A dissenting opinion suggested the use of the term "arising out of" was sufficiently broad to encompass the facts of the case. The dissent further noted that the use of that term was intended to broaden the meaning of the contract to account for the narrow interpretation of "based directly on" in earlier decisions.

### Effect of Competing Excess Coverage Clauses

*Cargill, Inc. v. Commercial Union Insurance Co.*, 889 F.2d 174 (8th Cir. 1989).

The Eighth Circuit Court of Appeals concluded that policies containing competing excess coverage clauses were not reconcilable and directed the insurers to pay the claimant on a pro rata basis subject to deductibles. Cargill purchased grain insured by two policies. A policy issued by Commercial Union contained a $10,000 deductible, a $600,000 limit of coverage, and a clause that stated the policy would be deemed excess coverage if other insurance covered a loss covered by the policy. The policy issued by St. Paul provided for a $100,000 deductible, a $2 million limit, and stated that it was contingent and secondary if another policy provided for coverage. A barge carrying the grain sank, causing a $194,000 loss. Each insurer agreed that the loss was within the coverage of its policy but disagreed as to the effect of the competing excess coverage clauses.

The court concluded that it would disregard the competing clauses because they were mutually repugnant if they both provided for excess coverage. The Commercial Union clause clearly contemplated that purpose. According to the court, the St. Paul policy provision was equivalent to an excess coverage provision. Thus, the court concluded that the clauses were ineffective.

The court then divided the liability of the parties. Of the $194,000 loss, the court concluded that St. Paul was not liable for any of the first $100,000 due to its deductible. The insurers were responsible for the remainder based on the amount of each one's coverage limit to the total coverage available under the two policies.

### Scope of Fidelity Bond Exclusion

*Continental Corp. v. Aetna Casualty and Surety Co.*, 892 F.2d 540 (7th Cir. 1989).

Reversing a prior decision, the Seventh Circuit held that an exclusion in a fidelity applied to only dishonest action otherwise within the bond's stated coverage. The insured company, Continental Corporation, filed a claim on a fidelity bond to recover for the malfeasance of an employee of a subsidiary, American Title. The American Title employee had issued title insurance omitting prior encumbrances in a scheme with another person to sell property. As a result, American Title paid $3.2 million to settle title insurance claims brought against it due to the defective titles of purchasers. Continental then sought to recover the settlement payments on the fidelity bond. The bond generally covered the dishonest acts of employees but excluded loss or expense

resulting from liability of the insured under insurance contracts or due to an inspection, title search, or survey that was made, not made, or improperly made. Applying a prior case that held that the exclusion applied to only honest mistakes, the trial court ordered payment on the bond. The court of appeals reversed.

In holding that the exclusion was effective to prevent payment on the bond for the dishonest acts of the employee in issuing title policies, the court reasoned that the policy could not exclude what was not initially covered. Since there was no coverage for losses due to honest brokerage, an exclusion for honest mistakes was meaningless. As the court stated, exclusions must be construed to subtract from the existing broad coverage. Further, the court found that the policy continue to cover other wrongful acts such as employee theft and forgery. Thus, the policy continued to cover a significant area of risk despite the exclusion.

### Coverage of Punitive Damages

*Home Insurance Co. v. American Home Products Corp.*, 75 N.Y.S.2d 196 (N.Y. 1990).

On a question presented to it by a federal court, the New York Court of Appeals concluded that public policy would prevent insurance coverage of punitive damages arising from a strict liability claim for failure to warn. American Home Products suffered $9.2 million in compensatory damages and $13 million in punitive damages because it failed to warn of known dangers of one of its drugs. It looked to Home for coverage of the excess damages not covered by its primary insurer. Home filed suit for a declaration that it was not responsible for the punitive damages not paid by the primary insurer. The federal court presented the question to the New York Court of Appeals which agreed with the insurer.

The court stated the general policy that insurers were not responsible for indemnifying punitive damages because payment would undermine the punitive rationale. The court then determined that the facts in the product liability case warranted the application of the principle. At the trial, the jury was instructed that the evidence must show that the manufacturer showed utter indifference. The court found the instruction sufficient to warrant a similar award under New York law. Thus, the jury finding against American Home Products precluded excess coverage indemnity from Home.

### Pharmacist's Duty to Warn

*McKee v. American Home Products Corp.*, 113 Wash. 2d 701, 782 P.2d 1045 (1989).

The Washington Supreme Court affirmed a decision that a pharmacist has not duty to warn a patient receiving medicine by doctor's prescription of the effects of the drug absent special circumstances. For ten years, McKee's doctor prescribed an amphetamine as a means of weight control. The manufacturer's package insert warned that the drug was potentially addictive and that the