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EXCESS INSURANCE: AN OVERVIEW OF GENERAL PRINCIPLES AND CURRENT ISSUES

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I. INTRODUCTION

Historically, insureds purchased excess insurance policies for the purpose of protecting themselves against the rare catastrophic event. Premiums for excess insurance generally were extremely low as carriers anticipated minimal involvement either in claims handling or in ultimately contributing toward a settlement or judgment. Since primary insurance carriers ordinarily bear the duty of defending the insured, excess insurers typically acquiesced in the primary insurer's defense efforts and became involved in the case only after a pretrial demand was made or a judgment was returned in excess of the primary limits.

Beginning in the 1970s and through the 1980s, however, the importance of excess insurance and the role of the excess insurer as an active participant in litigation against its insured increased dramatically. More excess insurance coverage is being issued as commercial and professional insureds purchase excess insurance as part of their comprehensive risk management scheme. In addition, excess insurers have become more involved in the day-to-day handling of claims due to a variety of factors including the increased utilization of the self-insured retention, which may allow the insured to control the handling of claims, and the increased loss exposure faced by many insureds. The increased loss exposure has been due to a combination of factors, including high jury verdicts due to inflation and relatively sympathetic juries in certain locales, as well as the judicial and legislative expansion of the bases for a defendant's liability in various areas of the law.

*716 This article discusses the manner in which excess insurance differs from other types of insurance, the principal legal issues affecting the excess insurer-insured relationship, the excess insurer's relationship to other insurers and some of the issues that uniquely affect the excess insurer in insurance litigation.

II. EXCESS INSURANCE—DISTINGUISHED FROM OTHER TYPES OF INSURANCE

Liability insurance coverage is provided by a single primary layer of coverage and can be followed by one or more layers or levels of excess insurance. The basic differences between the types of insurance which can form the various layers of an insured's liability coverage are addressed below.

A. Primary Insurance

The basic insurance policy is written on a "primary" basis. An individual's automobile liability and homeowner's policies are primary insurance policies. Primary insurance has been described as coverage "whereby, under the terms of the policy, liability attaches immediately upon the happening of the occurrence that gives rise to liability."¹ Simply stated, the primary policy provides "first dollar" liability coverage up to the limits of the policy, in some instances subject to a small deductible. Thus, where an insured has purchased solely a \$ 100,000 single limit liability policy, only \$ 100,000 in coverage is available to cover an occurrence for which the insured bears liability. If a settlement is reached or a judgment is returned against the insured in the amount of \$ 125,000, under ordinary circumstances the primary insurer will not be liable for the additional \$ 25,000; the insured will be obligated to pay the excess settlement or judgment.²

The primary insurance carrier is obligated not only to pay on behalf of the insured settlements and judgments, but also owes its insured a duty to defend under most policies. These dual obligations of the primary insurer to indemnify and defend are expressed in a typical comprehensive general liability policy as follows:

The company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of

**bodily injury or
property damage**

to which this insurance applies, caused by an occurrence, and the company shall have the right and duty to defend any suit against the insured seeking damages on account of such bodily injury or property damage, even if any of the allegations of the suit are groundless, false or fraudulent. . . .

***717** The relationship between an insurance company's obligations to defend and indemnify its insured has been extensively litigated, resulting in various principles governing the relationship between the primary insurer and the insured.³ The duty to provide defense counsel to the insured and to pay these attorneys' fees distinguishes primary insurance from most policies of excess insurance. Most excess policies do not obligate the insurer to defend lawsuits filed against the insured.⁴

B. Self-Insurance

A form of coverage closely analogous to primary insurance, "self-insurance," may likewise be the initial source for the payment of settlements or judgments. Self-insurance, also referred to as a "self-insured retention," "SIR" or "retained limit," essentially operates as a deductible—the insured itself pays the first level of loss. In recent years, insurance underwriters have shifted a relatively greater proportion of the first level of loss to many commercial and professional insureds. The insured whose coverage is subject to a self-insured retention may be obligated to retain its own defense counsel and the entire claims handling effort may be controlled by the insured. Some insureds with a self-insured retention utilize an independent adjusting company or a primary insurer's claim department for purposes of assisting in claim management, though the insured typically continues to monitor lawsuits quite closely due to its exposure for the first layer of any judgment or settlement.⁵

C. Excess Insurance

An "excess" or secondary insurance policy provides coverage "whereby, under the terms of the policy, liability attaches only after a predetermined amount of primary coverage has been exhausted."⁶ Thus, excess insurance is the next "layer" or "level" of coverage above the primary policy or the insured's self-insured retention. Just as there is a contractual relationship between the primary insurer and the insured, the excess carrier similarly has contracted with the insured for coverage; there is no contractual relationship between a primary insurer and an excess insurer. The several types of excess insurance are addressed below.

1. Excess Insurance by "Coincidence"

One way for excess coverage to arise is by "coincidence," where an interpretation of the "other insurance" clauses contained within two policies applying to the same occurrence renders one policy excess.⁷ The most common situation where excess insurance arises by coincidence involves the person who purchases a liability insurance for his own automobile but at the time

of the accident is driving another person's vehicle which also is insured. Under these circumstances, by operation of the *718 policies' "other insurance" clauses, the coverage on the vehicle is primary and the driver's policy is excess by "coincidence."⁸ Since the policies are underwritten as primary coverage, they each contain a clause obligating the insurer to defend.⁹

2. "Following Form" Excess Insurance

Excess insurance may also be written by design based upon a carefully planned insurance program. This type of insurance commonly is referred to as "following form" or "specific" excess coverage. Most major corporations purchase multiple layers of excess insurance to cover losses potentially aggregating in the millions of dollars. The premium paid by the insured for each successive layer of coverage is normally proportionately less expensive than for the immediate underlying layer.¹⁰ The lower premium charged for following form excess insurance is based upon both the decreased risk of a judgment or settlement within higher layers of coverage and the absence of a duty to defend the insured.

The following form policy generally provides that the exact same risks are covered as are covered by underlying insurance. A typical following form excess indemnity clause provides:

The provisions of the immediate underlying policy are incorporated as part of this policy except for any obligation to investigate and defend and pay for costs and expenses incident to any of the same, the amounts of the limits of liability, any "other insurance" provision and any other provisions therein which are inconsistent with this policy.

Thus, where an insured purchases a primary policy and several following form excess policies, the policies generally will contain the same basic provisions with the notable exception of those relating to the duty to defend and limits of liability. The excess carrier and the insured of course may agree to add particular conditions or endorsements to the following form policy either to broaden or to narrow the excess coverage.

3. "Umbrella" Excess Insurance

The "umbrella" policy is another type of excess insurance. It generally provides two types of coverage: (1) standard following form excess coverage; and (2) broader coverage than is provided by the underlying insurance, which includes a duty to defend lawsuits not covered by the underlying coverage.¹¹

*719 For example, an individual who purchases separate policies of primary insurance covering his automobile and homeowners liability may also obtain an umbrella policy providing coverage in excess of each of the two primary policies. While the standard homeowner's policy covers the insured's personal liability for a third party's "bodily injury," the standard personal umbrella policy expands the insured's coverage to include claims of "personal injury" (a different type of coverage which may provide coverage for libel, slander, malicious prosecution and various other offenses). Thus, if a libel lawsuit is brought against the insured, the umbrella carrier would effectively become the primary carrier (i.e., "drop down") for purposes of the defense and indemnification of the insured. For the insured's automobile liability, however, the umbrella policy would apply in the same manner as a following form excess policy.

The umbrella policy is thus a hybrid policy, combining aspects of both a primary policy and a following form excess policy.

D. Surplus Lines Insurance

Most insurance is written by insurers who are licensed to do business in the state in which the insured resides. However, certain insureds may not be able to obtain liability insurance written by an insurer authorized to do business in their state, particularly

insureds whose operations present unusual or difficult risks (e.g., riding stables, waterslides or landfills). For such insureds, insurance brokers are permitted to obtain insurance policies from insurers who are not authorized to do business in that state.¹² This type of insurance issued by non-admitted insurers is referred to as “surplus lines insurance.” State insurance codes establish the rules and guidelines which must be followed in procuring surplus lines insurance. Excess coverage for many commercial insureds is written on a surplus lines basis.

III. THE RELATIONSHIP BETWEEN THE EXCESS INSURER AND THE INSURED

The relationship between the excess insurer and its insured principally is defined by their insurance contract. The rights and obligations of both the insured and the excess carrier therefore must be determined pursuant to the policy to which they are parties. Excess policies often contain the same or similar basic provisions, many of which are addressed in this article. To the extent an excess policy incorporates the terms of an underlying policy, those provisions will govern the parties' rights under the excess policy. Addressed below are the principal issues which uniquely affect the rights and obligations of excess insurers in connection with lawsuits brought against the insured.

A. The Insured's Duty to Provide Notice of a Claim or Lawsuit

An express condition of most liability policies, including excess policies, is that the insured must give its insurer timely notice of all claims and lawsuits brought against the insured. The “notice” provision ordinarily is set forth in the “conditions” section of the policy. Most reported cases relating to an insurer's notice defense involve primary insurers. This is because the primary insurer is obligated to undertake the investigation and defense of claims against the insured when it receives notice of claims potentially covered under the policy. Several courts, however, have addressed the right of an excess carrier to receive notice of claims or lawsuits likely to affect its coverage.¹³

In *Brownlee v. Western Chain Co.*,¹⁴ the court considered an excess insurer's argument that no coverage was afforded under its policy because it did not receive timely notice of a lawsuit filed against the insured. The excess insurer was first notified of the lawsuit against its insured after the entry of a default judgment which exceeded the available primary insurance. The notice provision required the insured to notify the excess carrier whenever it “had information from which the insured may reasonably conclude” that the excess policy limits would be affected. Based on the language of the notice provision, the *Brownlee* court held that the insured furnished timely notice. The insured was never provided a copy of the complaint and thus had no information regarding the damages claimed by the plaintiffs. The court would not impose an obligation upon the insured to inquire about the damages sought “where the policy's notice provision is not subject to such judicial construction.”¹⁵

In *Sisters of Divine Providence v. Interstate Fire & Casualty Co.*,¹⁶ the insured medical center was sued for malpractice by a patient who contracted meningitis. The medical center maintained a \$ 100,000 self-insured retention, followed by a \$ 100,000 excess policy and a \$ 5 million second level excess policy. In 1977, the father of the injured minor testified at his deposition as to the serious and permanent nature of his son's injuries. Two years later, defense counsel notified the insured that the injuries were “catastrophic.” Nonetheless, the second level excess carrier was first notified of the lawsuit in 1980, one month prior to trial.

In subsequent coverage litigation, the excess carrier argued that it received late notice as a matter of law. The policy contained a condition precedent requiring notice of a lawsuit as soon as practicable. The insured had actual knowledge of the liability and damages involved in the underlying case and could offer no excuse for its delay in providing notice. The *Sisters of Divine Providence* court found that the insured did not exercise proper diligence and held that the excess insurer afforded no coverage. Though the insured argued that the excess insurer had not been prejudiced by the late notice, the court explained that Illinois law does not require proof that the timing of notice has prejudicially affected the carrier since only the reasonableness of the notice is relevant.¹⁷

*721 The argument often advanced by insureds is that notice to the excess carrier is not particularly crucial since defense counsel appointed by the primary will protect both carriers' interests. Nonetheless, the excess carrier includes a notice provision in its policy in order to allow itself the opportunity on a timely basis to evaluate its coverage position, investigate and evaluate the merits of the lawsuit against the insured, review the files of the primary insurer and its counsel and, if it so chooses, become involved in the handling of the liability lawsuit.¹⁸ In addition, although only the insured is in privity with the excess insurer, the prudent primary carrier will notify the excess insurer of claims with the potential to involve the excess coverage in order to avoid difficulties which may result when the primary carrier attempts to tender its limits or a verdict in excess of the primary policy limits is rendered.¹⁹

B. The Excess Insurer's Duty to Defend

Since it is principally the obligation of the primary insurer to defend lawsuits against the insured, the excess insurer does not undertake the insured's defense in most cases. Because the cost of defending a liability lawsuit can be significant, however, the nature and extent of the excess insurer's defense obligation has been extensively litigated.

1. General Principles—The Excess Insurer's Duty to Defend Is Contractual

Under the law of most jurisdictions, an insurance carrier's duty to defend is purely contractual. Thus, if an excess carrier does not contract to defend its insured, it generally owes no defense obligation.²⁰

The court explained the general rule in *All-Star Insurance Corp. v. Steel Bar, Inc.*:²¹

*722 The nature of the insurer's duty to defend is purely contractual. There is no common law duty as to which the courts are free to devise rules. The obligation on the court is merely to interpret the language of the insurance contract.

