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Issues and Problems in "Other Insurance," Multiple Insurance, and Self-Insurance

Douglas R. Richmond

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Issues and Problems in “Other Insurance,” Multiple Insurance, and Self-Insurance

Douglas R. Richmond*

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I. INTRODUCTION

Theoretically a mere category of contract law, "insurance law" is now a world unto itself. No area of insurance law spawns more practical confusion than coverage disputes, due largely to insurers' chosen policy language. One exasperated court observed:

Ambiguity and incomprehensibility seem to be the favorite tools of the insurance trade in drafting policies. Most are a virtually impenetrable thicket of incomprehensible verbosity. It seems that insurers generally are attempting to convince the customer when selling the policy that everything is covered and convince the court when a claim is made that nothing is covered. The miracle of it all is that the English language can be subjected to such abuse and still remain an instrument of communication.¹

Additional confusion and difficulty are created if two or more insurance companies insure the same risk. Courts recognize that under such circumstances, a single insurer should not be compelled to pay the entire loss, but instead should be entitled to contribution from other insurers pursuant to various formulas or theories. Problems involving multiple insurers and the interaction of the "other insurance" clauses in their policies are most perplexing.²

As if the problems posed by overlapping insurance coverage were not sufficiently difficult, insurers and sophisticated commercial insureds have developed a range of hybrid mechanisms for allocating risk. Precisely because these arrangements are designed for differing and special circumstances, they vary widely and seldom are defined by standard insurance industry policy forms.³ Perhaps best generically described as "self-insurance," these customized arrangements are now woven into the fabric of insurance disputes.

This Article examines the problems posed and the issues raised by multiple insurance and interacting "other insurance" clauses in policies,

1. *Universal Underwriters Ins. Co. v. Travelers Ins. Co.*, 451 S.W.2d 616, 622-23 (Ky. Ct. App. 1970).

2. In *Columbia Cas. Co. v. Northwestern Nat'l Ins. Co.*, 282 Cal. Rptr. 389 (Ct. App. 1991), the court observed that the policy at issue was "[m]ore a vehicle for Jesuitical or Talmudic debate than a definition of the rights and obligations of the parties . . . the policy crosses one's eyes and boggles one's mind." *Id.* at 396. The court in *Insurance Co. of North America v. Home & Auto Ins. Co.*, 628 N.E.2d 643 (Ill. App. Ct. 1993), noted that it was being drawn "deep into the catacombs of insurance policy English, a dimly lit underworld where many have lost their way." *Id.* at 644.

3. William T. Barker, *Combining Insurance and Self Insurance: Issues for Handling Claims*, 61 DEF. COUNS. J. 352, 354 (1994).

including loss allocation and the apportionment of defense costs. This Article also addresses the developing area of self-insurance as it relates to various indemnification schemes.

II. OTHER INSURANCE AND MULTIPLE INSURANCE

Addressing the issues raised when several insurers cover the same risk requires an understanding of what constitutes "other insurance" and "multiple insurance." It is also important to recognize common "other insurance" clauses.

A. What Constitutes "Other Insurance" and "Multiple Insurance"?

"Other insurance" refers only to two or more policies insuring the same risk, and the same interest, for the benefit of the same person, during the same period.⁴ Courts and litigants often liberalize this somewhat restrictive definition, describing the interplay between insurance policies as though there were no requirement of concurrent policies. Thus, consecutive policies may be thought to constitute "other insurance," so long as the risk and insured interest superficially remain the same. Such treatment or definition is seriously flawed, however, because while successive policies might insure the same *type* of risk, they do not insure the same risk. Moreover, so generous a definition wrongly suggests that insurers might be liable for damages occurring outside their policy periods. The fact that "other insurance" clauses in policies only operate when there is concurrent coverage⁵ highlights these definitional

4. See *American Ins. Co. v. Freeport Cold Storage, Inc.*, 703 F. Supp. 1475, 1485 (D. Utah 1987); *Nationwide Mut. Ins. Co. v. Hall*, 643 So. 2d 551, 561 (Ala. 1994); *Insurance Co. of N. Am. v. Nicholas*, 533 S.W.2d 204, 206 (Ark. 1976); *Nolt v. United States Fidelity & Guar. Co.*, 617 A.2d 578, 579-84 (Md. 1993); *McCormick v. Travelers Indem. Co.*, 496 N.E.2d 174, 176 (Mass. App. Ct. 1986); *Upjohn Co. v. New Hampshire Ins. Co.*, 444 N.W.2d 813, 819-20 (Mich. Ct. App. 1989), *rev'd on other grounds*, 476 N.W.2d 392 (Mich.), *reh'g denied*, 503 N.W.2d 442 (1991); *Retail Sys., Inc. v. CNA Ins. Cos.*, 469 N.W.2d 735, 738 (Minn. Ct. App. 1991); *B.K. Gen. Contractors, Inc. v. Michigan Mut. Ins. Co.*, 612 N.Y.S.2d 198, 199 (App. Div. 1994); *Mutual Benefit Ins. Co. v. Goschenhoppen Mut. Ins. Co.*, 572 A.2d 1275, 1277 (Pa. Super. Ct. 1990); *National Grange Mut. Ins. Co. v. Firemen's Ins. Co.*, 425 S.E.2d 754, 757-58 n.4 (S.C. Ct. App. 1992); *State Farm Fire & Cas. Co. v. Griffin*, 888 S.W.2d 150, 155 (Tex. Ct. App. 1994).

5. *St. Paul Fire & Marine Ins. Co. v. Vigilant Ins. Co.*, 919 F.2d 235, 241 (4th Cir. 1990) (applying North Carolina law); *In re Prudential Lines, Inc.*, 170 B.R. 222, 235-36 (S.D.N.Y. 1994) (applying New York law); *Pines of La Jolla Homeowners Ass'n v. Indus. Indem.*, 7 Cal. Rptr. 2d 53, 58-59 (Ct. App. 1992); *Pafco Gen. Ins. Co. v. Providence Washington Ins. Co.*, 587 N.E.2d 728, 729 n.2 (Ind. Ct. App. 1992); *Continental Cas. Co. v. Medical Protective Co.*, 859 S.W.2d 789, 791 (Mo. Ct. App. 1993); *Owens-Illinois, Inc. v. United Ins. Co.*, 650 A.2d 974, 991, 995 (N.J. 1994); *Orsi v. Aetna Ins.*

problems. Accordingly, questions relative to consecutive policies should be ascribed to "multiple insurance."

Concurrent coverage for the same risk can be the product of design, coincidence, or the inadvertent purchase of overlapping policies. Common examples of designed co-insurance are the purchase of an umbrella liability policy with specifically scheduled underlying policies, and the purchase of multi-layered excess coverage above specifically scheduled primary insurance or self-insurance.⁶ Coincidental concurrent coverage results when the driver of a non-owned automobile is a named insured under his own policy as well as being covered by the omnibus clause in the owner's policy,⁷ where an insured driver rents a car from an insured agency,⁸ or where a health care professional has personal malpractice insurance and is simultaneously covered by a hospital's policy.⁹ There may be an inadvertent overlap if an insured switches from occurrence coverage to claims made coverage and suit is filed during the claims made policy period for an alleged tort committed during the occurrence policy period. Competing coverage under consecutive policies typically occurs in toxic tort or environmental claims, where the alleged injury or damage spans several policy periods.¹⁰ Coverage under consecutive policies also becomes an issue in progressive property damage claims, such as those resulting from earth movement or water leakage.¹¹

Co., 703 P.2d 1053, 1058 (Wash. Ct. App. 1985); see *Transamerica Ins. Group v. Turner Constr. Co.*, 601 N.E.2d 473, 476-77 (Mass. App. Ct. 1992); *Secura Ins. Co. v. Cincinnati Ins. Co.*, 497 N.W.2d 230, 232 (Mich. Ct. App. 1993); *Northern States Power Co. v. Fidelity & Cas. Co.*, 523 N.W.2d 657, 664 (Minn. 1994); *Board of Vocational Educ. v. Janicki*, 422 S.E.2d 822, 825 (W. Va. 1992).

6. See, e.g., *State Farm Fire & Cas. Co. v. Hartford Ins. Co.*, 631 So. 2d 30 (La. Ct. App.), writ denied, 635 So. 2d 1108 (La. 1994); *Globe Indem. Co. v. Jordan*, 634 A.2d 1279 (Me. 1993); *State Farm Mut. Auto. Ins. Co. v. Mahin*, 634 N.E.2d 1058 (Ohio Ct. App. 1993), jurisdictional motion overruled, 630 N.E.2d 378 (Ohio 1994).

7. E.g., *Georgia Mut. Ins. Co. v. Rollins, Inc.*, 434 S.E.2d 581 (Ga. Ct. App. 1993); *State Farm Mut. Auto. Ins. Co. v. Liberty Mut. Ins. Co.*, 883 S.W.2d 530 (Mo. Ct. App. 1994); *Guaranty Nat'l Ins. Co. v. State Farm Ins. Co.*, 777 P.2d 353 (Mont. 1989); *Utica Mut. Ins. Co. v. Preferred Mut. Ins. Co.*, 583 N.Y.S.2d 986 (App. Div. 1992); *Unisun Ins. Co. v. First S. Ins. Co.*, 443 S.E.2d 808 (S.C. Ct. App. 1994).

8. See, e.g., *Liberty Mut. Ins. Co. v. Vanarkadie*, 585 So. 2d 1017 (Fla. Dist. Ct. App. 1991); *Hartford Cas. Ins. Co. v. Budget Rent-A-Car Sys., Inc.*, 796 S.W.2d 763, 766-69 (Tex. Ct. App. 1990).

9. E.g., *American Cas. Co. v. PHICO Ins. Co.*, 643 A.2d 91 (Pa. 1994).

10. E.g., *Scottsdale Ins. Co. v. American Empire Surplus Lines Ins. Co.*, 811 F. Supp. 210, 216-18 (D. Md. 1993); *W.R. Grace & Co. v. Maryland Cas. Co.*, 600 N.E.2d 176 (Mass. App. Ct.), review denied, 604 N.E.2d 35 (Mass. 1992).

11. See, e.g., *Firemen's Fund Ins. Co. v. Aetna Cas. & Sur. Co.*, 273 Cal. Rptr. 431

B. The "Other Insurance" and "Multiple Insurance" Bottom Line

The reconciliation of "other insurance" and "multiple insurance" issues is often irrelevant to insureds.¹² If a single policy will cover a claimed loss, or if a single insurer will defend without reserving its rights, the potential involvement of two or more insurers matters little to the insured. However, the presence of another insurer on a particular risk is of appreciable economic concern to all carriers.

Courts recognize that when two or more insurance companies insure the same interest and the same risk, and one carrier is compelled to pay the entire loss, the insurer that pays may be entitled to recover some portion of its expenditure from its co-insurers.¹³ An insurer's right to recover from another carrier on the same risk does not sound in contract because there is no contractual relationship between the carriers.¹⁴ Courts thus look to the basic equitable principle that "one who pays money for the benefit of another is entitled to be reimbursed."¹⁵ Some courts allow insurers to recover from one another under a contribution theory,¹⁶ while others follow equitable subrogation doctrine.¹⁷ Still other

(Ct. App. 1990); *Cullen/Frost Bank v. Commonwealth Lloyd's Ins. Co.*, 852 S.W.2d 252, 256-58 (Tex. Ct. App. 1993), *error denied*, 889 S.W.2d 266 (Tex. 1994).

12. This is not to say that "other insurance" clauses are entirely meaningless to insureds. If a loss is covered by two concurrent policies, neither having an "other insurance" clause, it can be argued that the insured is entitled to full recovery under both policies. *See, e.g., Linn v. North Idaho Dist. Medical Serv. Bureau, Inc.*, 638 P.2d 876, 884 (Idaho 1981); *Control Specialists Co. v. State Farm Mut. Auto. Ins. Co.*, 423 N.W.2d 775, 777 (Neb. 1988). Insureds may not hesitate to pursue double recovery. *See, e.g., Caballero v. Metropolitan Prop. & Liab. Ins. Co.*, 476 So. 2d 296, 297 (Fla. Dist. Ct. App. 1985); *Costello v. Illinois Farmers Ins. Co.*, 636 N.E.2d 710 (Ill. App. Ct. 1993).

13. *Aetna Cas. & Sur. Co. v. James J. Benes & Assocs., Inc.*, 593 N.E.2d 1087, 1090 (Ill. App. Ct.), *appeal denied*, 602 N.E.2d 445 (Ill. 1992). It logically follows that if the insured interests and risks are not identical, there is no right to contribution. *Hall v. Country Cas. Ins. Co.*, 562 N.E.2d 640, 644 (Ill. App. Ct. 1990).

14. *Northern Ins. Co. v. Allied Mut. Ins. Co.*, 955 F.2d 1353, 1360 (9th Cir.) (applying California law), *cert. denied*, 112 S. Ct. 3033 (1992); *Gould, Inc. v. Continental Cas. Co.*, 585 A.2d 16, 18 (Pa. Super. Ct. 1991).

15. *Carolina Cas. Ins. Co. v. Oregon Auto. Ins. Co.*, 408 P.2d 198, 203 (Or. 1965).

16. *MIC Prop. & Cas. Ins. Corp. v. International Ins. Co.*, 990 F.2d 573, 576-77 (10th Cir. 1993) (applying Oklahoma law); *Gulf Ins. Co. v. American Family Mut. Ins. Co.*, 962 F.2d 834, 835-36 (8th Cir. 1992) (applying Missouri law); *Nationwide Mut. Ins. Co. v. Hall*, 643 So. 2d 551, 561-62 (Ala. 1994); *Golden Eagle Ins. Co. v. Foremost Ins. Co.*, 25 Cal. Rptr. 2d 242, 254 (Ct. App. 1993); *United States Fidelity & Guar. Co. v. Continental Cas. Co.*, 556 N.E.2d 671, 675 (Ill. App. Ct. 1990); *Jefferson Ins. Co. v. Health Care Ins. Exch.*, 588 A.2d 1275, 1277-78 (N.J. Super. Ct. App. Div. 1991); *Continental Cas. Co. v. Rapid-Am. Corp.*, 609 N.E.2d 506, 513-14 (N.Y. 1993); *J. H. France Refractories Co. v. Allstate Ins. Co.*, 626 A.2d 502, 509 (Pa. 1993); *TRW-Title Ins. Co. v. Stewart Title Guar. Co.*, 832 S.W.2d 344, 346 (Tenn. Ct. App. 1991).

17. *See Hartford Accident & Indem. Co. v. Aetna Cas. & Sur. Co.*, 792 P.2d 749,

courts apparently mix contribution and subrogation, or allow recovery on either approach.¹⁸

While insurers' rights to contribution may be essentially equitable, they are not purely so. The specific means by which co-insurers' risk is allocated "must be determined not by an adjustment of equities, but by the provisions of the contracts which they made."¹⁹ Hence the significance of "other insurance" clauses in concurrent policies.

C. "Other Insurance" Clauses

"Other insurance" clauses originated in property insurance to discourage insureds from over-insuring, thereby reducing moral hazard.²⁰ They became standard in many liability policies despite the remote possibility that over-insurance would promote fraud.²¹ For an "other insurance" clause to be triggered, concurrent policies must cover the same interest. If, for example, two persons have different insurable interests in the same property, a loss affecting their distinct interests will not implicate the "other insurance" clauses in their respective policies.²²

Indemnity agreements between insureds or contracts with indemnifica-

752-54 (Ariz. 1990); *State v. Continental Cas. Co.*, 879 P.2d 1111, 1114-15 (Idaho 1994); *North Carolina Ins. Guar. Ass'n v. Century Indem. Co.*, 444 S.E.2d 464, 472 (N.C. Ct. App.), *review denied*, 448 S.E.2d 532 (N.C. 1994); *Unisun Ins. Co. v. Hertz Rental Corp.*, 436 S.E.2d 182, 186 (S.C. Ct. App. 1993); *Jefferson Ins. Co. v. Travelers Ins. Co.*, 614 A.2d 385, 387 (Vt. 1992).

18. *See, e.g.*, *Forum Ins. Co. v. Ranger Ins. Co.*, 711 F. Supp. 909, 914 (N.D. Ill. 1989) (applying Illinois law); *National Cas. Co. v. Great S.W. Fire Ins. Co.*, 833 P.2d 741, 747-48 (Colo. 1992); *Hanover Ins. Co. v. Fireman's Fund Ins. Co.*, 586 A.2d 567, 569-70 (Conn. 1991).

19. *Western Cas. & Sur. Co. v. Trinity Universal Ins. Co.*, 764 P.2d 1256, 1259 (Kan. Ct. App. 1988), *aff'd*, 775 P.2d 176 (Kan. 1989). *Accord Isler v. Federated Guar. Mut. Ins. Co.*, 567 So. 2d 1264, 1265 (Ala. 1990); *American Economy Ins. Co. v. Motorists Mut. Ins. Co.*, 593 N.E.2d 1242, 1246 (Ind. Ct. App.), *aff'd in part, vacated in part on other grounds*, 605 N.E.2d 162 (Ind. 1992); *State Auto. Prop. & Cas. Ins. Co. v. Gibbs*, 444 S.E.2d 504, 507 (S.C. 1994); *American Concept Ins. Co. v. Certain Underwriters at Lloyds of London*, 467 N.W.2d 480, 482 (S.D. 1991).

20. *State Farm Mut. Auto. Ins. Co. v. Bogart*, 717 P.2d 449, 451 (Ariz. 1986); *St. Paul Fire & Marine Ins. Co. v. American Home Assur. Co.*, 514 N.W.2d 113, 115 (Mich. 1994).

21. *Bogart*, 717 P.2d at 451; *St. Paul*, 514 N.W.2d at 115.

22. *See, e.g.*, *Western Agric. Ins. Co. v. Industrial Indem. Ins. Co.*, 838 P.2d 1353, 1356-57 (Ariz. Ct. App. 1992); *Hartford Accident & Indem. Co. v. Western Cas. & Sur. Co.*, 712 S.W.2d 722, 724-25 (Mo. Ct. App. 1986); *Musselman v. Mountain W. Farm Bureau Mut. Ins. Co.*, 824 P.2d 271, 275 (Mont. 1992).

tion clauses, such as those commonly found in the construction industry, may shift an entire loss to a particular insurer notwithstanding the existence of an "other insurance" clause in its policy.²³ Policy endorsements may affect the allocation or apportionment of losses. For example, the endorsement at issue in *Woodson v. A & M Investments, Inc.*²⁴ made one carrier's policy primary and triggered a second insurer's excess "other insurance" clause.²⁵ "Other insurance" clauses may be circumvented in certain regulated industries, such as transportation. In the case of interstate motor carriers, for example, primary liability is determined by Interstate Commerce Commission regulations.²⁶ Policy endorsements, exclusions or terms also may sever an insurer's obligations when it might otherwise appear that there is concurrent coverage.²⁷

"Other insurance" clauses only affect insurers' rights among themselves; they do not affect the insured's right to recovery under each concurrent policy.²⁸ Inter-insurer loss allocation by way of "other insurance" clauses never permits allocation of a loss to the insured. Payment of the insured's claim always takes priority over the allocation of the loss be-

23. See, e.g., *J. Walters Constr., Inc. v. Gilman Paper Co.*, 620 So. 2d 219, 220-21 (Fla. Dist. Ct. App. 1993) (applying Georgia law); *Costello v. Times Square Hotel Co.*, 567 N.Y.S.2d 231, 232 (App. Div. 1991).

24. 591 So. 2d 1345 (La. Ct. App. 1991).

25. *Id.* at 1347-48.

26. *Transamerica Ins. Co. v. Maryland Cas. Ins. Co.*, 801 P.2d 454, 455 (Ariz. Ct. App. 1990); *Planet Ins. Co. v. Gunther*, 608 N.Y.S.2d 763, 767 (Sup. Ct. 1993); *Ohio Cas. Ins. Co. v. United S. Assur. Co.*, 620 N.E.2d 163, 165 (Ohio Ct. App.), *jurisdictional motion overruled*, 619 N.E.2d 698 (Ohio 1993). *But see* *Prestige Cas. Co. v. Michigan Mut. Ins.*, 859 F. Supp. 1058, 1070-71 (E.D. Mich. 1994).

27. See, e.g., *Fireman's Fund Ins. Co. v. Allstate Ins. Co.*, 286 Cal. Rptr. 146 (Ct. App. 1991); *Englund v. State Farm Mut. Auto. Ins. Co.*, 475 N.W.2d 369 (Mich. Ct. App. 1991); *Progressive Cas. Ins. Co. v. Empire Ins. Co.*, 616 N.Y.S.2d 136, 137-38 (Sup. Ct. 1994); *Universal Leaf Tobacco Co. v. Oldham*, 439 S.E.2d 179 (N.C. Ct. App.), *review denied*, 447 S.E.2d 412 (N.C. 1994); *Mattheis v. Heritage Mut. Ins. Co.*, 487 N.W.2d 52 (Wis. Ct. App. 1992). This situation often occurs in connection with the "newly-acquired automobile" clause in automobile liability insurance policies, or where a vehicle is sold and liability or "no fault" coverage are an issue. See, e.g., *Hawaiian Ins. & Guar. Co., Ltd. v. Financial Sec. Ins. Co.*, 807 P.2d 1256 (Haw.), *reconsideration denied*, 841 P.2d 1074 (1991); *Ellis v. Weger*, 550 N.E.2d 1347 (Ind. Ct. App. 1990); *Northern Assur. Co. of Am. v. Farm Bureau Mut. Ins. Co.*, 822 P.2d 45 (Kan. 1991); *Allstate Ins. Co. v. Liberty Mut. Ins. Group*, 868 P.2d 110 (Utah Ct. App. 1994).

28. *Chemical Leaman Tank Lines, Inc. v. Aetna Cas. & Sur. Co.*, 817 F. Supp. 1136, 1154 n.11 (D.N.J. 1993) (applying New Jersey law); *Employers Reinsurance Corp. v. Phoenix Ins. Co.*, 230 Cal. Rptr. 792, 798 (Ct. App. 1986); *Zurich Ins. Co. v. Northbrook Excess & Surplus Ins. Co.*, 494 N.E.2d 634, 650 (Ill. App. Ct. 1986), *aff'd sub nom.* *Zurich Ins. Co. v. Raymark Indus., Inc.*, 514 N.E.2d 150 (Ill. 1987); *Bazinet v. Concord Gen. Mut. Ins. Co.*, 513 A.2d 279, 281 (Me. 1986); *Slabic v. Hendrickson*, 556 N.Y.S.2d 236, 237 (Sup. Ct. 1990).

tween concurrent insurers.²⁹ Finally, it must be noted that "other insurance" clauses do not automatically operate to require contribution or apportion losses. The insured must tender a claim to all concurrent insurers. If an insurer is not asked to respond to a claim by way of defense or indemnity, those insurers accepting the insured's tender cannot later seek contribution from the non-participating company. An "other insurance" clause does not make an insurer a third-party beneficiary under its insured's other concurrent policies.³⁰

Insurance policies typically contain any of four "other insurance" clauses: "(1) the 'pro rata' clause, which provides that the insurer will pay its share of the loss in the proportion its policy limits relates to the aggregate liability coverage available;" (2) an "excess" clause, which provides that an insurer will pay a loss only after other available primary insurance is exhausted; (3) an "escape" clause, which provides that an insurer is absolved of all liability if other coverage is available; and (4) an "excess escape" clause, which provides that the insurer is liable for that amount of a loss exceeding other available coverage and that the insurer is not liable when other available insurance has limits equal to or greater than its own.³¹ Some "other insurance" clauses specially crafted by indi-

29. See *E.R. Squibb & Sons, Inc. v. Accident & Cas. Ins. Co.*, 860 F. Supp. 124, 127 (S.D.N.Y. 1994).

30. See *Institute of London Underwriters v. Hartford Fire Ins. Co.*, 599 N.E.2d 1311, 1315 (Ill. App. Ct. 1992).

31. *Liberty Mut. Ins. Co. v. Harbor Ins. Co.*, 603 A.2d 300, 301 n.2 (R.I. 1992).

Another type of "other insurance" clause not discussed in this Article is a coordination of benefits (COB) clause. COB clauses appear in health insurance plans and policies. See, e.g., *Blue Cross & Blue Shield of Kan., Inc. v. Riverside Hosp.*, 703 P.2d 1384, 1387 (Kan. 1985); *City of Louisville v. McDonald*, 819 S.W.2d 319, 320 (Ky. Ct. App. 1991); *Smith v. Physicians Health Plan, Inc.*, 514 N.W.2d 150, 152 (Mich. 1994); *Samuels v. Blue Cross of Greater Philadelphia*, 592 A.2d 1310, 1313-15 (Pa. Super. Ct. 1991), *appeal denied*, 604 A.2d 250 (Pa. 1992). COB clauses provide that "if the same hospital, medical or surgical risk is covered by more than one insurer, the insurance carrier the company insuring with a COB provision in its policies may reduce the amount of its payment by that payable from some other coverage. In other words, the claimant may not recover twice." *William C. Brown Co. v. General Am. Life Ins. Co.*, 450 N.W.2d 867, 870-71 (Iowa 1990). Absent COB clauses in their policies, concurrent health insurers are obligated to pay all qualifying medical expenses. That a patient or her beneficiaries may receive payments exceeding a hospital's charges is no defense to the insurers' obligations to pay under their policies. *Nahom v. Blue Cross & Blue Shield of Ariz., Inc.*, 885 P.2d 1113, 1119 (Ariz. Ct. App. 1994). "COB provisions prescribe *rules* to determine when the carrier's obligation to pay is primary or secondary." *William C. Brown Co.*, 450 N.W.2d at 871. If an obligation is "primary," the carrier pays all qualifying policy expenses. *Id.* "Secondary" means that the

vidual insurers defy easy classification. Commentators and scholars sometimes term such "other insurance" clauses "tailor-made."³²

1. Pro Rata Clauses

Pro rata clauses usually call for sharing a loss in relation to the insurers' respective liability limits.³³ A simple pro rata clause in an automobile liability policy may provide:

[I]f the insured has other similar insurance available to him . . . the Company shall not be liable for a greater proportion of any loss to which this Coverage applies than the limits of liability hereunder bear to the sum of the applicable limits of liability of this insurance and such other insurance.³⁴

A pro rata clause in a homeowners policy may provide: If a loss covered by this policy is also covered by other insurance, we will pay only the

insurer's obligations are excess to all other applicable insurance. *Id.* at 871; *see also* Arkansas Poultry Fed'n Ins. Trust v. Lawrence, 805 S.W.2d 653, 659 (Ark. Ct. App. 1991). Simply stated: "COB provisions have as their primary characteristic a structure of priority of claim payment which enables broad risk accident and health insurance carriers to reduce the amount of premiums paid out by limiting the claimants to a single payment of benefits for a single medical risk." *William C. Brown Co.*, 450 N.W.2d at 871 (citing *American Family Life Assur. Co. v. Blue Cross of Fla., Inc.*, 348 F. Supp. 267, 268-69 (S.D. Fla. 1972), *aff'd*, 486 F.2d 225 (5th Cir. 1973), *cert. denied*, 416 U.S. 905 (1974)).

32. *See, e.g.*, BARRY R. OSTRAGER, HANDBOOK ON INSURANCE COVERAGE DISPUTES 285 (3d ed. 1990); Shaun McParland Baldwin & Dawn Midkiff, *Apportioning Indemnity and Defense Costs: The "Other Insurance" Clause and Other Theories of Allocation*, in SELECTED ISSUES IN INSURANCE COVERAGE AND PRACTICE (Def. Research Inst. 1990).

33. A few courts have attempted to prorate losses according to the premiums paid for each of the subject policies. *See, e.g.*, *Indiana Ins. Co. v. Federated Mut. Ins. Co.*, 415 N.E.2d 80, 88-89 (Ind. Ct. App. 1981). Following this approach, each insurer's contribution is based on the percentage of premiums it received compared to the total premiums paid to all insurers. The underlying theory is that the amount of the premiums collected accurately reflects the amount of risk assumed by each insurer, and therefore most fairly allocates the loss. ROBERT H. JERRY, II, UNDERSTANDING INSURANCE LAW 496 (1987). But prorating according to policy premiums can also be unfair, because equal premiums seldom are paid for the same coverage. *See Ruan Transp. Corp. v. Truck Rentals, Inc.*, 278 F. Supp. 692, 695 (D. Colo. 1968) (criticizing pro rata by premium approach because "many variables other than the maximum amount of coverage" affect premium charges). For example, one concurrent insurer may have received significantly greater premiums solely because its policy covered additional insureds and additional risks. *See, e.g.*, *Fireman's Fund Ins. Co. v. Nationwide Mut. Ins. Co.*, 464 A.2d 431, 436-37 (Pa. Super. Ct. 1983). Under such circumstances, compelling the better compensated insurer to bear a larger portion of the loss penalizes the company for issuing one policy when it could have issued several. Moreover, this approach is practically unworkable and is so administratively expensive as to be unfeasible. For these reasons the premium approach to pro rata allocation has been abandoned.

34. *M.F.A. Mut. Ins. Co. v. American Family Mut. Ins. Co.*, 654 S.W.2d 230, 234 n.4 (Mo. Ct. App. 1983).

proportion of the loss that the limit of liability that applies under this policy bears to the total amount of insurance covering the loss.

As case law concerning the effect of various "other insurance" clauses developed, insurers modified their policy provisions in the pursuit of economic advantage. The simple pro rata clause was a casualty of industry advances, and its use is now mostly limited to automobile and home-owner policies. Most comprehensive general liability (CGL) policies now contain an "other insurance" amalgam. Today's standard CGL pro rata clause provides:

When both this insurance and other insurance apply to the loss on the same basis, whether primary, excess or contingent, the company shall not be liable under this policy for a greater proportion of the loss than that stated in the applicable contribution provision below:

(1) Contribution by Equal Shares: If all of such other valid and collectible insurance provides for contribution by equal shares, the Company shall not be liable for a greater proportion of such loss than would be payable if each insurer contributes an equal share until the share of each insurer equals the lowest applicable limit of liability under any one policy or the full amount of the loss is paid, and with respect to any amount of loss not so paid the remaining insurers then continue to contribute equal shares of the remaining amount of the loss until each such insurer has paid its limit in full or the full amount of the loss is paid.

(2) Contribution by Limits: If any of such other insurance does not provide for contribution by equal shares, the Company shall not be liable for a greater proportion of such loss than the applicable limit of liability under this policy for such loss bears to the total applicable limit of liability of all valid and collective insurance against such loss.³⁵

The difference in the amounts an insurer might have to contribute, depending on whether pro rata indemnity is calculated by liability limits or by equal shares, can be appreciable. The difference in the approaches—and thus the economic effect on co-insurers—is best understood by way of example.³⁶ Assume a \$700,000 loss, and three concurrent primary liability policies providing aggregate coverage of \$1,400,000. Insurer A has \$100,000 policy limits, Insurer B has policy limits of \$300,000, and Insurer C provides \$1,000,000 in coverage. Allocating the loss by equal shares:

35. *State of N.Y. v. Blank*, 27 F.3d 783, 799 (2d Cir. 1994); *Liberty Mut. Ins. Co. v. United States Fidelity & Guar. Co.*, 756 F. Supp. 953, 955 (S.D. Miss. 1990).

