616, 620 (Va. 1986) (insured who had been found not guilty for reason of insanity in shooting of his friend was found to have intended the shooting for purposes of insurance law, since "he knew that he was shooting a human being").

Another dispute involves actions taken in self-defense. Some courts have held that acts of self-defense do not trigger the intentional injury exclusion, because the insured presumably did not intend to become involved. See, e.g., Western Fire Ins. Co. v. Persons, 393 N.W.2d 234, 237 (Minn. Ct. App. 1986) (reasoning that one who has acted in self-defense has not used "insurance coverage as a license to commit wanton and malicious acts"). Under Florida law, however, the intentional act exclusion in a liability policy excludes coverage for acts taken in self-defense. State Farm Fire and Casualty Co. v. Marshall, 554 So. 2d 504 (Fla. 1989), followed in Aetna
the insured intended the act, must the injury be a direct result of the intentional act, or does “intentional” include an injury that was an unintended result of an intentional act? There are three basic approaches to this problem.\textsuperscript{51}

The approach that provides the broadest definition of “intentional”—and therefore the narrowest coverage—uses the tort concept of foreseeability. This approach excludes foreseeable injuries resulting from intentional acts, regardless of whether the insured intended the result.\textsuperscript{52} The problem with this approach in an insurance context is that foreseeability is often an element in tort actions. Excluding foreseeable injuries would exclude negligence claims and frustrate the very purpose of insurance.\textsuperscript{53} The Florida Supreme Court has rejected this approach, stating that it is “totally unsuited and unadaptable in construing accident policies,” and would “do violence to the reason for buying accident insurance.”\textsuperscript{54}

At the other end of the spectrum is the approach which provides the narrowest definition of “intentional”—and therefore the broadest coverage. This approach requires that, to qualify as intentional, the insured intend the act that causes injury, and the insured intend the specific injury that results.\textsuperscript{55} For an extreme example under this approach, assume that the insured intentionally and willfully broke someone’s leg, and the victim unexpectedly went into shock and died. The insured’s act of killing the victim would not be considered intentional, since the insured did not intend the exact harm that resulted.

Florida has rejected this rule as well, and follows the rule set forth in \textit{Prudential Property and Casualty Insurance Co. v. Swindal},\textsuperscript{56} that for the intentional act exclusion to apply, the insured must have both intended the act, and intended that some injury or harm occur.\textsuperscript{57} In \textit{Swindal}, the insured and his neighbor had been involved in an ongoing feud, which culminated in a shooting.\textsuperscript{58} After the neighbor drove through the insured’s driveway brandishing a hammer, the insured

\textsuperscript{51} JERRY, supra note 8, at 306.
\textsuperscript{52} Id.; see, e.g., Casualty Reciprocal Exch. v. Thomas, 647 P.2d 1361, 1364 (Kan. Ct. App. 1982).
\textsuperscript{53} Rynearson, supra note 48, at 515.
\textsuperscript{55} See, e.g., Pachucki v. Republic Ins. Co., 278 N.W.2d 898 (Wis. 1979).
\textsuperscript{56} 622 So. 2d 467 (Fla. 1993).
\textsuperscript{57} Id. at 473.
\textsuperscript{58} Id. at 469.
grabbed his handgun and gave chase. The insured caught up to his neighbor and, carrying his loaded handgun with a finger on the trigger, approached his neighbor’s car. The insured then reached inside the car to grab what he thought was a gun, and the two men struggled. The insured’s gun fired, causing severe bodily injury to the neighbor. Pursuant to the intentional injury exclusion, the insurer refused to pay. The Florida Supreme Court concluded that where an insured commits an intentional act intending to cause only fear, but unintentionally causes bodily injury, then the intentional injury exclusion does not apply.

Under this approach, an intentional act that results in unintended damages is not excluded. In Grissom v. Commercial Union Insurance Co., the insured had filled and elevated a watercourse and as a result neighboring property was flooded and sustained damage. The court stated, “Clearly, the intentional filling of the watercourse was not an ‘accident’ under the policy; but the unintentional flooding and damage to church property resulting from the negligent failure to provide adequate drainage facilities, being neither expected nor intended, does constitute an accident within [Florida] case law.”

Perhaps the most difficult cases involving the intentional act exclusion are those involving sexual abuse of children by the insured. The majority of courts hold that injury resulting from sexual molestation by the insured is excluded, but some have applied a subjective intent stan-

59. Id.
60. Id.
61. Id.
62. Id. at 473. The same reasoning was applied in a case in which an insured doctor, “being mildly upset, intentionally tugged on both ends of the stethoscope draped around [another doctor’s] neck,” which caused the other doctor to suffer a herniated cervical disk. Aetna Casualty and Sur. Co. v. Miller, 550 So. 2d 29, 30 (Fla. 3d DCA 1989). The court noted, “That [the insured] did not intend to cause the resulting physical injury does not avoid the policy’s intentional act exclusion.” Id.
63. 610 So. 2d 1299 (Fla. 1st DCA 1992).
64. Id. at 1301.
65. Id. at 1307; see also Orear v. Allstate Ins. Co., 619 So. 2d 974 (Fla. 2d DCA) (holding that insured’s intentional act of pushing a friend while “slam dancing,” which resulted in the friend falling and striking his head, presented a genuine issue of material fact as to whether the act reasonably could have been expected to cause bodily injury), rev. denied, 630 So. 2d 1098 (1993).

There is one situation in which the insured will not trigger the intentional act exclusion, even though he intended to commit harm. This occurs when the insured is mistaken as to the target’s identity. Spengler v. State Farm Fire and Casualty Co., 568 So. 2d 1293, 1295, 1297 (Fla. 1st DCA 1990) (exclusion did not apply where boyfriend shot his girlfriend when he mistook her for a burglar, because he did not “intend to injure the person actually injured” by the act) (citing Sabri v. State Farm Fire and Casualty Co., 488 So. 2d 362 (La. App. 1986) (interpreting the same exclusionary clause)).

66. E.g., Allstate Ins. Co. v. Kim W., 206 Cal. Rptr. 609, 613 (1984) (criminal prohibition on sexual acts with children was designed to protect children from harm, thus intent to harm can be inferred as a matter of law when such acts are committed); Linebaugh v. Berdish, 376 N.W.2d
standard to determine whether the insured intended to harm the child. Although one Florida court had adopted the subjective intent standard for sexual abuse cases, the Florida Supreme Court, in *Landis v. Allstate Insurance Co.*, disapproved of that decision and held that specific intent to commit harm is not required to exclude coverage in cases of sexual abuse; the intent is inferred as a matter of law. Thus, the sexual abuse cases do not change the rule in Florida regarding the intentional act exclusion. To be excluded, the insured must both intend the act and intend that some harm result.

There is another special class of cases in which intent will be inferred as a matter of law: cases in which the insured is convicted of a crime. In such situations, the criminal conviction may collaterally estop the insured from seeking coverage or defense under his insurance pol-


67. E.g., MacKinnon v. Hanover Ins. Co., 471 A.2d 1166, 1167 (N.H. 1984) (applying subjective standard, and rejecting arguments that intent should be inferred as a matter of law, and that public policy should preclude allowing a child molester to insure himself against liability); see also State Auto Mut. Ins. Co. v. McIntyre, 652 F. Supp. 1177, 1194 (N.D. Ala. 1987) (finding the insured "had no specific intent to cause bodily harm to his minor granddaughter . . . when he sexually abused her in a nonviolent way on the two occasions in question"). *Contra* CNA Ins. Co. v. McGinnis, 666 S.W.2d 689, 690 (Ark. 1984) ("The test is what a plain ordinary person would expect and intend to result from a mature man's deliberately debauching his six-year-old stepdaughter and continuing to do so for years.").

68. Zordan v. Page, 500 So. 2d 608 (Fla. 2d DCA 1986).

While the court's holding rested on traditional principles of policy interpretation, and on the refusal to import tort foreseeability into insurance law, the court mentioned the importance of securing compensation for the victim. "[A] conclusion in this insurance coverage case that there may be insurance coverage as compensation for injuries inflicted by the insured which the premiums received by the insurers were paid to provide would, however incidentally, be consistent with the interests of the child." *Id.* at 613.

