APPLYING THE LESSONS OF FIRST PARTY COVERAGES TO FIDELITY CARRIERS: THE RELATIONSHIPS, DUTIES, RIGHTS AND PRIVILEGES AMONG PRIMARY AND EXCESS CARRIERS AND CO-INSURERS

Matthew M. Horowitz, Esq.
Wolf, Horowitz, Etlinger & Case, LLC
Hartford, Connecticut

Surety Claims Institute
June 22-24, 2005

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I. *Introduction*

An insurance policy is "primary" where coverage attaches immediately upon the happening of an insured event.[1] An insurance policy is "excess" where coverage attaches only after primary coverage has been exhausted and only for amounts in excess of the primary coverage limits.[2] Primary and excess coverages often arise as a result of a planned layering of insurance coverages designed to achieve the desired coverage at an acceptable premium and at an acceptable level of risk assumed by each carrier. However, where an insured purchases two separate policies with partially or totally overlapping coverages that are each designed to be primary, courts may create a primary/excess relationship between the two carriers based on the text of "other insurance clauses" in the policies and common law rules for interpreting these clauses.[3]

In contrast, "co-insurers" each bind themselves to pay the entire loss sustained as a result of an insurable event.[4] Co-insurance may arise as a result of conscious risk sharing decisions by underwriters. Co-insurance may also arise as a matter of law where two separate overlapping policies are construed by the courts to create a co-insurance relationship.[5]

Third party insurers have extensive experience with primary/excess and co-insurance relationships, both through conscious underwriting and unanticipated overlapping coverages. Primary/excess coverages and co-insurance is less common in the context of fidelity coverage, though these relationships are becoming more usual both intentionally as the magnitude of covered risks has increased and the availability of reinsurance tightens and through unanticipated overlapping coverages as the variety of available coverage packages has expanded.

There is an established body of case law that addresses the relative rights and responsibilities among third party primary and excess carriers and co-insurers. The issues addressed by this case law include the following:

- Whether a primary insurer owes duties to an excess carrier in connection with the settlement of claims?
- Whether a primary insurer owes a duty to provide notice of claim to an excess carrier?
- Whether a co-insurer owes a duty of notice of claim to another co-insurer?
- Whether a co-insurer owes a duty of contribution to another co-insurer?

- Whether otherwise privileged documents exchanged among co-insurers and primary and excess carriers maintain their privileged status?

There is no case law or virtually no case law that addresses these issues in the context of fidelity coverage.

This paper provides an overview of the "third party" case law regarding these issues and considers whether the same legal principles are likely to be applicable in the context of first party coverages.[6] Underlying this analysis is the recognition that the relationships among primary and excess carriers and among co-insurers are generally determined by the case law and ad hoc decision-making in lieu of explicit agreements among the related carriers. The relevant case law highlights the problems that arise in the absence of explicit understandings among the carriers and raises the issue of whether co-insurers or primary and excess carriers would benefit from having explicit claims handling protocols.[6]

II. ***Analysis***

A. THE DUTIES AND RELATIONSHIPS AMONG PRIMARY AND EXCESS INSURERS

In 1974, the Claims Executives Council, composed of the American Insurance Association, the American Mutual Insurance Alliance and eight unaffiliated companies published the Guiding Principles for Insurers of Primary and Excess Coverages ("Guiding Principles").[7] The Guiding Principles include the following:

(1) The primary insurer must promptly and diligently investigate a claim even if it is apparent that its policy limits will be consumed.

(2) The primary insurer must evaluate claims on a continuing and timely basis based on all pertinent facts and legal principles.

(3) The primary insurer's evaluation of a claim must be without regard to the policy limit.

(4) The primary insurer must give prompt, written notice of adequate scope to the excess carrier at such time as it reasonably appears that the insured may be exposed beyond the primary limits. At such time, the primary insurer should invite the excess carrier to participate in the handling of the claim and disclose pertinent information regarding the claim to the primary carrier.

(5) Where an assessment of damages would justify payment of a demand within the primary policy limits and there is a possibility of a verdict in excess of the policy limits but the primary insurer is unwilling to pay a

demand within the policy limits because liability is reasonably in dispute, the primary insurer must provide timely notice of these factors to the excess carrier and disclose pertinent information.

(6) The primary insurer may never request the excess carrier to contribute to a settlement within the primary policy limits but it can accept a contribution by the excess carrier on the initiative of the excess carrier.

(7) The excess carrier shall refrain from coercive or collusive conduct designed to force the primary carrier to settle a claim. The excess carrier should never make a formal demand on the primary carrier to settle a claim within the primary policy limits. In any dispute between the primary and excess carriers, the absence of such a demand shall not be used as evidence against the excess carrier's claims.[8]

The Guiding Principles were intended to be solely hortatory, though they have been cited to the courts as evidence of the prevailing standards in the insurance industry and have been used by litigants to attempt to define legally obligatory duties imposed on primary and excess carriers.[9] There seems to be only one reported decision in which a court has accepted the Guiding Principles in their entirety as the standard of care in the insurance industry.[10]

The issues that have typically been litigated between third party primary and excess carriers relate to the primary carrier's settlement decisions and the timing and content of notices and information disclosures from the primary to the excess carrier. Assuming that duties relating to notice or settlement are owed by third party primary carriers to excess insurers, this paper considers below whether any such duties are equally applicable in the context of first party fidelity coverages.

1. Whether A Primary Insurer Writing Fidelity Coverage Owes Duties To An Excess Carrier in Connection With the Settlement of Claims

(a) Summary of Third Party Case Law

A third party insurance carrier owes a duty of care to an insured to engage a claimant in settlement negotiations with care and in good faith.[11] Typically, the operative policy language requires the insurer to defend the third party claim and affords the insurer exclusive control of the investigation, settlement and litigation of the claim.[12] The insurer's duty to the insured in connection with settlement arises out of the insurer's exclusive right to control the litigation and settlement process.[13] This duty is specifically tailored to address situations where the primary carrier and the insured have conflicting interests in evaluating settlement options-- typically where there is potential exposure to the insured in excess of the policy limits and the plaintiff proposes settlement for at or slightly less than the policy limits.[14] Faced with maximum exposure if it settles, the primary carrier may have every incentive to try the case in the hope of securing a more favorable verdict. However, the rejection of a "policy limits" settlement may expose the

insured to liabilities for which the insured does not have coverage. The duty owed by the primary carrier to the insured in these circumstances is characterized differently among the jurisdictions ranging from a negligence standard to a bad faith standard to a standard based on breach of fiduciary duty.[15] Examples of the many formulations of this duty include the following:

- "The essence of a typical "bad faith" claim is that a primary insurer having exclusive control over the settlement of a claim...in gross disregard for the interests of its policyholder fails or refuses to negotiate in good faith a settlement within policy limits (or tender its full policy limits in a settlement) because it places its own financial self-interest ahead of its obligation to protect the interests of the policyholder."[16]

- "In assessing good faith, the test is whether the insurer has approached the matter of settlement as if policy limits do not exist."[17]

- An insurer is required to consider in good faith the interests of the insured in deciding whether to settle a claim.[18]

- The insurer must give its insured's interests at least equal consideration with its own.[19]

- The insurer fulfills its duty to the insured if it acts in good faith and without negligence.[20]

- The insurer owes a fiduciary duty to the insured. Any doubts regarding the advisability of settlement must be resolved in favor of the insured. [21]

- The test is one of ordinary negligence—would a reasonable insurer have settled the claim but for its policy limits.[22] Improper motives may also subject the insurer to liability.[23]

Whatever the scope of this duty, the primary carrier is not obligated to settle a case where liability is fairly in dispute or where a reasonable argument can be made that the demand from the plaintiff is excessive.[24] However, in the event that a carrier refuses to settle within the policy limits and a judgment ultimately enters against the insured in excess of the policy limits, the insured may assert a cause of action for unfair claims settlement practices, with a potential recovery equal to the entirety of the uninsured exposure.[25]

A primary insurer may be liable to an excess carrier where the primary carrier breaches its claims settlement obligations owed to its insured.[26] In connection with settlement issues, the excess carrier's interests in the primary carrier's settlement decisions are analogous to the interests of an insured who does not have excess coverage.[27] The courts have determined that public policy favors allowing the excess

carrier to enforce the primary carrier's claims settlement duties for numerous reasons, including the following:

