UNIVERSITY OF HOUSTON LAW CENTER
ADVANCED PERSONAL INJURY SEMINAR

DISPUTES AMONG INSURANCE CARRIERS

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I. SCOPE OF DISCUSSION

Disputes among insurance carriers encompass almost the same variety and scope as disputes among other entities or individuals. Nevertheless, there are many areas to which claims among carriers seem to gravitate. Those areas include disputes regarding subrogation, policies with "other insurance" clauses, declaratory judgment actions and cases in which negligent claims handling is alleged. This paper will focus on those four areas where carriers engage in conflicts with other carriers. This discussion regarding Stowers' claims or negligent claims handling is subsumed within the section on subrogation.

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III. SUBROGATION

A. Introduction

Subrogation is one of the most common claims brought by carriers against carriers. "The courts of Texas have always been peculiarly hospitable to the right of subrogation and have been in the forefront of upholding it." *McBroom-Bennett Plumbing, Inc. v. Villa France, Inc.*, 515 S.W.2d 32 (Tex. Civ. App.--Dallas 1974, writ ref'd n.r.e.); *Argonaut Ins. Co. v. Allstate Ins. Co.*, 869 S.W.2d 537 (Tex. App.--Corpus Christ 1993, writ denied). Subrogation is the right that one party has against a third-party for payment of a legal obligation that should have been paid by the third-party. Windt, 2 Insurance Claims & Disputes § 10.05, p. 128 (3rd ed. 1995). This means that the insurer, upon payment, is substituted for and "stands in the shoes" of the insured with respect to all rights, both substantive and procedural, that the insured possesses. Ostrager & Newman, Handbook on Insurance Coverage Disputes § 5.06[d][1], pp. 198-199 (8th ed. 1995).

The underlying justification for subrogation is to prevent the insured from receiving a double recovery. However, the doctrine of subrogation is given liberal application and is broad enough to include every instance in which one person, not acting voluntarily, has a paid a debt for which another was primarily liable and which in equity and good conscience should have been discharged by the latter. *Argonaut Ins. Co. v. Allstate Ins. Co.*, 869 S.W.2d 537, 541 (Tex. App.--Corpus

Christ 1993, writ denied), citing *Forney v. Jorrie*, 511 S.W.2d 379 (Tex. Civ. App.--San Antonio 1974, writ ref'd n.r.e.).

There are two kinds of subrogation in Texas: (i) conventional (or contractual) and (ii) legal or equitable. *Interfirst Bank of Dallas v. U.S. Fidelity & Guaranty Co.*, 774 S.W.2d 391 (Tex. App.--Dallas 1989, writ denied); *Foremost County Ins. Co. v. Home Indemnity Co.*, 897 F.2d 754, 761 (5th Cir. 1990), *reh'g denied* 902 F.2d 955 (5th Cir. 1990); *Texas Employer's Insurance Assoc. v. The Underwriting Members of Lloyds*, 836 F.Supp. 398, 403 (S.D. Tex. 1993). Equitable subrogation is applicable when one person acting involuntarily has paid a debt for which another was primarily liable unjustly enriching the latter. *Id*., citing *Godwin v. Pate*, 667 S.W.2d 201 (Tex. App.--Dallas 1983, writ ref'd n.r.e.). Equitable subrogation has been defined as "a legal fiction by force of which an obligation, extinguished by payment made to a third person, is treated as still subsisting for his benefit" or "the procedure by which the equitable rights of one person are worked out through the legal rights of another." *Texas Co. v. Miller*, 165 F.2d 111, 115 (5th Cir. 1947). Under the theory of equitable subrogation, the insurer paying a loss under a policy becomes subrogated to any cause of action the insured may have against at third-party causing the loss. *American Centennial Ins. Co. v. Canal Ins. Co.*, 843 S.W.2d 480, 482 (Tex. 1992). Equitable subrogation does not depend upon a contract but arises by implication in equity to prevent injustice. *Texas Employer's Insurance Assoc v. The Underwriting Members of Lloyds*, 836 F.Supp. 398, 404 (S.D. Tex. 1993). Texas courts have upheld an insurer's right to equitable subrogation even without privity between insurers. See, *Liberty Ins. Co. v. General Ins. Co.*, 517 S.W.2d 791 (Tex. Civ. App.--Tyler 1974, writ ref'd n.r.e.).

Insurance policies frequently contain subrogation clauses allowing the insurer to be subrogated to the insured's right of action against any person whose act or omission caused the loss or who was legally responsible to the insured for the loss caused by a wrongdoer. This right which is set forth in the policy is "conventional" or "contractual" subrogation. Windt, 2 Insurance Claims & Disputes § 10.05, p. 128 (3rd ed. 1995). Unless the contract indicates otherwise, contractual subrogation is examined within the framework of the doctrine of equitable subrogation and is subject to conformity with its principles. In conventional subrogation, the extent of the right is measured by the agreement for subrogation; equity will determine the rights of the parties by the contract, enforce the agreement and give the second or substituting creditor what he contracted for. *Id*. Stated another way, although the right of subrogation may be provided for by contract, the exercise of that right will have its basis in general principles of equity. 68 Tex. Jur. 3d Subrogation § 6 p. 54 (1989). Contracts that give insurers the right to subrogation "confirm, but do not expand the equitable subrogation rights of insurers." *Esparza v. Scott & White Health Plan*, 909 S.W.2d 548, 552 (Tex. App.--Austin 1995, writ denied) citing *Oss v. United Serv. Auto. Assn.*, 807 F.2d 457 (5th Cir. 1987).

There are a few differences between equitable and conventional subrogation. When pursuing a claim under equitable subrogation, the claim will be subject to equitable defenses. When pursuing a claim under contractual subrogation, the claimant does not have to prove that it was not a volunteer. Windt, 2 Insurance Claims & Disputes §10.05, pp. 128-9 (3rd ed. 1995). Under contractual subrogation, no balancing of equities is necessary to determine whether the subrogee has a right to recover at all. *Esparza*, 909 S.W.2d at 551, supra.

Subrogation has been used by carriers to, among other things, (1) recover defense costs, *Blue Ridge Ins. Co. v. Hanover Ins. Co.*, 748 F.Supp. 470 (N.D. Tex. 1990); (2) recover costs paid in settlement, *Foremost County Ins. Co. v. Home Indemnity Co.*, 897 F.2d 754 (5th Cir. 1990); and (3) allow the excess carrier to recover for negligent handling and defense by the primary carrier and its chosen counsel, *American Centennial Ins. Co. v. Canal Ins. Co.*, 843 S.W.2d 480, 482 (Tex. 1992). Subrogation is used by primaries against primaries, excess against primaries, and excess against excess carriers.

B. Claims Subject To Subrogation

The right of subrogation is not limited to cases founded in tort, but includes any right of the insured. Even the right to recover based on contract will pass to the insurer. *F.H. Vahlsing, Inc. v. Hartford Fire Ins. Co.*, 108 S.W.2d 947, 950 (Tex. Civ. App.--San Antonio 1937, writ dism'd); *Rushing v. International Aviation Underwriters*, 604 S.W.2d 239, 244 (Tex. Civ. App.--Dallas 1980, writ ref'd n.r.e.); *Duval County Ranch Co. v. Alamo Lumber Co.*, 663 S.W.2d 627, 636 (Tex. App.--Amarillo 1984, writ ref'd n.r.e.); *Highlands Ins. Co. v. New England Ins. Co., et al.*, 811 S.W.2d 272 (Tex. App.--San Antonio 1991, no writ); *Vesta Ins. Co. v. Amoco Production Co.*, 986 F.2d 981, 988 (5th Cir. 1993). The insurer may even recover attorney's fees where the insured would be entitled. *Liberty Ins. Co. v. General Ins. Co.*, 517 S.W.2d 791, 797 (Tex. Civ. App.--Tyler 1974, writ ref'd n.r.e.).

C. Insured Must Be Made Whole

The insured is entitled to be made whole before the insurer can recover under subrogation. *Ortiz v. Great Southern Fire & Casualty Ins. Co.*, 597 S.W.2d 342 (Tex. 1980). The insurer can only recover the excess collected from the tortfeasor after the insured is made whole. *Id.*; *Esparza*, 909 S.W.2d at 552, *supra*. The insurer should not "recover sums received by the insured from the tort source until the insured has been fully indemnified." *Oss v. United Serv. Auto. Assn.*, 807 F.2d 457, 460 (5th Cir. 1987) citing G. Palmer, Law of Restitution § 23.14 at 434 and n. 13 (1978).

D. Effect Of "No Action" Provision

An insurer is bound by a provision in a policy issued by another insurer providing that no action on the policy shall be sustainable unless commenced within a designated period after the cause of action accrues. *Insurance Co. of North America v. Fire Ins. Exchange*, 590 S.W.2d 642 (Tex. Civ. App.--Eastland 1979, writ ref'd n.r.e.).

E. Waiver Of Subrogation Rights

The insured's release or dismissal of the tortfeasor with prejudice destroys the insurer's subrogation rights. *United States Fidelity & Guaranty v. Cascio*, 723 S.W.2d 209 (Tex. App.--Dallas 1986, no writ); *Huttleston v. Beacon National Ins. Co.*, 822 S.W.2d 741 (Tex. App.--Fort Worth 1992, writ denied). For this reason, Texas courts have upheld the validity of standard consent clauses as a means of protecting the insurer's subrogation rights against any person legally responsible for the insured's injuries. *Id.*; *Ford v. State Farm Mutual Auto. Ins. Co.*, 550 S.W.2d 663, 666 (Tex. 1977).

The insurer's right of subrogation is not affected by the insured's settlement with or release if (i) the wrongdoer is given a release after the insurer has acquired subrogation rights and is aware of the insurer's rights, *Southern Pacific Transport Co. v. State Farm Mutual Ins. Co.*, 480 S.W.2d 59, 63 (Tex. Civ. App.--Corpus Christi 1972, no writ); or (ii) the settlement or release is not for damage not included in the policy coverage. *Triton Ins. Co. v. Garner*, 460 S.W.2d 262 (Tex. Civ. App.--Beaumont 1980, writ ref'd n.r.e.).