69. 546 So. 2d 1051 (Fla. 1989).

70. *Id.* at 1053. The *Landis* opinion caused some uncertainty in the law regarding the intentional injury exclusion, because it said "all intentional acts are properly excluded by the express language of the homeowners policy." *Id.* This statement sweeps much more broadly than the established rule that exclusion required an intentional act and intent to commit some form of harm. One court challenged this sentence, asking, "whether a literal interpretation of the statement that all intentional acts bar coverage, does not create an insurmountable barrier to coverage. We would suggest that nearly all accidents have at their beginning an intentional act." *Orear v. Allstate Ins. Co.*, 619 So. 2d 974, 976 n.1 (Fla. 2d DCA 1993). The Florida Supreme Court later limited the scope of its language in *Landis*, stating:

*Landis* held that an intentional injury exclusion clause excluded coverage for injuries suffered by children who were sexually molested while under the care of the insureds. . . . Our decision in *Landis* did not suggest that courts apply tort law causation principles of "reasonably foreseeable" or "natural and probable consequences" in construing the intentional injury clause in insurance contracts. Rather, we merely found that an intent to injure is inherent in the act of sexually abusing a child.

Prudential Property and Casualty Ins. Co. v. Swindal, 622 So. 2d 467, 471-72 (Fla. 1993).
icy.71 One Florida court suggested that a conviction can have collateral estoppel effect if it is for a crime for which intent is an element.72 In that case, the insured was convicted of second-degree murder for recklessly firing a gun into a crowd. The court held that, notwithstanding the conviction, the act was not excluded where "the defendant has no intent to hit or kill anyone."73 Thus, a criminal conviction for the act does not exclude coverage and defense unless intent is an element of the crime. "The primary consideration in determining if an intentional act exclusion clause applies is whether the insured had the subjective, specific intent to cause any harm to his victim."74 Therefore, "strict liability" crimes that do not require proof of intent, such as statutory rape and driving while intoxicated, should not exclude coverage. General intent crimes, in which subjective intent is irrelevant to proof, also should not exclude coverage. These include crimes such as second-degree murder,75 rape, and possession of controlled substances. Conviction of a "specific intent" crime for which intent must be proved, however, such as robbery,76 first degree murder, and battery, should trigger exclusion.77

II. Deciding to File the Declaratory Action

As discussed above, Florida law favors the insured in insurance coverage disputes.78 Nevertheless, when insurers believe that a claim falls outside of policy coverage, they certainly will not accept responsibility without a challenge.79 The insurer has three basic options when

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71. See, e.g., Morton v. Safeco Ins. Co., 905 F.2d 1208 (9th Cir. 1990) (violation of California Penal Code for criminal sexual assault of a minor is a willful act, and is thus excluded from insurance coverage).
72. United States Fidelity & Guar. Co. v. Perez, 384 So. 2d 904 (Fla. 3d DCA 1980).
73. Id. at 905.
75. See Perez, 384 So. 2d 904.
76. See Bosson v. Uderitz, 426 So. 2d 1301 (Fla. 2d DCA 1983).
77. Sawaya, supra note 74, at 532-33.
78. For a full discussion of the duty to defend, see supra part I.A.
79. See L. Louis Mrachek, The Insurer's Options: When Confronted with a Liability Claim, 54 FLA. B.J. 341 (1980). To preserve its rights to deny coverage, the insurer must comply with the claims administration statute. This provision requires the insurer to provide written notice to the insured of the coverage defense, and either give written notice of its refusal to defend, obtain a nonwaiver agreement, or retain independent counsel for the insured. FLA. STAT. § 627.426 (1995).
confronted with a claim which it believes is outside of coverage: it can refuse to defend, it can defend under a reservation of rights, or it can defend without reservation. Each option brings certain risks. If the insurer refuses to defend and the claim is later found to have been within coverage, the insurer is liable to the insured for breach of contract. If the insurer defends under a reservation of rights, it places itself in a conflict of interest with the insured. If the insurer defends without reservation, it risks waiving coverage defenses.

In combination with any of these options, the insurer can file a declaratory judgment action to determine its duties. The declaratory action is an important tool for the insurer, and can also benefit the injured third party. There are several advantages for the insurer who files a declaratory judgment action. Primarily, if the insurer is held to have no duty under the policy, then it avoids the expense of defending the tort action.

Some Florida courts have considered an insurer to have waived coverage defenses despite a nonwaiver agreement, where the insurer continued to defend the insured for an extended period of time after the insurer had completed its investigation. An insurer can avoid such a waiver by filing a declaratory judgment action. Strategically, the insurer obtains an additional advantage by filing an action, because it thereby notifies its insureds and the plaintiff’s counsel that the insurer

81. Mrachek, supra note 79, at 343. If the insurer wrongfully refuses to defend, it may be liable for a judgment in excess of the policy limits. Id.; see also Thomas v. Western World Ins. Co., 343 So. 2d 1298 (Fla. 2d DCA 1977).
82. Mrachek, supra note 79, at 344. The insured and the insurer both want the insured to be found not liable. The conflict arises if the insured is liable. In that case, the insured has an interest in being held liable for a covered claim, while the insurer has a conflicting interest in having the insured found liable for a noncovered or excluded reason.
83. Id. at 343.
84. Unless the insured has “deep pockets” of its own, the injured party would certainly be concerned about the availability of insurance coverage to pay a judgment. The declaratory action allows the injured party to know if insurance coverage is available. Note, supra note 80, at 95-96; see, e.g., Smith v. General Accident Ins. Co. of Am., 641 So. 2d 123 (Fla. 4th DCA 1994) (plaintiff injured by insured’s driver filed declaratory action against insurer to determine insurer’s duty to defend).
85. Robert S. Treece & Richard D. Hall, When Do You File a Declaratory Judgment Action?, 53 Ins. Couns. J. 396, 397-98 (1986). The authors note that it is difficult to obtain a final judgment quickly, and suggest that the sooner the declaratory judgment action is filed after the insured has been served in the tort action, the more likely the trial court will be to expedite the declaratory judgment action. Id. at 398.
87. Treece & Hall, supra note 85, at 398.
will aggressively fight questionable claims.\textsuperscript{88}

There are, of course, corresponding disadvantages to filing a declaratory judgment action. The principal problem, according to some commentators, is the "practical procedural difficulty" that may result from delaying the underlying tort action between the third party and the insured.\textsuperscript{89} Furthermore, an insurer is always concerned with the goodwill of its business, and initiating litigation against its own insured certainly impacts goodwill adversely.\textsuperscript{90} Another disadvantage of the declaratory judgment action is expense. Since most tort actions are settled before trial, and thus before coverage questions are determined, the declaratory action may seem unnecessary, and it may appear in hindsight that the expense of filing the action could have been saved.\textsuperscript{91} Of course, the "unnecessary" declaratory action may have had a strong influence on the parties' negotiating positions.

Whether or not to bring a declaratory judgment is a serious, strategic decision for the insurer.\textsuperscript{92}

In spite of these drawbacks, the declaratory judgment action provides the insurer with an expeditious avenue for determining its rights and obligations under the insurance policy. . . . [T]he declaratory judgment action gives notice to the public that an insurer will not meekly capitulate, but will take an aggressive stance, when dealing with questionable claims.\textsuperscript{93}

Thus, although the declaratory judgment action is an effective tool for insurers, it is a double-edged sword, and insurers do not use it without seriously considering the consequences.


\textsuperscript{90} Ericsson, \textit{supra} note 88, at 179. "Whatever goodwill the insured still has toward the insurance company despite the disagreements over coverage will be dissipated by the filing of such an action against him." Treece & Hall, \textit{supra} note 85, at 399-400.

\textsuperscript{91} See Treece & Hall, \textit{supra} note 85, at 400.