> (1) By affording a right of action to excess carriers, the courts provide an additional deterrent to primary carriers engaging in unfair claims settlement practices that injure either an insured or an excess carrier and that require the courts to allocate scarce judicial resources to trials that need not occur.[28]
>
> (2) Premiums for excess coverage are far less than premiums for primary coverage due to the differing risk exposures. The courts express concern that to the extent that primary carriers are able to shift risks to excess carriers through unfair settlement practices, excess insurance premiums charged to the public are likely to rise. In addition, the courts note that it is contrary to fair commercial business practices for a primary carrier to extract a higher premium than that charged by the excess carrier and then, after the fact, shift risks to the excess carrier that the primary carrier was paid to assume.[29]

Generally, the excess carrier is subrogated to the rights of the insured against the primary carrier once the excess carrier has paid a judgment in excess of the primary carrier's limits.[30] Acting as subrogee, the excess carrier may sue the primary carrier for alleged unfair settlement practices and, if the excess carrier prevails, it can recover the losses that would have been incurred by the insured in the absence of excess coverage---generally all sums paid by the excess carrier.[31]

In some cases, excess carriers have argued for the creation of a direct duty running from the primary carrier to the excess carrier in addition to the excess carrier's subrogation rights.[32] A direct duty has advantages for the excess carrier since it would not be subject to defenses that could be asserted against the insured such as a refusal to agree to settlement or a failure to cooperate in the defense of the claim.[33] A minority of courts have recognized a direct duty owing from a primary to an excess carrier.[34] Many jurisdictions have questioned the advisability of creating a direct duty but have refused to address the issue directly since the excess plaintiff has been able to fully vindicate its rights through subrogation.[35] Other jurisdictions have rejected creating new obligations running from a primary carrier to an excess carrier.[36]

The courts that have created a direct duty between an excess and primary carrier note that a primary carrier's fiduciary duty to fairly settle claims serves broad public policy objectives and should be vindicated in all circumstances irrespective of defenses that can be asserted based on the insured's conduct.[37]

The courts that have refused to recognize a direct duty consider many of the following factors:

(1) The primary carrier's duty to the insured is premised on policy language that requires the insured to relinquish control of settlement and litigation decisions to the primary carrier. Under the typical excess policy, the excess carrier's right to participate in the investigation, settlement or defense of a claim is reserved and the excess carrier can exercise these rights in its discretion.

(2) The insured typically relies on the primary carrier's greater expertise and experience in handling and settling claims. No such experience discrepancy exists between primary and excess carriers.

(3) The insured typically cannot negotiate the terms of its primary policy. Though primary and excess carriers typically have no contractual relationship, there are neither financial nor knowledge impediments that would impair their abilities to negotiate the terms of their relationship should they desire to do so.

(4) The recognition of an express duty running from a primary carrier to an excess carrier could lead to an explosion of litigation by excess carriers and greater intrusions by the courts into insurance practices based on claims of additional duties owed by primary carriers to the excess, many of which alleged duties may be of limited consequence to the insured. For example, assuming a direct duty, query whether a primary carrier that paid the plaintiff its policy limits pretrial would be exposed to a claim by an excess carrier facing a substantial judgment based on an allegation by the excess carrier that the primary limits would not have been exceeded but for the primary carrier paying the policy limits to the claimant rather than to the excess carrier and it's failure to conduct an adequate investigation?[38]

In sum, although a primary carrier generally does not owe a direct duty to the excess carrier to fairly settle claims, the excess carrier can enforce through subrogation the settlement duties owed by the primary carrier to the insured.

(b) Applying the First Party Case Law to Fidelity Primary and Excess Carriers

A fidelity carrier may also owe a duty of good faith to settle its insured's claims.[39] Where this duty is allegedly breached, the insured can sue the carrier in many jurisdictions to recover under the policy and for bad faith and, if it prevails, can recover the fair value of the claim and possibly interest, attorney's fees, and extra-contractual damages.[40]

Where a primary fidelity carrier wrongfully refuses to settle within the scope of its policy limits and the insured secures a judgment in excess of the primary limits, the excess carrier is damaged as a result of the primary carrier's wrongful conduct. However,

the insured is presumably made whole by its judgment against the primary carrier and therefore sustains no loss as a result of the primary carrier's wrongful conduct. To the contrary, the insured's outcome is better than if the primary carrier had accepted a policy limits settlement. Since the only remedy available to an excess carrier in a subrogation action is the losses sustained by the insured, it would appear that a subrogation action would not provide a meaningful recovery vehicle for an excess carrier against a primary carrier in the context of first party coverage.[41]

The fact that a subrogation action may not provide a viable remedy in the context of first party coverages may persuade some courts to recognize a direct duty of care owing from a first party primary carrier to an excess carrier in regard to settlement tactics and decisions, despite the fact that no such duty is necessary in order to fully compensate the insured. However, the rationales which have persuaded the majority of courts to eschew such direct duties in the context of third party coverages are largely applicable to first party carriers. Unlike an insured, an excess fidelity carrier does not contract to limit its rights to control the defense and settlement decisions.[42] A primary fidelity carrier does not have special expertise that would allow it to take advantage of an excess carrier.[43] There are no impediments that would prevent primary and excess fidelity carriers from negotiating specific agreements regarding the making of settlement decisions.[44]

Even in jurisdictions that have demonstrated some disposition in favor of recognizing direct duties between primary and excess carriers in connection with third party coverages, the applicable policy concerns may not be transferable to first party coverages. To the extent that the courts seek to maximize the deterrent against unfair settlement practices, the first party insured can make itself whole and adequately create the desired deterrent effect through its own causes of action on the policy and for bad faith. The extra deterrent effect resulting from suits by excess carriers would be marginal at best. Though the absence of a remedy for the excess carrier's losses resulting from unfair settlement practices could theoretically increase premiums paid for excess coverages, this concern might be outweighed by the risk that the recognition of a direct duty might spawn an entirely new generation of litigation filed by excess carriers seeking to define and broaden the scope of judicial intervention into the settlement and possibly other claims decisions of primary carriers.

In sum, it is entirely conceivable that an excess fidelity carrier may not have a viable cause of action against a primary fidelity carrier for alleged unfair claims settlement practices, except possibly in the minority of jurisdictions that have recognized direct duties owing from third party primary carriers to excess carriers.

2. Whether a Primary Insurer Writing Fidelity Coverage Owes Duties to Provide Notice To An Excess Carrier of Possible Exposures in Excess of the Primary Policy Limits?

(a) Summary of Third Party Case Law

Excess insurance policies typically incorporate notice provisions requiring that the insured provide notice to the excess carrier of its possibly exposures.[45] Notice clauses in these policies are of differing scopes and jurisdictions vary as to whether the failure to adequately notice requires a showing of prejudice on the part of the carrier in order to obviate coverage. In general, excess policies require that the insured notify the excess carrier at such time as it becomes "reasonably likely" that a claim will be found to have a value in excess of the primary policy limits.[46] There may be legitimate disputes regarding whether or when notice was required. The issue is not whether the insured's decisions regarding providing notice were correct but rather whether these were reasonably based.[47]

There are only a small number of reported cases in which a third party excess carrier claims the right to refuse to pay a judgment in excess of the primary limits based on an allegation that the primary carrier breached a duty by failing to provide it with adequate notice or in which an insured has sought to hold a primary carrier liable where an excess carrier has denied coverage due to an absence of adequate notice.[48] These cases address multiple theories under which an excess carrier could assert a cause of action or defense based on the conduct of the primary carrier. Three of these theories are predicated on subrogation principles:

- Excess carriers have argued that they are subrogated to the primary carrier's duty to the insured to keep the insured fully and promptly informed regarding the progress of litigation and the status of settlement discussions.[49] Under this theory, the focus of the claim is the notice provided to the insured and not to the excess carrier.[50] This approach may be of limited utility to an excess carrier since even where the excess carrier is not apprised of settlement discussions or evaluations of the exposures, it is likely that the insured has received adequate notice through its relationship with defense counsel retained by the primary carrier.[51]

- It has been argued that a primary carrier owes a duty to the insured to advise it to notify its excess carrier and that the excess carrier may be subrogated to that right.[52] There has been difficulty in explaining the source of this alleged duty and, possibly for this reason, the cases have not adopted this theory.[53]