It nonetheless has been held that if an insurance policy does not contain a provision negating an insurer's duty to defend (i.e., if the policy is silent), the excess insurer may under certain circumstances be obligated to defend. For example, in *Conanicut Marine v. Insurance Company of North America*,²² the court found that the primary insurer was required to defend the insured because the policy did not contain a provision expressly excluding the duty to defend. The court stated:

We find that an ambiguity exists in the language of the policy in question. We are convinced that an ordinary purchaser of insurance reading the policy in question would not be aware that it is a policy of indemnity with no obligation on the part of the insurer to defend the insured. The title of the policy does not indicate that it is an indemnity policy, and defendant has failed to identify the specific language in the policy that states that defendant has no duty to defend plaintiff in any contested matter.²³

The holding of the Conanicut court, and similar decisions implying a duty to defend even though an insurance contract did not obligate the insurer to defend,²⁴ unfortunately disregards the contractual nature of the insurance relationship under the guise of rules of construction favoring the insured. Particularly where the insured under the excess policy is sophisticated in matters of insurance, the courts' resort to rules of construction to imply a duty to defend which was not bargained for by the parties is misplaced.²⁵

Most courts do not disregard the agreement between the parties to find a defense obligation where no such duty exists under the terms of the policy, though some courts have implied a duty to defend if a policy does not clearly exclude defense cost coverage.

2. The Excess Insurer's "Option" to Defend

Many excess policies allow the carrier the "option" to defend lawsuits pending against the insured. This provision is intended to allow the excess insurer, if it so chooses, to become involved in actively defending lawsuits which could involve its layer of coverage. Most courts have held that even though an insurance policy allows the insurer the right or option to defend lawsuits, the carrier does not thereby have a duty to defend the insured.²⁶

*723 In *Chicago & Eastern Illinois Railroad Co. v. Reserve Insurance Co.*,²⁷ the court held that the insurer was not obligated to pay defense costs since the insured was contractually obligated to provide its own defense. The policies at issue contained a standard "option to defend" clause:

The Assured shall be responsible for the settlement or defense of any claim made or suit brought or proceeding instituted against the Assured which no other insurer is obligated to defend. The Assured shall use due diligence and prudence to settle all such claims and suits which in the exercise of sound judgment should be settled, provided, however, that the Assured shall make no settlement for any sum in excess of the retained limit without approval of the Underwriters. When in the judgment of Underwriters an occurrence may involve damages in excess of the retained limit or deductible or the limit of other insurance, Underwriters may elect at any time to participate with the Assured and any other insurer in the investigation, settlement and defense of all claims and suits in connection therewith.²⁸

Finding that the insurer was not required to defend under the above language, the court stated:

The insurance policies provide that: "The Assured shall be responsible for the defense or settlement of any claim made or suit brought or proceeding instituted against the Assured which no other insurer is obligated to defend." Furthermore, under these policies, the insurers merely had the right to "participate with the Assured" in the defense. . . . We find no basis for disregarding the contract language and imposing upon the insurers a duty to defend the insured which the insurers did not undertake in the insurance policies.²⁹

Similarly, in *City of Peoria v. Underwriters at Lloyds' London*,³⁰ the policy allowed the insurers, "if they so desire," to "take over the conduct . . . of the defense of any claim" covered by the policy. The court held that the insurer was not required to defend suits against the insured:

We think that this provision is clear. It creates the right, but not the obligation, to assume the conduct of the defense of the [underlying] suit. It is accordingly adjudged that . . . defendants are not obligated to provide legal counsel for plaintiffs' defense of the . . . suit.³¹

*724 In *Outboard Marine Corp. v. Liberty Mut. Ins. Co.*,³² the United States Court of Appeals for the Seventh Circuit construed California law and found that the excess carrier was not liable to the insured for failing to participate in the defense of the underlying lawsuit. The Seventh Circuit explained with respect to the excess insurer's policy:

The relevant provisions of the Home insurance contract require Home to pay sums "which the Insured, or any company as his insurer, or both, become obligated to pay either through adjudication or compromise"; provided that Home "shall not be called upon to assume charge of the settlement or defense" but has the right "to associate with the Insured or the Insured's underlying insurers, or both, in the defense and control of any claim, suit or proceeding . . . in which event the Insured and the Company shall cooperate in the defense"; and also provide that Home's liability under the policy "shall not attach" until the insured or the underlying insurer have paid the amount of the underlying policy limits.³³

Based on this language, the court held:

The only obligation imposed on Home was to indemnify the insured after payment had been made. The insurance contract explicitly states that Home does not have the duties plaintiff seeks to impose upon it in this action. The reservation of the option to “associate” in the defense imposes no duties when that option is not exercised. Even the right to assume control of the defense carries with it no duty to participate in the defense.

Conversely, in *Interstate Fire v. Stuntman, Inc.*,³⁴ the United States Court of Appeals for the Ninth Circuit recently found that an excess insurer issuing a policy containing an “option to defend” clause had an implied duty to defend the insured.³⁵ The excess policy also provided as follows:

The insured shall be responsible for the investigation, settlement or defense of any claim made or suit brought or proceeding instituted against the insured which no underlying insurer is obligated to defend . . .³⁶

Noting that the policy did not expressly provide that the excess insurer was not obligated to defend, the court found it had an obligation to defend upon the exhaustion of the primary policy.³⁷ The court’s ruling was based on equitable principles and did not focus on the excess policy’s option to defend clause.

Many following form excess insurers reserve to themselves the option to defend lawsuits against the insured. The option is exercised by carriers in situations where there is significant exposure in excess of the underlying limits and the underlying insurer is not mounting a strong defense. Consistent with the contractual nature of *725 the duty to defend, the excess insurer should not be obligated to defend the insured notwithstanding a policy provision allowing the excess insurer the option to defend.

3. The Umbrella Insurer's Obligation to Defend Lawsuits “Not Covered” by Primary Insurance

Umbrella policies obligate the insurer to defend lawsuits covered under the umbrella policy but which are “not covered” under the primary policy. To the extent a lawsuit against the insured is potentially covered under the broader coverage of the umbrella policy but not the primary policy, the umbrella carrier generally will owe the insured a defense.

In *Jostens, Inc. v. Mission Ins. Co.*,³⁸ a lawsuit was brought against the insured by a former employee alleging he was wrongfully terminated. The insured tendered the defense of the lawsuit both to its primary and to its umbrella insurer. Neither insurer defended the suit and the insured thus defended itself. The Minnesota Supreme Court noted the three coverage possibilities which existed at the time the claim was tendered to the carriers:

1. Both insurers had coverage, so the primary insurer would have had the sole duty to defend;
2. The lawsuit was only covered under the “broader” umbrella coverage, so only under the umbrella carrier owed the insured a defense; or
3. Some of the claims fell under the primary policy and others were covered under the umbrella policy, so both insurers, to the extent they afforded primary coverage, had some duty to defend.

The Jostens court held that because it could be argued “legitimately and in good faith” that both insurers owed a defense to the insured, both were obligated to defend. The court stated:

[W]here an umbrella policy is involved, as between the underlying insurer and the umbrella insurer, the underlying insurer shall be liable for the entire defense costs except as to those costs that the underlying insurer can show were for defending claims covered only under the umbrella insurer's "broader" or primary coverage.³⁹

In *U.S. Fire Ins. Co. v. Charter Financial Group*,⁴⁰ the Seventh Circuit construed Indiana law and clarified the scope of coverage afforded by an umbrella policy. A partnership was named as an insured under the umbrella policy, but not the primary policy. The umbrella policy provided coverage in excess of the \$ 100,000 primary policy as well as broader coverage for occurrences "not covered" by the primary policy subject to a \$ 25,000 retention. Suit was brought against the partnership and the insured argued it was obligated only to pay the \$ 25,000 retained limit because the partnership was "not covered" by the primary policy. The Seventh Circuit disagreed and explained:

***726** USFIC has stipulated that the excess policy covers the explosion even though the underlying policy does not. It therefore admits bargaining for the risk of insuring some events that are not covered by the primary insurance. But it does not follow that the parties contemplated that the excess policy would cover property damage under \$ 100,000 should the insureds violate the terms of the underlying policy. This would 'transmogrify the policy into one guaranteeing' the insureds' compliance with the primary policy. The broad, 'comprehensive' coverage of the excess policy indicates only that USFIC was willing to risk insuring down to \$ 25,000 [for] less common categories of losses (like advertising liability) not covered by the primary insurance.⁴¹ The Seventh Circuit followed the rationale of other courts which have found that the language of the standard umbrella policy is clear and unambiguous.⁴²

Some insureds have argued that because courts have held that a primary insurer's defense obligation terminates upon the exhaustion of its policy by the payment of judgments or settlements,⁴³ the insured's umbrella insurer must undertake the insured's defense thereafter on the basis that pending and later filed lawsuits are "not covered" by the primary policy. There is no merit to this argument because it has been held that the "not covered" language of the umbrella policy refers to the "fact of coverage under the underlying policy, not to the extent of coverage under that policy."⁴⁴ Accordingly, the exhaustion of the insured's primary coverage by the payment of claims does not trigger the umbrella insurer's defense obligation.

The broader coverage of an umbrella policy, including the umbrella insurer's defense obligation, applies only to risks which are not within the scope of the insured's standard underlying coverage but which fall within the more expansive coverage of the umbrella policy.

4. Allocating Defense Costs between Primary and Excess Insurers

A source of conflict between primary and excess insurers is the extent to which excess insurers should contribute to the defense of claims which have the potential to involve the excess insurer's indemnity limits. The problem arises when the primary carrier incurs significant defense costs in connection with a lawsuit which is likely to exhaust the limits of the primary policy. Under these circumstances, the vigorous defense of the action inures to the principal benefit of the excess insurer and the primary insurer often takes the position that the excess carrier is obligated to contribute toward the defense costs.⁴⁵

***727** The traditional view is that an excess insurer is not required to contribute to the defense of the insured as long as the primary insurer is required to defend.⁴⁶ For example, in *Occidental Fire & Cas. Co. v. Underwriters at Lloyds', London*,⁴⁷ the court considered the relative defense obligations of a primary insurer and an excess carrier. The insured maintained a primary policy containing a defense obligation and an excess policy requiring the insurer to pay legal expenses only where three

conditions, including the consent of the excess carrier, were met. The primary insurer defended the insured and a judgment in excess of both the primary and excess limits resulted. An unsuccessful appeal was taken; the primary tendered its policy limits and thereafter sought to recover a pro rata share of the costs of appeal from the excess carrier. The court held that the primary insurer was not entitled to reimbursement from the excess carrier.

The Occidental court cited various reasons for deciding that the excess insurer did not owe any portion of the costs of the appeal. First, the court noted that the primary policy required the carrier to pay all costs until its policy limits had been paid or tendered; because its policy limits were not tendered until after the appeal, the primary was still required to defend. In addition, the court found that the excess carrier had no duty to defend because its policy did not obligate it to do so. Finally, the court declined to apportion the defense costs based on the doctrine of equitable subrogation since the insurers each honored the duties imposed by their respective contracts.

Similarly, an excess insurer which defended the insured was allowed to recover defense costs it expended from the non-defending primary insurer in *F. B. Washburn Candy v. Fireman's Fund*.⁴⁸ Holding that the doctrine of equitable subrogation allowed the excess insurer to recover its costs of defense, the court noted:

[The excess insurer] was placed in the posture of defending [the insured] only after [the primary insurer] wrongfully refused to render a defense. Thus, [the excess insurer's] duty to defend was activated under inappropriate circumstances. Moreover, under the doctrine of equitable subrogation, [the primary insurer's] liability as a primary insurer is not increased by [the excess insurer's] recovery of attorneys' fees. The duty owed to [the excess insurer] is identical to that which was owed to [the insured] but was refused.⁴⁹

***728** This represents the prevailing rule where an excess carrier seeks to recover defense costs it incurs due to the primary insurer's wrongful failure to defend.⁵⁰

A relatively recent trend in the law is the application of a pro rata or other "equitable" division of defense cost obligations between the primary and excess carriers. While this is still a minority view, equitable allocation has found support because, as stated in *Celina Mutual Insurance Co. v. Citizens Insurance Co.*,⁵¹ prorating defense costs among primary and excess insurers, based upon their exposure, "provides no obstacle to an effective defense and leads to a more equitable distribution of the cost of litigation among the insurers."⁵²

Recently, in *Hartford Accident & Indemnity v. Continental National American Insurance*,⁵³ the United States Court of Appeals for the Ninth Circuit considered a primary insurer's attempt to shift to the excess insurer its obligation to defend the insured by conceding liability to the extent of its primary limits. The primary policy provided that the "payment" of the policy's limits terminated the obligation to defend. The excess carrier was obligated under its policy to defend upon "exhaustion of underlying limits of liability through payment of judgments and settlements." Applying California law, the court found that the primary insurer's concession of its limits did not constitute a "payment" sufficient either to exhaust the duty of the primary insurer to defend or to trigger the excess insurer's defense obligation. Moreover, rejecting the primary insurer's argument that equitable principles required the excess insurer to defend, the court stated:

An excess insurer predicates the premiums it charges upon the obligations that it and the primary insurer assume, including the primary insurer's obligation to defend all suits until exhaustion of its liability limits. Equity cannot require [the excess insurer] to provide coverage for which it was not paid. Obviously, primary and excess insurers can ***729** alter their coverages and correspondingly adjust their premiums to provide the result [[the primary insurer] wishes. They have not done so in this case, however.⁵⁴

On the other hand, it has been held that an excess insurer must assume the defense of the insured where the primary insurer's liability limits are exhausted by an actual settlement for less than the primary limits. In *Tiegen v. Jelco of Wisconsin, Inc.*,⁵⁵ the primary insurer provided \$ 500,000 in liability coverage underlying an excess policy. A personal injury action was filed against the insured; the primary carrier defended and then entered into a covenant not to sue whereby it was released from liability under its policy although it paid only \$ 390,000 in settlement; the plaintiff reserved all rights to continue the lawsuit to pursue recovery from the excess insurer. The excess carrier filed an action alleging that the settlement was made in bad faith. Relying on its prior decision in *Loy v. Bunderson*,⁵⁶ the Wisconsin Supreme Court upheld the settlement in *Tiegen* and noted that after the primary insurer settled "it is not unreasonable for (the excess insurer) to defend against claims falling within the parameters of its coverage."⁵⁷

Decisions such as *Loy* and *Tiegen* have a significant impact on excess insurers, which the courts fail properly to recognize. Allowing a primary insurer to terminate its defense obligation to the insured by paying less than its limits deprives the excess carrier of its bargained for layer of underlying protection. Moreover, such settlements in practice simply operate as a mechanism to fund the plaintiff's case against the excess carrier.⁵⁸

Most cases relating to the respective duties of primary and excess insurers to defend have arisen where one policy provides excess coverage by "coincidence."⁵⁹ There is particular disagreement among the courts as to the proper allocation of the burden of defense between primary and excess insurers in coincidence cases. The cases may be basically divided into two groups: (1) those holding that the primary has the entire duty of defense, and (2) those holding that the excess has some duty to *730 defend.⁶⁰ Even in this latter group, however, there is disagreement as to the extent of the excess carrier's duty and what must occur before the excess carrier may be called on to provide a defense.

