INTRODUCTION

In today’s litigation arena, where an increasing number of cases implicate multiple layers of liability insurance coverage, whether because of catastrophic injuries, number of claimants or lottery ticket jurisdictions, relationships between insureds, primary insurers and excess insurers are being tested. The rights and obligations of insureds and their insurers, whether primary, umbrella or excess, are founded first and foremost in contract, as set forth in the language of insurance policies. Typically, however, there is no contractual relationship between primary and excess insurers who provide coverage to a common insured. Consequently, the obligations between primary and excess insurers have developed largely as a matter of caselaw and may differ significantly from one jurisdiction to another.

The purpose of this paper is to provide a general review of the rights and obligations of the insured, primary insurers and excess insurers in the defense and resolution of large loss litigation. Any such analysis must begin with an understanding of the different mechanisms of liability insurance and self-insurance that are available to insureds.

A. Components of a Multi-tiered Insurance Program

1. Primary Insurance

Primary liability insurance provides the first layer of insurance coverage that attaches immediately upon the happening of an occurrence that is covered by the terms of the policy.

Highlands Ins. Co. v Continental Co, 64 F.3d 514 (9th Cir. 1995); American Home Assur. Co. v. Republic Ins. Co., 984. F.2d 76 (2d Cir.1993); Associated Wholesale Grocers, Inc. v. Americold
Corporation, 261 Kan. 806, 941 P.2d 65, 81 (1997). Under the typical primary liability insurance policy, an insurer undertakes two separate and distinct obligations: to defend and to indemnify the insured from liability for accidental bodily injury and property damage to third parties subject to the exclusions and limitations set forth in the policy. Typically, under standard form primary liability policies, the insurer has a duty to provide a defense for any claims “potentially covered” by the policy and the right to control the defense of such claims. Mesmer v. Maryland Automobile Ins. Fund, 353 Md. 241, 258, 725 A.2d 1053 (1999); Sherwood Brands, Inc. v. Hartford Accident & Indemnity Company, 374 Md. 32, 43, 698 A.2d 1078 (1997); St. Paul Fire & Marine Ins. Co. v. Pryseski, 292 Md. 187, page 438 A.2d 282 (1981); Brohawn v. Transamerica Ins. Co., 276 Md. 396, 408, 347 A.2d 842 (1975). In most jurisdictions, courts have found that the primary insurer’s duty to defend the policyholder is distinct from and broader than the duty to indemnify. It is triggered by allegations of fact that, if true, would bring a claim within the coverage of the policy. Such allegations may give rise to the insurer’s defense obligation even where ultimately there is no duty to indemnify.¹

Because most losses are within primary policy limits and because primary insurers are generally obligated to provide a defense to their insureds, “primary coverage is much more expensive than excess coverage.” Americold Corp., 934 P.2d at 81 (insured’s premium cost for $1 million primary coverage was $232,077, while cost for $25 million excess coverage was $121,500); see also Reliance National Indem. Co. v. General Star Indem. Co., 85 Cal. Rptr.2d 627, 638-39 (Ct. App. 1999).

¹ In this regard, primary liability insurance policies are found to provide “litigation insurance” shifting the expense of defending lawsuits to the primary insurer, who can be expected to employ its legal and investigative resources to defeat the action for the mutual benefit of both the insurer and the insured. Nationwide Ins. Companies v. Rhodes, 127 Md. App. 231, 240, 732 A.2d 388 (1999); Brohawn, 276 Md. at 409-410, 341 A. 2d 842.
2. **Self Insurance**