- It has been argued that because the primary carrier is subrogated to the claims of its insured up to the amounts of its payments it is also subrogated to the insured's obligations, including the insured's obligations under its excess policy to provide reasonable notice to the excess carrier. A few courts have seemingly endorsed this proposition, holding that a primary carrier that pays in excess of its policy limits and seeks to recover the excess from an excess carrier may be barred from recovery if the insured failed to provide the required notice to the excess carrier.[54] Not all courts that have addressed the issue subscribe to this analysis.[55]

A few courts have held that a primary insurer owes a direct duty to the excess carrier to keep it adequately apprised of the litigation and settlement status of claims that could reasonably be expected to trigger excess coverage.[56] These courts note that the insured often lacks sufficient expertise to determine when an excess carrier's interests are implicated in a claim and that the primary carrier is often the sole party that has the necessary knowledge base and expertise to make a reasoned judgment regarding the circumstances under which an excess carrier should be notified.[57] According to courts subscribing to this theory, the public is well served by imposing a direct duty running from primary to excess carriers since requiring notice from the primary carrier is most likely to result in risks being properly allocated among primary and excess carriers, which in turn can obviate unnecessary rate increases for excess policies.[58] Other courts, however, have found that an insured that is adequately kept apprised of the status of litigation and settlement discussions is entirely capable of making decisions regarding the timing and content of notice to an excess carrier.[59]

A finding that a primary carrier is obligated to provide direct notice to an excess carrier is far more likely in jurisdictions that are prepared to recognize direct duties running from primary to excess carriers as opposed to those jurisdictions where any rights afforded to excess carriers arise solely under subrogation principles.

Assuming that a court recognizes a direct duty on the part of a primary carrier to notify an excess carrier, there may be difficult fact issues regarding whether notice was required and, if so, the timing and content.[60] If a jurisdiction requires proof of prejudice, there may also be difficult fact issues regarding whether the excess carrier would likely have obviated or reduced its exposure if adequate notice had been provided.[61]

(b) Applying the First Party Case Law to Fidelity Primary and Excess Carriers

To the extent that the third party case law imposes a duty on primary carriers to provide notice to excess carriers, that duty arises largely from the conclusion that only the primary carrier has the necessary knowledge and expertise to be able to make reasoned judgments regarding when notice should be afforded to the excess carrier and the content of such notice.[62] Assuming arguendo the persuasiveness of this argument in the third party context, its logic may not carry to first party claims such as fidelity claims. The triggering of a notice obligation in the third party context depends on an investigation and evaluation of facts related to a claim and injuries sustained by a party other than the insured. The insured is entirely dependent upon the primary carrier or its counsel for information and evaluation regarding the facts that may or may not warrant notice to the excess carrier. In contrast, the focus in the first party context is the insured's own claim for which the insured is arguably more knowledgeable than any other party. The insured is likely to be represented in pursuing its claim and its counsel will have no allegiance other than to the insured. It counsel may be intimately familiar with the insured through providing representation to the insured over a sustained period of time. In the first party context, the insured arguably has more and a better understanding of the claim than the first party primary carrier. If the insured is the party best situated to provide notice to the

excess carrier, there would be no policy reasons warranting the shifting of the notice obligation created under the excess policy from the insured to the first party carrier.

In addition, it is seemingly unfair in the first party context to impose a direct duty on the primary carrier to notify the excess carrier since an overly cautious first party carrier that provides notice to the excess carrier may substantially and unnecessarily undercut its position with the insured in terms of negotiating a fair settlement of the claim.

Thus, the notion of a primary carrier being under a legal obligation to provide notice to the excess carrier is controversial in the third party context and far less warranted in regard to first party fidelity coverages.

B. THE DUTIES AND RELATIONSHIPS AMONG CO-INSURERS

The administration of a claim on a policy with co-insurers raises a number of issues, including, which carrier will be primarily responsible for investigating the claim, what role and rights will be afforded to the "secondary carrier" in relation to investigation and settlement issues, what notices and information should be disclosed to each carrier, whether settlement decisions will be discussed among the carriers and agreed to by consensus, etc. Typically, co-insurers do not enter into written agreements that define and apportion their relative responsibilities in regard to these and other issues.

In the absence of written agreements among co-insurers, certain of these issues will inevitably be resolved after-the-fact through the case law. The cases focus primarily on two issues: whether co-insurers owe each other a duty of contribution in connection with the payment of a settlement or judgment and whether one co-insurer owes a duty to another co-insurer to provide notice regarding a claim. Though these issues have arisen primarily in the context of third party coverage, there are reported decisions relating to first party carriers that apply the same principles as those applied in third party contexts.[63] There is seemingly no reason why the law relating to these issues should differ depending on whether the coverage is third or first party.

1. Whether Co-Insurers Owe Each Other a Duty of Contribution?[64]

Where a first or third party co-insurer pays a judgment or settles a claim and seeks contribution from another co-insurer, the courts assess the claim both under subrogation principles and/or under a direct equitable duty of contribution.

(a) Subrogation

A co-insurer that settles a claim or pays a judgment may be subrogated to the insured's rights to coverage under another applicable policy of insurance.[65] The right of subrogation may arise as a consequence of equity or under a subrogation clause in the policy of the carrier that pays the claims.[66] The courts generally recognize that where one

co-insurer pays a greater proportion of a judgment or settlement than what is warranted under the operative policies, equity favors allowing the paying insurer to recover the amount of the excess from its co-insurer.[67] The courts have further held that allowing co-insurers to subrogate to their insureds' rights under co-insurance policies is consistent with public policy concerns since the availability of such actions can deter carriers from taking unreasonable claims settlement positions in an attempt to leverage other carriers to pay a greater percentage of a settlement or judgment than what is warranted under the operative policies.[68]

In asserting a subrogation claim, the co-insurer stands in the shoes of the insured.[69] Therefore, subrogation does not provide a cause of action to the extent that the insured has no direct rights under another policy that might provide coverage for the loss; for example, where a contractor's third party, general commercial liability carrier pays a claim for property damage at the project site and the loss may also be covered by a first party builder's risk policy naming the owner as insured.[70]

For the same reason, a co-insurer asserting a subrogation action against another co-insurer is subject to all of the defenses that the defendant co-insurer can assert against the insured.[71]

Waiver defenses are commonly asserted in litigation among co-insurers. For instance, defendant co-insurers have argued that where a plaintiff co-insurer agrees to an overall settlement of a claim and fails to reserve its right to later contest the allocation among the co-insurers, the plaintiff co-insurer had waived its right to contest these relative contributions.[72] Defendant co-insurers have also argued that where the insured executes a complete release of its claim, it no longer has rights to which a plaintiff co-insurer can be subrogated.[73] The courts are decidedly unreceptive to these kinds of claims, noting that public policy warrants obviating any impediments to a co-insurer securing a recovery where it pays more than its fair share in the first instance if such a contribution is necessary to fairly settle a claim.[74] The courts further note that a co-insurer should not be rewarded for using sharp tactics to coerce another carrier to pay more than its fair share.[75] For these and other reasons, the courts hold that waiver is not to be inferred where the defendant co-insurer knew or should have known that the plaintiff co-insurer would have a subrogation right or unless the plaintiff co-insurer explicitly waives its claim.[76]

It has also been argued that a defending co-insurer may be immune from exposure to a plaintiff co-insurer in third party contexts in light of "no action" clauses in many policies that preclude actions against the insurer until the insured's liability has been determined through judgment or a settlement approved by the insured, claimant and insurer.[77] However, the courts appear willing to balance such clauses against the impact of unfair settlement practices on a co-insurer; possibly on the basis that if a co-insurer is in fact in violation of its settlement obligations, it is in material breach of its contractual obligations under the policy and therefore cannot continue to rely on contractual defenses.[78]

The existence of a subrogation right does not mean that one co-insurer is entirely bound by and liable for the settlement decisions made by another co-insurer.[79] The relative obligations among co-insurers is determined based on a reasonableness standard, with the carriers being obligated to act reasonably under their respective policies.[80] The analysis initially focuses on whether the defendant co-insurer was reasonable in its position on settlement. If the defendant's position was reasonable based on the facts then known, the plaintiff carrier is not entitled to contribution. If the defendant co-insurer was not acting reasonably, the plaintiff co-insurer can recover but only to the extent that its payments were reasonable under the circumstances. Some courts focus more on a subjective issue- whether the defendant co-insurer acted in good faith.[81] In response to arguments that this standard is too lenient toward alleged recalcitrant co-insurers, the courts have noted that co-insurers typically have equal knowledge and bargaining power and are not precluded from entering into contracts that define and set out the boundaries of their interactions.[82]

In sum, many jurisdictions permit a co-insurer to pursue a subrogation remedy against another co-insurer to determine the proper allocation of a claims payment, though the plaintiff co-insurer's rights are no greater than that of its insured and it is subject to defenses that can be asserted against its insured.