F. Subrogation By Excess Carrier

Where an insured maintains two policies in which one is excess and the other is primary, if the excess insurer pays the entire claim it is equitably subrogated to the rights of the insured against the primary. *Employers Casualty Co. v. Transport Ins. Co.*, 444 S.W.2d 606 (Tex. 1969); *CNA Lloyd's of Texas v. St. Paul Ins. Co.*, 902 S.W.2d 657 (Tex. App.--Austin 1995, no writ). See also, Anno. 31 A.L.R. 2d 1324 "Right to Subrogation, As Against Primary Insurer, of Liability Insurers Providing Secondary Insurance."

G. Elements Of Equitable Subrogation

There are two key elements to a claim for equitable subrogation: (1) that the party on whose behalf the claimant discharged the debt was primarily liable on the debt and (2) the claimant paid the debt involuntarily. *Argonaut Ins. Co. v. Allstate Ins. Co.*, 869 S.W.2d 537 (Tex. App.--Corpus Christi 1993, writ denied).

H. Defenses

Because a subrogation action is derivative, a defendant in such a case may assert any defense which he would have had in a suit brought by the subrogor. *Guillot v. Hix*, 838 S.W.2d 230 (Tex. 1992); Ostrager & Newman, Handbook on Insurance Coverage Disputes § 5.06[d][1], pp. 198-199 (8th ed. 1995). It follows that subrogation actions are subject to the same statute of limitations which would apply had the action been brought by the subrogor. *Utica Ins. Co. v. Pruitt & Cowden*, 902 S.W.2d 143 (Tex. App.--Houston [1st Dist.] 1995, no writ).

I. Assignment Compared To Subrogation

Subrogation arises equitably or by contract when the insurer pays a claim. Occasionally, however, an insurer will seek to bolster or expand its claim by taking an assignment from the insured upon payment of a claim. See, Windt, 2 Insurance Claims & Disputes § 10.20, p. 170-171 (3rd ed. 1995). As with subrogation, suit may be brought in the assignee's own name. An assignment passes legal title to the claim. However, as with subrogation, the assignee is subject to every defense which would have been valid against the assignor. See, 45 Tex.Jur.3d Insurance Contracts and Coverage § 510 p. 564-565 (1995).

Insurance policies typically have prohibitions against "assignability." However, the "non-assignability" clause really means that an insured cannot assign his coverage before a loss occurs. In *McLaren v. Imperial Casualty & Indemnity Co.*, 767 F.Supp. 1364 (N.D. Tex. 1991), the Court, discussing the "nonassignability" provision, stated that:

> "No Texas case has been cited by the parties and none has been found on this subject; however, the Court has no doubt that a Texas court would hold that the policy prohibition against assignment of an interest under the policy is inapplicable to the assignment of causes of action that have come into existence after the loss has occurred."

Id. at 1377. Thus, while the "non-assignability" provision prevents the insured from assigning coverage before loss, after loss, the insured can assign his rights under a policy.

See also *Hartford Casualty Ins. Co. v. Argonaut-Midwest Ins. Co.*, 854 F.2d 279 (7th Cir. 1988). In this case, an insurer accepted assignment of a cause of action against a medical malpractice co-defendant's insurer which refused to contribute towards settlement. The insurer obtaining the assignment paid an additional $1,000,000.00 to consummate the settlement. The insurer then brought an action to recover under the assignment. The Federal District Court found the assignment to be invalid as against public policy. However, on appeal,

the Seventh Circuit held that the physician's assignment to his insurer of a claim against a coinsurer did not violate public policy. The Appellate Court rejected the defendant insurer's argument that an insured should not be allowed to assign a claim that it has against one insurance company to another insurance company. Noting that the insured could have assigned his claim to the plaintiffs in the underlying malpractice claim, the Appellate Court stated that "there is a no reason to believe that allowing the present case to go forward will affect the propensity of insurance companies to settle their squabbles rather than incur the cost of trials." *Id*. at 281. In discussing the difference between subrogation and assignment, the Court noted that subrogation arises after a debt or claim has been paid. An assignment on the other hand, presupposes that the debt or claim has not been paid. In the circumstances of that suit, there was no difference whether the claim was prosecuted under assignment rather than subrogation. *Id*. at 282.

In *St. Paul Fire & Marine Ins. Co. v. Allstate Ins. Co.*, 25 Ariz.App. 309; 543 P.2d 147 (1975), a house suffered fire loss in the amount of $10,700.00. At the time of the fire, there was a valid insurance policy issued by Allstate that covered the fire loss. There was also a policy issued by St. Paul which covered the owners as "loss payees." St. Paul paid the fire loss, but Allstate refused to contribute. St. Paul then took an assignment from the owners. Interestingly, both insurance policies had pro-rata "other insurance" clauses.

St. Paul brought an action for recovery under the assignment. The trial court granted summary judgment in favor of Allstate. St. Paul appealed. Allstate argued that St. Paul acted as a volunteer in paying the entire loss, that the insureds no longer had an viable claim to assign to St. Paul and, therefore, St. Paul could not prosecute its action against Allstate. The Appellate Court rejected this argument. The Appellate Court held that St. Paul had a valid unpaid assignment of the claim against Allstate. The Arizona Court of Appeals held that:

> "After a loss has occurred and the rights under the policy have accrued, an assignment may be made without the consent of the insurer. The assignment is not regarded as a transfer of the policy itself, but rather as a chose in action."

The prohibition against assigning policies is based on the right of the insurer to chose its insured so as to know its risks. This is not applicable when an assignment is made by an insured after the liability-causing event has occurred. In such a case, the general rule is that the assignment is not of the policy itself, but of a claim under, or a right of action on, the policy." *Id*. An insurer which properly undertakes the burden of a full settlement is not a volunteer and does not lose the right to recover from other carriers who are obligated for the same loss.

J. Examples Of Subrogation

The following is a discussion of a number of cases representing disputes among carriers where subrogation has been urged.

1. Disputes Regarding Duty To Defend: Going Beyond The Complaint Allegation Rule

Blue Ridge Ins. Co. v. Hanover Ins. Co., 748 F.Supp. 470 (N.D. Tex. 1990).

In this dispute among carriers, the district court went beyond the allegations in the complaint to extrinsic facts to determine that one carrier did not owe a duty to defend because the putative insured was not covered.

This insurance dispute arose out of an automobile accident. Two policies were involved. Hanover covered the employer, Southern Ionics. Blue Ridge covered the car. The driver was not an employee and did not have permission to drive the car from Southern Ionics.

The use of the vehicle by the driver was not with the permission of named insured. Since the driver did not qualify as an insured under the Hanover policy, he did not have any rights under that policy as to the litigation or accident.

Blue Ridge contended that Hanover was the primary insurer for the driver and that Hanover was required to defend the driver in the litigation. Blue Ridge settled the lawsuit. Blue Ridge alleged that it incurred expenses in the defense and payment of settlement of the claim and sought equitable subrogation to the causes of action that the driver had against Hanover.

Blue Ridge argued that the state court allegation that the driver was operating the vehicle with the permission of Southern caused Hanover to have at least an obligation to defend the driver in the litigation. The federal district court rejected this contention stating that "the status of an 'insured' is to be determined by the true facts, not false, fraudulent or otherwise incorrect facts that might be alleged by a personal injury claimant." Where the basis for the refusal to defend is that the events giving rise to the suit are outside the coverage of the insurance policy, facts extrinsic to the claimant's petition may be used to determine whether a duty exists. In this case, Hanover did not have any insuring obligation and, therefore, Blue Ridge had no claim for equitable subrogation through the driver based on the failure of Hanover to extend benefits or protection.

2. Volunteer Not Equitably Subrogated For Excess Payment

Foremost County Ins. Co. v. Home Indemnity Co., 897 F.2d 754 (5th Cir. 1990).

Butler and his company held a general liability policy issued by Home and an automobile and physical damage policy issued by Foremost, each of which had $250,000.00 limits and each of which had "other insurance" clauses. Butler killed Mario Porcayo in an automobile accident and was sued by the Porcayo Estate. Foremost refused to defend. Home tendered a defense under its worker's comp policy but did not indicate that there might be coverage under its GL. Both Home and Foremost refused settlement offers within policy limits.

Immediately before trial, Home's attorneys drafted a covenant not to execute which was signed by the Porcayos. The Porcayos agreed not to execute against Butler and Butler assigned his rights to the Porcayos against Foremost including the wrongful refusal to defend. At trial, Home did not question the Porcayos' witnesses and a final judgment was rendered against Butler in the amount of $3,797,000.00. Shortly thereafter, Foremost settled its claims with the Porcayos for $3,200,000.00. Foremost then sought a declaratory judgment action, subrogation and contribution from Home. The insurers filed cross motions for summary judgment. The district court granted Foremost's and denied Home's. The district court ordered Home to pay half of Foremost's $3,200,000.00 settlement.

On appeal, the Fifth Circuit reversed.

a. Stowers' Claim Requires Negligent - Bad Faith Conduct

Home's policy covered Butler. Home is not liable under the Stowers' doctrine because one of the conditions necessary to the application of the doctrine is the negligent or bad faith conduct of the insurer. Home's decision to reject the settlement offer never resulted in any injury to the insured because the covenant not to execute released Home's insured from all legal obligations to pay. Therefore, Home did not breach the Stowers' duty. As a result, Home's potential liability is limited to its policy limits.

b. Contractual Subrogation

Contractual subrogation is examined within the framework of the doctrine of equitable subrogation and is subject to conformity

with its principles. In conventional subrogation, the extent of the right is measured by the agreement for subrogation while equity will determine the rights of the parties by the contract to enforce the agreement and give the second or substituting creditor what he contracted for. Under equitable subrogation, if a person has any palpable interest which win be protected by the extinguishment of the debt, he may pay the debt and be entitled to hold and enforce it just as a creditor could. In this case, Foremost could never have been liable under its policy for more than $250,000.00. While Foremost's payment relieved its client from all liability, merely protecting its client's interest is insufficient to prevent Foremost from being considered a volunteer. Therefore, only $250,000.00 of Foremost's payment is subject to subrogation.

c. "Other Insurance" Clause

Foremost and Home each had "other insurance" clauses providing contribution by equal shares. Therefore, since both policies contained these clauses, payment is properly apportioned by the equal shares method. Thus, Foremost is entitled to a $125,000.00 subrogation from Home. See discussion of "Other Insurance" Clauses at p. N-21 below.