Some businesses elect to “self insure” at the primary level up to certain limits of liability or with respect to particular types of losses. \(^2\) “Self insurance” can take various forms: true self insurance where a corporation retains all risks against which it might otherwise insure; the purchase of insurance with a self-insured retention or SIR; \(^3\) the purchase of fronting policies; or the purchase of policies with retrospective premiums. Douglas R. Richmond, *Issues and Problems in “Other Insurance,” Multiple Insurance and Self-Insurance*, 22 Pepp. L. Rev. 1373, 1447-48 (1995). In cases where an insured has a significant SIR, it may also retain the right and obligation to adjust the claim, either directly or through a third-party administrator and to select counsel to defend the case. Richmond, *supra* at 1449; *see, also*, Liberty Mutual Ins. Co. v. American Home Assur. Co., 348 F.Supp.2d 940, 943, 953, 961-62 (N.D. Ill. 2004) (railroad with multi-tiered risk-management program, including $5 million self-insured primary level retained duty to investigate and defend catastrophic accident that implicated excess layers). As a general rule, a self-insured must satisfy or “exhaust” its SIR before excess coverage is triggered.

As distinguished from a primary insurer, a self-insured has a contractual relationship with its excess carrier and, correspondingly, assumes contractual duties to its excess carrier under the terms and conditions of the excess insurance policy. A self-insured also assumes duties of good faith and fair dealing in handling the defense and settlement of a claim so as not to elevate its

---

\(^2\) An insured can be deemed self-insured for a particular risk when it affirmatively purchases liability policies which exclude that risk from coverage. *See Mayor & City Council of Baltimore, Inc. v. Utica Mutual Ins. Co.*, 145 Md. App. 256, 283-86, 802 A.2d 1070, 1086-88 (2002) (asbestos installer that purchased policies with product hazard exclusions deemed to be self-insured for asbestos property damage claims in those periods).

\(^3\) An SIR differs from a deductible in that, once the SIR has been satisfied, the full limits of liability under the subject policy are available. In contrast, a deductible is subtracted from the policy limits, thereby reducing an insurer’s indemnity obligations. Additionally, if an insured with a deductible should become insolvent, the insurer must satisfy the deductible as part of his obligations to pay covered losses up to the limit of liability under the policy. In contrast, if the insurer’s policy is subject to an SIR, the insurer would be liable only for the portion of the loss exceeding the SIR.

3. **Excess Insurance**

When the size, operations or circumstances of the insured require higher limits of insurance, the insured typically procures umbrella and/or excess coverage. Excess liability insurance “covers occurrences covered by the primary policy but exceeding the liability limits of the primary policy.” Mayor & City Council, 145 Md. App. at 308, 802 A.2d at 1101, n.50 (quoting Megonnel v. United States Automobile Ass’n, 368 Md. 633, 644, 796 A.2d 758, 765 n.6 (2002)). In general, companies purchase excess coverage to protect themselves from catastrophic loss. Id. (citations omitted). An excess policy will respond only after a predetermined amount of underlying coverage is exhausted and it does not broaden the scope of coverage provided by the underlying policy. See generally, Douglas R. Richmond, Rights and Responsibilities of Excess Insurers, 78 Denv. U. L. Rev. 29, 30 (citing Wells Fargo Bank v. Cal. Ins. Guar. Ass’n., 45 Cal. Rptr.2d 537, 539 n.2 (Ct. App. 1995); Globe Indem. Co. v. Jordan, 634 A.2d 1279, 1283 (N.E. 1993)). The insuring agreement of excess policies typically contain provisions such as:

> The company will indemnify the insured for Ultimate Net Loss in excess of the applicable Underlying Limit which the Insured shall become legally obligated to pay as damages because of Personal Injury, Property Damage or Advertising Injury to which this policy applies, caused by an occurrence anywhere in the world.….  

Excess insurance policies may “follow form” to the underlying coverage, incorporating by reference its terms, conditions, and exclusions or it may be written on its own insuring agreement. As distinguished from primary coverage, there is no duty to defend under an excess

---

4 The insuring agreement of a follow form excess policy typically states that, “except as may be inconsistent with the terms and conditions of this policy, the insurance afforded by this policy shall follow the Insuring Agreements
policy unless and until the stated limits of underlying insurance are exhausted. Under most excess policies, however, the excess insurer has the right to participate, at its own expense, in the investigation, settlement or defense of any claim or suit that it believes may implicate its coverage.