36. Percentages and total have been rounded for simplification. For a similar example, see *Baldwin & Midkiff*, *supra* note 32, at 48.

| | | | | | |
|-----------|-----------|---|----------|---|------------------|
| Insurer A | \$100,000 | + | [Limits] | = | \$100,000 |
| Insurer B | \$100,000 | + | 200,000 | = | \$300,000 |
| Insurer C | \$100,000 | + | 200,000 | = | <u>\$300,000</u> |
| | | | | | \$700,000 |

Alternatively, allocating the same loss by policy limits:

| | | | | | |
|-----------|--------------------|---|----------------|---|-----------|
| Insurer A | <u>\$100,000</u> | = | 7.14% of loss | = | \$49,980 |
| | \$1,400,000 | | | | |
| Insurer B | <u>\$300,000</u> | = | 21.43% of loss | = | \$150,010 |
| | \$1,400,000 | | | | |
| Insurer C | <u>\$1,000,000</u> | = | 71.43% of loss | = | \$500,010 |
| | \$1,400,000 | | | | |

The differences in the contribution by equal shares and by limits approaches to pro rata allocation can be illustrated with a smaller loss, as well. Assume that an insured has two personal lines policies: Policy A provides \$50,000 in coverage, while Policy B has a \$150,000 limit of liability. The insured suffers an \$80,000 loss covered by both policies. Were the loss prorated by equal shares, each insurer would contribute \$40,000. Were the loss prorated by policy limits, on the other hand, Insurer A would contribute \$20,000 (because Insurer A wrote 25% of the total coverage) and Insurer B would contribute \$60,000.³⁷

As illustrated and expected, the insurer with the lowest policy limits benefits when the loss is allocated by limits. The converse is true when the loss is allocated by equal shares.³⁸

37. See JERRY, *supra* note 33, at 495.

38. Kansas and some other jurisdictions take a different approach to proration by equal shares. Assuming the \$700,000 loss and \$1,400,000 in available coverage from the first example, Kansas courts would prorate the loss (in round numbers):

| | | | | | |
|-----------|----------|---|----------|---|------------------|
| Insurer A | \$33,333 | + | [Limits] | = | \$33,333 |
| Insurer B | \$33,333 | + | 100,000 | = | \$133,333 |
| Insurer C | \$33,333 | + | 500,000 | = | <u>\$533,333</u> |
| | | | | | \$700,000 |

Kansas courts thus prorate losses equally up to the limits of the lowest policy in stages, first dividing the lowest policy limits among all three insurers, and then between two, with the largest insurer bearing the largest loss. In this example, Company C's share is calculated as: \$33,333 + 100,000 + 400,000 = \$533,333. Company C thus contributes equally with A and B at the first stage, and it contributes equally

Of the two pro rata approaches, contribution by equal shares is probably the most logical. Each co-insurer has undertaken equally to insure against low-level losses. Accordingly, the insurers should share losses equally at lower levels.³⁹ Opponents of the contribution by equal shares approach might argue that it results in a windfall to insurers with higher liability limits. In the \$80,000 loss illustrated above, for example, the insurers share the loss equally even though Company B's policy limits are three times greater than Company A's. Under such circumstances, equal loss allocation may appear inequitable. To the contrary, each insurer received the same premiums up to the limit of the lowest policy, and the insurers should therefore share the loss up to the lowest limit equally.⁴⁰ Insurers with higher policy limits should not be required to subsidize insurers with lower policy limits.⁴¹

2. Excess Clauses

An excess "other insurance" clause provides that the insurer's liability is limited to the amount of the loss exceeding all other valid and collectible insurance, up to the limits of the policy. A typical excess clause might read: "This insurance shall apply only as excess insurance over any other valid and collectible insurance which would apply in the absence of this policy, except insurance written specifically to cover as excess over the limits of liability applicable to . . . this policy."⁴²

Some courts dislike excess "other insurance" clauses.⁴³ This disfavor results from the court's realization that an excess clause is "a self-serving provision that attempts to make [a primary] insurer only secondarily liable" when other available coverage exists.⁴⁴ In sum, a primary insurer should not be able to avoid a loss when it bargained for the risk.

with B (matching A's \$100,000 policy limits) at the second stage. Under this minority approach, Insurer C bears the greatest loss when contributing by equal shares, just as it would were the loss prorated by policy limits.

39. JERRY, *supra* note 33, at 496.

40. *Id.*

41. *See* Liberty Mut. Ins. Co. v. Fireman's Fund Ins. Co., 479 A.2d 289, 293 (Del. Super. Ct. 1983).

42. Deerfield Management Co. v. Ohio Farmers Ins. Co., 529 N.E.2d 243, 248 (Ill. App. Ct. 1988).

43. *See, e.g.*, Federal Ins. Co. v. St. Paul Fire & Marine Ins. Co., 638 So. 2d 1132, 1135-36 (La. Ct. App. 1994) (refusing to give effect to excess clause).

44. Penton v. Hotho, 601 So. 2d 762, 764-65 n.3 (La. Ct. App. 1992).

3. Escape and Excess Escape Clauses

An escape clause provides that the insurer is not liable if any other coverage is available.⁴⁵ A simple escape clause typically states: "Provided that where the Assured is, irrespective of this insurance, covered or protected against any loss or claim which would otherwise have been paid by the Assurer, under this policy, there shall be no contribution by the Assurer on the basis of double insurance or otherwise."⁴⁶

Escape clauses are often more broadly drafted. All-inclusive escape clauses are commonly referred to as "super-escape" clauses.⁴⁷ A super-escape clause may provide: "This insurance does not apply . . . to any liability for such loss as is covered on a primary, contributory, excess or any other basis by insurance in another insurance company."⁴⁸

In addition to simple escape and super-escape clauses, insurers also employ hybrid "excess escape" clauses. An excess escape clause provides that the insurer is liable for the amount of the loss exceeding the limits of other available insurance, and that the insurer is not liable where the limits of other available coverage equal or exceed its own.⁴⁹ For example:

If . . . the insured has other insurance, whether on a primary, excess or contingent basis, there shall be no insurance afforded hereunder . . . ; provided, that if the limit of liability of this policy is greater than the limit of liability provided by other insurance, this policy shall afford excess insurance over and above such other insurance in an amount sufficient to give the insured, as respects the layer of coverage afforded by this policy, a total limit of liability equal to the limit of liability afforded by this policy.⁵⁰

Excess escape clauses are common in uninsured motorist coverage. For example:

With respect to bodily injury to an insured while occupying an automobile not owned by the named insured, Uninsured Motorists Coverage shall apply only as excess insurance over any other similar insurance available to such insured and applicable to such automobile as primary insurance, and this insurance shall then apply only in the amount by which the limit of liability for this coverage exceeds the applicable limit of liability of such other insurance.⁵¹

45. *Brown v. Travelers Ins. Co.*, 610 A.2d 127, 128 (R.I. 1992).

46. *Elf Exploration, Inc. v. Cameron Offshore Boats, Inc.*, 863 F. Supp. 386, 392 (E.D. Tex. 1994).

47. *See, e.g., Automobile Underwriters, Inc. v. Fireman's Fund Ins. Cos.*, 874 F.2d 188, 191 (3d Cir. 1989) (describing clause as "super-escape/reduced limits clause").

48. *Baldwin & Midkiff*, *supra* note 32, at 49; *see also Hodgen v. Forest Oil Corp.*, 862 F. Supp. 1567, 1577 (W.D. La. 1994) (similar language in marine protection and indemnity policy).

49. *Brown*, 610 A.2d at 128; *see also McDonald v. Country Mut. Ins. Co.*, 478 N.E.2d 571, 574 (Ill. App. Ct. 1985).

50. *Insurance Co. of N. Am. v. Continental Cas. Co.*, 575 F.2d 1070, 1072 (3d Cir. 1978).

51. *Midwest Mut. Ins. Co. v. Farmers Ins. Co.*, 599 P.2d 1021, 1024 (Kan. Ct. App.

No matter how they are classified, escape clauses are disfavored. Escape clauses are frequently viewed as being contrary to public policy.⁵²

4. Tailor-Made Clauses

Some "other insurance" clauses are difficult to classify because they are drafted by individual insurers for particular risks. For example, the hybrid pro rata/excess clause at issue in *Firemen's Insurance Co. v. St. Paul Fire & Marine Insurance Co.*⁵³ provided:

If the Insured has other insurance against a loss covered by Part I of this policy, the Company shall not be liable under this policy for a greater proportion of such loss than the applicable limit of liability stated in the declarations bears to the total applicable limit of liability of all valid and collectible insurance against such loss; provided, however, the insurance with respect to a temporary substitute automobile or non-owned automobile shall be excess over any other valid and collectible insurance.⁵⁴

Although tailor-made clauses may suit the objectives of the immediate contracting parties, their special characteristics often clash with "other insurance" clauses in policies purchased to share specific losses. What appears to be primary coverage may thus become excess, or intended pro rata loss allocation may be circumvented.⁵⁵

III. RECONCILING "OTHER INSURANCE" CONFLICTS

The presence of "other insurance" predictably results in litigation between insurers. Courts hearing disputes between concurrent insurers have formulated certain principles for resolving conflicts. Some situations permit a straightforward approach to resolution. For example, where neither of the two policies at issue contains an "other insurance" clause, courts prorate liability between the two insurers⁵⁶ or require

1979); *see also* *Childs v. New Jersey Mfrs. Ins. Co.*, 531 A.2d 723, 724 (N.J. 1987) (very similar clause).

52. *CSE Ins. Group v. Northbrook Prop. & Cas. Co.*, 29 Cal. Rptr. 2d 120, 124 (Ct. App. 1994); *Fryer v. Allstate Ins. Co.*, 573 A.2d 225, 226-28 (Pa. Super. Ct. 1990).

53. 411 P.2d 271 (Or. 1966).

54. *Id.* at 272.

55. *See, e.g.*, *Empire Fire & Marine Ins. Co. v. Insurance Co. of the State of Pa.*, 638 So. 2d 102 (Fla. Dist. Ct. App. 1994) (reversing declaratory judgment for pro rata allocation and designating one insurer to pay primary and one to pay excess coverage).

56. *See Oregon Auto. Ins. Co. v. United States Fidelity & Guar. Co.*, 195 F.2d 958, 960 (9th Cir. 1952); *United Servs. Auto Ass'n v. Agricultural Ins. Co.*, 355 P.2d 143,

them to share the loss equally.⁵⁷ As the vintage of the supporting cases suggests, the proliferation of "other insurance" clauses has virtually eliminated this simple problem. In the more likely scenario where one policy contains an "other insurance" clause and the competing policy does not, courts generally give effect to the lone "other insurance" clause.⁵⁸ This rule reflects a judicial effort to effectuate the insurers' intent.

Real problems surface when both or all of the policies at issue contain "other insurance" clauses. Policies may have similar "other insurance" clauses, or dissimilar "other insurance" clauses.

A. *Primary Policies With Similar "Other Insurance" Clauses*

1. Pro Rata Clause v. Pro Rata Clause

Where both policies contain pro rata clauses, the traditional rule has been to hold insurers liable for the proportion of the subject loss that the face amount of each insurer's policy bears to the total amount of valid and collectible insurance.⁵⁹ The contribution by limits method has been

144 (N.M. 1960).

57. See, e.g., *Cosmopolitan Mut. Ins. Co. v. Continental Cas. Co.*, 147 A.2d 529, 534 (N.J. 1959).

58. *Transport Indem. Co. v. Paxton Nat'l Ins. Co.*, 657 F.2d 657, 660 (5th Cir. 1981) (applying Mississippi law), *cert. denied*, 455 U.S. 982 (1982); *Fremont Indem. Co. v. New England Reinsurance Co.*, 815 P.2d 403, 405-06 (Ariz. 1991); *United States Fidelity & Guar. Co. v. Budget Rent-A-Car Sys., Inc.*, 842 P.2d 208, 214 (Colo. 1992); *Southern Gen. Ins. Co. v. Boerste*, 394 S.E.2d 566, 567-68, 70 (Ga. Ct. App. 1990); *Carriers Ins. Co. v. American Policyholders' Ins. Co.*, 404 A.2d 216, 218 (Me. 1979); *Nationwide Ins. Co. v. Auto-Owners Mut. Ins. Co.*, 525 N.E.2d 508, 512 (Ohio Ct. App. 1987); *Co-operators Ins. Co. v. Allstate Rent-A-Car*, 804 P.2d 1050, 1052 (Nev. 1991); *White v. Howard*, 573 A.2d 513, 514-16 (N.J. Super. Ct. App. Div.), *cert. denied*, 585 A.2d 354 (N.J. 1990); see also *City of Old Town v. American Employers Ins. Co.*, 858 F. Supp. 264, 270-71 (D. Me. 1994) (enforcing escape clause where competing policy's "other insurance" clause stated it was primary and did not apportion liability); *Safeco Ins. Co. of Am. v. Great Am. Ins. Co.*, 523 F. Supp. 983, 987-88 (E.D. Pa. 1981) (giving effect to escape clause where one insurer's "other insurance" clause simply stated that its policy was primary, and did not attempt to allocate or apportion liability); *Honeywell, Inc. v. American Motorists Ins. Co.*, 441 N.E.2d 348, 349-51 (Ill. App. Ct. 1982) (holding as primarily liable the insurer whose excess clause was silent on allocation or apportionment versus the second insurer's "other insurance clause"); *Integon Gen. Ins. Corp. v. Universal Underwriters Ins. Co.*, 394 S.E.2d 209, 210-11 (N.C. Ct. App. 1990) (finding that "other insurance" clause clearly declared policy's coverage as primary). *But see* *Nationwide Mut. Ins. Co. v. Hall*, 643 So. 2d 551, 561-62 (Ala. 1994) (requiring insurers to share loss pro rata by limits even though one policy did not have an "other insurance" clause).

59. See, e.g., *Cargill, Inc. v. Commercial Union Ins. Co.*, 889 F.2d 174, 179-81 (8th Cir. 1989); *Compton v. State Farm Mut. Auto. Ins. Co.*, 870 P.2d 545, 547-48 (Colo. Ct. App. 1993); *General Accident Ins. Co. v. United States Fidelity & Guar. Co.*, 602 N.Y.S.2d 948, 951-52 (App. Div. 1993); *Tarolli v. Continental Cas. Co.*, 581 N.Y.S.2d

subject to criticism, however, because it ignores the economic reality that the cost of insurance does not increase proportionately with policy limits. Furthermore, the fact that a company insures a party against major losses should be of no significance when considering that insurer's relative liability for a small loss.⁶⁰ Accordingly, the current preference is for contribution by equal shares, whereby two or more insurers share the loss equally until the lowest policy is exhausted.⁶¹ Certainly, insurers are required to contribute by equal shares where both policies' "other insurance" clauses so provide—even if the clauses alternatively provide for pro rata contribution by limits.⁶²

2. Excess Clause v. Excess Clause

When two primary policies both contain excess "other insurance" clauses, courts generally treat the excess clauses as mutually repugnant and prorate the loss between the insurers.⁶³ As the court explained in

510, 511 (App. Div. 1992); *Aetna Cas. & Sur. Co. v. Continental Ins. Co.*, 429 S.E.2d 406, 409 (N.C. Ct. App. 1993); *Equity Mut. Ins. Co. v. Spring Valley Wholesale Nursery, Inc.*, 747 P.2d 947, 954 (Okla. 1987); *Mission Ins. Co. v. Guarantee Ins. Co.*, 683 P.2d 215, 220 (Wash. Ct. App. 1984); *State Farm Mut. Auto. Ins. Co. v. Continental Cas. Co.*, 498 N.W.2d 247, 249-50 (Wis. Ct. App.), *review denied*, 501 N.W.2d 459 (Wis. 1993).

60. OSTRAGER, *supra* note 32, at 403.

61. *See, e.g.*, *Reliance Ins. Co. v. St. Paul Surplus Lines Ins. Co.*, 753 F.2d 1288, 1292 (4th Cir. 1985) (applying District of Columbia law); *Arkansas Poultry Fed'n Ins. Trust v. Lawrence*, 805 S.W.2d 653, 660-61 (Ark. Ct. App. 1991); *Western Cas. & Sur. Co. v. Universal Underwriters Ins. Co.*, 657 P.2d 576, 580-82 (Kan. 1983); *Nolt v. United States Fidelity & Guar. Co.*, 617 A.2d 578, 582 (Md. 1993); *Mission Ins. Co. v. United States Fire Ins. Co.*, 517 N.E.2d 463, 468 (Mass. 1988); *Tracey Road Equip., Inc. v. Village of Johnson City*, 571 N.Y.S.2d 586, 589 (App. Div. 1991); *North Carolina Farm Bureau Mut. Ins. Co. v. State Farm Mut. Auto. Ins. Co.*, 403 S.E.2d 151, 153 (S.C. Ct. App.), *appeal dismissed*, 411 S.E.2d 425 (S.C. 1991); *Odessa Sch. Dist. No. 105 v. Insurance Co. of Am.*, 791 P.2d 237, 243-44 (Wash. Ct. App.), *appeal dismissed*, 804 P.2d 9 (Wash. 1990).

62. *See, e.g.*, *State v. Blank*, 27 F.3d 783, 798-99 (2d Cir. 1994) (applying New York law); *Aviles v. Burgos*, 783 F.2d 270, 281-83 (1st Cir. 1986); *Liberty Mut. Ins. Co. v. United States Fidelity & Guar. Co.*, 756 F. Supp. 953, 956-57 (S.D. Miss. 1990); *Holyoke Mut. Ins. Co. v. Cherokee Ins. Co.*, 386 S.E.2d 524, 526-27 (Ga. Ct. App. 1989); *Insurance Co. of N. Am. v. Home & Auto Ins. Co.*, 628 N.E.2d 643, 644-46 (Ill. App. Ct. 1993).

63. *Indiana Ins. Co. v. Mission Nat'l Ins. Co.*, 874 F.2d 631, 634 (9th Cir. 1989) (applying Washington law); *Hennes Erecting Co. v. National Union Fire Ins. Co.*, 813 F.2d 1074, 1077 (10th Cir. 1987) (applying Kansas law); *Horace Mann Ins. Co. v. United Int'l Ins. Co.*, 762 F. Supp. 1470, 1474 (M.D. Ala. 1990) (applying Alabama law),

Federal Insurance Co. v. Atlantic National Insurance Co.:⁶⁴

If we were to take the language literally and give effect to each of these [excess] "other insurance" clauses, we would be required to conclude that neither policy provided primary coverage. But that would be a logical impossibility since, quite obviously, there can be no *excess* insurance absent a policy providing *primary* coverage and, in the absence of such other policy, each would be primary. To give effect to the excess clause in either of the policies would defeat the similar provision in the other and it follows, therefore, that the "excess" clauses operate to cancel out each other, both coverages must be treated as primary and each company is obligated to share in the cost of the settlement and the expenses.⁶⁵

There is some question as to whether the general rule holds true when one of the excess clauses at issue is a hybrid "excess escape" clause. This uncertainty is compounded by a relative lack of precedent. Some courts follow the general rule and hold that the clauses cancel out each other,⁶⁶ while other jurisdictions give effect to the excess escape clause.⁶⁷

aff'd, 932 F.2d 1443 (11th Cir. 1991); *Progressive Cas. Ins. Co. v. Travelers Ins. Co.*, 735 F. Supp. 15, 17-18 (D. Me. 1990) (applying Maine law); *Liberty Mut. Ins. Co. v. Pacific Indem. Co.*, 579 F. Supp. 140, 143 (W.D. Pa. 1984) (applying Pennsylvania law); *Arkansas Poultry Fed'n Ins. Trust v. Lawrence*, 805 S.W.2d 653, 660-61 (Ark. Ct. App. 1991); *CSE Ins. Group v. Northbrook Prop. & Cas. Co.*, 29 Cal. Rptr. 2d 120, 122-23 (Ct. App. 1994); *Empire Cas. Co. v. St. Paul Fire & Marine Ins. Co.*, 764 P.2d 1191, 1199 (Colo. 1988); *Allstate Ins. Co. v. Executive Car & Truck Leasing, Inc.*, 494 So. 2d 487, 489 (Fla. 1986); *Georgia Mut. Ins. Co. v. Southern Gen. Ins. Co.*, 351 S.E.2d 658, 659 (Ga. Ct. App. 1986); *Continental Nat'l Am. Ins. Co. v. Aetna Life & Cas. Co.*, 542 N.E.2d 954, 958 (Ill. App. Ct. 1989); *Motor Club of Iowa Ins. Co. v. Iowa Mut. Ins. Co.*, 508 N.W.2d 634, 637-38 (Iowa 1993); *Dean v. State Farm Mut. Auto. Ins. Co.*, 518 So. 2d 1115, 1118 (La. Ct. App. 1987), *writ denied*, 522 So. 2d 1096 (La. 1988); *Universal Underwriters Ins. Co. v. Allstate Ins. Co.*, 638 A.2d 1220, 1224 (Md. Ct. Spec. App. 1994); *National Indem. Co. v. Budget Rent-A-Car Sys., Inc.*, 489 N.W.2d 175, 176-77 (Mich. Ct. App. 1992); *Polenz v. Farm Bureau Ins. Co.*, 419 N.W.2d 677, 684 (Neb. 1988); *Universal Underwriters Ins. Co. v. Allstate Ins. Co.*, 592 A.2d 515, 517 (N.H. 1991); *Rogers v. Snappy Car Rental, Inc.*, 639 A.2d 1154, 1160 (N.J. Super. Ct. Law Div. 1993); *Lumber Mut. Ins. Co. v. Lumberman's Mut. Cas. Co.*, 588 N.Y.S.2d 630, 631 (App. Div. 1992), *appeal denied*, 616 N.E.2d 159 (N.Y. 1993); *Aetna Cas. & Sur. Co. v. Continental Ins. Co.*, 429 S.E.2d 406, 409 (N.C. Ct. App. 1993); *Erie Ins. Group v. Nationwide Mut. Ins. Co.*, 585 N.E.2d 464, 471 (Ohio Ct. App. 1989); *Aetna Cas. & Sur. Co. v. National Union Fire Ins. Co.*, 353 S.E.2d 894, 896-97 (Va. 1987). *But see* *Farm Family Mut. Ins. Co. v. Allstate Ins. Co.*, 579 N.Y.S.2d 207, 209 (App. Div.) (holding that excess clause "indicating a higher level of coverage" is given effect over competing excess clause), *appeal denied*, 602 N.E.2d 232 (N.Y. 1992).

64. 250 N.E.2d 193 (N.Y. 1969).

65. *Id.* at 194-95 (emphasis in original).

66. *Fremont Indem. Co. v. New Eng. Reinsurance Co.*, 815 P.2d 403, 407 (Ariz. 1991).

67. *Utah Power & Light Co. v. Federal Ins. Co.*, 983 F.2d 1549, 1560-61 (10th Cir. 1993) (applying Utah law); *RLI Ins. Co. v. Hartford Accident & Indem. Co.*, 980 F.2d 120, 122-24 (2d Cir. 1992) (applying Connecticut law).

There are exceptions to the general rule that excess clauses cancel out each other. For example, if one policy specifically states that it provides excess coverage above another designated primary policy, courts will enforce the excess clause and only the designated policy will be primary.⁶⁸ Perhaps the most common exception arises in the context of state financial responsibility laws mandating automobile liability insurance and uninsured motorist coverage. If an insured is driving a vehicle he does not own and the owner's insurance policy provides concurrent coverage, the owner's policy will be deemed primary even if both policies contain excess "other insurance" clauses.⁶⁹ This result is mandated by standard automobile policy language providing that the owner's policy is excess only with respect to non-owned covered automobiles. Simply stated, automobile insurance "follows the automobile, rather than the driver."⁷⁰

3. Escape Clause v. Escape Clause

If courts enforced competing escape clauses, insureds would be left without coverage. At the same time, there is no rational means by which one insurer's escape clause might be enforced, and another concurrent insurer held liable. Therefore, when two or more concurrent policies contain "other insurance" provisions that can be categorized as escape clauses, courts generally deem the clauses mutually repugnant and prorate the loss between the insurers.⁷¹ This general rule holds true when

68. *See Lumbermens Mut. Cas. Co. v. Allstate Ins. Co.*, 417 N.E.2d 66, 67-68 (N.Y. 1980).

69. *Aetna Cas. & Sur. Co. v. CNA Ins. Co.*, 606 A.2d 990, 993-94 (Conn. 1992); *State Farm Mut. Auto. Ins. Co. v. Clarendon Nat'l Ins. Co.*, 604 A.2d 384, 390 (Del. 1992); *Jones v. Wortham*, 411 S.E.2d 716, 718 (Ga. Ct. App. 1991); *State Farm Mut. Auto. Ins. Co. v. Employers Mut. Cas. Co.*, 500 N.W.2d 80, 83 (Iowa Ct. App. 1993); *Universal Underwriters Ins. Co. v. Allstate Ins. Co.*, 638 A.2d 1220, 1224-25 (Md. Ct. Spec. App. 1994); *Boren v. State Farm Mut. Auto. Ins. Co.*, 406 N.W.2d 640, 644 (Neb. 1987); *Universal Underwriters Ins. Co. v. Allstate Ins. Co.*, 592 A.2d 515, 516-17 (N.H. 1991); *Royal Ins. Co. v. Rutgers Cas. Ins. Co.*, 638 A.2d 924, 927 (N.J. Super. Ct. App. Div. 1994); *State Auto Prop. & Cas. Ins. Co. v. Gibbs*, 444 S.E.2d 504, 507 (S.C. 1994); *Union Ins. Co. v. Farmland Ins. Co.*, 389 N.W.2d 820, 822 (S.D. 1986); *State Farm Mut. Auto. Ins. Co. v. Universal Underwriters Ins. Co.*, 383 S.E.2d 791, 796 (W. Va. 1989). *But see John Deere Ins. Co. v. West Am. Ins. Group*, 854 P.2d 1201, 1202-04 (Ariz. Ct. App. 1993) (competing garage owners' liability policies); *United Servs. Auto. Ass'n v. Universal Underwriters Ins. Co.*, 420 S.E.2d 155, 157-58 (N.C. 1992) (garage owner's liability policy at issue).

70. *Allstate Ins. Co. v. State Auto. Mut. Ins. Co.*, 364 S.E.2d 30, 33 (W. Va. 1987).

71. *See Underwriters at Lloyd's, London v. Pike*, 977 F.2d 1278, 1279-80 (8th Cir. 1992) (applying Arkansas law); *Guidry v. CSI Blasters/Painters, Inc.*, 724 F. Supp. 435,

both conflicting clauses are of the "excess escape" variety.⁷² Conflicting "super-escape" clauses should also be declared mutually repugnant, since the enhanced exculpatory language does not affect their basic character.

*B. Primary Policies With Dissimilar "Other Insurance" Clauses:
Majority Approaches*

When faced with dissimilar "other insurance" clauses, most courts attempt to reconcile the clauses in a manner that will give effect to the intent of the parties. This approach is consistent with traditional contract law.

1. Pro Rata Clause v. Excess Clause

It is common in concurrent coverage situations for one policy to contain a pro rata "other insurance" clause and the other policy to include an excess clause. Under the majority rule, the policy with the excess clause is treated as true excess coverage and the insurer is liable only after the primary coverage provided by the policy with the pro rata clause is exhausted.⁷³ The relationship between pro rata and excess

437 (W.D. La. 1989), *aff'd*, 921 F.2d 275 (5th Cir. 1990) (applying Louisiana law); Travelers Ins. Co. v. Lexington Ins. Co., 478 So. 2d 363, 365 (Fla. Dist. Ct. App. 1985), *review denied*, 488 So. 2d 69 (Fla. 1986); Centennial Ins. Co. v. State Farm Mut. Auto. Ins. Co., 524 A.2d 110, 115-16 (Md. Ct. Spec. App.), *cert. denied*, 530 A.2d 273 (Md. 1987); Travelers Indem. Co. v. Chappell, 246 So. 2d 498, 504 (Miss. 1971); Crown Ctr. Redevelopment Corp. v. Occidental Fire & Cas. Co., 716 S.W.2d 348, 361-62 (Mo. Ct. App. 1986); Carlino v. Lumbermens Mut. Cas. Co., 546 N.E.2d 909, 912 n.3 (N.Y. 1989).

72. Arizona Joint Underwriting Plan v. Glacier Gen. Assur. Co., 631 P.2d 133, 134-35 (Ariz. Ct. App. 1981); *see also* Perez Trucking, Inc. v. Ryder Truck Rental, Inc., 886 P.2d 196, 200-201 (Wash. Ct. App. 1994) (noting pro rata approach hinged on special facts involving insured tractor-trailer rig).

73. St. Paul Mercury Ins. Co. v. Pennsylvania Cas. Co., 642 F. Supp. 180, 185 (D. Wyo. 1986) (applying Wyoming law); Alta Cal. Regional Ctr. v. Fremont Indem. Co., 30 Cal. Rptr. 2d 841, 847 n.1 (Ct. App. 1994); United States Auto. Ass'n v. Hartford Ins. Co., 468 So. 2d 545, 547 (Fla. Dist. Ct. App.), *review denied*, 476 So. 2d 676 (Fla. 1985); Home Indem. Co. v. General Accident Ins. Co. of Am., 572 N.E.2d 962, 964 (Ill. App. Ct. 1991); Grinnell Mut. Reinsurance Co. v. Globe Am. Cas. Co., 426 N.W.2d 635, 638 (Iowa 1988); Western Cas. & Sur. Co. v. Trinity Universal Ins. Co., 764 P.2d 1256, 1263 (Kan. Ct. App. 1988), *aff'd*, 775 P.2d 176 (Kan. 1989); Hartford Ins. Co. v. Kentucky Farm Bureau Ins. Co., 766 S.W.2d 75, 76-77 (Ky. Ct. App. 1989); Frois v. Bullock, 639 So. 2d 1218, 1221 (La. Ct. App.), *writ denied*, 644 So. 2d 391 (La. 1994); Royal Globe Ins. Co. v. Hartford Accident & Indem. Co., 485 A.2d 242, 243-44 (Me. 1984); Nolt v. United States Fidelity & Guar. Co., 617 A.2d 578, 582 (Md. 1993); St. Paul Fire & Marine Ins. Co. v. American Home Assur. Co., 514 N.W.2d 113, 118-21 (Mich. 1994); Mountain W. Farm Bureau Mut. Ins. Co. v. Credit Gen. Ins. Co., 805 P.2d 569, 570-71 (Mont. 1991); Harleysville Ins. Co. v. Crum & Forster Personal Ins., 588 A.2d 385, 388-89 (N.J. Super. Ct. App. Div. 1990); Belmer v. Nationwide Mut.

"other insurance" clauses was succinctly explained in *Jones v. Medox, Inc.*:⁷⁴

[T]he standard phrase "other valid and collectible insurance" [in an excess clause] means other valid and collectible *primary* insurance. It follows, then, that the policy containing the pro rata clause is other valid and collectible primary insurance that triggers application of the excess clause in the second policy. The excess clause in the second policy therefore is given full effect and that carrier is liable only for the loss after the primary insurer has paid up to its policy limits. The policy containing the excess clause, however, is not considered to be other valid and collectible primary insurance for the purpose of triggering the operation of the pro rata clause, because when a stated contingency occurs, that is, when there is other valid and collectible primary insurance available to the insured, the policy containing the excess clause becomes secondary coverage only.⁷⁵

This reasoning might justifiably be attacked as circular, inasmuch as it appears to depend on which competing policy is read first. Even so, the majority approach is consistent with the insurers' intent as expressed in their policies. Were courts to enforce the pro rata clause and instead order proration, "they would effectively deny the terms and intent of the excess clause."⁷⁶ Additionally, an insurer's use of a pro rata clause expressly recognizes primary liability up to the policy's liability limits.⁷⁷

2. Pro Rata Clause v. Escape Clause

If one primary policy contains a pro rata "other insurance" clause and a second policy contains an escape clause, the insurer with the escape clause in its policy will prevail. The policy containing the escape clause

Ins. Co., 599 N.Y.S.2d 427, 429 (Sup. Ct. 1993); *United Servs. Auto. Ass'n v. Universal Underwriters Ins. Co.*, 420 S.E.2d 155, 156-57 (N.C. 1992); *Transamerica v. Farmers Ins. Exch.*, 463 N.W.2d 641, 643-44 (N.D. 1990); *Shelby Ins. Co. v. Insurance Co. of N. Am.*, 601 N.E.2d 210, 213-14 (Ohio Ct. App. 1991); *Equity Mut. Ins. Co. v. Spring Valley Wholesale Nursery, Inc.*, 747 P.2d 947, 954 (Okla. 1987); *American Cas. Co. v. PHICO Ins. Co.*, 643 A.2d 91, 94-95 (Pa. 1994); *State Farm Fire & Cas. Co. v. St. Paul Fire & Marine Ins. Co.*, 268 N.W.2d 147, 149 (S.D. 1978); *United Servs. Auto. Ass'n v. Travelers Indem. Co.*, 396 S.E.2d 658, 660-61 (Va. 1990); *Progressive Cas. Ins. Co. v. Cameron*, 724 P.2d 1096, 1102 (Wash. Ct. App. 1986); *Duncan v. Ehrhard*, 461 N.W.2d 822, 825 (Wis. Ct. App. 1990).