(b) Contribution

A number of courts have determined that a subrogation remedy is too problematic to vindicate the public interests underlying fair distributions of risk among co-insurers, considering that the co-insurer's claim would be subject to all defenses that can be claimed against the insured including those arising under the policy.[83] As a result, many jurisdictions recognize a direct duty of equitable contribution running between co-insurers based on equitable principles that imply a contract between the parties to contribute ratably to the discharge of their common obligation.[84]

In order for a right of equitable contribution to run between co-insurers, the respective policies must address a common obligation; that is, it must afford coverage to the same insured, the same property, and the same interests in the property and it must cover the same risk and owe payments if any to the same person.[85] For instance, there may not be a right of contribution between an insurer providing fire coverage to an owner and an insurer providing builders risk coverage to a contractor, though there might possibly be a right of contribution where a property owner has purchased both fire insurance and builder's risk coverage.

It would seem that the right of contribution parallels the right of subrogation in that the courts focus on the relative reasonableness of the positions of the co-insurers to determine whether one co-insurer must contribute or contribute further to offset the sums paid by the other.[86]

Defendant co-insurers commonly argue in contribution actions that the plaintiff co-insurer has no right to invoke equity because it acted as a volunteer in paying obligations for which it was not liable.[87] On face, this argument has no applicability in circumstances where each co-insurer is liable for the entirety of the loss.[88] However, this argument may have force in contexts where coinsurance is created by "other insurance clauses" in both policies that require that liability be apportioned "pro rata" in the event of overlapping coverages.[89] Or, primary fidelity coverage may be issued among multiple fidelity carriers, with each being liable for a percentage of the loss. Under these circumstances, each carrier is liable in the first instance for only part of the risk, not the entirety. There is a body of case law holding that if a carrier pays in excess of its pro rata share, it acts as a volunteer and has no right to contribution[90]

Practically, a "volunteer" defense would make it risky and arguably impossible for a co-insurer to settle its exposure with the claimant even if its assessment of liability is reasonable and the assessment of the co-insurer is either unreasonable or motivated by illegitimate objectives. A "volunteer defense" also seems to reward a carrier who takes an unreasonable position with a co-insurer. For these and other reasons, many courts have held that because a "pro-rata" co-insurer has a legitimate interest in settling a claim in full even if that requires at least a temporary overpayment, the paying co-insurer is not a volunteer.[91]

In sum, fidelity co-insurers are exposed to either subrogation actions or claims for contributions to the extent that a co-insurer pays some or all of a claim in an amount that it believes is in excess to the relative obligations of the carriers.

2. Whether a Co-Insurer Owes a Duty to Provide Notice of Claim to Other Co-Insurers

Most first and third party insurance policies require the insured to provide prompt notice of a claim to the carrier.[92] The carrier's agreement to insure against a particular risk is predicated on various rights and protections, including the right to prompt notice so that the claim can be efficiently investigated and the carrier can assert control over the investigation, litigation, and settlement process, if any.[93] Jurisdictions vary as to whether the failure to provide reasonable notice constitutes a complete defense to the carrier or whether a notice breach constitutes a defense only to the extent that there is resulting prejudice.[94]

The issue of a co-insurer's obligation to provide notice to another co-insurer arises where one co-insurer receives adequate notice and pays on the claim and another co-insurer refuses to pay in whole or part due to an alleged lack of adequate notice.

To the extent that a co-insurer seeks contribution based on a subrogation theory, the plaintiff co-insurer stands in the shoes of the insured, allowing the defendant co-insurer to assert a defense of lack of adequate notice against the plaintiff co-insurer to the extent that the insured failed to provide adequate notice and the lack thereof constitutes a defense in the jurisdiction.

In contexts where a co-insurer pursues a direct claim for equitable contribution, the courts have determined that, as a matter of equity, a co-insurer owes a duty of reasonable notice to other co-insurers and that in the event of a breach of that duty, it would be inequitable to compel the co-insurer that did not receive reasonable notice to contribute to a settlement or judgment.[95] In some jurisdictions, a co-insurer may need to prove prejudice as a result of the lack of notice in order to establish a complete defense, in other jurisdictions a showing of prejudice is not required.[96]

The determination of what constitutes "reasonable notice" under the circumstances is intensely fact based, taking into account all pertinent facts and the professed reasons for why notice was not provided at an earlier time.[97] Delays as short as ten to fifty days and as long as ten months have been declared unreasonable under particular fact scenarios.[98]

In sum, a fidelity co-insurer will likely have a right of contribution against its co-insurer and will also likely have a duty to provide notice of claims that are jointly covered under the operative policies.

C. Whether Evidentiary Privileges Attach to Documents Shared Among Primary and Excess Carriers and Co-insurers

Based on the foregoing analysis, it is evident that documents are likely to flow between primary and excess carriers and among co-insurers at times when these parties are aligned and at times when these parties are at odds. Third parties may seek access through discovery to documents exchanged between primary and excess carriers or among co-insurers and claim that such exchanges constitute a waiver of any privileges that might otherwise attach to the documents.

These issues raise the question of the availability of attorney client, work product, and joint defense privileges where documents and communications are shared among primary and excess carriers and among co-insurers.[99] For purposes of the discussion, this paper relies on the following broad principles relating to the availability of privileges:[100]

- The attorney client privilege protects confidential communications between attorney and client regarding legal advice.[101] Communications between attorney and client that do not address legal advice, such as opinions on business decisions, may not be privileged.[102]

- The attorney client privilege can be waived by disclosure of otherwise protected communications or documents to third parties who are outside of the attorney-client relationship.[103]

- The work product privilege is a qualified privilege that applies to documents prepared in anticipation of litigation or for trial by a party or the party's representatives.[104] The primary focus of the privilege is to protect counsel's

thought process and analysis.[105] As insurance claims files are prepared to adjust claims in the normal course of a carrier's business but may also be prepared in some contexts in anticipation of litigation, the applicability of the work product privilege to these files may raise uncertain issues.[106]

- Work product privilege may be waived by the voluntary disclosure of otherwise privileged documents to parties outside of the privileged relationship.[107]

- The joint defense privilege protects privileged communications between two or more parties and their respective counsel if they are engaged in a joint defense effort.[108] The privilege attaches where communications are made in the course of a joint defense effort, the exchanges are intended to advance that effort, and the privilege has not been waived.[109] The joint defense privilege allows for the disclosure of privileged documents among parties participating in a joint defense without the disclosure constituting a waiver of the privilege.[110] The joint defense privilege may be evidenced by a joint defense agreement, but the privilege may be invoked in the absence of a writing.[111]

- The joint defense privilege may be waived between the privilege holders where the privilege holders become adversaries in subsequent litigation.[112] The fact that information has been exchanged among parties evidences that the parties do not share an expectation of confidentiality between each other.[113] As to third persons, the joint defense privilege cannot be waived in the absence of consent by all parties to the joint defense undertaking.[114]

The case law suggests, either directly or by analogy, that primary and excess carriers and co-insurers may be able to assert in many contexts that, due to their shared interests in the resolution of a claim, otherwise privileged documents or communications do not lose their privileged status simply because of the sharing of documents or communications among them.[115] However, the complexity and unpredictable nature of the relationships between primary and excess carriers and among co-insurers makes it difficult to make blanket statements regarding the applicability of these privileges to shared documents in particular contexts.