3. No Subrogation Where Loss Exceeds Payments By Insurer And Tortfeasors

Ortiz v. Great Southern Fire & Casualty Ins. Co., 597 S.W.2d 342 (Tex. 1980).

The insureds owned a dwelling which was insured for $8,500.00 through Great Southern Fire & Casualty covering the dwelling but not the contents. A fire broke out which caused damages to the home and its contents. The insureds then sued a carpet company alleging that the fire was caused by carpet padding placed over a floor furnace causing damage of at least $4,000.00 to the realty and $11,614.00 to the personal property.

Great Southern intervened claiming subrogation in the amount of $4,000.00 representing the amount it had paid for repairs to the dwelling. The insureds denied the right of subrogation. All parties settled the suit for $10,000.00. No allocation was made in the settlement proceeds for the realty or the contents.

Great Southern moved for summary judgment on its claim for subrogation in the amount of $4,000.00. The trial court granted the

summary judgment. On appeal, to the Court of Appeals, the judgment was affirmed.

The Texas Supreme Court reversed and remanded holding that an insurer is not entitled to subrogation if the insured's loss is in excess of the amounts recovered from the insurer and the third-party causing the loss. *Id*. at 343.

4. <u>Excess Insurer Subrogated To Insured's Claim For Legal Malpractice</u>

Stonewall Surplus Lines Ins. Co. v. Drabek, 835 S.W.2d 708 (Tex. App.--Corpus Christi 1992, writ denied).

During the course of a wrongful death suit, the trial court entered sanctions against the insureds finding that the insureds had abused the discovery process, refused to submit to depositions and refused to comply with requests for production. The court struck the pleadings and rendered a partial default judgment against them regarding their joint and several liability to the survivors for actual damages. The trial court also ordered that the only issues for the trial would be the amount of actual damages and whether the insureds were grossly negligent and the amount of exemplary damages. After the sanctions were imposed, the case was settled for $1,800,000.00. Of that amount, Stonewall paid $1,300,000.00 and the primary carrier paid its policy limits of $500,000.00.

Stonewall brought suit against the law firm and the primary carrier alleging negligence which proximately caused it to pay substantially more to settle the death case than it should have had to pay. On appeal, the Corpus Christi Court of Appeals held that there was no dispute that the insureds would have a cause of action against the attorney and the law firm for damages caused by their negligent representation. Therefore, the excess carrier is subrogated to the insureds' claim for legal malpractice and negligence against the attorney and law firm. The Corpus Christi Court of Appeals stated that:

> "Where the insurance policy is regarded as one of indemnity ... the company on payment of the loss is subrogated to any rights which the insured may have against the person alleged to be responsible for the loss [citations omitted]. The right of subrogation is not dependent upon an express stipulation in the policy or upon an actual assignment of the cause of action by the insured; ... payment of the loss operates as an equitable transfer of the claim [citations omitted]."

Id. at 711, citing *International Ins. Co. v. Medical Professional Building*, 405 S.W.2d 867 (Tex. Civ. App.--Corpus Christi 1966, writ ref'd n.r.e.).

This holding was approved by the Texas Supreme Court in *American Centennial Ins. Co. v. Canal Ins. Co.*, 843 S.W.2d 480 (Tex. 1992). In that case, the Supreme Court held that an excess carrier has a claim for equitable subrogation against defense counsel for legal malpractice. *Id*. at 484-485. In recognizing this cause of action, the Supreme Court observed that such a claim would not interfere with the relationship between the attorney and client, would not result in additional conflicts of interest and would not impose new or additional burdens on defense counsel. The Supreme Court also observed that the insured would have little incentive to enforce its right to competent representation where the judgment or settlement fell within the excess carrier's limits.

5. <u>Excess Carrier Subrogated To The Right Of The Insured Against Primary Carrier</u>

American Centennial Ins. Co. v. Canal Ins. Co., 843 S. W.2d 480 (Tex. 1992).

In this seminal case, the Texas Supreme Court held that an excess carrier has a cause of action under the doctrine of equitable subrogation against a primary carrier and trial counsel for mishandling a claim.

In this death case, Canal had $100,000.00 in primary coverage, First State had $1,000,000.00 in excess coverage and American Centennial provided an excess layer of coverage up to $4,000,000.00. The two excess carriers brought suit against Canal, the law firm and two lawyers for negligence, gross negligence, breach of duty of good faith, violations of the Texas Deceptive Trade Practices Act, Tex. Bus. & Com. Code § 17.41 et seq., and violations of art. 21.21 of the Texas Ins. Code. The trial court granted summary judgment holding that the primary insurer and its counsel owed no duties to the excess carriers. The Court of Appeals reversed the judgment as to Canal, but affirmed as to defense counsel. The Supreme Court held that the excess carriers have a right of equitable subrogation against both the primary insurer and defense counsel.

The Supreme Court recognized that under *G.A. Stowers Furniture Co. v. American Indemnity Co.*, 15 S.W.2d 544 (Tex. 1929), the insured has a right to sue the carrier for wrongful refusal to settle a claim within policy limits. Under *Ranger County Mutual Ins. Co. v. Guin*, 723 S.W.2d 656, 659 (Tex. 1987), the carrier's duties were extended to claim

investigation, trial defense, and settlement negotiations. The Supreme Court reasoned that if the excess carrier had no remedy, the primary insurer would have less incentive to settle within policy limits. However, the new claim did not impose new or additional burdens on the primary carrier because the *Stowers* and *Guin* decisions imposed duties on the primary carrier to protect the interests of the insured.

The Supreme Court declined to create a direct duty from the primary to the excess. Although the Supreme Court recognized a claim for subrogation, it did not decide whether such claim would encompass theories of negligence, gross negligence or violations of the DTPA or Insurance Code.

6. Excess Settled Auto Accident Suit And Obtained Subrogation: Voluntariness Of Payment

In *Argonaut Ins. Co. v. Allstate Ins. Co.*, 869 S.W.2d 537 (Tex. App.--Corpus Christi 1993, writ denied), the excess carrier negotiated and settled a lawsuit arising out of an automobile accident without involving the primary carrier or its attorney in the settlement discussions. The primary carrier refused to contribute. The excess carrier then sued the primary carrier for breach of contract, breach of settlement, contribution, unjust enrichment and subrogation. Both carriers filed Motions for Summary Judgment. The trial court granted the primary carrier's Motion for Summary Judgment.

On appeal, the Appellate Court held that there was no contract between the excess and primary carrier and, therefore, there was no breach of contract; the primary was not unjustly enriched because unjust enrichment arises when a person has obtained a benefit by fraud, duress or undue advantage and none of those elements were present; but, the trial court erred in granting summary judgment on the subrogation claim. It was clear that Argonaut paid a claim for which Allstate was primarily liable and there was a fact issue as to whether Argonaut paid the debt voluntarily.

In the context of a subrogation cause of action between excess and primary insurance carriers, the courts have impliedly held that, by virtue of their secondary liability on insurance policies, excess insurance carriers' payments to insureds on behalf of primary carriers are not "voluntary." *Id*. at 542, citing *Liberty Mutual Ins. Co. v. General Ins. Co.*, 517 S.W.2d 791 (Tex. Civ. App.--Tyler 1974, writ ref'd n.r.e.).

Because Argonaut risked great potential liability in the underlying lawsuit and because the excess carrier's attorney had negotiated a

settlement agreement, the reasonableness of which Allstate never challenged, there was a fact issue on the question of the voluntariness of the payment. Therefore, summary judgment was not proper in favor of Allstate.

7. <u>Excess Carrier May Be Entitled To Punitive Damages And Attorney's Fees From Primary Carrier Under Equitable Subrogation</u>

Employers National Ins. Co. v. General Accident Ins. Co., 857 F. Supp 549 (S.D. Tex. 1994).

Employers brought suit against General Accident to recover payments it made in settlement of claims in the underlying state court action arose from an accident in May of 1987, when a scaffold used for window washing fell from the roof of Pennzoil Place in Houston resulting in the deaths of two window washers and injuries to several pedestrians. Jobs, which had the contract with the building for window washing, was one of several defendants in the many lawsuits. By August 1990, all personal injury claims by all of the plaintiffs settled except for claims against Jobs.

General issued the primary policy for $1,000,000.00 and Employers issued an excess policy of $5,000,000.00. General assumed the defense of Jobs. At no time prior to trial did General accept an offer from Plaintiffs' counsel, Ron Krist, nor did it make any counter-offers that exceeded $150,000.00. Employers, the excess carrier, could not take control of the defense unless General "tendered" its limits which would then allow Employers the discretion to use General's $1,000,000.00.

On the eve of trial, Employers met with Plaintiffs' counsel without General's knowledge and agreed to a settlement. Employers informed General and demanded that General tender its limits. General tendered its limits "under protest." Jobs settled the claims for $3,050,000.00 requiring Employers to pay $2,050,000.00.

Employer then sued General for equitable subrogation. The trial court entered judgment in favor of Employers for recovery of $2,065,000.00. The trial court found that General's evaluation that Jobs would be found no more than ten percent liable was negligent and General's reliance on a large offset to its liability by allowing other defendants to settle first was speculative and negligent. In addition, General's claims that it relied on counsel were disingenuous because General attempted to manipulate the negotiation process. General was

also negligent in refusing to continually negotiate rationally within its limits or admit the likelihood of liability in excess of its estimates.

The trial court found that punitive damages and attorney's fees may be recoverable in equitable subrogation suits. However, this case did not deserve punitive damages or attorney's fees. General's conduct was negligent but not egregious. The excess carrier's interests are subrogated to the interest of the insured to the extent the excess carrier bears the loss. Without this remedy, the primary insurer would have no incentive - other than spontaneous integrity - "to work to settle within the limits of the primary policy when it is reasonably clear the primary level will be consumed...". *Id*. at 551, citing *American Centennial Ins. Co. v. Canal Ins. Co.*, 843 S.W.2d 480 (rex. 1992).

"Equitable subrogation does not create new duties on the part of the primary carrier. Equitable subrogation is derived solely from the insured's rights against the primary carrier for a wrongful refusal to settle a claim within the policy limits. Before it may recover, the excess carrier has to prove that the primary carrier was negligent in fulfilling its duty to the insured under the primary policy's terms." *Id*. at 552.

