SC94250

IN THE SUPREME COURT OF MISSOURI

JIMMIE LEE TAYLOR,

Plaintiff/Appellant,

v.

THE BAR PLAN MUTUAL INSURANCE COMPANY

Defendant/Respondent.

APPEAL FROM THE CIRCUIT COURT OF JACKSON COUNTY

DIVISION 1

Cause No. 1016-CV38900

Honorable Sandra C. Midkiff

SUBSTITUTE BRIEF OF RESPONDENT THE BAR PLAN MUTUAL INSURANCE COMPANY

THE BALDWIN LAW GROUP
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STATEMENT OF FACTS

In September of 2006, Appellant Jimmie Lee Taylor, the trustee and sole beneficiary of The Jimmie Lee Taylor and Leilla V. Taylor Revocable Trust ("Trust") retained Wirken Law Group, P.C. ("Law Group") and James Wirken ("Wirken"). *See* Legal File ("L.F."), pp. 438-39.[1] Taylor originally retained Wirken to pursue certain claims that he and the Trust had. L.F., pp. 438-39. However, Wirken continued to represent Taylor in the handling of matters related to his own and his wife's estate planning and in regards to the estate planning and administration of Leilla V. Taylor's estate during 2007-2008. L.F., p. 439. Therefore, Wirken became "thoroughly knowledgeable about the assets and resources of [Taylor] and Trust for investment." L.F., p. 410. Moreover, Taylor and his wife "had no experience with investing and were not sophisticated investors." *Id.* Therefore, "they sought the advice of J. Wirken regarding the investment of their personal assets and the assets which had been in Trust and were being transferred through inheritance to [Taylor]. *Id.*

A. Facts Regarding the Underlying Loans to The Law Group

In 2007, Wirken suggested Taylor have the Trust loan money to the Law Group on 3 separate occasions. *See* L.F., p. 439. On April 5, 2007, Taylor loaned the Law Group $100,000.00. *Id.* On May 21, 2007, Taylor loaned the Law Group another $100,000.00. *Id.* On June 7, 2007, Taylor loaned the Law Group a final $50,000.00. *Id.* In exchange for the loans, the Law Group executed promissory notes, which Wirken personally

[1] Wirken was a 100% equity owner of the Law Group. See L.F., pp. 347-48 and p. 423.

guaranteed. L.F., pp. 439-40. In these promissory notes, the Law Group agreed to repay the loan principal, pay 10% interest until default, and pay 15% interest after default. *Id.*

Wirken never advised Taylor he should see another lawyer about loaning money to the Law Group. L.F., p. 50. "Wirken did not disclose in writing to Taylor, as required by the Rules of Professional Responsibility, all the details of the loans to Group, including the likelihood of repayment and the creditworthiness of Group and Wirken." L.F., p. 434. In addition to not disclosing the terms and risk of the loans, Wirken "did not advise Taylor to consult with others regarding the wisdom of making the loans to Group, the terms of the loans, the security for the loans, or the creditworthiness of Group or Wirken." *Id.*

To obtain the loans, Wirken told Taylor that the Law Group could and would repay the loans with fees from contingency cases that would settle before the end of the year. L.F., p. 440. In actuality, Wirken did not know whether these contingent fee cases would favorably settle and the Law Group would earn these fees, if at all, in time to repay the loans promptly. L.F., p. 440. When making the loans, Appellant relied on the truthfulness of Wirken's statements about the Law Group being able to repay the loans from future contingent fees. *Id.* Wirken served his own and the Law Group's interests rather than Taylor's interests when he advised Taylor to loan money to the Law Group suggesting that the Law Group would repay the loans from resources that Wirken did not know whether it would have. *Id.*

Wirken drew the Notes for the three loans and thereby was providing legal services to Taylor. L.F., p. 440. During the time when Wirken drew these notes and advised Taylor on how the Law Group would repay these loans, Taylor believed Wirken was his lawyer and was acting in his best interests, and Wirken admitted that he was acting as the attorney for Taylor and for the Trust and had a fiduciary duty to them as clients. *Id.*

However, Wirken and the Law Group failed to repay the loans when the contingency cases did not settle in time to provide them with the resources to repay the loans. L.F., p. 441.

B. <u>Facts Regarding the Underlying Loans to Longview</u>

Wirken also advised Taylor that he was aware "of a tremendous investment opportunity and that [Taylor] should put as much money as he could in that opportunity, Longview Village Development Company." L.F., p. 411-412. Wirken "represent[ed] to [Taylor] that the personal guarantors of the notes to Longview had deep pockets implying that [Taylor's] investment would be repaid…." L.F., p. 419. However, Wirken failed "to advise [Taylor] of the high risk nature of the investment and fail[ed] to reveal that the personal guarantors of these loans had likely effectively shielded their personal assets from execution by creditors." *Id.*

Based upon Wirken's advice, Taylor loaned $150,000.00, $90,000.00, and $21,740.00 to Longview in a series of loans from May through June of 2007. L.F., pp. 442-44. By the terms of the promissory notes, the Longview loans bore 32% interest payable to Taylor. *Id.* Longview did not repay any of these loans. *Id.*

When asked about the Longview loans, Wirken denied "even say[ing] it was a good investment…." L.F., p. 160. Wirken also "stated he never had any specific conversations with [Longview] with regard to Jim Taylor's investment that I am aware of." L.F., at p. 161. However, Wirken admitted that Longview paid him a commission for delivering Taylor as a lender. L.F., p. 442. Wirken testified that, "his best assumption is that they were for 5 percent of what somebody had invested that I had referred to the people at Longview Village." L.F., p. 160. In fact, Wirken testified that "I was pleased to be able to get the finder's fee, I thought it was a benefit to Jim Taylor and I hoped it would be a benefit to the people that he had made the investment with…." L.F., p. 159.

That said, Wirken did not advise Taylor of facts he was obliged to disclose by reason of his conflict of interest due to Longview paying him a finder's fee, such as his arrangement to receive a commission, or that Longview already owed him money, or about the advisability of obtaining the advice of other counsel regarding these transactions. L.F., pp. 444-45. Instead, Taylor only learned of the commissions Longview paid Wirken and the debt Longview owed Wirken after he made the loans. These facts would have altered Taylor's decision to loan money to Longview. L.F., pp. 444-45.

In all three Longview loan transactions, Wirken acted as Taylor's lawyer. L.F., p. 444. As Taylor's lawyer, Wirken performed legal services for him in these Longview loan transactions by passing documents from Longview to Taylor through his offices, implying that Wirken would review the paperwork and transaction details to see that Taylor's best interests were served, and by serving as a vehicle for funding the loans from Taylor to Longview. L.F., p. 446. Wirken breached his fiduciary duty to Taylor failing to disclose he would receive a commission for the loans and that Longview owed him money, and as a result of that breach the Taylor was damaged in the amount of the loans. *Id.*

C. <u>Underlying Lawsuit</u>

After the loan defaults, Taylor filed suit against Wirken and the Law Group. The Second Amended Petition in the underlying case was the operative pleading when the Court entered the underlying judgment. L.F., pp. 408-20. In Count I, Taylor alleged that Wirken and the Law Group breached their fiduciary duties to him as his attorney when Wirken advised that he have the Trust loan money to the Law Group. L.F., pp. 415-17. In Count II, Taylor claimed that Wirken and the Law Group breached their contracts with the Trust by failing to repay the loans. L.F., pp. 417-18. Count III alleged that Wirken and the Law Group breached fiduciary duties that they owed Taylor in their representation of him in the Longview loans by failing to disclose material information. L.F., pp. 418-19. In the common allegations that were incorporated into each count of the Second Amended Petition, Taylor alleged that Wirken was acting as the agent and servant of the Law Group.

The Bar Plan provided Wirken and the Law Group with a defense against Taylor's suit under the Lawyers Professional Liability Insurance Policy bearing number 0003049-2007, with the effective dates August 1, 2007 to August 1, 2008 ("Policy"). L.F., p. 11. The defense was under a reservation of rights to decline coverage if the Court entered a judgment for alleged acts and/or omissions that the Policy did not cover. During litigation, Wirken and the Law Group asked The Bar Plan to withdraw its reservation of rights and unconditionally commit to covering any judgment Taylor obtained. *Id.* The Bar Plan declined, and thereafter, Wirken and the Law Group asked The Bar Plan to withdraw from its defense of them. *Id.*

On April 21, 2010, the Hon. W. Stephen Nixon presided over a bench trial of the underlying case. L.F., p. 437. On November 9, 2010, Judge Nixon entered a judgment for Taylor against Wirken and the Law Group finding that Wirken was acting in the course and scope of his agency for the Law Group. L.F., p. 438. The judgment awarded Taylor $415,971.69 on Counts I and II and $524,873.13 on Count III. L.F., pp. 446-47.

D. <u>Garnishment Action</u>

Taylor then filed this garnishment action against The Bar Plan. The Bar Plan moved for summary Judgment, relying on the following policy language:

II. COVERAGE

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

The Company will pay on behalf of an Insured all sums, subject to the Limit(s) of Liability, Exclusions and terms and conditions contained in this Policy, which an Insured shall become legally obligated to pay as Damages as a result of CLAIMS (INCLUDING CLAIMS FOR PERSONAL INJURY) FIRST MADE AGAINST AN INSURED DURING THE POLICY PERIOD OR ANY APPLICABLE EXTENSION PERIOD COVERAGE AND REPORTED TO THE COMPANY DURING THE POLICY PERIOD, THE AUTOMATIC EXTENDED CLAIM REPORTING PERIOD, OR ANY

APPLICABLE EXTENSION PERIOD COVERAGE by reason of any act or omission by an Insured acting in a professional capacity providing Legal Services.

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III. EXCLUSIONS

THIS POLICY DOES NOT PROVIDE COVERAGE FOR ANY CLAIM BASED UPON OR ARISING OUT OF:

****

B. An Insured's capacity as:

4. A legal representative of investors in regard to and resulting in investment in an enterprise in which an Insured owns an equity interest or for which the Insured receives a fee or commission from an Entity other than the investor.

L.F., pp. 356, 360.

Based on the foregoing, The Bar Plan argued that the policy's insuring clause did not provide coverage because Wirken did not provide legal services to Taylor. In the alternative, The Bar Plan argued Section III(B)(4) precluded coverage because Wirken represented Taylor in the Wirken and Longview loans and had an equity interest in the Law Group and was paid a commission by Longview.

In response to The Bar Plan's summary judgment motion, Taylor never claimed that Exclusion III(B)(4) was ambiguous; L.F., pp. 387-405, 450-59, 460-61, 471-82. Nor did Appellant argue that the concurrent proximate cause rule applied. *Id.* Nor did

Appellant argue that all of Section III(B) was ambiguous. In fact, Taylor tellingly never addressed Exclusion III(B)(4) at all below. He did, however, file a cross-motion for summary judgment arguing that there should be coverage. The trial court granted The Bar Plan's Summary Judgment Motion and denied Taylor's Cross Motion for Summary Judgment. L.F., pp. 496-507.