Because excess insurers are not typically obligated to provide a defense, excess premiums are less than premiums charged for primary policies. The concept of excess policies is to provide inexpensive coverage for unusual catastrophic losses above limits of conventional primary coverage. Mayor & City Council, supra (citing Fried v. North River Ins. Co., 710 F.2d 1022, 1026 (4th Cir. 1983).

4. **Umbrella Insurance**

Like excess insurance, an umbrella policy provides limits of insurance that are in addition to those available under a primary policy. Unlike an excess policy, an umbrella policy may also provide broader coverage than the underlying primary policy. Umbrella policy forms commonly contain a complete set of declarations, terms, conditions, definitions and endorsements. The insuring agreement of an umbrella policy will frequently state that it provides for coverage of damages caused by an occurrence, as defined within the coverage terms of the policy, and also for an occurrence which “is not within the terms of coverage of underlying insurance, but is within the terms of coverage of this insurance.” To this extent, an umbrella policy may function as a “gap filler” that provides a defense and first dollar liability coverage for claims that are not within the coverage provided by a primary policy.
B. **Duties of the Insured and Primary Insurer to Excess Insurer**

As noted above, there is no contractual relationship between a primary insurer and an excess insurer that gives rise to contractual obligations between the two. Instead, the insurance contracts, whether excess or primary, create obligations only between the insured and the respective insurer. Under the insurance contract, an insurer typically does not assume any duties to another insurer, including those that provide coverage at a different layer for a common insured. Notwithstanding the absence of contractual obligations, some courts have imposed non-contractual duties on primary insurers in their dealings with excess insurers in the context of claims that are likely to exceed primary limits.

1. **Duties with Respect to Settlement**

   It is well-established in the majority of jurisdictions that a primary insurer owes a duty of good faith and fair dealing to its insured that arises from the insurer’s exclusive right to control the defense and settlement of claims within the coverage of its policy. In the context of settlement negotiations, courts have held that, in light of this right of control, an insurer may not place its pecuniary interests ahead of its insured in the settlement process. Under most state’s law, an insurer may be liable to its insured for any amount in excess of policy limits if that excess verdict is caused by the primary insurer’s unreasonable failure to settle within policy limits when it could have done so. See, e.g., *State Farm Mutual Automobile Ins. Co. v. White*, 233 Md. 324, 236 A.2d 269 (1967). In some jurisdictions this liability is found to arise from an independent tort duty. *State Farm*, supra; *Anderson v. Continental Ins. Co.*, 85. Wis.675, 271 N.W. 2d 368, 374 (1978). The majority of states, however, do not recognize a cause of action in tort for an insurer’s failure to honor its obligations. Instead these jurisdictions find that liability lies, if at all, in breach of the contractual duty of good faith and fair dealing, see, e.g., *State Farm*

Whether sounding in tort or contract, a primary insurer’s liability to an insured for any failure to act reasonably when considering settlement arises from its contractual relationship with the insured. Because of the absence of any contractual relationship between a primary and an excess insurer, concepts of duty and breach are less clear when a primary insurer’s failure to settle implicates the excess insurer’s coverage, as opposed to an insured’s assets. The majority of jurisdictions confronting this question have found that an excess insurer’s rights against a primary insurer arise through the doctrine of equitable subrogation. Under the doctrine of equitable subrogation, an insurer paying a loss under a policy becomes subrogated to a cause of action that the insured may have against a third party who caused the loss. An excess insurer can use the doctrine of equitable subrogation to assert the insured’s right to insist that the primary insurer use due care to avoid an excess judgment against the insured. Liberty Mutual Ins. Co. v. American Home Assur. Co., 348 F.Supp.2d 940, 961 (N.D. Ill. 2004) (citing Westchester Fire Ins. Co. v. General Star Indem. Co., 183 F.3d 578, 582-83 (7th Cir. 1999)); Haddick Ex Rel. Griffith v. Balor Ins., 198 Ill.2d 409, 261 Ill. Dec. 329, 763 N.D.2d 299, 303-04 (2001)). The doctrine of equitable subrogation thus allows an excess insurer to “step into the legal shoes” of the insured and acquire the insured’s right against the primary insurer. Id. Between excess and

primary insurers, this duty comes into play in determining whether the primary insurer has been negligent or has exercised bad faith in failing to settle a claim within primary limits.\(^6\)

While the doctrine of equitable subrogation has been widely accepted, in contrast, the majority of courts considering the question have found that primary insurers have no direct duty to excess insurers. Two recent decisions have rejected the notion that any such direct duty exists and expressed certain limitations on the equitable subrogation rights available to an excess insurer in the context of a settlement in excess of the primary limits.