74. 430 A.2d 488 (D.C. 1981).

75. *Id.* at 491.

76. Linda K. Hasse, Comment, *Is There a Solution to the Circular Riddle? The Effect of "Other Insurance" Clauses on the Public, the Courts, and the Insurance Industry*, 25 S.D. L. REV. 37, 44 (1980).

77. *Federated Am. Ins. Co. v. Hansen*, 563 P.2d 1303, 1305 (Wash. Ct. App. 1977) (quoting *General Ins. Co. v. State Farm Ins. Co.*, 449 P.2d 391, 393 (Wash. 1969)).

does not constitute other valid and collectible insurance within the meaning of the competing pro rata clause. Conversely, the policy with the pro rata clause is the "other insurance" that gives effect to the escape clause. The insurer with the pro rata clause in its policy therefore bears the loss.⁷⁸

3. Excess Clause v. Escape Clause

When confronted with two concurrent primary policies, one containing an excess "other insurance" clause and the other containing an escape clause, courts' responses are mixed. It is presently impossible to state a majority rule.⁷⁹ A court may follow the traditional rule and deem the policy with the escape clause primary and require its exhaustion before applying the policy with the excess clause.⁸⁰ One reason for this approach is fundamental judicial dislike for escape clauses, regardless of circumstance. Alternatively, a court may find that a policy with an excess clause is not "other valid and collectible insurance," and the escape clause therefore never operates. Other jurisdictions enforce the escape clause.⁸¹ Still other courts deem the clauses mutually repugnant and prorate the loss.⁸² Similarly unsettled is the question of how to reconcile the conflict between an excess clause and a super-escape clause. Some courts hold that the insurer with the super-escape clause is absolved of liability,⁸³ while others take the time honored approach and make the

78. *See, e.g.*, *Efferson v. Kaiser Aluminum & Chem. Corp.*, 816 F. Supp. 1103, 1119 (E.D. La. 1993); *Aetna Cas. & Sur. Co. v. Continental Cas. Co.*, 604 N.E.2d 30, 32 (Mass. 1992).

79. The excess clause versus escape clause conflict has long tormented courts. The Supreme Court of Texas once labeled the attempted resolution of conflicting excess and escape clauses a "circular riddle." *Hardware Dealers Mut. Fire Ins. Co. v. Farmers Ins. Exch.*, 444 S.W.2d 583, 589 (Tex. 1969).

80. *American Home Assur. Co. v. Fish*, 451 A.2d 358, 359 (N.H. 1982); *Horace Mann Ins. Co. v. Continental Cas. Co.*, 284 S.E.2d 211, 214 (N.C. Ct. App. 1981); *Connecticut Indem. Co. v. Cordasco*, 535 A.2d 631, 633-34 (Pa. Super. Ct. 1987). *Cf. Mosca v. Ford Motor Credit Co.*, 541 N.Y.S.2d 528, 530 (App. Div. 1989) (holding that insurer with "non-liability clause" in policy is primarily liable while insurer with excess "other insurance" clause is secondarily liable).

81. *Hodgen v. Forest Oil Corp.*, 862 F. Supp. 1567, 1577 n.43 (W.D. La. 1994) (applying Louisiana law); *State Farm Mut. Auto. Ins. Co. v. Burgin*, 752 F. Supp. 877, 884-86 (W.D. Ark. 1990) (applying Arkansas law); *State Auto. Mut. Ins. Co. v. Ryder Truck Rental, Inc.*, 627 So. 2d 1326, 1327-28 (Fla. Dist. Ct. App. 1993), *review denied*, 639 So. 2d 981 (Fla. 1994); *State Farm Mut. Auto. Ins. Co. v. Western Cas. & Sur. Co.*, 477 S.W.2d 421, 427 (Mo. 1972) (discussing the escape clause in garage owner's policy versus excess clause in auto policy); *Liberty Mut. Ins. Co. v. Aetna Cas. & Sur. Co.*, 571 N.Y.S.2d 735, 745 (App. Div. 1991); *Government Employees Ins. Co. v. Universal Underwriters Ins. Co.*, 350 S.E.2d 612, 615-16 (Va. 1986).

82. *Home Ins. Co. v. Liberty Mut. Ins. Co.*, 641 N.E.2d 855, 857 (Ill. App. Ct. 1994); *Dette v. Covington Motors, Inc.*, 486 So. 2d 805, 807 (La. Ct. App. 1986).

83. *United States Fidelity & Guar. Co. v. Hanover Ins. Co.*, 632 N.E.2d 402, 404-05

insurer with the excess clause in its policy only secondarily liable.⁸⁴

Not all courts adhere to traditional rules when excess "other insurance" clauses conflict with escape or super-escape clauses. In *Brown v. Travelers Insurance Co.*,⁸⁵ the Supreme Court of Rhode Island faced the issue of how to reconcile an excess clause and a super-escape clause. The *Brown* court did not differentiate between simple and super-escape clauses,⁸⁶ but nonetheless declined to apply the majority rule. Fearing that ruling for either of the two insurers involved "would lend more ammunition to the battle of the drafters," and not wishing to "encourage the complication of insurance legerdemain" at the expense of courts and policyholders, the *Brown* court required both insurers to afford pro rata liability.⁸⁷

C. Primary Policies With Dissimilar "Other Insurance" Clauses: Minority Approaches

1. The *Lamb-Weston* Rule

Some courts avoid the "other insurance" fray by adopting the simple rule that all "other insurance" clauses are mutually repugnant and are therefore unenforceable. Sometimes referred to as the "Oregon Rule," this approach is best known as the "*Lamb-Weston* Rule," named after the Oregon case *Lamb-Weston, Inc. v. Oregon Automobile Insurance Co.*⁸⁸

(Mass. 1994); *Aetna Cas. & Sur. Co. v. Continental Ins. Co.*, 429 S.E.2d 406, 409 (N.C. Ct. App. 1993).

84. See, e.g., *Protective Nat'l Ins. Co. v. Bell*, 361 So. 2d 1058, 1059-60 (Ala. 1978).

85. 610 A.2d 127 (R.I. 1992).

86. *Id.* at 130. The court found that the conflict between an escape clause in one policy and an excess clause in the other "is more readily resolved by requiring both insurers to afford pro-rata liability." *Id.*

87. *Id. Accord Aid Ins. Co. v. United Fire & Cas. Co.*, 445 N.W.2d 767, 769-71 (Iowa 1989).

88. 341 P.2d 110 (Or. 1959), *modified and reh'g denied*, 346 P.2d 643 (1959). The *Lamb-Weston* rule was actually introduced seven years earlier by the Ninth Circuit Court of Appeals in *Oregon Auto. Ins. Co. v. United States Fidelity & Guar. Co.*, 195 F.2d 958 (9th Cir. 1952). Applying Oregon law, the Court of Appeals held:

[T]he "other insurance" provisions of the two policies are indistinguishable in meaning and intent. One cannot rationally choose between them . . . Here, where both policies carry like "other insurance" provisions, we think they must be held mutually repugnant and hence be disregarded. Our conclusion is that such view affords the only rational solution of the dispute in this case.

Id. at 960 (footnote omitted).

In *Lamb-Weston*, one of the plaintiff's drivers destroyed a truck leased to the corporation.⁸⁹ The lessor's liability policy contained a pro rata "other insurance" clause, while the plaintiff's policy contained an excess clause.⁹⁰ After reviewing various approaches to resolving "other insurance" conflicts, the Supreme Court of Oregon concluded that "none [are] logically acceptable and . . . any attempt to give effect to the 'other insurance' provisions of one policy while rejecting it in another is like pursuing a will o' the wisp."⁹¹ The court then explained the basis for the rule that now bears its name:

The "other insurance" clauses of all policies are but methods used by insurers to limit their liability, whether using [escape, excess or pro rata clauses]. In our opinion, whether one policy uses one clause or another, when any come in conflict with the "other insurance" clause of another insurer, regardless of the nature of the clause, they are in fact repugnant and each should be rejected in toto.⁹²

The court ultimately held that the loss should be prorated between the two insurers, in an amount proportional to their coverage limits.⁹³

The *Lamb-Weston* Rule has endured,⁹⁴ and has been adopted by several jurisdictions.⁹⁵ The beauty of the *Lamb-Weston* Rule is its simplicity. Application of the rule yields uniform results regardless of the number of subject policies or the nature of their "other insurance" clauses. At the same time, however, the rule has many shortcomings. The *Lamb-Weston* approach ignores the contracting parties' intent,⁹⁶ and the rule amounts to judicial legislation of mandatory pro rata "other insurance" clauses in all policies.⁹⁷ Furthermore, *Lamb-Weston* ignores the fact that the construction and enforceability of "other insurance" clauses is a factor in the actuarial determination of premiums.⁹⁸ As a result, judicial disregard of

89. *Lamb-Weston*, 341 P.2d at 111.

90. *Id.* at 113-14.

91. *Id.* at 115-16.

92. *Id.* at 119.

93. *Id.*

94. *See, e.g.*, *Northwest Agric. Coop. Ass'n, Inc. v. Continental Ins. Co.*, 769 P.2d 218, 220 (Or. Ct. App.), *review denied*, 777 P.2d 410 (Or. 1989); *Forest Indus. Ins. Exch. v. Viking Ins. Co.*, 728 P.2d 943, 944-45 (Or. Ct. App. 1986).

95. *See, e.g.*, *Horace Mann Ins. Co. v. Colonial Penn Ins. Co.*, 777 P.2d 1162, 1164 (Alaska 1989) (pro rata v. escape); *Indiana Ins. Co. v. American Underwriters, Inc.*, 304 N.E.2d 783, 787-89 (Ind. 1973) (excess v. escape); *York Mut. Ins. Co. v. Continental Ins. Co.*, 560 A.2d 571, 573 (Me. 1989); *CC Housing Corp. v. Ryder Truck Rental, Inc.*, 746 P.2d 1109, 1113 (N.M. 1987); *State Farm Mut. Ins. Co. v. Taylor*, 511 S.W.2d 464, 465 (Tenn. 1974) (pro rata v. excess).

96. *See Hartford Ins. Co. v. Kentucky Farm Bureau Ins. Co.*, 766 S.W.2d 75, 76 (Ky. Ct. App. 1989).

97. *See Jones v. Medox, Inc.*, 430 A.2d 488, 492-93 (D.C. 1981); *Sloviaczek v. Estate of Puckett*, 565 P.2d 564, 568-69 (Idaho 1977) (McFadden, C.J., dissenting).

98. *See John D. Ingram, Conflicts in "Other Insurance" Clauses*, 44 FED'N INS. & CORP. COUNS. Q. 51, 62 (1993).

"other insurance" clauses can lead to uncertainty in the calculation of premiums, resulting in the unnecessary and inadvertent burdening of consumers.

2. The Minnesota Rule

Minnesota courts do not just look at the types of "other insurance" clauses in conflict. The preferred Minnesota approach is to allocate respective policy coverages in light of the total policy insuring intent, as determined by the primary risks on which each policy's premiums are based and as determined by the policies' primary functions.⁹⁹ Alternatively, Minnesota courts allocate liability to the insurer whose policy is "closest to the risk."¹⁰⁰ To determine which policy is closest to the risk, Minnesota courts ask three questions: (1) Which policy specifically describes the cause of the subject accident? (2) Which policy's premiums reflect greater contemplated exposure? and (3) Is coverage of the risk the primary focus of one policy and incidental to the other?¹⁰¹ Despite their similarities, Minnesota courts resist attempts to blend the two approaches.¹⁰² This reluctance is curious considering that the only difference between the two approaches is that the "total policy insuring intent" test has a slightly less mechanical application.¹⁰³

In *Interstate Fire & Casualty Co. v. Auto-Owners Insurance Co.*,¹⁰⁴ Kenneth DeCent, a high school student, was rendered a quadriplegic while in a scramble for a loose ball in physical education class.¹⁰⁵ DeCent was injured when Jim Leitch, a senior student supervisor, accidentally dropped him on his head as they wrestled for the ball.¹⁰⁶ DeCent's

99. *Garrick v. Northland Ins. Co.*, 469 N.W.2d 709, 712 (Minn. 1991); *Integrity Mut. Ins. Co. v. State Auto & Cas. Underwriters Ins. Co.*, 239 N.W.2d 445, 446 (Minn. 1976).

100. *American Family Ins. v. National Cas. Co.*, 515 N.W.2d 741, 745 (Minn. Ct. App. 1994); *Richardson v. Ludwig*, 495 N.W.2d 869, 873-75 (Minn. Ct. App. 1993); *United States Fire Ins. Co. v. Fireman's Fund Ins. Co.*, 461 N.W.2d 230, 234-36 (Minn. Ct. App. 1990).

101. *Illinois Farmers Ins. Co. v. Depositors Ins. Co.*, 480 N.W.2d 657, 660-61 (Minn. Ct. App. 1992).

102. *See, e.g., Interstate Fire & Cas. Co. v. Auto-Owners Ins. Co.*, 433 N.W.2d 82, 86 (Minn. 1988).

103. *CPT Corp. v. St. Paul Fire & Marine Ins. Co.*, 515 N.W.2d 747, 751 (Minn. Ct. App. 1994).

104. 433 N.W.2d 82 (Minn. 1988).

105. *Id.* at 83.

106. *Id.*

parents sued the school, various teachers and administrators, and Leitch.¹⁰⁷ Ultimately, the DeCents settled all claims against all parties for \$810,863.¹⁰⁸ The school's primary insurer, Continental, paid \$500,000, and its excess liability carrier, Interstate, paid the remaining \$310,863.¹⁰⁹ Interstate then sued Auto-Owners, Leitch's insurer, to recover the settlement it paid.¹¹⁰

Auto-Owners moved for summary judgment, arguing that Interstate was "closest to the risk," and, as a result, that Interstate's policy should be prioritized.¹¹¹ The trial court agreed and entered summary judgment in Auto-Owners' favor.¹¹² The Minnesota Court of Appeals reversed, concluding that the Interstate policy was excess only, and thus did not operate on Auto-Owners' coverage level.¹¹³

The Supreme Court of Minnesota reversed the intermediate appellate court and reinstated the trial court's summary judgment.¹¹⁴ The court reasoned:

Interstate, the umbrella carrier, contracted with the school district to provide coverage in excess of the underlying insurance provided by Continental, the primary carrier. While it is true that Interstate relied on Continental's primary coverage in setting its premium, Interstate was not further relying on each student having a family homeowners policy when it calculated its risk in insuring the school district. The umbrella policy contemplated coverage for accidents and injuries sustained on school property during school events. The injury caused by a student supervisor during a physical education class is precisely the type of risk Interstate intended to cover in providing catastrophic insurance to the school district. To hold that Auto-Owners is the primary insurer for this accident would be to ignore the intent of the respective policies.¹¹⁵

The Minnesota approach is potentially troublesome because it may eliminate the parties' intent as expressed in the "other insurance" clauses at issue.¹¹⁶ In *Interstate Fire*, for example, the Leitch's homeowners policy with Auto-Owners did not contain either an excess clause or an escape clause,¹¹⁷ and therefore should have afforded primary coverage.

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.* Auto-Owners also argued that its business pursuit exclusion precluded coverage. *Id.* at 84. That portion of the decision, however, is not discussed here. *Id.*

112. *Id.* at 84.

113. *Id.*

114. *Id.* at 86.

115. *Id.*

116. Baldwin & Midkiff, *supra* note 32, at 54.

117. *Interstate Fire*, 433 N.W.2d at 83-84. The Auto-Owners policy contained what is now the standard pro rata "other insurance" clause, alternatively providing for pro rata contribution by equal shares and by limits. *Id.*

D. Reconciling "Other Insurance" Clauses Involving Excess and Umbrella Policies

Confusion often results where secondary coverage is involved. Secondary coverage may come in the form of an excess insurance policy, or an umbrella policy.

A true excess or umbrella policy requires a primary policy as a condition of coverage.¹¹⁸ In other words, "the same insured" must have "purchased underlying coverage for the same risk."¹¹⁹ The purpose of excess coverage or an umbrella policy is to protect the insured in the event of catastrophic losses in which liability exceeds available primary coverage.¹²⁰ Excess and umbrella policies are intended to "expand the amount, but not the scope of coverage."¹²¹ Therefore, only after the underlying primary policy has been exhausted will any umbrella policies kick in.¹²² Many umbrella policies, unlike traditional excess policies, also provide primary coverage for risks that the underlying policy does not cover.¹²³

The nature of excess policies, and their relationship with primary poli-

118. *Southern Baptist Hosp. v. Golden Rule Ins. Co.*, 628 So. 2d 142, 145 (La. Ct. App. 1993).

119. *St. Paul Fire & Marine Ins. Co. v. Gilmore*, 812 P.2d 977, 980 (Ariz. 1991).

120. *See Travelers Indem. Co. v. Overseas Ace Hardware, Inc.*, 550 So. 2d 12, 13 (Fla. Dist. Ct. App. 1989), *cause dismissed*, 557 So. 2d 867 (Fla.), *review dismissed*, 557 So. 2d 866 (1990); *Bailey v. State Farm Fire & Cas. Co.*, 642 N.E.2d 1323, 1326 (Ill. App. Ct. 1994); *LeMars Mut. Ins. Co. v. Farm & City Ins. Co.*, 494 N.W.2d 216, 218 (Iowa 1992); *Lindsey v. Poole*, 579 So. 2d 1145, 1147 (La. Ct. App.), *writ denied*, 588 So. 2d 100 (La. 1991); *Globe Indem. Co. v. Jordan*, 634 A.2d 1279, 1283 (Me. 1993).

121. *Globe Indemnity*, 634 A.2d at 1283 (emphasis in original); *see also Kennerly v. State*, 580 A.2d 561, 566 (Del. 1990).

122. *Institute for Shipboard Educ. v. CIGNA Worldwide Ins. Co.*, 22 F.3d 414, 426 (2d Cir. 1994) (applying Pennsylvania law); *Iolab Corp. v. Seaboard Sur. Co.*, 15 F.3d 1500, 1504 (9th Cir. 1994) (applying California law); *Barrett v. Chin*, 843 F. Supp. 783, 787 (D. Mass. 1994) (applying Massachusetts law); *St. Paul Fire & Marine Ins. Co. v. Gilmore*, 812 P.2d 977, 980 (Ariz. 1991); *Grant v. New Hampshire Ins. Co.*, 613 So. 2d 466, 470-71 (Fla. 1993); *Royal Ins. Co. v. Process Design Assocs., Inc.*, 582 N.E.2d 1234, 1242 (Ill. App. Ct. 1991); *State Farm Mut. Auto. Ins. Co. v. Cramer*, 857 P.2d 751, 754 (Nev. 1993); *Utica Nat'l Ins. Co. v. Fidelity & Cas. Co.*, 812 S.W.2d 656, 662-63 (Tex. Ct. App. 1991); *Seats Inc. v. Nutmeg Ins. Co.*, 504 N.W.2d 613, 618 (Wis. Ct. App.), *review denied*, 510 N.W.2d 136 (Wis. 1993).

123. *Haggard Hauling & Rigging Co. v. Stonewall Ins. Co.*, 852 S.W.2d 396, 399 n.1 (Mo. Ct. App. 1993); *see, e.g., Laborde v. Deblanc*, 587 So. 2d 58, 62 (La. Ct. App. 1991).

cies containing excess "other insurance" clauses, are succinctly described in *Oelhafen v. Tower Insurance Co.*:¹²⁴

Umbrella carriers are not primary insurers that attempt to limit a portion of their risk by describing it as "excess." Umbrella policies also are not devices for an insurer to escape responsibility

We also note that the intent of umbrella policies to serve a different function from primary policies with excess clauses is reflected in the rate structures of the two types of policies. In general, umbrella policy premiums are relatively small in relation to the amount of risk "so that the company cannot be expected to prorate with other excess coverages; and public policy should not demand that this be done."¹²⁵

These policies are therefore considered true excess coverage over and above all primary coverages, including primary policies with excess "other insurance" clauses.¹²⁶ An excess "other insurance" clause in a primary policy "does not transform that primary policy into an excess policy vis-a-vis a second carrier with excess coverage."¹²⁷

In a leading case, *Liberty Mutual Insurance Co. v. United States Fire Insurance Co.*,¹²⁸ a Texas court applied these basic principles to complex facts. Elizabeth Hillyer was injured in an automobile accident.¹²⁹ Steve Kennedy was driving the automobile in which Hillyer was a passenger.¹³⁰ Kennedy had an insurance policy with Liberty Mutual that had policy limits of \$100,000 per person per accident.¹³¹ Henry Taub, the

124. 492 N.W.2d 321 (Wis. Ct. App.), *review denied*, 494 N.W.2d 211 (Wis. 1992).

125. 492 N.W.2d at 324 (quoting 8A J.A. APPLEMAN & J. APPLEMAN, *INSURANCE LAW & PRACTICE*, § 4909.85 (1981)).

126. *Id.*; see also *Towne Realty, Inc. v. Safeco Ins. Co. of Am.*, 854 F.2d 1264, 1268-69 (11th Cir. 1988) (applying Florida law); *Argonaut Ins. Co. v. U.S. Fire Ins. Co.*, 728 F. Supp. 298, 302-03 (S.D.N.Y. 1990) (applying New York law); *Insurance Co. of N. Am. v. American Economy Ins. Co.*, 746 F. Supp. 59, 64 (W.D. Okla. 1990) (applying Arkansas law); *Independent Fire Ins. Co. v. Mutual Assur., Inc.*, 553 So. 2d 115, 118 (Ala. 1989); *United Servs. Auto. Ass'n v. Empire Fire & Marine Ins. Co.*, 653 P.2d 712, 713-14 (Ariz. Ct. App. 1982); *Allstate Ins. Co. v. Frank B. Hall & Co.*, 770 P.2d 1342, 1347-48 (Colo. Ct. App. 1989); *Atkinson v. Atkinson*, 326 S.E.2d 206, 213-14 (Ga. 1985); *Easton v. Chevron Indus., Inc.*, 602 So. 2d 1032, 1041 (La. Ct. App.), *writ denied*, 604 So. 2d 1315, *writ denied*, 604 So. 2d 1318 (La. 1992); *Admiral Ins. Co. v. Columbia Cas. Ins. Co.*, 486 N.W.2d 351, 360 (Mich. Ct. App. 1992), *appeal denied sub nom. Admiral Ins. Co. v. Brochert*, 503 N.W.2d 449 (Mich. 1993); *Kattoura v. Patel*, 619 A.2d 1031, 1035-36 (N.J. Super. Ct. App. Div. 1993); *State Farm Fire & Cas. Co. v. LiMauro*, 482 N.E.2d 13, 18-20 (N.Y. 1985); *Liberty Mut. Ins. Co. v. Harbor Ins. Co.*, 603 A.2d 300, 302-03 (R.I. 1992); *Carrabba v. Employers Cas. Co.*, 742 S.W.2d 709, 714-15 (Tex. Ct. App. 1987).

127. *North River Ins. Co. v. American Home Assur. Co.*, 257 Cal. Rptr. 129, 131 (Ct. App. 1989).

128. 590 S.W.2d 783 (Tex. Civ. App. 1979).

129. *Id.* at 784.

130. *Id.*

131. *Id.*

owner of the car, had two policies: a family automobile policy with American General Insurance Company for \$100,000 and a \$1,000,000 umbrella policy with United States Fire.¹³² There was no dispute that the United States Fire policy was excess over the American General policy.¹³³

Hillyer's personal injury claim was settled for \$250,000.¹³⁴ American General and Liberty Mutual each paid \$100,000, and United States Fire paid the remaining \$50,000.¹³⁵ Liberty Mutual then sued United States Fire to determine the respective obligations.¹³⁶ The trial court held that Liberty Mutual was not entitled to recover any of its settlement expenditure from United States Fire, and Liberty Mutual appealed.¹³⁷

The Liberty Mutual policy had not been made underlying insurance in the United States Fire policy schedules.¹³⁸ The only provision in the United States Fire policy applicable to Liberty Mutual, therefore, was its "other insurance" clause statement that it was excess over any other valid and collectible insurance, and would not contribute with such other insurance.¹³⁹ The Liberty Mutual policy, however, contained an "other insurance" clause making its coverage excess in the event its insured was involved in an accident while driving a non-owned automobile.¹⁴⁰ Thus, the accident in this case fell squarely within Liberty Mutual's excess "other insurance" clause.

Liberty Mutual argued that its excess clause and the excess clause in the United States Fire policy were "mutually repugnant."¹⁴¹ Accordingly, the two policies provided "concurrent second-layer" coverage and Hillyer's loss should be prorated based on their respective policy limits.¹⁴² The court rejected this superficially appealing argument:

It is true that each of the policies has an "other insurance" clause that apparently limits coverage in the fortuitous circumstance of the presence of other validly subsisting coverage, but an examination of the purpose of the policies dictates the

132. *Id.*

133. *Id.* The United States Fire policy expressly provided that it was excess above a scheduled \$100,000 automobile policy. *Id.* at 784-85.

134. *Id.* at 784.

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.* at 785.

140. *Id.* at 784.

141. *Id.* at 785.

142. *Id.*

resolution of this dispute. Liberty Mutual's policy generally affords primary coverage; its coverage becomes excess only because of the presence of a non-owned vehicle. United States Fire's policy remains excess in all events. Thus it is apparent that the intent of all parties to the policies is for United States Fire's policy to remain an umbrella policy, and Liberty Mutual's coverage to underlie it Had Liberty Mutual issued its policy as it did, and United States Fire had issued its policy to Kennedy instead of to Taub, there would be no question that Liberty would be liable to the full extent of its policy limits.¹⁴³

The *Liberty Mutual* approach now reflects the majority rule.

A different result was reached in *U.S. Fire Insurance Co. v. Aetna Casualty & Surety Co.*¹⁴⁴ In *U.S. Fire*, however, the excess policy at issue did not contain a general "other insurance" clause stating that it was excess over all other valid and collectible insurance.¹⁴⁵ The competing primary policy contained an excess clause.¹⁴⁶ Under those circumstances, the excess carrier was secondary only to the underlying primary policy specifically scheduled in its policy.¹⁴⁷ The competing primary carrier with an excess "other insurance" clause was therefore secondary even to the excess insurer's obligations.¹⁴⁸

1. Requiring an Excess Carrier to "Drop Down"

It is not unusual for an insured's primary policy to fully cover a loss, negating the need for excess or umbrella coverage. Similarly, a loss might consume the insured's primary coverage and even trigger a first layer of excess coverage, but not encroach on upper layers of excess coverage. But what if a primary insurer or an intermediate excess insurer is insolvent? May an excess carrier be forced to "drop down" and fill the coverage gap created by the underlying insurer's insolvency?

"Drop down" coverage occurs when an insurer providing a higher level of coverage is obligated to provide the coverage that an immediately underlying carrier agreed to provide. Drop down coverage can become an issue for reasons other than insurer insolvency. For example, a loss may fall within an exclusion in the primary insurer's policy, or the loss simply may not be covered. Under such circumstances, is an excess carrier required to drop down and provide primary or lower coverage?

Drop down questions are answered by the terms of the subject excess policy.¹⁴⁹ Unfortunately, many excess policies fail to address whether

143. *Id.*

144. 781 S.W.2d 394, 399 (Tex. Ct. App. 1989).

145. *Id.* at 398.

146. *Id.* at 396.

147. *Id.* at 399.

148. *Id.* 396-99.

149. *Alabama Ins. Guar. Ass'n v. Kinder-Care, Inc.*, 551 So. 2d 286, 287 (Ala. 1989); *Denny's Inc. v. Chicago Ins. Co.*, 286 Cal. Rptr. 507, 510 (Ct. App. 1991); *Domingue v.*

they drop down to the next lowest level of liability when underlying insurers become insolvent.¹⁵⁰ Because the focus then shifts to potentially related policy language, courts and litigants often find themselves searching for ambiguities that might require an excess insurer to drop down.¹⁵¹ The majority rule is that absent obligatory policy language, an excess insurer is not required to drop down and cover that portion of a loss once within an insolvent insurer's coverage.¹⁵²

In *Hoffman Construction Co. v. Fred S. James & Co.*,¹⁵³ the insured had three layers of coverage: a \$50,000 Seaboard Surety primary policy, a \$450,000 intermediate layer of excess coverage provided by Holland-America, and an umbrella liability policy with Century Insurance.¹⁵⁴ Sea-

Reliance Ins. Co., 619 So. 2d 1220, 1223 (La. Ct. App. 1993); *see, e.g.*, *Atkinson Dredging Co. v. St. Paul Fire & Marine Ins. Co.*, 836 F. Supp. 341 (E.D. Va. 1993).

150. *Metropolitan Leasing, Inc. v. Pacific Employers Ins. Co.*, 633 N.E.2d 434, 436 (Mass. App. Ct.), *review denied*, 639 N.E.2d 1082 (Mass. 1994); *see, e.g.*, *Newton v. United States Fire Ins. Co.*, 391 S.E.2d 837, 839-40 (N.C. Ct. App.) (discussing "amendatory endorsement"), *review denied*, 399 S.E.2d 329 (N.C. 1990). Insurers have recognized the problem. Many policies now expressly include provisions precluding drop-down coverage. *Louisiana Ins. Guar. Ass'n v. Interstate Fire & Cas. Co.*, 630 So. 2d 759, 768 n.18 (La. 1994).

151. *See, e.g.*, *Alabama Ins. Guar. Ass'n v. Magic City Trucking Serv., Inc.*, 547 So. 2d 849, 853-56 (Ala. 1989).