The trial court found the Policy's insuring clause applied because Wirken had acted as Appellant's lawyer for the Wirken and Longview loans. However, it then "found the coverage is defeated by the **unambiguous** language of the policy exclusion in Section III(B)(4)." L.F., p. 506. (emphasis supplied) It found that, as Wirken was 100% equity owner of the Law Group, "the loans to his firm fall squarely within the exclusion when he acted as legal representative for Mr. Taylor 'in regard to and resulting in investment in which an insured owns an equity interest.'" *Id.* As to the Longview loans, the court found that it was undisputed that Wirken received a commission from that company for Taylor's investment in it. L.F., p. 507. Therefore, it found Section III(B)(4) precluded coverage for these loans because "the loans were **investments** for which the insured receives a fee or commission from an Entity other than the investor." *Id.* (emphasis supplied)

SUMMARY OF ARGUMENT

The Bar Plan Policy provides malpractice insurance for lawyers. As in any malpractice insurance, it contains exclusions that preclude coverage for claims arising from certain categories of professional acts and/or omissions. One category of claims the Policy does not cover is claims "based upon or arising out of" the "insured's capacity" as a "legal representative of investors in regard to and resulting in an investment in an enterprise" when the insured either (a) "owns an equity interest" in the enterprise in which the investment was made or (b) "receives a fee or commission from an [e]ntity other than the investor" for the investment. Section III(B)(4) of the Policy. Exclusion III(B)(4) makes it clear that the Policy does not provide coverage where a lawyer represents a client in investments in which the lawyer has a financial stake because the lawyer either owns the company receiving the investment or is getting paid to solicit the investment.

This Exclusion merely reinforces the reasonable expectations that any lawyer purchasing the Policy would have. Before ever opening the Policy to read it, no reasonable lawyer would expect The Bar Plan to serve as the guarantor of loans that he got his client to make to his practice, but that the practice never repaid. Nothing about reading the Exclusion would change that reasonable expectation. Moreover, after reading the Exclusion, no reasonable lawyer would believe that the Policy insured him for having a client commit his or her money to the lawyer or to a third party who pays the lawyer, so long as the client commits the money in the form of a loan rather than an equity interest purchase.

There is no question that here Wirken put himself in the position where his and his client's financial interests conflicted, which is unmistakably the exact reason for the Exclusion. He represented Taylor in transactions that Wirken had a financial interest in, completely aside from whatever legal fees he was receiving directly from Taylor. Specifically, Wirken owned 100% of the Law Group and Longview paid him a fee for soliciting the Longview loans. The only coverage question is whether a reasonable person purchasing the Policy would believe the above Exclusion applied to these transactions. The untortured answer is yes.

Nevertheless, Taylor claimed for the first time on appeal that the terms "investment" and "investor" in Exclusion III(B)(4) are ambiguous. However, lay dictionaries have an amazingly uniform and simple definition of investment, namely: the expenditure of money for profit. Moreover, Black's legal dictionary provides a similarly broad definition. Hence, these loans constitute investments under that term's plain meaning because Taylor provided the Law Group and Longview with money in exchange for the promise of interest income. To avoid the plain meaning of these commonly used terms, Taylor attempts to rewrite the Exclusion so that it only applies to financial transactions that meet the technical requirements that define a security. However, Exclusion III(B)(4) does not use the technical term securities. Instead, it uses the deliberately broad lay term "investment." The deliberate use of a broad term in an exclusion does not equal ambiguity in that setting, and Taylor cannot manufacture an ambiguity by pretending otherwise or by substituting another more specific word, like "securities."

The second point Taylor raised for the first time on appeal, is that the concurrent proximate cause "rule" should apply and result in coverage. This rarely invoked "rule" does not apply here as there is no independent non-excluded covered cause. It is clear that each alleged breach found by the underlying judgment arose out of and are directly related to Wirken representing Taylor in regards to the Wirken and Longview loans. Wirken allegedly breached his ethical duties in regards to the loans to the Law Group by not making the disclosures required when a lawyer enters into a business transaction with a client. Moreover, Wirken allegedly breached the fiduciary duties that he owed Taylor as his attorney for these loans by serving Wirken's own interest rather than the interests of Taylor when he advised Taylor to loan the money to the Law Group, and when he advised Taylor that the Law Group would repay the loans from resources that Wirken did not know whether the Law Group would have. As to the Longview loans, Wirken allegedly breached his duties to Taylor by not revealing the commission Longview was paying him to solicit the loans and by failing to advise Taylor that Longview already owed him money.

These are Wirken's alleged breaches of fiduciary duty on which the Court entered judgment. They are directly connected with Wirken having represented Taylor in the Wirken and Longview loans and the duties breached literally arose because of the specifically prohibited situations described in the Exclusion. There is no separate independent non-excluded cause alleged or found, so the concurrent proximate cause "rule" (which Missouri courts basically invoke only as to failure to supervise), has no place here.

The third point Appellant raised for the first time on appeal is that Section III(B) of the Policy is ambiguous *in its entirety*. The authorities Taylor cites do not support this argument. Section III(B) states the Policy will not cover liability arising out of an insured acting in various capacities. It then contains four (4) separate *numbered* paragraphs specifying four different situations of representation that sometimes occur in some lawyers' practices and which the Policy excludes from coverage. However, Taylor argued for the first time on appeal that the use of the word "and" between paragraph 3 and paragraph 4 makes it unclear whether all of Section B is really just one giant, collective, impossibly multi-faceted exclusion that would only apply if the insured has simultaneously acted in every excluded situation listed in Section III(B)(1- 4). This argument results in the preposterous reading that the Exclusion would only apply if the insured has simultaneously acted as a: Public official/ERISA fiduciary/real estate agent/securities broker/insurance agent/accountant/legal representative of investors resulting in investment in an enterprise in which an Insured owns an equity interest or for which the Insured receives a fee or commission from an Entity other than the investor. An ordinary lay person reading the Policy would never in a million years read Policy Section III(B) that way. In fact, Appellant's own cite (*Burns*) in support of this argument actually shows the obvious point here, *i.e*. that separate *numbered* exclusions in an exclusion section of an insurance policy, when connected by an "and" are indeed **separate** exclusions.

RESPONSE TO POINTS RELIED ON

I. THE CIRCUIT COURT CORRECTLY ENTERED SUMMARY JUDGMENT IN FAVOR OF THE BAR PLAN AND AGAINST APPELLANT BECAUSE EXCLUSION III(B)(4) TO THE POLICY UNAMBIGUOUSLY PRECLUDES COVERAGE IN THAT WIRKEN REPRESENTED APPELLANT IN LOANS MADE TO THE LAW GROUP AND TO LONGVIEW, THOSE LOANS CONSTITUTED INVESTMENTS UNDER THAT TERM'S PLAIN MEANING, AND WIRKEN OWNED AN EQUITY INTEREST IN THE LAW GROUP AND RECEIVED A COMMISSION FROM LONGVIEW FOR THE LOANS APPELLANT MADE TO THAT COMPANY.

Bar Plan Mut. Ins. Co. v. Chesterfield Mgmt. Associates, 407 S.W.3d 621 (Mo. Ct. App. 2013)

Vaughn v. Guarino-Sanders, 2012 WL 1522724 (6th Cir. May 1, 2012)

II. THE CIRCUIT COURT CORRECTLY ENTERED SUMMARY JUDGMENT IN FAVOR OF THE BAR PLAN AND AGAINST APPELLANT BECAUSE EXCLUSION III(B)(4) PRECLUDES COVERAGE FOR DAMAGES CAUSED BY AN ATTORNEY ACTING IN THE PRESCRIBED REPRESENTATIONS WHERE THE LAWYER HAS A CONFLICT DUE TO A FINANCIAL SELF-INTEREST NO MATTER THE CAUSE OF LOSS AND REGARDLESS, WIRKEN'S BREACHES OF FIDUCIARY DUTY ARE RELATED TO HIM HAVING ACTED AS APPELLANT'S LAWYER FOR THE LAW GROUP

AND LONGVIEW LOANS, SO THE CONCURRENT PROXIMATE CAUSE RULE HAS NO APPLICATION

Friar v. Statutory Trustees of Kirkwood Sports Ass'n, Inc., 959 S.W.2D 808 (Mo. Ct. App. 1997)

Green v. Penn-Am. Ins. Co., 242 S.W.3D 374 (Mo. Ct. App. 2007)

Hunt v. Capitol Indem. Corp., 26 S.W.3D 341 (Mo. Ct. App. 2000)

III. THE CIRCUIT COURT CORRECTLY ENTERED SUMMARY JUDGMENT IN FAVOR OF THE BAR PLAN AND AGAINST APPELLANT BECAUSE A REASONABLE INSURED WOULD KNOW THAT EACH NUMBERED PARAGRAPH OF SUBSECTION B OF THE EXCLUSION SECTION OF THE POLICY IS A SEPARATE EXCLUSION

Burns v. Smith, 303 S.W.3d 505 (Mo. 2010)

Mendota Ins. Co. v. Ware, 348 S.W.3d 68 (Mo. Ct. App. 2011)

ARGUMENT

STANDARD OF REVIEW FOR ALL POINTS

A court may enter summary judgment when the undisputed material facts require entry of judgment as a matter of law in favor of the moving party. *ITT Commercial Finance Corp., et al., v. Mid-America Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. 1993); Missouri Supreme Court Rule 74.04. A fact is material when its resolution is dispositive and a "genuine issue" of fact exists where the record contains competent materials that evidence two plausible, but contradictory, accounts of the material facts. *Id.* at 382.

A defendant establishes the right to summary judgment by showing: (1) facts that negate any one of the claimant's elements; (2) that the non-movant…will not be able to produce evidence sufficient to allow the trier of fact to find the existence of any one of the claimant's elements; **or** (3) that there is no genuine dispute as to the existence of each of the facts necessary to support the movant's properly-pled affirmative defense. *Id.* at 380 (citing Missouri Supreme Court Rule 74.04(b)). Once the movant makes any one of the above showings, the plaintiff must then prove that a dispute exists over a material fact or prove that the undisputed material facts do not entitle the defendant to summary judgment. *Id.*

The interpretation of an insurance policy, including the determination of whether coverage and exclusion provisions are ambiguous, is a question of law that this Court reviews *de novo*. *Burns v. Smith*, 303 S.W.3d 505, 509 (Mo. 2010). Where, as here, the trial court granted summary judgment, this Court also applies a *de novo* standard of review. *Id.* This Court can affirm summary judgment on any ground supported by the summary judgment record. *Allen v. Scott, Hewitt & Mize, L.L.C.*, 186 S.W.3d 782, 785 (Mo. Ct. App. 2006).

I. THE CIRCUIT COURT CORRECTLY ENTERED SUMMARY JUDGMENT IN FAVOR OF THE BAR PLAN AND AGAINST APPELLANT BECAUSE EXCLUSION III(B)(4) TO THE POLICY UNAMBIGUOUSLY PRECLUDES COVERAGE IN THAT WIRKEN REPRESENTED APPELLANT IN LOANS MADE TO THE LAW GROUP AND TO LONGVIEW, THOSE LOANS CONSTITUTED INVESTMENTS UNDER THAT TERM'S PLAIN

MEANING, AND WIRKEN OWNED AN EQUITY INTEREST IN THE LAW GROUP AND RECEIVED A COMMISSION FROM LONGVIEW FOR THE LOANS APPELLANT MADE TO THAT COMPANY.