In *Federal Ins. Co. v. Travelers Casualty & Surety Co.*, 843 So.2d 140 (Ala. 2002), the Alabama Supreme Court addressed two questions certified to it by the U.S. Court of Appeals for the Eleventh Circuit: (1) whether, absent any specific contractual duty, a primary insurer is nevertheless obligated to perform the following duties when defending an insured; the duty of good faith to settle; the duty of good faith in deciding whether to settle; and the duty of good faith to keep the excess carrier informed of settlement negotiations and adverse developments; and (2) whether an excess carrier, whose insured was never subject to a final judgment ordering the payment of money, that the insured, not its insurer, personally would have to pay, can be equitably subrogated to the rights of the insured arising out of any of the foregoing duties against the primary carrier in the conduct of its defense of the mutual insured. *Id.* at 142. In answer to the first set of certified questions, the Alabama Supreme Court held that “in the absence of contrary contractual obligations, a primary insurer owes no duty of good faith to an excess insurer with respect to the settlement of a lawsuit against the insured.” *Id.* (reasoning that,  

\(^6\) The majority of courts have held that an excess carrier has no cause of action against a primary insurer where the primary insurer has refused to settle a case causing the excess to step in and settle to protect against an even larger loss. Instead, an action will lie only where the primary’s unreasonable failure to defend has resulted in a verdict in excess of the primary policy limits. A few courts have held otherwise. *Continental Casualty Co. v. Reserve Ins. Co.*, 307 Minn. 5, 258 N.W. 2d 862 (1976); *Fortman v. Safeco Ins. Co.*, 221 Cal. App. 3d 1394, 271 Cal. Rptr. 117 (2d Dist. 1990).
because insured relinquishes to primary insurer the right to control defense and settlement, primary insurer has duty of good faith to insure; however, because excess insurer did not relinquish that right to primary insurer, “the primary-insurer/excess-insurer relationship does not involve the same policy considerations that justify imposing on those insurers the duty of good faith to settle that currently exist between an insured and his insurer.”

In response to the second certified question, the Alabama Supreme Court recognized that the doctrine of equitable subrogation has long been recognized in Alabama and that an excess insurer “which pays an obligation incurred by its insured could be equitably subrogated to the rights of its insured in order to seek reimbursement from some third-party wrongdoer.” However, the court went on to reason that a “unique analysis” is applicable to an equitable subrogation claim in the primary-insurer/excess-insurer context. Specifically, because the insurer, through subrogation, “stands in the shoes” of the insured, its rights are no greater than the insured. Because the insured in that case had no personal exposure with respect to the judgment, due entirely to the availability of sufficient excess insurance, the court concluded that the insured and, correspondingly, the excess insurer, would never be able to assert a bad faith failure-to-settle claims against the primary insurer. Id. at 145.

claimant, pursuant to which Zurich paid its remaining limits to the claimant in exchange for a covenant not to execute against the assets of the insured. The excess insurer, U.S. Fire, then assumed the defense of the insured and ultimately settled with the claimant for an amount in excess of its policy limits. U.S. Fire later sued Zurich to recover both defense costs and amounts paid in settlement under both a direct duty and equitable subrogation theory of recovery. The U.S Fire court declined to follow the “prediction” in Schal Bovis that Illinois would recognize a direct duty owed by a primary insurer to an excess insurer. It also dismissed U.S Fire’s equitable subrogation claim against Zurich, finding that, as a subrogee of the insured, U.S Fire acquired no greater rights than those of the insured. Because the insured had consented to the settlement and executed a release of Zurich, any claim by the insured and, correspondingly, U.S Fire, as its subrogee, was barred.