8. <u>Company With Self-Insured Retention Owes No Duty To Excess Carrier</u>

International Ins. Co. v. Dresser Industries, 841 S.W.2d 437 (Tex. App.--Dallas 1992, writ denied).

Dresser is a manufacturer of products operating as a self-insurer with a self-insured retention. Dresser retained absolute and complete management and control of the handling and defense of all claims and lawsuits. Fidelity was the fronting carrier. International was the excess carrier. International filed a declaratory action against Dresser and Fidelity seeking a determination that it was not obligated to pay a claim arising from a judgment entered in lawsuit against Dresser.

The Dallas Court of Appeals held that the claims handling manual entitled "Guiding Principles" did not impose a contractual duty upon Dresser to settle cases within the limits of the primary coverage. Dresser did not owe a common law duty to International to make reasonable attempts to settle the underlying lawsuit. The Dallas Court of Appeals cited with approval and adopted *Commercial Union Assurance Co. v. Safeway Stores, Inc.*, 26 Cal.3d 912, 164 Cal.R. 709, 610 P.2d 1038 (1980). In that case, the California Supreme Court rejected the invitation to find that the insured owed the excess carrier any duty which would require the insured contemplating settlement to put the excess carrier's financial interest on at

least an equal footing. The Dallas Court of Appeals declined to recognize a common law duty giving rise to a cause of action by an excess insurer against its insured for failing to settle a lawsuit below the threshold of the excess policy. Dresser did not owe common law duties to International to make reasonable attempts to settle the underlying lawsuit within the primary or self-insured limits. *Id*. at 445. Finally, the Dallas Court of Appeals refused to impose a direct duty on Fidelity (the fronting carrier) for the acts of its claims handling assignee, Dresser.

9. <u>Contractual Subrogation: Priority Of Reimbursement Is Determined By Contract</u>

Highlands Ins. Co. v. New England Ins. Co., et al., 811 S.W.2d 272 (Tex. App.--San Antonio 1991, no writ).

The issue in this case concerned which of several excess carriers was entitled to reimbursement for settlement proceeds.

In the underlying case, several Plaintiffs brought suit for damages resulting from injuries and deaths caused by a product called E-Ferol. The manufacturers and insurers refused to provide a defense for O'Neal, their distributor. Ultimately, O'Neal, the distributor of E-Ferol, and its insurers settled with the Plaintiffs, and then recovered some of the settlement payments through Mary Carter agreements and lawsuits against the manufacturing defendants and their insurers.

O'Neal had $500,000.00 primary insurance with National Union, a $10,000,000.00 first excess layer with Highlands, a $5,000,000.00 second excess layer with Hartford, and a $45,000,000.00 third excess layer with New England Group. The primary coverage and the first two levels of excess coverage were exhausted and the New England Group paid over $20,000,000.00 in settlement. Highlands (the first excess) paid $3,500,000.00 more than its $10,000,000.00 policy limits. Highlands sought reimbursement <u>before</u> the New England Group which paid more than $20,000,000.00.

New England filed a declaratory judgment action seeking recovery of funds from the manufacturing defendants and their insurers for failure to defend O'Neal and provide coverage. New England sought summary judgment based on (1) the express subrogation provisions of the insured's policies, (2) contractual and common law principles, and (3) collateral estoppel. The summary judgment was granted on all three grounds. The San Antonio Court of Appeals affirmed on the first ground - express subrogation.

The Highlands policy contained a subrogation provision which stated that in the case of any payment, the priorities of reimbursements would be as follows: first, "any interests" [i.e. - not Highlands] that shall have paid an amount over and above any payment hereunder [i.e. payment by Highlands]; second, "the Company" [Highlands] is then to be reimbursed; and third, the interests of whom this coverage is in excess is entitled to claim the residue, if any.

The San Antonio Court of Appeals found that this express contractual subrogation provision gave first priority of reimbursement to New England Group which was an "interest" that paid money "over and above any payment hereunder." As the San Antonio Court of Appeals held, "the subrogation provision in each policy mandates that among excess carriers, those farthest removed from the primary coverage stand first in line when subrogation recoveries are distributed. That is, those who pay last are first to recoup subrogation monies." *Id*. at 278, citing 16 Couch on Insurance § 61:48 at 133 (2d Ed. 1983).

10. Contribution: Excess Carrier Seeks Contribution From Second Line Of Excess Insurance

Utica National Ins. Co. of Texas v. Fidelity & Casualty Co. of New York, 812 S.W.2d 656 (Tex. App.--Dallas 1991, writ denied).

In this case arising out of an automobile accident, two lines of insurance covered the claim. Each line contained primary insurance as well as excess insurance. The underlying suit was settled for $2,200,000.00. The primary carriers contributed their limits of $1,350,000.00, leaving $850,000.00 to be apportioned between the two lines of excess. The Utica line of excess with one $10,000,000.00 excess policy paid the $850,000.00 in settlement and sought contribution from the Fidelity line, which consisted of five excess policies totaling $50,000,000.00.Utica claimed that the entire $50,000,000.00 line of excess comprised of five separate layers should be considered in determining the allocation of the $850,000.00 settlement. The trial court and the Court of Appeals held that Utica's $10,000,000.00 excess policy should be compared only with the first $5,000,000.00 in excess in the Fidelity line since this layer of coverage would be sufficient to pay for the $850,000.00 remainder of the settlement. Therefore, Utica was entitled to a contribution in the amount of $283,333.33 from Fidelity.

IV. DECLARATORY JUDGMENT ACTIONS

In order to determine their rights and duties under insurance policies, insurance carriers frequently file declaratory judgment actions. Declaratory judgment actions are

authorized under federal statutes, 28 U.S.C. §400, and a state statute, TEX. CIV. PRAC. & REM. C. § 37 (1996).

The Texas Declaratory Judgment Act provides that:

> "A person interested under a deed, will, written contract or other writings constituting a contract ... may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relation thereunder."

TEX. CIV. PRAC. & REM. C. § 37.004(a) (1996). The Act provides that the court may award costs and reasonable and necessary attorney's fees as are equitable and just. TEX. CIV. PRAC. & REM. C. § 37.009 (1996).

Declaratory judgments are used by carriers to (i) obtain judicial interpretation of policy provisions, *National City Mutual Fire Ins. Co. v. Johnson*, 879 S.W.2d 1 (Tex. 1993); (ii) determine coverage under particular policy, *State Farm Fire & Casualty Co. v. Reed*, 873 S.W.2d 698 (Tex. 1993); (iii) determine the effect of an "other insurance" clause, *U.S. Fire Ins. Co. v. Aetna Casualty & Surety Co.*, 781 S.W.2d 394 (Tex. App.---Houston [1st Dist.] 1989, no writ); (iv) determine entitlement to settlement proceeds, *Highlands Ins. Co. v. New England Ins. Co., et al.*, 811 S.W.2d 276 (Tex. App.--San Antonio 1991, no writ); (v) determine contribution rights in issues of defense costs, *Travelers Ins. Co. v. U.S. Fire Ins. Co.*, 570 F.2d 515 (5th Cir. 1978), and determine many other issues.

It should be noted that there are certain issues which cannot be determined by a declaratory judgment action. For example, an insurance carrier cannot bring a declaratory judgment action to determine its liability obligations under a policy where third parties have simultaneously sued the carrier's insured. *Providence Lloyds v. Blevins*, 741 S.W.2d 604 (Tex. App.--Austin 1987, no writ); *National Savings Ins. Co. v. Gaskins*, 572 S.W.2d 573 (Tex. Civ. App.--Fort Worth 1978, no writ). In *Providence Lloyds*, *supra*, plaintiffs/homeowners sued Blevins for breach of warranty in connection with the construction of their house. The insurance company took the position that its policy did not cover Blevins. While the first suit pended, the insurance company brought a declaratory judgment action seeking a declaration that it did not have a duty to defend and there was no coverage. The trial court dismissed the carrier's cause of action. lie Appellate Court affirmed citing *Fireman's Ins. Co. v. Burch*, 442 S.W.2d 331 (Tex. 1968). Relying on *Burch*, the Appellate Court found that the carrier's suit was purely advisory in nature. See also, *Commonwealth County Mutual Ins. Co. v. Moctezuma*, 900 S.W.2d 798, 800 (Tex. App.--San Antonio 1995, writ dism'd by agreement).

The following are some of the types of issues which insurers have sought to determine in a declaratory judgment action:

A. Policy Interpretation - Coverage And Exclusions

Travelers Ins. Co. v. U.S. Fire Ins. Co., 570 F.2d 515 (5th Cir. 1978). This was a declaratory judgment action brought by Travelers seeking an interpretation of two insurance policies, one issued by Travelers and the other by U.S. Fire Insurance Company. The issue was whether either or both of the companies were insurers of a tractor-trailer rig that was involved in a collision. Each of the policies contained "like" insurance clause which omnibus insurance in the event that the insured vehicle component was used in conjunction with another vehicle component not covered by like insurance purchased from the same company.

Assicurazioni Generali S.P.A. v. Ranger Ins. Co., 64 F.3d 979 (5th Cir. 1995). In this case, the insurer of a truck owner brought a declaratory judgment action seeking a determination that the truck lessee's insurance provided coverage for an accident occurring while the owner was bobtailing in route to having the truck's brakes repaired. The lessee's insurer counterclaimed seeking a determination that the owner's insurance provided primary coverage to the lessee and the owner. The federal district court determined that the lessee's policy provided primary -coverage and that endorsements attached to the truck owner's policy excluded coverage. The Fifth Circuit reversed and rendered that the "in the business of" endorsement in the owner"s non-trucking insurance policy was ambiguous and would be construed against the insurer to provide coverage for the accident. Both policies also provided primary coverage.

Travelers Ins. Co. v. Highlands Ins. Co., 546 F.2d 1147 (5th Cir. 1977). Travelers brought a declaratory judgment action against Highlands seeking to determine whether a certain vehicle fell within coverage of Travelers' liability policy. The district court held that the truck was not covered by the policy and the Fifth Circuit affirmed. [Georgia diversity action interpreting Georgia law.]

Life of America Ins. Co. v. Aetna Life Ins. Co., 744 F.2d 409 (5th Cir. 1984). Life of America filed suit seeking a declaratory judgment that it was not obligated to make payments under a re-insurance agreement with Aetna, an injunction against arbitration of the suit pursuant to an arbitration embodied in the re-insurance agreement, and violations of the Texas Insurance Code. The district court and the Fifth Circuit ordered the matter to arbitration.