C. The Excess Insurer's Reservation of Rights

An excess insurer as a matter of course often will issue a reservation of rights letter to advise the insured of its coverage position. Several courts have considered whether an excess insurer which has no duty to defend its insured is required under the law to advise the insured of its coverage position during the pendency of litigation against the insured.

The excess insurer's obligation to inform the insured of its coverage position was addressed in *Whiting Corp. v. Home Ins. Co.*⁶¹ Home issued an excess liability policy and was aware that its insured was involved in litigation potentially involving Home's excess coverage. Home closely monitored the litigation but nonetheless remained silent concerning its coverage position. The insured settled the action and Home then denied coverage based on a policy exclusion. The insured subsequently brought a separate lawsuit against Home claiming that it was estopped from denying coverage due to its failure to provide timely notice of its coverage position. Home moved to dismiss, arguing that it had no obligation to inform the insured of its coverage defense.

The *Whiting* court restated the familiar Illinois rule concerning a primary insurer's obligations:

The law appears quite clear that if a primary carrier that undertakes to defend its insured does not promptly notify the insured that the defense is undertaken pursuant to a reservation of rights (or institute a declaratory judgment action), the carrier is estopped from later denying coverage.⁶²

The court noted that the rationale for such a rule is to afford the insured notice of the coverage position of the insurer that is controlling the defense of the liability lawsuit in order that the insured may take measures to protect its interest with respect to the development of the case. The court held that a question of fact was presented with respect to whether Home, an excess carrier, was estopped from denying coverage. The court stated that "the issues here are whether, under the circumstances . . . Home had an obligation to speak and whether (the insured) has been prejudiced by its failure to do so."⁶³ The court explained:

[A]n argument clearly can be made that prejudice to the insured resulted from the insurer's unwarranted inaction and subsequent mistaken reliance on an inapplicable portion of the policy. Whether Whiting will ultimately be able to prove reliance and prejudice is another matter, but it is surely entitled to its day in court on those issues.⁶⁴

***731** More recently, in *St. Paul Fire & Marine Ins. v. Children's Hospital*,⁶⁵ St. Paul issued primary as well as excess errors and omissions coverage to Dr. Ong and Children's Hospital. St. Paul defended a medical malpractice action brought against its insureds under the primary policy through the time a judgment exceeding the limits of the primary policy was entered. St. Paul then denied coverage under its excess policy. In a subsequent declaratory judgment action, the insured argued that St. Paul was estopped from denying coverage under its excess policy. The court held that St. Paul was not obligated to defend under the excess policy and therefore could not be estopped from denying coverage:

St. Paul, in its capacity as the excess carrier, had no duty to defend Ong and Children's Hospital. The duty to defend arose solely under the primary liability policy. Thus, when Children's Hospital and Dr. Ong tendered the defense of the Lee claims to St. Paul as primary liability insurer, St. Paul had a duty to disclaim coverage or reserve rights with respect to the primary liability policy. It had no obligation to speak with respect to the other policies. Since there was no obligation to speak, that can be no implicit promise of coverage upon which to base estoppel.⁶⁶

The St. Paul court expressly rejected the reasoning of the Whiting court, holding that the question of whether an excess carrier has an “obligation to speak” is a question of law and not one of fact.⁶⁷

The St. Paul decision is better reasoned than Whiting. The courts' rationale for precluding insurers with a duty to defend from contesting coverage in the event a reservation of rights is not issued on a timely basis has no application to an excess insurer which has no defense obligation. In cases where a judgment possibly will exceed the primary limits, excess carriers nonetheless are well advised to inform their insureds of coverage issues as early as practicable in the litigation in order to avoid a later dispute.

D. The Excess Insurer's Duty to Indemnify

The obligation of an excess insurer to indemnify the insured is, from the insured's standpoint, the very essence of the excess insurance contract. By definition, excess insurers generally are liable only for the amount of loss or damage in excess of underlying coverage. A standard indemnity provision contained in a following form policy provides:

The company will indemnify the insured for loss in excess of the total applicable limits of liability of underlying insurance stated in the schedule.

The schedule of underlying insurance specifies the self-insured retention and other underlying coverage (whether primary or excess) purchased by the insured. Therefore, the obligation of the excess insurer generally is clear—the carrier must indemnify

***732** the insured for settlements or judgments in excess of the underlying coverage, up to the limits of the excess policy.⁶⁸

It also should be recognized that the point at which an excess carrier becomes obligated to indemnify the insured can be a source of controversy involving not only the insured and the excess insurer, but the insured and its insurance broker as well.⁶⁹ The insured's broker often becomes the focal point of litigation over a gap in coverage since it owes a fiduciary obligation to the insured with respect to procuring the insured's coverage. It is beyond the scope of this article to address the duties owed by insurance brokers to insureds.⁷⁰

Addressed below are various situations where an issue has been raised between the insured and its excess insurer as to the point at which the excess carrier must provide coverage.

1. Underlying Coverage Not Purchased

Excess insurers issue their coverage based on the insured's warranties and representations, including the representation of how much underlying coverage is in place. Excess policies typically contain a "maintenance clause" whereby the insured represents that the coverage listed in the schedule of underlying insurance will remain in effect throughout the term of the policy. Failure to comply with the maintenance clause has resulted in the loss of excess coverage.

In *Whitehead v. Fleet Towing Co.*,⁷¹ the excess carrier provided \$ 100,000 excess coverage over a \$ 50,000 primary layer of insurance. The insured failed to purchase the \$ 50,000 policy and an action was brought against the insured, which resulted in a \$ 126,000 verdict. The excess insurer refused to indemnify the insured for any portion of the verdict, and a garnishment action was instituted against the carrier. The excess carrier argued that the insured falsely warranted and misrepresented its actual insurance coverage. The trial court ruled in favor of the garnishment plaintiff, awarding \$ 76,000 which represented the portion of the verdict for which the excess insurer would have been liable had primary coverage been in effect.

On appeal, the *Whitehead* court reversed the trial court and held that the excess carrier was under no duty whatsoever to provide coverage where there was no primary insurance in effect. As a matter of law, the court held that an "insured's failure to procure primary coverage is such a material defect that regardless of whether a warranty or misrepresentation theory is pursued, the garnishees cannot be held liable *733 on the excess insurance policy."⁷² The court reached its conclusion on the basis that an excess carrier is exposed to greater risks, not reflected in the premiums paid for excess coverage, where no primary coverage exists. The *Whitehead* court did not cite, nor apparently rely upon, the language of the excess policy in rendering its decision.⁷³

The insured's purchase of an underlying layer of primary insurance is a fundamental prerequisite to the issuance of a following form excess policy. The insured's failure to purchase coverage violates the excess policy's maintenance clause and at least will prevent the excess insurer from "dropping down" to provide primary insurance. Many policies provide that the insured's failure to comply with the maintenance clause "shall not invalidate (the) policy but in the event of such failure (the insurer) shall be liable only to the extent that it would have been liable had (the insured) complied therewith." Under such language, the excess insurer should provide coverage subject to an uninsured "gap" in the amount of the primary coverage which was to have been purchased.

2. Insolvency of an Underlying Insurer

In recent years, an increasing number of primary and excess insurers have become insolvent. Consequently, litigation has resulted over the obligation of an excess insurer to assume the obligations of an underlying carrier that has been declared insolvent. Excess insurers argue that simply by virtue of providing coverage over the insolvent carrier they should not be liable for the "gap" in coverage, while insureds predictably contend that carriers should "drop down" to fill any gaps.

For example, in *Molina v. United States Fire Ins. Co.*,⁷⁴ and *St. Vincent's Hosp. & Medical Center v. Insurance Co. of America*,⁷⁵ the courts held that the insolvency of the primary insurer did not require the excess insurer to "drop down" and assume the obligations of the insolvent primary insurer. In *Molina*, the excess policy indemnified the insured for "the ultimate net loss in excess of the retained limit," where "retained limit" was defined as "the total of the applicable limits of the underlying policies."⁷⁶ In *St. Vincent's*, the excess policy provided that the insurer was obligated to indemnify the insured in "excess of the amount specified" in the primary insurance policies.⁷⁷ Since the language of the policies in both *Molina* and *St. Vincent's*

required the excess carrier to pay losses in excess of a fixed amount, the primary policy limits, the courts found that the excess insurers were not obligated to “drop down.”⁷⁸

*734 Similarly, in *Zurich Ins. Co. v. Heil Co.*⁷⁹ the Seventh Circuit held that an umbrella policy containing provisions which are relatively common in the insurance industry did not “drop down” due to the primary insurer’s insolvency. The Seventh Circuit applied well-settled Illinois and Wisconsin rules of insurance contract construction and rejected the insured’s “drop down” argument on the following bases:

1. The insolvency of a primary insurer is not an “occurrence” which would trigger the coverage of an umbrella policy.⁸⁰
2. The policy’s “limits of liability” language clearly provided that the umbrella policy only applied in excess of the limits of the primary policy, regardless of whether the primary insurer was solvent.
3. The umbrella policy’s “maintenance clause” places the burden on the insured to maintain the underlying insurance in force as collectible.
4. The comparatively lower premium charged for excess coverage reflects the insurer’s intent not to drop down. Zurich represents a growing body of well-reasoned case law finding that standard umbrella policies do not “drop down” due to a primary insurer’s insolvency.⁸¹

Conversely, under different policy language, courts have held that an excess carrier is obligated to “drop down” due to the insolvency of a primary insurer. In *Reserve Insurance Co. v. Pisciotto*,⁸² the excess policy provided that the insurer was liable for ultimate net loss in excess of “the amount recoverable under the underlying insurance.” The court held that the policy language required the excess carrier to “drop down” to provide coverage in place of the insolvent primary insurer:

CNA assumed liability for any excess over the “amount recoverable” under the underlying policy. That language might possibly be interpreted to either expose CNA only for amounts over the dollar limits of the underlying insurance or to expose CNA for amounts which the insured is not able to actually recover from the underlying insurer because of its insolvency. Because there are two meanings which may reasonably be attributed to the term in question, it is ambiguous and under settled principles must be construed in favor of the insured.⁸³

The court therefore concluded that the excess insurer’s policy included within the scope of its coverage the risk of the primary insurer’s insolvency.

*735 The Illinois court in *MacNeal, Inc. v. Interstate Fire & Casualty Co.*,⁸⁴ reached the same conclusion as did the Pisciotto court. Where the excess carrier’s policy in *MacNeal* provided coverage “in excess of . . . the amount recoverable under underlying insurance,” the court stated:

We adopt the reasoning of *Pisciotto* and conclude the defendant’s term limiting liability in excess of the amount recoverable under underlying insurance was subject to two interpretations and is, therefore, ambiguous. Construing the ambiguous phrase “amount recoverable” most strongly against the insurer and in favor of the insured, we hold that the language of the excess insurance contract requires defendant to assume the risk of the primary insurer’s insolvency.⁸⁵

The court distinguished *Molina* and *St. Vincent’s* on the basis that those cases involved different policy language. The *MacNeal* court also held that cases where the insured violated the excess policy’s maintenance clause by not purchasing coverage were inapplicable.