\textsuperscript{92} Of course, an insured or third-party claimant may also file a declaratory judgment action to prove that coverage exists. \textit{See} e.g., Smith v. General Accident Ins. Co. of Am., 641 So. 2d 123 (Fla. 4th DCA 1994) (suit brought by injured party against tort defendant's insurer). The problem with such suits, however, is that there may be no justiciable controversy between the parties before a judgment in the underlying action fixes the parties' liabilities. Ericsson, \textit{supra} note 88, at 164; \textit{see also} Dohoney, \textit{supra} note 89, at 482 (noting that Texas courts cannot decide questions of indemnification, because they may not give advisory opinions). Where the insurer takes a firm position disclaiming coverage, however, Florida courts have determined that an actual controversy exists. Stonewall Ins. Co. v. W.W. Gay Mechanical Contractor, Inc., 351 So. 2d 403, 403 (Fla. 1st DCA 1977); Travelers Ins. Co. v. Emery, 579 So. 2d 798, 802 (Fla. 1st DCA 1991).

\textsuperscript{93} Ericsson, \textit{supra} note 88, at 180.
III. DECLARATORY JUDGMENTS IN INSURANCE DISPUTES IN FLORIDA

Recently, there has been disagreement among Florida courts regarding the rights of insurers to bring declaratory actions. One question is whether the declaratory action is available to resolve questions of fact. The other, more difficult question is whether the insurer can bring the declaratory judgment action to determine rights under an insurance policy before the parties in the underlying action determine liability. This latter issue is especially difficult if the same question must be resolved in both the underlying and coverage actions.

A. Statutory Authority for the Action

Declaratory judgment actions in Florida are governed by Chapter 86 of the Florida statutes. Florida originally adopted its version of the Uniform Declaratory Judgments Act in 1943, and the law remains fundamentally the same. The law grants trial courts jurisdiction to render declarations regarding the legal or factual questions regarding the existence or nonexistence of "any immunity, power, privilege, or right" of the parties. The following three sections of the statute provide for specific cases in which a trial court has the power to enter a decree. Such cases include construing deeds, wills, or contracts, construing a contract before or after breach, and hearing actions by "executors, administrators, trustees, etc." After specifying these instances, the law states that they are not exclusive, and that they do not "limit or restrict" the availability of declaratory judgments in any actions which meet the

95. Ch. 21820, Laws of Fla. (1943).
96. The law was amended in 1990 to allow county courts, as well as circuit courts, to decide declaratory judgment actions "within their respective jurisdictional amounts." Fla. Stat. § 86.011 (1995).
97. Id. The jurisdictional grant states:
The circuit and county courts have jurisdiction within their respective jurisdictional amounts to declare rights, status, and other equitable or legal relations whether or not further relief is or could be claimed. . . . The court may render declaratory judgments on the existence, or nonexistence:
(1) Of any immunity, power, privilege, or right; or
(2) Of any fact upon which the existence or nonexistence of such immunity, power, privilege, or right does or may depend, whether such immunity, power, privilege, or right now exists or will arise in the future. Any person seeking a declaratory judgment may also demand additional, alternative, coercive, subsequent, or supplemental relief in the same action.

Id.
99. Fla. Stat. § 86.031 (1995). This provision would seem to allow an action by an insured against the insurer, if the insurer indicates that it will not provide coverage. For example, a reservation of rights by the insurer may indicate a future breach. See supra note 92.
requirements of section 86.011.\textsuperscript{101} In cases involving questions of fact, the law provides for jury trials in declaratory proceedings.\textsuperscript{102}

The statute contains its own rule of construction,\textsuperscript{103} which states that the law is remedial, and is to be "liberally administered and construed."\textsuperscript{104} The declaratory judgment action in Florida is therefore a flexible tool for resolving a wide range of disputes. With this statutory authority, insurers regularly bring actions to determine their duties to defend and indemnify insureds.

\section*{B. Questions of Fact in Insurance Coverage Cases}

Before describing the present split of authority in Florida, it is necessary to clear up a fine point regarding the power of courts to decide questions of fact in declaratory judgments. This Comment's central argument is that parties should be permitted to bring declaratory actions to determine their rights regarding insurance before a court determines liability in the underlying action, if necessary. As indicated above, the insurer's duty to defend often depends on questions of fact, such as whether a certain act was intentional. Therefore, this section addresses the ancillary issue of a court's power to decide a question of fact in a declaratory judgment action.

The first Florida Supreme Court case to interpret the jurisdiction of a court to hear a declaratory judgment action in an insurance case was \textit{Columbia Casualty Co. v. Zimmerman}.\textsuperscript{105} Despite the express language of the statute which granted jurisdiction over questions of fact to trial courts,\textsuperscript{106} the Florida Supreme Court held that the trial court did not have jurisdiction over the proceeding, because the issue before the court was a question of fact, and there was no question of contract interpretation before the court.\textsuperscript{107}

\textit{Zimmerman} involved an automobile accident. A woman was driving a vehicle owned by the insured when the vehicle collided with a city

\textsuperscript{101} \textit{FLA. STAT.} § 86.051 (1995). "The enumeration in ss. 86.021, 86.031 and 86.041 does not limit or restrict the exercise of the general powers conferred in s. 86.011 in any action where declaratory relief is sought." \textit{Id.}

\textsuperscript{102} \textit{FLA. STAT.} § 86.071 (1995). The section provides that fact issues are tried in declaratory judgment actions in the same way as in other civil actions.

\textsuperscript{103} \textit{FLA. STAT.} § 86.101 (1995).

\textsuperscript{104} \textit{Id.}

\textsuperscript{105} 62 So. 2d 338 (Fla. 1952).

\textsuperscript{106} At the time of the case, the law regarding declaratory decrees was codified in Chapter 87 of the Florida Statutes. \textit{FLA. STAT.} §§ 87.01-.13 (1951). The statutes were moved to Chapter 86 in 1967. The current language remains fundamentally the same.

\textsuperscript{107} \textit{Zimmerman}, 62 So. 2d at 340. It appears that the pleadings may have only alleged a claim under \textit{FLA. STAT.} § 87.02 (1951), which gives the power to construe contracts. \textit{Id.}
The collision caused substantial injury and damage, and several bus passengers sued the driver and the owner/insured. The driver then demanded that the owner’s insurer provide a defense. The owner’s insurer refused to defend, claiming that the driver was not driving with the knowledge and consent of the insured, and thus the insurer was not obliged to provide a defense. The insurer then sought a declaration of whether it was obliged to provide a defense, but the trial court dismissed the action for failure to state a claim within the declaratory judgments statute.

On appeal, the supreme court stated, “The real question which appellants sought to have determined is a purely factual one, namely, whether or not Mary Yates was driving the automobile with the knowledge and consent of the owners, or either of them.” The court then stated that the controlling sections of the statute were section 87.02, regarding the power to construe contracts, and section 87.05, which provided that the specific enumerations in the statute were not exclusive, and that declarations could issue regarding future rights and duties. Despite stating that section 87.05 was implicated, however, the majority analyzed the claim only in terms of section 87.02, and found that it did not apply because it did not involve interpretation of the insurance policy itself.

The court determined that under section 87.02 courts could only issue declarations involving the interpretation of documents, not questions of fact. The court stated, “The question of whether or not the automobile was being driven with the knowledge and consent of the insured was a question of fact to be determined as any other question of fact and requires no construction of the insurance policy in order to determine the meaning thereof.”

This holding conflicts with the statutes. Section 87.05, which the majority acknowledged was implicated in the case, referred specifically to section 87.01, which authorized circuit courts to render declaratory judgments.

108. Id. at 338.
109. Id.
110. Id. The driver was insured as well, but her policy contained a clause which provided that if she operated a non-owned automobile, her policy would be excess insurance to any other valid and collectible insurance available. The driver and her insurance company both made demand upon Columbia Casualty to defend the suits. Id.
111. Id. at 338.
112. Id. at 339.
113. Id.
114. FLA. STAT. § 87.02 (1951). Substantially identical language is now codified at § 86.021.
115. FLA. STAT. § 87.05 (1951) (presently codified at § 86.051).
117. FLA. STAT. § 87.01 (1951) (presently codified at section 86.011).
judgments on questions of fact upon which contractual rights depend. The majority interpreted section 87.01 to confer only jurisdiction, and insisted that a declaratory action can only proceed when there is some ambiguity or doubt about the contract.