A. Missouri's General Rules for Interpreting Insurance Policies

"[I]n construing the terms of an insurance policy, this Court applies the meaning which would be attached by an ordinary person of average understanding if purchasing insurance...." *Allen v. Cont'l W. Ins. Co.*, 436 S.W.3d 548 (Mo. 2014), reh'g denied (Aug. 19, 2014)(internal citations omitted). Thus, "[t]he general rule in interpreting insurance contracts is to give the language of the policy its plain meaning." *Id.* The foregoing is an objective, not a subjective, test in which the Court determines what an average insured would believe policy language means. *See Shearson/American Express, Inc. v. First Continental Bank & Trust Co.,* 579 F.Supp. 1305, 1310 (W.D. Mo. 1984). Therefore, the subjective understanding of a particular insured about policy language is not controlling if it disagrees with the understanding of similarly situated insureds. *Id.* As what matters is the objective understanding of the average insured, courts consult a dictionary to determine how an average insured would understand a policy term. *Id.* An objective standard also means that a disagreement between the insurer and insured over the meaning of policy language does not make that language ambiguous. *Lero v. State Farm Fire & Cas. Co.*, 2011 WL 5041191 (Mo. Ct. App. Oct. 25, 2011). Rather, "an ambiguity exists only when a phrase is 'reasonably open to different constructions.'" *Allen, 436 S.W.3d 548.* Therefore, a court only can find that policy language is ambiguous "if reasonable persons may honestly and fairly differ in their construction of the terms." *Bar Plan Mut. Ins. Co. v. Chesterfield Mgmt. Associates*, 407 S.W.3d 621, 628 (Mo. Ct. App. 2013), reh'g and/or transfer denied (May 23, 2013), transfer denied (Oct. 1, 2013).

Moreover, when determining whether language is ambiguous '[t]he entire policy and not just isolated provisions must be considered." *Floyd-Tunnell v. Shelter Mut. Ins. Co.*, SC93904, 2014 WL 3729882 (Mo. July 29, 2014). Thus, "[t]he mere presence of an exclusion does not render an insurance policy ambiguous" because "definitions, exclusions, conditions, and endorsements are necessary provisions in insurance policies. If they are clear and unambiguous within the context of the policy as a whole, they are enforceable." *Id.*

"If language in an insurance policy is ambiguous, this Court resolves the ambiguity against the insurer-drafter." *Allen*, 436 S.W.3d 548. However, and this is key, "[m]ultiple or broad meanings do not necessarily create ambiguity[….]" *Chesterfield Mgmt.*, 407 S.W.3d at 628. Instead, sometimes "there is often a deliberate purpose in using a word with a broad meaning or multiple meanings in a contract, namely to achieve a broad purpose." *Id.* Therefore, (as with the determination of ambiguity in general) whether a word with broad or multiple meanings is ambiguous depends on the particular circumstances and context. *Id*.

"Absent an ambiguity, however, Missouri appellate courts do not resort to canons of construction." *Allen*, 436 S.W.3d 548. "If the policy's language is unambiguous, it must be enforced as written." *Id.* "In addition, courts may not unreasonably distort the language of a policy or exercise inventive powers for the purpose of creating an ambiguity where none exists." *Id.*

Furthermore, "[a] fair and lawful interpretation is required even when the doubts are to be resolved in favor of the insured. The rule of favorable construction for the insured should not be applied so as to...permit a construction which is *unreasonable and not in keeping with the language used and the obvious intent of the parties.*" *Mendota Ins. Co. v. Ware*, 348 S.W.3d 68, 71 (Mo. Ct. App. 2011) (emphasis in original) citing 2 COUCH ON INSURANCE 3d § 22:17, at 22–94 to 22–95 (2010). As any interpretation of the Policy language has to be both reasonable and fair to be lawful, "not every ambiguity in an insurance policy is resolved favorably to the insured, but only where a reasonable person in the position of the adherent would have expected coverage." *Id.*

B. The Terms "Investment" and "Investor" in Exclusion III(B)(4) Are Not Ambiguous.

Exclusion III(B)(4) precludes coverage where a lawyer represents a client who commits money to a company the lawyer owns or that is paying the lawyer a commission. Taylor does not dispute that Wirken represented him in the Law Group and Longview loans, nor could he as the Judgment is based on that finding. Nor does Taylor deny that Wirken owned the Law Group or that Longview paid Wirken a commission for soliciting the Longview loans. Therefore, the sole question is whether these loans constituted investments.

Frankly, the key issue here is that any reasonable lawyer purchasing the Policy would understand in a heartbeat that the obvious focus of the Exclusion is to preclude coverage in those specified situations where a lawyer gets a client to commit money in these two forbidden situations in which the lawyer has a financial self-interest, and therefore it matters not which particular form the client's financial commitment took, i.e. equity or a debt. Even if the focus of the Exclusion were literally on the term "investment," rather than the two situations of lawyer self-interest the Exclusion describes, a reasonable insured would read the Exclusion to deliberately and unambiguously exclude both stock and debt transactions as both are encompassed in the normal meaning of the word "investment."

When not otherwise defined in a policy, the ordinary meaning of a term controls, and the ordinary meaning of the term investment is amazingly uniform. Merriam Webster defines investment as "an expenditure of money for income or profit." Webster's Third New International Dictionary (1993**).** **Merriam Webster has no other non-archaic financial definition of the term**. The New Oxford American Dictionary defines investment as: "the action or process of investing money for profit or material result." New Oxford American Dictionary (3 ed.). **It, too, has no other financial definition of the term.**

However, Taylor mentions neither of the above scholarly dictionaries or the complete absence therein of any alternative non-archaic financial definition. Instead, Taylor cites to the American Heritage Dictionary's definition of "invest." Even here, Taylor stretches to the breaking point to find an ambiguity where none exists. First, Taylor raises the fact that investment has non-financial definitions as if that could create ambiguity. Thus, Taylor's counsel notes that an American Heritage definition of investment that states "to endow with authority or power: The Constitution invests Congress with the Power to make laws." *See* Appellant's brief, at p. 31. However, as Taylor's counsel well knows, the test for ambiguity is not and cannot be simply that there are multiple definitions of a term, but is rather: Whether a word has multiple definitions that would therefore reasonably generate confusion in an insured as to the meaning of the term as it is used in that Policy provision. Otherwise, pretty much every term would be ambiguous and drafting policies would be impossible.

Moreover, as this Court well knows, dictionaries list a term's most common usage first. The first definition of the sole dictionary Taylor cites, American Heritage, is "[t]o commit (money or capital) in order to gain a financial return: invested their savings in stocks and **bonds**." American Heritage Dictionary of the English Language, Fifth Edition (2011)(emphasis added). In other words, American Heritage's primary definition of "invest," like the definitions in the other dictionaries cited above, is the (a) outlay of money (b) for profit. Or to put it even more simply, investing is using your money to make more money.

Rather than use the first and most common definition in the dictionary he selected, Taylor points to the American Heritage definition that states, "to purchase with the expectation of benefit." This is the last, or **eighth**, definition of "invest" in Taylor's American Heritage Dictionary. In short, to manufacture an ambiguity, Taylor ignores the primary definition of invest, and skips over the next six definitions before getting to the forced definition he wants. Moreover, he then changes that last American Heritage definition to better suit his argument by rewriting it to state the most "common use of the term invest is to commit money to purchase something that will increase in value in the future." *See* Appellant's Brief at p. 32. Unfortunately for Taylor, the example American Heritage gives for this eighth/last definition is: "We decided to invest in a new car." Most people who have bought cars know they are depreciating assets that lose value over time, and are worth less than was paid for them the moment you drive them off the lot. Hence, and unsurprisingly, even Taylor's favored, but least common, use of the term "invest" per his own choice of dictionaries does not mean what he proposes, i.e. purchasing an asset intended to appreciate in value over time. Instead, the definition Taylor cites is the very colloquial (hence being the last) definition of the term "invest," and the literal example references a purchase an ordinary layman knows is an asset that has a declining value from the moment of purchase. No ordinary lay reader of the Policy would believe that this last and eighth definition of "invest" Taylor cites has anything to do with this Exclusion.

Having essentially made up a definition of investment that suits his purposes, Appellant then argues his made up definition is what most lawyers purchasing the Policy would have. He also argues that this definition shows how the plain meaning of the term investment only covers transactions that involve equity ownership, purchases, and that are tied to a company's performance. As shown above, these distinctions find no support in the lay dictionaries cited above. In fact, Appellant provides no support for these purported requirements for a financial transaction to constitute an investment whatsoever outside of his own assertion that this is what the average lawyer would believe the term means.

As with an analysis of the meaning lay persons give to a word, the best source for how a reasonable lawyer would define investment is the dictionary. The most common legal dictionary is Black's. Therefore, it stands to reason that a party attempting to determine if the average lawyer defines investment differently than a lay person would at least turn to Black's. However, Taylor's brief never mentions or cites to Black's definition of investment. That omission is telling because Black's definition of investment unsurprisingly shows that the average lawyer would define investment similarly to the reasonable layperson. The similarity is unsurprising as investment is not generally a technical legal term, except as it might be used for the purposes of a specific statute with a specific purpose. Such technical statutory usage would never be the proper source to define the word unless that specific statute were at issue, and certainly should not be used to define an average insured's understanding of a commonly used term in an insurance policy.

Black's defines investment as an "[1] expenditure to acquire property or other assets in order to produce revenue; a capital outlay [or] [2] the asset acquired or the sum invested." INVESTMENT, Black's Law Dictionary (9th ed. 2009).[2] To break Black's definition of investment down to its constituent parts, the definition has four basic requirements: (1) an expenditure of money (2) to acquire (3) property or other assets (4) in order to produce revenue. The Law Group and Longview loans meet each of these requirements.

[2] Black's remaining two definitions of investment do not relate to finance.

Requirement 1 is present as the loan transaction required expenditures by Taylor. Black's Dictionary defines expenditure as "The act or process of paying out; disbursement. 2. A sum paid out."' EXPENDITURE, Black's Law Dictionary (9^{th} ed. 2009). There is no question that Taylor disbursed money to the Law Group and Longview in exchange for the promissory notes. Elements 2 and 3 are present because Taylor acquired the promissory notes from the Law Group and Longview in exchange for the funds, and promissory notes are assets. *See e.g., Cordes v. Williams*, 201 S.W.3d 122, 136 (Mo. Ct. App. 2006)("The trial court's finding that the promissory note was an estate asset is affirmed…"). Finally, the loans satisfy Black's fourth requirement for transactions to constitute an investment because it is undisputed that the loans provided interest.