152. *See, e.g.*, *Hartford Accident & Indem. Co. v. Chicago Hous. Auth.*, 12 F.3d 92, 95-96 (7th Cir. 1993) (applying Illinois law); *Revco D.S., Inc. v. Government Employees Ins. Co.*, 791 F. Supp. 1254, 1264-69 (N.D. Ohio 1991) (applying Ohio law), *aff'd*, 984 F.2d 154 (6th Cir. 1992); *Alaska Rural Elec. Co-op. Ass'n, Inc. v. INSCO Ltd.*, 785 P.2d 1193, 1194-96 (Alaska 1990); *Maricopa County v. Federal Ins. Co.*, 757 P.2d 112, 115 (Ariz. Ct. App. 1988); *Playtex FP, Inc. v. Columbia Cas. Co.*, 622 A.2d 1074, 1078 (Del. Super. Ct. 1992); *Southeast Atl. Cargo Operators, Inc. v. First State Ins. Co.*, 398 S.E.2d 264, 265 (Ga. Ct. App. 1990); *Hendrix v. Fireman's Fund Ins. Co.*, 823 S.W.2d 937, 938 (Ky. Ct. App. 1991); *Vickodil v. Lexington Ins. Co.*, 587 N.E.2d 777, 778-80 (Mass. 1992); *American Hoist & Derrick Co. v. Employers' of Wausau*, 454 N.W.2d 462, 466-67 (Minn. Ct. App. 1990); *Fred Weber, Inc. v. Granite State Ins. Co.*, 829 S.W.2d 589, 591 (Mo. Ct. App. 1992); *Central Waste Sys., Inc. v. Granite State Ins. Co.*, 437 N.W.2d 496, 498-500 (Neb. 1989); *Werner Indus., Inc. v. First State Ins. Co.*, 548 A.2d 188, 190-91 (N.J. 1988); *Ambassador Assocs. v. Corcoran*, 562 N.Y.S.2d 507 (App. Div. 1990), *aff'd*, 589 N.E.2d 1258 (N.Y. 1992); *North Carolina Ins. Guar. Ass'n v. Century Indem. Co.*, 444 S.E.2d 464, 467-71 (N.C. Ct. App.), *review denied*, 448 S.E.2d 532 (N.C. 1994); *J. Kinderman & Sons, Inc. v. United Nat'l Ins. Co.*, 593 A.2d 857, 859-60 (Pa. Super. Ct. 1991), *aff'd*, 619 A.2d 1058 (Pa. 1993); *Rapid City Regional Hosp., Inc. v. South Dakota Ins. Guar. Ass'n*, 436 N.W.2d 565, 567 (S.D. 1989); *Emscor, Inc. v. Alliance Ins. Group*, 804 S.W.2d 195, 198-99 (Tex. Ct. App. 1991). *But see Kelly v. Weil*, 563 So. 2d 221, 226 (La. 1990).

153. 836 P.2d 703 (Or. 1992).

154. *Id.* at 704.

board paid the first \$50,000 of plaintiff's \$375,000 covered loss.¹⁵⁵ When Holland-America became unable to pay the next \$325,000 due to insolvency, the plaintiffs demanded the money from Century.¹⁵⁶

The Century excess policy provided that the company would only be liable for the "ultimate net loss of . . . the amount recoverable under the underlying insurances" specifically declared.¹⁵⁷ The plaintiffs argued that the phrase "amount recoverable under the underlying insurances" required the umbrella carrier to pay that portion of the loss that could not be recovered from insolvent Holland-America.¹⁵⁸ Century argued that the phrase entitled the plaintiffs to recover only that portion of the net loss exceeding the limits of the underlying policies.¹⁵⁹ The plaintiffs essentially argued that "amount recoverable" meant the amount "able to be recovered," while the insurer construed the phrase to mean the "amount capable of recovery."¹⁶⁰

The *Hoffman* court embraced the insurer's urged interpretation.¹⁶¹ The court drew support from the "Limit of Liability" section in the Century umbrella policy, which specified the circumstances under which the umbrella policy would drop down.¹⁶² The policy provided for drop down coverage in "those situations in which there [was] reduced primary coverage . . . on account of the payment of claims."¹⁶³ The court's holding that Holland-America's insolvency failed to create drop down coverage gave effect to both provisions and was consistent with the basic rules of contract interpretation.¹⁶⁴

The court next rejected the plaintiffs' interpretation based on the "Loss Payable" provision in the Century policy.¹⁶⁵ The Loss Payable provision stated that "Liability under this policy with respect to any occurrence shall not attach unless and until the Insured, or the Insured's underlying insurer, shall have paid the amount of the underlying limits on account of such occurrence."¹⁶⁶ The court explained that to accept the plaintiffs' insolvency argument would render this provision "a meaningless redundancy."¹⁶⁷ The *Hoffman* court concluded that the parties could not

155. *Id.*

156. *Id.*

157. *Id.* (emphasis omitted).

158. *Id.* at 705.

159. *Id.*

160. *Id.* at 706.

161. *Id.* at 707.

162. *Id.*

163. *Id.*

164. *See id.* at 706-708.

165. *Id.* at 707.

166. *Id.* at 707-708.

167. *Id.* at 708.

have intended such an unreasonable result.¹⁶⁸

Finally, the plaintiffs asserted that the language in the Century policy's "other insurance" clause required drop down coverage.¹⁶⁹ Like most "other insurance" clauses, the Century policy provided that it would be excess over other "valid and collectible insurance."¹⁷⁰ That condition, the plaintiffs argued, demonstrated the insurer's intent to cover any losses unless it was determined that other insurance of the insured was both valid and collectible.¹⁷¹ The court rejected this argument as well.¹⁷²

The court found plaintiffs' argument flawed because the use of the word "collectible" demonstrated the parties' awareness of the collectibility of concurrent insurance and also that the parties chose not to connect it separately with the phrase "amount recoverable under the underlying insurances."¹⁷³ The *Hoffman* court reasoned that the omission was patented.¹⁷⁴ The "amount recoverable" provision was designed to acknowledge the underlying insurance specifically stated in the policy declarations, while the "other insurance" clause was specifically intended to limit the umbrella carrier's liability should other insurance be available.¹⁷⁵

*Playtex FP, Inc. v. Columbia Casualty Co.*¹⁷⁶ presented a slightly different situation. In *Playtex*, Mission National Insurance, one of several excess carriers, became insolvent.¹⁷⁷ All of the excess insurers employed "following form" policies.¹⁷⁸

Like the *Hoffman* plaintiffs, the *Playtex* plaintiffs argued that the phrase "amount recoverable" meant "real money."¹⁷⁹ Thus, the coverage purportedly provided by the Mission policy was not an amount recoverable due to Mission's insolvency.¹⁸⁰ The excess carriers argued that

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.*

176. 622 A.2d 1074 (Del. Super. Ct. 1992).

177. *Id.* at 1076.

178. *Id.* at 1078. "Following form" policies "are subject to all conditions, agreements, exclusions and limitations in the underlying policies." Massachusetts Bay Transp. Auth. v. Allianz Ins. Co., 597 N.E.2d 439, 443 (Mass. 1992).

179. *Playtex*, 622 A.2d at 1081.

180. *Id.*

“amount recoverable” and “limits of liability” were synonymous.¹⁸¹ The *Playtex* court, like the *Hoffman* court, concluded that “amount recoverable” referred to specifically scheduled underlying insurance.¹⁸² The Mission policy failed to meet this definition.¹⁸³

The plaintiffs next turned their attention to the “Maintenance of Underlying Insurances” requirement in the Mission policy.¹⁸⁴ This provision required the insured to maintain the scheduled underlying policies in full force and effect for the duration of the excess policies, except for any reduction in applicable limits or the aggregate limit.¹⁸⁵ If the insured failed to maintain the underlying policies, Mission agreed to be bound only to the extent of its previous obligation.¹⁸⁶

The plaintiffs argued that Mission’s financial situation caused a ‘reduction’ in the underlying limits beyond the insured’s control or which was not the insured’s fault.¹⁸⁷ Because the excess carriers’ policy followed Mission’s form, the excess carriers were obligated to drop down.¹⁸⁸ The insurers contended that any reduction must be by payment of claims.¹⁸⁹ Were that not so, the insurers argued, the condition’s purpose would be eliminated.¹⁹⁰ The *Playtex* court rejected the plaintiffs’ argument.¹⁹¹ The condition in the Mission policy requiring the insured to maintain its underlying insurance was simply that; it was “clear that the provision [was] not intended to expand the insured’s coverage and force the excess insurers to drop down.”¹⁹²

The positions taken by the *Hoffman* and *Playtex* courts make practical sense. Excess insurance and umbrella policies are relatively inexpensive because excess insurers are only obligated to pay claims to the extent they exceed primary coverage.¹⁹³ Insureds’ expectations that excess carriers drop down in the event of insolvency are objectively unreasonable. An underlying insurer’s insolvency is not an “occurrence.”¹⁹⁴ Additionally, because the insured presumably selected the primary carrier, it is not

181. *Id.*

182. *Id.* at 1083.

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.* at 1085.

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.*

193. *Alaska Rural Elec. Coop. Ass'n, Inc. v. INSCO Ltd.*, 785 P.2d 1193, 1194 (Alaska 1990).

194. *See Zurich-Am. Ins. Co. v. Mead Reinsurance Corp.*, 555 N.Y.S.2d 333, 334 (App. Div.), *appeal denied*, 564 N.E.2d 671 (N.Y. 1990).

unfair to ask the insured to bear the risk of insolvency. Excess insurers should not be asked to bear the risk of the insolvency of primary insurers they do not select.¹⁹⁶ Finally, the term "collectible," when used in an "other insurance" clause, should never be held to create an ambiguity as to an excess insurer's coverage in the case of a primary insurer's insolvency. In the excess insurance context, an "other insurance" clause serves to limit the company's liability in the event insurance other than the scheduled underlying insurance is available. Where a primary insurer is insolvent there is no "other insurance," and the clause never comes into play.¹⁹⁶

While *Hoffman* and *Playtex* reflect the majority position, *Coca Cola Bottling Co. of San Diego v. Columbia Casualty Co.*¹⁹⁷ reflects the other side of the insolvency coin. *Coca Cola Bottling* also involved the Mission insolvency, and following form excess policies.¹⁹⁸ As in *Playtex*, the case hinged on the "Maintenance of Underlying Insurances" provision in Section III of the Mission policy.¹⁹⁹

Columbia argued that because it was excess of the Mission policy, and therefore not scheduled as underlying insurance in the Mission policy, Section III of the Mission policy could not define the coverage provided by the Columbia policy.²⁰⁰ This argument was succinctly disposed of by the court:

The fundamental difficulty with Columbia's argument is that it requires that Mission bear risks without imposing similar risks on insurers whose coverage is in excess of Mission's coverage. Such a disparate risk allocation between primary and excess carriers is inconsistent with the "followed form" nature of the insurance Columbia provided. "An excess policy generally follows the form of the underlying primary coverage and is called 'following form' excess coverage, i.e., the excess had the same scope of coverage as the primary policy."²⁰¹

The court next looked to Columbia's policy definition of its lower limits.²⁰² The policy provided coverage "where applicable excess of primaries."²⁰³ Because the Columbia policy did not fully define the lower limits of its coverage, the court returned to the underlying Mission poli-

195. *Alaska Rural*, 785 P.2d at 1195.

196. *Id.* at 1196.

197. 14 Cal. Rptr. 2d 643 (Ct. App. 1992).

198. *See id.*

199. *See id.*

200. *Id.* at 646.

201. *Id.* at 646-47 (citation omitted).

202. *Id.*

203. *Id.* at 647.

cy.²⁰⁴ Of course, the Mission policy provided that the lower limit of coverage was the "amount recoverable,"²⁰⁵ a phrase previously determined by California courts to be ambiguous.²⁰⁶ The *Coca Cola Bottling* court thus concluded that Columbia was obligated to drop down.²⁰⁷

As noted previously, drop down coverage may be an issue for reasons other than an underlying insurer's insolvency. *National Union Fire Insurance Co. v. Glenview Park District*²⁰⁸ is an exemplary case.

National Decorating Service (NDS) contracted with the Glenview Park District to refurbish an ice rink.²⁰⁹ The contract required NDS to maintain a public liability insurance policy with limits of not less than \$1,000,000, and to specifically name the District as an additional insured.²¹⁰ NDS purchased the required policy from National Union Fire, and also purchased a \$2,000,000 excess and umbrella policy from National Surety.²¹¹ The underlying National Union policy excluded coverage for damages caused by the negligence of an additional insured, *i.e.*, the District.²¹²

During the refurbishing, NDS employee Frederick Claussen (Claussen) fell from a scaffold and was seriously injured.²¹³ Claussen's guardian sued the District, and National Union then filed a declaratory judgment action, alleging that the District's alleged acts of negligence were excluded by its policy.²¹⁴ The trial court sustained National Union's subsequent dispositive motion, and further found that National Surety's excess and umbrella policy dropped down to cover the District.²¹⁵ National Surety argued on appeal that its policy did not drop down; the District responded that the insurer's argument was of no moment, because its policy was in fact primary.²¹⁶

National Surety's policy provided true excess coverage, denominated Coverage A, and umbrella coverage, or Coverage B. The umbrella coverage obligated National Surety: "To pay on behalf of the Insured all sums which the Insured shall be obligated to pay as damages by reason of

204. *Id.*

205. *Id.*

206. *Id.* at 645-46.

207. *Id.*

208. 594 N.E.2d 1300 (Ill. App. Ct. 1992), *aff'd in part, rev'd in part*, 632 N.E.2d 1039 (Ill. 1994).

209. *Id.* at 1301.

210. *Id.*

211. *Id.*

212. *Id.* at 1301-02.

213. *Id.* at 1302.

214. *Id.*

215. *Id.*

216. *Id.* at 1306.

liability imposed on the Insured or Assumed under Contract because of Personal Injury, Property Damage or Advertising Injury caused by an Occurrence during the Policy Period.²¹⁷ The Coverage A portion of the policy also included a typical excess "other insurance" clause, providing that the National Surety coverage was to be excess over other valid and collectible insurance.²¹⁸

The *Glenview* court held that National Surety was obligated to drop down and defend and indemnify the District in connection with the Claussen suit.²¹⁹ The National Surety policy was excess with respect to Coverage A, but Coverage B's umbrella provision afforded primary coverage.²²⁰ Because the National Union policy excluded the Claussen loss, the "other insurance" clause in National Surety's umbrella coverage did not operate.²²¹

2. Allocating Liability Between Concurrent Excess Insurers

Courts are seldom called upon to prorate liability between concurrent insurers affording true excess coverage. As a general rule, courts should attempt to reconcile the "other insurance" clauses at issue just as though the policies were primary.²²² The fact that competing policies are excess rather than primary does not change the fact that they operate on the same plane or at the same level.

Among the few cases addressing this issue is *Mission Insurance Co. v. United States Fire Insurance Co.*²²³ In *Mission*, Mission Insurance issued a \$1,000,000 umbrella policy to the lessor of a vehicle.²²⁴ A lessee's employee wrecked the vehicle.²²⁵ The lessee had a "Commercial Comprehensive Catastrophe Liability Policy" with U.S. Fire.²²⁶ The U.S. Fire policy had limits of \$3,000,000.²²⁷ Both policies contained excess "other

217. *Id.* at 1307.

218. *Id.*

219. *Id.* at 1308.

220. *Id.*

221. *Id.*

222. *See, e.g., Hartford Accident & Indem. Co. v. Sequoia Ins. Co.*, 260 Cal. Rptr. 190, 199 (Ct. App. 1989) (excess "other insurance" clauses in umbrella policies deemed mutually repugnant and proration ordered).

223. 517 N.E.2d 463 (Mass. 1988).

224. *Id.* at 464.

225. *Id.*

226. *Id.*

227. *Id.*

insurance" clauses providing coverage in excess of all other valid and collectible insurance.²²⁸ Neither company's policy was identified in the other's schedule of underlying policies.²²⁹ There was no dispute that, in the absence of "other insurance," each of the policies covered the subject loss.²³⁰

Mission and two primary insurers settled a tort claim arising out of the accident.²³¹ Mission then sued U.S. Fire seeking a declaration that U.S. Fire had to contribute to the settlement.²³² U.S. Fire successfully moved for summary judgment, asserting that its coverage was excess to Mission's policy and that it need contribute nothing until the Mission policy was exhausted.²³³ The Massachusetts Supreme Court reversed.²³⁴

The *Mission* court first determined that both policies created "umbrella-type excess insurance,"²³⁵ rather than the owner's policy being primary, as U.S. Fire contended.²³⁶ The court then turned to the conflict between the two competing excess "other insurance" clauses, adopting the majority approach that excess clauses are mutually repugnant.²³⁷ The court required both insurers to prorate the loss by equal shares.²³⁸

In reaching this conclusion, the *Mission* court rejected U.S. Fire's argument that Mission's failure to state in its limit of liability clause that its coverage was excess of all other collectible insurance, as it provided in its "other insurance" clause, created a fatal ambiguity.²³⁹ The court reasoned that it would be clear to Mission's insured that the policy provided excess coverage.²⁴⁰ The only colorable ambiguity resulted from a comparison of the Mission limit of liability clause with the corresponding clause in the U.S. Fire policy.²⁴¹ Creating an "ambiguity" by comparing Mission's policy with a separate unrelated document (the U.S. Fire policy) did not justify construing Mission's policy other than as written.²⁴²

228. *Id.*

229. *Id.*

230. *Id.*

231. *Id.*

232. *Id.*

233. *Id.*

234. *Id.*

235. *Id.* at 467.

236. *Id.* at 464-66.

237. *Id.* at 467.

238. *Id.* at 468.

239. *Id.* at 467.

240. *Id.*

241. *Id.*

242. *Id.*

IV. STATE INSURANCE GUARANTY FUNDS AS "OTHER INSURANCE"

With the increasing number of liability insurer insolvencies in the late 1960s, Congress took notice.²⁴³ Faced with the prospect of congressional intrusion into state insurance domain, the insurance industry persuaded the National Association of Insurance Commissioners (NAIC) to draft model insurance guaranty fund legislation.²⁴⁴ States quickly adopted the NAIC model legislation. Today, almost all states have some form of guaranty fund for property and casualty insurers.²⁴⁵

Once an insurer is declared insolvent, and assuming the insured's loss is a statutory covered claim, the state guaranty fund or association steps into the insolvent insurer's shoes and assumes all related rights and obligations.²⁴⁶ There are, however, limits on the various state funds. For

243. Grace M. Giesel, *A Proposal for a Tort Remedy for Insureds of Insolvent Insurers Against Brokers, Excess Insurers, Reinsurers, and the State*, 52 OHIO ST. L.J. 1075, 1087 (1991).

244. *Id.* at 1088.

245. ALA. CODE §§ 27-42-1 to -42-20 (1986); ALASKA STAT. §§ 21.80.010-190 (1993); ARIZ. REV. STAT. ANN. §§ 20-661 to -695 (1990); ARK. CODE ANN. §§ 23-90-101 to -123 (1992); CAL. INS. CODE §§ 1063-1063.15 (West 1993); COLO. REV. STAT. §§ 10-4-501 to -520 (1994); CONN. GEN. STAT. §§ 38a-836 to -853 (1992); DEL. CODE ANN. tit. 18, §§ 4201-4223 (Cum. Supp. 1992); FLA. STAT. ANN. §§ 631.50-.70 (West 1989); GA. CODE ANN. §§ 33-36-1 to -19 (1990); HAW. REV. STAT. §§ 431:16-101 to -219 (1990); IDAHO CODE §§ 41-3601 to -3621 (1991); ILL. ANN. STAT. ch. 215 para. 5/532 to /553 (Smith-Hurd 1993) (formerly ILL. REV. STAT. ch. 73, para. 1065.82-.103 (Smith-Hurd 1991)); IND. CODE ANN. §§ 27-6-8-1 to -19 (Burns 1994); IOWA CODE ANN. §§ 515B.1-.26 (West 1988); KAN. STAT. ANN. §§ 40-2901 to -2919 (1993); KY. REV. STAT. ANN. §§ 304.36-010 to -170 (Michie/Bobbs-Merrill 1988); LA. REV. STAT. ANN. §§ 22:1375 -1384 (West 1990); ME. REV. STAT. ANN. tit. 24-A, §§ 4431-4452 (West 1990); MD. ANN. CODE art. 48A, §§ 504-519 (1994); MASS. GEN. L. ch. 175D, §§ 1-16 (1987); MICH. COMP. LAWS § 500.815(a) (1994); MINN. STAT. §§ 60C.01-22 (1994); MISS. CODE ANN. §§ 83-23-101 to -137 (1991); MO. REV. STAT. §§ 375.771-780 (1994); MONT. CODE ANN. §§ 33-10-101 to -117 (1992); NEB. REV. STAT. §§ 44-2401 to -2418 (1988); NEV. REV. STAT. §§ 687A.010-.160 (1991); N.H. REV. STAT. ANN. §§ 404-B:1-18 (1983); N.J. REV. STAT. §§ 17:30A-1 to -20 (1994); N.M. STAT. ANN. §§ 59A-43-1 to -18 (Michie 1992); N.D. CENT. CODE §§ 26.1-42-01 to -15 (1990); OHIO REV. CODE ANN. §§ 3955.01-19 (Anderson 1989); OKLA. STAT. tit. 36, §§ 2001-2020 (1990); OR. REV. STAT. §§ 734.510-710 (1989); R.I. GEN. LAWS §§ 27-34-1 to -19 (1989); S.C. CODE ANN. §§ 38-31-10 to -170 (Law. Co-op 1989); S.D. CODIFIED LAWS ANN. §§ 58-29A-1 to -53 (1990); TENN. CODE ANN. §§ 56-12-101 to -120 (1994); TEX. INS. CODE ANN. art. 21.28-C §§ 1-22 (West 1989); UTAH CODE ANN. §§ 31A-28-201 to -221 (Michie 1991); VT. STAT. ANN. tit. 8, §§ 3611-3626 (1984); VA. CODE ANN. §§ 38.2-1600 to -1623 (1994); WASH. REV. CODE §§ 48.32.010-930 (1990); W. VA. CODE §§ 33-26-1 to -19 (1992); WIS. STAT. §§ 646.01-.73 (1990); WYO. STAT. §§ 26-31-101 to -117 (1991).

246. See *Windle v. Alabama Ins. Guar. Ass'n*, 591 So. 2d 78, 80-81 (Ala. 1991);

example, most funds provide a maximum statutory limit for a single claim,²⁴⁷ some states impose a deductible,²⁴⁸ and perhaps most important for "other insurance" or multiple insurance purposes, most states make the exhaustion of other insurance policies a prerequisite to guaranty fund recovery.²⁴⁹

Whether a state guaranty fund constitutes "other valid and collectible insurance" was litigated in *Luko v. Lloyd's London*.²⁵⁰ In *Luko*, plaintiff Michael Luko sued Independent Terminal Company (Independent) in connection with his injury on Independent's pier.²⁵¹ At the time of Luko's accident, Independent had a \$1,000,000 primary liability policy issued by Midland Insurance Company, which included a \$10,000 deductible.²⁵² Independent also had a \$10,000,000 umbrella policy issued by a Lloyd's consortium.²⁵³ Independent was thus insured against losses up to \$11,000,000, with the first \$1,000,000 covered by Midland and Lloyd's then providing the excess coverage up to \$10,000,000.²⁵⁴ The Lloyd's umbrella policy also provided coverage in excess of \$100,000 for any one occurrence where no underlying insurance existed.²⁵⁵

While Luko's suit was pending, Midland was declared insolvent.²⁵⁶ Independent thus sought primary protection from the Pennsylvania Insurance Guaranty Association (PIGA).²⁵⁷ Rather than reimburse Independent for the amount of Midland's liability, Independent was directed to

Maytag Corp. v. Tennessee Ins. Guar. Ass'n, 608 N.E.2d 772, 775 (Ohio Ct. App.), *jurisdictional motion overruled*, 600 N.E.2d 679 (Ohio 1992); *Washington Ins. Guar. Ass'n v. Mullins*, 816 P.2d 61, 63 (Wash. Ct. App. 1991).

247. *See, e.g.*, ALA. CODE § 27-42-8(a)(1) (1994) (\$150,000); ALASKA STAT. § 21.80.060(a)(1) (1994) (\$500,000); ARIZ. REV. STAT. ANN. § 20-667(B) (1990) (\$100,000); KY. REV. STAT. ANN. § 304.36-080(1)(a) (Michie/Bobbs-Merrill 1994) (\$100,000).

248. *See, e.g.*, N.D. CENT. CODE § 26.1-42-05(1)(a) (1990); WASH. REV. CODE § 48.32.060(1)(a) (1990).

249. *See, e.g.*, ARIZ. REV. STAT. ANN. § 20-673(C) (1989); CAL. INS. CODE § 1063.2(e) (West 1995); GA. CODE ANN. § 33-36-14 (Michie 1990); ILL. ANN. STAT. ch. 215 para 5/546(b) (Smith-Hurd 1993); KAN. STAT. ANN. § 40-2910 (1993) (must exhaust rights under insolvent insurer's policy); MASS. GEN. L. ch. 175D, § 9 (1987); *see also* Arizona Prop. & Cas. Ins. Guar. Fund v. Herder, 751 P.2d 519, 523 (Ariz. 1988); *Witkowski v. Brown*, 576 A.2d 669, 671 (Del. Super. Ct. 1989); *Hetzel v. Clarkn*, 772 P.2d 800, 805-806 (Kan. 1989); *Ventulett v. Maine Ins. Guar. Ass'n*, 583 A.2d 1022, 1023-24 (Me. 1990); *Oglesby v. Liberty Mut. Ins. Co.*, 832 P.2d 834, 843 (Okla. 1992); *Northland Ins. Co. v. Virginia Prop. & Cas. Ins. Guar. Ass'n*, 392 S.E.2d 682, 684 (Va. 1990).

250. 573 A.2d 1139 (Pa. Super. Ct.), *appeal denied*, 584 A.2d 319 (Pa. 1990).

251. *Id.* at 1140.

252. *Id.*

253. *Id.*

254. *Id.*

255. *Id.*

256. *Id.*

257. *Id.* at 1141.

first seek coverage from the Lloyd's consortium. The "non-duplication" provision of the Pennsylvania Act was the basis of PIGA's request.²⁵⁸ When the Lloyd's consortium did not respond to the request for information regarding the extent of Independent's coverage, Independent filed a declaratory judgment action.²⁵⁹ The trial court required that Lloyd's cover Luko's claim for all amounts exceeding \$100,000, and that PIGA cover the difference between Independent's deductible and \$100,000 (the point at which the excess coverage began).²⁶⁰

On appeal, the Lloyd's consortium first argued that its coverage did not begin at \$100,000 by virtue of Midland's insolvency.²⁶¹ The court quickly disposed of this argument, relying on the ambiguous language in the Lloyd's policy.²⁶² The issue then became at what level Lloyd's drop down coverage should begin. Was it the trial court mandate of \$100,000, or \$300,000, the upper limit of PIGA's statutory obligation?²⁶³

The court concluded that PIGA's guaranty did not function as "other valid and collectible insurance" within the meaning of the Lloyd's umbrella policy.²⁶⁴ The court reasoned that to adopt the insurer's argument that PIGA should function as a primary carrier would "pervert legislative intent."²⁶⁵ PIGA was enacted to protect individuals whose insurers become insolvent, and it was intended "to place *claimants* in the same position that they would have been in if the liability insurer had not become insolvent."²⁶⁶ The Pennsylvania Act was intended "not to protect other insurers by filling in for every aspect of the underlying insurance but rather to fill in only as the insolvency adversely [affects] the insured."²⁶⁷

Whether a state guaranty fund constitutes "other insurance" was most recently contested in *Scordill v. Smith*.²⁶⁸ In *Scordill*, Western Preferred Casualty, the primary insurer, became insolvent.²⁶⁹ Century Indemnity, the excess insurer, argued that it should only have to drop down to the

258. *Id.* at 1140-41.

259. *Id.* at 1141.

260. *Id.* at 1141-42.

261. *Id.* at 1142.

262. *Id.*

263. *Id.* at 1142-43.

264. *Id.* at 1143.

265. *Id.*

266. *Id.* (citations omitted).

267. *Id.*

268. 635 So. 2d 407 (La. Ct. App. 1994).

269. *Id.*

statutory maximum protection afforded by the Louisiana Insurance Guaranty Association (LIGA).²⁷⁰ LIGA, on the other hand, argued that Century dropped down to provide “first dollar” coverage.²⁷¹ The *Scordill* court agreed with LIGA.²⁷²

The court first observed that “LIGA’s obligations are triggered only as a last resort.”²⁷³ LIGA’s status as a fund of last resort was evidenced by language specifically stating that if a claimant had other insurance available, it owed no duty to assume obligations of insolvent insurers.²⁷⁴ In fact, CIGA’s purpose was to safeguard claimants in the event of insurer insolvency, not be the financial support of solvent insurers.²⁷⁵ Absent LIGA’s existence, “Century would drop down to dollar one.”²⁷⁶ The *Scordill* court concluded that LIGA’s existence should not alter the result.²⁷⁷

Luko and *Scordill* are well-reasoned. State guaranty funds are intended to provide a limited form of protection for the insured public, not to protect insurance companies from the insolvencies of their fellow insurers.²⁷⁸ Exposing an insured to liability while softening the insurer’s blow via operation of an “other insurance” clause would controvert legislative intent. *Luko* and *Scordill* should represent the majority view.

V. DEDUCTIBLES AND STACKING

The accurate evaluation of insurers’ exposure when allocating or apportioning liability necessarily includes consideration of deductibles and the potential stacking of policy limits. The presence of deductibles and insureds’ ability to stack multiple policies may significantly affect insurers’ indemnity obligations.

A. Deductibles

Difficulty sometimes arises when one or more policies among which a loss is being allocated contain(s) a deductible. The essential issue is

270. *Id.* at 407-08. In Louisiana, unlike most jurisdictions, an excess policy drops down upon a primary insurer’s insolvency if its “Limit of Liability” language provides for coverage in excess of “the amount recoverable under the underlying insurances.” *Id.* at 408.

271. *Id.*

272. *Id.* at 409.

273. *Id.*

274. *Id.* at 408-09.

275. *Id.* at 409.

276. *Id.*

277. *Id.*

278. See *Maxwell Communications v. Webb Publishing Co.*, 518 N.W.2d 830, 833 (Minn. 1994) (citations omitted).

whether insurers' allocation of liability among or between themselves may result in insureds' personal exposure. Several courts have addressed this issue, but there appears to be no clear rule.

The insured in *Pacific Power & Light Co. v. Transport Indemnity Co.*²⁷⁹ settled a wrongful death claim for \$25,000 after Transport Indemnity refused its tender.²⁸⁰ The power company had concurrent liability coverage with the Home Insurance Company.²⁸¹ The Home policy had a \$25,000 deductible; the Transport Indemnity policy did not have a deductible.²⁸² The power company sued Transport Indemnity to recover its defense costs plus the amount paid in settlement.²⁸³ Home was not made a party to the declaratory judgment action.²⁸⁴ Applying Oregon law, the *Pacific Power* court concluded that the policies' "other insurance" clauses were mutually repugnant, and that the loss should be prorated between the two carriers.²⁸⁵ Transport Indemnity bore only its pro rata share, notwithstanding Pacific Power's apparent inability to recover from Home by virtue of its deductible.²⁸⁶ Because the deductible in the Home policy was relevant only to its relationship with its insured, and because Home was not a party, the *Pacific Power* court never addressed the insured's residual liability.²⁸⁷

A more interesting deductible analysis appears in *Cargill, Inc. v. Commercial Union Insurance Co.*²⁸⁸ In *Cargill*, unlike *Pacific Power*, both insurers were before the court.

In *Cargill*, a barge accident resulted in a \$194,158.07 loss of Cargill grain.²⁸⁹ Cargill submitted the claim to Huffman, which towed the barge.²⁹⁰ Huffman's marine insurer, Commercial Union, denied cover-

279. 460 F.2d 959 (9th Cir. 1972).

280. *Id.* at 960.

281. *Id.*

282. *Id.*

283. *Id.*

284. *Id.*

285. *Id.* at 961. Such a clause in a policy provides that the policy's coverage shall be treated as excess where the insured has an additional policy which protects against the same risk. *Id.*

286. *Id.* at 961-62.

287. *See id.* at 962.

288. 889 F.2d 174 (8th Cir. 1989) (applying Minnesota and Missouri law).

289. *Id.* at 176.