The Zimmerman court also reasoned that the issue of the insured's knowledge and consent could not be decided in a declaratory action, because it was a question of fact, "to be determined as any other question of fact." The court's interpretation notwithstanding, the determination of fact questions was certainly contemplated by the legislature in section 87.08, which provided for jury trials of declaratory judgments: "When a proceeding under this chapter involves the determination of an issue of fact, such issue may be tried and determined in the same manner as issues of fact are tried and determined in other civil actions in the circuit court in which the proceeding is pending." The irony of the Zimmerman court's choice of words is inescapable; using the same language in its opinion as the legislature had in the statute, the supreme court reached the opposite result. The court reasoned that because questions of fact must be tried as they are tried in other actions, they may not be resolved by declaratory judgment. But the legislature had already required that courts try questions of fact in declaratory judgments, specifically so that courts would determine questions of fact in the same manner in declaratory actions as in other actions. In a sense, the court was treating declaratory actions as different from other actions though the legislature had attempted to treat them in the same way.

The dissenting justice noted that the test to activate the declaratory judgments statute was "whether or not the moving party shows that he is in doubt as to the existence or nonexistence of some right, status, immunity, power or privilege . . ." The dissent noted that the driver and the insurer were certainly in doubt as to their rights and liabilities under the policy, and that these doubts would have been resolved by the declaratory judgment action. It is also significant that the fact at issue

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118. Chapter 87.01 (1951); see supra note 97 for the present statute's virtually identical language.
120. Id. at 339.
121. FLA. STAT. § 87.08 (1951).
122. Id. (emphasis added).
123. Zimmerman, 62 So. 2d at 341 (Terrell, J., dissenting) (quoting Ready v. Safeway Rock Co., 24 So. 2d 808 (Fla. 1946) (Terrell, J.), which first interpreted the declaratory judgments act and set forth the test for activating jurisdiction in a declaratory action).
124. Id. at 342.

Whether or not Mary Yates was driving the automobile at the time of the collision, with the consent of the owners, is a very important point in this litigation. It may be vital to other suits growing out of the collision. If the contention of appellant is sustained, numerous suits against it may be forestalled. All the text-writers and
in *Zimmerman* was not an issue in the underlying tort litigation. Presumably, the alleged negligence of the driver had nothing to do with her permission or lack of permission to use the automobile. Since the factual determination here would have no impact on the tort suit, and there would therefore be no collateral estoppel, it is surprising that the court did not allow the action. Moreover, in a trial between the allegedly negligent driver and the injured third parties, the question of whether the driver had permission to use the vehicle may never have arisen. The insurer might therefore have been deprived of any forum in which to address the issue.

To say that the insurer could argue the issue later, in a coverage case, is not satisfactory. First, allowing multiple suits to be brought, and then forcing the plaintiffs to bring additional suits against the insurer is not an efficient use of judicial resources. Second, as one court noted, arguing that an insurer should defend where it has no obligation to do so, rather than resolving the issue by declaratory action, “ignores the fact that providing a defense where there is no legal obligation to do so constitutes an irreparable injury in and of itself.” Further, the insured wants to be defended, and the plaintiff wants the insured to be covered so there is a “deep pocket” from which to secure a judgment. Neither party has an interest in resolving coverage issues. Without a declaratory judgment action, the insurer has no forum. The result is a “perfect conspiracy between a plaintiff and the insured and the insurer has no remedy.”

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many of the decisions hold that declaratory action is an ideal way to prevent resort to a multiplicity of suits.

Id. 125. *See Treece & Hall, supra* note 85, at 397 (noting that declaratory judgments are "generally available" for these types of fact questions).

One possible explanation for the overly restrictive interpretation of the statute is that the justices were not comfortable with giving such broad scope to declaratory judgments. The Florida Supreme Court first interpreted the modern declaratory judgments act in *Ready v. Safeway Rock Co.*, 24 So. 2d 808 (Fla. 1946). The opinion included a special concurrence which expressed concern with the breadth of the act, *id.* at 811-12, and suggested that it be “cautiously applied and construed.” *Id.* at 812. The concurring justice reminded courts not to give legal advice, to exercise discretion in allowing declaratory judgments, and only to gradually allow new types of actions to be brought as declaratory actions. *Id.* at 811-12.

Another explanation for the narrow interpretation may be simple cultural lag. Prior to the 1943 law, Florida had a much more limited declaratory judgment statute. Ch. 7857, Laws of Fla. (1919). The statute allowed for a bill in equity to determine interest under a deed, will, or contract. This law was quite similar to § 87.02, which was at issue in the *Zimmerman* case. The concurrence in *Ready* quoted at length from the case which had construed the 1919 act, and urged that the two laws be construed similarly. *Ready*, 24 So. 2d at 811-12. The decision in *Zimmerman* could therefore be seen as a return to the Acts of 1919.

126. *State Farm Fire and Casualty Co.* v. *Nail*, 516 So. 2d 1022, 1023 (Fla. 5th DCA 1987).

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Despite these problems, the supreme court has not modified the Zimmerman rule that a declaratory judgment action is not available for purely factual questions.\(^{128}\) Rather, the court reaffirmed Zimmerman in Bergh v. Canadian Universal Insurance Co.,\(^{129}\) which involved an insurer’s duty to defend a medical malpractice claim under a professional liability policy.\(^{130}\) The insured doctor failed to give timely notice of a pending malpractice claim which, according to the insurer, violated the policy.\(^{131}\) The insurer had initially undertaken the defense, but later filed a declaratory judgment action alleging that the insured’s failure to give notice was a breach of the policy, and therefore the insured was not entitled to a defense.\(^{132}\) The Florida Supreme Court, following Zimmerman, held that the questions at issue were merely factual because they did not involve questions of interpretation, and therefore were not subject to a declaratory judgment.\(^{133}\) Like the Zimmerman court, the Bergh court disregarded clear statutory grants of authority to the courts to resolve questions of fact. Because the coverage questions in this case raised no issues important to the underlying malpractice action, the insurer was once again denied a forum in which to litigate coverage or defense issues until the tort action was concluded.\(^{134}\)

Questions of fact may be resolved in declaratory judgment proceedings, but only if necessary to a construction of the legal rights of the parties.\(^{135}\) Nevertheless, some courts have recently followed the Zimmerman rule denying jurisdiction to trial courts over questions of fact, even though legal rights depended on resolution of those questions.\(^{136}\)

\(^{128}\) There have been opportunities. The court in Allstate Ins. Co. v. Conde recognized a possible conflict with the Zimmerman case, 595 So. 2d at 1007 n.4, and certified the following question to the supreme court: “May the insurer pursue a declaratory action in order to have declared its obligation under an unambiguous policy even if the court must determine the existence or nonexistence of a fact in order to determine the insurer’s responsibility?” Id. at 1008.

\(^{129}\) 216 So. 2d 436 (Fla. 1968).

\(^{130}\) Id. at 437.

\(^{131}\) Id. at 438.

\(^{132}\) Id. at 438-39.

\(^{133}\) Id. at 440. “Nowhere does it appear an interpretation of the language of the policy or of the nonwaiver agreement was a part of the decisional disposition of the declaratory judgment proceedings. The correctness of the determination of factual issues was the sole subject decided by the District Court . . . .” Id.

\(^{134}\) The court in Bergh could be seen to have narrowed Zimmerman by stating that the common issue was “whether the insurer is liable to the insured in view of alleged breaches of policy provisions—said determinations involving, in each case, factual questions and issues and not contract interpretations or construction.” Id. at 440.

\(^{135}\) For a discussion of statutory and policy objections to the rule in Zimmerman, see supra notes 106-127 and accompanying text.

\(^{136}\) See supra note 97 for text of § 86.011; see also Smith v. Milwaukee Ins. Co., 197 So. 2d 548, 550 (Fla. 4th DCA 1967); Prudential Property and Casualty Ins. Co. v. Castellano, 571 So. 2d 598, 599 (Fla. 2d DCA 1990).