As interests among co-insurers and primary and excess carriers can become adverse, a primary issue in evaluating such privilege claims is whether the carriers in fact shared a common interest as of the time that communications were exchanged. If one carrier had denied coverage as of the date of sharing or was considering same and the other carrier had acknowledged coverage, the privileges may be waived as to the shared documents.[116] If excess and primary carriers were assessing the merits of a settlement proposal or settlement strategy differently as of the time of information exchanges, the privilege may be at risk. If co-insurers disagreed regarding litigation tactics or settlement strategies as of the time of information exchanges, the privilege may be at risk. Any evidence of a lack of harmony among the carriers as of the time of information exchanges

can be used by a third party to argue that the carriers did not share common interests and, therefore, the sharing of information equated to a privilege waiver.[117]

Where co-insurers or primary and excess carriers share communications, particularly where this occurs in advance of litigation, there may be issues regarding whether the shared communications are more closely associated with a routine claims resolution process or are more properly identified as being in anticipation of litigation.[118] The same considerations apply to communications to and from counsel; i.e, was counsel providing legal advice or advice regarding business or claims strategies?[119]

There may also be issues as to whether the joint interests of carriers as of the time of disclosures addressed business interests or litigation strategies.[120] If, at the time of shared communications, primary and excess carriers share a common business interest but are not collaborating on a common litigation strategy, the joint defense privilege may not attach.[121]

As noted above, a written joint defense agreement is not a prerequisite to the assertion of a joint defense privilege. However, the availability of a written agreement may offer substantial advantages among primary and excess carriers and co-insurers since such agreements can establish a predicate for later representations that interests were common at the time of information disclosures or that the parties were engaged in the process of formulating joint litigation strategies and not simply joint business strategies.[122]

Finally, though this paper does not directly address privilege issues as these relate to disputes between carriers, it should be emphasized, as noted above, that parties to a joint defense agreement do not have expectations of privacy between each other in connection with documents disclosed in the course of their joint defense.[123] Therefore, a carrier making information disclosures in order to preserve the integrity of excess coverage or co-insurance obligations should consider that though these disclosures may be privileged in the course of litigation between third parties, no privilege will attach should there be subsequent litigation among the carriers.

III. ***Conclusion***

Primary and excess fidelity carriers or fidelity co-insurers may find themselves in complicated interactions with each other when faced with certain kinds of difficult claims. Under a worst case scenario, these interactions can lead to litigation among the carriers, with the outcomes uncertain given the dearth of applicable case law regarding first party coverages and the diversity of the case law in connection with analogous issues faced by third party carriers. These risks may provide incentives for primary/excess fidelity carriers and fidelity co-insurers to either create understandings regarding claims settlement practices with their counterpart companies at the outset of coverages or to create these understandings at the outset of the administration of particular claims. Coordination on these issues among carriers should take account of the likely information flow between the carriers and the impact of these exchanges on the availability of

evidentiary privileges in cases brought by third parties, with serious consideration given to executing joint defense agreements where litigation with the insured or others is a realistic possibility.

[1] 44 *Am.Jur.2d* Insurance § 1755 at pp. 228-229. *See AMHS Insurance Co. v. Mutual Insurance Co.*, 258 F.3d 1090, 1093 (9th Cir. 2001) (*"AMHS"*); *American Home Assurance Co. v. Republic Insurance Co.*, 984 F.2d 76, 77-78 (2d Cir. 1993); *National Union Insurance Co. v. Dowd & Dowd, P.C.*, 2 F.Supp.2d 1013, 1018 (N.D. Ill. 1998).

[2] *Id*.

[3] *See, e.g., AMHS, supra*, 258 F.3d 1090; *Attorney's Liability Protective Society v. Reliance Insurance Co.*, 117 F.Supp.2d 1114 (D.Kan. 2000); *CNA Insurance Co. v. Selective Insurance Co.*, 807 A.2d 247 (N.J.Super. 2002).

[4] *See United States v. Brennan*, 938 F. Supp. 1111 1122 (E.D.N.Y. 1966).

[5] *See, e.g., AMHS, supra*, 258 F.3d 1090; *Attorney's Liability Protective Society v. Reliance Insurance Co.*, 117 F.Supp.2d 1114 (D.Kan. 2000); *CNA Insurance Co. v. Selective Insurance Co.*, 807 A.2d 247 (N.J.Super. 2002).

[6] The third party case law is discussed herein in summary form to provide a basis for considering its application to fidelity coverages. This paper does not address the criteria applied by the courts to determine whether overlapping coverages create co-insurance or primary/excess relationships.

[6] This paper does not address the relationships among sureties that share a common risk in part because "primary/excess" relationships do not exist among sureties and in part because the relationship and legal duties among co-sureties is materially different than that among co-insurers.

[7] *See Royal Insurance Co. v. Reliance Insurance Co.*, 140 F.Supp.2d 609, 613 (D.S.C. 2001) ("*Royal*"); *International Insurance Co. v. Dresser Industries*, 841 S.W.2d 437, 440-42 (Tex. App. 1992).

[8] *Id*.

[9] *United States Fire Insurance Co. v. Nationwide Mutual Insurance Co.*, 735 F. Supp. 1320, 1324-25 (E.D.N.C. 1990) (The Guiding Principles set forth the general standards of insurance practice) *See Royal, supra*, 140 F.Supp.2d at 613; *First State Insurance Co. v. Utica Mutual Insurance Co.*, 870 F.Supp. 1168, 1176 (D.Mass. 1994) ("*Utica*"); *United States Fire Insurance Co. v. American National Fire Insurance Co.*, 53 Pa. D&C4th 474, 488, n. 15 (2001) ("*American National Fire*"); *American Centennial Insurance Co. v. Warner-Lambert Co.*, 681 A.2d 1241, 1246 (1995) ("*Centennial*"); *Monarch Cortland v. Columbia Casualty Co.*, 626 N.Y.S.2d 426, 430-31 (N.Y.Sup.Ct. 1995), *mod*., 646 N.Y.S.2d 904 (A.D. 1996) ("*Monarch*"). *But see Baen v. Farmers Mutual Fire Insurance*

Co., 723 A.2d 636 (N.J.Super. 1999) (*"Baen"*) (Guiding Principles of minimal significance since the litigants were not signatories).

[10] *See United States Fire Insurance Co. v. Nationwide Mutual Insurance Co., supra*, 735 F. Supp. at 1324-25.

[11] *See, e.g., Twin City Fire Insurance Co. v. Country Mutual Insurance Co.*, 23 F.3d 1175, 1178 (7th Cir. 1994) (*"Twin City"*).

[12] *See Twin City, supra*, 23 F.3d at 1178; *Kivi v. Nationwide Mutual Insurance Co.*, 695 F.2d 1285,1287 (11th Cir. 1983); *Combustion Engineering, Inc. v. IMETAL*, 235 F.Supp.2d 265, 271 (S.D.N.Y. 2002) (*"Combustion"*); *Forest Insurance, Ltd. v. American Motorist Insurance Co.*, 1994 U.S. Dist. Lexis 3334 at pp. 25-26 (S.D.N.Y. 1994) (*"Forest"*); *Great Southwest Fire Insurance Co. v. CNA Insurance Co.*, 547 So.2d 1339, 1343-43 (La.Ct.App. 1989); *General Accident Fire & Life Assurance Corp. v. American Casualty Co.*, 390 So.2d 761, 764 (Fla. App. 1980).

[13] *Id*.

[14] *Id*.

[15] *Certain Underwriters, etc. v. General Accident Insurance Co.*, 699 F.Supp. 732, 736-7 (S.D.Ind. 1988) (*"Certain Underwriters"*).

[16] *Forest, supra*, 1994 U.S.Dist. Lexis 3334 at p. 32.

[17] *Berglund v. State Farm Mutual Automobile Insurance Co.*, 121 F.3d 1225, 1227 (8th Cir. 1997).

[18] *United States Fire Insurance Co. v. Royal Insurance Co.*, 759 F.2d 306, 309 (3rd Cir. 1985).

[19] *California Union Insurance Co. v. Liberty Mutual Insurance Co.*, 920 F.Supp. 908, 920 (N.D.Ill. 1996) (*"California Union"*).

[20] *St. Paul-Mercury Indemnity Co. v. Martin*, 190 F.2d 455, 457-8 (10th Cir. 1951).

[21] *Western World Insurance Co. v. Allstate Insurance Co.*, 376 A.2d 177 (N.J.Super. 1977).

[22] *Utica, supra*, 870 F.Supp. at 1175-76.

[23] *Id*.

[24] *United States Fire Insurance Co. v. Royal Insurance Co.*, 759 F.2d 306, 310 (3rd Cir. 1985); *New England Insurance Co. v. Healthcare Underwriters Mutual Insurance*, 146 F.Supp.2d 280 (E.D.N.Y. 2001); *California Union, supra*, 920 F.Supp. at 920; *Iowa*

National Mutual Insurance Co. v. Auto-Owners Insurance Co., 371 N.W.2d 627 (Minn..Ct.App. 1985).

[25] *Id*.