290. *Id.*

age.²⁹¹ Cargill then submitted the claim to St. Paul, its insurer.²⁹² St. Paul paid Cargill \$94,157.07, the difference between the amount of the loss and the \$100,000 deductible under the St. Paul policy.²⁹³ Sometime thereafter, Commercial Union changed course, concluding that its policy in fact covered the loss.²⁹⁴ Commercial Union then paid Cargill \$90,000, the difference between the unpaid balance of the claim and the policy's \$10,000 deductible.²⁹⁵ Huffman then paid the remaining \$10,000 of Cargill's claim, *i.e.*, the Commercial Union deductible.²⁹⁶

After first concluding that the "other insurance" clauses in the St. Paul and Commercial Union policies were mutually repugnant, thus requiring proration by policy limits,²⁹⁷ the *Cargill* court next examined the effect of the deductibles.²⁹⁸ Commercial Union argued that the loss should be prorated by limits without reference to the insurers' respective deductibles.²⁹⁹ St. Paul argued that if the loss must be prorated, an amount equal to St. Paul's larger \$100,000 deductible should be shifted to Commercial Union whose deductible was relatively small.³⁰⁰

The *Cargill* court accepted the basic argument that deductibles should be considered in apportioning the insurers' respective indemnity obligations.³⁰¹ "Up to the \$100,000 of St. Paul's deductible there was no 'other insurance' triggering Commercial Union's 'other insurance' clause."³⁰² The first \$100,000 was therefore covered by Commercial Union, not by St. Paul.³⁰³ Moreover, considering the respective deductibles before apportioning liability reflected the lesser economic risk assumed by St. Paul, as evidenced by its larger deductible.³⁰⁴

The critical question for insurers beyond whether a deductible will be accounted for in loss allocation is, when will it be taken into account? Phrased differently, will the deductible be taken into account before proration, or after? *Cargill* provides a comparative analysis.

The *Cargill* court prorated the insured's loss by policy limits.³⁰⁵ Thus,

291. *Id.*

292. *Id.*

293. *Id.*

294. *Id.*

295. *Id.* at 177.

296. *Id.*

297. *Id.* at 179.

298. *Id.*

299. *Id.*

300. *Id.* at 180.

301. *Id.*

302. *Id.*

303. *Id.*

304. *See id.* (citing *Insurance Co. of N. Am. v. Continental Cas. Co.*, 431 F. Supp. 316, 319 (E.D. Pa. 1977), *rev'd on other grounds*, 575 F.2d 1070 (3d Cir. 1978)).

305. *Id.* at 180.

Commercial Union bore 23.1% of the loss (\$600,000 policy limits/\$2,600,000 available coverage), while St. Paul bore 76.9% of the loss.³⁰⁶ By shifting St. Paul's deductible to Commercial Union before prorating the loss, the *Cargill* court calculated Commercial Union's pro rata share to be \$121,750.51.³⁰⁷ Specifically:

| | |
|--------------|---|
| \$100,000.00 | St. Paul's deductible |
| 21,750.51 | Loss of \$94,158.07 after deductible x 23.1% (Commercial Union's pro rata share) |
| <hr/> | |
| \$121,750.51 | Total CU Liability |

St. Paul was thus left with an indemnity obligation of \$72,407.56.³⁰⁸

The *Cargill* court could have prorated the loss before shifting the deductible to Commercial Union—an approach enjoying existing judicial support.³⁰⁹ Had the court pro rated the loss before shifting the deductible (as St. Paul urged), the parties' ultimate liability would have differed by some \$23,000. The difference is illustrated below:

| | |
|--------------|---|
| \$ 44,850.51 | Loss of \$194,158.07 x 23.1% (Commercial Union's pro rata share) |
| 100,000.00 | St. Paul's deductible |
| <hr/> | |
| \$144,850.51 | Total CU Liability |

By shifting the deductible *after* prorating the loss, Commercial Union's total liability would increase to \$144,850.51. St. Paul, on the other hand, would see its liability reduced to \$49,307.56.

Deductibles may come into play where consecutive policies, rather than concurrent policies, cover a loss. As a rule, insurers cannot by using

306. *Id.* at 180-81.

307. *Id.*

308. *Id.* at 181.

309. *See Insurance Co. of N. Am. v. Continental Cas. Co.*, 431 F. Supp. 316, 319 (E.D. Pa. 1977), *rev'd on other grounds*, 575 F.2d 1070 (3d Cir. 1978).

their "other insurance" clauses allocate liability among themselves in a way that will impose liability on the insured.³¹⁰ This rule holds true regardless of whether liability flows to the insured by way of deductibles, retrospective premiums or side indemnity agreements.³¹¹ Of course, where the subject loss is continuing or progressive and the insured elects coverage under a policy with a deductible, the insured should have to pay the deductible.

B. Stacking

"Stacking" refers to the recovery of damages by an insured under multiple policies in succession until all damages have been satisfied, or until the total limits of all policies are exhausted.³¹² An insured's ability to stack policies is most often at issue in the uninsured motorist coverage (UM) and underinsured motorist coverage (UIM) contexts. More specifically in UM and UIM cases, "intrapolicy stacking is the cumulation of the liability limits for multiple vehicles under a single policy," while "interpolicy stacking" refers to the cumulation of coverage afforded under multiple policies.³¹³ Uninsured and underinsured motorist claims are fertile ground for stacking questions because any given person can usually qualify as an insured under more than one automobile liability policy, and thus for uninsured and underinsured motorist coverage as well.³¹⁴ Alternatively, several different vehicles may be listed on a single policy, with the insurer collecting separate UM and UIM premiums for each.

It is nearly impossible to explain succinctly UM and UIM stacking rules largely because of states' differing approaches.³¹⁵ Many states allow

310. See *Air Prods. & Chems., Inc. v. Hartford Accident & Indem. Co.*, 707 F. Supp. 762, 771 (E.D. Pa. 1989), *aff'd in part, rev'd in part*, 25 F.3d 177 (3d Cir. 1994); *Detrex Chem. Indus., Inc. v. Employers Ins. of Wausau*, 746 F. Supp. 1310, 1325-26 (N.D. Ohio 1990).

311. *Air Products*, 707 F. Supp. at 771; *Detrex*, 746 F. Supp. at 1325-26.

312. *State Farm Mut. Auto. Ins. Co. v. Richardson*, 437 S.E.2d 43, 44-45 n.1 (S.C. 1993) (citing *Jackson v. State Farm Mut. Auto. Ins. Co.*, 342 S.E.2d 603 (S.C. 1986)).

313. *Upshaw v. Trinity Cos.*, 842 S.W.2d 631, 632 n.1 (Tex. 1992).

314. *Baldwin & Midkiff*, *supra* note 32, at 62.

315. Missouri law illustrates the legal morass that UM and UIM stacking can become. As a general rule, Missouri law permits insureds to stack UM and UIM coverages. See *Krombach v. Mayflower Ins. Co.*, 827 S.W.2d 208, 212 (Mo. 1992); *Rodriguez v. General Accident Ins. Co. of Am.*, 808 S.W.2d 379, 383-84 (Mo. 1991). It does not matter whether separate premiums are charged for separate vehicles, since Missouri courts presume that UM coverage for additional vehicles is built into basic premium charges. *Oliver v. Cameron Mut. Ins. Co.*, 866 S.W.2d 865, 869 (Mo. Ct. App. 1993). Assuming the policy definition of "insured" includes not only the named insured but a "relative" or a "family member," courts will liberally construe these terms. The same is true with respect to who is an "owner." See *Lightner v. Farmers Ins. Co.*, 789 S.W.2d 487, 489-90 (Mo. 1990). Injured occupants who are not named

insureds to stack UM and UIM coverage under certain circumstances and depending on any number of variables, including intrapolicy versus interpolicy determinations, and the payment of separate premiums.³¹⁶ Of those states that allow stacking, some nonetheless enforce clear and prominently displayed "anti-stacking" provisions in UM and UIM policies.³¹⁷ Other states, such as Kansas, do not allow insureds to stack UM

insureds or owners are not necessarily entitled to stack coverages. *Krombach*, 827 S.W.2d at 212; *Hartford Ins. Co. v. Kean*, 866 S.W.2d 924, 926 (Mo. Ct. App. 1993). Occupancy insureds are not entitled to equal public policy protections. *Hines v. Government Employees Ins. Co.*, 656 S.W.2d 262, 265 (Mo. 1983).

Missouri public policy prohibits insurers from including anti-stacking provisions in UM coverage. *Cameron Mut. Ins. Co. v. Madden*, 533 S.W.2d 538, 544-45 (Mo. 1976). This public policy flows from Missouri statutes mandating UM coverage. *See* MO. REV. STAT. § 379.203 (Cum. Supp. 1994). Because Missouri does not mandate UIM coverage, there is no public policy prohibiting anti-stacking clauses in the underinsured motorist context. *Noll v. Shelter Ins. Cos.*, 774 S.W.2d 147, 151 (Mo. 1989). Clear and unambiguous anti-stacking clauses in UIM coverage are thus enforced as written, so long as UM and UIM coverages are treated separately. *Krenski v. Aubuchon*, 841 S.W.2d 721, 731 (Mo. Ct. App. 1992). If insurers "lump together" UM and UIM coverages, however, courts treat the combined coverages as UM coverage and disregard or invalidate any anti-stacking clauses. *See Keating v. Gavrilovici*, 861 S.W.2d 205, 208 (Mo. Ct. App. 1993); *Nolan v. American States Preferred Ins. Co.*, 851 S.W.2d 720, 723-24 (Mo. Ct. App. 1993).

Finally, set-off provisions in UM and UIM coverages—including stacked coverages—are enforceable. *American Economy Ins. Co. v. Cornejo*, 866 S.W.2d 174, 178 (Mo. Ct. App. 1993); *Keating*, 861 S.W.2d at 208. Set-off provisions must be clear and unambiguous if they are to be enforced. *See Killpack v. Farm Bureau Town & Country Ins. Co.*, 861 S.W.2d 608, 610-12 (Mo. Ct. App. 1993).

316. *See, e.g.*, *Powell v. State Farm Mut. Auto. Ins. Co.*, 601 So. 2d 60, 63 (Ala. 1992); *Allstate Ins. Co. v. Link*, 645 A.2d 1052, 1055-56 (Conn. App. Ct.) (UIM coverage), *cert. denied*, 648 A.2d 161 (Conn. 1994); *Bruder v. Country Mut. Ins. Co.*, 620 N.E.2d 355, 358-59 (Ill. 1993) (UM coverage); *State Farm Mut. Auto. Ins. Co. v. Davis*, 613 So. 2d 1179, 1182 (Miss. 1992) (UM coverage); *Jaramillo v. Providence Washington Ins. Co.*, 871 P.2d 1343, 1345-49 (N.M. 1994) (UM coverage); *Mitchell v. Nationwide Mut. Ins. Co.*, 439 S.E.2d 110, 111 (N.C. 1994) (UIM coverage); *Kinder v. Oklahoma Farmers Union Mut. Ins. Co.*, 813 P.2d 546, 548 (Okla. Ct. App. 1991) (UM coverage); *USAA Cas. Ins. Co. v. Alexander*, 445 S.E.2d 145, 148 (Va. 1994) (UM coverage); *Carrington v. St. Paul Fire & Marine Ins. Co.*, 485 N.W.2d 267, 273 (Wis. 1992) (UM coverage).

317. *See, e.g.*, *Giannini v. State Farm Mut. Auto. Ins. Co.*, 837 P.2d 1203, 1206 (Ariz. Ct. App. 1992); *State Farm Fire & Cas. Co. v. Amos*, 798 S.W.2d 440, 442 (Ark. Ct. App. 1990); *Shelter Mut. Ins. Co. v. Thompson*, 852 P.2d 459, 467 (Colo. 1993); *Dixie Ins. Co. v. Thomas*, 627 So. 2d 1306, 1306 (Fla. Dist. Ct. App. 1993); *Armstrong v. State Farm Mut. Auto. Ins. Co.*, 595 N.E.2d 172, 175 (Ill. App. Ct. 1992); *Rodish v. State Farm Mut. Auto. Ins. Co.*, 501 N.W.2d 514, 514-15 (Iowa 1993); *Yahr v. Garcia*, 461 N.W.2d 363, 363 (Mich. 1990); *Serrett v. Kimber*, 874 P.2d 747, 749 (Nev. 1994);

or UIM coverage.³¹⁸ Fortunately, the UM and UIM stacking hodgepodge does not taint stacking issues in the liability context, since UM and UIM policies provide first-party coverage.³¹⁹

Insureds' ability to stack liability policies has emerged as an issue in continuing injury or progressive loss cases, where consecutive policies are implicated.³²⁰ Under the liability insurance concept of stacking, the limits of all policies triggered by an occurrence are added to determine the amount of coverage available to pay a single claim. Typical scenarios in which insureds or plaintiffs might attempt to stack liability policies include progressive disease claims, like asbestos exposure, and environmental contamination, such as prolonged discharges from toxic waste sites.

When liability insurance is at issue, "intrapolicy" stacking refers to multiple occurrences involving the same person within the same policy period. Returning to asbestos claims as an example, jurisdictions employing the exposure trigger could treat each inhalation of asbestos as a single occurrence.³²¹ Similarly, in the environmental claim arena, multiple "sudden and accidental" discharges in a single policy period could be deemed separate occurrences. An insurer's liability might be unlimited in the absence of a stated aggregate coverage. "Interpolicy" stacking in the liability insurance context becomes an issue when a single occurrence transcends policy periods, thus triggering consecutive policies. An insured would attempt interpolicy stacking in order to obtain the limits of each policy's coverage.

Among the more interesting stacking cases is *American Physicians Insurance Exchange v. Garcia*,³²² a recent Texas decision. *Garcia* involved medical malpractice allegations stemming from Dr. Ramon Garcia's treatment of Gustavo Cardenas between October 1980 and April 1982.³²³ The Cardenases alleged in a 1984 suit that Dr. Garcia's prescrip-

Concord Gen. Mut. Ins. Co. v. Mitchell, 637 A.2d 903, 904-905 (N.H. 1994); Rodriguez v. Windsor Ins. Co., 879 P.2d 759, 765 (N.M. 1994); Nielsen v. O'Reilly, 848 P.2d 664, 666-69 (Utah 1992); McGreevy v. Oregon Mut. Ins. Co., 876 P.2d 463, 467 (Wash. Ct. App. 1994).

318. KAN. STAT. ANN. § 40-284(d) (1993); Walker v. State Farm Mut. Auto. Ins. Co., 973 F.2d 634, 637-38 (8th Cir. 1992) (construing Kansas statute).

319. Ball v. Midwestern Ins. Co., 829 P.2d 897, 900 (Kan. 1992); State Farm Mut. Auto. Ins. Co. v. Shrader, 882 P.2d 813, 826 (Wyo. 1994).

320. The allocation or apportionment of losses when consecutive policies are at issue is discussed at *infra* notes 374-97 and accompanying text.

321. Baldwin & Midkiff, *supra* note 32, at 62.

322. 876 S.W.2d 842 (Tex. 1994).

323. *Id.* at 843.

tion of two drugs for Mr. Cardenas caused Mr. Cardenas to develop a debilitating brain disease.³²⁴

At all relevant times Dr. Garcia was insured under three consecutive Insurance Corporation of America (ICA) professional liability policies.³²⁵ In 1980, the doctor was covered under a \$100,000 ICA claims made policy.³²⁶ In 1981 and 1982, Dr. Garcia was covered under consecutive ICA occurrence policies, each with \$500,000 liability limits.³²⁷ In 1983, the doctor purchased a \$500,000 occurrence policy from American Physicians Insurance Exchange (APIE).³²⁸

In December, 1993, several months before filing their petition, the Cardenases notified Dr. Garcia of their intentions by letter.³²⁹ Dr. Garcia reported the letter to APIE, which informed the doctor that its policy would only cover claimed acts of negligence in 1983.³³⁰ After concluding that Mr. Cardenas had seen Dr. Garcia but once in 1983 and, thus, that ICA bore the greatest risk, APIE agreed with ICA to share in any settlement or judgment on a pro rata basis.³³¹ The Cardenases subsequently filed an original and five amended petitions and did not allege malpractice during the APIE policy period.³³² In July of 1985, APIE informed Dr. Garcia that its policy was inapplicable, because all of the Cardenases' allegations occurred prior to its coverage.³³³

The Cardenases' attorney made his first written settlement demand in the amount of \$600,000 before APIE sent its letter to Garcia denying coverage.³³⁴ The Cardenases' attorney subsequently made demands of \$1,100,000 and \$1,600,000, the latter coming the day of trial.³³⁵ The demands went unmet.³³⁶ On the day of trial, the Cardenases filed their sixth amended petition, for the first time making allegations within APIE's policy period.³³⁷ This last petition was filed in conjunction with

324. *Id.*

325. *Id.*

326. *Id.*

327. *Id.* at 843-44.

328. *Id.*

329. *Id.* at 844.

330. *Id.*

331. *Id.*

332. *Id.*

333. *Id.*

334. *Id.* at 844-45.

335. *Id.* at 845.

336. *Id.*

337. *Id.*

the Cardenases' agreement not to execute against Dr. Garcia, but to look only to his insurance to satisfy any judgment.³³⁸ The Cardenases obtained a \$2,235,483.30 judgment.³³⁹

The issue ultimately became APIE's extracontractual liability for its alleged bad faith refusal to settle within policy limits.³⁴⁰ However, the Cardenases' lowest settlement demand of \$600,000 triggered no duty on APIE's part unless it was within applicable limits.³⁴¹ The Cardenases' demands could satisfy the "policy limits" requirement only if the limits of all triggered policies could be stacked.³⁴²

The *Garcia* court refused to allow the plaintiffs to stack the ICA and APIE policies to satisfy this requirement because it involved a single claim with indivisible injury.³⁴³ The policy's per-occurrence indemnity cap is not raised simply because an occurrence has been extended over several policy periods, according to the *Garcia* court.³⁴⁴

The [bad faith] claim by Garcia and the Cardenases rests on the assumption that Garcia had three times more insurance than he purchased. At no time during the four relevant coverage years did any two policies overlap. Thus, at no time during the four years did Garcia carry liability insurance with a per-occurrence limit greater than \$500,000. Garcia did not purchase malpractice insurance for \$1.5 million in coverage, as he might have done by purchasing excess or umbrella coverage, and therefore he may not claim to benefit from \$1.5 million in coverage by stacking temporally distinct policies.

Although the triggering of multiple policies would provide multiple funding sources and thereby have a considerable effect on any contribution claims between ICA and APIE, it cannot lead to the conclusion that Garcia's total coverage for a "continuing" Claim Occurrence somehow exceeds the "Per Claim Occurrence" limit stated in every policy he purchased.

If a single occurrence triggers more than one policy, covering different policy periods, then different limits may . . . appl[y] at different times. In such a case, the insured's indemnity limits should be whatever limit applied at the single point in time during the coverage periods of the triggered policies when the insured's limit was highest. The insured is generally in the best position to identify the policy or policies that would maximize coverage.³⁴⁵

Were concurrent primary and excess policies triggered, the *Garcia* court concluded, those insurers should allocate the loss or potential loss among themselves.³⁴⁶

338. *Id.*

339. *Id.*

340. *Id.* at 848.

341. *Id.* at 849-50.

342. *Id.* at 849.

343. *Id.* at 853.

344. *Id.* at 853-54.

345. *Id.* at 854-55 (footnotes omitted).

346. *Id.* at 855.

Absent the plaintiffs' ability to stack the various policies, APIE never had a chance to settle the Cardenas suit within policy limits.³⁴⁷ APIE thus could not be liable for classic third-party bad faith.³⁴⁸

The Supreme Court of Louisiana examined interpolicy stacking, which it termed "horizontal stacking," in *Cole v. Celotex Corp.*³⁴⁹ The *Cole* plaintiffs were three former refinery workers who claimed damages attributable to long-term asbestos exposure in their workplace.³⁵⁰ The plaintiffs alleged that the defendants were negligent in failing to provide them with a safe workplace in every year from 1945 through 1976.³⁵¹ The jury agreed and awarded each plaintiff \$300,000.³⁵² The defendants were insured at all relevant times by the Insurance Company of North America (INA).³⁵³ INA's coverage during these years ranged from \$10,000 to \$50,000 per accident and/or occurrence.³⁵⁴

INA argued that only one policy limit should be available to satisfy the plaintiffs' judgments.³⁵⁵ Specifically, INA asserted, the plaintiffs should be limited to the single highest applicable per accident or per occurrence limits policy triggered.³⁵⁶ The plaintiffs, conversely, argued that INA's receipt of annual premiums "refute[d] its attempt to telescope coverage."³⁵⁷ The *Cole* court rejected INA's arguments and allowed the plaintiffs to horizontally stack the INA policies to permit full recovery.³⁵⁸

The *Cole* court first reasoned that stacking was appropriate because of its adoption of the "exposure" trigger theory.³⁵⁹ In other words, INA's coverage was triggered by the plaintiffs' mere exposure to asbestos during each policy period.³⁶⁰ The court observed that because the exposure theory's effect is the distribution of losses over many years, it harmonized nicely with the horizontal stacking of liability policies.³⁶¹ Indeed,

347. *Id.*

348. *Id.*

349. 599 So. 2d 1058, 1060-61 (La. 1992).

350. *Id.* at 1061.

351. *Id.*

352. *Id.*

353. *Id.*

354. *Id.*

355. *Id.* at 1074.

356. *Id.*

357. *Id.* at 1078.

358. *Id.* at 1079-80.

359. *Id.* at 1079.

360. *Id.* at 1075 n.51.

361. *Id.* at 1079.

exposure theory represents a judicial attempt to parallel an insured's potential tort liability with its insurers' coverage.³⁶² This benefits insureds by keeping down liability insurance costs.³⁶³

Second, the *Cole* court found support for its decision to allow horizontal stacking in "general principles of insurance law."³⁶⁴ Without surveying case law or comparing applications, the court casually accepted a statement in a treatise proclaiming that claimants generally "may recover under all available coverages provided there is no double recovery."³⁶⁵

Last, the court posited that the case before it might not even involve stacking.³⁶⁶ To support this hypothesis, the court analogized the instant case to progressive loss cases involving multiple insurers.³⁶⁷ The court noted that where multiple insurers are involved, the cumulation of policy limits is arguably necessary to ensure contribution among insurers.³⁶⁸ By spreading the plaintiffs' judgments over several INA policies, the court was effectively "enforcing INA's contribution rights against itself."³⁶⁹ However, the *Cole* court's final point makes little sense; after all, INA's "rights against itself" exist only in the abstract.

Although *Cole* is among the most recent interpolicy or horizontal stacking decisions, it does not necessarily represent the majority view. The leading exposure theory case is *Insurance Co. of North America v. Forty-Eight Insulations, Inc.*,³⁷⁰ in which the court refused to permit interpolicy stacking through a single insurer issuing multiple policies.³⁷¹ In *Forty-Eight*, the Sixth Circuit recognized that the exposure theory could lead to stacking problems and held that no insurer should be held liable in any one case for amounts exceeding the highest single yearly limit of each policy.³⁷²

Insureds should not be allowed to stack multiple liability policies, regardless of whether they are issued by a single insurer or by several insurers. Insureds desiring greater coverage than might be available on a primary basis are free to purchase excess or umbrella policies. To allow insureds to stack policies is to treat insurers' obligations for catastrophic or continuing injuries differently from their obligations for other losses.

362. *Id.*

363. *See id.*

364. *Id.* at 1080.

365. *Id.* (citations omitted).

366. *Id.*

367. *Id.*

368. *Id.*

369. *Id.*

370. 633 F.2d 1212 (6th Cir. 1980), *clarified on reh'g*, 657 F.2d 814 (6th Cir.), *cert. denied*, 454 U.S. 1109 (1981).

371. *Id.* at 1226.

372. *Id.* at 1226 n.28.

Courts should not rewrite policies to reflect this distinction. Moreover, the fact that an occurrence spans several years does not change the fact that it is but a single occurrence. For example, a doctor's continued negligence over several years does not translate into more than one claim of malpractice.³⁷³

VI. APPORTIONING DEFENSE COSTS BETWEEN OR AMONG CONCURRENT PRIMARY INSURERS

A plaintiff's complaint or petition may trigger more than one concurrent insurer's duty to defend.³⁷⁴ Given insurers' sensitivity to defense costs, it is not surprising that concurrent insurers frequently seek contribution toward defense costs just as they look to apportion their indemnity obligations.

373. See *Hartford Cas. Ins. Co. v. Medical Protective Co.*, 641 N.E.2d 545, 548-49 (Ill. App. Ct. 1994); *American Physicians Ins. Exch. v. Garcia*, 876 S.W.2d 842, 845, 853-55 (Tex. 1994).

374. "Each case involving an insurer's promise to defend must be considered independently . . ." *Simmons v. Farmers Ins. Group*, 877 P.2d 1255, 1258 (Utah Ct. App. 1994). Generally, whether an insurer owes its insured a defense is determined by comparing the allegations in the petition or complaint with the policy. See, e.g., *Cincinnati Ins. Co. v. Lee Anesthesia*, 641 So. 2d 247, 249 (Ala. 1994); *Hames Contracting, Inc. v. Georgia Ins. Co.*, 440 S.E.2d 738, 739 (Ga. Ct. App. 1994); *Hawaiian Holiday Macadamia Nut Co. v. Industrial Indem. Co.*, 872 P.2d 230, 233 (Haw. 1994); *Dixon Distrib. Co. v. Hanover Ins. Co.*, 641 N.E.2d 395, 398 (Ill. 1994); *Ottumwa Housing Auth. v. State Farm Fire & Cas. Co.*, 495 N.W.2d 723, 726 (Iowa 1993); *Steptore v. Masco Constr. Co.*, 643 So. 2d 1213, 1218 (La. 1994); *Baywood Corp. v. Maine Bonding & Cas. Co.*, 628 A.2d 1029, 1030 (Me. 1993); *Town of Ayer v. Imperial Cas. & Indem. Co.*, 634 N.E.2d 571, 572 (Mass. 1994); *Green Mountain Ins. Co. v. Foreman*, 641 A.2d 230, 232 (N.H. 1994); *Lopez v. New Mexico Pub. Sch. Ins. Auth.*, 870 P.2d 745, 747 (N.M. 1994); *Ledford v. Gutoski*, 877 P.2d 80, 82 (Or. 1994); *Federated Mut. Ins. Co. v. Piedmont Pet. Corp.*, 444 S.E.2d 532, 533 (S.C. Ct. App. 1994); *Atlantic Mut. Ins. Co. v. Roffe, Inc.*, 872 P.2d 536, 538 (Wash. Ct. App. 1994); *Reisig v. Union Ins. Co.*, 870 P.2d 1066, 1068 (Wyo. 1994). If just one of several pleaded theories is potentially covered the insurer must defend the entire suit, even if the policy specifically excludes other alleged bases for recovery. See *Travelers Ins. Co. v. Freightliner Corp.*, 628 N.E.2d 325, 328 (Ill. App. Ct. 1993); *Treadway v. Vaughn*, 633 So. 2d 626, 628 (La. Ct. App. 1993), *writ denied*, 635 So. 2d 233 (La. 1994); *Voorhees v. Preferred Mut. Ins. Co.*, 607 A.2d 1255, 1259 (N.J. 1992). Any doubts as to an insurer's duty to defend must be resolved in the insured's favor. *Horace Mann Ins. Co. v. Barbara B.*, 846 P.2d 792, 796 (Cal. 1993); *Hart Constr. Co. v. American Family Mut. Ins. Co.*, 514 N.W.2d 384, 389 (N.D. 1994); *Allstate Ins. Co. v. Russo*, 641 A.2d 1304, 1306 (R.I. 1994); *Clemons v. State Farm Fire & Cas. Co.*, 879 S.W.2d 385, 392 (Tex. Ct. App. 1994).

An insurer that attempts to recover some portion of defense costs from a concurrent carrier that did not assume its respective duty to defend may have a difficult time. There is no contractual obligation between or among the insurers; all contractual duties or obligations flow only to the insured.³⁷⁵ Accordingly, a few courts do not allow concurrent primary insurers to recover their defense costs.³⁷⁶ As the Supreme Court of South Carolina held in *Sloan Construction Co. v. Central National Insurance Co.*:³⁷⁷

[W]here two companies insure the identical risk and both policies provide for furnishing the insured with a defense, neither company, absent a contractual relationship, can require contribution from the other for expenses of the defense where one denies liability and refuses to defend. The duty to defend is personal to both insurers; neither is entitled to divide the duty.³⁷⁸

If the minority approach explained in *Sloan* has some redeeming quality, it is its encouragement of concurrent insurers to promptly resolve defense issues by cooperative arrangement.³⁷⁹

A majority of jurisdictions hold that an insurer honoring its duty to defend may obtain contribution from a concurrent insurer that breaches its duty to defend their common insured.³⁸⁰ The majority position sounds in equity,³⁸¹ and indeed is supported by fairness and logic. Because each primary insurer affording coverage has a duty to defend the

375. *Shell Oil Co. v. Winterthur Swiss Ins. Co.*, 15 Cal. Rptr. 2d 815, 850 (Ct. App. 1993) (citing *American Auto. Ins. Co. v. Seaboard Sur. Co.*, 318 P.2d 84, 86 (Cal. Ct. App. 1957)); *Church Mut. Ins. Co. v. Smith*, 509 N.W.2d 274, 275 (S.D. 1993).

376. *See Continental Cas. Co. v. United Pac. Ins. Co.*, 637 So. 2d 270, 271-75 (Fla. Dist. Ct. App.), *review denied*, 645 So. 2d 451 (Fla. 1994).

377. 236 S.E.2d 818 (S.C. 1977).

378. *Id.* at 820.

379. *See Jostens, Inc. v. Mission Ins. Co.*, 387 N.W.2d 161, 167 (Minn. 1986).

380. *See, e.g., Hartford Accident & Indem. Co. v. Pacific Employers Ins. Co.*, 862 F. Supp. 160, 163-65 (S.D. Tex. 1994) (applying Texas law); *Liberty Mut. Ins. Co. v. United States Fidelity & Guar. Ins. Co.*, 756 F. Supp. 953, 957 (S.D. Miss. 1990) (applying Mississippi law); *Continental Cas. Co. v. Farmers Ins. Co.*, 883 P.2d 473, 475-76 (Ariz. Ct. App. 1994); *Herrick Corp. v. Canadian Ins. Co.*, 34 Cal. Rptr. 2d 844, 847-49 (Ct. App. 1994); *Sacharko v. Center Equities Ltd. Partnership*, 479 A.2d 1219, 1224 (Conn. App. Ct. 1984); *Rentals Unlimited, Inc. v. Aetna Cas. & Sur. Ins. Co.*, 647 A.2d 1278, 1283-84 (Md. Ct. Spec. App. 1994), *cert. denied*, 651 A.2d 854 (Md. 1995); *Michigan Educ. Employees Mut. Ins. Co. v. Transamerica Ins. Co. of Am.*, 516 N.W.2d 93, 94-95 (Mich. Ct. App. 1994); *Universal Underwriters Ins. Co. v. Allstate Ins. Co.*, 592 A.2d 515, 517-18 (N.H. 1991); *Avemco Ins. Co. v. United States Fire Ins. Co.*, 513 A.2d 962, 966-67 (N.J. Super. Ct. App. Div. 1986); *American Gen. Fire & Cas. Co. v. Progressive Cas. Co.*, 799 P.2d 1113, 1118-19 (N.M. 1990); *Continental Cas. Co. v. Rapid-American Corp.*, 609 N.E.2d 506, 514 (N.Y. 1993); *Unisun Ins. Co. v. Hertz Rental Corp.*, 436 S.E.2d 182, 186 (S.C. Ct. App. 1993); *Perez Trucking, Inc. v. Ryder Truck Rental, Inc.*, 886 P.2d 196, 201 (Wash. Ct. App. 1994).