\(^{136}\) Vanguard Ins. Co. v. Townsend, 544 So. 2d 1153, 1155 (Fla. 5th DCA 1989); cf.
The Conde court, however, called this interpretation of the statute into question, stating, "This interpretation limits Chapter 86 to little more than a codification of the parol evidence rule. Chapter 86 should not be read so narrowly." 137

C. Traditional Rule: Determine Defense, not Indemnity, Before Liability

A distinct but closely related issue to the propriety of resolving factual questions in a declaratory judgment action is the propriety of allowing the declaratory action to proceed before liability has been decided. The timing of the declaratory judgment action is very important to the parties. It is in the insurer's interest to have the option to bring the declaratory judgment action early in the litigation. 138 If the insurer can show that it is impossible for the claim to come within policy coverage, then the insurer will be relieved of all obligations. 139 It is certainly in the insurer's interest to get such a declaration before the tort action, rather than after, since providing a defense where there is no legal obligation constitutes an irreparable injury. 140 Bringing the coverage action early may also further judicial economy. If potential insurance proceeds are the insured's only asset, the third party may simply save itself the expense of pursuing a worthless judgment.

In Florida, most courts have not allowed insurers to bring declaratory judgments before the tort action. Declaratory relief is generally unavailable until after liability is decided, especially if the coverage action could involve questions at issue in the underlying litigation. 141 Florida has followed the general rule that if, when the declaratory action is brought, a tort suit is pending "which involves the same issues and in which litigation the plaintiff in the declaratory decree may secure full protection." Travelers Ins. Co. v. Emery, 579 So. 2d 798, 802 (Fla. 1st DCA 1991) ("We find it equally clear that this declaration does not depend solely upon a factual determination, but requires the court's interpretation of the . . . exclusion . . . .") (first emphasis added).


138. Whether the insurer will in fact bring the action depends on a number of strategic factors. See supra notes 86-93 and accompanying text. One court stated, "[I]t has generally been recognized as prudent, insurance company practice to have coverage resolved as promptly as possible." Britamco Underwriters, Inc. v. Central Jersey Insvs. Inc., 632 So. 2d 138, 141 (Fla. 4th DCA 1994).

139. See supra part I.A.; see also Nationwide Mut. Fire Ins. Co. v. Keen, 658 So. 2d 1101, 1102 (Fla. 4th DCA 1995) (holding that the insurer had no duty to defend where the insured unequivocally disclosed facts to the insurer that negated coverage).

140. State Farm Fire and Casualty Co. v. Nail, 516 So. 2d 1022, 1023 (Fla. 5th DCA 1987).

adequate and complete relief, such bill for declaratory decree will not be permitted to stand.\textsuperscript{142} The problem for insurers who seek declaratory decrees is that they are not parties to the tort action, and so cannot get complete relief. Further, insurers are usually not permitted to intervene in the tort action.\textsuperscript{143} And some courts have held that declaratory actions are not available if the underlying action is pending, and the parties are litigating common issues.\textsuperscript{144} Thus, the insurer is not permitted a voice in the main action, and is also denied a separate forum in which to raise the issues.\textsuperscript{145}

Many courts have allowed a declaration regarding the duty to defend, but have required that a declaration regarding the duty to indemnify must wait until the parties determine liability.\textsuperscript{146} In \textit{International Surplus Lines Insurance Co. v. Markham},\textsuperscript{147} the court stated that the "only determination for the trial court to make" in the declaratory action was whether the insurer was required to \textit{defend} the insured against the complaint.\textsuperscript{148} It was important for the court to determine the duty to defend at the outset of litigation, because requiring the insurer to defend where it had no obligation would constitute an irreparable injury to the insurer.\textsuperscript{149} The court refused to determine indemnification, holding:

\[\text{Id. at 1155; Irvine v. Prudential Property and Casualty Ins. Co., 630 So. 2d 579 (Fla. 3d DCA 1993).}\]

Of course, this procedure can only be implemented where determining

\begin{itemize}
  \item 142. Taylor v. Cooper, 60 So. 2d 534 (Fla. 1952), quoted in Vanguard Ins. Co. v. Townsend, 544 So. 2d 1153, 1155 (Fla. 5th DCA 1989).
  \item 143. See Vanguard, 544 So. 2d at 1154.
  \item 144. Id. at 1155; Irvine v. Prudential Property and Casualty Ins. Co., 630 So. 2d 579 (Fla. 3d DCA 1993).
  \item 145. The Alabama Supreme Court solved the dilemma by holding that "intent" for insurance coverage purposes is a different issue than "intent" for purposes of the underlying tort action. Therefore, a declaratory judgment action could proceed. Smith v. North River Ins. Co., 360 So. 2d 313 ( Ala. 1978). This rule allows the coverage question to proceed separately and independently of the main action, and allows all parties to be heard.
  \item 147. 580 So. 2d 251 (Fla. 2d DCA 1991).
  \item 148. Id. at 253; see supra part I.A. for a discussion of the duty to defend in Florida.
  \item 149. Id. at 254 (citing State Farm Fire and Casualty Co. v. Nail, 516 So. 2d 1022 (Fla. 5th DCA 1987)).
  \item 150. Id. The Third District Court of Appeal applied the same analysis in Irvine v. Prudential Property and Casualty Ins. Co., 630 So. 2d 579 (Fla. 3d DCA 1993). There, the injured party sued the insured for damages for bodily injury, alleging both negligent and intentional acts. The court held that the insurer must defend the action, but refused to allow a determination of indemnification, ruling that "the better process is to require the insurer to defend the action under a reservation of rights." Id. at 580.
\end{itemize}
the duty to defend is independent of determining the duty to indemnify—and only if the court applies the strict “exclusive pleading” test.

The rule that indemnification cannot be decided before liability is not universal. Where questions of coverage or defense do not involve issues common to the underlying action, some courts have allowed declaratory relief. In Travelers Insurance Co. v. Emery\(^{151}\)—in which the injured party had not filed a complaint, so the underlying action did not even yet exist—the district court held that a declaratory judgment was proper, and remanded for a determination of coverage.\(^{152}\) The court noted that under the declaratory judgments act, a trial court may render judgment of any fact upon which the existence of a right may depend, even if the right may exist only in the future.\(^{153}\) The court stated, “It is patently clear from this record that Travelers’ petition presented the lower court with an actual, bona fide, present need to have the court declare that Travelers did not cover [the insured] in this situation and was therefore not obligated to defend him in any resulting lawsuit.”\(^{154}\)

Similarly, the court in Britamco Underwriters, Inc. v. Central Jersey Investments, Inc.,\(^{155}\) quashed the trial court’s order of abatement\(^{156}\) and allowed the declaratory action to proceed.\(^{157}\) In that case, an employee of the insured’s bar had killed a patron. The decedent’s estate brought a wrongful death action against the insured, alleging the insured’s failure to intervene, and the employee’s negligence.\(^{158}\) The insurer defended under a reservation of rights, and brought a declaratory action alleging that the claims were excluded based on an Assault & Battery Endorsement and a Liquor Liability Exclusion.\(^{159}\) The court held that because the construction of the liquor liability exclusion did not involve facts common to the wrongful death action, there was “no sound policy reason” that would preclude the insurer from litigating the

\(^{151}\) 579 So. 2d 798 (Fla. 1st DCA 1991).

\(^{152}\) Id. at 802. Though the injured party had not filed suit, his attorney had sent a letter to the insured stating, “Mr. Kemp will be seeking legal redress against you.” Id. at 799. The district court, noting that no case has stated that declaratory relief is available only after a tort action has been filed, id. at 800, held that there was a bona fide controversy between the parties which gave jurisdiction under Fla. Stat. § 86.011. Id. at 800-02.

\(^{153}\) Id. at 800 (citing Fla. Stat. § 86.011 (1987)).

\(^{154}\) Id. at 802.

\(^{155}\) 632 So. 2d 138 (Fla. 4th DCA 1994).