[26] *See General Star Indemnity Co. v. Vesta Fire Insurance Co.*, 173 F.3d 946, 950, n.18 (5th Cir. 1999) (*"Vesta"*); *Twin City, supra*, 23 F.3d at 1178-80; *Phico Insurance Co. v. Aetna Casualty and Surety Co.*, 92 F.Supp.2d 982, 990 (S.D. Ind. 2000) (*"Phico"*); *Utica, supra*, 870 F.Supp. at 1175; *American Centennial Insurance Co. v. Canal Insurance Co.*, 843 S.W.2d 480, 482-83 (Tx.Sup.Ct. 1993) (*"Canal"*).

[27] *Canal, supra*, 843 S.W.2d at 482-83.

[28] *See Vesta, supra*, 173 F.3d 946, 950, n.18 (5th Cir. 1999); *Twin City, supra*, 23 F.3d at 1178-80; *Phico, supra*, 92 F.Supp.2d at 990; *Utica, supra*, 870 F.Supp. at 1175; *Certain Underwriters, supra*, 699 F.Supp. at 737-39; *Bein, supra*, 723 A.2d 636; *Canal, supra*, 843 S.W.2d at 482-83.

[29] *Id*.

[30] *See, e.g., AMHS, supra*, 258 F.3d at 1100-1101; *Evanston Insurance Co. v. Stonewall Surplus Lines Insurance Co*., 111 F.3d 852, 858-59 (11th Cir. 1997) (*"Evanston"*); *Twin City, supra*, 23 F.3d 1175, 1178 (7th Cir. 1994); *United States Fire Insurance Co. v. Royal Insurance Co*., 759 F.2d 306, 309 (3rd Cir. 1985); *California Union, supra*, 920 F.Supp. at 920 ; *Federal Insurance Co. v. Travelers Casualty and Surety Co.*, 843 So.2d 140, 144 (Ala. Sup.Ct. 2003); *Providence Washington Insurance Co. v. Southern Guarantee Insurance Co*., 667 So.2d 323, 324-25 (Fla. App. 1995); *Canal, supra*, 843 S.W.2d at 482-83; *Great Southwest Fire Insurance Co. v. CNA Insurance Co.*, 547 So.2d 1339, 1343-43 (La.Ct.App. 1989); *Home Insurance Co. v. North River Insurance Co.*, 385 Se.2d 736 (Ga.App. 1989); *Kranzush v. Badger State Mutual Casualty Co.*, 307 N.W.2d 256 (Wis. 1981); *Iowa National Mutual Insurance Co. v. Auto-Owners Insurance Co.*, 371 N.W.2d 627 (Minn..Ct.App. 1985).

[31] *Id.* An excess insurer's subrogation right applies both where a primary carrier wrongly refuses to settle a claim for less than the policy limits and where a primary carrier wrongly denies coverage and the excess carrier assumes the costs of defense and pays a claim or judgment properly owing by the primary carrier. *See Hocker v. New Hampshire Insurance Co.*, 922 F.2d 1476 (10th Cir. 1991); *Aetna Casualty and Surety Co*., 105 N.E.2d 568 (Ohio Sup.Ct. 1952).

[32] *Canal, supra*, 843 S.W.2d 480, 482-83.

[33] *Utica, supra*, 870 F.Supp. at 1175, n. 3; *Canal, supra*, 843 S.W.2d at 482-83; *National Union Fire Insurance Co. v. INA*, 955 S.W.2d 120, 133 (Tex. App. 1997).

[34] *See St. Paul-Mercury Indemnity Co. v. Martin*, 190 F.2d 455 (10th Cir. 1951); *National Union Fire Insurance Co. v. Liberty Mutual Insurance Co.*, 696 F.Supp. 1099, 1101

(E.D.La. 1988); *Schal Bovis Inc. v. Casualty Insurance Co.*, 732 N.E.2d 1082 (Ill.App. 1999); *Commercial Union Insurance Co. v. The Medical Protective Co.*, 356 N.W.2d 648 (Mich.App. 1984); *Hartford Accident and Indemnity Co. v. Michigan Mutual Insurance Co.*, 462 N.Y.S.2d 175 (A.D. 1983) (*"Michigan"*); *Western World Insurance Co. v. Allstate Insurance Co.*, 376 A.2d 177 (N.J.Super. 1977).

[35] *See Twin City, supra*, 23 F.3d at 1179-1181; *Utica, supra*, 870 F.Supp. at 1175; *Canal, supra*, 843 S.W.2d at 482-83; *Twin City Fire Insurance Co. v. Superior Court*, 792 P.2d 758 (Ariz.Sup.Ct. 1990).

[36] *See AMHS, supra*, 258 F.3d at 1100; *Evanston, supra*, 111 F.3d at 858-59; *Greater New York Mutual Insurance Co. v. North River Insurance Co.*, 85 F.3d 1088, 1096 (3rd Cir. 1996); *Royal, supra*, 140 F.Supp.2d 609. *Federal Insurance Co. v. Travelers Casualty and Surety Co.*, 843 So.2d 140, 144 (Ala. Sup.Ct. 2003); *Great Southwest Fire Insurance Co. v. CNA Insurance Co.*, 547 So.2d 1339, 1343-43 (La.Ct.App. 1989); *Kranzush v. Badger State Mutual Casualty Co.*, 307 N.W.2d 256 (Wis. 1981).

[37] *See, e.g., American Centennial Insurance Co. v. American Home Assurance Co.*, 729 F.Supp. 1228,1231-32 (N.D.Ill. 1990).

[38] *Phico, supra*, 92 F.Supp.2d at 990; *Federal Insurance Co. v. Travelers Casualty and Surety Co.*, 843 So.2d 140, 144 (Ala. Sup.Ct. 2003); *Twin City Fire Insurance Co. v. Superior Court*, 792 P.2d 758, 759-60 (Ariz.Sup.Ct. 1990). *See also Combustion, supra*, 235 F.Supp.2d at 271 (exclusive control by the primary insurer is a necessary prerequisite to the duties owed by a primary insurer to its insured); *Forest, supra*, 1994 U.S.Dist. Lexis 3334 at pp. 30-35 (S.D.N.Y. 1994) (same).

[39] *See, e.g., St. Paul Reinsurance, Co. v. Commercial Financial Corp.*, 197 F.R.D. 620, 624-26 (N.D.Ia. 2000).

[40] *See, e.g., St. Paul Reinsurance, Co. v. Commercial Financial Corp.*, 197 F.R.D. 620, 624-26 (N.D.Ia. 2000).

[41] *See National Union Fire Insurance Co. v. INA*, 955 S.W.2d 120, 133 (Tex.App. 1997).

[42] *See* pp. 5-6, *supra*.

[43] *Id*.

[44] *Id*.

[45] *See Green Door Realty Co. v. TIG Insurance Co.*, 329 F.3d 282 (2d Cir. 2003); *Evanston supra*, 111 F.3d at 860-63; *Briggs & Stratton Corp. v. Royal Globe Insurance Co.*, 64 F.Supp.2d 1346 (M.D.Ga. 1999).

[46] *Id*.

[47] *Id*.

[48] *See Evanston, supra*, 111 F.3d 852; *American Home Assurance Co. v. Republic Insurance Co.* , 984 F.2d 76 (2d Cir. 1993); *American National, supra*, 2001 Pa. D&C Lexis 156; *Centennial, supra*, 681 A.2d 1241; *Monarch, supra*, 626 N.Y.S.2d 426 (1995), mod., 646 N.Y.S.2d 904 (A.D. 1996). *See also National Union Fire Insurance Co. v. Liberty Mutual Insurance Co.*, 696 F.Supp. 1099, 1101-2 (E.D.La. 1988).

[49] *See Evanston, supra*, 111 F.3d 852.

[50] *Id*.

[51] *Id*.

[52] *See American National, supra*, 2001 Pa. D&C Lexis 156 at p.11-12.

[53] Id.

[54] *See Sequoia Insurance Co. v. Royal Insurance Co.*, 971 F.2d 1385, 1393-94 (9th Cir. 1992); *American National, supra*, 2001 Pa. D&C Lexis 156 at pp. 23-29.

[55] *See Monarch, supra*, 626 N.Y.S.2d 426 (1995), mod., 646 N.Y.S.2d 904 (A.D. 1996)

[56] *See American Home Assurance Co. v. Republic Insurance Co.* , 984 F.2d 76 (2d Cir. 1993); *American National Insurance Co., supra*, 2001 Pa. D&C Lexis 156 at pp. 14-23; *Centennial, supra*, 681 A.2d 1241.

[57] *Id.*

[58] *Id.*

[59] *See Monarch, supra*, 646 N.Y.S.2d 904 (A.D. 1996).