In sum, Black's definition of investment does not support Taylor's claim that an average lawyer would believe investment only includes equity transactions or transactions tied to a company's performance. To further make this point, Black's definition of investment uses "bonds held to maturity" as an example of an investment. What Taylor's brief conveniently ignores (as it must), is that, per Black's Dictionary, both bonds and promissory notes are financial instruments where the issuer promises to repay a certain amount, which is what debt investments are. See NOTE, Black's Law Dictionary (9th ed. 2009) and BOND, Black's Law Dictionary (9th ed. 2009). Neither bonds nor notes involve equity ownership purchases or are tied to a company's performance being fixed investments that pay interest income. Thus, Black's demonstrates that the average lawyer would define investment to include both equity transactions in which a party expends money to obtain an ownership interest in an enterprise and debt transactions (such as bonds, promissory notes, etc.) where a party expends money for the promise an enterprise will pay the party interest. It also shows that investments do not have to be tied up to a company's performance since fixed investments like bonds and notes are not tied to a company's performance and, in fact, that reduced risk is why certain parties invest via bonds and notes.

Taylor next argues that the loans are not investments because RSMo § 356.111(1) precluded him from "investing" in the Law Group. However, this argument fails for a variety of reasons.

First, that statutory prohibition against providing lay persons with an ownership interest in a professional corporation, as Taylor argues, clearly prohibits *equity* investment by lay persons in a professional corporation. That in no respect prohibits investments by way of a loan.

Second, Taylor points out that in addition to precluding a professional corporation from issuing shares to lay persons, the statute also precludes a professional corporation from issuing "other securities" to lay persons. However, and no matter how much Taylor wishes otherwise, the Exclusion here does not use the limited term "securities" to restrict the type of financial transactions for which it precludes coverage. Therefore, the statute precluding a professional corporation from issuing securities to a lay person simply has no application to the question of whether it precludes *investments*, much less whether a debt can constitute an investment per the Exclusion. Rather this argument is simply one of many times Taylor attempts to re-write the Exclusion more narrowly so that it only applies to securities, as opposed to investments. [3]

Third, that a statute makes certain types of financial transactions illegal for reasons specific to the purpose of that statute, such as transactions made pursuant to insider information, does not make those transactions any less of an investment when the unwary client is committing their money. To put it another way, the Exclusion would apply with equal force if, instead of getting a loan from Taylor, Wirken had actually illegally sold Taylor stock in the Law Group, and then did not have the money later to buy it back. It is of no consequence what ruse or what legitimate purpose the lawyer might have had in getting his client to invest. The deliberate idea in the Exclusion is that **all** types of investment are precluded from coverage where a lawyer in the proscribed conflicted self-

[3] Taylor also misstates the facts to make this argument. He states that the record shows he never intended to invest in the Law Group (apparently based on Appellant's forced definition of "invest" which, as already demonstrated, is not the common definition and not even the definition used in his own referenced cites). He cites to the underlying judgment, L.F., pp. 331-32. But the judgment says no such thing. Instead, it simply states that Taylor loaned money to the Law Group. The record contains no finding or statement that Appellant did not consider these loans to be investments. Appellant also tries to imply the court below found that he did not invest in the Law Group, L.F., p. 507. That is wrong because the court below properly found the loans constituted "investment," which is why it found the Exclusion applies.

interest situation, gets his client to make that financial investment, no matter whether equity or debt/loan. It would apply no matter whether that transaction was otherwise legal or was statutorily prohibited, although if indeed the transaction was illegal, all the more reason not to expect it to be covered and all the more reason to exclude it. It is entirely possible that when the lawyer is in the self-conflicted situation described in the Exclusion, he could well be desperate enough to solicit a completely improper or illegal investment, (as very likely happened here) and such an investment most of all should fall under the Exclusion. The Exclusion here never requires a determination of which kind of investment, or whether it was illegal or otherwise legitimate, because in the self-conflicted situations for the lawyer described in that Exclusion, **all** types of investment are prohibited from coverage.

Ultimately, even Taylor implicitly concedes that certain debt instruments, such as bonds, are investments. However, Taylor attempts to argue bonds are different because one traditionally acquires them by purchase whereas the Law Group and Longview Loans were not purchased. That distinction also fails. The examples of investments that Black's provides range from stocks to bonds to savings accounts. Both bonds and notes can be bought and sold (although these notes were not). However, while one opens or acquires a savings account, one does not purchase it (as it is a debt the bank owes back to you). Yet, Black's still gives a savings account as an example of an investment, which of course it is, since you have given money to the bank which pays you interest for the use of your money. Having never cited to Black's, Taylor avoided having to explain how a savings account, which like these notes, one acquires but does not "purchase," and which, like these notes, provides interest income untied to a bank's performance, qualifies as an investment under the term's plain meaning, but somehow these promissory notes do not.

Moreover, Taylor never supports his claim that short-term loans are not investments because they pay simple interest unlike bonds, which pay interest, and which Appellant concedes are investments. Taylor alleges without any support that simple interest on a short-term loan merely compensates the creditor for the economic cost of the money not being in his or her possession for the amount of time of the loan. First, this argument fails basic economics. The value of having cash in hand (i.e., the time value of the money) is the ability to invest that cash for profit. Thus, stating that a short-term loan is not an investment because simple interest "only" reimburses the time value of a creditor's money is nonsensical, circular reasoning. The "time value" of that money to the owner of that money is what that person can earn with the money if he or she invests it. In short, the normal definition or measure of the "cost" or "time value" of the money not being in the investor's possession, **is** the lost return/profit that particular person can get on their money by investing it in their particular chosen investment.

Moreover, even if Taylor's point made any logical economic sense (and it does not), he never explains why simple interest only compensates a party for the "time value" of their money whereas the interest charged by bonds somehow does more than that. Everyone knows simple interest can be usuriously high and bonds can provide low yields, so his distinction does not match with reality. Therefore, despite his many and varied efforts, Appellant once again fails to overcome the simple fact that "ordinarily a loan is an investment made for the purpose of securing interest income." *Sutro Bros. & Co. v. Indem. Ins. Co. of N. Am.*, 264 F. Supp. 273, 289-90 (S.D.N.Y. 1967) aff'd, 386 F.2d 798 (2nd Cir. 1967).

It is an irrelevant distraction to say that not all "loans" constitute investments. For example, loans that charge no interest, such as loans to friends and family, do not qualify as investments because the lender did not expect to profit financially as a direct result of simply having loaned that money. The key is whether the party engaging in making the loan undertook it with the expectation of making money directly from that loan. That is why the plain meaning of "[t]he word 'investment' comprehends the investing of money for income or profit and is equally descriptive of a purchase or a loan." *Blue River Sawmills, Ltd. v. Gates*, 358 P.2d 239, 254 (1960).

Here, there is no question that the Law Group and Longview loans were made with the expectation of profit as the loans charged healthy interest. The Law Group loans had double digit interest and the Longview loans charged 32%.[4] L.F., pp. 439-40, 442-44. Anyone with a passing understanding of economics knows those interest rates represent a massive return over inflationary increases and the return offered by many stocks. Given that the interest charged was so high, these loans were obviously financial transactions made with the expectation of profit. Moreover, Wirken and Taylor themselves thought Taylor was investing his and the Trust's money. L.F., pp. 159-160.

[4] So much for the loan is a mere payment for the, "time value of loss of use of the money" the theory.

411-412, 419, 439. Therefore, these loans qualify as investments under that term's plain meaning.

As the loans constitute investments, and Taylor concedes the rest of the Exclusion's elements, the Policy does not cover Taylor's Judgment against Wirken. The only court to interpret Exclusion III(B)(4) held that it is unambiguous and that it precludes coverage for any type of breach in the course of representing investors in either prohibited situation. *Vaughn v. Guarino-Sanders*, 2012 WL 1522724 (6th Cir. May 1, 2012). In *Vaughn*, the client alleged that the insured attorney had solicited her to invest in companies that the attorney owned. In the course of the representation, the attorney had engaged in multiple and conflicting representations, had provided her with erroneous advice, and had failed to make full and complete disclosures regarding the transactions. The court found that Exclusion III(B)(4) was unambiguous and precluded coverage no matter the type of breach, so long as it relates to either forbidden investment representation situation.

Moreover, contra to Taylor's current position, the mere fact that investment's plain meaning covers both purchasing equity and making loans does not make the term ambiguous. *The Bar Plan Mut. Ins. Co. v. Chesterfield Mgmt. Assocs.*, 407 S.W.3d 621, 629 (Mo. Ct. App. 2013) ("'[m]ultiple or broad meanings do not necessarily create ambiguity' because 'there is often a deliberate purpose in using a word with a broad meaning or multiple meanings in a contract, namely to achieve a broad purpose'"). To hold otherwise totally ignores the reality that the term is deliberately broad and was intended as such, so the Exclusion would apply in the proscribed situations to any of the ever expanding array of financial transactions (e.g., exchange traded funds, derivatives etc.) that a lawyer could have a client commit funds to. Instead, a reasonable person's understanding of investment is simply expending money to make a profit. This broad definition facially covers all financial transactions, both debt and equity based, that are undertaken for profit. That does not make the term's meaning indistinct or uncertain, or the Exclusion ambiguous. Quite the opposite, because the exclusion proscribes getting the client to commit funds to financial transactions where the lawyer has a conflicted self-interest, and that self-interest conflict is there no matter if the client commits money expecting equity or interest payments. Thus, the use of a broad term in the Exclusion simply means that the Exclusion precludes coverage for either type of financial commitment that a client undertakes for profit when his lawyer is in the proscribed conflicted situation spelled out in the Exclusion.

In addition, holding that broad definitions that cover multiple types of related acts are inherently ambiguous would require insurers to make insurance policies byzantine labyrinths of exclusions, which does not benefit insureds or insurers. Instead of having a few broad and easily understood exclusions that define the categories of acts that a policy does not cover, a policy would have to include a multitude of exclusions that mostly overlap simply to capture every potential variation of act within a category of prohibited acts. Such a consequence would not make policies clearer to the average insureds. Insureds would have to try to navigate through a thicket of mostly duplicative exclusions to see if their exact act fits within a massive list of narrow, overlapping exclusions.

Whether a term such as investment is ambiguous must be assessed in the context in which the term is used and the facts to which the court must apply the term. *Chesterfield Mgmt. Associates*, 407 S.W.3d at 629. That a court must consider context when defining a term both makes practical sense and is the law of this state. *Purcell Tire & Rubber Co. v. Executive Beechcraft, Inc.*, 59 S.W.3d 505, 510 (Mo. 2001) ("Ambiguity depends on context"). However, Taylor completely ignores that very logical legal principle when he cites to cases that he believes hold that the term "investment" is ambiguous. Of note, none of the cases that Taylor cites involve insurance, and all are in an inverted context to the one present here, as will be explained below.

For example, Appellant cites *In re Terry Mfg. Co., Inc.*, 2007 WL 274319, at *8 (Bankr. M.D. Ala. Jan. 25, 2007), for the proposition that investment is ambiguous. In that case, a bankruptcy trustee made a claim that an "Agreement and Contract" which provided for a transaction labelled a "short term investment" constituted a fraudulent conveyance under the bankruptcy code which should be voided. The court noted that the key to whether it was a fraudulent transfer by the bankrupt debtor was whether the transfer from the bankrupt debtor to the "Contract" holder was in exchange for reasonably equivalent value. The court further noted that if the so-called investment "contract" in question was a loan from the contract holders to the bankrupt, then there would be no fraudulent conveyance because the payments by the bankrupt back to the contract holders would reduce dollar for dollar the indebtedness of the bankrupt. If, on the other hand, the investment contract was an equity instrument that provided dividend payments, it would be a voidable fraudulent conveyance because a dividend to contract holders of equity would not reduce any obligation of the bankrupt as mere equity holders are owed nothing, in contrast to a loan.

