



**LITCHFORD &
CHRISTOPHER**
PROFESSIONAL ASSOCIATION

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Legal News for Clients

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DUTY FREE:

YOUR INSURANCE COMPANY'S ABSENCE MAY BE QUITE TAXING ON YOUR PEACE OF MIND.

Whether one is engaging in traditional business activities or simply conducting personal affairs, we must all resign ourselves to the fact that risks and potential liability constantly exist. Most people attempt to defray this risk and liability by obtaining insurance coverage. They seek to acceptably limit their exposure to these undesirable phenomena. Purchasers of most liability insurance policies expect that their premium will buy peace of mind, economic security, and (last but not least) competent capable legal representation in the event of a lawsuit or other claim. Unfortunately, American Nat. Fire Ins. Co. v. M/V Seaboard Victory, 21 Fla. L. Weekly Fed. D 567 (S. D. Fla. March 17, 2009), (hereinafter "Seaboard Victory") emphasizes how, notwithstanding your purchase of the correct type and amount of insurance coverage, you may find yourself without a lawyer on your fateful day in court.

In the Seaboard Victory case, Newport Trucking asked the United States District Court for the Southern District of Florida to issue a declaratory judgment stating that its in-

surer, Underwriters at Lloyd, owed a duty to defend a liability lawsuit that had been filed against Newport Trucking. In ruling against Newport Trucking, the court first rebuffed Newport's contention that the express terms of the insurance policy created a duty to defend it in any lawsuits filed against it. The policy language at issue in that case stated "[underwriters reserve the right at their option without expense to the Insured, to conduct and control the defense on behalf of and in the name of the Insured." The court found that no duty to defend can be created where the language specifically provides the insured with the "option" to defend. Accordingly, Underwriters at Lloyd was entirely within its rights to exercise its "option" not to defend the lawsuit.

As an alternative, Newport Trucking also argued that Underwriters at Lloyd maintained a "fiduciary duty," separate and apart from the contract or any statute, which obligated the insurance company to defend Newport Trucking in the lawsuit. The court also rejected this argument out-of-hand and stated "an in-

surer's duty to defend an insured is mandated only by contract or statute, and does not arise from independent fiduciary duties." In support of its ruling, the Court cited to the Florida Supreme Court's earlier decision in Allstate Insurance Co. v. RJT Enterprises, 692 So. 2d 142, 144 (Fla. 1997).

Ultimately, the lesson here is to carefully read your policies and understand the nature of any coverage your insurer is providing before it becomes an issue. Depending upon your circumstances, you may or may not want your insurance company to incur a duty to pay for your defense. Many factors may inform this decision i.e., the nature of your business, your desire to control any litigation yourself, and/or the effect that such duty may have on the amount of your monthly insurance premiums. There is no universal right or wrong answer to this question. The real peril is to believe that a duty to defend exists . . . where in fact it does not.

YOU MAY ONLY RECOVER LOST PROFITS FOR BREACH OF A SERVICE CONTRACT

As a result of the downturn in the economy, many individuals and businesses have defaulted on contracts for services into which they previously entered. In a lawsuit, how much should a party be able to recover against the other party who ceases to perform a service contract? The Third District Court of Appeal considered this question in Marbella Park Homeowners Association, Inc. v. My Lawn Service, Inc., 34 Fla. L. Weekly D971 (3d DCA May 13, 2009).

Marbella Park Homeowners Association, Inc. ("Marbella Park") had entered into a five year landscape maintenance contract with My Lawn Service, Inc. ("My Lawn

Service"). Marbella Park stopped making payments. My Lawn Service then filed a lawsuit for breach of contract, which sought the full remaining amount to be paid under the five-year contract - \$385,000.00. After the trial court entered a judgment awarding My Lawn Service \$355,711.10 in total damages, which included a setoff for some partial payments made by Marbella Park during the litigation, Marbella Park filed its appeal. Marbella Park argued that the trial court committed error in awarding the full amount otherwise to become due under the contract as damages. Agreeing with Marbella Park, the appellate court found that the proper measure of damages for breach of a services con-

tract is the non-breaching party's lost profits, which are calculated by subtracting the non-breaching party's performance costs from the contract price. The court further noted that My Lawn Service had the burden to prove the amount of its lost profits. The appellate court therefore reversed and directed the trial court to hold an evidentiary hearing to determine My Lawn Service's lost profits for the five-year contract.