[60] *See Evanston, supra*, 111 F.3d 852.

[61] *Id*. See *Sequoia Insurance Co. v. Royal Insurance Co.*, 971 F.2d 1385, 1393-94 (9th Cir. 1992).

[62] *See American Home Assurance Co. v. Republic Insurance Co.* , 984 F.2d 76 (2d Cir. 1993); *American National, supra*, 2001 Pa. D&C Lexis 156 at p. 20; *Centennial, supra*, 681 A.2d 1241 (N.J.Super. 1995)

[63] *See United States Fidelity & Guaranty Co. v. Commercial Union Insurance Co.*, 943 S.W.2d 640 (Mo. 1997); *Indiana Insurance Co. v. Sentry Insurance Co.*, 437 N.E.2d 1381 (Ind. App. 1982).

[64] This paper does not address the criteria applied in the case law to apportion liability among co-insurers once it is determined that contribution is mandated.

[65] *See Foremost County Mutual Insurance Co. v. The Home Indemnity Co*., 897 F.2d 754, 761-62 (5th Cir. 1990) (*"Foremost"*); *Liberty Mutual Insurance Co. v. Mid-Continent Insurance Co.*, 266 F.Supp.2d 533, 541 (N..D.Tex. 2003); *Arrow Exterminators, Inc. v. Zurich American Insurance Co.*, 136 F.Supp.2d 1340, 1351-52 (N.D.Ga. 2001); *Sharon Steel Corp. v. Aetna Casualty and Surety Co.*, 931 P.2d 127, 137 (Utah 1997) (*"Sharon"*).

[66] *See Foremost, supra*, 897 F.2d at 761-62.

[67] *Sharon, supra*, 931 P.2d at 137.

[68] *Id*.

[69] *Liberty Mutual Insurance Co. v. Mid-Continent Insurance Co.*, 266 F.Supp.2d 533, 540 (N.D.Tex. 2003); *Arrow Exterminators, Inc. v. Zurich American Insurance Co.*, 136 F.Supp.2d 1340, 1351-52 (N.D.Ga. 2001).

[70] *See Ohio Casualty Insurance Co. v. State Farm Fire and Casualty Co*., 546 S.E.2d 421 (Va. 2001).

[71] *See Liberty Mutual Insurance Co. v. Mid-Continent Insurance Co*., 266 F.Supp.2d 533, 539-40 (N..D.Tex. 2003).

[72] *Id*.

[73] *Sharon, supra*, 931 P.2d at 138-9.

[74] *Liberty Mutual Insurance Co. v. Mid-Continent Insurance Co., supra*, 266 F.Supp.2d at 539-40; *Sharon, supra*, 931 P.2d at 138-9.

[75] *Id.*

[76] *Id.*

[77] *See General Agents Insurance Co. v. The Home Insurance Co.,* 21 S.W.3d 419, 424-25 (Tex.App. 2000); *Employers Casualty Co. v. Transport Insurance Co.*, 444 S.W.2d 606, (Tex. 1969).

[78] *Id. See Vandenberghe v. Amco Insurance Co.*, 1992 U.S.Dist. Lexis 10760 (N.D.Cal. 1992).

[79] *See Keystone Shipping Co. v. The Home Insurance Co.*, 840 F.2d 181(3rd Cir. 1988); *General Agents Insurance Co. v. The Home Insurance Co*., 21 S.W.3d 419, 426 (Tex.App. 2000).

[80] *Liberty Mutual Insurance Co. v. Mid-Continent Insurance Co.,* 266 F.Supp.2d 533, 542-44 (N..D.Tex. 2003); *General Agents Insurance Co. v. The Home Insurance Co.*, 21 S.W.3d 419, 426 (Tex.App. 2000).

[81] *Keystone Shipping Co. v. The Home Insurance Co.*, 840 F.2d 181, 186-88 (3rd Cir. 1988).

[82] *Id.* at p. 186.

[83] *See United States Fire Insurance Co. v. Peerless Insurance Co.*, 2001 Mass. Super. Lexis 560 (2002).

[84] *See State of New York v. Blank*, 27 F.3d 783, 794 (2d Cir. 1994); *United States Fire Insurance Co. v. Peerless Insurance Co.*, 2001 Mass. Super. Lexis 560 (2002); *Ohio Casualty Insurance Co. v. State Farm Fire and Casualty Co.*, 546 S.E.2d 421 (Va. 2001); *Royal Globe Insurance Co. v. Aetna Insurance Co.*, 403 N.E.2d 680 (Ill. App. 1980).

[85] *Id. See State Farm Fire and Casualty Co. v. Monroe Guaranty Insurance Co.*, 111 F.3d 42 (6th Cir. 1997); *Reliance Insurance Co. v. Liberty Mutual Fire Insurance Co*., 13 F.3d 982, (6th Cir. 1994)

[86] *See Royal Globe Insurance Co. v. Aetna Insurance Co*., 403 N.E.2d 680 (Ill. App. 1980).

[87] *See, e.g., Progressive Casualty Insurance Co. v. Liberty Mutual Insurance Co*., 1994 U.S.Dist. Lexis 18327 at p.7-10 (S.D.N.Y. 1994). The volunteer defense is not applicable to claims under either equitable or conventional subrogation since this defense addresses the actions of the co-insurer and not the actions of the insured. *See Employers Casualty Co. v. Transport Insurance Co*., 444 S.W.2d 606 (Tex. 1969).

[88] 44 *Am.Jur.2d* Insurance §1765 at pp. 236-37.

[89] Id.

[90] *See Progressive Casualty Insurance Co. v. Liberty Mutual Insurance Co.*, 1994 U.S.Dist. Lexis 18327 at pp. 7-8 (S.D.N.Y. 1994); *Associated Mutual Insurance Co. v. Fireman's Fund Insurance Co.*, 436 N.E.2d 1333 (N.Y. 1982); *Indiana Insurance Co. v. Sentry Insurance Co.*, 437 N.E.2d 1381 (Ind. App. 1982); *INA v. Fire Insurance Exchange*, 525 S.W.2d 44 (Tex. App. 1975); *Commercial Union Insurance Co. v. Farmers Mutual Insurance Co.*, 457 S.W.2d 224 (Mo. 1970); *Farm Bureau Mutual Automobile Insurance Co. v. The Buckeye Union Casualty Co.*, 67 N.E.2d 906 (Ohio 1946); *Fidelity and Casualty Co. v. Fireman's Fund Indemnity Co.*, 100 P.2d 364 (Cal.App. 1940).

[91] *Employers Casualty Co. v. Transport Insurance Co*., 444 S.W.2d 606 (Tex. 1969); *Employers Mutual Liability Co. v. Pacific Indemnity Co.*, 334 P.2d 658 (Cal.App. 1959). *See Commercial Standard Insurance Co. v. American Employers Insurance Co.*, 209 F.2d 60 (6th Cir. 1954); *State Farm Mutual Automobile Insurance Co. v. Calvert Insurance Co.*, 1992 U.S.App.Lexis 28346 (6th Cir. 1992); *Werley v. United Services Automobile Assoc.*, 498 P.2d 112 (Alaska 1972); *Meritplan Insurance Co. v. Universal Underwriters Insurance Co.*, 247 Cal.App. 2d 451 (1966); *Arditi v. Massachusetts Bonding and*

Insurance Co., 315 S.W.2d 736 (Mo. 1958); *Lamb-Weston v. Oregon Automobile Insurance Co.*, 341 P.2d 110 (1959); *United States Guarantee Co. v. Liberty Mutual Insurance Co.*, 12 N.W.2d 59 (Wis. 1943).

[92] *See State of New York v. Blank*, 27 F.3d 783, 793-4 (2d Cir. 1994) ("*Blank*"); *Truck Insurance Exchange v. Unigard Insurance Co*., 79 Cal.App.4th 966 (2000) ("*Truck*").

[93] *Id*.

[94] *Id*.

[95] *See Blank, supra*, 27 F.3d at 794-98; *Casualty Indemnity Insurance V. Liberty National Fire Insurance Co.*, 902 F.Supp. 1235, 1238-41 (D.Mont. 1995); *United National Insurance v. Admiral Insurance*, 1992 U.S.Dist. Lexis 12336 at pp. 18-23 (E.D.Pa. 1992); *Truck, supra*, 79 Cal.App.4th at 978-85.