Empire Indemnity Ins. Co. v. Carolina Casualty Ins. Co., et al., 838 F.2d 1428 (5th Cir. 1988). This was a declaratory judgment action arising out of a dispute between four liability insurance companies as to which provided coverage in a wrongful death and survival action commenced by the estate of an automobile driver who was killed on a collision with a truck driver who was under a lease agreement with a common carrier. The district court held that Shelter General Insurance Company as primary insurer of the common carrier and Carolina Casualty Insurance Company as the primary insurer of the leased truck driver in

the accident were jointly and equally liable. The court held that the other two insurance companies, Northland Insurance Company and Empire Indemnity Insurance Company, were not liable. The court also held that Empire Indemnity Insurance Company had a duty to defend one of the parties sued and, therefore, was not entitled to reimbursement for defense costs.

Argonaut Southwest Ins. Co. v. American Home Assurance Co., et al., 483 F. Supp. 724 (N.D. Tex. 1980), *aff'd* 636 F.2d 311 (5th Cir. 1981). This was a declaratory judgment action brought under 28 U.S.C. § 2201 by Argonaut against American Home and Travelers. Argonaut sought to establish that neither it nor Zurich Insurance Company provided liability insurance coverage for a personal injury accident involving a piece of heavy equipment. The district court held that the policies which covered the corporation but explicitly excluded coverage for one of the corporation's divisions did not provide liability coverage with respect to an accident involving a product manufactured by the division. Therefore, these insurers were not required to make any contribution to Travelers or American Home for the settlement of the underlying suit.

Atlantic Mutual Ins. Co. v. Gulf Ins. Co., 596 S.W.2d 326 (Tex. Civ. App.--Texarkana 1980, no writ). This case involved the meaning of the term "borrower" as used in an automobile liability insurance policy. Atlantic Mutual, Holland America and the insured brought a declaratory judgment action against Gulf Insurance Company seeking a determination that Gulf was required to indemnify them under the terms of its policy for portions of the amount of settlement in an underlying case involving a truck accident. The Court of Appeals held that the loader was not entitled to coverage under the owner's policy because it was not a "borrower" of the truck within the meaning of the policy.

B. Duty To Defend

State Farm Fire & Casualty Co. v. Wade, 827 S.W.2d 448 (Tex. App.--Corpus Christi 1992, writ denied). In this declaratory judgment action, State Farm sought to obtain an interpretation of the business pursuit exclusion in a personal boatowner's liability policy and a declaration that State Farm did not owe a duty to defend in an underlying personal injury, wrongful death action. The trial court dismissed the declaratory judgment action. The Appellate Court held that Texas courts recognize a carrier's ability to bring a declaratory judgment action to determine a duty to defend an insured prior to determination of liability in the underlying lawsuit. *Id*. at 450; see, *Fidelity & Guar. Ins. Underwriters Inc. v. McManus*, 633 S.W.2d 787, 788 (Tex. 1982).

Commonwealth Lloyd's Ins. Co. and United States Fire Ins. Co. v. Cullen-Frost Bank of Dallas, 889 S.W.2d 266 (Tex. 1994). In this declaratory judgment action, the bank sued the insurers for a determination of their duty to defend the bank under five commercial general liability insurance policies. The underlying suit

involved claims for rescission, negligent misrepresentation, breach of warranty and violations of the DTPA by condominium owners who purchased their condominiums from the bank.

U.S. Fire Ins. Co. v. United Service Automobile Association, 772 S.W.2d 218 (Tex. App.--Dallas 1989, writ denied). This declaratory judgment action was filed by United Service Automobile Association to determine which, if any, among three insurance policies had a duty to defend an automobile passenger who caused an automobile accident by seizing the steering wheel while it was being operated. This case involved the interpretation of automobile insurance policies.

Institute of Lloyd Underwriters v. First Horizon, 972 F.2d 125 (5th Cir. 1992). In this case, the primary insurer sought contribution for defense costs from the excess carrier. The excess carrier counterclaimed seeking a declaratory judgment that it owed no defense costs to the primary insurer. The district court held that the excess carrier's unambiguously relieved it from the duty to defend and, therefore, the cost of defense. The Fifth Circuit affirmed.

American Guaranty & Liability Ins. Co. v. Shell-Ray Underwriters, Inc., et al., 844 F.Supp. 325 (S.D. Tex. 1993). In this case, the insurer filed a declaratory judgment action seeking a determination that it had no duty to defend the insured in the underlying state fraud action. The insured counterclaimed for breach of contract, breach of duty of good faith and fair dealing, and violations of the Texas Deceptive Trade Practices - Consumer Protection Act, TEX. BUS. & COMM. CODE §17.41, et seq. The district court held that the various causes of action based on allegations of knowingly fraudulent statements by insured meant that the insurer had no duty to defend in light of the policy exclusion for injury done by or at the direction of the insured with knowledge of its falsity.

Aetna Casualty & Surety Co. v. Protective Ins. Co., 661 S.W.2d 291 (Tex. App.--Houston [lst Dist.] 1983, no writ). In this case, a company's insurer sought a declaratory judgment that the policy issued by the employer's insurer required employer to defend company in suit brought by employer's employee. The Court of Appeals held that the company was not "in possession" of the truck involved in the accident and, therefore, the company was not a "borrower" of the truck. Judgment was rendered declaring that Atlas Truck Lines was not entitled to be defended by Aetna.

C. <u>Entitlement To Proceeds</u>

Little v. X-Pert Corp., 867 S.W.2d 15 (Tex. 1993). In this case, a declaratory judgment action was brought by a corporation against former shareholders and an insurance company to determine its entitlement to insurance policy proceeds taken out on a former shareholder at a time when he still owned shares.

Centennial Ins. Co. v. Hartford Accident & Indemnity Co., 821 S.W.2d 192 (Tex. App.--Houston [14th Dist.] 1991, no writ). This was a declaratory judgment action brought by Centennial to determine whether a bodily injury exclusion under a CGL applied to an automobile fatality. Centennial brought suit to obtain Hartford's pro-rata participation in the settlement and payment of reasonable attorney's fees.

McCraw v. Maris, 828 S.W.2d 756 (Tex. 1992). In this case, the surviving children filed suit for a declaratory judgment asserting that they were entitled to life insurance proceeds because their mother assigned and filed the appropriate form with the employing office designating them as beneficiaries. The surviving spouse counter-claimed asserting that he was entitled to the life insurance proceeds.

Union Indemnity Ins. Co. v. Certain Underwriters at Lloyd's, et al., 614 F.Supp. 1015 (S.D. Tex. 1985). A primary hull underwriter brought action for declaratory judgment to determine obligations under primary and excess policies with respect to contributions to a settlement. The district court held that in a hull insurance case in which total loss occurred and was later compromised, excess underwriters were not required to share ratably with primary underwriter in satisfaction of the settlement.

Highlands Ins. Co. v. New England Ins. Co., et al., 811 S.W.2d 276 (Tex. App.--San Antonio 1991, no writ). In this case, the first excess liability insurer brought a declaratory judgment action seeking a judicial determination that it was entitled to proceeds obtained from the insured in settlement over a claim from the third excess insurance carrier. This case involved the interpretation of two excess liability insurance policies to determine priority of subrogation.

D. Other Insurance

U.S. Fire Ins. Co. v. Aetna Casualty & Surety Co., 781 S.W.2d 394 (Tex. App.---Houston [lst Dist.] 1989, no writ). In this case, U.S. Fire brought suit against Aetna to determine which policy's "other insurance" clause required it to fund after the primary insurance had been exhausted.

V. "OTHER INSURANCE" CLAUSES

Insurance policies typically provide "other insurance" clauses. These clauses are contractual devices which seek to determine the percentage or priority of payment when a loss is covered by two or more policies. Ostrager & Newman, Handbook on Insurance Coverage Disputes § 11.01, p. 495 (8th ed. 1995). Such clauses are generally valid. There are many types of "other insurance" clauses, but they can generally be categorized as: "equal shares," "pro-rata," "excess" or "escape." *Id*. at pp. 497-499.

An “equal shares” clause is aptly named. It provides that concurrent insurers shall cover a loss in “equal shares.”

A “pro-rata” clause provides that if other insurance exists, the insurer will pay its pro-rata share of the loss. This is usually determined by comparing the proportion that each policy bears to the aggregate of all collectable insurance. *Id*. Caveat: in determining the aggregate amount, where there are multiple layers of excess insurance, only those layers which are likely to be reached are included in the aggregate calculation. See, *Utica National Ins. Co. of Texas v. Fidelity & Casualty Co. of New York*, 812 S.W.2d 656 (Tex. App.--Dallas 1991, writ denied).

An “excess” clause provides that an insurer’s liability is limited to the amount which the loss exceeds other collectible insurance. Ostrager & Newman at p. 498. In other words, the insurance is excess of other available insurance.

An “escape” clause provides that if other insurance is available, the insurance with the “escape” clause does not provide coverage.

Courts have struggled with “other insurance” clauses. The problems arise when two or more competing clauses were involved. In the beginning, courts tried to determine which clauses were more specific. This led to a drafting “arms race” in which each insurer tried to obtain advantage through drafting more specific clauses. Courts also adopted rules of interpretation and dominance, with “excess” clauses trumping “pro-rata” clauses and so on.

Generally speaking, when only one of two policies has an “other insurance” clause, it is given effect. When both policies contain “pro-rata” clauses, the insurers share in proportion to the total amount of collectable insurance. Where both policies contain “excess” or both contain “escape” clauses, a pro-rata allocation is made. Where the policies contain dissimilar provisions, the courts look at the intent of the parties and the overall package of insurance. Ostrager & Newman at pp. 502-505. For example, where one policy provides primary coverage and contains a pro rata clause, and another policy contains an excess clause, the excess clause Will be given effect, and the primary policy must be exhausted before the excess coverage pays. *Allstate Ins. Co. v. Universal Underwriters Ins. Co.*, 439 S.W.2d 385 (Tex. Civ. App.--Houston [14th Dist.] 1969, no writ). See, Anno. 12 A.L.R. 4th 993 “Resolution of Conflicts, in Non-Automobile Liability Insurance Policies, Between Excess or Pro-Rata ‘Other Insurance’ Clauses” and 69 A.L.R. 2d 1122 “Apportionment of Liability Between Liability Insurers Each of Whose Policies Provides That it Shall Be ‘Excess’ Insurance.”