381. *Hartford Accident & Indem. Co. v. Superior Court*, 34 Cal. Rptr. 2d 520, 522 (Ct. App. 1994).

insured, each should share in defense costs. Allowing a concurrent primary insurer to avoid contributing to its insured's defense only encourages the breach of the insurer's duty to defend, as the carrier can thereby reduce its expenses. Of course, and as is true with concurrent insurers' indemnity obligations, an insurer's right to contribution is not automatic. In other words, a concurrent insurer seeking contribution or reimbursement must make such a demand. Whatever obligation that might be imposed on a non-participating insurer "[does] not accrue until that insurer [is] requested to participate on some basis."³⁸²

A defending insurer's equitable right to contribution does not attach if a concurrent insurer also defends, but the complaining insurer defends more vigorously or otherwise incurs greater costs. *Aetna Casualty & Surety Co. v. Mutual Enumclaw Insurance Co.*³⁸³ illustrates this point. *Aetna* involved a defamation claim against an attorney, Skip Smyser, and a public opinion polling firm.³⁸⁴ Smyser was insured under both his law firm's business owner's policy with *Aetna* and his homeowner's policy with *Mutual of Enumclaw*.³⁸⁵ Both insurers honored their duty to defend Smyser.³⁸⁶ *Aetna* ultimately spent \$30,522.04 for Smyser's defense, while *Mutual of Enumclaw* spent only \$5,220.00.³⁸⁷ *Aetna* later sued *Mutual of Enumclaw* in an effort to recover its defense costs.³⁸⁸ The trial court required *Mutual of Enumclaw* to pay one-half of Smyser's total defense costs, and the insurer appealed.³⁸⁹

The *Aetna* court recognized concurrent insurers' rights to contribution or reimbursement of defense costs, but only where the target insurer breaches its duty to defend.³⁹⁰ This distinction was critical, since *Mutual of Enumclaw* "did not breach its duty to defend Smyser . . ."³⁹¹ The court concluded that both insurers, "having fulfilled their duty to defend, although adopting different strategy and tactics, shall pay for their own defense costs."³⁹²

382. *American Home Assur. Co. v. St. Paul Fire & Marine Ins. Co.*, 558 A.2d 65, 69 (N.J. Super. Ct. App. Div.), cert. denied, 569 A.2d 1334 (N.J. 1989).

383. 826 P.2d 1315 (Idaho 1992).

384. *Id.* at 1316.

385. *Id.*

386. *Id.*

387. *Id.*

388. *Id.*

389. *Id.* at 1317, 1319.

390. *Id.* at 1317-19.

391. *Id.* at 1319.

392. *Id.*

With the great weight of authority supporting the apportionment of defense costs among duty-bound primary insurers, the method or means by which costs are shared becomes the critical issue. Unfortunately, a majority rule cannot safely be stated. It is not unusual for courts in the same jurisdiction, or for federal courts sitting in diversity cases, to apply differing rules depending on the case. Some courts simply divide defense costs equally between the insurers,³⁹³ while others prorate defense costs based on the total policy limits.³⁹⁴ Defense costs may also be apportioned in accordance with indemnity payments,³⁹⁵ an approach that enjoys wide acceptance.

All three approaches to apportioning defense costs are somewhat arbitrary, but all are justifiable. The latter approach arguably best reflects concurrent insurers' intent, since it tracks their respective indemnity obligations. Courts should always attempt to give effect to the contracting parties' intent. Prorating defense costs by total policy limits recognizes the basic principle that where an insurer's potential liability is greater its interest in the litigation should be greater, and it should therefore bear defense costs in proportion to its interest.³⁹⁶ Finally, because insurers' defense and indemnity obligations are separate and distinct, a compelling argument can be made that defense costs should be borne equally. After all, each insurer assumed an equal and unrelated duty to defend.

The "other insurance" clauses in concurrent insurers' respective policies should have no bearing on the apportionment of defense costs.³⁹⁷ Of course, in certain circumstances an "other insurance" clause may operate to remove an insurer from the coverage picture, thus severing its duty to defend. The concurrent insurer with primary liability must then

393. *United States Fidelity & Guar. Co. v. Executive Ins. Co.*, 893 F.2d 517, 520 (2d Cir. 1990) (applying New York law); *Universal Underwriters Ins. Co. v. Allstate Ins. Co.*, 592 A.2d 515, 517-18 (N.H. 1991).

394. *Continental Ins. Co. v. McKain*, 821 F. Supp. 1084, 1090-93 (E.D. Pa. 1993) (applying Pennsylvania law), *aff'd*, 19 F.3d 642 (3d Cir. 1994); *Avondale Indus., Inc. v. Travelers Indem. Co.*, 774 F. Supp. 1416, 1436-38 (S.D.N.Y. 1991) (applying New York law); *CNA Cas. of Cal. v. Seaboard Sur. Co.*, 222 Cal. Rptr. 276, 289 (Ct. App. 1986); *Sacharko v. Center Equities Ltd. Partnership*, 479 A.2d 1219, 1224 (Conn. App. Ct. 1984).

395. *Columbia Cas. Co. v. United States Fidelity & Guar. Co.*, 870 P.2d 1200, 1202 (Ariz. Ct. App. 1994).

396. *See Federal Ins. Co. v. Cablevision Sys. Dev. Co.*, 662 F. Supp. 1537, 1540 n.5 (E.D.N.Y.), *aff'd*, 836 F.2d 54 (2d Cir. 1987).

397. *Guaranty Nat'l Ins. Co. v. American Motorists Ins. Co.*, 758 F. Supp. 1394, 1397 (D. Mont. 1991), *aff'd*, 981 F.2d 1108 (9th Cir. 1992). *But see State of N.Y. v. Blank*, 27 F.3d 783, 798-99 (2d Cir. 1994); *Employers Mut. Cos. v. Illinois Emcasco Ins. Co.*, 570 N.E.2d 528, 530 (Ill. App. Ct. 1991) (citing *New Amsterdam Cas. Co. v. Certain Underwriters at Lloyd's, London*, 216 N.E.2d 665 (Ill. 1966)).

bear the entire burden of defense. Beyond such fundamentals, however, "other insurance" clauses speak only to loss allocation. In the liability insurance context, "losses" are either covered judgments or settlements on the behalf of insureds. "Other insurance" clauses thus relate only to insurers' indemnity obligations, and they do not even purport to address the allocation or apportionment of defense costs.

VII. ALLOCATING LOSSES AND APPORTIONING DEFENSE COSTS AMONG OR
BETWEEN CONSECUTIVE INSURERS:
"MULTIPLE INSURANCE" PROBLEMS

As previously discussed, the problems posed when there is concurrent coverage are often complex. Such difficulties pale in comparison to the problems raised in cases involving progressive injuries or losses. Asbestos-related disease claims, hazardous waste site litigation and a wide range of other "toxic torts," as well as progressive property damage cases, such as those involving earth movement and water leakage, have spawned hopelessly confusing insurance coverage problems. "Other insurance" clauses do not operate where the subject policies are consecutive rather than concurrent, depriving insurers and insureds alike of a crucial tool for resolving coverage disputes. Courts are thus left to adopt or embrace one of several equitable apportionment theories that have emerged.

A. Coverage "Triggers"

Comprehensive general liability (CGL) policies cover bodily injury or property damage caused by an "occurrence." Standard policies define an "occurrence" as an "accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured."³⁹⁸ In continuing injury or progressive loss cases, there may be prolonged exposure to the harmful condition, ultimately followed by manifestation of the harm. The question then becomes, which consecutive policies were triggered? The answer to this question is crucial, because each insurer whose coverage is triggered is potentially liable for the loss up to its

398. See, e.g., *Smartfoods, Inc. v. Northbrook Prop. & Cas. Co.*, 618 N.E.2d 1365, 1367 (Mass. App. Ct. 1993); *Friendship Homes, Inc. v. American States Ins. Cos.*, 450 N.W.2d 778, 779 (N.D. 1990); *Sanborn Plastics Corp. v. St. Paul Fire & Marine Ins. Co.*, 616 N.E.2d 988, 993 (Ohio Ct. App. 1993).

policy limits, as well as facing defense costs. Four predominant coverage triggers have emerged: (1) the "exposure" theory; (2) the "actual injury" or "injury in fact" theory; (3) the "manifestation" theory; and (4) the "continuous trigger" or "triple trigger" theory. Of course, liability policies do not specify a "trigger." The term "trigger" merely describes the event or events that determine whether an insurer must defend and/or indemnify its insured under a given policy.

1. The "Exposure" Trigger

The "exposure" theory of liability was crafted in asbestos litigation. Asbestos-related diseases develop slowly over many years without detection; however, because scar tissue develops shortly after the inhalation of asbestos fibers, courts employing exposure theory deem each exposure (*i.e.*, each deposit of asbestos fiber) to be a separate occurrence of bodily injury in a continuing tort.³⁹⁹ Exposure theory has moved beyond asbestos litigation to general toxic torts and environmental litigation.⁴⁰⁰ In short, the exposure theory results in CGL coverage being triggered each time a person or property is exposed to the harmful condition during a policy period.⁴⁰¹ Regardless of when the injury actually occurs, it is deemed to have occurred at the time of exposure.⁴⁰² A worker's repeated inhalation of harmful vapors over a twenty year career thus may trigger twenty CGL policies (assuming calendar year policy periods).

2. The "Actual Injury" or "Injury in Fact" Trigger

The "actual injury" or "injury in fact" trigger implicates those policies in effect when the subject property damage or bodily injury actually occurs,⁴⁰³ even if it is not discovered during that policy period.⁴⁰⁴ Ha-

399. *Home Ins. Co. v. Landmark Ins. Co.*, 253 Cal. Rptr. 277, 281 (Ct. App. 1988); *Sentinel Ins. Co. v. First Ins. Co. of Haw.*, 875 P.2d 894, 914 (Haw. 1994); *see, e.g.*, *Lloyd E. Mitchell, Inc. v. Maryland Cas. Co.*, 595 A.2d 469, 478 (Md. 1991).

400. *See, e.g.*, *Village of Morrisville Water & Light Dept. v. United States Fidelity & Guar. Co.*, 775 F. Supp. 718, 730-31 (D. Vt. 1991); *Mapco Alaska Pet., Inc. v. Central Nat'l Ins. Co.*, 795 F. Supp. 941, 948 (D. Alaska 1991); *TBG, Inc. v. Commercial Union Ins. Co.*, 806 F. Supp. 1444, 1452-53 (N.D. Cal. 1990) (wastewater discharge at hazardous waste site).

401. *Sentinel Insurance*, 875 P.2d at 914; *see also* *American Employers Ins. Co. v. Pinkard Constr. Co.*, 806 P.2d 954, 956 (Colo. Ct. App. 1990), *cert. dismissed*, 831 P.2d 887 (Colo. 1991) (applying exposure theory to progressive property damage under CGL policy).

402. *Diocese of Winona v. Interstate Fire & Cas. Co.*, 858 F. Supp. 1407, 1419 (D. Minn. 1994).

403. *Quaker State Minit-Lube, Inc. v. Fireman's Fund Ins. Co.*, 868 F. Supp. 1278, 1300 (D. Utah 1994); *SCSC Corp. v. Allied Mut. Ins. Co.*, 515 N.W.2d 588, 595 (Minn. Ct. App. 1994).

404. *See* *Abex Corp. v. Maryland Cas. Co.*, 790 F.2d 119, 121, 124-25 (D.C. Cir.

waii adopted the injury in fact trigger for all standard CGL policies in 1994. The Supreme Court of Hawaii spoke for all jurisdictions that have adopted this trigger when it held in *Sentinel Insurance Co., Ltd. v. First Insurance Co. of Hawai'i, Ltd.*:⁴⁰⁶ "[T]he injury-in-fact trigger is compelled by the plain language of the policies, and it does not violate the objectively reasonable expectations of the parties or relevant policy considerations."⁴⁰⁶

Where harm results from discrete, identifiable events, or where contamination ceases prior to a particular policy's inception, the actual injury trigger limits coverage to the policy in effect when contaminants or pollutants were first discharged. Harm persisting into subsequent policy periods relates back to the initial policy period.⁴⁰⁷ If harm results from diverse causes over successive years, the date of actual injury may not be limited to a single policy period.⁴⁰⁸

3. The "Manifestation" Trigger

Those courts employing the "manifestation" trigger hold that bodily injury or property damage occurs when a latent disease or defect manifests itself. The policy in effect when the injury or damage is discovered, or reasonably should be discovered, is thus triggered. The manifestation trigger has been widely adopted.⁴⁰⁹ The manifestation trigger results in

1986); *American Home Prods. Corp. v. Liberty Mut. Ins. Co.*, 748 F.2d 760, 763 (2d Cir. 1984); *see, e.g., Cortland Pump & Equip., Inc. v. Firemen's Ins. Co.*, 604 N.Y.S.2d 633 (App. Div. 1993), *appeal denied*, 640 N.E.2d 147 (N.Y. 1994).

405. 875 P.2d 894 (Haw. 1994).

406. *Id.* at 915; *see also St. Paul Fire & Marine Ins. Co. v. McCormick & Baxter Creosoting Co.*, 870 P.2d 260, 264-65 (Or. Ct. App.), *modified*, 875 P.2d 437 (Or. 1994) (discussing policy language).

407. *See Boyce Thompson Inst. for Plant Research, Inc. v. Insurance Co. of N. Am.*, 751 F. Supp. 1137, 1142-43 (S.D.N.Y. 1990).

408. *Savoy Medical Supply Co. v. F & H Mfg. Corp.*, 776 F. Supp. 703, 709-10 (E.D.N.Y. 1991); *Uniroyal, Inc. v. Home Ins. Co.*, 707 F. Supp. 1368, 1379-90 (E.D.N.Y. 1988) (Agent Orange claims); *see also Diamond Shamrock Chems. Co. v. Aetna Cas. & Sur. Co.*, 609 A.2d 440, 455-56 (N.J. Super. Ct. App. Div. 1992) (applying New York law), *cert. denied*, 634 A.2d 528 (N.J. 1993).

409. *See, e.g., Chemstar, Inc. v. Liberty Mut. Ins. Co.*, 41 F.3d 429, 433-37 (9th Cir. 1994) (applying California law—property damage under liability policy); *Mraz v. Canadian Universal Ins. Co.*, 804 F.2d 1325, 1328 (4th Cir. 1986) (Maryland law); *Fireman's Fund Ins. Co. v. Aetna Cas. & Sur. Co.*, 273 Cal. Rptr. 431, 432-34 (Ct. App. 1990); *Wrecking Corp. of Am., Va., Inc. v. Insurance Co. of N. Am.*, 574 A.2d 1348, 1350 (D.C. 1990); *Transamerica Ins. Co. v. Safeco Ins. Co.*, 472 N.W.2d 5, 6-7 (Mich. Ct. App. 1991) (formaldehyde gas exposure); *Dorchester Dev. Corp. v. Safeco Ins. Co.*,

the narrowest coverage because it assigns the risk to the policy period when the harm was discovered or should have been discovered. Once the subject injury or damage manifests itself, subsequent policies cannot be triggered. The insurer on the risk at the time of manifestation bears the entire loss.⁴¹⁰

4. The "Continuous Trigger" or "Triple Trigger" Theory

The broadest coverage is afforded by application of a "continuous trigger" or "triple trigger." This theory was first expounded in *Keene Corp. v. Insurance of North America*.⁴¹¹ The continuous trigger theory implicates all policies from the date of first exposure through manifestation. It is called the "triple trigger" or sometimes the "*Keene* triple trigger" because it embraces the three other possible triggers: exposure, actual injury, and manifestation. Like the manifestation trigger, the continuous trigger has been widely adopted.⁴¹²

The continuous trigger theory is often thought to best accommodate the competing interests of insurers and insureds. As the court in *Owens-Illinois, Inc. v. United Insurance Co.*⁴¹³ observed in the progressive disease context: "[T]he continuous trigger theory best comports with what medical science teaches and what common sense dictates, that a disease begins with the onset of exposure and continues until the illness becomes manifest. It follows that insurance policies in place from exposure to manifestation are implicated and afford coverage."⁴¹⁴ The *Owens-Illinois* court's reasoning translates easily to environmental claims, such as those attributable to the discharge of pollutants over several years.

737 S.W.2d 380, 383 (Tex. Ct. App. 1987).

410. *Larkspur Isle Condominium Owners' Ass'n, Inc. v. Farmers Ins. Group*, 37 Cal. Rptr. 2d 3, 5-6 (Ct. App. 1994); *Cleveland Bd. of Educ. v. R.J. Sticke Int'l*, 602 N.E.2d 353, 356 (Ohio Ct. App. 1991), *cause dismissed*, 584 N.E.2d 743 (Ohio 1992).

411. 667 F.2d 1034, 1041 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 1007 (1982).

412. *See, e.g., New Castle County v. Continental Cas. Co. (CNA)*, 725 F. Supp. 800, 812-13 (D. Del. 1989) (Delaware law), *aff'd in part, rev'd in part sub nom. New Castle County v. Hartford Accident & Indem. Co.*, 933 F.2d 1162 (3d Cir. 1991); *Montrose Chem. Corp. v. Admiral Ins. Co.*, 5 Cal. Rptr. 2d 358, 363-69 (Ct. App.), *review granted*, 862 P.2d 661 (Cal. 1992); *United States Gypsum Co. v. Admiral Ins. Co.*, 643 N.E.2d 1226, 1256-57 (Ill. App. Ct. 1994) (property damage under CGL policy); *Owens-Illinois Inc. v. United Ins. Co.*, 650 A.2d 974, 995 (N.J. 1994); *J.H. France Refractories Co. v. Allstate Ins. Co.*, 626 A.2d 502, 507 (Pa. 1993); *see also Harford County v. Harford Mut. Ins. Co.*, 610 A.2d 286, 294-95 (Md. 1992) (manifestation is "not the sole trigger of coverage in environmental pollution cases" when CGL policy at issue).

413. 625 A.2d 1 (N.J. Super. Ct. App. Div. 1993), *cert. denied*, 639 A.2d 301 (N.J. 1994).

414. *Id.* at 26.

B. *Liability Insurance: Allocating Losses and Apportioning Defense Costs*

Different triggers may be applied to different types of injuries and property damage.⁴¹⁵ Additionally, losses spanning consecutive policy periods may not be confined to progressive disease cases (e.g., asbestos litigation) and environmental hazards. For example, claims of child sexual abuse and medical malpractice may implicate multiple policies. To the limited extent possible, general guidelines for allocating losses and apportioning defense costs must therefore be gleaned from a few illustrative cases.

1. Exposure Trigger

In *Gulf Chemical & Metallurgical Corp. v. Associated Metals & Minerals Corp.*,⁴¹⁶ the Fifth Circuit Court of Appeals determined the appropriate apportionment defense costs among a chemical manufacturer's five insurers.⁴¹⁷ Some 5000 workers sued the manufacturer, alleging that exposure to the latter's product, molybdenum, between 1946 and 1990 harmed them.⁴¹⁸ The *Gulf Chemical* court apportioned defense costs "according to the time that each insurer accepted the risk of exposure to Gulf's chemicals."⁴¹⁹ Specifically, the Fifth Circuit explained that liability for defense costs should be based on "(1) who sues Gulf (as opposed to who recovers damages from Gulf); (2) the time period [of] alleged exposure . . . ; and (3) the amount of effort required to defend Gulf"⁴²⁰ Because it could not determine the answers to these factors from the existing record, the court ordered the insurers to bear the costs equally.⁴²¹

Missouri adopted the exposure trigger in *Continental Casualty Co. v. Medical Protective Co.*⁴²² In *Continental Casualty*, three malpractice insurers sought declaratory judgment on the proper apportionment of a

415. *Trustees of Tufts Univ. v. Commercial Union Ins. Co.*, 616 N.E.2d 68, 75 (Mass. 1993).

416. 1 F.3d 365 (5th Cir. 1993).

417. *Id.* at 368. The chemical manufacturer appealed the district court's dismissal of its claim against three insurers. *Id.*

418. *Id.* at 367.

419. *Id.* at 372.

420. *Id.* at 373.

421. *Id.*

422. 859 S.W.2d 789 (Mo. Ct. App. 1993).

settlement that the insurers paid on a dentist's behalf.⁴²³ The plaintiff in the underlying action alleged that the dentist "failed to exercise ordinary skill and care throughout the course of her treatment," which spanned some forty-eight office visits between 1965 and 1985.⁴²⁴ Although none of the insurers' policies ever overlapped, "[t]he trial court, focusing on the 'other insurance' clauses contained in the policies . . . , ordered a pro rata allocation of the loss based upon the total of policy limit exposure of each company."⁴²⁵

The Missouri Court of Appeals reversed the trial court, first observing:

The provisions of liability insurance policies pertaining to the effect of other or additional liability insurance coverage for the same loss relate to concurrent coverage of a single occurrence. These policy provisions have no application to a loss resulting from series of occurrences over a period of time involving consecutive rather than concurrent insurance coverage.⁴²⁶

The court next observed that each of the insurers contracted to indemnify the dentist only for the period during which their respective policies were in effect.⁴²⁷ Accordingly, each insurer should not be held responsible for any actions of the insured prior or subsequent to the period of their respective coverage.⁴²⁸ Because the trial court's decision mandated the opposite result, it was therefore erroneous.⁴²⁹ The unfairness of the trial court's approach was most evident when the court considered that "[t]he risk to which each insurer is exposed and the premium it receives . . . are related more to the time of exposure than to the amount of coverage."⁴³⁰

The *Continental Casualty* court concluded that "[w]here a loss is caused . . . by a series of cumulative acts or omissions, . . . the fair method of apportioning the loss among consecutive insurers is by application of the 'exposure theory.'⁴³¹ The court then divided the settlement among the insurers in amounts proportionate to the number of days that each insurer was exposed to the risk.⁴³²

Finally, the court resolved the issue of defense cost apportionment.⁴³³ Because defense costs are an "inevitable concomitant of a claim for dam-

423. *Id.* at 790.

424. *Id.* at 790-91.

425. *Id.* at 791.

426. *Id.* (citations omitted).

427. *Id.*

428. *Id.*

429. *Id.*

430. *Id.* at 792.

431. *Id.*

432. *Id.*

433. *Id.* at 793. The three insurers stipulated to the amount of \$11,237.63 as a "reasonable cost of defense." *Id.*

ages," the court divided the amount in the same proportion that it divided the damage settlement.⁴³⁴

2. Actual Injury Trigger

The Supreme Court of Minnesota recently allocated liability for property damage under consecutive liability insurance policies in *Northern States Power Co. v. Fidelity & Casualty Co.*⁴³⁵ In *Northern States*, the groundwater was contaminated at two of the insured's coal-tar gasification facilities.⁴³⁶ The insured argued that all of its consecutive insurers were liable and that the "court should apportion liability" pro rata according to the respective policy limits.⁴³⁷ The court rejected this argument, noting that the appropriate theory in Minnesota to determine which consecutive policies have been triggered by an "occurrence" is the "actual injury" or "injury-in-fact" theory.⁴³⁸

The essence of the actual injury trigger theory is that each insurer is held liable for only those damages which occurred during its policy period; no insurer is held liable for damages outside its policy period. Where the policy periods do not overlap, therefore, the insurers are consecutively, not concurrently, liable. A "pro rata by limits" allocation method effectively makes those insurers with higher limits liable for damages incurred outside their policy periods and is therefore inconsistent with the actual injury trigger theory.⁴³⁹

The court then addressed the actual allocation of damages based on this theory.⁴⁴⁰

The *Northern States* court instructed the trial court to presume that damages were continuous beginning from the first damage to the time that damages were discovered or when cleanup occurred in those situations where damages span multiple policy periods.⁴⁴¹ The court further instructed that if an insurer claimed that no damage occurred during his respective policy period, the court determined that the insurer maintained the burden of proof on that fact.⁴⁴²

434. *Id.*

435. 523 N.W.2d 657, 658 (Minn. 1994).

436. *Id.* at 659.

437. *Id.* at 662.

438. *Id.*

439. *Id.*

440. *Id.*

441. *Id.* at 664.

442. *Id.* The court noted that an insurer becomes liable only upon "at least one [triggering] occurrence." *Id.*

In the instant case, the court found that there was no feasible method of determining when individual instances of pollution had occurred because the pollution was so continuous and repetitive.⁴⁴³ This "one continuing occurrence" satisfied the requisite triggering occurrence for each period of the applicable policy.⁴⁴⁴ Therefore, the court concluded that the proper method of allocating the total liability of the insurers was to base it on the length of time that each insurer was on the risk.⁴⁴⁵ The court explained its conclusion by example:

If . . . contamination occurred over a period of ten years, 1/10th of the damage would be allocable to the period of time that a policy in force for one year was on the risk and 3/10ths of the damage would be allocable to the period of time a three-year policy was in force.⁴⁴⁶

Because the insured had a self-insured retention under each of the triggered policies, the court held that the insurer bore the loss up to its retained limit under each triggered policy.⁴⁴⁷ The insurers then had to pay for amounts that exceeded the insured's retained limit for each policy "up to the policy limit for one occurrence."⁴⁴⁸

Northern States is a curious decision because the court essentially applied a continuous trigger even though it announced that it was applying an actual injury trigger. The court's *de facto* application of the continuous trigger no doubt stemmed from its determination that there was but a single continuing occurrence. Although the *Northern States* court's approach is not erroneous, it is intellectually dishonest to label it as actual injury theory. The court should have just stated that the continuous trigger applies to progressive losses, even though the actual injury trigger is Minnesota's first choice or standard. In fact, this was the approach the Hawaii Supreme Court took in *Sentinel Insurance Co., Ltd. v. First Insurance Co. of Hawaii*.⁴⁴⁹

3. Continuous Trigger

Among the most recent asbestos cases is *J.H. France Refractories Co. v. Allstate Insurance Co.*,⁴⁵⁰ in which the Supreme Court of Pennsyl-

443. *Id.* (citing *Uniroyal, Inc. v. Home Ins. Co.*, 707 F. Supp. 1368, 1383-85 (E.D.N.Y. 1988)).

444. *Id.*

445. *Id.*

446. *Id.*

447. *Id.*

448. *Id.*

449. 875 P.2d 894, 917-19 (stating that "where injury-in-fact occurs continuously over a period covered by different insurers or policies, and actual apportionment . . . is difficult or impossible to determine, the continuous injury trigger may be employed"), *appeal granted*, 879 P.2d 558 (Haw. 1994).

450. 626 A.2d 502 (Pa. 1993).

vania approved the continuous trigger theory of liability.⁴⁵¹ Using this theory, the court reversed the intermediate appellate court's decision to prorate liability based on "the amount of time each policy was in effect."⁴⁵² The court gave four reasons for its decision. First, the language of the policies required each insurer to "pay . . . all sums which the Insured shall become legally obligated to pay' . . . not merely some pro rata portion."⁴⁵³ Second, medical evidence contradicts the notion that asbestosis-related disease progresses linearly.⁴⁵⁴ Thus, it was logically inconsistent to apportion liability on a linear basis.⁴⁵⁵ Indeed, the court was unwilling to apportion liability based on a fictitious policy with unascertainable terms and limits.⁴⁵⁶ Finally, the insurers' policy defined "occurrence" to include "continuous or repeated exposure to conditions which result in bodily injury."⁴⁵⁷ The court explained that this definition entails liability for an entire loss because "additional exposure or injury . . . at times other than when the insurer was on the risk" is irrelevant "once the liability of a given insurer is triggered."⁴⁵⁸

Consistent with these reasons, the *J.H. France Refractories* court held that each and every one of the insurers who maintained a policy during the period of an asbestosis-related disease, or its evolution, is deemed a primary insurer.⁴⁵⁹ Additionally, the court allowed the insured to seek indemnity from its choice or combination of policies and to turn to any of the remaining insurers determined to be on the risk during the development of the disease once the insured exhausted the limits of the other policies.⁴⁶⁰

Finally, the court observed that its method for allocating loss affected neither the insurers' rights to contribution nor the validity of "other in-

451. *Id.* at 507. The court called the continuous trigger theory the "multiple trigger" theory. *Id.* at 506.

452. *Id.*

453. *Id.*

454. *Id.* at 508 (citing *Insurance Co. of N. Am. v. 48 Insulations, Inc.*, 633 F.2d 1212, 1214 (6th Cir. 1980) ("Asbestosis is a progressive disease And varies greatly from person to person.")).

455. *Id.* Third, it is a "legal fiction" to find the insured was self-insured during periods that it was uninsured and that the court should therefore include it as one of the insurers when the court apportions liability.

456. *Id.* (quoting *Keene Corp. v. Insurance Co. of N. Am.*, 667 F.2d 1039, 1048-49 (D.C. Cir. 1981)).

457. *Id.*

458. *Id.*

459. *Id.*

460. *Id.* at 508-09.

insurance" clauses.⁴⁶¹ Indeed, insurers remained free to seek reimbursement of "indemnification or defense costs . . . under 'other insurance' clauses or under the equitable doctrine of contribution."⁴⁶²

In *Zurich Insurance Co. v. Transamerica Insurance Co.*,⁴⁶³ a California appellate court applied the continuous trigger to progressive property damage claims made under third-party liability policies.⁴⁶⁴ The *Zurich* court rejected the manifestation trigger based on the definition of "occurrence" in the third-party liability context.⁴⁶⁵ The court reasoned that the manifestation trigger did not translate well to "a continuing series of loss causing events" that implicated liability coverages, even though a court might appropriately apply it in the first-party property insurance context.⁴⁶⁶

J.H. France Refractories and *Zurich* make clear that any insurer on a risk in continuous trigger jurisdictions initially faces liability up to its policy limits.⁴⁶⁷ Liability and defense costs must somehow be apportioned later. Unfortunately, "other insurance" clauses do not assist in any way because they apply only when there is concurrent coverage. If a court is to allocate liability and defense costs, it will most likely prorate based on purely equitable principles.⁴⁶⁸ The wild card, of course, is the method of proration. A court might simply allocate a loss through contribution by equal shares or straight contribution by limits, or a court might create a hybrid mechanism, such as prorating based on policy limits multiplied by years of coverage.

461. *Id.* at 509.

462. *Id.*

463. 34 Cal. Rptr. 2d 913 (Ct. App. 1994).

464. *Id.* at 922.

465. *Id.* at 921.

466. *Id.* at 922.

467. See *J.H. France Refractories Co. v. Allstate Ins. Co.*, 626 A.2d 502, 508-09 (Pa. 1993).

468. *Zurich Ins. Co. v. Transamerica Ins. Co.*, 34 Cal. Rptr. 2d 913, 923 (Ct. App. 1994).

C. A Single Occurrence v. Multiple Occurrences

When a loss spans several policy periods, insurers and insureds commonly question whether there is a single occurrence or multiple occurrences. Most courts have adopted the "causal approach" to determine whether particular events constitute one occurrence or multiple occurrences for purposes of insurance liability.⁴⁶⁹ Under the causal approach, so long as the injuries stem from one proximate cause there is a single occurrence.⁴⁷⁰

The single occurrence versus multiple occurrences question may come up in the context of environmental claims where pollutants are discharged over a period of years. Alleged multiple occurrences also may be an issue in medical malpractice cases where the plaintiff treats with the allegedly negligent physician over several months or years.⁴⁷¹ The question has recently and frequently been raised in disturbing cases of pedophilia.⁴⁷²

In *Interstate Fire & Casualty Co. v. Archdiocese of Portland in Oregon*,⁴⁷³ Interstate appealed the summary judgment granted to the Archdiocese.⁴⁷⁴ Nine years earlier, Fred Grgich sued the Archdiocese. Grgich asserted that he had been sexually molested from 1979 to 1983 by a

469. See, e.g., *Norfolk & W. Ry. v. Accident & Cas. Ins. Co.*, 796 F. Supp. 929, 936-37 (W.D. Va. 1992) (applying Virginia law); *Arizona Prop. & Cas. Ins. Guar. Fund v. Helme*, 735 P.2d 451, 456-57 (Ariz. 1987); *Travelers Indem. Co. v. Olive's Sporting Goods, Inc.*, 764 S.W.2d 596, 599 (Ark. 1989); *Mason v. Home Ins. Co.*, 532 N.E.2d 526, 529 (Ill. App. Ct. 1988), *appeal denied*, 537 N.E.2d 811 (Ill. 1989); *Lantier v. Aetna Cas. & Sur. Co.*, 614 So. 2d 1346, 1357 (La. Ct. App. 1993); *Bish v. Guaranty Nat'l Ins. Co.*, 848 P.2d 1057, 1058 (Nev. 1993); *Doria v. Insurance Co. of N. Am.*, 509 A.2d 220, 224 (N.J. Super. Ct. App. Div. 1986); *Voigt v. Riesterer*, 523 N.W.2d 133, 136-38 (Wis. Ct. App. 1994).