Therefore, in the context of that setting and in the course of the determination to be made, i.e. whether the investment was a fraudulent transfer, the court correctly noted that just calling the transaction an "investment" would not sufficiently answer the inquiry. In the context of the specific rule to be applied (fraudulent transfer), the word investment was ambiguous as it was too broad to answer the inquiry since "investment" referred to both a loan and to an equity purchase.

Hence, at issue in *In re Terry* was the application of a rule that specifically prohibited a particular *type* of investment (equity) but permitted another (loan/debt). Therefore the rule itself (permitting payments by bankrupt where there was a dollar for dollar reduction in liability in return for payment) **necessarily required** that a distinction be made between loan/debt investment and equity investment because otherwise the determination of fraudulent transfer literally could not be made because one type of investment (equity) would qualify as a fraudulent transfer, whereas the other type of investment (equity) would not.

The situation here is the opposite. Here the rule (exclusion) deliberately refers to "investments," the idea being that all types are precluded from coverage where a lawyer in the proscribed conflicted self-interest situation, gets his client to make that financial investment, no matter whether of the equity or debt/loan type. The exclusion here never requires a determination of which kind of investment because the obvious point of the exclusion is the self-conflicted situation for the lawyer -- and that conflict is the same for both equity and loan/debt investment. Hence, very logically, both types of investment are prohibited from coverage and the key is the existence of the conflicted situation, not the type of investment.

Likewise, *Engelking v. Inv. Bd.*, 458 P.2d 213, 219 (Idaho 1969), cited by plaintiff also does not hold that loans are not investments, but as with *In re Terry* clearly holds that loans are indeed one type of investment. In *Engelking*, a statute allowed state schools to invest funds in private corporations – and being undefined, investment as used in that statute could be loan or equity. So far, so good. However, a challenge was made to the statute on the basis of a constitutional provision that state government cannot be a shareholder in private corporations, i.e. state government cannot make an equity investment in private corporations. The court held that insofar as the statute term "investment" referenced equity investment it was unconstitutional because of that provision, but loan investment of school funds in private corporations was not prohibited and would not be constitutionally prohibited.

As with *In re Terry* the rule (constitutional provision against equity ownership investment) itself **required** that a distinction be made because, by the terms of the rule (no shareholder ownership), one type of investment (equity) was prohibited, whereas the other type of investment (loan/debt) was not.

The situation here is the opposite. Here, the rule (exclusion) requires no distinction nor is it even logical to try to make one. The deliberate idea is that all types of investment are precluded from coverage where a lawyer in the proscribed conflicted self-interest situation, gets his client to make that financial investment, no matter whether equity or debt/loan. The Exclusion here never requires a determination of which kind of investment because, in that conflicted situation for the lawyer, all types of investment are prohibited from coverage.

Appellant also mis-cites *In re Keisker's Estate*, 168 S.W.2d 96 (Mo. 1943), as an example of a court finding that loans are not investments. First, that is not what the Court did at all. The statute in question provided that a guardian of a ward could "loan" the ward's money out "on prime real estate security, or invest it in bonds of the United States', etc." *Id*., at 98. The guardian argued the court should interpret the statute's use of the word loan to include all types of investments including mortgage bonds he had purchased. Therefore, this was not a case about whether a loan is an investment, but rather is a case where a party tried to expand the word loan (one type of investment) to encompass all types of investment. The court disagreed that the statute's use of the word loan allowed all types of investment, but in doing so stated that the terms "loan" and "invest," "are often used **interchangeably"**[which reinforces The Bar Plan's proper deliberate use of a broad term here] , "but we think ***the statute now under consideration <u>compels</u> us to make a distinction between them***." *Id*. (emphasis and bracketed comment supplied.) The court then ultimately found that expanding the statute's use of the word loan to include all investments would undercut the statute's purpose of safeguarding the ward's money.

The above cases[5] that Appellant cites merely hold that neither equity nor debt is individually exclusively synonymous with the term investment because investment is a broader term which encompasses *both* equity and debt based financial transactions -- precisely why the broad term is appropriate and not ambiguous in the Exclusion here. The Exclusion deliberately uses the broader word investment to state what is not covered because, as is obvious by the provisions of the Exclusion here, it is meant to preclude coverage where a lawyer has a conflicted financial self-interest in the client committing money to a certain endeavor or entity and that conflicted self-interest remains the same no matter whether the client commits the money in the form of a loan or an equity purchase, which is why the Exclusion using the broad term "investment" unambiguously applies to both types of investment.

No reasonable lawyer would read that Exclusion to say that it prohibits coverage for equity purchases by the client in situations where the lawyer has a conflicted financial self-interest, but it is just fine for that same lawyer in that same conflicted situation to get

[5] Appellant also cites *In re Owen's Estate*, 36 N.Y.S.2d 60, 62 (Sur. 1942), for the proposition that "investment" is an ambiguous term. However, that estate case also acknowledges that debt based financial transactions constitute investments reasoning that "[i]f this will were the product of a skilled draftsman the term 'investment' might well be limited to stocks, bonds **and other evidences of indebtedness."** *Id.* (emphasis added). Instead, the question was whether investment included money held by banks. The court found that it did because it wanted to limit the amount the deceased party was intestate.

the same amount of money from the client if it is in the form of a loan. The policy language requires no determination of what type of investment because both types of investments made in that same proscribed lawyer conflict situation are excluded because, no matter which type of investment is being made by the client, the conflict for the lawyer remains the same. For the same reasons, it is no accident that Judge Midkiff, in reaching her reasonable interpretation of the Exclusion, found that it **unambiguously** applied to the transactions in this case.

All that can be gleaned from Appellant's situational quotes from the cases above about "investment" being ambiguous is that the plain meaning of "investment" is broad and encompasses both debt and equity. This has never been the issue. The issue is that there is no ambiguity created by the fact that the term applies to both types of investment, where, as here, the broad term is deliberately used to apply to and exclude both types of investment. Hence, Appellant tries an alternate path of manufacturing ambiguities by relying on case law applying technical meanings that courts have given the term investment, and even resorts to cases discussing completely different terms, such as "securities," when these terms are used in statutes or regulations. This is forbidden, as courts are to give policy terms their ordinary meaning unless it plainly appears that the policy intended a term to have a technical one. *Farmland Indus., Inc. v. Republic Ins. Co.*, 941 S.W.2d 505, 508 (Mo. 1997). That rule should apply no less when the reasonable insured is a lawyer. Therefore, the court should not derive the definition that an ordinary lawyer gives the term investment by examining that term's technical meanings under specific statutes or regulations. Rather, the proper reference sources, if needed, would be dictionaries, which, as already demonstrated, uniformly would include loans as investments.

Indeed, one of the cases Taylor cites rejected a similar attempt by a plaintiff to restrict the common definition of investment with the term's usage in cases involving different contexts. *Minn. Lawyers Mut. Ins. Co. v. Ahrens*, 432 Fed.Appx. 143 (3d Cir. 2011). In *Ahrens*, the policy excluded coverage where an insured solicited specific investments. Plaintiff in *Ahrens* argued that the exclusion did not apply because the transactions in question were loans, which they, like Appellant here, argued do not constitute investments. Based on the pleadings, the trial court *sua sponte* found that the specific investment exclusion applied to preclude coverage. When deciding whether the term investment was ambiguous, the Third Circuit first reasoned that the trial court correctly used the standard dictionary definition of 'investment,' which it stated was "an expenditure of money for income or profit. Webster's Third New International Dictionary 1190 (1993)." *Id.* The plaintiffs in *Ahrens* argued (as Appellant does here) that the standard dictionary definition of "investment" was too general and that the trial court should have instead used a more specific definition laid out in federal securities case law. However, the Third Circuit rejected the plaintiff's attempt to restrict the plain meaning of investment with technical usages, stating that "[w]ords of common usage in insurance policies are to be construed in the natural, plain, and ordinary sense, and [a court] may inform [its] understanding of these terms by considering the dictionary definitions." *Id.* Therefore, the trial court "did **not** err when it used a **standard** dictionary to define 'investment,' or when it eschewed reliance on our precedents that defined related terms ***in other contexts***." (emphasis supplied) *Id.* Hence, the Third Circuit ruled there was no coverage for the insured lawyer's failure to repay the monies he solicited from clients under the exclusion for soliciting specific investments. *Id.*

The inherent problem with using *statutory* definitions of investment out of context is that it creates the appearance of existence of ambiguities where no ambiguity exists in the ordinary meaning of the term. For example, Appellant points to *Oren v. C.I.R*, 357 F.3d 854, 857-58 (8th Cir. 2004) for the proposition that loans are ordinarily not investments, but does not provide this court with any context. In *Oren*, the court was determining whether a loan to a close corporation by a shareholder counts as an investment for certain tax purposes.

The purpose of the test *Oren* imposed was to avoid sham transactions, which is not a concern here. Moreover, the test that the *Oren* court used to distinguish sham transactions from real loans that constitute investments actually shows why the Law Group and Longview loans are investments. To avoid sham transactions, the Court stated that "there must be an actual economic outlay of money by a shareholder to the corporation for the loan to constitute an investment in the company." *Id.* To put it another way, "[o]nly where the shareholder provides his own money (or money he is directly liable for) to the corporation is the loan an investment." *Id.* That holding is completely in accord with and merely implements the common meaning of the term investment, which simply requires a party to commit money for financial gain. If there is no actual economic outlay, a party has expended no money and, therefore, the loan is not an investment under that term's ordinary meaning.

Thus, *Oren* makes no pronouncement that loans are not investments, but instead precludes shareholders from counting sham paper transactions as loans and therefore investments, when no money was paid over in the first place. Here, there is no doubt money was paid over by Taylor – it was the loss of that money that comprised the bulk of the damages awarded.

Moreover, throughout his brief, Taylor goes far beyond merely citing cases that interpret the meaning of the word "investment" in specific statutes. He actually cites cases defining a completely different and more limited term, "securities." He does so in an effort to rewrite the Exclusion, which uses the lay term "investment," as though it used the technical legal term "securities," and while securities are a form of investment, they are not the only form, so the two terms are not synonymous – which is why the argument is misleading and inaccurate.

It is from courts attempting to define what constitutes a "security," not what constitutes an "investment," that Taylor picks up the purported requirement that the Exclusion should only apply to financial transactions tied to a company's performance, or financial transactions involving the purchase of an asset, and picks up his argument that the Exclusion does not apply to short-term loans.[6] This might all be true if indeed the term used in the Exclusion was securities rather than investment, but of course that is not the case.

[6] By statute, notes with a maturity of nine months or less are not securities. Securities Act § 2(1), 3(a)(3); Exchange Act § 3(a)(10).

Indeed, this Exclusion here of course never uses the term securities, (which is used in other Policy exclusions, such as the exclusion for work performed in an insured's capacity as a securities broker), so obviously The Bar Plan deliberately chose not to use the narrower term "securities" in the exclusion at issue here [III(B)4] and Taylor should not be allowed to reword the Policy to create a straw argument to manufacture coverage here.