“Other insurance” clauses have provided fertile material for litigation among carriers. Over the years, jurisprudence has developed certain rules where such clauses conflict, depending upon which types of clauses are involved. In order to resolve such a dispute, however, courts generally begin by looking at the overall pattern of insurance in place.

A. "Other Insurance" Clauses In General

As a general rule, if each of several insurers of the same property contract to pay such a proportion of the loss as the amount insured by the company bears to the whole amount of the insurance obtained on the property, the payment of the whole loss by one insurer will not discharge the liability of the other insurers. Such prorata contracts are several and independent of each other. *Traders & General Ins. Co. v. Hicks Rubber Co.*, 140 Tex. 586, 169 S.W.2d 142 (1943). "Where there are two insurers and the policy of each contains a prorata or co-insurer clause, each insurer is liable to the insured to its proportion of the loss, and payment by one of a larger in no way affects the liability of the other's..." *Employers Casualty Co. v. Transport Ins. Co.*, 444 S.W.2d 606 (Tex. 1969).

For other insurance to trigger the operation of a pro-rata clause and relieve the insurer of liability beyond that specified in the pro-rata clause, the other insurance must generally cover the same property and interest therein against the same risk in favor of the same party. *State Farm Fire & Casualty Co. v. Griffin*, 888 S.W.2d 150 (Tex. App.--Houston [1st Dist.] 1994, no writ), citing *American Centennial Ins. Co. v. Harrison*, 205 S. W.2d 417 (Tex. Civ. App.--Eastland 1947, writ ref d n.r.e.).

B. Courts Look To Overall Pattern Of Insurance Coverage

Liberty Mutual Ins. Co. v. United States Fire Ins. Co., 590 S.W.2d 783 (Tex. Civ. App.--Houston [14th Dist.] 1979, writ ref'd n.r.e.).

This case involved a declaratory judgment action brought to determine the amount of the respective liabilities of two insurance companies for losses incurred as a result of an automobile accident. The underlying personal injury suit was settled for $250,000.00. The driver was insured by Liberty Mutual with policy limits of $100,000.00 per person per accident. Taub, the owner of the vehicle, was insured by American General with primary limits of $100,000.00 and by U.S. Fire with a professional comprehensive personal catastrophe liability policy commonly referred to as an umbrella policy with limits of $1,000,000.00 in excess of the insured's retained limit. The settlement by agreement of all parties was paid as follows: American General paid its policy limits of $100,000.00; Liberty Mutual paid its policy limits of $100,000.00; and United States Fire paid the remaining $50,000.00. The parties expressly agreed to seek a judicial determination of coverage and order of coverages.

Liberty Mutual's policy provided primary coverage for bodily injuries but also contained an "other insurance" excess clause. The U.S. Fire policy also had an "other insurance" excess clause.

The Court of Appeals distinguished the case from *Hardware Mutual Fire Ins. Co. v. Farmers Ins. Exchange*, 444 S.W.2d 583 (Tex. 1969). In that case, the carriers were both primary insurers. In Liberty Mutual, there was an umbrella and a primary automobile policy and neither policy contained an "other insurance" escape clause. The Court of Appeals held "where there is apparent conflict between clauses of applicable insurance policies, the courts should look to the overall pattern of insurance coverage to resolve disputes among carriers." *Id*. at 785, citing *Berkeley v. Fireman's Fund Ins. Co.*, 407 F.Supp. 960 (W.D. Wash. 1975). In this case, Liberty Mutual's policy generally affords primary coverage. On the other hand, U.S. Fire's remained excess in all events. The intent of all parties was for U.S. Fire's policy to remain an umbrella and Liberty Mutual's policy to underlie it. Therefore, Liberty Mutual is required to pay the full limits of its coverage prior to U.S. Fire's obligation to assume any of the loss.

C. For Two Primary Carriers, Pro Rata Allocation

Hardware Dealers Fire Ins. Co. v. Farmers Ins. Exchange, 444 S.W.2d 583 (Tex. 1969).

This case involved a declaratory judgment action brought by Farmers against Hardware seeking a determination of the extent, if any, of automobile liability insurance coverage afforded the insured by a family auto policy issued by Farmers or by an auto garage policy issued by Hardware to Frizzel Pontiac, owner of the car which the insured was driving at the time of the accident. The insured was on a test drive of new Pontiac with Frizzel's permission during which he was involved in a collision with another auto. The second driver instituted suit against the insured as a result of the accident. Hardware claimed that its policy had an "other insurance" escape clause which excluded coverage of the insured if there was other collectible insurance. Farmers' policy also had an "other insurance" excess clause. Both Farmers' and Hardware's policies restricted liability or coverage in the event of "other insurance." The courts below held that Hardware owed the primary coverage up to the limits of its policy as well as a duty to defend the insured. The Supreme Court reversed and rendered judgment that the two insurers must apportion liability and each has the duty to defend.

Caveat: When there are two or more insurers who may be liable for damages and one voluntarily pays the damages without fraud, deception or duress, the paying insurer cannot compel the other insurers to contribute to the payment unless the other insurers have been given the opportunity to participate in the determination of the merits of the underlying claim. *Employers Casualty Co. v. Universal Underwriters Ins. Co.*, 404 S.W.2d 954 (Tex. Civ. App.--Amarillo 1966, no writ).

D. Pro Rata Allocation

Liberty Mutual Ins. Co. v. General Ins. Co., et al., 517 S.W.2d 971 (Tex. Civ. App.--Tyler 1974, writ ref'd n.r.e.).

In this case, the Lessee of an automobile was covered by primary and excess automobile liability insurance. The Lessor was covered by a primary insurance carrier (Liberty Mutual). The Lessee's vehicle was involved in a collision which killed one person and injured two others. After extensive discovery and investigation, the Lessee's primary and excess carriers compromised the claims and paid $325,000.00. Liberty Mutual, the Lessor's primary carrier, refused to make any contribution.

The Lessee's primary and excess carriers brought a subrogation claim against Liberty Mutual. General (Lessee's primary) and Liberty Mutual had identical other insurance clauses and subrogation clauses. The Court of Appeals held that General and Liberty were obligated to share equally in the primary coverage up to their limits.

Lessor's excess carrier attempted to reserve contractual subrogation rights. The Court of Appeals held that if the contractual subrogation rights were not effective, then Continental would still have equitable subrogation rights against Liberty.

E. Separate Suits Against Concurrent Insurers: Prorata Apportionment Still Applies

United States Fire & Ins. Co. v. Stricklin, 556 S.W.2d 575 (Tex. Civ. App.--Dallas 1977, writ ref'd n.r.e.).

In this case, Plaintiff was a mortgagee on two separate fire insurance policies covering property that was damaged by fire. Prior to suit, the mortgagee foreclosed upon the property and repaired it. The mortgagee/plaintiff then brought separate suits against each insurance company. Both insurance policies had prorata "other insurance" clauses.

In the suit against U.S. Fire, the trial court refused to admit evidence of the second fire insurance policy and refused to give affect to the "other insurance" clause. On appeal, the Dallas Court of Appeals reversed and remanded. The Dallas Court of Appeals found that the trial court erred in refusing to give affect to the "other insurance" clause and in refusing to prorate the loss between the insurers. "The rule is that if two or more insurers contract to pay a portion of a loss, each is liable only to the extent that the amount insured by such insurer bears to the total loss and that none of the insurers has any right of contribution from the other insurers because the contracts are several, rather than joint." *Id*. at 578. However, the Dallas Court of Appeals did not find that the court abused its

discretion in refusing to consolidate the two suits against the insurers. Since the liability of U.S. Fire and Houston General (the other insurer) was several, Houston General was not a necessary party to the U.S. Fire suit. Consolidation would have been proper and might have served the interest of judicial economy, but was not mandatory under the circumstances of that case.

F. "Other Insurance" Clause Applied Where "Specific" Insurance Covered the Property

Insurance Company of North America v. Fireman's Fund Ins. Co., 471 S.W.2d 878 (Tex. Civ. App.--Houston [1st Dist.] 1971, writ ref'd n.r.e.) involved a suit between two insurers to determine their respective liability under personal property insurance policies for the loss of certain compressors by Dresser Industries. The insurers agreed to pay $575,000 for the loss and then filed a declaratory judgment action. Both policies had "other insurance" clauses. The Fireman's Fund "other insurance" clause stated that its policy did not apply if the property is covered by other insurance which is not written upon an identical plan, term or condition. The INA "other insurance" clause provided that it did not apply where any "specific" insurance exists ... on the property insured hereunder." In construing the two policies, the Court of Appeals held that the Fireman's Fund policy was not "specific insurance ... on the property insured." Consequently, the INA "other insurance" clause did not apply. Therefore, the Fireman's Fund "other insurance" clause prevailed and since the loss was within INA's limits, Fireman's Fund was not required to participate in the payment of the loss at all.

G. Endorsement Prevails Where "Other Insurance" Clause Conflicts With Endorsement

U.S. Fire Ins. Co. v. Aetna Casualty & Surety Co., 781 S.W.2d 394 (Tex. App.--Houston [1st Dist.] 1989, no writ).

The driver of a vehicle involved in collision causing bodily injury and death was insured by Aetna. The owner of the vehicle was insured by Highlands for primary coverage and by U.S. Fire for excess coverage. Both the Aetna and U.S. Fire policies contained "other insurance" clauses. The underlying lawsuit was settled for a total sum of $1,500,000.00. Highlands paid its policy limits of $250,000.00. U.S. Fire paid the remaining $1,250,000.00, and then sued Aetna to recover that amount.