470. *Bish*, 848 P.2d at 1058.

471. See, e.g., *Doe v. Illinois State Medical Inter-Ins. Exch.*, 599 N.E.2d 983, 989-91 (Ill. App. Ct.), *appeal denied*, 606 N.E.2d 1225 (Ill. 1992); *Insurance Corp. of Am. v. Rubin*, 818 P.2d 389 (Nev. 1991); *National Chiropractic Mut. Ins. Co. v. Morgan*, 840 P.2d 732 (Or. Ct. App. 1992), *review denied*, 846 P.2d 1161 (Or. 1993).

472. See, e.g., *Society of the Roman Catholic Church of the Diocese of Lafayette and Lake Charles, Inc. v. Interstate Fire & Cas. Co.*, 26 F.3d 1359, 1363-67 (5th Cir.), *reh'g denied*, 29 F.3d 626 (1994); *Lee v. Interstate Fire & Cas. Co.*, 826 F. Supp. 1156, 1161-64 (E.D. Mo. 1993); *State Farm Fire & Cas. Co. v. Elizabeth N.*, 12 Cal. Rptr. 2d 327, 329-30 (Ct. App. 1992); *Worcester Ins. Co. v. Fells Acres Day Sch., Inc.*, 558 N.E.2d 958, 973-74 (Mass. 1990).

473. 35 F.3d 1325 (9th Cir. 1994).

474. *Id.* at 1326.

priest working for the Archdiocese.⁴⁷⁵ Father Laughlin, the priest, sexually molested children for many years.⁴⁷⁶ Laughlin's behavior was first reported in 1979 and complaints continued to be reported every year through 1983.⁴⁷⁷ The Archdiocese and Laughlin settled the Grgich suit for \$500,000.⁴⁷⁸

At all relevant times the Archdiocese maintained at least a \$50,000 self-insured retention (SIR).⁴⁷⁹ A first layer of excess coverage was provided by Underwriters at Lloyd's of London (Lloyd's), with a second layer excess policy provided by Interstate Fire & Casualty Company (Interstate).⁴⁸⁰ Interstate incorporated Lloyd's terms by using "following form" policies.⁴⁸¹ Interstate funded nearly \$350,000 of the Grgich settlement.⁴⁸² Interstate then sued the Archdiocese and Lloyd's for reimbursement of all funds that it contributed to the settlement.⁴⁸³ Interstate maintained that each molestation of Grgich was a separate occurrence.⁴⁸⁴ Alternatively, Interstate argued that each series of molestations in a single policy period constituted a single occurrence.⁴⁸⁵ Either way, Grgich's claims triggered coverage in each policy year; therefore, the Archdiocese's annual SIR's and the consecutive Lloyd's policies covered the entire loss.⁴⁸⁶

The district court concluded that Laughlin's molestation of Grgich during 1979-83 constituted a single occurrence.⁴⁸⁷ In determining whether the single occurrence triggered one or more policies, the court applied the "first encounter rule."⁴⁸⁸ Because Grgich was first molested in 1979, the court held that all claimed damages were covered under the policies in effect in 1979.⁴⁸⁹ Based on this theory the court did not allow Interstate reimbursement.⁴⁹⁰ The Ninth Circuit reversed.⁴⁹¹

The *Interstate Fire* court reasoned that while the standard policy definition of "occurrence" provides that multiple exposures attributable to

475. *Id.*

476. *Id.* at 1327.

477. *Id.*

478. *Id.*

479. *Id.*

480. *Id.*

481. *Id.*

482. *Id.*

483. *Id.*

484. *Id.*

485. *Id.* at 1327-28.

486. *Id.* at 1328.

487. *Id.*

488. *Id.*

489. *Id.*

490. *Id.*

491. *Id.* at 1331.

the same general conditions constitute a single occurrence, the policy's assuring clause made clear that this is true only of multiple exposures during the policy period.⁴⁹² Accordingly, Grgich's exposure to Laughlin in each of the four different policy periods constituted separate occurrences.⁴⁹³

The Archdiocese and Lloyd's argued that a finding of multiple occurrences would violate "the rule that an insurer cannot insure against a loss that has already begun."⁴⁹⁴ The court quickly disposed of this argument:

By positing that the entire series of molestations constituted a single "loss," as that term is used in the policies, this argument assumes what it seeks to prove. Here, there is distinct loss in each policy period because . . . each policy covers only damages arising from the molestations "happening during the period of Insurance." As the *Diocese of Lafayette* court reasoned in directly analogous circumstances: "A subsequent molestation, occurring outside the policy period, is not a consequential damage of the previous molestation; it is a new injury, with its own resulting damages." Because the loss under any given policy includes only damages stemming from molestations occurring within the policy period, and because there were distinct acts and distinct damages requiring indemnification in each policy period, this argument too must fail.⁴⁹⁵

In *Diocese of Winona v. Interstate Fire & Casualty Co.*,⁴⁹⁶ the parties agreed that six reported incidents of pedophilia by one priest over a period of eight years constituted "a single, continuing occurrence that spanned eight one-year policy periods."⁴⁹⁷ In *Diocese of Winona*, Aetna insured the Diocese when the plaintiff was first molested.⁴⁹⁸ The other two responsible insurers, Lloyd's and Interstate, argued that the damage should be deemed to have occurred at the time of the plaintiff's first encounter with the priest; thus, only Aetna's policy was triggered.⁴⁹⁹ Aetna argued that each consecutive policy covered only that portion of the plaintiff's injury that occurred during the policy period, such that "any damage award must be apportioned between the triggered policies."⁵⁰⁰

492. *Id.* at 1329-30.

493. *Id.* at 1330.

494. *Id.*

495. *Id.* (citations omitted).

496. 858 F. Supp. 1407 (D. Minn. 1994).

497. *Id.* at 1414.

498. *Id.* at 1413.

499. *Id.* at 1414.

500. *Id.*

The court rejected the argument that the majority of the plaintiff's injuries stemmed from the first incidence of abuse.⁵⁰¹ Based on the facts presented, the court found that the plaintiff continued to suffer additional personal injury as long as he endured the priest's abuse.⁵⁰² Because the single occurrence spanned multiple policy periods, the court reasoned that the damage had to be allocated between the policy periods according to when it happened.⁵⁰³ The court allocated damages on a monthly basis, since the priest abused the plaintiff during only parts of the first and last policy periods.⁵⁰⁴ Allocating damages on a monthly basis instead of an annual basis was said to be more than fair under the circumstances.⁵⁰⁵

A different situation was presented in *Washoe County v. Transcontinental Insurance Co.*⁵⁰⁶ The *Washoe* plaintiffs alleged that Washoe County (the County) negligently licensed the Papoose Palace Day Care Center (Papoose).⁵⁰⁷ A Papoose employee admittedly abused several children between May 1980 and his arrest in April 1983.⁵⁰⁸

The County eventually paid out \$406,000 to settle all the pending lawsuits.⁵⁰⁹ The County retained two insurers, Transcontinental Insurance Company and Columbia Casualty Company, to cover claims exceeding the County's \$50,000 retained limit.⁵¹⁰ When the carriers declined to indemnify the County for its settlements with the Papoose claimants, the County sued.⁵¹¹

The County argued that its liability stemmed from the single ongoing act of improper conduct in the licensing process.⁵¹² The failure to adequately investigate Papoose's qualifications led to dangerous conditions for the children attending Papoose.⁵¹³ In short, the County argued that all of the employee's acts of molestation constituted a single occurrence.⁵¹⁴ The insurers contended that the injuries to each child constituted separate occurrences per policy period because additional liability resulted each time a child was molested by a Papoose employee.⁵¹⁵

501. *Id.* at 1421.

502. *Id.*

503. *Id.* at 1423.

504. *Id.*

505. *Id.* at 1424.

506. 878 P.2d 306 (Nev. 1994).

507. *Id.* at 307.

508. *Id.*

509. *Id.*

510. *Id.*

511. *Id.*

512. *Id.*

513. *Id.*

514. *Id.*

515. *Id.*

Thus, the carriers reasoned, the \$50,000 injury limit had never been surpassed.⁵¹⁶ The trial court sustained the insurers' summary judgment motion, concluding that the molestation of each child was a separate occurrence.⁵¹⁷

The Supreme Court of Nevada reversed the trial court.⁵¹⁸ The *Washoe* court rejected the insurers' argument that the occurrence analysis necessarily focused on the Papoose employee's conduct.⁵¹⁹ The court found that an "occurrence" would be found under the "causal" approach only when it could be linked to the liability of the defendant.⁵²⁰ The court held that negligence in the County's licensing of Papoose caused all the acts of molestation.⁵²¹ The court concluded that the County's negligence in the licensing process, and its attendant investigation, constituted a single occurrence.⁵²² As the case was remanded in favor of the County, the carriers were obligated to indemnify the County for its settlements in the Papoose litigation.⁵²³

D. *The Special Problems of Property Insurance*

First-party property insurance cases are materially different from third-party liability cases. A property insurance policy is a contract under which "the insurer agrees to indemnify the insured in the event the insured property suffers a covered loss."⁵²⁴ Coverage under the policy encompasses specific losses or "perils."⁵²⁵ Property insurance policies consider "perils" to be losses due to "fortuitous" forces, such as "lightning, wind and explosion."⁵²⁶ First party contract cases depend on whether the policy explicitly or implicitly provides coverage for the claim.⁵²⁷ In contrast, coverage under a liability policy is predicated on the tort law of

516. *Id.*

517. *Id.*

518. *Id.*

519. *Id.* at 308.

520. *Id.* at 310.

521. *Id.* at 308.

522. *Id.*

523. *See id.* at 311.

524. *Garvey v. State Farm Fire & Cas. Co.*, 770 P.2d 704, 710 (Cal. 1989) (quoting Michael E. Bragg, *Concurrent Causation and the Art of Policy Drafting: New Perils for Property Insurers*, 20 FORUM 385, 386-87 (1985)).

525. *Id.*

526. *Id.*

527. *Id.*

negligence.⁵²⁸ Thus, liability insurance policies cover more risks than first-party policies.⁵²⁹

The leading case on loss allocation in the first-party property context is *Prudential-LMI Commercial Insurance v. Superior Court*.⁵³⁰ The *Prudential-LMI* plaintiffs built an apartment complex in 1971 and insured it successively with four different fire and property insurers over a fifteen-year period.⁵³¹ Prudential insured the building from October 1977 to October 1980.⁵³² The policy covered "all risks of direct physical loss," except for specific exclusions.⁵³³

Five years after the Prudential policy expired, the plaintiffs discovered that a large fissure had damaged the foundation. They filed a claim one month later.⁵³⁴ The plaintiffs' insurance broker informed all four insurance companies of the claim.⁵³⁵ Prudential's investigation found that the damage resulted from the stress of "expansive soil."⁵³⁶ Nearly two years after filing the claim, but before receiving a formal rejection, the plaintiffs sued the insurers on alternative theories of breach of contract, bad faith, breach of fiduciary duties and negligence.⁵³⁷

Prudential moved for summary judgment, claiming plaintiff could not prove that the loss occurred while Prudential insured the property.⁵³⁸ The trial court denied the insurer's motion.⁵³⁹ Prudential then petitioned the Court of Appeal for a writ of mandamus, arguing that the plaintiffs' claim failed under the policy's provision that suits must be brought within one year.⁵⁴⁰ The Court of Appeal agreed that the plaintiffs' claims were time-barred.⁵⁴¹ The property damage may have occurred over several years, and that may have influenced the appellate court's decision.⁵⁴² The court reasoned that "because it is often difficult to detect progressive property loss and such damage may occur over several policy periods without detection, equity demands an apportionment of damages between those insurers on the risk during the entire period of the

528. *Id.*

529. *Id.*

530. 798 P.2d 1230 (Cal. 1990).

531. *Id.* at 1233.

532. *Id.*

533. *Id.*

534. *Id.*

535. *Id.*

536. *Id.* at 1233-34.

537. *Id.* at 1234.

538. *Id.*

539. *Id.*

540. *Id.*

541. *Id.* at 1235.

542. *Id.* at 1234-35.

damage progressed.⁵⁴³ The court's apportionment of liability was one of the issues that the California Supreme Court was asked to review.⁵⁴⁴

The Court of Appeal had observed in dictum that the continuous trigger approach to liability should be applied.⁵⁴⁵ Because its policy period ended five years before the plaintiffs discovered the damage, Prudential contended that it should not be responsible for any portion of the loss.⁵⁴⁶ Prudential asserted that the "manifestation rule" of liability was reasonable.⁵⁴⁷ Under this rule, the insurer at the time of the discovery of a loss must pay the claim.⁵⁴⁸

The *Prudential-LMI* court agreed that the manifestation rule is appropriate in first-party claims because it provides a well-defined standard for insurers and claimants.⁵⁴⁹ Indeed, such a rule is in the public interest because without it, insurers could contest every claim.⁵⁵⁰ As the court explained:

[P]rior to the manifestation of damage, the loss is still a contingency under the policy and the insured has not suffered a compensable loss. Once the loss is manifested, however, the risk is no longer contingent; rather an event has occurred that triggers indemnity unless such event is specifically excluded Correspondingly, in conformity with the loss in progress rule, insurers whose policy terms commence after initial manifestation of the loss are not responsible for any potential claim relating to the previously discovered and manifested loss.⁵⁵¹

Using the time of manifestation of damage as a guide to liability satisfies an insured's reasonable expectations because his current insurance company indemnifies his loss.⁵⁵² The manifestation rule also benefits insurers because it clearly establishes the parameters of liability.⁵⁵³ Absent manifestation, insurers cannot be liable after their policies expire.⁵⁵⁴ Further, this predictability ultimately benefits insureds through lower premiums.⁵⁵⁵

543. *Id.*

544. *Id.* at 1232.

545. *Id.* at 1242-43.

546. *Id.* at 1243.

547. *Id.*

548. *Id.*

549. *Id.* at 1246-47.

550. *See id.*

551. *Id.* at 1246-47 (citations omitted).

552. *Id.* at 1247.

553. *Id.*

554. *Id.*

555. *See id.* at 1246.

The Supreme Court of Nevada took up the issue of apportionment among consecutive property insurers some two years later in *Jackson v. State Farm Fire & Casualty Co.*⁵⁵⁶ In *Jackson*, ground movement gradually damaged the plaintiff's house.⁵⁵⁷ The court's first task was to determine whether the damage occurred during State Farm's policy period.⁵⁵⁸ The court observed that although State Farm continuously insured the property, the coverage was renewed annually.⁵⁵⁹ State Farm argued that it was responsible for damage incurred only within the one-year period of the policy.⁵⁶⁰ The Jacksons contended that applying the continuous exposure rule was fair, while State Farm argued for adoption of the manifestation rule.⁵⁶¹

The *Jackson* court adopted the manifestation rule, agreeing with the *Prudential-LMI* court that this theory "promotes greater certainty in the insurance industry" and benefits consumers because it contains insurance costs and satisfies insureds' reasonable expectations.⁵⁶² In rejecting the continuous exposure approach, the court distinguished the extensive harm of the asbestos cases from ordinary damage claims.⁵⁶³ The tremendous need and widespread damage of the asbestos cases requires special consideration and does not affect the analysis of individual claims of "progressive property loss."⁵⁶⁴

Prudential-LMI and *Jackson* should reflect the majority view. Under the "known loss" or "loss in progress" rule,⁵⁶⁵ an insurer may insure only against contingent or unknown risks.⁵⁶⁶ An insurer cannot be liable

556. 835 P.2d 786 (Nev. 1992).

557. *Id.* at 787.

558. *Id.*

559. *Id.*

560. *Id.* at 788.

561. *Id.*

562. *Id.* at 789.

563. *Id.*

564. *Id.*

565. The "known loss" and "loss in progress" rules are not interchangeable. However, "[t]he only apparent difference between the two is that the known loss rule operates where the loss has occurred before the policy period commences while the loss-in-progress rule applies when the loss is imminent or still occurring when the policy becomes effective." *Sentinel Ins. Co. v. First Ins. Co. of Haw., Ltd.*, 875 P.2d 894, 919 (Haw. 1994), *order on consideration*, 879 P.2d 558 (Haw. 1994).

566. *Inland Waters Pollution Control, Inc. v. National Union Fire Ins. Co.*, 997 F.2d 172, 177-78 (6th Cir. 1993); *Continental Ins. Co. v. Beecham, Inc.*, 836 F. Supp. 1027, 1046 (D.N.J. 1993); *Zurich Ins. Co. v. Transamerica Ins. Co.*, 34 Cal. Rptr. 2d 913, 919 (Ct. App. 1994); *Sentinel Ins. Co.*, 879 P.2d at 558 (Haw. 1994); *Public Util. Dist. No. 1 of Klickitat County v. International Ins. Co.*, 881 P.2d 1020, 1030 (Wash. 1994); *City of Edgerton v. General Cas. Co.*, 493 N.W.2d 768, 786 (Wis. Ct. App. 1992), *aff'd in part, rev'd in part*, 517 N.W.2d 463 (Wis. 1994). As the Supreme Court of Illinois explained in *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 607 N.E.2d 1204

where damages occur and are apparent before its policy takes effect.⁵⁶⁷ The loss in progress rule corresponds naturally with the manifestation theory in that both seek to fix a time of loss.⁵⁶⁸ In contrast, the exposure theory attempts to allocate a loss along a continuum.⁵⁶⁹ The exposure trigger is thus wholly inconsistent with the known loss rule, which requires a specific reference point for any given loss. Indeed, the known loss rule is a "fundamental principle" of insurance law that provides that insurance is designed to only cover risks "which are not definitely known to the insured."⁵⁷⁰ The manifestation rule preserves this principle, but the exposure theory does not.

VIII. SELF-INSURANCE

When prospective insureds are sufficiently large or sophisticated, and particular levels or types of losses are predictable, potential losses become a cost rather than a risk.⁵⁷¹ Even if target losses are not totally predictable, the prospective insured may be in a financial position to bear some or all of the losses. Because risk transfer, such as purchasing insurance, entails transactional costs, deliberate risk retention may offer economic advantages.⁵⁷² An individual's or entity's deliberate decision to retain risk and forego insurance is known as "self-insurance."⁵⁷³ For ex-

(Ill. 1992):

By its very nature, insurance is fundamentally based on *contingent risks* which may or may not occur If the insured knows or has reason to know, when it purchases [an insurance] policy, that there is a substantial probability that it will suffer or has already suffered a loss, the risk ceases to be contingent and becomes a probable or known loss. Where the insured has evidence of a probable loss when it purchases [an insurance] policy, the loss is uninsurable under that policy (unless the parties otherwise contract) because the "risk of liability is no longer unknown."

Id. at 1210 (emphasis in original) (citations omitted).

567. See, e.g., *Outboard Marine Corp.*, 607 N.E.2d at 1210.

568. See *Zurich*, 34 Cal. Rptr. at 920-21 ("[T]he manifestation rule presupposes that the first party insured will be on site to observe the damage; it is in the nature of the discovery rule.").

569. See *id.* at 922. This theory is appropriate when there is "continuous and repeated exposure to a continuing series of loss-causing events." *Id.*

570. *Sentinel*, 875 P.2d at 919.

571. See *Barker*, *supra* note 3, at 352.

572. *Id.*

573. *Id.* *Packing Co. v. Commissioner of Internal Revenue*, 811 F.2d 1297 (9th Cir. 1987)). Insurance involves risk transfer and risk distribution. In *Clougherty Packing Co.*, the Ninth Circuit succinctly explained basic insurance theory:

ample, when a corporation's "losses" are a "certainty,"⁵⁷⁴ it may choose to self-insure. In such a case, the corporation would pay damage claims outright.

A. *Self-Insurance Mechanisms or Schemes*

"Self-insurance" can take many forms. Self-insurance mechanisms or schemes include: true self-insurance, or pure risk retention; the purchase of insurance with a self-insured retention; the purchase of fronting policies; and the purchase of policies with retrospective premiums.

1. True Self-Insurance

A corporation that truly self-insures retains all risks against which it might otherwise insure. For example, a corporation that self-insures instead of purchasing a CGL policy bears any judgments or settlements connected to property damage or bodily injury claims, as well as all related loss adjustment expenses.⁵⁷⁵ For these reasons, true self-insurance is usually reserved for the largest and wealthiest corporations. Many governmental entities, such as municipalities, counties and various ser-

Shifting risk entails the transfer of the impact of a potential loss from the insured to the insurer. If the insured has shifted its risk to the insurer, then a loss by or a claim against the insured does not affect it because the loss is offset by the proceeds of an insurance payment. Distributing risk allows the insurer to reduce the possibility that a single costly claim will exceed the amount taken in as a premium and set aside for the payment of such a claim. Insuring many independent risks in return for numerous premiums serves to distribute risk. By assuming numerous relatively small, independent risks that occur randomly over time, the insurer smoothes out losses to match more closely its receipt of premiums. Risk distribution incorporates the statistical phenomenon known as the law of large numbers. This law is reflected in the financial world by the diversification of investment portfolios and in the day-to-day world by the adage "Don't put all your eggs in one basket."

Clougherty Packing Co., 811 F. 2d at 1300 (citations omitted). Self-insurance includes no like elements or theories. There are also purely practical differences between insurance and self-insurance. For example, insurance premiums are deductible, while deposits into self-insurance reserves are not. *Id.*

574. Barker, *supra* note 3, at 352.

575. Loss adjustment expenses may be described as "allocated" or "unallocated." Allocated loss adjustment expenses are those costs and expenses that can be allocated to a specific claim because they are incurred in its adjustment, appraisal, investigation, settlement or defense. Examples include attorneys' fees and expenses, investigators' or experts' fees and expenses, court costs, bonds, post-judgment interest, etc. Unallocated loss expenses are attributable to the cost of operating and maintaining a claims department. See Thomas R. Newman, *Excess Liability Over Self-Insured Retentions*, 44 FED'N INS. & CORP. COUNS. Q. 127, 127 n.3 (1994).

vice districts, also self-insure. Governmental entities often choose risk retention because of the prohibitive cost of liability insurance for their activities or operations, or because the purchase of liability insurance operates as a waiver of sovereign or statutory immunity.

2. Self-Insured Retentions

A corporation may purchase liability insurance covering less than its entire possible exposure and retain the remaining risk. The dollar amount of potential losses retained or borne by the corporation is referred to as its "self-insured retention," or "SIR." When an SIR is under an excess or umbrella policy, it is commonly referred to as the "retained limit."⁵⁷⁶

Although deductibles and SIR's may appear superficially analogous, there are significant differences between the two. First, when an implicated policy includes an SIR, the full policy limits are available once the SIR has been satisfied. A deductible, on the other hand, is subtracted from the policy limits, thereby reducing an insurer's indemnity obligation. Second, should an insured with a deductible become insolvent, the insurer must satisfy the deductible as part of its obligation to pay losses up to its limit of liability. With an SIR, the impact of the insured's insolvency usually is felt by the claimant—not the insurer. The insured remains obligated to pay the amount of its SIR directly to the claimant, and the insurer is liable only for that portion of the loss exceeding the SIR. Finally, when a liability policy includes an SIR, the insured generally adjusts claims, either directly or through a third-party administrator. With a deductible, however, the insurer retains control of claims handling.

3. Fronting Policies

"Fronting" refers to the issuance of an insurance policy under which the insured is left to administer all claims and agrees to reimburse the insurer for all settlements or judgments paid. Fronting policies do not indemnify the insured, and they are usually issued to satisfy state financial responsibility laws. Fronting policies satisfy state financial responsibility laws by guaranteeing third parties that their claims against the insured

576. *See, e.g.,* Coleman Co. v. California Union Ins. Co., 960 F.2d 1529, 1533 (10th Cir. 1992); Kennerly v. State, 580 A.2d 561, 566 (Del. 1990); Columbia Cas. Co. v. City of Des Moines, 487 N.W.2d 663, 663 (Iowa 1992); Chase Resorts, Inc. v. Safety Mut. Cas. Corp., 869 S.W.2d 145, 148 (Mo. Ct. App. 1993).

will be paid. The insurer essentially functions as a surety relative to the insured's ability to pay covered claims.⁵⁷⁷

4. Retrospective Premiums

A risk may be insured under a policy with a retrospective premium feature. In other words, premium cost is determined annually based on the insured's losses in the previous year, or "claim experience."⁵⁷⁸ Retrospectively-rated policies operate simply: the parties establish an annual premium at the inception of coverage based on estimated losses for the ensuing policy year. If the actual losses incurred during the policy period are less than estimated, the insured receives a partial premium rebate. If actual losses are greater than the insurer estimated, the insured is charged an additional premium.⁵⁷⁹ The retrospective premium is a percentage of the losses, often coupled with some portion of defense costs or a charge for claims administration. Retrospective premiums are commonly encountered in workers' compensation insurance policies.⁶⁰⁰

B. *Self-Insurance as "Other Insurance"*

1. Self-Insurers v. Insurers in the Liability Insurance Context

As self-insurance has increased in popularity, liability insurers have frequently attempted to compel self-insureds to share indemnity obligations pursuant to the "other insurance" clauses in the insurers' policies. The question then becomes, do self-insurance mechanisms or schemes constitute "other valid and collectible insurance"? Several jurisdictions hold that where "self-insurance" is pure risk retention, an SIR, or participation in some sort of governmental risk retention pool, self-insurance is not "other insurance."⁶⁰¹

577. See *Columbia Cas. Co.*, 282 Cal. Rptr. at 397.

578. See *National Sur. Corp. v. Fast Motor Serv., Inc.*, 572 N.E.2d 1083, 1085 (Ill. App. Ct. 1991).

579. *Travelers Indem. Co. v. Howard Elec. Co.*, 879 P.2d 431, 433 (Colo. Ct. App. 1994); *Corrado Bros., Inc. v. Twin City Fire Ins. Co.*, 562 A.2d 1188, 1190 (Del. 1989); *Transit Cas. Co. v. Topeka Transp. Co.*, 663 P.2d 308, 309 (Kan. Ct. App. 1983); *Port E. Transfer, Inc. v. Liberty Mut. Ins. Co.*, 624 A.2d 520, 520-21 (Md. 1993).

580. See, e.g., *Security Officers Serv., Inc. v. State Compensation Ins. Fund*, 21 Cal. Rptr. 2d 653 (Ct. App. 1993); *Deerfield Plastics Co. v. Hartford Ins. Co.*, 536 N.E.2d 322 (Mass. 1989).

581. See *St. John's Regional Health Ctr. v. American Cas. Co.*, 980 F.2d 1222, 1224-26 (8th Cir. 1992) (Missouri law); *Wake County Hosp. Sys., Inc. v. National Cas. Co.*, 804 F. Supp. 768, 777 (E.D.N.C. 1992), *aff'd*, 996 F.2d 1213 (4th Cir. 1993) (addressing issue of first impression under North Carolina law); *Universal Underwriters Ins. Co. v. Marriott Homes, Inc.*, 238 So. 2d 730, 732 (Ala. 1970); *Hillsborough County Hosp. & Welfare Bd. v. Taylor*, 546 So. 2d 1055, 1057-58 (Fla. 1989); *Ponder v. Fulton-DeKalb*

*Wake County Hospital System, Inc. v. National Casualty Co.*⁵⁸² is a representative case. The plaintiffs in *Wake County* sued the hospital and its employee, nurse Sharon Sarvey, for medical malpractice in connection with Sarvey's neonatal care of an infant.⁵⁸³ The hospital had liability insurance with St. Paul Fire & Marine, with a \$750,000 per person/per event SIR and a \$1,000,000 annual aggregate SIR.⁵⁸⁴ Sarvey had a separate policy with National Casualty that did not have a deductible.⁵⁸⁵ Sarvey's National Casualty policy included an excess "other insurance" clause.⁵⁸⁶ The suit was settled for less than the hospital's \$750,000 per event SIR, with National Casualty and the hospital funding the settlement.⁵⁸⁷ The parties reserved their rights to litigate coverage issues.⁵⁸⁸ The hospital later sued National Casualty seeking a declaratory judgment that Sarvey's policy with National Casualty was primary, and provided exclusive coverage for the settlement.

The hospital contended that its SIR did not constitute "other valid and collectible insurance" as that phrase was used in Sarvey's policy with National Casualty.⁵⁸⁹ The hospital argued that National Casualty's "other insurance" clause applied only to other insurance policies and not to its SIR.⁵⁹⁰ The hospital further argued that its SIR was not insurance at all because (1) the hospital received no premiums or payments; (2) a risk of loss was never shifted; (3) the hospital was not in the business of insur-

Hosp. Auth., 353 S.E.2d 515, 517 (Ga.), *cert. denied*, 484 U.S. 863 (1987); *State v. Continental Cas. Co.*, 879 P.2d 1111, 1114-18 (Idaho 1994); *Aetna Cas. & Sur. Co. v. James J. Benes & Assocs., Inc.*, 593 N.E.2d 1087, 1092-93 (Ill. App. Ct.), *appeal denied*, 602 N.E.2d 445 (Ill. 1992); *Eakin v. Indiana Intergovernmental Risk Mgt. Auth.*, 557 N.E.2d 1095, 1098 (Ind. Ct. App. 1990); *Morgan v. City of Ruleville*, 627 So. 2d 275, 280-81 (Miss. 1993); *American Nurses Ass'n v. Passaic Gen. Hosp.*, 471 A.2d 66, 69-71 (N.J. Super. Ct. App. Div.), *aff'd in part, rev'd in part*, 484 A.2d 670 (N.J. 1984); *In re Mission Ins. Co.*, 816 P.2d 502, 505-06 (N.M. 1991); *Cone Mills Corp. v. Allstate Ins. Co.*, 443 S.E.2d 357, 360-61 (N.C. Ct. App.) (adopting the *Wake County* court's reasoning), *review allowed*, 448 S.E.2d 518 (N.C. 1994); *Physicians Ins. Co. v. Grandview Hosp. & Medical Ctr.*, 542 N.E.2d 706, 707 (Ohio Ct. App. 1988); *In re Request for Opinion of Supreme Court*, 379 N.W.2d 822, 827 (S.D. 1985); *City of Laramie v. Facer*, 814 P.2d 268, 270-71 (Wyo. 1991).

582. *Wake County*, 804 F. Supp. 768.

583. *Id.* at 770-71.

584. *Id.* at 770.