As these cases illustrate, predicking a primary insurer’s duty to an excess insurer on the doctrine of equitable subrogation, as opposed to a direct duty, is more than a theoretical distinction. Under the doctrine of equitable subrogation, an excess insurer’s rights are limited to those that could be asserted by the insured, and in those instances where the insured consented to the primary insurer’s decisions with respect to settlement or where the insured’s assets are not put at risk, the excess insurer may be barred from proceeding against the primary insurer. Where there is a direct duty, however, an excess insurer’s rights against the primary carrier are not circumscribed by those of the insured and can be based upon duties owed directly by the primary to the excess insurer.

2. **Duty to Notify**

Both primary and excess insurance policies impose upon the insured the contractual duty to provide notice of a loss to the insurer. While language of such notice provisions may vary, the purpose of all notice provisions is to enable the insurer to adequately investigate and respond to claims. *Aetna Casualty & Sur. Co. v. Murphy*, 206 Conn. 409, 416, 538 A.2d 219, 222 (1988). A typical primary level general liability policy may contain the following notice provision:

**Duties in the Event of Occurrence, Offense, Claim or Suit**

a. You must see to it that we are notified as soon as practicable of an “occurrence” or an offense which may result in a claim. To the extent possible, notice should include:

   (1) How, when and where the “occurrence” or offense took place;

   (2) The names and addresses of any injured persons and witnesses; and

   (3) The nature and location of any injury or damage arising out of the “occurrence” or offense.

b. If a claim is made or “suit” is brought against any insured, you must:
Immediately record the specifics of the claim or “suit” and the date received; and

Notify us as soon as practicable.

Excess policies also contain notice provisions which require the insured to notify the excess insurer in the event of a loss that can reasonably be expected to reach the excess layer. A typical excess policy notice provision may read:

Upon the happening of any occurrence reasonably likely to involve the coverage of this policy, written notice containing particulars sufficient to identify the insured and also reasonably obtainable information with respect to the time, place, and circumstances thereof and the names and addresses of the injured and of available witnesses, shall be given by or for the insured to the company or any of its authorized agents as soon as practicable.

Thus, as a matter of contract, the duty to notify both the primary insurer and the excess insurer lies with the insured. However, in the case of an excess insurer, it is not always clear when the duty to notify attaches, as the extent of a potential loss may not become clear until fairly late in the litigation. This analysis becomes even more complicated where a loss is significant, but perhaps not viewed in the early stages as catastrophic, and the insured has multi-layers of excess coverage.

In Liberty Mutual Co. v. American Home Assur Co., supra, the first level excess policy ($20M excess of $5M SIR) required the insured to provide notice to the excess insurer “as soon as practicable” of any “occurrence, claim, or suit which the Insured reasonably expects to deplete the Underlying Amount . . . by more than 50%.” Liberty Mutual, 348 F.Supp. at 943. The second layer excess policy ($75M excess of $30M) required the insured to notify the insurer “as soon as possible of any occurrence, claim or suit which may result in a ‘loss’ covered under this policy.” In Liberty Mutual, the insured’s broker notified the first layer excess carrier the day after being served with a lawsuit arising from a serious personal injury railroad crossing.
accident. Because of its $5 million SIR, the insured retained the right to investigate and defend the lawsuit. Over the next year, counsel retained by the insured defended the case, reporting to the first layer excess carrier, including his evaluation of the settlement value of the case between $4M and $8.5M. After the case went to trial, but before the jury verdict was returned, the insured’s broker notified the second layer excess insurers of the case. After the jury returned a verdict in excess of $54M, one of the second layer excess carriers brought a cause of action against the first layer excess insurer predicated primarily upon its failure to reasonably negotiate a settlement of the underlying action. Paramount in the second layer excess carrier’s argument was the failure of both the insured and the first layer excess carrier to notify it of the pendency of the underlying case.