The excess carrier generally will not be obligated to “drop down” where its policy is triggered upon the exhaustion of a specified amount of underlying coverage. On the other hand, if the excess policy by its terms is triggered after the exhaustion of “collectible” or “recoverable” underlying insurance, courts generally will obligate the excess insurer to “drop down.” The excess carrier's policy must carefully be analyzed to determine whether it clearly and unambiguously prevents a “drop down,” as in Zurich, or whether a court might find the policy ambiguous as did the court in MacNeal.

3. Settlement for Less than the Available Underlying Limits

In recent years, primary insurers increasingly have engaged in the practice of entering into settlements with plaintiffs' attorneys for less than the primary policy limits, reserving to the plaintiff the right to pursue the action against the insured but only to the extent of the excess insurer's available limits. Although excess insurers have objected to this practice as collusive, the courts generally have upheld such settlements.

The principal decision supporting the position of excess insurers that such settlements are improper is *United States Fire Ins. Co. v. Lay*.⁸⁶ In *Lay*, before a wrongful death action was filed against the insured, the primary insurer paid \$ 70,000 of its \$ 100,000 in liability coverage to the administratrix. The primary insurer received a release of its policy obligations, though all rights were reserved against the excess insurer. The lawsuit was then filed and a judgment was entered in the amount of \$ 150,000. The excess insurer filed an action seeking a declaration that it was not liable for any portion of the judgment.

The Seventh Circuit held that the excess carrier was not liable for the judgment based on policy language which it characterized as providing “that the excess carrier is liable only if and when the insured sustains a loss in excess of the retained limit of *736 \$ 100,000 by reason of liability imposed by law or assumed by contract.”⁸⁷ The *Lay* court found the insured did not sustain such a loss and therefore held that the excess policy provided no coverage. The court further explained:

We can conceive of good reasons for an excess carrier to be unwilling to accept liability unless the amount of the primary policy has actually been paid. A settlement for less than the primary limit that imposed liability on the excess carrier would remove the incentive of the primary insurer to defend in good faith or to discharge its duty to represent the interests of the excess carrier. Here the primary insurer had no incentive whatsoever to reach a settlement at a figure between \$ 70,000 and \$ 100,000. Moreover, the settlement agreement terminating Comador's liability [to] the administratrix made her subsequent wrongful death action against Comador a sham. Neither Comador nor the primary insurer, which purported to defend the action, had any interest whatsoever in the outcome.⁸⁸

In *Allstate Ins. Co. v. Riverside Ins. Co. of America*,⁸⁹ the court considered a primary carrier's settlement of a liability lawsuit for less than its policy limits and stated:

The danger apprehended by Plaintiff Allstate is that the settlement is a sham and that its effect would be to alter the adversary relationships among the parties. No assertion is made as to how the settlement would alter these adversary relationships. It is true that the only party among those aligned with the tortfeasor (including both the primary and excess carriers) with a monetary liability at risk in the lawsuit is the excess carrier, Allstate. The Court now asks—So What? Again, this is not any different than a case in which the insurance carrier admits liability on behalf of its insured tortfeasor in return for the tort claimant's reduction of his claim to the limits of the policy.⁹⁰

The Riverside court nonetheless left open the possibility that the excess carrier could be relieved of its indemnity obligation if it could demonstrate the insured failed to cooperate in the defense of the case.⁹¹ Other cases are in accord with Riverside in rejecting the Lay rationale.⁹²

The principal adverse consequences to an excess insurer once there is a settlement for less than the primary policy limits are: (1) the primary carrier may be relieved of any further defense obligation; and (2) the excess insurer may lose a valuable settlement opportunity since the plaintiff may be less willing to enter into a full release for a reasonable overall settlement once the primary insurer effectively has financed the *737 continuation of the lawsuit against the excess insurer. Since courts generally are unwilling to follow the Lay rationale, excess carriers should protect themselves by modifying their contracts to require that they be allowed both to participate in all settlement negotiations and to reject settlements such as the one entered into in Riverside. From a practical perspective, excess carriers can avoid the problem created by such decisions by writing excess coverage only over reputable primary carriers (including themselves, of course).

4. Reformation of the Underlying Policy

The excess insurer naturally has a strong interest in the nature and extent of the coverage provided by underlying policies. It is common for following form excess policies to be issued without the excess insurer having actually reviewed the underlying policies. When the insured and the underlying carrier seek to reform their policy after a loss occurs (to the detriment of the excess insurer), the excess insurer can be expected to object.

In *L. E. Myers Co. v. Harbor Ins. Co.*,⁹³ the primary insurer issued a policy excluding property damage to work performed by the insured construction contractor. The excess policy provided that it would “follow the terms and conditions of the applicable underlying insurance in respect of such loss.” A lawsuit was brought against the insured for damage to certain electrical transmission lines and towers it was constructing. The primary insurer and the insured agreed that the lawsuit fell within an exclusion in the primary policy.

After the excess insurer denied coverage, the insured engaged in discussions with the primary carrier and it was learned that the primary insurer failed to follow the broker's instructions in writing the policy. Damage to the insured's own work was to have been covered under the policy and the insured and primary carrier thus reformed the policy on the basis of the parties' mutual mistake. The excess carrier persisted in its denial of coverage.

The Illinois Supreme Court noted that the excess carrier never reviewed the primary policy before issuing its own policy; the first time the excess carrier saw the primary policy was after the lawsuit was filed against the insured. Moreover, neither the primary insurer nor the insured's broker advised the excess carrier of the nature of the primary coverage before the excess insurer issued its policy. Consequently, the *L. E. Myers* court held that the following form excess carrier was bound by the reformation of the primary policy.

In *Great Atlantic Ins. Co. v. Liberty Mut. Ins. Co.*,⁹⁴ the United States Court of Appeals for the Eighth Circuit reached a similar result. The primary insurer issued two primary insurance policies to the insured, each providing \$ 500,000 in product liability coverage underlying an excess policy. After a lawsuit was filed against the insured, the primary insurer contended that a single \$ 500,000 limit of liability applied since one policy was intended to cover the insured's operations in the United States *738 while the other was to apply to Canadian operations. The excess carrier took the position that both policies applied to the lawsuit. A settlement in the amount of \$ 766,475.37, was reached, with the primary insurer paying \$ 500,000 and the excess carrier paying the balance of \$ 266,475.37.

The excess carrier instituted a breach of contract action against the primary insurer and the primary insurer filed a counterclaim seeking the reformation of its policies to set forth specifically the intended territorial limits of each policy. The Great Atlantic court found that the policies were intended to apply to different countries and that the intention of the insured and primary therefore was not properly reflected in the policies. The court noted the difference in premiums between the policies and the anomalous situation that would result if two separate policies were purchased from the primary insurer to cover the same risk. The court further observed that the excess policy listed the applicable underlying coverage as \$ 500,000 and the excess insurer therefore could not have relied upon the existence of two primary policy limits. Consequently, the court allowed the reformation of the primary policies.

The decisions upholding reformation of the primary carrier's policy are based principally on the absence of reliance by the excess carrier on the primary policy terms and provisions subject to reformation.⁹⁵ In order to avoid problems with a primary insurer's reformation of its policy after a loss occurs, underwriters of excess insurance should carefully document their files to reflect the exact terms and provisions of the underlying coverage.

IV. THE RELATIONSHIP BETWEEN EXCESS AND PRIMARY INSURERS

As has been noted throughout this article, there is no contractual relationship between primary and excess insurers since each has a separate contractual obligation to the insured. Since the carriers are not in privity with one another, one commentator has suggested that the primary and excess carriers "are not blood relatives but are at best 'in-laws.'"⁹⁶ Notwithstanding the absence of a legal relationship between them, the "in-laws" must deal with one another on an ongoing basis in the course of handling litigation against their mutual insured. The relationship can be and often is strained when the interests of the carriers conflict.⁹⁷

Addressed in the sections below are the efforts of the insurance industry to establish general guidelines governing the primary-excess relationship and the courts' treatment of the relationship.

A. The Guiding Principles for Insurers of Primary and Excess Coverages

In an effort to establish standards of conduct between primary and excess insurers, in 1974 the insurance industry enacted the Guiding Principles for Insurers of Primary *739 and Excess Coverages. The Guiding Principles were promulgated by the Claims Executives Council, composed of the American Insurance Association, the American Mutual Insurance Alliance and eight unaffiliated companies, in an attempt to reduce the incidence of controversy between primary and excess insurers.⁹⁸ Insurers are not automatically bound by the principles, but must become signatories in order to be bound theoretically by their effect. Though the principles have been introduced as evidence and argued in the trial of suits between primary and excess insurers there are few reported decisions in which courts have addressed the provisions.⁹⁹

The Guiding Principles for Insurers of Primary and Excess Coverages provide:

1. The primary insurer must discharge its duty of investigating promptly and diligently even those cases in which it is apparent that its policy limit may be consumed.
2. Liability must be assessed on the basis of all relevant facts which a diligent investigation can develop and in light of applicable legal principles. The assessment of liability must be reviewed periodically throughout the life of a claim.
3. Evaluation must be realistic and without regard to the policy limit.
4. When from evaluation of all aspects of a claim, settlement is indicated, the primary insurer must proceed promptly to attempt a settlement, up to its policy limit if necessary, negotiating seriously and with an open mind.

5. If at any time, it should reasonably appear that the insured may be exposed beyond the primary limit, the primary insurer shall give prompt written notice to the excess insurer, when known, stating the results of investigation and negotiation, and giving any other information deemed relevant to a determination of the exposure, and inviting the excess insurer to participate in a common effort to dispose of the claim.

6. Where the assessment of damages, considered alone, would reasonably support payment of a demand within the primary policy limit but the primary insurer is unwilling to pay the demand because of its opinion that liability either does not exist or is questionable and the primary insurer recognizes the possibility of a verdict in excess of its policy limit, it shall give notice of its position to the excess insurer when known. It shall make available its file to the excess insurer for examination, if requested.

***740** 7. The primary insurer shall never seek a contribution to a settlement within its policy limit from the excess insurer. It may, however, accept contribution to a settlement within its policy limit from the excess insurer when such contribution is voluntarily offered.

8. In the event of a judgment in excess of the primary policy limit, the primary insurer shall consult the excess insurer as to further procedure. If the primary insurer undertakes an appeal with the concurrence of the excess insurer the expense shall be shared by the primary and the excess insurer in such manner as they may agree upon. In the absence of such an agreement, they shall share the expense in the same proportions that their respective shares of the outstanding judgment bear to the total amount of the judgment. If the primary insurer should elect not to appeal, taking appropriate steps to pay or to guarantee payment of its policy limit, it shall not be liable for the expense of the appeal or interest on the judgment from the time it gives notice to the excess insurer of its election not to appeal and tenders its policy limit. The excess insurer may then prosecute an appeal at its own expense being liable also for interest accruing on the entire judgment subsequent to the primary insurer's notice of its election not to appeal. If the excess insurer does not agree to an appeal it shall not be liable to share the cost of any appeal prosecuted by the primary insurer.

9. The excess insurer shall refrain from coercive or collusive conduct designed to force a settlement. It shall never make formal demand upon a primary insurer that the latter settle a claim within its policy limits. In any subsequent proceedings between excess insurer and primary insurer the failure of the excess insurer to make formal demand that the claim be settled shall not be considered as having any bearing on the excess insurer's claim against the primary insurer.

The principles also provide for the mediation or arbitration of disputes.

Many insurers, particularly writers of excess and umbrella coverage, have declined to adopt these principles.¹⁰⁰ Excess insurers have criticized the eighth principle providing that the excess carrier should be liable for the costs of appeal, as well as expenses and interest on the entire judgment, in the event the primary carrier elects not to appeal. Because most primary policies obligate the primary insurer to determine whether to pursue an appeal and to pay interest on a judgment, this principle has fostered considerable concern.

Moreover, the ninth principle, which forbids an excess insurer from making a formal demand upon a primary carrier to settle within its limits, has been challenged on the basis that it negates one of the excess carrier's most basic protections. If a demand is made by the plaintiff against the primary carrier in the amount of the primary limits, excess carriers understandably contend they should be able to suggest that the case be settled.

***741** For the most part, the Guiding Principles relating to the primary insurer's conduct reflect the present state of the law in most jurisdictions. The provisions relating to excess carriers generally do not impose such obligations. This is the cause of the excess insurers' dissatisfaction with these principles and the reluctance of many excess insurers to become signatories.

Despite the criticisms of the Guiding Principles, meaningful guidelines have been attempted for fair dealing between the carriers with respect to the settlement of claims. Even if these criteria are not followed, the ideas which are embodied in the principles serve as a basis for understanding the interests of both the primary insurer and the excess carrier.

B. The Relationship between Primary and Excess Insurers with Respect to Trial or Settlement

Excess and primary insurers have litigated with one another over various situations that arise during the handling of claims against the insured (e.g., the payment of defense fees, reformation of the primary policy and settlements for less than the primary limits). Two of the principal sources of controversy among primary and excess carriers related specifically to the primary insurer's control over litigation pending against the insured are the primary's failure to settle appropriate cases within its limits and the manner in which some primary insurers prematurely attempt to exhaust their limits.