[96] *See Blank, supra*, 27 F.3d at 794-98; *United National Insurance V. Admiral Insurance*, 1992 U.S.Dist. Lexis 12336 at pp. 12-18 (E.D.Pa. 1992).

[97] *Id*.

[98] *Id*.

[99] A related issue involving co-insurers and primary and excess carriers that is the beyond the scope of this paper is whether or to what extent these parties can protect otherwise privileged documents where they are engaged in bad faith litigation against each other and it is argued that their analyses of the claims and their thought processes are directly at issue. *See, e.g., Bovis Lend Lease, LMB, Inc. v. Seasons Contracting Corp.*, 2002 U.S. Dist. Lexis 23322 (S.D.N.Y. 2002); *Argonaut Insurance Co. v. Hartford Accident and Indemnity Insurance Co*., 687 F.Supp. 911 (S.D.N.Y. 1988); *Twin City Fire Insurance Co. v. Burke*, 63 P.3d 282 (Ariz. 2003); *Hartford Accident and Indemnity Co. v. U.S.C.P. Co.*, 515 So.2d 998 (Fla.App. 1987).

[100] The courts differ on the scope of these various privileges in numerous respects. *See Lugosch v. Congel*, 219 F.R.D. 220, 237-39 (N.D.N.Y. 2003). The analysis relies solely on core elements of these doctrines that are mostly of general applicability.

[101] *See, e.g., United States v. Philip Morris*, 2004 U.S.Dist. Lexis 27026 at pp. 10-13 (D.D.C. 2004); *Bovis Lend Lease, LMB, Inc. v. Seasons Contracting Corp.*, 2002 U.S. Dist. Lexis 23322 at p. 9 (S.D.N.Y. 2002).

[102] *Id. See SR International Business Insurance Co. v. World Trade Center Properties*, LLC, 2003 U.S.Dist. Lexis 1106 at pp. 2-4 (S.D.N.Y. 2003).

[103] *Id. See Medcom Holding Co. V. Baxter Travenol Laboratories, Inc.*, 689 F.Supp. 841 (N.D.Ill. 1988).

[104] *See In re Sealed Case*, 29 F.3d 715, 718 (D.C.Cir. 1994); *United States v. Philip Morris*, 2004 U.S.Dist. Lexis 27026 a p. 19-23(D.D.C. 2004); *SR International Business Insurance Co. v. World Trade Center Properties, LLC*, 2003 U.S.Dist. Lexis 1106 at pp. 8-11 (S.D.N.Y. 2003); *Bovis Lend Lease, LMB, Inc. v. Seasons Contracting Corp.*, 2002 U.S. Dist. Lexis 23322 at p. 12-13 (S.D.N.Y. 2002).

[105] *Id.*

[106] *See, e.g., Bovis Lend Lease, LMB, Inc. v. Seasons Contracting Corp.*, 2002 U.S. Dist. Lexis 23322 at pp. 12-13 (S.D.N.Y. 2002); *St. Paul Reinsurance, Co. v. Commercial Financial Corp.*, 197 F.R.D. 620, 631-43 (N.D.Ia. 2000).

[107] *Id.*

[108] *See In re Sealed Case*, 29 F.3d 715, 718-19 (D.C.Cir. 1994); *United States v. LeCroy*, 348 F. Supp.2d 375 (E.D.Pa. 2004); *United States v. Salvagno*, 306 F.Supp.2d 258, 271 (N.D.N.Y. 2004); *United States v. Philip Morris*, 2004 U.S.Dist. Lexis 27026 at pp. 17-19 (D.D.C. 2004); *Medcom Holding Co. v. Baxter Travenol Laboratories, Inc.*, 689 F.Supp. 841, 844-45 (N.D.Ill. 1988); *Western Fuels Association, Inc. v. Burlington Northern Railroad Co.*, 102 F.R.D. 201, 203 (D.Wy. 1984). Some courts use the terms "joint defense privilege" and "common interest rule" interchangeability. *United States v. Salvagno*, 306 F.Supp.2d 258, 271 (N.D.N.Y. 2004). Other courts use the term "common interest rule" to refer to communications among counsel representing multiple clients.

[109] *United States v. LeCroy*, 348 F. Supp.2d 375 (E.D.Pa. 2004); *Medcom Holding Co. v. Baxter Travenol Laboratories, Inc*., 689 F.Supp. 841, 844-45 (N.D.Ill. 1988).

[110] *Id*.

[111] *United States v. LeCroy*, 348 F. Supp.2d 375 (E.D.Pa. 2004); *SR International Business Insurance Co. v. World Trade Center Properties, LLC*, 2003 U.S.Dist. Lexis 1106 at pp. 2 (S.D.N.Y. 2003).

[112] *Lugosch v. Congel*, 219 F.R.D. 220, 237-39 (N.D.N.Y. 2003); *Robinson v. Texas Auto. Dealers Ass'n*, 214 F.R.D. 432, 443-44 (E.D.Tex. 2003); *United States v. Weissman*, 1996 U.S. Dist. LEXIS 19066 (S.D.N.Y. 1996); *Resolution Trust Corp. v. Fidelity & Deposit Co.*, 1995 U.S. Dist. LEXIS 21903
(D.N.J. 1995).

[113] *Id.*

[114] *John Morrell & Co. V. Local Union 304A*, 913 F.2d 544, 556 (8th Cir. 1990); *Lugosch v. Congel*, 219 F.R.D. 220, 237-39 (N.D.N.Y. 2003); *Robinson v. Texas Auto. Dealers Ass'n*, 214 F.R.D. 432, 443-44 (E.D.Tex. 2003); *United States v. Weissman*, 1996 U.S. Dist. LEXIS 19066 (S.D.N.Y. 1996); *Resolution Trust Corp. v. Fidelity & Deposit Co.*, 1995 U.S. Dist. LEXIS 21903 (D.N.J. 1995).

[115] *See Bovis Lend Lease, LMB, Inc. v. Seasons Contracting Corp*., 2002 U.S. Dist. Lexis 23322 (S.D.N.Y. 2002)(communications among insured and insurer and among co-insurer); *Great American Surplus Lines Co. v. Ace Oil Co.,* 120 F.R.D. 533 (E.D.Cal. 1988) (communications between carrier and reinsurer); *Minnesota School Boards Association Insurance Trust v. Employers Insurance Co.,* 183 F.R.D. 627 (N.D.Ill. 1999) (communications between carrier and reinsurer) *Hartford Steam Boiler Inspection and Insurance Co., Stauffer Chemical Co.,* 1991 Conn. Super. Lexis 2527 (1991) (communications between carrier and reinsurer); *United States Fire Insurance Co. v. General Reinsurance Corp.,* 1989 U.S.Dist. Lexis 8280 (S.D.N.Y. 1989) (communications between carrier and reinsurer). *But see Allendale Mutual Insurance Co. v. Bull Data Systems, Inc.,* 152 F.R.D. 132 (N.D.Ill. 1993) (Otherwise privileged communications shared between carrier and reinsurer lose their privileged status where the communications were intended to keep each other informed about claims as a matter of standard business practice and not to prepare a joint litigation defense.).

[116] *Bovis Lend Lease, LMB, Inc. v. Seasons Contracting Corp.,* 2002 U. S. Dist. Lexis 23322 (S.D.N.Y. 2002).

[117] *See United States v. Brennan,* 938 F. Supp. 1111, 1128-30 (E.D.N.Y. 1966) (noting that in order for the court to determine whether communications among co-insurers are privileged, the court must conduct an evidentiary hearing to determine whether the co-insurers' interests were common as of the time of disclosure).

[118] *In Re Payroll Express Corp,* 1996 U.S. Dist. LEXIS 18230 (Bkrtcy. S.D.N.Y. 1996).

[119] *See Certain Underwriters, Etc. v. Fidelity and Casualty Co.,* 1997 U.S.Dist. Lexis 19670 (N.D.Ill. 1997).

[120] *See Allendale Mutual Insurance Co. v. Bull Data Systems, Inc.,* 152 F.R.D. 132 (N.D.Ill. 1993) (Otherwise privileged communications shared between carrier and reinsurer lose their privileged status where the communications were intended to keep each other informed about claims as a matter of standard business practice and not to prepare a joint litigation defense.).

[121] *See In re Payroll Express Corp*., 1996 U.S.Dist. Lexis 18230 (S.D.N.Y. 1996).

[122] A form Joint Defense Agreement is attached to this paper.

[123] *See* p. 15, *supra*.