The U.S. Fire policy included a preprinted "other insurance" clause which stated that it would be excess where other insurance covered the loss. However, Endorsement No. 2 provided that the U.S. Fire policy would apply "regardless of the existence of other insurance that would apply on the same basis." *Id*. at 396. Thus, the preprinted "other insurance" clause conflicted with the Endorsement

No. 2 which stated that the policy would apply "regardless of the existence of other insurance." The Aetna policy also had an "other insurance" clause that stated that it would be in excess if other insurance applicable to any loss was available. The First Court of Appeals held that "an endorsement to a policy prevails over inconsistent printed provisions of the policy." *Id*. at 399, citing *Mutual Life Ins. Co. v. Daddy$ Money, Inc.*, 646 S.W.2d 255 (Tex. App.--Dallas 1982, writ ref'd n.r.e.). The Appellate Court further found that U.S. Fire's policy was not the kind of umbrella policy that comes into play only when all other valid and collectible insurance was exhausted. Instead, it was denominated an "Excess Insurance Policy" and it applied whenever its underlying policy [in this case Highlands] had been exhausted. *Id*. at 399.

H. Consecutive Policies Provide Full Coverage Up To Policy Limits For The Entire Claim

CNA Lloyd's of Texas v. St. Paul Ins. Co., 902 S.W.2d 657 (Tex. App.---Austin 1995, no writ).

The underlying suit involved a dental malpractice and gross negligence claim. St. Paul had a policy with $100,000.00 in coverage. CNA had a policy with $1,000,000.00 in coverage. The policies were consecutive in time and overlapped because there were continuous acts of malpractice which resulted in one injury and which triggered coverage under both insurance policies. Before trial, the insurers reached a settlement with the Plaintiff for $262,500.00. CNA contributed $162,500.00 towards the settlement and St. Paul contributed its $100,000.00 policy limit. St. Paul reserved rights to seek reimbursement from CNA. St. Paul's policy had a prorata "other insurance" clause. St. Paul sought reimbursement for $76,136.36 arguing that its proportion ($100,000.00 over $1,100,000.00 equals 9%) of the settlement was about $24,000.00. The trial court granted summary judgment in favor of St. Paul. CNA appealed. The judgment of the trial court was affirmed.

Both policies had "other insurance" clauses. However, because this was a continuous injury triggering consecutive policies, the insurance policies do not provide for a reduction of the insurer's liability limits. Instead, both policies contract to pay the sums the insured becomes legally obligated to pay, not merely a prorata proportion of the amount. Once triggered, both the St. Paul and CNA policies provided full coverage up to the policy limits for the entire claim. St. Paul protested from the outset that its contribution towards settlement should not exceed nine percent and reserved its right to proceed against CNA. Because it was not a volunteer, St. Paul was entitled to equitable subrogation against CNA.

I. Settlement By One Insurer Does Not Affect Liability At Trial Of Other Insurer

Farmers Texas County Mutual Ins. Co. v. Jones, 660 S.W.2d 879 (Tex. App.--Fort Worth 1983, no writ).

Fire destroyed mobile home valued between $32,000.00 and $38,000.00. EMMCO Insurance Company covered the mobile home with a $25,000.00 fire policy. Farmers Texas County Mutual Insurance Company covered the home and personal property contents in the amount of $25,000.00. Both policies contained a Prorata mother insurance' clause. EMMCO settled its liability without trial for $12,000.00. Farmers Mutual denied liability claiming owner arson. Trial was to a jury which found that the value of the home was $12,300.00 and the value of the contents was $10,444.00. The Court held Farmers Mutual liable for the $10,444.00 in contents and $6,833.00 for the loss of home (representing a prorata proportion of the $12,300.00 value that the jury found).

On appeal, the Court held that the $12,000.00 payment by EMMCO in settlement before the trial in no way affected the liability of Farmers Mutual for its share of the loss. EMMCO determined its liability to be $12,000.00. On the other hand, Farmers Mutual's liability was determined by the jury finding of $12,300.00 which would be multiplied by its prorata proportion to the EMMCO policy. Allowing the owner to keep the $12,000.00 settlement paid by EMMCO And the $6,833.00 amount found by the jury was not an unjust enrichment. The jury's $12,300.00 of the value of the home did not represent the value of the home for the purpose of determining the liability of EMMCO, but only for determining the liability of Farmers Mutual.

J. Excess Insurance Beyond The Level Of Settlement Is Not Considered In Proration

(i) *Atlantic Mutual Ins. Co. v. Truck Ins. Exchange*, 797 F.2d 1288 (5th Cir. 1986).

The insured was covered by two policies, one from Atlantic Mutual Insurance Company and the other by Truck Insurance Exchange. The insured was sued in connection with property damage. Atlantic provided a defense and settled the underlying suit. Truck refused to participate in the defense.

Atlantic brought a diversity action seeking contribution from Truck for settlement and defense costs. Following a bench trial, the district court granted Atlantic a portion of the relief. On appeal, the Fifth Circuit Court of Appeals affirmed.

Atlantic's policy covering property damage was $2,000,000.00. Truck covered property damage in the amount of $1,000,000.00. Aetna provided a $4,000,000.00 excess policy and Midland Insurance Company provided $5,000,000.00 above the Aetna excess.

Santini, the insured, was sued by Dresser. Suit was settled for $850,000.00. Atlantic also incurred expenses of $446,649.38 in defending Santini. The district court awarded Atlantic one-third of the settlement amount and one-half of the defense costs, plus prejudgment interest. The Court, however, denied Atlantic's request for attorney's fees incurred in the suit against Truck.

Both policies contained "other insurance" clauses which limited the policies to "excess" when other insurance is available. The parties agreed that liability should be proportioned to the policy limits, but Atlantic contended that the entire line of insurance available to Santini based on Truck's primary insurance should be considered in determining the relevant policy limits. However, the Fifth Circuit found that because settlement was within Truck's primary insurance, the excess insurers should not be considered in determining the appropriate proration. *Id*. at 1296.

(ii) *Utica National Ins. Co. of Texas v. Fidelity & Casualty Co. of New York*, 812 S.W.2d 656 (Tex. App.--Dallas 1991, writ denied).

This case involves the allocation of settlement to two lines of excess insurance which covered an automobile accident. One line covered the injured passenger. The other fine covered the driver and his company. Each line of insurance included primary and excess insurance.

The settlement of the underlying case was $2,200,000.00. Primary insurance from both lines aggregated to $1,350,000.00, leaving a balance of $850,000.00 to be paid from the two lines of excess insurance. The Utica line of insurance contained one policy with $10,000,000.00. The Fidelity line of excess contained a Fidelity excess policy in the amount of $5,000,000.00, a second Fidelity excess policy in the amount of $10,000,000.00, a Harbor excess policy in the amount of $10,000,000.00, a Nutmeg policy in the amount of $10,000,000.00 and a First State excess policy in the amount of $15,000,000.00 for a total aggregate of Fidelity excess in the amount of $50,000,000.00. Utica contended that in determining the allocation of the payment of the remainder of the $850,000.00 in settlement, the total amount of coverage provided by the two lines should be considered. In that case, the Fidelity line aggregating $50,000,000.00 would be prorated against the Utica $10,000,000.00.

Utica paid the $850,000.00 excess obligation and sought contribution from Fidelity. Both Utica and Fidelity filed Motions for Summary Judgment. The trial court held that $850,000.00 in settlement should be prorated by comparing Utica's $10,000,000.00 with Fidelity's first excess layer of $5,000,000.00, thereby requiring that Fidelity pay $283,333.33. Because Fidelity's first excess layer of $5,000,000.00 would not be exhausted, the trial court determined that the other

policies in the Fidelity line should not be considered in determining the prorata share. The Dallas Court of Appeals upheld the trial court holding that "the excess policies in the Fidelity line of insurance clearly intended hierarchy of coverage that contemplates a specific order of contribution based on the exhaustion of applicable policy limits." *Id*. at 663.

K. Excess Insurers: Competing "Other Insurance" Clauses

St. Paul Mercury Ins. Co. v. Lexington Ins. Co., 888 F.Supp. 1372 (S.D. Tex. 1995), *aff'd* 78 F.3d 202 (5th Cir. 1996).

In 1992, Blake Foret and his wife, Dorothy, brought suit against Campbell Wells Corporation for personal injuries Blake Foret sustained in the course and scope of his employment at Campbell Wells. Campbell Wells was a wholly owned subsidiary of Sanifill, Inc. Lexington Insurance Company, St. Paul Fire & Marine Insurance Company, Landmark Insurance Company and Centennial Insurance Company all provided insurance coverage to Sanifill and Campbell. Centennial assumed the defense of Sanifill and Campbell Wells in the Foret case. St. Paul, the excess carrier under Centennial, provided associate counsel for the defense. Prior to mediation, Lexington and Landmark were asked to participate in the defense and possible settlement of the Foret case. At mediation, the Foret case was settled for $4,800,000.00 with Centennial contributing $426,352.00 in settlement and $73,647.00 in attorney's fees. Landmark contributed its policy limits of $1,000,000.00. Lexington contributed $1,600,000.00 and St. Paul contributed $1,773,647.00. The insurers reserved the right to seek a judicial determination of their respective rights and obligations under the policies.

Lexington instituted a declaratory judgment action against St. Paul seeking a declaration of the parties' respective obligations to contribute to the Foret settlement. Lexington alleged that it was under no obligation to participate or contribute in the settlement of the Foret case and sought the return of the $1,600,000.00 it contributed to that settlement. Lexington added Centennial as a party and added a claim against both St. Paul and Centennial for negligent handling. Landmark was later brought into the case by St. Paul which sought reimbursement from Landmark of the defense costs associated with the Foret case.

St. Paul and Centennial had escape "other insurance" clauses which provided that if there was other insurance, their policies would not have to contribute.

Landmark's policy was a worker's compensation and employer's liability policy with limits of $1,000,000.00, not subject to reduction for attorney's fees and costs. Lexington's policy was an umbrella policy of $5,000,000.00.

Centennial's policy was a hull and protection indemnity policy with limits of $500,000.00, subject to reduction for attorney's fees and costs. St. Paul's policy was an excess protection and indemnity policy with $4,500,000.00 in coverage.

Each of the primary carriers (Landmark and Centennial) had "other insurance" clauses. Landmark's clause was a pro-rata clause. Centennial's clause was an escape clause. St. Paul's policy adopted Centennial's escape "other insurance" clause. Centennial's failure to reserve its rights and St. Paul's late reservation of rights as against Landmark and Lexington did not affect the relationship between the insurers. Therefore, Centennial and St. Paul did not waive their reservations of rights and were not estopped from asserting defenses to insurance coverage.