\(^{156}\) “Abatement” operates as a stay of proceedings. It is proper in a subsequently filed action, where a prior action involving the same parties and addressing substantially the same issues is pending in a court of comparable jurisdiction. International Surplus Lines Ins. Co. v. Markham, 580 So. 2d 251, 253 (Fla. 2d DCA 1991). Abatement is not proper, however, when the interests of the parties are antagonistic, as with an insurer and the insured in a case of disputed coverage. Id.

\(^{157}\) Britamco, 632 So. 2d at 142.

\(^{158}\) Id. at 139.

\(^{159}\) Id.
issue before the conclusion of the tort case.  

D. Conde and the Split Among the District Courts of Appeal

Travelers Insurance Co. v. Emery and Britamco Underwriters v. Central Jersey Investments can be construed as merely limited exceptions to the general rule that the duty to indemnify is not subject to a declaratory judgment before liability is determined. The decision of the Fifth District Court of Appeal in Allstate Insurance Co. v. Conde, however, would not fit within this exception. The District Courts of Appeal are therefore split on the question of when coverage issues may be decided in declaratory judgment actions.

In Conde, the issue of the propriety of using a declaratory judgment action to determine factual issues is closely related to—and overlaps with—the issue of whether such a declaratory action may be adjudicated before liability is determined. Conde involved an insured who went on a rampage against his family, killing his son and seriously injuring the others. The decedent’s mother filed an action against the insured for intentional wrongdoing, a claim excluded under the policy, and negligence, which was covered under the policy.

Regarding the duty to defend, the district court noted that an insurer must defend the insured at least until covered claims have been elimi-
nated from the action. In a case like Conde, however, the duty to defend could not be determined without also addressing the duty to indemnify.

[T]here are not some claims that are covered and some that are not; the asserted claims are mutually exclusive. . . . Therefore, the insurer must provide defense until the coverage issue is resolved. In a case such as this—alternative, mutually exclusive theories—the indemnity issue and the duty to defend issue are inextricable. The resolution of one necessarily resolves the other.

Early resolution of the question is essential, because to provide a defense where there is no legal obligation to do so constitutes irreparable injury to the insurer. The Conde court allowed the declaratory action regarding the duty to defend to proceed before liability was determined, even though the duty to defend was intertwined with the duty to indemnify. Therefore, a declaration on one issue would unavoidably constitute a declaration on the other. Unlike earlier cases where the court refused to allow a pending declaratory action regarding indemnity to proceed, the Conde court refused to dismiss the declaratory action because of this effect.

166. Id. (citing C.A. Fielland, Inc. v. Fidelity & Casualty Co. of N.Y., 297 So. 2d 122, 127 (Fla. 2d DCA 1974)). Of course, if an insurer is conducting an insured's defense, there is an inherent conflict of interest; the insurer may be tempted to eliminate covered claims and leave only excluded claims.

167. Id.; see supra note 149 and accompanying text. One could argue in response that where the insurer cannot resolve the indemnification early, the negligence count will obviously remain; so long as the negligence count remains, then the insurer has a legal obligation to defend. See National Union Fire Ins. Co. v. Lenox Liquors, Inc., 358 So. 2d 533 (Fla. 1977). This argument may seem formalistic, but so is the exclusive pleading test which Florida purports to follow, in that it ignores extrinsic facts in favor of contrived pleadings.

168. See, e.g., Irvine v. Prudential Property and Casualty Ins. Co., 630 So. 2d 579 (Fla. 3d DCA 1993); Vanguard Ins. Co. v. Townsend, 544 So. 2d 1153 (Fla. 5th DCA 1989).

170. Having determined that the declaratory action could proceed regarding the coverage issues, the court faced a separate problem. The issue to be determined in Conde was a question of fact, and the Florida Supreme Court had previously held that declaratory relief is not available for such questions. Columbia Casualty Co. v. Zimmerman, 62 So. 2d 338 (Fla. 1952). For a discussion of the Zimmerman case and the resolution of factual questions in declaratory judgments, see supra part III.B.

The Conde court resolved the conflict with Zimmerman by suggesting that the pleadings may have limited the Zimmerman court's analysis:

The majority in Zimmerman, perhaps because of the pleadings, did not consider the more expansive provisions of what is now section 86.011 which specifically authorizes the court to determine if a fact exists (intentional shooting) which would establish the existence of an "immunity, power, privilege or right" (lack of coverage). If the legislature did not contemplate some fact finding in declaratory actions, it is curious why section 86.071 provides that "a determination of an issue of fact" may be submitted to a jury.

Conde, 595 So. 2d at 1007 n.4.
Two judges dissented in part in Conde, arguing that the court should not have allowed the declaratory action to go forward on both the duty to defend and the duty to indemnify before the trial court fixed the parties' liability in the tort case. They urged that the court adopt the procedure used in International Surplus Lines Insurance Co. v. Markham, under which the court could determine the duty to defend, but would defer ruling on the duty to indemnify until after liability had been decided. The majority responded that where the two duties are necessarily resolved by the same question, a determination would resolve both duties and leave nothing left to defer. In this case, a determination that Conde acted intentionally would relieve the insurer of the duty to defend, as well as the duty to indemnify. A contrary finding would mean that the insurer must indemnify and defend.

The difference between these views is more fundamental, however, than merely a concern for timing. The majority's contention that "there is nothing to defer" once a court resolves the duty to defend issue is only correct if the court considers the facts extrinsic to the pleadings to determine the duty. The Markham procedure could certainly work under the facts of Conde; it would be a simple, mechanical exercise of examining the pleadings for an asserted, covered claim. Under that procedure, the insurer in Conde would have a duty to defend, because the complaint contains an allegation of negligence.

The Conde court, however, implicitly rejecting the "exclusive pleading" test, went beyond the pleadings and stated that where the allegations are mutually exclusive, "the court must, in the declaratory judgment action, determine the 'fact' which will determine the duty to defend/indemnity issue." According to the court, the insurer must be able to participate in the coverage issue, or the danger of collusion

The Conde court held that refusing to allow determination of fact questions in declaratory actions would unduly restrict the scope of the Florida declaratory judgments statute, FLA. STAT. ch. 86 (1992). at 1007. Although the same court had previously held that a declaratory action was available only to settle the meaning of ambiguities in insurance policies, but not to resolve questions of fact, Vanguard, 544 So. 2d at 1155, the Conde court rejected the earlier case: "This interpretation limits Chapter 86 to little more than a codification of the parol evidence rule. Chapter 86 should not be read so narrowly." Conde, 595 So. 2d at 1007. Thus, the court allowed the declaratory judgment action to proceed in order to determine whether the shooting was intentional or negligent.

171. 580 So. 2d 251 (Fla. 2d DCA 1991); see also Irvine, 630 So. 2d at 580 (agreeing with Judge Sharp's separate opinion in Conde).
172. Conde, 595 So. 2d at 1010 (Sharp, J.); id. at 1011 (Diamantis, J.).
173. Id. at 1007 n.5.
174. Id.
175. See supra part I.A. for a discussion of the test for determining the duty to defend in Florida.
176. 595 So. 2d at 1008.
between plaintiff and insured would render the insured powerless to control the defense. The insurer must have a voice. “Otherwise, the insurer must sit back and provide an attorney to ‘defend’ an insured by, in concert with the plaintiff, establishing that what might be the most deliberate shooting was, in fact, a negligent shooting.”177

The Conde decision suggests that, for at least the limited type of case involving mutually exclusive theories, the insurer should be able to look beyond the pleadings to determine its duties. The court’s interpretation of chapter 86 of the Florida statutes, which allows determination of questions of fact in declaratory judgment actions whether or not they involve interpretation of a written document, is not limited to cases of mutually exclusive theories.178 In fact, the statute requires that it be “liberally administered and construed.”179 Courts should not limit its effect.