Moreover, securities law simply and unsurprisingly has a different purpose than this Exclusion because "[t]he basic purpose of the 1934 and 1933 regulatory statutes is to protect investor confidence in the securities markets. Nothing in those statutes, or in the Litigation Act, suggests their object is to protect persons whose connection with the statutorily defined securities is more remote than buying or selling." *Chadbourne & Parke LLP v. Troice*, 188 L. Ed. 2d 88 (2014). In other words, securities law exists to protect investors partaking *in the securities **market***. Therefore, it only makes sense that securities law has added requirements that go above and beyond the normal lay meaning of investment (such as an inquiry into whether a financial instrument was purchased) because it is focused on and controls a very specific and sophisticated level of investment, i.e. securities, which are traded in a controlled <u>market</u> to which the Securities Act or securities regulations would apply.

Appellant's own cites demonstrate the impropriety of using securities law to define what constitutes an investment under the Exclusion here. For example, Appellant's requirement that an investment be tied to a company's performance actually comes from a case defining an "investment contract", which is a specific type of regulated security under federal law. *SEC v. W.J. Howey & Co.*, 328 U.S. 293, 298–99 (1946). Of course, what constitutes an "investment contract" under securities law in no way defines the ordinary meaning of investment to a reasonable insured in this simple exclusion.

In fact, the U.S. Supreme Court itself rejected plaintiff's idea here of applying the *Howey* test to determine whether other types of financial transactions, such as notes, constitute investments. *Reves v. Ernst & Young*, 494 U.S. 56 n. 4 (1990). Instead, the Court reasoned that a note is an investment "if the investor is interested primarily in the profit the note is expected to generate." *Id.* The court clarified that "profit," in the context of notes, means a valuable return on an investment, which undoubtedly includes interest income, and stated there is no requirement that interest is keyed to the earning of the enterprise. *Id.* at n. 4. Having determined that promissory notes are quite often investments, the Court concluded that "[a] note is presumed to be a 'security'…." *Id.* at 67. The Court provides a four factor test that can rebut the presumption that a promissory note with interest is a security. That list actually underscores that what constitutes a security is more limited than what constitutes an investment, as one aspect of the test to determine whether a note constitutes a security under the Securities Act and the Exchange Act is that "the existence of another regulatory scheme significantly reduces the risk of the instrument, *thereby rendering application of the Securities Acts unnecessary*. *Id.*

Nor does the fact that the Exclusion requires the investment be "in an enterprise" create an ambiguity. Black's Law Dictionary defines an "enterprise" as "[a]n organization or venture, esp. for business purposes." Both the Law Group and Longview fit that definition. Moreover, one can invest in an enterprise without purchasing an equity share. The U.S. Supreme Court has held that demand notes are "most naturally conceived as an investment in a business enterprise rather than as a purely commercial or consumer transaction." *Reves*, 494 U.S at 68.

In sum, Taylor has cited to no evidence or case law that would hold the term investment ambiguous when used in the context of the Exclusion. The plain meaning of investment is simply the use of money to make more money, so it includes both debt and equity without distinction. Appellant cannot distort the term's plain meaning by referencing technical definitions of "investment" in statutes or even worse simply rewriting the language of the Exclusion to only apply to "securities." The Law Group and Longview Loans qualify as investments under the term's plain meaning because the loans each promised double digit interest. Therefore, the loans in question here undoubtedly qualify as Taylor having used his money for the purpose of making money, *i.e.*, having invested.

II. THE CIRCUIT COURT CORRECTLY ENTERED SUMMARY JUDGMENT IN FAVOR OF THE BAR PLAN AND AGAINST APPELLANT BECAUSE EXCLUSION III(B)(4) PRECLUDES COVERAGE FOR DAMAGES CAUSED BY AN ATTORNEY ACTING IN THE PROSCRIBED REPRESENTATIONS WHERE THE LAWYER HAS A CONFLICT DUE TO A FINANCIAL SELF-INTEREST NO MATTER THE CAUSE OF LOSS AND REGARDLESS, WIRKEN'S BREACHES OF FIDUCIARY DUTY ARE

RELATED TO HIM HAVING ACTED AS APPELLANT'S LAWYER FOR THE LAW GROUP AND LONGVIEW LOANS, SO THE CONCURRENT PROXIMATE CAUSE RULE HAS NO APPLICATION.

Having failed to show that the Exclusion is ambiguous, Appellant next argues "[t]he law of Missouri is that, as exclusions in insurance policies must be strictly construed against the insurer and read in favor of coverage if at all reasonably possible, a concurrent proximate of an injury must result in coverage even if another cause is excluded." *See* Appellant's Brief, p. 31. However, this Court has never recognized the "concurrent proximate cause rule" and Appellant's justification for the rule misstates Missouri law. Courts do not strictly construe exclusions against insurers if they are unambiguous. Instead, the same ambiguity test applies regardless of whether policy language is contained in the insuring clause or in an exclusion because whether an exclusion applies is inherent in the question of whether the policy provides coverage. *Todd v. Mo. United Sch. Ins. Council*, 223 S.W.3d 156, 163 (Mo. 2007). Moreover, canons of construction, such as strict construction of exclusions, only apply if policy language is ambiguous. They cannot be used to create an ambiguity where none exists. *Shiddell v. The Bar Plan Mut. Ins. Co*., 385 S.W.3d 478, 485 (Mo. Ct. App. 2012). Plaintiff cannot avoid this axiomatic principle of Missouri and avoid the plain meaning and application of the Exclusion in this case by invoking a "rule" that this Court has never recognized.

To invoke the "rule," Appellant essentially argues there should be coverage because the underlying judgment found that Wirken served as Taylor's attorney and breached duties he owed Taylor as an attorney. In doing this, Appellant has wholly misperceived the structure of insurance policies and the Exclusion. Any exclusion is not reached until the Court has first found that the Underlying Judgment is within the scope of the Policy's insuring clause. Here, the Policy's insuring clause only covers acts that constitute legal services (i.e., breaches by an insured performing legal services). Therefore, to reach the Exclusion, the Court must first find that the insured breached his duties as an attorney. Hence, the entire purpose of the Exclusion is to specifically preclude coverage for harms that a lawyer commits when he is representing clients in investments in which he has a financial stake. So, the very existence of the Judgment and the Exclusion means there is no ambiguity in the policy at all about what happens when a lawyer provides subpar professional services related to such investments in the factual circumstances laid out in the exclusion – there is no coverage. If the fact that Wirken was engaged in legal services during the underlying transactions alone was sufficient to invoke the concurrent proximate cause rule, then, by definition, no Policy exclusion would apply, (except possibly the one for intentional acts). Obviously, the proposed rule by Appellant is a drastic and unworkable over-reach, which would dramatically exceed any ruling on policy exclusions in any jurisdiction to date. In fact, the reality is quite the opposite, as the concurrent proximate cause doctrine is very limited and applied very sparingly.

Thus, Appellant appears to mistakenly take the phrase "an insured risk" literally to mean a risk insured without regard to looking at exclusions, which obviously guts any exclusion in a liability policy covering negligence, except for an exclusion for intentional acts. This is not the proper analysis even for this rarely invoked "rule." Hence, some of the cases use clearer phrasing by referring to a "non-excluded risk" rather than saying "an insured risk" because exclusions obviously are a key means of limiting and focusing the risk, and exclusions are taken into account in determining whether an alternate concurrent cause is insured.

Furthermore, as Appellant admits, the "rule" has been followed a grand total of five times in Missouri -- four for failure to supervise and once for failure to secure a mentally incompetent patient in a car before ever operating, which for all practical purposes is the same as failure to supervise. Here, neither of those situations applies. Wirken was the sole owner of his practice, so there could be no suit for failure to supervise himself, nor was a failure to supervise or anything close to that alleged or found in this case, as obviously it could not be.

Moreover, an exhaustive review of the times Missouri courts have applied and rejected application of the "rule" shows it does not apply here. These cases show there must be a wrongdoing that is independent from and not intertwined with the excluded cause. That determination primarily depends on whether the excluded cause of injury was only **incidental** to the alleged wrongdoing by the insured. That, in turn, depends on whether the alleged wrongdoing could have led to a variety of types of damages so it was purely circumstance that caused the particular injury a plaintiff suffered to be for an excluded loss. Typically, that type of independent wrongdoing only exists where a general failure to supervise leads to damages caused by a certain type of instrument, such as a gun or car, which the policy happens to exclude coverage for. Here, however, the alleged attorney breaches by Wirken all involve failures related to the loans and the Exclusion does not preclude coverage for injuries caused by certain types of acts, but for all injuries that occur during a lawyer's representation of a client in investments in which the lawyer has a financial stake.

Braxton v. United States Fire Insurance Co., 651 S.W.2d 616, 619 (Mo. Ct. App. 1983) was the first Missouri case to use the "rule." In *Braxton*, a drunken employee got into an altercation with a customer and shot him with the employee's personal gun. The employer's liability policy contained an exclusion for "injury…arising out of the ownership or use of any firearm." The non-excluded theory asserted by plaintiff was negligent supervision by the employer of the drunken employee, by allowing him to continue to work when the employer knew or should have known that it was likely he would injure a customer. That wrongdoing did not relate to gun ownership at all. Therefore, it was purely incidental that it led to the employee shooting, as opposed to stabbing, a customer, or injuring him by other instrumentality.

A Western District case, *Am. States Ins. Co., Inc. v. Porterfield*, 844 S.W.2d 13, 15 (Mo. Ct. App. 1992), is also often discussed in this line of cases. It involved a trailer coming unhitched from the insured's truck and colliding with a car. The plaintiff alleged the defendant negligently supervised his employees regarding the proper method of hitching the trailer to the truck. The plaintiff then cited *Braxton* for the proposition that defendant's commercial liability policy, which had the typical exclusion for damages caused by a vehicle owned by or operated by an insured, covered the claim. However, the Court of Appeals rejected that argument reasoning that an injury caused by the insured negligently supervising hitching a trailer to a truck that it owned or operated could only happened if the truck was being operated. Therefore, the Court found the two alleged causes of loss were inextricably intertwined, which meant that the "rule" did not apply.

The next case after *Braxton* to apply the "rule" was *Centermark Properties, Inc. v. Home Indem. Co.*, 897 S.W.2d 98 (Mo. Ct. App. 1995). In *Centermark*, the plaintiff alleged multiple theories of negligent supervision of its employees resulting in the theft of a Centermark car which then wound up in a collision injuring a policeman. Plaintiff sought coverage under the defendant's commercial liability policy which had the typical exclusion for injuries arising out of the ownership, use, etc. of an automobile. The court agreed that bad supervision and security rules resulted in the criminal stealing the car and hurting others in the process. However, the bad supervision and security rules were not car specific so the Court ruled that it was merely incidental that they resulted in a car being stolen as opposed to some other kind of bad event and, therefore, it was merely incidental that a car caused the loss.