Ultimately, the Liberty Mutual court concluded that the first layer excess carrier had no direct duty to the second layer excess carrier, and, thus, could not be liable to the second layer excess carrier for failure to notify of the pending claim. However, the case illustrates the controversies that can arise when high level excess carriers are not notified of a case that ultimately implicates their layer. See also, D. Richmond, Rights and Responsibilities of Excess Insurers, 78 Denv. U.L.Rev. 29, 34-44.

Controversies concerning duties of notification to excess carriers can also arise between self-insureds and their excess carriers. In such cases, the dispute is more likely to focus upon the parties’ contractual rights as set forth in the language of notice provisions in the excess policies. In Prince George’s County v. Local Government Insurance Trust, 159 Md. App. 471, 859 A.2d 353 (2004), cert. granted, 384 Md. 581, 865 A.2d 589 (January 12, 2005), a County, which was self insured for $1,000,000 sought recovery, under its excess policy after a jury returned a $4.1M verdict in a police wrongful entry case. The excess carrier, a non-profit association of local
governments that contributed funds to a risk sharing pool, declined coverage based upon the County’s failure to notify it before the verdict was rendered. 159 Md. App. at 473, 859 A.2d at 354-55. The excess policy consisted of three documents: the declaration page, the Excess Liability Scope of Coverage and the Self-Insurance Excess Coverage Endorsement. The Scope of Coverage required the County to notify the Trust “promptly of an occurrence, wrongful act or accident which is likely to create an obligation under this Scope of Coverage.” Id. at 477, 859 A.2d at 356. The Endorsement, on the other hand, required the County to report certain “Losses” within 60 days of learning of them. 159 Md. App. at 478, 859 A.2d at 357. The County argued that the excess insurer had no right to deny coverage for failing to comply with what the County claimed were two different and conflicting notice provisions.

The court found that the two notice provisions were not in conflict; rather, they served a similar purpose at two different stages of a claim, each reinforcing the requirements of the other as the claim passed from origination to disposition. 159 Md. App. at 483, 859 A.2d at 360. It concluded that the County had, indeed, breached the notice requirements of the excess policy. Id. at 484, 859 A.2d at 360. That did not end the disputes, however, as the court went on to reason that such a breach, standing alone, was not sufficient to allow the excess insurer to deny coverage. Id. Instead, the excess carrier was also required to establish that it had been prejudiced by the breach, as required by the Maryland Insurance Code, Section 19-110 which precluded a liability insurer from disclaiming coverage unless the insurer can establish, by a preponderance of the evidence, that the lack of notice resulted in actual prejudice to the insurer. Id.

The County argued that the insurer could demonstrate no prejudice, because it, not the excess insurer, had the duty to defend the underlying case and the County had done so from its
inception through the jury verdict. The court disagreed. It reasoned that showing “actual prejudice” does not require the insurer to prove a negative. 159 Md. App. at 485, 859 A.2d at 361. Rather, in cases where the insurer has been deprived of all opportunity to defend, the mere entry of the adverse judgment is affirmative evidence of actual prejudice to the insurer. Id., quoting Washington v. Fed. Kemper Ins. Co., 60 Md. App. 288, 295-96, 482 A.2d 503 (1984).