1. The Primary Insurer's Failure to Settle within Policy Limits

By controlling the defense of lawsuits against the insured, the primary carrier can significantly affect the excess insurer's exposure. Where the primary insurer rejects an opportunity to settle within its limits and a verdict in excess of the primary carrier's limits is returned, the excess insurer may seek to hold the primary insurer liable for the excess verdict.

Courts have long held that an insurer owes its insured a duty of good faith with respect to the settlement of cases.¹⁰¹ These cases establish that an insurer can be liable to its insured for failing to settle within its policy limits; the lawsuit has come to be known as either a third-party "bad faith" case or, more accurately, a "failure to settle" lawsuit. The action is premised upon the liability insurer's control over the defense of an action against the insured. At some point during the pendency of the suit, the insurer has the opportunity to settle for an amount within the insured's policy limits but the offer is rejected. If a verdict in excess of the policy limits is returned, the insured may then be able to bring the "failure to settle" action against its *742 insurer in an attempt to recover the excess judgment. The insured's cause of action often is assigned to the plaintiff who then pursues the insurer in a garnishment proceeding.

Where the insured has purchased excess liability coverage, however, the excess carrier stands in the same position the insured would have if an excess policy had not been purchased. Thus, if the primary carrier rejects an opportunity to settle within its limits and a verdict in excess of the primary policy results, the excess insurer may consider bringing an action against the primary. In attempting to state a claim against a primary insurer, excess insurers most often have asserted two separate legal theories: (1) a common law direct duty owed by the primary to the excess insurer, and (2) the doctrine of equitable subrogation.

Most courts have rejected the theory that a duty is owed directly by a primary carrier to an excess insurer.¹⁰² The courts generally hold that because there exists no contractual or fiduciary relationship between a primary and an excess carrier, a cause of action cannot be stated based on a direct duty theory. Nonetheless, some courts have found that an independent duty is owed by a primary to an excess carrier, similar to the duty owed by the primary to its insured. In *Hartford Acc. & Indem. Co. v. Michigan Mut. Ins. Co.*,¹⁰³ the New York Court of Appeals held that an excess carrier could bring an action for bad faith in its own capacity against the primary insurer. The Court of Appeals affirmed the lower court decision, where the Appellate Division stated:

As primary insurer, it acts as a fiduciary and is held to an exacting standard of utmost good faith. Any such right of action arises as a result of the independent and direct duty to the excess insurer and is not dependent upon equitable principles of subrogation.¹⁰⁴

Courts generally uphold the excess insurer's right to bring a lawsuit against a primary insurer based on the doctrine of equitable subrogation. In *Continental Cas. Co. v. Reserve Ins. Co.*¹⁰⁵ the excess carrier settled a claim prior to trial without any

settlement contribution from the primary insurer. The excess insurer thereafter brought an action contending that it was equitably subrogated to the rights of the insured in pursuing the primary carrier. The court upheld the excess insurer's suit, reasoning:

***743** When there is no excess insurer, the insured becomes his own excess insurer, and his single primary insurer owes him a duty of good faith in protecting him from an excess judgment and personal liability. If the insured purchases excess coverage, he in effect substitutes an excess insurer for himself. It follows that the excess insurer should assume the rights as well as the obligations of the insured in that position. ¹⁰⁶

Most other courts considering the equitable subrogation theory likewise have held that, on payment of the insured's liability to the injured claimant, the excess insurer becomes equitably subrogated to the rights of the insured, including the right of the insured to bring an action against the primary carrier for the wrongful failure to settle. ¹⁰⁷

It should be noted that many courts treat the direct duty and equitable subrogation theories interchangeably as if there were no distinction. ¹⁰⁸ One commentator notes, however, that the theory that is employed may be important. ¹⁰⁹ Windt suggests that because a subrogee's rights can rise to a level no higher than the subrogor's rights, where the primary insurer does not settle a case because the insured has requested that the case not be settled, the excess insurer should not be able successfully to prosecute an action against the primary carrier. ¹¹⁰ Windt also posits the situation where the primary does not settle a case because the plaintiff is only willing to settle for an amount in excess of the primary policy's limits. Applying the equitable subrogation theory, the primary insurer would be free from any potential liability and would be allowed simply to reject a settlement offer not within its policy limits. ¹¹¹

Once a failure to settle action has been instituted by an excess insurer against a primary carrier, the litigation of the case is analogous to the insured-primary carrier lawsuit in most respect. ¹¹²

2. The Underlying Insurer's Premature Exhaustion of Its Policy Limits

During the course of handling claims against the insured, the primary carrier has the opportunity to assign dates of loss to lawsuits, to determine whether lawsuits involve ***744** single or multiple occurrences and to decide when and in what manner the primary limits will be expended. All of these decisions have a significant impact on the indemnity obligation of the excess insurer. If the primary insurer prematurely exhausts its coverage, the excess insurer may pursue an action seeking a proper allocation of loss payments under the primary insurer's coverage. While a declaratory judgment action is the ordinary method of adjudicating the carriers' rights, ¹¹³ under certain circumstances a bad faith action may be maintained.

In *Kaiser Foundation Hospitals v. North Star Reinsurance*, ¹¹⁴ the excess insurer alleged that the insured and the primary insurer acted in bad faith in assigning claims to certain policy years in a wrongful attempt to trigger prematurely the excess insurer's policies. The insured argued that it and the primary carrier had exclusive power to determine dates of loss, regardless of how detrimental such determinations would be to the excess insurer. The court disagreed, stating that "[t]here can be no question that in this case the duty of good faith and fair dealing was owed to the excess insurer both by [the insured] . . . as well as by . . . the primary insurer." ¹¹⁵ The court further noted that nothing in the excess insurer's policy expressed or implied an intention on the part of the excess carrier to accept the assignment of dates of loss by the insured and the primary. The court explained:

Contract language apart, Kaiser presents several arguments to the effect that it would be inexpedient to permit North Star to question a decision by Kaiser and Lloyd's to allocate a loss to the 1965-1966 policy year. Thus Kaiser argues that if the excess insurer is permitted to question such allocation, it will be more difficult to settle cases. Even if this were true, it would be a relatively small price to pay for not permitting an insured and a primary insurer to ride roughshod over the rights of the excess carrier. As a practical matter we doubt the correctness of Kaiser's conclusion: our experience has been that bona fide disputes as to the

correct policy period to which a loss should be allocated are rare. Inviting the advance agreement of the excess carrier or carriers as part of an overall settlement should decrease rather than increase, the occasions for litigation.¹¹⁶

The court stated that it would not attempt to define precisely the rights and duties of the parties, noting that the primary insurer's obligation to the excess insurer with respect to the allocation of dates of loss presented a question of fact.¹¹⁷

A difficult situation is presented when multiple lawsuits are pending against the insured and the primary insurer can, by paying its limits, settle some but not all of the claims. Under these circumstances, the primary insurer always faces the possibility of a judgment exceeding its coverage and it therefore can face potential liability either for paying too much to settle certain claims (prematurely reducing the available primary *745 coverage) or for failing to reduce the insured's overall exposure by not settling any claims.¹¹⁸ The dilemma that faces the primary insurer under these circumstances usually can be avoided if the primary insurer seeks the advice and agreement of both the insured and the excess insurer with respect to settlement decisions.

Another problem related to the premature exhaustion of primary limits arises in connection with the primary policy which includes in its aggregate limits defense fees incurred in defending the insured. In a high exposure case, the primary insurer which faces exhaustion of its coverage may not have an interest in properly controlling the defense costs. Accordingly, the excess insurer should ensure that the defense fees charged against underlying limits are not excessive and otherwise are properly payable under the terms of the policy.

A primary insurer's settlement with the claimant for less than the primary limits in exchange for a covenant not to sue, reserving the claimant's right to pursue the excess insurer, also is a source of considerable controversy between primary and excess insurers.¹¹⁹ This subject is addressed previously in this article.¹²⁰

Questions concerning the manner in which the insured's underlying coverage is being depleted ordinarily can be dealt with most effectively during the course of the underlying litigation. The excess insurer's active involvement in the overall claims handling effort will avoid some of the problems noted above.

V. THE EXCESS INSURER AND COVERAGE LITIGATION

Litigation with excess insurers involves many of the same substantive and strategic considerations as are involved generally in insurance coverage and commercial contract litigation. There are nonetheless certain particular considerations which should be taken into account in litigation involving an excess insurer, including the "actual controversy" requirements of declaratory judgment statutes, the effect of the "service of suit" clause contained in many excess policies, and the excess insurer's potential interest in intervening either in the underlying action against the insured or in a pending declaratory judgment action involving the primary insurer.

A. The "Actual Controversy" Requirement for Declaratory Judgment Suits

Declaratory judgment actions often are instituted to resolve questions of insurance contract interpretation. A court has jurisdiction to grant declaratory relief if there is an "actual controversy" between the parties.¹²¹ Although courts have expressed a preference for resolving insurance coverage questions prior to the trial of the underlying *746 case, the "actual controversy" requirement can pose a problem regarding an excess insurer that has a duty only to indemnify the insured. An insured cannot properly assert a demand against its excess carrier until there is a settlement offer or a judgment against the insured which exceeds the available underlying limits. Thus, prior to such time, ordinarily there is no "actual controversy" to support the court's jurisdiction over a declaratory judgment action.

For example, in *Batteast v. Argonaut Ins. Co.*,¹²² a personal injury claimant filed a declaratory judgment action to determine the maximum amount of coverage to which he would be entitled under the insured's excess insurance policy. The underlying personal injury suit was pending and had not proceeded to trial. The *Batteast* court held that the plaintiff lacked standing to seek a declaratory judgment because an "actual controversy" did not exist:

The controversy here stems from the parties' differing interpretations of the provisions regarding amount of coverage in the applicable insurance policy. Regardless of their disagreement, the plaintiff's right to any amount is contingent upon a finding of liability in the underlying tort action. Even if liability is later established, a resolution of the dispute would remain unnecessary unless the damages awarded exceeded \$ 1 million. Moreover, if we were to allow this action, there is no reason why every tort claimant would not, upon filing a personal injury action, concomitantly file a declaratory judgment action to determine the maximum amount of coverage to which he would be entitled in the event that liability was subsequently established. We cannot create the right to such premature litigation. The instant fact situation does not present an actual controversy between the parties. Therefore, the plaintiff does not have standing at this time to maintain the declaratory judgment action.¹²³

The plaintiff's case thus was dismissed.¹²⁴

In *Laguna Pub. Co. v. Employers Reinsurance Corp.*,¹²⁵ the court dismissed a declaratory judgment action brought by an underlying plaintiff against the insured's excess carrier. The court held there was no "actual controversy" and stated: Neither of the two ripeness factors supports juristicability in this case. First, the question of E.R.C.'s liability to Laguna may never become an issue at all. Laguna is suing E.R.C. under an excess liability policy which covers a primary policy issued to insured Golden Rain by Centennial. Until Centennial's liability under the primary policy is settled, the Court cannot be certain that a controversy will arise between Laguna and E.R.C. Laguna may only be awarded damages, or Centennial may settle with Laguna, within the primary policy limits. In that case, there would be no excess liability for the E.R.C. policy to cover, and there would be no dispute between Laguna and E.R.C. to adjudicate.

*747 Second, delaying the adjudication of the question of whether E.R.C. policy covers the type of claim made by Laguna would not work a hardship on the parties. Even if this Court were to decide that E.R.C. policy covered Laguna's claim, Laguna could not make a claim against the policy . . . until Centennial's liability and the amount of its liability, had been established. Thus this claim for declaratory relief is not yet ripe for adjudication.¹²⁶

On the other hand, in *Zurich Ins. Co. v. Raymark Industries, Inc.*¹²⁷ the court found that an actual controversy existed as to three excess carriers of the insured once the underlying primary carrier claimed its limits were exhausted. The court stated: "Consequently, since November of 1983, when Raymark and Zurich represented to the trial court that Zurich's primary limits were exhausted and that Zurich would cease making any further payments, there has been an actual controversy with the three excess carriers regarding coverage."¹²⁸ The court further stated:

We observe that in the declaratory judgment action, the trial court was not asked to merely render an advisory opinion, but rather to determine who among the primary and excess carriers are obligated to fund the defense and indemnity of asbestos cases against Raymark and whether any carrier's previous payments in these cases should be reallocated. The excess carriers are necessarily implicated under any theory of allocation of indemnity and defense liability. This litigation cannot be resolved without either affecting the interests of the excess carriers or leaving the interests of the other parties herein in an inequitable position.¹²⁹

The cases that have addressed the “actual controversy” requirement with respect to excess carriers establish that there must be a real and present dispute involving the excess insurer's coverage before the court may exercise jurisdiction. If the insured or the primary insurer is not asserting a present demand against the excess carrier (e.g., for a defense) and the only issue involving the excess insurer is a contingent indemnity obligation, ordinarily the court cannot assert jurisdiction.