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E. Joinder of Parties in Declaratory Actions

If an insurer seeks an early declaration regarding insurance coverage, the injured party has an interest in the coverage case. One court has suggested that, because of the danger of inconsistent adjudications, an important factor in determining whether to let the declaratory judgment action proceed before the underlying action is whether the plaintiff in the underlying tort action has been joined.180

Where the courts have allowed the declaratory action to proceed, such as in Emery,181 Britamco,182 and Conde,183 the third parties had been joined. Conversely, where the courts have not permitted the declaratory action to proceed, the plaintiffs in the underlying action were not joined. Whether the joinder or lack of joinder is a major factor in these decisions, however, is not clear.184 Where the declaratory actions

177. Id.
178. The language of the statute suggests no limitation. See supra note 97 for the text of § 86.011.
179. Fla. Stat. § 86.101 (1995). “This chapter is declared to be substantive and remedial. Its purpose is to settle and to afford relief from insecurity and uncertainty with respect to rights, status, and other equitable or legal relations and is to be liberally administered and construed.” Id. (emphasis added).
183. 595 So. 2d 1005.
184. The Emery court did not mention joinder as a factor in its decision. 579 So. 2d 798. In Britamco, the court considered the joinder of the third party to be a positive, although not a necessary factor in the court’s decision. 632 So. 2d at 141.
were not permitted, the courts did not specifically mention the lack of joinder as a major factor in the decisions.\textsuperscript{185} Only the Conde court considered it "essential" to join the injured parties.\textsuperscript{186} The court stated that joinder was necessary, because "If the declaratory judgment action determines that the insured's conduct was intentional, then there would no longer be a negligence action to defend."\textsuperscript{187}

Some courts have expressed a concern with requiring all the parties to be joined, because the insurance coverage action could become more important than the underlying tort action.\textsuperscript{188} There is a fear that the insurance action will become the main action. This is not a problem, however, but is the correct result. If the only substantial asset of the tortfeasor is the insurance policy, then the insurance coverage action is the main case and the law should treat it so.

IV. "Deep Pockets," Exclusive Pleading, and Declaratory Actions

In Gray v. Zurich Insurance Co.,\textsuperscript{189} the insurer refused to defend the insured because the underlying complaint alleged an intentional tort, which was excluded under the policy.\textsuperscript{190} The California Supreme Court held that an insured should be able to look beyond the pleadings to determine whether the claim is covered, thus triggering the insurer's duty to defend.\textsuperscript{191} In explaining its decision to part from the exclusive pleading test, the court stated: "Defendant cannot construct a formal fortress of the third party's pleadings and retreat behind its walls. . . . [W]e should hardly designate the third party as the arbiter of the policy's coverage."\textsuperscript{192} Current practice in Florida, however, continues to trap the

\textsuperscript{185} Of course, those courts required the insurers to defend, and did not have to reach the joinder issue. Irvine v. Prudential Property and Casualty Ins. Co., 630 So. 2d 579 (Fla. 3d DCA 1993). In Irvine, however, the court specifically stated that it would not allow the insurer to use the declaratory judgment action as a "mini trial" to resolve the coverage issues "without the participation of the plaintiffs." \textit{id.} at 580.

\textsuperscript{186} 595 So. 2d at 1008.

\textsuperscript{187} \textit{id.}

\textsuperscript{188} See, e.g., \textit{id.} at 1011 (Diamantis, J., concurring in part and dissenting in part) ("I must respectfully dissent from the apparent effort of the majority to make the coverage issue the main focus in situations where there is an independent tort action against an insured and a separate issue concerning coverage.").

\textsuperscript{189} 419 P.2d 168 (Cal. 1966) (in bank).

\textsuperscript{190} \textit{id.} at 170.

\textsuperscript{191} \textit{id.} at 176.

\textsuperscript{192} \textit{id.}
insurer in the “formal fortress” of the injured party’s complaint, by applying the “exclusive pleading” test to determine the duty to defend.

Although Florida purports to rely upon the allegations of the complaint to determine the insurer’s duty to defend, the courts tend to read the allegations broadly to find coverage for the insured. By enforcing the strict, mechanical exclusive pleading rule against insurers, however, the courts preclude insurers from challenging bogus allegations, thus encouraging fictional claims. This allows a plaintiff and defendant to keep a claim within coverage even though the claim has no basis in fact. A concurring judge in Conde addressed this problem directly:

Given the undisputed facts of this case, absent considerations of insurance . . . , it would never occur to a lawyer to plead this plainly intentional tort as negligence . . . . I can see no good faith basis for asserting a claim of negligence in this case, although I recognize it is standard practice. The problem is that such a pleading creates a perfect conspiracy between a plaintiff and the insured and the insurer has no remedy.

The plaintiff pleads negligence in a case like this because he wants a deep pocket from which to satisfy a judgment or, even better, to obtain a settlement . . . . An insured defendant is often totally committed to the negligence pleading of the plaintiff because as long as the negligence claim is included in the complaint, the insured must be provided a defense on the intentional tort claim, a benefit he would not have if the spurious negligence claim were missing. It is also more likely the insurer will come up with the money to settle the entire case based on the cost of defending the negligence claim.

If litigation is the search for truth, then courts should allow the truth to be determined. Otherwise, by forcing insurers to undertake the expense of defending claims which are outside of coverage, the law creates settlement value in suits which otherwise would have none. When the

193. For a discussion of whether Florida actually follows this test, see supra part I.A.
194. See supra notes 32-40 and accompanying text, discussing cases in which the courts read the pleadings expansively in favor of insureds.
195. Allstate Ins. Co. v. Conde, 595 So. 2d 1005, 1008 (Fla. 5th DCA 1992). This case is discussed in more detail supra part III.D.
196. Id. at 1008-09 (Griffin, J., concurring); see also Marr Invs., Inc. v. Greco, 621 So. 2d 447, 449 (Fla. 4th DCA 1993) (“It is wrong to require the insurance company to defend against facts that are clearly not within the coverage of the policy, even though the ‘complaint’ may be.”).

The “perfect conspiracy” between the insured-defendant and the injured party-plaintiff is often reinforced by a close relationship, or by feelings of remorse between the parties. See, e.g., Conde, 595 So. 2d 1005 (de facto husband and father shot his wife and children); Spengler v. State Farm Fire and Casualty Co., 568 So. 2d 1293 (Fla. 1st DCA 1990) (boyfriend shot girlfriend in case of mistaken identity).
197. There is an additional temptation for fraud in cases where an insured hires his own counsel. One commentator hypothesized a case in which the complaint has accurately alleged a
law does not allow insurers to determine the truth, and instead helps injured parties to squeeze settlements from insurance companies for claims clearly outside of coverage, then the law, in a sense, aids in extortion.

Some who object to allowing coverage issues to be determined before liability express concern that the insured will suffer. For example, a dissenter in Conde worried that if the insurer could litigate coverage issues against its insured, it would “turn its back” on the tort action, thus requiring the insured to pay for two lawsuits, “despite the insurance policy, which guaranteed him at least one defense.”198 But the insurance policy did not, and for reasons of public policy could not, insure Osvaldo Conde for shooting his wife and children. The insurer guaranteed a defense for covered claims, not for intentional acts.

Several courts have determined that public policy supports allowing declaratory actions regarding insurance coverage, because the actions inform the parties of their rights and prospects for recovery. In Britamco Underwriters, Inc. v. Central Jersey Investments, Inc.,199 the court stated:

Generally, an insurance carrier should be entitled to an expeditious resolution of coverage where there are no significant, countervailing considerations. A prompt determination of coverage potentially benefits the insured, the insurer and the injured party. If coverage is promptly determined, an insurance carrier is able to make an intelligent judgment on whether to settle the claim. If the insurer is precluded from having a good faith issue of coverage expeditiously determined, this interferes with early settlement of claims. The plaintiff certainly benefits from a resolution of coverage in favor of the insured. On the other hand, if coverage does not exist, the plaintiff may choose to cut losses by not continuing to litigate against a defendant who lacks insurance coverage.200

Another concern with allowing insurers to determine coverage issues in declaratory actions before liability is decided is that insurers will challenge every claim. Several practicalities, however, would pre-
vent any wave of declaratory judgment actions.201 One reason is expense, especially if the insurer is also paying for the insured's defense while the declaratory judgment action proceeds—as would happen if the insurer defends under a reservation of rights. The main reason insurers will not challenge every claim is related to business, not law. Insurers realize that when they bring an action against their own insured, they will likely lose that customer forever. From a marketing perspective, declaratory judgment actions brought against the insured destroy goodwill.202 Thus, allowing the insurer to challenge sham pleadings before liability is determined should not result in insurers challenging every case.