Lexington could not assert any claims under the theory of equitable subrogation against Centennial and St. Paul. Centennial and St. Paul fulfilled their obligations to the insured by defending the case and obtaining a settlement within the limits of the applicable insurance policies. Therefore, Sanifill, the insured, would not have a cause of action against either Centennial or St. Paul resulting from a lack of reservation of rights. With regard to the priority between the two primary policies (Landmark and Centennial), there is no Texas case law directly on point. Texas district courts which are faced with multiple policies containing conflicting "other insurance" clauses "look to the overall pattern of insurance coverage to resolve disputes among the carriers." *The Texas Supreme Court in Hardware Dealers Mutual Fire Ins. Co. v. Farmers Ins. Exchange*, 444 S.W.2d 583 (Tex. 1969) concluded that conflicting excess and escape "other insurance" clauses should be ignored and the liability prorated. In the present case, since the liability for the settlement was $4,800,000.00 and the primary policy coverage provided by Centennial and Landmark was $1,500,000.00, a proration is not needed since both primary policies will be exhausted.

In this case, the court concluded that liability should be prorated between Lexington and St. Paul.

L. Priority Between Excess Policies

St. Paul Mercury Ins. Co., et al. v. Lexington Ins. Co., et al., 78 F.3d 202 (5th Cir. 1996).

In this case, the Fifth Circuit upheld the Southern District of Texas in determining the priority of insurance among four insurance carriers, two primary and two excess carriers, in which all of the policies had "other insurance" clauses. The Fifth Circuit relied on *Hardware Dealers Mutual Fire Ins. Co. v. Farmers Ins. Exchange*, 444 S.W.2d 583 (Tex. 1969) in finding that the $4,800,000.00 settlement should be prorated among the carriers. Since the total aggregate of the two primary carriers was only $1,500,000.00, the primary carriers' coverage was exhausted regardless of the proration. However, the excess and the umbrella carriers' liability was prorated although one had an excess "other insurance" clause and the other had an escape "other insurance" clause. The Fifth Circuit agreed that since Centennial (primary) and St. Paul (excess) did not reserve rights over and against the other insurance carriers this did not mean that they were estopped from asserting their "other insurance" clauses. Thus, the Fifth Circuit upheld the Southern District of Texas in finding that equitable subrogation did not apply because there was no evidence that Centennial or St. Paul were negligent in handling the defense.

VI. MISCELLANEOUS

A. Defense Costs: Excess Generally Does Not Share In Defense Costs Until Unequivocal Tender By Primary: Excess Owes No Duty Of Good Faith And Fair Dealing To Primary

Texas Employer's Insurance Assoc. v. The Underwriting Members of Lloyds, 836 F.Supp. 398 (S.D. Tex. 1993)

The primary insurer sued excess insurer seeking contribution to defense costs and indemnity after it settled a wrongful death action arising out of an employee's exposure to benzene during his employment with the insured. TEIA, the primary carrier, issued a policy with $1,000,000.00 per occurrence lost limits. The Underwriting Members of Lloyds provided two layers of $5,000,000.00 and $10,000,000.00 in coverage.

In the underlying suit, Plaintiffs won a $108,000,000.00 verdict against Monsanto. The trial court granted an order for new trial. The second trial was settled for $7,250,000.00 before trial. TEIA paid its full $1,000,000.00 indemnity limits and the Underwriters paid the remaining $6,250,000.00. TEIA subsequently demanded reimbursement for $4,057,245.00 in attorney's fees and costs spent by TEIA in Monsanto's defense. The Underwriters rejected the demand and TEIA filed suit against the excess carriers. TEIA asserted that the Underwriters' refusal

was a breach of duty good faith and fair dealing. TEIA also argued that it was entitled to contribution under equitable subrogation.

The federal district court held that an excess insurer is not obligated to participate in the cost of defense until the primary policy limits are exhausted based on the language in the Underwriting Members' policy. However, language in some excess policies may require excess to drop down and defend insured if exclusions under the primary policy apply so that there is no primary coverage. In the Texas Employer's case, the defense costs at issue were incurred before settlement of the underlying litigation and before exhaustion of TEIA's policy limits. As a matter of law, TEIA is solely responsible for the cost of defense pursuant to the terms of its policy.

TEIA contended that after the original $108,000,000.00 verdict, TEIA telephoned Monsanto and "made available" TEIA's $1,000,000.00 policy limits. TEIA argued that this was a "tender" which "exhausted" its primary coverage thereby eliminating its liability for further defense costs. The federal district court found that TEIA's purported tender of its policy limit was inadequate. A "tender" is an unconditional offer by the debtor to pay a sum of money not less than the money due on the obligation. A valid and legal tender of money must be accompanied by the actual production of the funds and offer to pay the debt involved. The tenderer must relinquish possession of the funds for a sufficient time and under such circumstances as to enable the person to whom it is tendered without special effort to acquire its possession.

The federal district court rejected TEIA's contention that the excess carriers owed a duty of good faith and fair dealing to the primary carrier.

B. Excess Carrier Had No Duty To Second Layer Of Excess To Settle Within The First Layer Excess Coverage

National Union Fire Ins. Co. of Pittsburgh v. CNA Ins. Co., et al., 28 F.3d 29 (5th Cir. 1994), *cert. denied* 115 S.Ct. 1252 (1995).

A lawnmower manufacturer was sued when a child's hands were amputated while using the lawnmower. Manufacturer was self insured up to $100,000.00 per occurrence, $750,000.00 in the aggregate. Columbia provided the first and second levels of excess coverage ($1,000,000.00 less the insured's self-retained limits and $5,000,000.00). National Union provided the upper level excess of $15,000,000.00 in coverage.

The excess policy between the manufacturer and Columbia gave Columbia the right to associate itself with the insured and control negotiation, investigation and defense or appeal of any claims. However, endorsement six

deleted Columbia's right to settle a claim without the consent of insured within its limits. Manufacturer retained the right to control litigation and settlement.

In the underlying case, a large verdict was rendered in favor of the Plaintiffs. The manufacturer settled the case for $7,500,000.00. The settlement exhausted the manufacturer's self-insured limits and the first two layers of excess coverage provided by Columbia. National Union had to contribute approximately $2,000,000.00 of the upper level excess coverage.

National Union sued Columbia for violations of the Texas Deceptive Trade Practices Act, Article 21.21 of the Insurance Code and for equitable subrogation. The trial court granted summary judgment in favor of Columbia from which National Union appealed.

The Fifth Circuit held that Columbia had the right but not the duty to engage in settlement negotiation. Therefore, because Columbia had no duty to the manufacturer to settle, Columbia also had no duty to National Union under the doctrine of equitable subrogation. The manufacturer reserved the right to control the defense. As a matter of law, Columbia could not have controlled the defense or settlement of the claim.

C. Junior Excess Policy Liable For Expenses Until Limit Of Settlement Liability Reached: Senior Excess Carrier Entitled To Reimbursement For Overpayment

Hartford Accident & Indemnity Co. v. Pacific Employers Ins. Co., 862 F.Supp. 160 (S.D. Tex. 1994).

Baylor College of Medicine is self-insured for the first $5,000,000.00. The top $3,000,000.00 of Baylor's self-insurance was insured by Pacific Employers. National Union Fire Insurance provided a $5,000,000.00 excess coverage after the Baylor/Pacific limit. Hartford provided $15,000,000.00 in excess coverage after all other policies were exhausted. The Baylor plan stated that payment of expenses by an insurance company did not count towards the liability limits of the policies. The excess policies were "follow form" policies.

Hartford brought suit against Pacific alleging that Pacific had not exhausted its $3,000,000.00 limits ($108,500.00 remained) and, therefore, Hartford's layer of insurance had not been reached. Therefore, Hartford sought reimbursements for expense payments that it had made before Pacific's coverage had been exhausted.

The trial court held in favor of Hartford. The trial court observed that although there was no contract between Hartford and Pacific, Hartford could recover from Pacific to the extent that it was equitably subrogated to the rights of

Baylor. The trial court held that Hartford was entitled to the fun amount of expense payments that it made until Pacific's liability payments would have been exhausted if it had paid. Therefore, Hartford recovered $628,096.00 in reimbursement for payment of expenses, as well as the $108,500.00 in liability payments that Pacific failed to pay.

In addition to recovery for expenses, the trial court awarded prejudgment interest. The trial court found that "the question of equitable subrogation involves underlying issues sounding in both contract and tort. Because this case raises issues principally from contract rather than tort, the statutory interest rate applies." *Id*. at 165. That statutory rate was six percent.

D. Breach Of Duty To Defend: Carrier Not Liable For Judgment In Excess Of Policy If No Opportunity To Settle And No Bad Faith

Employers National Ins. Co. v. Zurich American Ins. Co., 792 F.2d 516 (5th Cir. 1986).

A suit was filed arising out of a dispute over liability coverage for a skyride accident at the Texas State Fair. The issue presented was if a liability insurer breaches its duty to defend the insured and if the insured is thereafter held to be liable to the third-party for an amount in excess of the policy limits, should the insurer be held liable for the full amount of the judgment? No proof was made of bad faith or an opportunity to settle within policy limits. The Fifth Circuit held that under Texas law, the duty to exercise reasonable care to settle claims survives the insurer's breach of its duty to defend. However, strict liability is not imposed on the insurer without any evidence that the claim could have been settled for less than the judgment if the insurer had conducted the defense. There must be a casual connection between the action of the insurer and the injury to the insured i.e. the judgment in excess of policy limits. *Id*. at 520.

VII. CONCLUSION

There are a variety of contexts in which carriers have disputes with other carriers. Frequently, by paying for defense costs, or a loss or a settlement, one carrier obtains a subrogation claim against another carrier. The subrogation can arise equitably or by contract. In addition, carriers often file declaratory judgment actions against other carriers in order to determine their respective rights and obligations regarding coverage or defense. Declaratory judgment actions are also utilized to obtain a favorable procedural advantage or to attempt to select a favorable forum. Finally, conflicts arise among carriers where carriers attempt to reduce or even eliminate their coverage through policy provisions such as "other insurance" clauses. Although such clauses have been the subject of countless suits, unique factual situations dictate that suits involving such provisions will continue.

As an industry, insurance is engaged in the business of evaluating and shifting losses. Litigation among insurance carriers is but one additional device utilized by carriers to shift their losses.