B. The “Service of Suit” Clause

A standard “service of suit” clause in insurance policies provides that the insurer will submit to personal jurisdiction in any court of competent jurisdiction within the United States and will comply with all requirements necessary to give the court jurisdiction. Underwriters at Lloyd's of London, which write a significant volume of excess insurance, years ago began the practice of inserting “service of suit” clauses in their policies. This was done to counter arguments by competitors that insureds should not purchase insurance from London underwriters since they would not be subject to suit in the United States. When a policy contains a “service of suit” clause, *748 conflicts can arise between the respective interests of the insurer and the insured concerning the forum in which the coverage dispute will be litigated.

The standard “service of suit” clause does not place venue in an exclusive jurisdiction. Rather, it provides that the insurer will submit to the jurisdiction of any competent court within the United States. Even when a forum selection clause places venue exclusively within a particular state, it has been found that it is one of the many factors to be considered in deciding where the lawsuit is properly venued.¹³⁰ For example, in *Gould, Inc. v. National Union Fire Insurance*,¹³¹ the court granted an insurer's motion to transfer an action from Illinois to Missouri even though the policy contained a standard service of suit clause.¹³²

In *Appalachian Ins. Co. v. Superior Court*,¹³³ Appalachian provided excess coverage to Union Carbide. Union Carbide is a New York corporation with its principal place of business in Connecticut, but conducts business in California. Appalachian is a Rhode Island Corporation with its principal place of business in that state, though it also conducts business in California. The underlying personal injury lawsuit had been pending in a New York state court and involved injuries sustained by the plaintiff in New York. Coverage questions arose.

Union Carbide filed a complaint for declaratory judgment in Los Angeles against Appalachian. Appalachian filed a motion to dismiss or to stay the action, arguing forum non conveniens and also filed a separate declaratory judgment action in a New York federal court. The Appalachian court analyzed the service of suit clause, rejected the insured's argument that the provision was intended to allow it to file an action in any jurisdiction and dismissed the declaratory judgment action.

In reaching its decision, the Appalachian court noted that there was “no indication that the parties foresaw use of a forum bearing no relationship to the events.”¹³⁴ The court was also persuaded by the affidavit of the insured's vice president in charge of claims administration. In the affiant's eighteen years of experience, he had “come to understand that [the service of suit] clause was voluntarily developed by Lloyd's of London many years ago, as a response to competitors' [sic] arguments that Lloyd's was not amenable to process in the United States and that the potential customer should therefore place its business with a domestic company that was subject to service [of] process.”¹³⁵

*749 The Appalachian decision is well reasoned and helps clarify what has been a problematic area. It should be noted, however, that because insurance coverage controversies involve relatively limited documentary and testimonial evidence, the forum non conveniens or transfer of venues factors which are applicable in other cases may have limited importance in a coverage case. In addition, even if a case is pending in a jurisdiction where the substantive insurance law is unfavorable to the carrier, the court may not be obligated to apply the laws of that state under applicable choice of law rules.

C. Intervention

The excess insurer relies heavily on the primary insurer's claims handling expertise, including the evaluation and defense of actions against the insured as well as the timely recognition and resolution of coverage issues. The primary carrier may not in its claims handling adequately protect the excess insurer's interests, however. Accordingly, the excess insurer may, in appropriate circumstances, consider seeking leave to intervene either in the underlying litigation against the insured or in coverage litigation involving underlying carriers.

Provided its involvement in the underlying action will not create an impermissible conflict of interest, an insurer may consider intervening in the action pending against the insured in order to protect its subrogation rights, to seek a stay pending resolution of coverage issues in another court or to seek answers to special interrogatories which could clarify or resolve coverage questions.

An excess carrier sought to intervene in an insurance coverage case which was pending between the primary carrier and the insured in *National Union Fire Ins. Co. v. Continental*.¹³⁶ Applying the criteria of [Rule 24 of the Federal Rules of Civil Procedure](#), the court first noted that the excess insurer possessed an interest relating to the subject matter of the suit since the terms of the excess policy were identical to those of the primary policy. The court explained that there was a question concerning the timeliness of the carrier's petition, but denied intervention principally because the excess carrier's interests would not be impaired if it were denied intervention (because it could not be collaterally estopped by the court's decision) and it was adequately represented by the insurers already parties to the case.

An excess insurer's petition to intervene, which can in certain circumstances serve as an effective mechanism to control potential exposure in excess of the primary limits, is governed by the same rules of procedure that apply to other litigants.¹³⁷ In the event an excess insurer's interests are not adequately being protected either in connection with the underlying suit or a declaratory judgment proceeding, it nonetheless must meet each element required either for intervention as a matter of right or for permissive intervention.

*750 VI. SUMMARY

Significant attention, and indeed substantial litigation, has focused on the obligations and rights of excess insurers in recent years. Although there once was a relative dearth of case law addressing the role of the excess insurer in litigation against the insured, principles of law have begun to develop. Though these principles help define the parties' relationships, any insurance coverage dispute involving an excess insurer must be examined substantively, procedurally and strategically with two principal concepts in mind. First, because the primary source of the parties' respective rights is the policy of excess insurance, the contract should and must be the focal point of the controversy. Generalized rules of law (including equitable principles) do not substitute for a full and complete analysis of the parties' rights as defined by the contract. Second, many controversies among the participants in the tripartite relationship (insured, primary insurer and excess insurer) can be avoided through adequate communication prior to and during the course of the liability lawsuit. Applying these basic precepts usually results in the most appropriate and economic solution to complex excess insurance problems.

Footnotes

- ¹ [Whitehead v. Fleet Towing Co.](#), 110 Ill. App. 3d 759, 764, 442 N.E.2d 1362, 1366, 66 Ill. Dec. 449 (5th Dist. 1982); [Olympic Ins. Co. v. Employers Surplus Lines Ins. Co.](#), 126 Cal. App. 3d 593, 599, 178 Cal. Rptr. 908, 910 (1981).
- ² An insurer may be held liable for an excess judgment if it can be demonstrated that it wrongfully refused to settle the third-party lawsuit within its policy limits, despite having had an opportunity to do so. See, e.g., [Betts v. Allstate Ins. Co.](#), 154 Cal. App. 3d 688, 201 Cal. Rptr. 528 (1984); [Phelan v. State Farm Mut. Auto. Ins. Co.](#), 114 Ill. App. 3d 96, 448 N.E.2d 579 (1983). See also [Kornblum, The Current State of Bad Faith and Punitive Damages Litigation in the U.S.](#), 23 TORT & INS. L.J. 812, 814-19 (1988).

- 3 See generally WINDT, INSURANCE CLAIMS AND DISPUTES §§ 4.01-4.41 (1988).
- 4 See infra notes 19-36, 44-53 and accompanying text.
- 5 See generally *Cooper Labs. v. International Surplus Lines*, 80 2 F.2d 667 (3d Cir. 1986).
- 6 *Whitehead v. Fleet Towing Co.*, 110 Ill. App. 3d 759, 764, 442 N.E.2d 1362, 1366, 66 Ill. Dec. 449, 453 (5th Dist. 1982); *Olympic Ins. Co. v. Employers Surplus Lines Ins. Co.*, 126 Cal. App. 3d 593, 598, 178 Cal. Rptr. 908, 910 (1982).
- 7 See generally WINDT, supra note 3, §§ 7.01-7.02 (1988).
- 8 See, e.g., *Metz v. Universal Underwriters Ins. Co.*, 10 Cal. 3d 45, 109 Cal. Rptr. 698 (1973); *Automobile Underwriters, Inc. v. Hardware Mut. Cas. Co.*, 49 Ill. 2d 108, 273 N.E.2d 360 (1971); *State Farm Fire & Cas. Co. v. LiMauro*, 65 N.Y.2d 369, 492 N.Y.S.2d 534, 482 N.E.2d 13 (1985).
- 9 See infra notes 45-60 and accompanying text regarding the insurers' respective defense obligations under these circumstances.
- 10 *Whitehead v. Fleet Towing Co.*, 110 Ill. App. 3d 759, 765, 44 2 N.E.2d 1362, 1366, 66 Ill. Dec. 449 (1982); *Signal Cos. v. Harbor Ins. Co.*, 27 Cal. 3d 359, 365, 612 P.2d 889, 893, 165 Cal. Rptr. 799, 803 (1980).
- 11 See generally *Continental Cas. Co. v. Roper Corp.*, 173 Ill. App. 3d 760, 527 N.E.2d 998, 1001-03 (1988) (describing umbrella insurance); *Garmany v. Mission Ins. Co.*, 785 F.2d 941, 948 (11th Cir. 1986).
- 12 See, e.g., CALIF. INS. CODE § 1760 et seq.; ILL. REV. STAT. ch. 73, §§ 445 et seq., N.Y. INS. LAW §§ 2104 et seq.
- 13 See generally WINDT, supra note 3, § 1.03 (1988).
- 14 74 Ill. App. 3d 804, 393 N.E.2d 515 (1979).
- 15 393 N.E.2d at 521.
- 16 117 Ill. App. 3d 158, 453 N.E.2d 36 (1983).
- 17 See also *Greyhound Corp. v. Excess Ins. Co. of America*, 233 F.2d 630 (5th Cir. 1956); *American Home Assur. Co. v. American Employers Ins. Co.*, 384 F. Supp. 3 (E.D. Pa. 1974); *Imparato Stevedoring Corp. v. Lloyd's Underwriters*, 27 A.D.2d 827, 278 N.Y.S.2d 153 (1967).
- 18 The viability of an excess carrier's late notice defense can be affected by whether it is required to demonstrate it has been prejudiced by the delayed notice. Some states require an insurer to prove prejudice in order to prevail on a late notice defense, while other states simply examine whether the notice was reasonable under the circumstances. See generally WINDT, supra note 3, § 1.04 (1988). Note, however, that late notice which deprives an insurer of even the opportunity to become involved in the handling of a claim has been deemed prejudicial as a matter of law. E.g., *Greyhound Corp. v. Excess Ins. Co. of America*, 233 F.2d 630, 636 (5th Cir. 1956).
- 19 For example, in *Ralston Purina Co. v. Home Ins. Co.*, 760 F.2d 897, 900 (8th Cir. 1985), the court found that the primary carrier defending the insured owed a fiduciary duty to the insured to notify it of a claim which may affect the excess coverage and may be liable to the insured if the excess carrier denies coverage based on late notice.
- 20 See, e.g., *Cooper Labs. v. International Surplus Lines*, 802 F.2d 667, 675 (3d Cir. 1986) (the "duty to defend is a matter of contract"); *Carrousel Concessions v. Florida Ins. Guar.*, 483 So. 2d 513, 516 (Fla. Dist. Ct. App. 1986) ("[a]n insurer's duty to defend arises solely from the language of the insurance contract"); *Chicago & Eastern Ill. R.R. Co. v. Reserve Ins. Co.*, 99 Ill. App. 3d 433, 425 N.E.2d 429, 433, 54 Ill. Dec. 564 (1981) ("there is no basis for disregarding the language and imposing upon the insurers a duty to defend the insured which the insurers did not undertake in the insurance policies"); *Occidental Fire & Cas. Co. v. Underwriters at Lloyds*, 19 Ill. App. 3d 265, 311 N.E.2d 330, 335 (1974) (the excess insurer "did not contract to do so" and it was "paid only for that which did contract to provide. . . . It did not, insofar as the facts here are concerned, agree to defend the assured or to share in the costs of defense"); *Crown Ctr. v. Occidental Fire & Cas. Co.*, 716 S.W.2d 348, 357 (Mo. App. 1986) ("[t]he duty of an insurer to defend is contractual, and if there is no contract to defend there is no duty to defend"). See generally WINDT, supra note 3, § 4.01 (1988).
- 21 324 F. Supp. 160, 163 (N.D. Ind. 1971).