The Court of Appeals again rejected the "rule" in *Friar v. Statutory Trustees of Kirkwood Sports Ass'n, Inc.*, 959 S.W.2d 808 (Mo. Ct. App. 1997). In *Friar*, plaintiff was injured during a baseball game while sliding into second base. His knee and leg hit a metal bar protruding from the defective second base. The insured had a liability policy that contained an exclusion for any injury sustained "**while**...practicing for or participating in any contest,…event, etc." The plaintiff argued that the "rule" should create coverage despite the exclusion, because the defective base constituted a defect in the premises which was a concurrent cause of his injury. The court (which notably included Judge Pudlowski, the author of *Braxton*) disagreed, noting that the exclusion in *Friar* literally stated that it applied to "**any**" injury "**while**" participating in the game. Thus, the exclusion applied no matter the type of wrongdoing if it occurred during a game and the two "causes" were therefore inextricably intertwined as the injury was due to and during participation in an excluded activity.

The next case applying the "rule" is *Columbia Mut. Ins. Co. v. Neal*, 992 S.W.2d 204 (Mo. Ct. App. 1999) in which a two-year-old was backed over by a car owned by the grandparents. The allegation was failure of the grandparents to supervise the two-year-old. Their homeowners' policy had the typical exclusion for damaged caused by a car used or owned by the insureds. Like in *Centermark*, an injury to an unsupervised child could have just as easily been caused by a stranger's car or something other than a car. Since the alleged wrongdoing of failing to supervise a child could have caused multiple types of injuries that did not involve the grandparent's car, the fact that the injury that actually occurred was from the grandparent's car was merely incidental to the alleged wrongdoing. As the excluded cause was merely incidental to the alleged wrongdoing, the court found that the "rule" applied.

It should be noted that the "rule" does not even always apply to negligent supervision claims where the failure to supervise directly relates to the activity excluded from coverage. *Schoettger v. Am. Nat. Prop. & Cas. Co.*, 10 S.W.3d 566 (Mo. Ct. App. 2000). In *Schoettger*, a child drowned while at day care operated by defendants. The plaintiff tried to get coverage from defendants' homeowner's policy, but it had "business pursuits" exclusion. Therefore, hoping to manufacture coverage, plaintiffs creatively alleged that their loss was caused by defendants' failure to supervise *their own children* who had left the gate to the pool open. The court wisely noted that the real cause was failure to supervise *the day care child*, which if done, would have prevented the drowning -- irrespective of the negligence of defendants' own children. Since the day care was a business, and the alleged cause of the drowned child's death was failing to properly run the day care, the Court unsurprisingly held that the policy's business pursuits exclusion applied.

The next case involving the "rule" is *Hunt v. Capitol Indem. Corp.*, 26 S.W.3d 341, 343 (Mo. Ct. App. 2000), which also shows the "rule" does not apply if the alleged wrongdoing relates to the excluded loss. *Hunt* involved the stabbing of a bar patron by another patron. The plaintiff claimed the bar negligently failed to remove the bad patrons despite knowledge of past violent activity on their part. The plaintiff sought coverage under the bar's commercial liability policy, which had an exclusion for injury or damage arising out of assault and battery. The court disagreed. Basically, the court rejected the plaintiff's argument because the bar's alleged wrongdoing, which was failing to expulse people it knew had a violent past, was intrinsically tied to the excluded assault and battery that resulted. As the resulting assault and battery that occurred was anything but incidental to the alleged breach of failing to expulse violent patrons, the "rule" had no application.

The next case to apply the "rule" was *Bowan ex rel. Bowan v. Gen. Sec. Indemn. Co. of Arizona*, 174 S.W.3d 1 (Mo. Ct. App. 2005). In *Bowan*, a transporter of a mentally incompetent person failed to secure her seatbelt and thereafter the transporter was involved in a wreck with another car. The commercial liability insurer for the transporter invoked the typical exclusion for injuries resulting from the use of an automobile. The court found this was like *Centermark* and *Neal*, (and obviously unlike *Porterfield*) in that the failure to secure the patient in the transporter could still have caused serious injury without the excluded failure (operating the car) ever occurring. If the transport were hit by another car while her own transporter sat still – but with the patient in it unsecured, she would have still had serious injury. Conversely, she would not have been hurt (or hurt as much) in the actual accident involved if she had been belted in. Hence, operation of the transport was not key, it was merely incidental. Therefore, the auto exclusion did not prevent coverage.

The next case where a court rejected application of the "rule" is *Green v. Penn-Am. Ins. Co.*, 242 S.W.3d 374, 382 (Mo. Ct. App. 2007) abrogation on other grounds recognized by *A.D.D. v. PLE Enterprises, Inc.*, 412 S.W.3d 270, 276 (Mo. Ct. App. 2013). In *Green*, the plaintiff's son walked over to a fight outside of a nightclub and got killed. Plaintiff sued the club for maintaining the nuisance of a surly crowd that often resulted in police calls. Like *Hunt*, *Green* involved an assault and battery exclusion to a commercial liability policy issued to a nightclub. Like in *Hunt*, the Court of Appeals upheld the exclusion and declined to invoke the "rule" because the alleged wrongdoing of maintaining a surly crowd was intertwined with the excluded cause of assault and battery.

The Court of Appeals also declined to invoke the "rule" in the case of *In re Estate of Murley*, 250 S.W.3d 393, 397 (Mo. Ct. App. 2008). *Murley* involved two men loading a shower unit into a pickup truck that then blew out of the truck in transport and injured the plaintiff. The plaintiff sought coverage for the claim from the defendants' homeowner's policy, which had the typical exclusion for damages resulting from automobile ownership and use. The plaintiff argued the case was like *Bowan*, where the damage caused by the defendant's failure to secure the plaintiff with a seatbelt was held not primarily caused by operation of an automobile. The insurer argued that the case was akin to *Porterfield*, *i.e.*, the "rule" did not apply as the injury would not have occurred in the absence of the excluded automobile usage. The court agreed with the insurer that the loss was intertwined with the use of the automobile because there was no danger to anyone until the vehicle with the shower unit in it was actually driven, whereas that was not necessary for the injury to occur in *Bowan* (as the patient was immediately exposed to injury from being unsecured even with the excluded transport not being operated). Because the harm necessarily depended on the operation of the truck, the court in *Murley* held the plaintiff's loss was inextricably intertwined with the excluded automobile usage.

The Court of Appeals again declined to invoke the "rule" in *Gateway Hotel Holdings, Inc. v. Lexington Ins. Co.*, 275 S.W.3d 268, 282 (Mo. Ct. App. 2008). *Gateway* involved a boxer who was hurt in a boxing match. He sued the match promoter and the hotel who had asked the promoter to set up the match, alleging they failed to have an ambulance standing by to get him immediate care. The commercial liability carriers for both defendants had exclusions for injuries arising out of "sporting events" which this unequivocally was. The court declined to invoke the "rule" because the defendant's liability inextricably arose out of the sporting event because neither the alleged injury to the boxer nor the alleged failure of the defendant to have an ambulance standing by could have occurred but for the excluded boxing match. Moreover, like *Friar* and *Hunt*, the *Gateway* policy did not exclude injuries caused by a certain type of instrument, such as a gun or a car, but excluded injuries that occurred during a certain type of event, such as boxing match or an assault.

The most recent case regarding the "rule" is *Intermed Ins. Co. v. Hill*, 367 S.W.3d 84 (2012). There, a physician's assistant was ultimately found to have molested the plaintiff in the course of purporting to provide medical care. Plaintiff sued the clinic for negligent hiring, supervision, and retention alleging that the clinic had prior notice that the assistant had performed unnecessary medical procedures, but did not take action to dismiss or monitor him for performing such procedures. The plaintiff claimed that the assistant would not have been in a position to molest her if the clinic had dismissed or monitored the assistant for having performed unnecessary medical procedures. The professional liability insurer attempted to invoke an exclusion for liability arising from sexual relations, activity, acts or conduct, etc. However, the court found that the alleged failure to dismiss or monitor the assistant for performing unneeded medical procedures well before the assault ever occurred was independent from the sexual assault. The breach of failing to dismiss or monitor the employee for having performed unneeded medical procedures was independent from the sexual assault because the insured's breach could have caused a variety of harms other than sexual assault depending on the unneeded medical procedure performed. Therefore, the employee's sexual assault was merely incidental to the insured having failed to prevent the employee from committing unneeded medical procedures.

As should be evident, this case fits the fact pattern where Missouri courts reject application of the "rule." First, the Exclusion does not preclude coverage for losses caused by certain types of instruments or even certain types of acts. Instead, the Exclusion precludes coverage for losses that an insured causes when acting in a certain capacity – the capacity of a lawyer representing a client in certain prohibited investments. Therefore, it is written in a similar fashion to the exclusion in *Friar*, which excluded all injuries that occurred during participating in particular types of listed events. As the *Friar* Court noted, under this type of exclusion, the specific cause of the loss does not matter so long as the loss occurred during the course of the excluded event. That makes application of the Exclusion here so clearly compelling because the Exclusion literally sets out two specific representations by an insured lawyer involving investments that the insured has a financial interest in and excludes coverage for damages caused by the insured's acts in the course of either of those representation situations. The specific tort or breach of contract that comes out of that representation situation becomes irrelevant. *Accord Vaughn*. Instead, the Exclusion is triggered if a claim arises from those excluded representation situations, which they undeniably did. Thus, the "rule" simply has no application to an Exclusion such as this, which does not depend on the particular manner by which the insured caused damage to the investing client.

Furthermore, Missouri courts consistently refuse to apply the "rule" when a covered cause of loss is inextricably intertwined with a non-covered cause of loss. Here, Wirken admittedly served as Appellant's attorney prior to representing him in the Law Group and Longview Loans. Taylor tries to use this fact to argue this preexisting attorney-client relationship was the source of Wirken's duties to Taylor and, therefore a cause of the loss. First, the source of a duty is not the same as the cause of the loss. Secondly, Taylor's Judgment against Wirken expressly found that he represented Appellant in those specific forbidden loan transactions. Thus, he would have owed the same duties even if there had been no prior representation. Third, and perhaps most important, the Judgment that Taylor obtained against Wirken was based solely upon breaches by Wirken related to the investments in question which were within the exact forbidden self-conflicted situation described in the exclusion. The Court based the Judgment for the Law Group Loans on Wirken having suggested that Taylor make the Law Group Loans and having not suggested that Taylor seek other counsel to review those loans. The Court based the Judgment for the Longview Loans for Wirken having failed to disclose that Longview was paying him commissions to solicit the loans, having failed to disclose that Longview owed him money, and having failed to ensure that the Longview loans were properly secured. Furthermore, the entire damage award in the Judgment below is calculated based on the failure to repay the Law Group and Longview loans, and nothing else. Therefore, there are no damages awarded for a covered act of fault or that was a function of anything else other than the excluded loans to the Law Group and Longview per III(B)(4). Thus, to say the alleged bad acts are inextricably intertwined with Wirken having acted as Appellant's lawyer for the loans in which he had a financial stake is an understatement, as there was literally no distinct and independent covered cause of loss found by the court other than those that occurred within and because of the precise circumstances excluded per III(B)(4).