The Maryland appellate court looked to decisions from other states that have held that an excess liability insurer is prejudiced as a matter of law when the insured fails to notify the insurer of a lawsuit until after trial. Id., citing Kerr v. Ill. Cent. R.R. Co., 283 Ill. App.3d 574, 219 Ill. Dec. 81, 670 N.E.2d 759 (1996) (excess liability insurer prejudiced as a matter of law when insured failed to notify insurer of lawsuit until after appellate court remanded suit to trial court for determination of damages); Allstate Ins. Co. v. Kepchar, 592 N.E.2d 694 (Ind. Ct. App. 1992) (excess liability insurer prejudiced as a matter of law when insured failed to notify insurer of lawsuit until one year after trial). Other state courts have held that an excess insurer is prejudiced as a matter of law when the insured notified it of a claim only a few weeks before trial. 159 Md. App. at 486, 859 A.2d at 361-62 citing Highlands Ins. Co. v. Lewis Rail Serv. Co., 10 F.3d 1247 (7th Cir. 1993) (excess liability insurer was prejudiced as a matter of law when it was notified of a lawsuit only six weeks before trial); Greyhound Corp. v. Excess Ins. Co., 233 F.2d 630 (5th Cir. 1956) (excess liability insurer was prejudiced as a matter of law when it was notified of a lawsuit only three weeks before trial). Cf. Herman Bros., Inc. v. Great West Cas. Co., 255 Neb. 88, 582 N.W.2d 328 (1998) (excess liability insurer was prejudiced as a matter of law when the insured notified it of a claim after it had entered a tentative settlement agreement and less than one week before payment of the settlement was to be made).
As these cases illustrate, when confronted with any case that has the potential for a large jury verdict, all insurers on the risk at the time of the occurrence (or at the time the claim was made and reported in the case of a claims-made policy) should be notified and kept apprised of developments as the case progresses.

3. **Defense Obligations: Primary vs. Excess Insurer**

In a case where it appears clear that the potential damages will exceed the primary policy limits, the primary insurer may wish to avoid its duty to defend, and attendant costs of defense, by tendering its limits to the tort plaintiff or the excess insurer. The problem for the primary insurer, however, is that the plaintiff will not likely accept the primary limits knowing there is excess coverage and the excess insurer will not accept the tender because it has no obligation to defend until the primary coverage is exhausted by payment of a judgment or settlement. \textit{Id.}

Although it does not have a duty to defend, an excess insurer may have a contractual right to participate in the insured’s defense where the excess policy limits may be implicated. Such a contractual right to participate, however, does not rise to the level of a duty to defend because the right is to protect the insurer rather than the insured and the contractual language itself does state any such duty. \textit{See Interstate Fire & Cas. Co. v. Underwriters at Lloyd’s, London}, 139 F.3d 1234 (9\textsuperscript{th} Cir. 1998); \textit{State Farm Fire & Cas. Co. v. Jioras}, 29 Cal.Rptr.2d 840, 844 (Ct. App. 1994); \textit{Int’l Ins. Co. v. Sargent & Lundy}, 609 N.E.2d 842, 855 (Ill.App.Ct. 1993); \textit{Interstate Fire & Cas. Co. v. Archdiocese of Portland}, 899 F.Supp. 498, 501 (D.Or. 1995), \textit{aff’d sub nom.} An excess insurer that exercises its contractual right to participate in the defense of the insured without issuing a reservation of rights will not be precluded by doctrines of waiver and estoppel from later raising coverage defenses. \textit{See e.g. Montgomery Ward and Co., Inc. v. Home Ins. Co.}, 753 N.E.2d 999 (Ill.App.1.Dist. 2001). This is because it is a liability insurer's duty to defend that gives rise to the need to reserve rights when defense of a claim is undertaken. \textit{Id.} Since an excess insurer does not have a duty to defend, it is not required to reserve its rights. An excess insurer, however, may still want to participate subject to a reservation of rights purely as a precautionary measure.

Where the primary insurer is required to pay the defense costs until such time as its policy is exhausted, the question arises whether the excess insurer should be required by equity
to contribute to those costs for which it has received a benefit. The minority view is that the excess insurer should be required to share in those costs. See Employers Ins. Co. v. Gen. Accident Ins. Co. v. Underwriting Members of Lloyds, 836 F.Supp. 398, 405 (S.D. Tex. 1993) (quoting 14 COUCH ON INSURANCE § 51:36, at 446 (2d ed. 1982) (excess insurer may be required to share in the defense costs on a pro rata basis)). The majority view, however, is that the excess or umbrella carrier is responsible for defense costs only after the primary policy limits have been exhausted.