- 22 511 A.2d 967 (R.I. 1986).
- 23 *Id.* at 970.
- 24 See, e.g., *Interstate Fire v. Stuntman, Inc.*, 853 F.2d 751 (9th Cir. 1988); *Aetna Cas. & Sur. Co. v. Certain Underwriters at Lloyds of London*, 56 Cal. App. 3d 791, 800, 129 Cal. Rptr. 47, 52-53 (1976); and cases cited *infra* notes 51-52 and accompanying text.
- 25 See, e.g., *Ostrager & Ichel, Should the Business Insurance Policy Be Construed Against the Insurer? Another Look at the Reasonable Expectations Doctrine*, 33 FED. INS. COUNS. Q. 273 (1983).
- 26 See, e.g., *Outboard Marine Corp. v. Liberty Mut. Ins. Co.*, 536 F.2d 730 (7th Cir. 1976); *Liberty Mut. Ins. Co. v. Pacific Indem. Co.*, 579 F. Supp. 140, 144 (W.D. Pa. 1984); *Evanston Ins. Co. v. Security Assur. Co.*, No. 85 C 9757, slip op. (N.D. Ill. Oct. 5, 1987); *City of Peoria v. Underwriters at Lloyds*, 290 F. Supp. 890 (S.D. Ill. 1968); *Chubb Pacific Indem. v. Insurance Co. of N. America*, 188 Cal. App. 3d 691, 233 Cal. Rptr. 539 (1987); *Chicago & Eastern Ill. R.R. Co. v. Reserve Ins.*, 99 Ill. App. 3d 433, 425 N.E.2d 429 (1981); *Cornhusker Agric. Ass'n v. Equitable Gen.*, 223 Neb. 618, 392 N.W.2d 366 (1986). But see *Interstate Fire v. Stuntman, Inc.*, 853 F.2d 751 (9th Cir. 1988).
- 27 99 Ill. App. 3d 433, 425 N.E.2d 429 (1981).
- 28 *Id.* at 434.
- 29 *Id.* at 438.
- 30 290 F. Supp. 890 (S.D. Ill. 1968).
- 31 *Id.* at 892-93. See also *Evanston Ins. Co. v. Security Assur. Co.*, No. 85 C 9757, slip op. at 9 (N.D. Ill. Oct. 5, 1987) (“the [p]olicy only includes the aforementioned ‘option to defend’ clause. This clause does not require Evanston to defend SAC, it requires SAC to defend itself while giving Evanston the choice to participate in the defense”); *Zaborac v. American Cas. Co. of Reading, Pa.*, 663 F. Supp. 330, 334 (C.D. Ill. 1987) (the policy gave the insurer “the option, but not the obligation, to advance defense costs as they are incurred”); *Kienle v. Flack*, 416 F.2d 693, 696 (9th Cir. 1969); *Steyer v. Westvaco Corp.*, 450 F. Supp. 384, 394 (D. Md. 1978).
- 32 536 F.2d 730 (7th Cir. 1976).
- 33 *Id.* at 736.
- 34 853 F.2d 751 (9th Cir. 1988).
- 35 *Id.* at 753.
- 36 *Id.*
- 37 But see *Chubb/Pacific Indem. Group v. Insurance Co. of N. America*, 188 Cal. App. 3d 611, 233 Cal. Rptr. 539 (1987) (no obligation to defend where excess policy specifically provided that excess insurer “shall not be obligated to assume charge of the settlement or defense of any claim or suit brought or proceeding instituted against the insured”).
- 38 387 N.W.2d 161 (Minn. 1986).
- 39 *Id.* at 167; see also *Crawford Ins. Co., Inc. v. Allwest Ins. Co.*, 645 F. Supp. 1440 (N.D. Cal. 1986) (umbrella insurer owed defense where it was aware of the possibility there was no coverage under primary policy).
- 40 851 F.2d 957 (7th Cir. 1988).
- 41 *Id.* at 962 (citations omitted).
- 42 See, e.g., *Zurich Ins. Co. v. Heil Co.*, 815 F.2d 1122 (7th Cir. 1987); *Steve D. Thompson Trucking Inc. v. Twin City Fire Ins. Co.*, 832 F.2d 309 (5th Cir. 1987). See also *Continental Cas. Co. v. Roper Corp.*, 173 Ill. App. 3d 760, 527 N.E.2d 998 (1988).
- 43 See, e.g., *Zurich Ins. Co. v. Raymark Indus.*, 118 Ill. 2d 23, 514 N.E.2d 150 (1987).

- 44 [Garmany v. Mission Ins. Co.](#), 785 F.2d 941, 947 (11th Cir. 1986) (emphasis in original). See also [Continental Cas. Co. v. Roper Corp.](#), 173 Ill. App. 3d 760, 527 N.E.2d 998, 1003 (1988).
- 45 See generally WINDT, *supra* note 3, § 4.11 (1988); Annot., [Allocation of Defense Costs Between Primary and Excess Insurance Carriers](#), 19 A.L.R. 4th 107 (1983); Hix, Kurlander & Farrugia, [Allocation of the Duties of Defense Between Carriers Providing Coverage to the Same Insured](#), 47 INS. COUNS. J. 224 (1980).
- 46 See [Planet Ins. Co. v. Mead Reinsur. Corp.](#), 789 F.2d 668 (9th Cir. 1986); [Federated Mut. Ins. Co. v. Pennsylvania Nat'l Mut. Ins. Co.](#), 480 F. Supp. 599, 600 (E.D. Tenn. 1979), *aff'd mem.*, 659 F.2d 1080 (6th Cir. 1981); [Grant v. North River Ins. Co.](#), 453 F. Supp. 1361, 1366-67 (N.D. Ind. 1978); [Molina v. U.S. Fire Ins. Co.](#), 574 F.2d 1176, 1178 (4th Cir. 1978); [Macloskie v. Royal Indem. Co.](#), 254 F. Supp. 782 (D.S.C. 1966), *aff'd*, 374 F.2d 892 (4th Cir. 1967) (*per curiam*); [Arizona Joint Underwriting Plan v. Glacier Gen. Assur. Co.](#), 129 Ariz. 351, 631 P.2d 133, 136 (1981); [Signal Co., Inc. v. Harbor Ins. Co.](#), 27 Cal. 3d 359, 165 Cal. Rptr. 799, 612 P.2d 889 (1988); [Nordby v. Atlantic Mut. Ins. Co.](#), 329 N.W.2d 820, 824 (Minn. 1983).
- 47 19 Ill. App. 3d 265, 311 N.E.2d 330 (1974).
- 48 541 A.2d 771 (Pa. Super. 1988).
- 49 *Id.* at 774 (citing [Peter v. Travelers Ins. Co.](#), 375 F. Supp. 1347, 1350 (C.D. Cal. 1974)).
- 50 See also [Aetna Cas. & Sur. Co. v. Coronet Ins. Co.](#), 44 Ill. App. 3d 744, 358 N.E.2d 914 (1976); [Associated Indem. v. Insurance Co. of N. America](#), 68 Ill. App. 3d 807, 386 N.E.2d 529 (1979).
- 51 133 Mich. App. 655, 661, 349 N.W.2d 547, 550 (1984).
- 52 See also [Aetna Cas. & Sur. Co. v. Certain Underwriters at Lloyd's](#), 56 Cal. App. 3d 791, 129 Cal. Rptr. 47, 53 (1976) (upon the exhaustion of the primary insurer's limits by settlement, the excess carrier owed the insured "an implied obligation to defend where it is not clearly omitted from the particular risk"); [American Excess Ins. Co. v. MGM Grand Hotels, Inc.](#), 729 P.2d 1352 (Nev. 1986) ("defense costs should be apportioned between insurers based on a ratio of the amount paid by each insurer to the total amount of the indemnity payments paid by all insurers in settlement of claims and satisfaction of judgments"); [Aetna Cas. & Sur. Co. v. Market Ins. Co.](#), 296 So. 2d 555, 558 (Fla. App. 1974) (excess insurer must "take over the legal representation from [the primary insurer]" when "it becomes apparent that the liability would exceed [the limit of primary policy]"); [Miller's Mut. Ins. Ass'n of Ill. v. Iowa Nat'l Mut. Ins. Co.](#), 618 F. Supp. 301, 306 (D. Colo. 1985) (where defense costs "could run into the hundreds of thousands of dollars, equity will not permit [excess insurers] the windfall of having their defense obligations discharged by [the primary insurer]"); [Schulman Inv. Co. v. Olin Corp.](#), 514 F. Supp. 572, 577 (S.D.N.Y. 1981) ("There may come a point at which the potential liability of the insured is so great that the excess carrier is required to participate in the defense despite any contractual provision disclaiming coverage of expenses covered by other policies.").
- 53 861 F.2d 1184 (9th Cir. 1988).
- 54 *Id.* at 1187 (citations omitted). See also [Signal Cos. v. Harbor Ins. Co.](#), 27 Cal. 3d 357, 612 P.2d 889, 165 Cal. Rptr. 799 (1980); [Chubb/Pacific Indem. Gr. v. Insurance Co. of N. Am.](#), 188 Cal. App. 3d 691, 233 Cal. Rptr. 539 (1987). But see [Aetna Cas. & Sur. Co. v. Certain Underwriters at Lloyd's](#), 56 Cal. App.3d 791, 129 Cal. Rptr. 47, 53 (1976) (excess insurer whose policy does not exclude duty to defend has implied defense obligation upon exhaustion of primary policy limits by settlement).
- 55 124 Wis. 2d 1, 367 N.W.2d 806 (1985).
- 56 107 Wis. 2d 400, 320 N.W.2d 175 (1982).
- 57 367 N.W.2d at 812. See also [Kelly Co. v. Central Nat'l Ins. Co. of Omaha](#), 662 F. Supp. 1284 (E.D. Wis. 1987). [Elas v. State Farm Auto Ins. Co.](#), 39 Ill. App. 3d 944, 352 N.E.2d 60 (1976). But see [United States Fire Ins. Co. v. Lay](#), 577 F.2d 421 (7th Cir. 1978) (under Indiana law, court found that "sham" settlement for less than primary limits did not trigger excess insurer's obligations). See also *infra* notes 86-92 and accompanying text.
- 58 See Ghiardi and Ferris, [Excess Insurer Beware—The Primary Insurer Has Found the Back Door](#), 28 FOR DEF. 12 (February 1986); Comment, [Excess Insurer's Duty to Defend after Primary Settles Within Policy Limits: Wisconsin after Loy and Teigen](#), 70 MARQ. L. REV. 385 (1987) (emphasizing Wis. law).

- 59 It should be recognized that in the excess by “coincidence” cases each carrier has contractually obligated itself to defend and has received a corresponding premium. In contrast, following form excess insurers generally do not contract to defend the insured. This distinction is significant from an insurance underwriting standpoint, though courts regrettably do not place particular emphasis on the difference between the “true” excess and the excess by “coincidence” situations.
- 60 See *Russo v. Rochford*, 123 Misc. 2d 55, 472 N.Y.S.2d 954, 960-62 (1984) (discussing cases applying the different rules).
- 61 516 F. Supp. 643 (S.D.N.Y. 1981).
- 62 *Id.* at 646.
- 63 *Id.*
- 64 *Id.*
- 65 670 F. Supp. 393 (D.D.C. 1987).
- 66 *Id.* at 402.
- 67 See also *Pepper's Steel & Alloys v. U.S.F.&G.*, 668 F. Supp. 1541, 1544 (S.D. Fla. 1987) (excess insurer did not waive coverage defenses by not complying with Florida statute requiring insurer with defense obligation to issue reservation of rights letter).
- 68 See, e.g., *U.S. Fire Ins. Co. v. Charter Fin. Grp.*, 851 F.2d 957, 961 (7th Cir. 1988) (“the excess coverage started at the level of underlying insurance . . . whether or not such primary insurance had been paid, was recoverable, or was even in effect on the date of the insurable event”); *Maryland Cas. Co. v. Chicago & Northwestern Transp. Co.*, 126 Ill. App. 3d 150, 466 N.E.2d 1091, 1095 (1984) (the insured “must expend an amount in defense or settlement of the case equal to the retained limit before the excess insurance . . . can be applied”).
- 69 See, e.g., *Lazzara v. Howard A. Esser, Inc.*, 802 F.2d 260 (7th Cir. 1986) (broker liable to insured as a matter of law for causing a “gap” between primary and excess coverage).
- 70 For a comprehensive treatment of the duties of insurance intermediaries both to the insurer and the insured, see HARNETT, RESPONSIBILITIES OF INSURANCE AGENTS AND BROKERS (1986).
- 71 110 Ill. App. 3d 759, 442 N.E.2d 1362 (1982).
- 72 442 N.E.2d at 1366.
- 73 See also *Wright v. Newman*, 767 F.2d 460 (8th Cir. 1985); *Shames v. Home Ins. Co.*, 73 A.D.2d 601, 422 N.Y.S.2d 122 (1979).
- 74 574 F.2d 1176 (4th Cir. 1978).
- 75 117 Misc. 2d 665, 457 N.Y.S.2d 670 (1982).
- 76 574 F.2d at 1178.
- 77 457 N.Y.S.2d at 672.
- 78 See also *Fried v. North River Ins. Co.*, 710 F.2d 1022 (4th Cir. 1983); *Wommack v. United States Fire Ins. Co.*, 323 F. Supp. 981 (W.D. Ark. 1971).
- 79 815 F.2d 1122 (7th Cir. 1987).
- 80 See also *Radiator Specialty Co. v. First State Ins. Co.*, 651 F. Supp. 439, 443 (W.D.N.C. 1987) (the standard definition of occurrence “hardly includes insolvency of the underlying insurer issuing the underlying policies”), *aff'd*, 836 F.2d 193 (4th Cir. 1987).
- 81 See, e.g., *Steve D. Thompson Trucking, Inc. v. Twin City Fire Ins. Co.*, 832 F.2d 309 (5th Cir. 1987); *Mission Nat'l Ins. Co. v. Duke Transp.*, 792 F.2d 550 (5th Cir. 1986); *U.S. Fire Ins. Co. v. Coleman*, 754 S.W.2d 941 (Mo. App. 1988); *U.S. Fire Ins. Co. v. Capital Ford Truck Sales*, 257 Ga. 77, 355 S.E.2d 428 (1987).