It should further be noted that this is no tortured reading of the Exclusion by the insurer here. This is not a homeowner's insurer stretching to assert the auto exclusion even though car use was at best incidental to the claim for failure to supervise resulting in theft of the car and consequent injury as in *Centermark*. The exclusion fits the risk that occurred like a perfect glove, i.e. the claim asserted here is precisely what was contextually contemplated by the exclusion. Like the insurer of a bar in *Hunt* and the insurer in *Green*, each writing an exclusion for a particular type of risk that can occur in operating the insured's business, here The Bar Plan wrote an exclusion for a particular type of situation (a financial conflict of a very clearly specified type) that can occur with some lawyers' practices, and can tempt them to put their interest ahead of the client, consciously or otherwise.

III. THE CIRCUIT COURT CORRECTLY ENTERED SUMMARY JUDGMENT IN FAVOR OF THE BAR PLAN AND AGAINST APPELLANT BECAUSE A REASONABLE INSURED WOULD KNOW THAT EACH NUMBERED PARAGRAPH OF SUBSECTION B OF THE EXCLUSION SECTION OF THE POLICY IS A SEPARATE EXCLUSION.

In an over-stretch to find an ambiguity somewhere in the Policy to manufacture coverage where none exists, Appellant also argues that the entirety of Section III(B) is ambiguous. Section III(B) of the Policy provides: THIS POLICY DOES NOT

PROVIDE COVERAGE FOR ANY CLAIM BASED UPON OR ARISING OUT OF: An Insured's capacity as:

1. A public official or employee of a governmental body, subdivision, or agency; provided, however, that if independent of that capacity, the Insured is also regularly engaged in the provision of Legal Services in return for financial remuneration, this exclusion shall not apply, but in that event, the insurance afforded by this Policy shall be excess over any other applicable, valid and collectible insurance or indemnity provided under law, rule, regulation or Policy applicable to such governmental body, subdivision or agency, notwithstanding any other language in this Policy;
2. A fiduciary under the Employee Retirement Income Security Act of 1974 and its amendments or any regulation or order issued pursuant thereto, except if an Insured under this Policy, is deemed to be a fiduciary solely by reason of rendering Legal Services in a professional capacity with respect to an employee benefit plan;
3. An investment advisor, securities broker or dealer, insurance agent or broker, real estate agent or broker or accountant; and
4. A legal representative of investors in regard to and resulting in investment in an enterprise in which an Insured owns an equity interest or for which the Insured receives a fee or commission from an Entity other than the investor.

An ordinary person reading Subsection B would easily see that 1-4 are each separate exclusions. So did the only appellant court to interpret exclusion III(B)(4). See *Vaughn*, 2012 WL 1522724. Each numbered subsection of B deals with very distinct factual circumstances in which the Policy does not provide coverage. B(1) excludes coverage for acts and/or omissions that an insured takes or fails to take in his capacity as a public official. B(2) excludes coverage for acts and/or omissions that an insured takes or fails to take in his capacity as an ERISA fiduciary. B(3) excludes coverage for acts and/or omissions an insured takes or fails take in a diverse array of non-lawyer professions, such as insurance broker, real estate agent, or accountant, etc. B(4) excludes coverage for acts and/or omissions that an insured takes in his capacity as a lawyer representing clients investing in an enterprise in which the insured owns an equity interest and/or where the insured receives a commission from a third party.

Appellant had no problem with this reading at the trial court level, and actually read the exclusion the same way, as did Judge Midkiff. However, Appellant argued for the first time on appeal that Section III(B)(1) through (4) constitute collectively one giant conglomerated nonsensical exclusion wherein all the requirements of all the separate numbered paragraphs together have to be met in order for that single exclusion to apply. Under that heavily strained reading, the exclusion would only preclude coverage when the insured is sued for having simultaneously acted as a Public official/ERISA fiduciary/real estate agent/securities broker/insurance agent/accountant and legal representative of investors resulting in investment in an enterprise in which an Insured owns an equity interest or for which the Insured receives a fee or commission from an Entity other than the investor.

Such an obscure tortured reading of Subsection B would strip this Section of any meaning as it could literally never apply because Appellant's interpretation of the Policy would have internal inconsistencies. For example, Exclusion III(B)(3) only applies if an insured is sued for having **not** acted as a lawyer, but instead for having acted as another type of professional, whereas exclusion III(B)(4) applies if an insured **is** acting as a lawyer. Therefore, Appellant's interpretation violates the maxim that a court should give meaning to every clause in a policy.

Appellant's reading also violates the principle that "[t]he rule of favorable construction for the insured should not be applied so as to...permit a construction which is unreasonable and not in keeping with the language used and the obvious intent of the parties." *Mendota Ins. Co. v. Ware*, 348 S.W.3d 68, 74 (Mo. Ct. App. 2011).

Nevertheless, Appellant persists in making the nonsensical argument that the use of "and" between the third and fourth **numbered** exclusions in Subsection B would confuse an ordinary insured into believing the entire subsection only constitutes a single exception to coverage with four mandatory (and contradictory) requirements. However, under any reasonable reading of Subsection B by an ordinary purchaser of the Policy, the use of the word "and" between subsections 3 and 4 of Subsection B plainly means that the Policy will not cover an insured who is acting as a public official, **and** it will not cover an insured acting as an ERISA fiduciary, **and** it will not cover an insured acting as a real estate agent e.g., etc. **and** it will not cover a lawyer representing investors making an investment in an entity that he owns all or part of, or an entity that is paying him a fee to solicit the loan for it. The use of the word "and" in this manner between numbered exclusion paragraphs is grammatically correct and, moreover, is completely congruent with the dictionary definition of "and."

It should also be noted that neither Judge Midkiff nor Appellant's former counsel found III(B)(1)-(4) to be ambiguous due to the use of "and," nor did they read the entirety of III(B)(1)-(4) to be one massive nonsensical contradictory exclusion. Instead, they obviously read the Policy in the ordinary sense it was intended, namely a numbered list of the types of excluded fact situations where the lawyer might have concerns beyond those of merely an attorney in private practice representing a single client in a matter. Hence, each individual numbered paragraph represented a different excluded situation. That is how Appellant's lawyer in the trial court of this coverage case obviously read III(B)(1)-(4), and that is how the learned trial court obviously read it, finding that III(B)(4) was not ambiguous.

Moreover, the case Appellant cites to support his decidedly unnatural reading of Section III(B) actually supports reading that Section to contain four separate exclusions. *Burns v. Smith*, 303 S.W.3d 505 (Mo. 2010). In *Burns*, the policy precluded coverage for business pursuits. It expressly defined such pursuits as:

> (1) A trade, profession or occupation, excluding farming**, and** the use of any premises or portion of residence premises for any such purposes*;* ***and***
>
> (2) the rental or holding for rental of the whole or any portion of the premises by an Insured." *Burns*, 303 S.W.3d at 510. (emphasis supplied).

The insurer in *Burns* argued that the "and" contained **within** exclusion (1) actually created two separate and distinct exclusions, so the "and" **within** the exclusion (1) really meant "or." *Id.* at 510–11. This Court rejected the insurer's argument, but *Burns*' reasoning validates The Bar Plan's position here and the reading of Section III(B) by Appellant's lawyer in the coverage case below, and the reading of III(B) by the learned trial court in the coverage case below.

Specifically, the Missouri Supreme Court noted in *Burns* that the policy had two **numbered** exclusions. Those separate **numbered** exclusions were obviously connected to each other with an "and," but the Missouri Supreme Court still treated those two separate **numbered** exclusions as a list of alternative **separately** excluded situations, **--** and it did so despite the obvious use of the term "and" between number 1 and number 2. Instead, this Court only stated that it would not however accept Farmers' argument that **<u>within</u> number (1)** there were actually two separate exclusions, separated by "and." In reaching this holding, this Court reasoned that:

> "in drafting the policy, Farmers chose to number the **types** of pursuits that would come within the term "business" as used in the policy, and it gave them the numbers (1) and (2), not (1), (2) and (3)." (emphasis supplied)

It then reasoned that to accept the insurer's argument that exclusion 1 **[within itself]** contained two distinct exclusions:

> "would require the Court, in effect, to add the number (3) to the definition and read it as if it set out three rather than two types of excluded businesses." *Id.*

In sum, this Court accepted in *Burns* that there were two **independent** exclusions where two **numbered** exclusions were joined by an "and." It simply prohibited an insurer that had expressly stated how many exclusions there were by **numbering** each of the exclusions from later trying to argue that a single numbered exclusion in the policy really was two separate exclusions. Here, The Bar Plan is not trying to make Exclusion III(B)(4) into two distinct exclusions within itself -- like the insurer in *Burns*. Instead, The Bar Plan is simply saying there is no coverage because every element in exclusion III(B)(4) is met.

In fact, *Burns* not only accepted the premise that each **numbered** paragraph in a policy subsection was a separate exclusion, it actually based its opinion in part on the fact that each **numbered** exclusion in a policy subsection connected by an "and" was a separate exclusion. That is why it reasoned that if the insurer wanted to create three rather than two exclusions in the policy section it needed to number all three, but having not done so, the insurer could not make more exclusions within an individual numbered exclusion by subdividing phrases joined by "and" **within** that numbered paragraph. For that reason, *Burns* actually supports reading the Policy as the learned trial court here did - so that each **numbered** paragraph in Subsection B constitutes a separate alternative exclusion. Obviously, *Burns* agrees that reading separately **numbered** exclusions as being in fact separate exclusions, even if joined by "and" at the end is how an ordinary insured would naturally interpret a Policy that connects **numbered** exclusions with an "and."

In *Burns,* the court also noted that its reading of the policy was not nonsensical: "There are logical reasons why an Insured may wish to have a policy that covers the occasional business pursuit that is not conducted on the premise and that otherwise might not be covered by a business policy or workers' compensation." *Id.* at 513. In contrast, here the tortured reading of Subsection B first "discovered" by Appellant's current counsel and strangely overlooked by previous counsel for Appellant and the trial court, presents a preposterous forced interpretation out of bounds with logic and with this Court's reading of the meaning of "and" when used between **numbered** exclusions as noted above.

CONCLUSION

Judge Midkiff properly found Exclusion III(B)(4) unambiguous and properly found that it precludes coverage for the Judgment which was entered based on the insured having represented Appellant in investments in which he owned an equity interest and for which he received a commission from a third party, and the loans here qualify as investments so Appellant was an investor. As all breaches of fiduciary duty here relate to the insured's representation of Appellant in making the investments, the concurrent proximate cause "rule" does not apply to create coverage because there is no independent and unrelated non-excluded cause of loss here. Finally, Section III(B) is not ambiguous in and of itself as it lists four separate numbered exclusions of which III(B)(4) is one. Hence, this Court should affirm the Circuit Court's grant of summary judgment in favor of The Bar Plan and against Appellant.

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that:

1. The attached brief complies with Supreme Court Rule 84.06(b) and contains **17,893** words, excluding the cover, the certificate of service, the certificate of compliance and the appendix as determined by Microsoft Word software, utilizing 13-point Times New Roman font.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this **30th** day of **September**, **2014**, the foregoing brief was filed electronically with the Clerk of the Court to be served by operation of the Court's electronic filing system upon all participating parties of record.

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