Victim compensation is another argument against allowing insurers to bring an early declaratory action, because allowing an action might decrease an insurer's incentive to settle.203 Judge Keeton has said, "[L]iability insurance has come to be used openly and extensively as a device for insuring compensation to victims." In one Florida sexual abuse case, in which the court held that the molester did not "intentionally" harm his granddaughter when he fondled her, the court attempted to justify its decision in part by stating, "[A] conclusion in this insurance coverage case that there may be insurance coverage as compensation for injuries inflicted by the insured which the premiums received by the insurers were paid to provide for would, however incidentally, be consistent with the interests of the child." The problem with this rationale is that it treats insurance companies as public utilities established to promote the general welfare, when they are private companies that contractually agree to protect the insured for risks covered by the policy. Insurance companies spread risk, and cannot do so efficiently when they are required to pay for risks they have not agreed to cover. Public policy precludes anyone from insuring themselves against a loss he may face as a result of sexually abusing a child, or intentionally shooting his family. Yet by considering victim compensation as an important function of liability insurance, and therefore precluding the insurance company from challenging the claims made, the system, in effect, allows insurance for these activities.207

201. See supra notes 84-93 and accompanying text for discussion of the advantages and disadvantages to an insurer of filing a declaratory judgment action against its insured.
202. See Treece & Hall, supra note 85; Ericsson, supra note 88.
203. See supra notes 195-197 and accompanying text, discussing the increased value given to lawsuits seeking excluded claims when insurers cannot challenge the pleadings.
204. KEETON, supra note 27, at 233.
205. Zordan v. Page, 500 So. 2d 608 (Fla. 2d DCA 1986).
206. Id. at 613.
207. This Comment does not address mandatory insurance, such as uninsured motorist
V. Conclusion

The present state of the law requires insurers to defend lawsuits which fall outside of coverage and are brought only to reach into the insurer’s deep pocket. For the insurance system to function efficiently, it must function openly, so that insurers and insureds can determine their rights and duties under their policies. The system cannot function well where plaintiffs are permitted, even encouraged, to artfully plead their cases into coverage, and the insurer has no mechanism for determining the truth.

This Comment proposes a rule which would increase the efficacy of the declaratory judgment action as a tool for resolving insurance coverage disputes. The proposed rule certainly would not eliminate “nuisance” lawsuits, but it should decrease the number of claims based on insupportable factual allegations. This Comment proposes: that all parties should be entitled to have purely factual questions which affect legal rights determined in a declaratory action; that insurers should be permitted to determine coverage issues by declaratory judgment at any stage in the liability action; that in such early declaratory actions insurers should be permitted to determine questions common to both coverage and liability actions; and that the injured party should be permitted, but not required, to join in the coverage action. This Comment also proposes that the courts discard the “exclusive pleading” test, and allow the courts to determine the true facts of a claim, rather than encourage fictionalized allegations to trigger coverage.

VI. Proposal

This Proposal addresses three issues regarding the use of declaratory judgment actions in liability cases in Florida: whether to allow courts to determine questions of fact in declaratory proceedings, whether to allow coverage issues to be determined before liability has been decided, and whether questions common to the coverage and liability actions are subject to declaratory judgment.

Questions of Fact. Declaratory actions should be available to resolve questions of fact in insurance cases.

There is no basis in the Florida declaratory judgments statute for refusing to resolve such questions. On the contrary, the statute clearly provides for the determination of questions of fact: section 86.011 grants jurisdiction to trial courts, section 86.051 specifies that none of liability. Where insurance is mandated, there is a much stronger argument that victim compensation is part of the public policy.

208. Fla. Stat. § 86.10 (1995); see supra note 97 for relevant text.
the enumerations provided for in the statute are exclusive,209 section 86.071 provides for jury trials to determine factual issues in declaratory actions,210 and section 86.101 provides that the statute is to be "liberally administered and construed."211

The case of Columbia Casualty Co. v. Zimmerman,212 which appears to have been decided either specific to its pleadings, or based on an understanding of the prior, more restrictive Florida statute on declaratory judgments, should be overruled as contrary to the remedial purpose of Chapter 86. There is no sound policy reason to treat factual and legal questions differently for purposes of declaratory judgments.

Declaratory Judgment before Liability. Insurers should not be forced to defer an adjudication of coverage issues until the end of the liability trial.

Deferral of coverage issues harms the insurer, who must wait until the underlying action is complete, then presumably refuse to indemnify, and eventually face another lawsuit. Deferral also harms the plaintiff, who may be suing a defendant whose only asset is insurance coverage. The plaintiff would be better off knowing that insurance coverage is not available before undertaking the time and expense of the underlying litigation. Further, the insured cannot complain of not receiving a defense if the claims are not covered or if he has engaged in excluded activity.

The injured party's complaint should not give the insured more coverage than he had originally purchased. Requiring the insurer to defend claims outside of coverage based on manufactured pleadings allows the plaintiff and the defendant insured to receive benefits they would not otherwise enjoy. If the insurer cannot bring a declaratory judgment action to determine the nature of its duties, it faces the possibility of providing a defense in a trial, yet having no forum in which to challenge bogus allegations. Faced with an expensive defense of the tort action, the insurer will often offer a settlement even though the case is not covered.

Rather than force the insurer to make decisions based on the artfulness of the third party's complaint, courts should allow declaratory judgment actions to go forward, so that all parties will be able to make fully informed and rational decisions on litigation and settlement.

Questions Common to Coverage and Liability. Questions common to both liability and coverage actions should be capable of determina-

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209. Fla. Stat. § 86.051 (1995); see supra note 101 for relevant text.
212. 62 So. 2d 338 (Fla. 1952).
tion in a declaratory action, but findings made in the coverage action should not bind the insured in the liability action.

It would be inequitable to force insureds to defend themselves in a declaratory action over coverage, and then to bind the insured by any negative findings made in the coverage action in the liability action. Some courts have held that insurers may not bring declaratory actions regarding coverage if the questions to be determined are common to both coverage and liability. However, this "solution" deprives the insurer of any forum in which to determine its rights. Such a harsh rule is not necessary.

The courts should fashion a rule limiting issue preclusion between the coverage and liability suits, so that the insured is not bound in the liability action by the findings in the coverage action. One court adopted this approach, holding "intent" in a wrongful death action is not the same issue as "intent" for purposes of the intentional act exclusion. This allowed the insurer to determine its coverage obligations, but without binding the parties in the tort action. This approach allows the declaratory action to proceed on the coverage issue to determine the rights of the insured and insurer vis-a-vis each other, but independently of the injured party. The decision would be final as to coverage, but the injured party would then be free to pursue any liability action against the insured, whether coverage exists or not.

Some may argue that this rule is unfair because the coverage action may show that there is no insurance coverage, and the injured party would then simply abandon the liability action. This is precisely the correct result, though, if the goal of the liability action is to gain any possible insurance proceeds. Certainly it is better for the injured party to learn the truth earlier, rather than later, in the litigation.

Joinder. The injured party must be permitted to join in the coverage action, but must not be required to join.

Although some cases have suggested that a declaratory action should only proceed if the injured party is joined as a defendant, this rule is only necessary if the rights of the injured party are being adjudicated. If the findings in the coverage action are not binding in the liability action, as suggested in this Proposal, it would not be necessary to join the injured party in the coverage action.

The injured party must be allowed to join the coverage action, however, or there would be a danger of collusion between the insurer and the insured. If the injured party were precluded from joining, the insurer

213. See, e.g., Marr Inv., Inc. v. Greco, 621 So. 2d 447 (Fla. 4th DCA 1993).
215. See supra part III.E. for a discussion of joinder issues.
and insured would have their own potential "perfect conspiracy." They could simply seek a determination that there is no insurance coverage, thus making the liability action worthless for the injured party, who might then drop the suit. The conflict thus established would mirror that created by the exclusive pleading rule and the present law regarding declaratory actions.

Gregor J. Schwinghammer, Jr.*

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