585. *Id.*

586. *Id.*

587. *Id.*

588. *Id.*

589. *Id.*

590. *Id.*

ance; and (4) the hospital was not subject to the statutory requirements imposed on ordinary insurers.⁵⁹¹

National Casualty contended that the hospital had a contractual obligation to defend and indemnify Sarvey as a third-party beneficiary under its St. Paul policy for claims up to \$750,000.⁵⁹² This contractual obligation constituted "other insurance" for purposes of National Casualty's policy.⁵⁹³ Essentially, National Casualty argued that because St. Paul had a duty to defend and indemnify Sarvey for any claim in excess of \$750,000, the hospital had a similar obligation to Sarvey under the St. Paul policy for any claim under \$750,000 arising out of her employment.⁵⁹⁴ National Casualty further argued that the hospital should not be allowed to shift a risk that the hospital accepted and for which it received a benefit.⁵⁹⁵ In other words, it would be inequitable to allow the hospital to saddle National Casualty with a loss that the hospital promised to cover and for which it received the economic benefit of reduced premiums.⁵⁹⁶

The *Wake County* court sustained the hospital's summary judgment motion.⁵⁹⁷ The court reasoned:

[T]he plain and ordinary meaning of the term "insurance" contemplates a written contract—an insurance policy—issued by one individual or entity to compensate another for loss in exchange for a premium [U]nder a self-insurance scheme, no written insurance policy is issued by another individual or entity nor is a premium paid because obviously a business which is self-insured does not need to pay itself to protect against its own risk of loss.

National argues that [the hospital] was contractually obligated to defend and indemnify Sarvey for claims up to \$750,000, and that this contractual obligation constitutes "other insurance." . . . [W]hatever contractual obligation Wake had to Sarvey, [it] does not fall within the plain and ordinary definition of insurance as the term is used in National's policy. Wake did not issue an insurance policy to Sarvey, nor did Sarvey pay a premium to Wake for any benefit or protection against loss. *Because Wake had a self-insured retention of \$750,000, it was essentially uninsured for that amount. As a result, Wake cannot be viewed as having "insurance," as that term is plainly and ordinarily used, since it had no insurance for valid claims made which were under \$750,000.*⁵⁹⁸

The general rule stated in *Wake County* may be inapplicable in the automobile liability insurance context. State financial responsibility laws making liability insurance compulsory, coupled with many corporations' (especially car rental agencies) decisions to self-insure, have made delib-

591. *Id.* at 770-71.

592. *Id.* at 771.

593. *Id.*

594. *Id.*

595. *Id.*

596. *Id.*

597. *Id.* at 775.

598. *Id.* (emphasis added).

erate risk retention the "functional equivalent" of liability insurance.⁵⁹⁹ Pure self-insurance and SIR's are typically held to be "other valid and collectible insurance" in the automobile liability context.⁶⁰⁰

In *Hillegass v. Landwehr*,⁶⁰¹ plaintiff Donald Hillegass was injured when his car collided with a car driven by defendant Gregory Landwehr.⁶⁰² Landwehr was driving a Burlington Air Express (BAE) company car.⁶⁰³ At the time, BAE was self-insured up to \$1,000,000 and had a \$2,000,000 umbrella policy with Protective Insurance Company.⁶⁰⁴ Landwehr had his own policy with Farmers Insurance Exchange.⁶⁰⁵ The trial court concluded that BAE's self-insurance was other valid and collectible insurance within the meaning of Farmer's "other insurance" clause and determined that BAE was primarily liable.⁶⁰⁶ BAE appealed the trial court's entry of summary judgment.⁶⁰⁷

On appeal, BAE argued that because "insurance" involves the contractual shifting of risk in exchange for premiums, there necessarily must be a third-party insurer to implicate an "other insurance" clause in a concurrent policy.⁶⁰⁸ The *Hillegass* court summarily rejected BAE's argument:

599. *McClain v. Begley*, 465 N.W.2d 680, 682 (Minn. 1991); *White v. Howard*, 573 A.2d 513, 515 (N.J. Super. Ct. App. Div.), *cert. denied*, 585 A.2d 354 (N.J. 1990).

600. *See Clark v. DS Rentco, Inc.*, 854 P.2d 1219, 1220 (Ariz. Ct. App. 1993); *Grand Rent A Car Corp. v. 20th Century Ins. Co.*, 31 Cal. Rptr. 2d 88, 91-95 (Ct. App. 1994); *Barnes v. Whitt*, 852 P.2d 1322, 1325-26 (Colo. Ct. App. 1993); *Stop & Shop Cos. v. Gonzales*, 619 A.2d 896, 898-99 (Del. 1993); *Allstate Ins. Co. v. Ellassal*, 512 N.W.2d 856, 858-59 (Mich. Ct. App. 1994); *McClain v. Begley*, 465 N.W.2d 680, 682 (Minn. 1991); *White v. Howard*, 573 A.2d 513, 515-16 (N.J. Super. Ct. App. Div.), *cert. denied*, 585 A.2d 354 (N.J. 1990); *Gutman v. Worldwide Ins. Co.*, 630 A.2d 1263, 1265 (Pa. Super. Ct. 1993); *Wright v. Smallwood*, 419 S.E.2d 219, 220-21 (S.C. 1992); *National Farmers Union Prop. & Cas. Co. v. Bang*, 516 N.W.2d 313, 319 (S.D. 1994); *Hartford Cas. Ins. Co. v. Budget Rent-A-Car Sys., Inc.*, 796 S.W.2d 763, 769 (Tex. Ct. App. 1990); *Hillegass v. Landwehr*, 499 N.W.2d 652, 656-56 (Wis. 1993). *Contra* *Budget Rent-A-Car Sys., Inc. v. Taylor*, 626 So. 2d 976, 978-79 (Fla. Dist. Ct. App. 1993); *Hearty v. Harris*, 574 So. 2d 1234, 1237-38 (La. 1991); *Kyrkos v. State Farm Mut. Auto. Ins. Co.*, 852 P.2d 1078, 1081 (Wash. 1993).

601. 499 N.W.2d 652 (Wis. 1993).

602. *Id.* at 653.

603. *Id.*

604. *Id.*

605. *Id.*

606. *Id.*

607. *Id.*

608. *Id.* at 654-55.

We reject Burlington's attempt to impose an implicit contract requirement not specified . . . and instead look to the nature of "self-insurance" in the instant case Whereas contractual insurance policies involve a third-party insurer underwriting the insured's risk in exchange for premium payments, self-insurers retain their own risk in exchange for not paying premiums. The parties implicated in the risk-shifting may change depending on the particular arrangement, but the essence of the transaction remains the same: exchanging future liability for premium payments. In the words of the [trial] court: "self-insurance is just a form of insurance . . . the modifying term 'self' just indicates where it emanates"

In the instant case, Burlington Air Express chose to retain its own risk for the first \$1 million rather than pay premiums to a third-party insurer. In so deciding, Burlington was able to exercise its business discretion in devising a scheme of risk management that it considered most advantageous. A different company might have reached a contrary conclusion and contracted for coverage with a third-party insurer.⁶⁰⁹

The court also rejected BAE's argument on public policy grounds.⁶¹⁰ The court chiefly embraced Farmers' argument that it would be "fundamentally unfair" and contrary to the legislative intent expressed in Wisconsin's financial responsibility law "to permit companies such as [BAE] to self-insure and thereby escape both the expense of premium payments and the possibility of being held liable as [a] primary insurer."⁶¹¹

The *Hillegass* court concluded that "[t]he phrase 'other collectible insurance' necessarily embraces all forms of insurance, including self-insurance."⁶¹² The court did not address BAE's final argument that Farmers might have drafted a more detailed "other insurance" clause, presumably addressing self-insurance.⁶¹³

It is currently impossible to state a general rule governing the application of "other insurance" clauses to self-insurance. While a number of courts have held that pure risk retentions, SIR's and governmental risk retention pools are not "insurance,"⁶¹⁴ the issue apparently remains undecided in many jurisdictions. In some instances controlling documents for government risk retention pools and other self-insurance mechanisms may so strongly resemble insurance policies that courts are compelled to treat them accordingly.⁶¹⁵ Too few courts have spoken to declare safely

609. *Id.* at 655.

610. *Id.*

611. *Id.*

612. *Id.* at 656.

613. *Id.*

614. *See, e.g.,* *Waire v. Joseph*, 825 S.W.2d 594, 596-97 (Ark. 1992); *City of Gary v. Allstate Ins. Co.*, 612 N.E.2d 115, 118-19 (Ind. 1993); *Coltey v. New England Tel. & Tel. Co.*, 600 A.2d 940, 941-42 (N.H. 1991); *Blackwelder v. City of Winston-Salem*, 420 S.E.2d 432, 435 (N.C. 1992); *Ellis v. Rhode Island Pub. Transit Auth.*, 586 A.2d 1055, 1058 (R.I. 1991).

615. *See, e.g.,* *Strength v. Alabama Dept. of Fin.*, 622 So. 2d 1283, 1284-89 (Ala.

a majority position. Coupled with that relative lack of precedent and the need for fact-specific inquiry is the growing contrary position in the automobile liability context. While the automobile liability cases have been decided in the shadow of financial responsibility laws, it would be imprudent to think that a doctrinal leap to CGL policies is out of the question. For example, there is no reason to believe that *Hillegass* should be limited to automobile liability policies, or that it does not generally state Wisconsin law. After all, the *Hillegass* court's broad statement that "[t]he phrase 'other collectible insurance' necessarily embraces all forms of insurance, including self-insurance,"⁶¹⁶ is in no way restricted to automobile liability policies.

Retrospectively-rated policies present a simpler situation. The fact that an insurer charges retrospective premiums does not alter the existence of a concurrent policy. The same is true with fronting policies. While a fronting policy may be more akin to a performance bond, and the fronting insurer more akin to a surety, such a policy is nonetheless "other insurance."

What should the law be? The better reasoned position is to hold that true self-insurance (*i.e.*, pure risk retention) and SIR's are other valid and collectible insurance within the meaning of an "other insurance" clause. Self-insurance is the functional equivalent of a liability insurance policy. Rather than paying premiums to an insurer to transfer risk, self-insureds retain risk in exchange for lower premiums, or no premiums. In both instances the transaction is the same: there is an exchange of potential liability for premium payments. Self-insurance is but one side of the same liability insurance coin. While there may be significant theoretical differences between insurance and self-insurance, there are no practical differences in the "other insurance" context.

Of course, from a competing insurer's perspective it *is* fundamentally unfair to allow a self-insurer that should be primarily liable to escape liability because it opts to retain its risk. To so hold is to accord self-insurers the dual benefit of no or reduced premiums, and freedom from liability. But the fairness argument does not work well when removed from the automobile liability forum. The business world is not a level playing field, and there is no factual or legal basis for an argument that self-insurers should be required to sacrifice themselves for insurers' economic benefit. Outside of financial responsibility laws, there is no public

1993).

616. *Hillegass*, 499 N.W.2d at 656.

policy favoring self-insureds' primary liability. Moreover, insurers wishing to reach self-insurers through their "other insurance" clauses need only specifically address self-insurance and SIR's in those clauses.⁶¹⁷ Insurers that fail to limit their coverage when drafting policies run the risk that courts will later construe provisions against them.⁶¹⁸

2. Self-Insurance as "Other Insurance" for Purposes of Determining Guaranty Fund Liability

Regardless of whether self-insurance constitutes "other insurance" when attempting to allocate losses between self-insurers and liability insurers, self-insurance may constitute "other valid and collectible" insurance for purposes of state guaranty fund liability in the face of an insurer's insolvency. *R.J. Reynolds Co. v. California Insurance Guaranty Ass'n*⁶¹⁹ is among the recent cases on the topic.

The R.J. Reynolds Company (Reynolds) hired Multi-Marketing, Inc. (MMI) to manage a special marketing program, including a racing tour.⁶²⁰ As part of the promotional contract, MMI agreed to provide liability insurance naming Reynolds as an additional insured for incidents arising on the tour.⁶²¹ MMI procured the required insurance from the Mission Insurance Companies (Mission).⁶²² MMI was provided a 1993 Nissan pickup truck by Reynolds for MMI's use during the tour.⁶²³ Reynolds was insured under an Aetna commercial automobile liability policy with retrospective premiums, while Nissan was insured under its own policy with the Insurance Company of North America (INA).⁶²⁴

A passenger in the Nissan truck, Tami Hetke, was injured while the truck was being driven by an MMI employee.⁶²⁵ Hetke sued Reynolds, MMI and Nissan.⁶²⁶ Reynolds tendered defense of the suit to Mission, which accepted the tender.⁶²⁷ Thereafter, Mission was declared insolvent.⁶²⁸ Mission's insolvency "triggered certain statutory obligations" of

617. See, e.g., *Nabisco, Inc. v. Transport Indem. Co.*, 192 Cal. Rptr. 207, 208-09 (Ct. App. 1983); *Edwards v. Saul*, 637 So. 2d 1258, 1261 (La. Ct. App.), writ denied, 643 So. 2d 161 (La. 1994).

618. See *Penalosa Co-op. Exch. v. Farmland Mut. Ins. Co.*, 789 P.2d 1196, 1200 (Kan. Ct. App. 1990).

619. 1 Cal. Rptr. 2d 405 (Ct. App. 1991).

620. *Id.* at 406.

621. *Id.*

622. *Id.*

623. *Id.*

624. *Id.*

625. *Id.*

626. *Id.*

627. *Id.*

628. *Id.*

the California Insurance Guarantee Association (CIGA), including the obligation to pay covered claims on policies with insolvent member insurers.⁶²⁹ CIGA refused to take over Mission's obligation to defend Reynolds and Nissan.⁶³⁰ CIGA asserted that because both Reynolds and Nissan had "other insurance" available to them, the Hetke suit was not a covered claim.⁶³¹

With Mission insolvent, and CIGA refusing to defend, Aetna assumed Reynolds' defense.⁶³² Aetna settled the case for \$804,192.⁶³³ Under the terms of its retrospectively rated policy, Reynolds was obligated to pay \$200,000 of the loss in its next Aetna premium.⁶³⁴ Faced with prospective liability of \$200,000, Reynolds filed a declaratory relief action against CIGA.⁶³⁵ Reynolds alleged that it was not insured for the first \$200,000 of the loss by virtue of its retrospectively rated policy and, thus, it was entitled to reimbursement of this amount from CIGA.⁶³⁶ The trial court entered summary judgment in CIGA's favor, concluding that Reynolds' retrospective Aetna policy was "other insurance" for CIGA's purposes.

The *Reynolds* court concluded that Reynolds' \$200,000 obligation to Aetna was not an SIR, but rather part of the premium payment Reynolds had agreed to pay for its Aetna policy. Accordingly, Reynolds was fully insured under its Aetna policy.⁶³⁷

Reynolds attempted to characterize its retrospective premium obligation as a plan whereby it paid a set premium and was then uninsured for losses up to \$200,000.⁶³⁸ The *Reynolds* court rejected this argument as "misleading."⁶³⁹ Rather:

[I]t appears from the language of the policy that the \$200,000, in the event of a loss during the rating period exceeding that amount, is but one component of the retrospective premium. Furthermore, REYNOLDS clearly elected to have the cost of its insurance rated retrospectively, thereby obtaining a substantial discount on the initial premium charged Had REYNOLDS contracted with AETNA to pay a standard premium in exchange for more comprehensive coverage . . . during the

629. *Id.* at 406-407.

630. *Id.* at 407.

631. *Id.*

632. *Id.*

633. *Id.*

634. *Id.*

635. *Id.*

636. *Id.*

637. *Id.* at 409.

638. *Id.* at 410.

639. *Id.*

policy period, CIGA would have no duty to reimburse REYNOLDS for that premium payment. We see no reason why a different result should obtain simply because REYNOLDS sought to minimize its cost of insurance by choosing [a] retrospective rating plan.⁶⁴⁰

A fronting arrangement was at issue in *North Dakota Insurance Guaranty Ass'n v. Agway, Inc.*⁶⁴¹ Agway, an incorporated farm supply and food marketing cooperative, formed a wholly-owned subsidiary insurer, Agway Insurance Company (AIC). Agway was then insured by AIC under a fronting policy. The Supreme Court of North Dakota rejected Agway's argument that it was a self-insurer and indicated that what appeared to be a premium paid to AIC was but a deposit in a self-insurance plan coupled with AIC's fee for plan administration.⁶⁴² The court concluded that the parties' conduct indicated a typical insurance transaction, and that their conduct was wholly consistent with an insurance contract.⁶⁴³ The AIC fronting policy constituted "other insurance," thus absolving the state guaranty fund of liability.⁶⁴⁴

There is appreciable authority for the contrary position; that is, self-insurance is not "other insurance" for guaranty fund purposes. In *Iowa Contractors Workers' Compensation Group v. Iowa Insurance Guaranty Ass'n*,⁶⁴⁵ the Supreme Court of Iowa concluded that a self-insured workers' compensation group was not an insurer, and that its claims were covered by Iowa's guaranty act.⁶⁴⁶ The Supreme Court of Louisiana held in *Bowen v. General Motors Corp.*⁶⁴⁷ that self-insurance "is not the equivalent of an insurance policy."⁶⁴⁸ Accordingly, the presence of a self-insurer did not preclude the plaintiff's recovery from the Louisiana Insurance Guaranty Association. The New Mexico supreme court reached the same conclusion in *In re Mission Insurance Co.*⁶⁴⁹ The self-insured employer in *In re Mission* "did not assume the risk of another,"⁶⁵⁰ and its risk retention therefore did not constitute insurance within the meaning of New Mexico's insurance guaranty act.⁶⁵¹ The absence of a third-party arrangement transferring risk again proved determinative in *Stamp v. Department of Labor and Industries*.⁶⁵² The *Stamp* court concluded

640. *Id.*

641. 462 N.W.2d 142 (N.D. 1990).

642. *See id.* at 144-45.

643. *Id.* at 145.

644. *Id.*

645. 437 N.W.2d 909 (Iowa 1989).

646. *Id.* at 915-18.

647. 608 So. 2d 999 (La. 1992).

648. *Id.* at 1003.

649. 816 P.2d 502 (N.M. 1991).

650. *Id.* at 505.

651. *See id.* at 505-06.

652. 859 P.2d 697 (Wash. 1993).

that a self-insured workers' compensation plan did not constitute "other insurance" for purposes of the Oregon guaranty act, or its nearly identical Washington counterpart.⁶⁵³

The results in *Reynolds* and *Agway* are not surprising. Regardless of whether a policy features retrospective premiums or reflects a fronting arrangement, it remains a policy of insurance. Courts' willingness to shield conventional self-insurers is more curious, since state insurance guaranty associations are insurers of last resort.⁶⁵⁴ However, pure risk retention and SIR's are not insurance, and they do not meet many guaranty acts' definitions of insurance.⁶⁵⁵

C. Existence, Scope and Extent of Coverage

Most coverage issues surrounding policies with SIR's are no different from the coverage issues attending conventional CGL policies. Occasionally, however, courts are called upon to resolve coverage issues unique to policies with self-insurance mechanisms.

1. Fact v. Extent of Coverage

The umbrella policy at issue in *Continental Casualty Co. v. Roper Corp.*⁶⁵⁶ contained two separate coverage provisions: Coverage A—Excess Liability Indemnity and Coverage B—Excess Liability Indemnity Over Retained Limit. Coverage A indemnified the insured "for loss in excess of the total applicable limits of liability of underlying insurance stated in the schedule."⁶⁵⁷ Coverage B indemnified the insured with respect to any occurrence "not covered by underlying insurance, or with respect to damages not covered by underlying insurance but which results from an occurrence covered by underlying insurance, for ultimate

653. *Id.* at 600-01.

654. *R.J. Reynolds Co. v. California Ins. Guar. Ass'n*, 1 Cal. Rptr. 2d 405, 408 (Ct. App. 1991); *Scordill v. Smith*, 635 So. 2d 407, 409 (La. Ct. App. 1994); *Ventulett v. Maine Ins. Guar. Ass'n*, 583 A.2d 1022, 1024 (Me. 1990); *Terminix Int'l Co. Ltd. Partnership v. Tennessee Ins. Guar. Ass'n*, 845 S.W.2d 772, 775 (Tenn. Ct. App. 1992).

655. *But see* *South Carolina Prop. & Cas. Ins. Guar. Ass'n v. Carolinas Roofing & Sheet Metal Contractors Self-Insurance Fund*, 446 S.E.2d 422, 424-25 (S.C. 1994) (noting self-insurance fund was "insurance," so it could not make claim against state guaranty association).

656. 527 N.E.2d 998 (Ill. App. Ct. 1988).

657. *Id.* at 999.

net loss in excess of the insured's retained limit⁶⁵⁸ The insured, Roper Corporation (Roper), had a primary policy with Columbia Casualty.⁶⁵⁹ The Columbia primary policy had limits of \$950,000 per occurrence with a \$1,000,000 aggregate in excess of Roper's \$50,000 per suit SIR.⁶⁶⁰

Columbia's liability limits for the 1975-76 policy year were exhausted while fifteen covered suits remained pending. Continental indemnified Roper for settlements and verdicts in excess of its SIR in all but two of the cases. One of those cases, *Webster*, became the subject of the decision.⁶⁶¹

The *Webster* plaintiff made a \$500,000 settlement demand. Continental offered to contribute \$50,000 toward settlement contingent upon Roper's payment of its \$50,000 SIR. Roper refused and the case went to trial. A jury returned a \$76,000 verdict against Roper, which Roper appealed on the issue of liability only.⁶⁶² While the appeal was pending the *Webster* plaintiff offered to settle for \$70,000, with \$50,000 coming in the form of Roper's SIR and \$20,000 being paid by Continental. Roper refused and prevailed on appeal, winning a new trial on liability *and* damages.⁶⁶³

Continental again asked Roper to settle the case within its SIR, or to send the \$50,000 to Continental and it would settle the case. Roper refused Continental's demand and the plaintiff increased his demand from \$70,000 to \$183,000. Roper took the case to trial, and the jury returned a \$214,000 verdict for the plaintiff.⁶⁶⁴

Roper then offered its \$50,000 SIR to Continental, while vowing to appeal. The judgment was affirmed on appeal. Roper then demanded that Continental satisfy the \$214,000 judgment plus post-judgment interest. Continental responded by sending Roper a \$20,000 check. Continental took the position that Roper had needlessly exposed it to greater risk by trying the case when it could have been settled for \$70,000. Accordingly, Roper was only entitled to the difference between its SIR and the reasonable settlement that Continental favored.⁶⁶⁵

Roper asserted that Continental "had the obligation and the opportunity to settle the case for \$70,000."⁶⁶⁶ In a declaratory judgment action, Roper contended that Continental's obligations were governed by Cover-

658. *Id.* at 999-1000.

659. *Id.* at 1000.

660. *Id.*

661. *Id.*

662. *Id.*

663. *Id.*

664. *Id.*

665. *Id.* at 1000-01.

666. *Id.* at 1001.

age B.⁶⁶⁷ Coverage B in the policy indemnified Roper in connection with occurrences or damages "not covered" by underlying insurance.⁶⁶⁸ Roper reasoned that because its primary Columbia policy was spent, the *Webster* claim was "not covered" and Coverage B applied.⁶⁶⁹ Continental maintained that Coverage A and Coverage B sections of the policy were mutually exclusive.⁶⁷⁰ According to Continental, Coverage A only "pick[ed] up indemnity obligations" when primary insurance is depleted, *i.e.*, it afforded Roper true excess coverage.⁶⁷¹ By comparison, Coverage B picked up "risks [and] damages not covered by underlying insurance."⁶⁷² Continental offered hypothetically that if underlying insurance did not cover punitive damages, its Coverage B umbrella would pay those damages.⁶⁷³

"[T]he trial court focused on the meaning of the phrase 'not covered by underlying insurance' in Coverage B.⁶⁷⁴ The court "concluded that the word 'coverage' means the sum of risks that an insurance policy covers."⁶⁷⁵ Therefore, because the *Webster* suit fell within "the underlying Columbia policy, Coverage A of the Policy applied when Columbia's coverage was exhausted."⁶⁷⁶ In other words, the trial court accepted Continental's argument "that the words 'coverage' or 'covered' refer to risks assumed, not ability to pay."⁶⁷⁷

The appellate court reasoned that only very specific risks were assumed by Continental under Coverage B: (1) "the risk that a certain occurrence will take place" for which there was no underlying coverage, or (2) the risk of some type of damage award that the underlying insurer did not cover.⁶⁷⁸ Columbia assumed the risk embodied in the *Webster* claim and the attendant damages and they were thus "covered," even though Columbia did not pay them because its policy was exhausted.⁶⁷⁹ In short:

667. *Id.*

668. *Id.*

669. *Id.*

670. *Id.*

671. *Id.*

672. *Id.*

673. *Id.*

674. *Id.* at 1001-02.

675. *Id.* at 1002.

676. *Id.* at 1001-02.

677. *Id.* at 1003.

678. *Id.*

679. *Id.*

[T]he phrase "not covered" as it appears in the Coverage B provision of the policy refers to the fact of coverage, not to the extent of coverage. Thus, in those circumstances, such as in *Webster*, where Columbia's underlying policy has assumed the risk of the occurrence and the risk of the damages at issue, coverage exists. When the extent of underlying coverage is exhausted, Coverage A, as an excess policy, picks up the liability.⁶⁸⁰

Therefore, Continental fully performed its obligations under Coverage A by tendering the \$20,000 difference between the plaintiff's settlement demand and Roper's SIR.⁶⁸¹ The *Roper* court affirmed the trial court's judgment for Continental.⁶⁸²

2. Scope of Coverage

In *United States Elevator Corp. v. Associated International Insurance Co.*,⁶⁸³ United States Elevator Corporation (USEC) had consecutive primary liability policies with Insurance Company of North America (INA).⁶⁸⁴ The INA policies had deductibles equalling their policy limits, so they were straight fronting and claims administration arrangements.⁶⁸⁵ The policy limits were usually \$500,000 per occurrence, but the products and completed operations hazards had a \$500,000 annual aggregate limit.⁶⁸⁶

USEC also had conventional excess insurance with Associated International Insurance Co. (Associated).⁶⁸⁷ "The Associated policies extended coverage to USEC for any losses or damages arising out of a *single occurrence* . . . which exceeded \$500,000," *i.e.*, the INA policy limits.⁶⁸⁸ The Associated policies also covered USEC for all losses "defined under the aggregate limit of the INA policy in excess of \$500,000."⁶⁸⁹ Associated knew INA's deductible limits when it issued its policies.⁶⁹⁰

USEC faced a number of suits alleging that its elevators were defective (termed "products cases"), or claims and suits alleging negligent maintenance and service of elevators (referred to as "service cases").⁶⁹¹ Both parties agreed that the products cases were subject to the \$500,000

680. *Id.* (emphasis added).

681. *Id.* at 1004-1005.

682. *Id.* at 1005.

683. 263 Cal. Rptr. 760 (Ct. App. 1989).

684. *Id.* at 761.

685. *Id.* at 762.

686. *Id.* at 761.

687. *Id.* at 762.

688. *Id.*

689. *Id.*

690. *Id.*

691. *Id.* at 763.

aggregate limit of the INA policies.⁶⁹² Associated would thus become responsible once total claims exceeded \$500,000.⁶⁹³ The dispute hinged on the service cases.⁶⁹⁴ Associated contended that service claims were not subject to the \$500,000 annual aggregate limit.⁶⁹⁵ Thus, INA (and USEC) were wholly liable unless a single service claim exceeded \$500,000, which none did.⁶⁹⁶

In defining the completed operations hazard, INA excluded certain operations that its manual classified as having completed operations coverage included in premises liability coverage.⁶⁹⁷ The latter coverage arguably included USEC's elevator and service operations.⁶⁹⁸ To the extent the somewhat obscure premises-completed operations provision applied, it operated to remove completed operations hazards from INA's aggregate limit, dramatically increasing USEC's liability under its INA fronting policies.⁶⁹⁹

USEC argued that the trial court should construe the ambiguous INA policies in its favor.⁷⁰⁰ USEC correctly reasoned that construing the ambiguous policies against the insurer, thus placing the completed operations hazard and the related service cases under the INA aggregate, would maximize its coverage by triggering Associated's excess coverage.⁷⁰¹ The trial court adopted USEC's position.⁷⁰²

The California Court of Appeal reversed.⁷⁰³ The normal construction of an ambiguous insurance policy against the drafter (INA) would work to USEC's detriment given the nature of the policies.⁷⁰⁴ Paradoxically, USEC could recover against Associated only if the court reversed normal rules of contract interpretation.⁷⁰⁵ USEC wanted the subject ambiguity construed in the *drafter's* favor.⁷⁰⁶ Unwilling to abandon traditional con-

692. *Id.*

693. *Id.* at 762.

694. *Id.* at 763.

695. *Id.*

696. *Id.*

697. *Id.* at 764.

698. *Id.* at 764-65.

699. *Id.* at 765.

700. *Id.*

701. *Id.*

702. *Id.*

703. *Id.*

704. *Id.* at 765-66.

705. *Id.* at 766.

706. *Id.*

tract principles, the court construed the INA policies against INA—and thus against USEC.⁷⁰⁷ Simply stated, the *United States Elevator* court was unwilling to stand contracts law on its head.

The court's adherence to basic rules of construction "require[d] that the services claims . . . be indemnified under the occurrence coverage" instead of the "aggregate coverage," the former coverage providing USEC the "broader benefit."⁷⁰⁸ USEC's "broader benefit" was only illusory, of course, having been wiped out in reality by the purchase or fronting policies.⁷⁰⁹

In *Ford Motor Co. v. Northbrook Insurance Co.*,⁷¹⁰ the issue was whether Ford's \$2,000,000 per occurrence SIR constituted "underlying insurances" within the meaning of Northbrook's first layer excess policy.⁷¹¹ If it did, the punitive damages exclusion operated to shield the upper layer excess carriers whose policies followed form.⁷¹² If not, the excess carriers were faced with at least \$12,000,000 in liability for punitive damages awarded in two cases.⁷¹³ The insurers contended that "self-insurance" was not "insurance," a position with which both the district and appellate courts disagreed.⁷¹⁴

The Sixth Circuit concluded that the applicable policy exclusion could be read as treating Ford's SIR as underlying insurance.⁷¹⁵ Second, Ford's SIR was set out in the schedule of underlying insurance in Northbrook's first-layer excess policy.⁷¹⁶ Finally, the "manifest purpose" of the subject exclusion was to prevent Northbrook from being required to drop down into the position of a primary insurer.⁷¹⁷ It therefore made no difference "whether the initial exposure was covered by self-insurance or a conventional policy of insurance, so long as the exposure was covered."⁷¹⁸

The practical construction adopted by the parties, who treated Ford's SIR as underlying insurance for purposes of the policy's limits of liability provisions, bolstered the *Ford Motor* court's reading of the exclusion.⁷¹⁹

707. *Id.*

708. *Id.*

709. *Id.* at 761-66.

710. 838 F.2d 829 (6th Cir. 1988) (applying Michigan law).

711. *Id.* at 831-32.

712. *Id.*

713. *Id.* at 831 n.1.

714. *Id.* at 832.

715. *Id.*

716. *Id.*

717. *Id.*

718. *Id.*

719. *Id.* at 833.

There was also abundant extrinsic evidence that Ford's SIR was to be treated as underlying insurance.⁷²⁰

IX. CONCLUSION

Courts and litigants have long been perplexed by "other insurance" issues. The circular riddle posed by conflicting "other insurance" clauses continues to be studied today. Even the straightforward, established conflict rules are often muddled by confusing policy language and complex facts. The attempted allocation of defense costs, the apportionment of losses over consecutive policies, and the continued development of self-insurance mechanisms or schemes only add to existing coverage confusion. Unfortunately, there are seldom easy answers or simple solutions to "other insurance," multiple insurance, and self-insurance problems. Courts in the same jurisdiction sometimes reach different conclusions on the same or substantially similar issues. In this "dimly lit underworld where many have lost their way,"⁷²¹ this Article hopes to shed some light.

720. *Id.*

721. *Insurance Co. of N. Am. v. Home & Auto Ins. Co.*, 628 N.E.2d 643, 644 (Ill. App. Ct. 1993).