- 82 30 Cal. 3d 800; 180 Cal. Rptr. 628 (1982).
- 83 30 Cal. 3d at 814-15.
- 84 132 Ill. App. 3d 564, 477 N.E.2d 1322 (1985).
- 85 *Id.* at 1325.
- 86 577 F.2d 421 (7th Cir. 1978).
- 87 *Id.* at 423.
- 88 *Id.* (citations omitted). See also *Whitehead v. Fleet Towing Co.*, 110 Ill. App. 3d 759, 442 N.E.2d 1362, 1366 (1982) (in dictum, the court stated that the Lay court's holding "has merit").
- 89 509 F. Supp. 43, 47 (E.D. Mich. 1981).
- 90 *Id.* at 47.
- 91 *Id.* at 47-48.
- 92 See *Kelley Co. v. Central Nat'l Ins. Co. of Omaha*, 662 F. Supp. 1284 (E.D. Wis. 1987); *Silgato v. Welch*, 607 F. Supp. 743 (D. Conn. 1985); *Tiegen v. Jelco of Wis., Inc.*, 124 Wis. 2d 1, 367 N.W.2d 806 (1985); *Loy v. Bunderson*, 107 Wis. 2d 400, 320 N.W.2d 175 (1982); *Gasquet v. Commercial Union Ins. Co.*, 391 So.2d 466 (La. App. 1980). Cf. *Pekin Ins. Co. v. Home Ins. Co.*, 134 Ill. App. 3d 31, 479 N.E.2d 1078 (1985) (excess insurer does not suffer injury where primary insurer does not involve excess insurer in settlement negotiations but obtains covenant not to sue in the amount of the primary policy limits). See also Ghiardi and Ferris, *Excess Insurer Beware— The Primary Insurer Has Found the Back Door*, 28 FOR DEF. 12 (Feb. 1986).
- 93 77 Ill. 2d 4, 394 N.E.2d 1200 (1979).
- 94 773 F.2d 976 (8th Cir. 1985).
- 95 See also *American Emp. Ins. Co. v. St. Paul Fire & Marine In s. Co.*, 594 F.2d 973 (4th Cir. 1979); *Truck Ins. Exch. v. Wilshire Ins. Co.*, 8 Cal. App. 3d 553, 87 Cal. Rptr. 604 (1970).
- 96 Conley, *Relations Between Primary and Excess Insurance Carriers*, FED. INS. COUNS. Q. 123, 124 (Wtr. 1982).
- 97 An interesting discussion of the relationship between the primary insurer and the excess insurer is set forth in *Russo v. Rochford*, 123 Misc. 2d 55, 472 N.Y.S.2d 954 (1984).
- 98 The drafters stated the purpose and the scope of the principles as follows:
To provide standards of conduct which, if followed by insurers in the handling of claims, will reduce if not eliminate the incidence of controversy between primary and excess insurers.
To provide a forum for the resolution of problems involving the interaction of primary and excess insurance coverages and their applicable policy limits.
It is implicit in these guiding principles that the primary insurer in its dealings with an excess insurer voluntarily adopt those standards of conduct which the law imposes upon the primary insurer in its dealings with its insured and that the excess insurer voluntarily refrain from any conduct which might create additional difficulty for the primary insurer in the handling of a case or increase the danger of the primary insurer's being liable in excess of its policy limit.
Nothing in these principles shall in any way abridge the rights of or the duties owed to the insured, indeed it is believed that the insured's interests will be better served by adherence of insurers to these principles.
- 99 See, e.g., *Puritan Ins. Co. v. Canadian Universal Ins. Co.*, 775 F.2d 76, 79 (3d Cir. 1985) (referring to the principles simply to emphasize "the unsatisfactory nature of the relationship between primary and excess carriers").
- 100 See, e.g., MAGARICK, *EXCESS LIABILITY* § 17.16 (3d ed. 1989); Lanzone, *Duties Owed by a Primary Insurer and an Insured with a Self-Insured Retention to an Excess Insurer—An Update*, 28 FED. INS. COUNS. Q. 267, 277 (1978).

- 101 See, e.g., *Easley v. State Farm Mut. Auto Ins. Co.*, 528 F.2d 558 (5th Cir. 1976); *Betts v. Allstate Ins. Co.*, 154 Cal. App. 3d 688, 201 Cal. Rptr. 528 (1984); *Phelan v. State Farm Mut. Auto Ins. Co.*, 114 Ill. App. 3d 96, 448 N.E.2d 579 (1983); *New York v. Merchant's Mut. Ins. Co.*, 486 N.Y.S. 2d 412 (App. 1985). See generally ASHLEY, BAD FAITH ACTIONS—LIABILITY AND DAMAGES (1984); WALL, LITIGATION AND PREVENTION OF INSURER BAD FAITH (1985).
- 102 See, e.g., *Puritan Ins. Co. v. Canadian Universal Ins. Co.*, 775 F.2d 76, (3d Cir. 1985); *Rocky Mountain Fire & Cas. Co. v. Dairyland Ins. Co.*, 452 F.2d 603 (9th Cir. 1971); *National Union Fire Ins. of Pittsburgh, Pa. v. Liberty Mut. Ins. Co.*, 1988 U.S. Dist. LEXIS 9953 (E.D. La. Aug. 31, 1988); *Allstate Ins. Co. v. Riverside Ins. Co. of America*, 509 F. Supp. 43 (E.D. Mich. 1981); *Commercial Union Assur. Co. v. Safeway Stores, Inc.*, 26 Cal. 3d 912, 164 Cal. Rptr. 709 (1980); *Allstate Ins. Co. v. Reserve Ins. Co.*, 116 N.H. 806, 373 A.2d 339 (1976).
- 103 61 N.Y.S.2d 569, 463 N.E.2d 608, 475 N.Y.S.2d 267 (1984).
- 104 *Hartford Acc. & Indem. Co. v. Michigan Mut. Ins. Co.*, 93 A. D.2d 337, 342, 462 N.Y.S.2d 175, 178 (1983). See also *Bohn v. Sentry Ins. Co.*, 681 F. Supp. 357 (E.D. La. 1988); *Canadian Universal Ins. Co. v. Employers Surplus Lines Ins. Co.*, 325 So.2d 29 (Fla. Dist. Ct. App. 1976); *Western World Ins. Co. v. Allstate Ins. Co.*, 150 N.J. Super. 481, 376 A.2d 177 (1977). See generally *Russo v. Rochford*, 123 Misc. 2d 55, 472 N.Y.S.2d 954 (1984).
- 105 307 Minn. 5, 238 N.W.2d 862 (1976).
- 106 238 N.W.2d at 864.
- 107 See, e.g., *Puritan Ins. Co. v. Canadian Universal*, 775 F.2d 76 (3d Cir. 1985); *Valentine v. Liberty Mut. Ins. Co.*, 620 F.2d 583 (6th Cir. 1980); *Commercial Union Assur. Cos. v. Safeway Stores, Inc.*, 26 Cal. 3d 912, 164 Cal. Rptr. 709 (1980); *General Acc. Fire v. American Cas. Co.*, 390 So. 2d 761 (Fla. Dist. Ct. App. 1980); *Commercial Union Ins. v. Medical Protective*, 393 N.W.2d 479 (Mich. 1986); *Centennial Ins. Co. v. Liberty Mut. Ins. Co.*, 62 Ohio St. 2d 221, 404 N.E.2d 759 (1980).
- 108 See, e.g., *Valentine v. Aetna Ins. Co.*, 564 F.2d 292 (9th Cir. 1977); *Vencill v. Continental Cas. Co.*, 433 F. Supp. 1371 (S.D.W.Va. 1977); *Estate of Penn v. Amalgamated Gen. Agencies*, 148 N.J. Super. 419, 372 A.2d 1124 (1977).
- 109 WINDT, *supra* note 3, § 317 (1988).
- 110 See, e.g., *Transit Cas. Co. v. Spink Corp.*, 94 Cal. App. 3d 124, 156 Cal. Rptr. 360 (1979), overruled in *Commercial Union Assur. Cos. v. Safeway Stores, Inc.*, 26 Cal. 3d 912, 164 Cal. Rptr. 704 (1980).
- 111 *Id.*
- 112 Various well-written articles address in greater depth the excess carrier's action against a primary insurer for failing to settle within its policy limits. See, e.g., *Excess Carrier's Rights to Maintain Action Against Primary Liability Insurer for Wrongful Failure to Settle Claim Against Insured*, 10 A.L.R. 4th 879 (1981); *Lanzone & Ringel, Duties of a Primary Insurer to an Excess Insurer*, 61 NEB. L. REV. 259 (1982); *Ingram, Triangular Reciprocity in the Duty to Settle Insurance Claims*, 13 PAC. L.J. 859 (1982); RIGHTS AND DUTIES OF PRIMARY AND EXCESS INSURANCE CARRIERS, DEFENSE RESEARCH INSTITUTE MONOGRAPH (1984).
- 113 See, e.g., *Aetna Cas. & Sur. Co. v. Medical Protective Co.*, 575 F. Supp. 901 (N.D. Ill. 1983).
- 114 90 Cal. App. 3d 786, 153 Cal. Rptr. 678 (1979).
- 115 *Id.* at 682.
- 116 *Id.*
- 117 See also *Home Ins. Co. v. American Home Products Corp.*, 665 F. Supp. 193 (S.D.N.Y. 1987) (in action by excess insurer against primary, factual issue existed as to whether primary prematurely exhausted its liability policy limits by misallocation of claims).
- 118 See, e.g., *Brown v. U.S.F.&G.*, 314 F.2d 675, 682 (2d Cir. 1963) (insurer can be held liable for excess judgment if it engages in "over-eager settlement of . . . claims in disregard of the possibility of the assured's resulting liability"); *Liberty Mut. Ins. Co. v. Davis*, 412 F.2d 475 (5th Cir. 1969) (insurer which was unable to achieve overall settlement of claims was liable for failing to settle with

any of the several claimants because “insurer would do better to have the leverage of his insurance money applied to at least some of the claims, to the end of reducing his ultimate judgment debt”).

- 119 See, e.g., [Tiegen v. Jelco of Wis., Inc.](#), 124 Wis. 2d 1, 367 N.W.2d 806 (1985).
- 120 See *supra* notes 86-92 and accompanying text.
- 121 See, e.g., 28 U.S.C. § 2201; CAL. CIV. PRO. CODE §§ 1060- 1062.5; ILL. REV. STAT., ch. 110, § 2-701; N.Y. CIV. PRAC. LAW § 3001.
- 122 118 Ill. App. 3d 4, 454 N.E.2d 706 (1983).
- 123 *Id.* at 708.
- 124 See also [American Home Assur. Co. v. Northwest Indus.](#), 50 Ill. App. 3d 807, 365 N.E.2d 956, 8 Ill. Dec. 570 (1st Dist. 1977) (underlying plaintiff was not a necessary party to declaratory judgment suit where its interest was contingent upon the exhaustion of a \$ 60 million fund).
- 125 617 F. Supp. 271 (D.C. Cal. 1985).
- 126 *Id.* at 273. See also [Employers Ins. of Wausau v. McGraw-Edison Co.](#), No. K86-48 CA, slip op. (W.D. Mich. Aug. 8, 1987) (motion to dismiss declaratory judgment action concerning upper level excess insurers' liability for environmental cleanup costs granted on the basis that there was “only a remote possibility of their ever being called upon for indemnification”); [Zaborac v. American Cas. Co. of Reading](#), 663 F. Supp. 330 (C.D. Ill. 1987) (no actual controversy with respect to insurer's defense obligation since insurer had the right but not the duty to defend).
- 127 144 Ill. App. 3d 943, 494 N.E.2d 630 (1986).
- 128 *Id.* at 633.
- 129 *Id.*
- 130 See, e.g., [Walter E. Heller & Co. v. James Godbe Co.](#), 601 F. Supp. 319 (N.D. Ill. 1984); [G. H. Miller & Co. v. Hanes](#), 566 F. Supp. 305 (N.D. Ill. 1983).
- 131 No. 82 C 3154, slip op. (N.D. Ill. Nov. 13, 1983).
- 132 Other cases addressing “service of suit” clauses and venue considerations include: [Capital Bank & Trust v. Associated Intern. Ins.](#), 576 F. Supp. 1522 (M.D. La. 1984); [Perini Corp. v. Orion Ins. Co.](#), 331 F. Supp. 453 (E.D. Cal. 1971); [Oil Well Serv. Co. v. Underwriters](#), 302 F. Supp. 384 (C.D. Cal. 1969); [Euzzino v. London & Edinburgh Ins. Co.](#), 228 F. Supp. 431 (N.D. Ill. 1964); [Wilson v. Continental Cas. Co.](#), 255 F. Supp. 622 (D. Minn. 1969).
- 133 162 Cal. App. 3d 427, 208 Cal. Rptr. 627 (1984).
- 134 *Id.* at 634.
- 135 *Id.* at 629.
- 136 110 F.R.D. 608 (N.D. Ill. 1986).
- 137 See, e.g., [FED. R. CIV. P. 24](#); ILL. REV. STAT., ch. 110, § 2-408; N.Y. CIV. PRAC. LAW §§ 1012-13. See generally Augustyn, [Intervention: The Insurer's Effective Litigation Tool](#), FOR DEF. (March 1988); Augustyn, [Intervention: The Need to Remove the Barriers](#), FOR DEF. (April 1988); WINDT, *supra* note 3, § 4.41 (1988).