Once the underlying insurance is exhausted and the excess insurer’s duty to defend is triggered, the excess insurer will be responsible for defense costs. Where the excess insurer wrongfully refuses to defend after the primary policy is exhausted, a primary insurer that pays the defense costs may seek reimbursement from the excess insurer. See Hartford Accident & Indem. Co. v. Super. Ct., 29 Cal.Rptr.2d 32, 34-35 (Ct. App. 1994). On the other hand, where the primary insurer fails to assume the defense and the insured would otherwise be left without a prompt and proper defense the excess insurer may determine to pay the defense costs. See e.g. Motors Ins. Co. v. Auto-Owners Ins. Co., 555 S.E.2d 37 (Ga.App. 2001); Grange Mut. Cas. Co. v. Rosko, 767 N.E.2d 1225 (Ohio.App.7.Dist.Mahoning 2001); New Hampshire Indem. Co., Inc. v. Budget Rent-A-Car Systems, Inc., 64 P.3d 1239 (Wash. 2003). In that event, the excess insurer should be entitled to recoup its costs from the primary insurer. New Hampshire Indem. Co., Inc., 64 P.3d 1239; Motors Ins. Co., 555 S.E.2d 37 (Ga.App. 2001).

4. **Allocation**

271-2, 447 A.2d 896 (1982)). In the context of long-tail claims that span multiple policy years, courts have employed a variety of different allocation methods to apportion responsibility for indemnity among insurers and, in some cases, the insured.

A detailed analysis of these allocation methodologies is beyond the scope of this paper. It is important to note, however, that these are court-imposed methodologies that most often are stated to be grounded upon equitable concepts, as opposed to contractual rights and obligations.

A growing number of courts have held in recent decisions that the obligation to indemnify an insured in cases that involve continuous or progressive injury or damage is to be prorated among carriers based upon their time on the risk over the triggered period. Mayor & City Council, 145 Md. App. at 266, 802 A.3d at 1076 (triggered primary insurance policies and self-insured periods of asbestos installer obligated to indemnify based upon time on the risk, rejecting the insured’s proffered “joint and several” or “all sums” allocation method as incompatible with injury-in-fact/continuing trigger). The Mayor and City Council court reasoned that a “time on the risk” rationale conformed with the realities of long-term property damage and the application of the injury in fact/continuous trigger of coverage. It went on to impose a horizontal exhaustion requirement, i.e., that the City (as a garnishee that stepped into the place of the insured asbestos installer) be required to exhaust all primary insurance before seeking indemnity from excess insurers. Id. Excess insurance would come into play only if the underlying policies had been exhausted, i.e., only after the primary carriers or self-insurers had fulfilled their irrespective allocations. Id. The court further held that an insured who elects not to carry liability insurance for a period of time, either by electing to be self-insured or by
purchasing a policy which excludes coverage for a particular risk\textsuperscript{7} would be liable for a pro-rated share that corresponds to the period of self insurance or no coverage. Mayor & City Council, 145 Md. App. at 309, 802 A.2d at 1101-02.

In Atchison, Topeka & Santa Fe Railway Co. v. Stonewall Ins. Co., 71 P.3d 1097 (Kan. 2003), the Kansas Supreme Court also ruled that self-insured retentions constitute primary insurance for the purpose of progressive injury claims and, as such, must be exhausted by the insured before it could seek recovery under excess policies. In that case, the court endeavored to give effect to the intent expressed under the terms of the excess policies, concluding that the self-insured retentions were “other insurance” within the meaning of the policies at issue. \textit{Id.} at 1129.

\textbf{Conclusion}

Decisional law regarding the relationships and obligations between insureds, self-insureds, primary insurers and excess insurers continues to evolve. As the size of verdicts inevitably increases, additional tensions are injected into these relationships which will undoubtedly lead to more litigation between these parties. As the cases illustrate, communication throughout the life of a claim, from first notice to the insured through resolution, can mitigate the likelihood of coverage litigation, decreasing both risk and expense for all concerned.

---

\textsuperscript{7} In that case, the insured had purchased policies that excluded the product hazard for a number of years, despite being urged to purchase this coverage by its broker. Mayor & City Council, 145 Md. App. at 283-286, 802 A.2d at 1086-1088.