In short, a party suing for breach of a service contract is not entitled to recover all future unpaid payments. Rather, a party may only recover the profits it would have made had the other party not defaulted under the contract.

INTRODUCING OUR SUMMER CLERKS

We were fortunate to have two clerks from law schools, Jeff Dambly and Willa Kalaidjian, working with our legal team this summer. Their enthusiasm for the practice of law was a breath of fresh air.

Jeff Dambly

Jeff Dambly will be entering his third year at the University of Florida Levin College of Law in the fall. A Floridian from an early age, Jeff also went to the University of Florida for his undergraduate education, where he received degrees in Political Science and Classical Studies.

The majority of Jeff's time in law school is spent coordinating activities for the UF Jessup Moot Court team, for which he will serve as president this coming year. Jeff

looks to improve upon the successes of this past year's team.

When asked about his experience at Litchford & Christopher, Jeff said, "This summer has been an incredibly valuable experience for me. It has been a pleasure and honor to work for such an excellent and experienced group of attorneys. Every day has provided me with a better understanding of what it takes to be a successful attorney."

Willa Kalaidjian

This coming fall, Willa Kalaidjian will be returning to Emory University to complete her final year of law school. Willa currently serves as Executive Articles Editor of the Emory International Law Review. This past spring, her

comment was chosen for publication in the Emory International Law Review. Willa will also participate in the Emory Barton Juvenile Defender Clinic this fall.

Willa completed her undergraduate studies at Columbia University in New York where she majored in Visual Arts. While in college, she participated as a mentor in the Big Brother/Big Sister program. After graduating, she spent three years teaching high school math in Brooklyn as part of the NYC Teaching Fellows Program and received her Masters in Education at Pace University.

When not in class, Willa enjoys cooking, photography, and spending time with her Australian shepherd.

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TOP FIVE NO-COST STRATEGIES TO KEEP BUSINESS UP ↑
WHEN THE ECONOMY IS DOWN ↓

No matter what type of business you're in, sales, service or manufacturing, times are tough right now. The following are five sensible no-cost strategies to survive until better days return:

1. **"It's All for One and One for All."** - If you have a great staff or workforce, capitalize on your resources. Good people will always figure how to get the job done, even in adverse conditions. Utilize employees' untapped strengths, skills, talents, education, experience, etc. to bring new ideas and survival strategies to the table. Invest in People (Not Things). People want to be part of the solution.
2. **"All Hands on Deck!"**- Train everyone to market and to make the most of any sales opportunity. Also, cross train in case lay-offs become necessary.
3. **"Tighten your Belt...but Don't Cut off your Circulation."** Look around...get rid of waste, but don't cut back on what's necessary for your staff to do their jobs properly.

Never unduly sacrifice quality to save a dollar.

4. **Treat your existing customers/clients like GOLD.** Your most loyal customers and long-time clients will stick it out with you and continue to "spread a good word" about you during hard times if you show your appreciation. Satisfied customers are your best source of "free advertising."

5. **Don't Stop Advertising.** Many businesses are cutting back on their marketing budgets in order to make ends meet. This is a big mistake. It necessarily creates a void that must be filled. A downturn in the economy creates opportunities to accelerate growth faster than your competitors. This means it may be the best time to step up your marketing — at least in quality if not quantity. Take advantage of your competitors' error in judgment by increasing your marketing efforts and filling that void.*

Of course there are many other ways to keep your business viable in this economy (if

you have the money to spare). Regardless of your financial resources however, you can apply these practical "no-cost" techniques now to help your business weather the storm.

* In a study of U.S. recessions, McGraw-Hill Research found that business-to-business firms that maintained or increased advertising expenditures during the 1981-1982 recession averaged significantly higher sales growth than those that eliminated or decreased advertising. In fact, by 1985 companies that were aggressive recession advertisers grew their revenue over 2.5 times faster than those that reduced their advertising.

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LITCHFORD &
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AND YOUR LOVED ONES A
HAPPY SUMMER!



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Litchford & Christopher is a Florida law firm representing clients involved in difficult business disputes. We try lawsuits. The firm, established in 1985, is an "AV-rated" firm with clients of varying sizes – from small, local businesses to national, Fortune 500 corporations – and in diverse industries.