The court also rejected Gelman's second argument that public policy required Hudson to drop down. The court felt that the important public policy to protect was the parties' contractual intent. Since the contract did not protect against the prior carrier's insolvency, the court refused to contravene the parties' expressed intentions.

Excess Insurer's Duty to Drop Down for Insolvent Excess Insurer

New Process Baking Co. v. Federal Insurance Co., 923 F.2d 62 (7th Cir. 1991).

In the second case related to the Mission Insurance insolvency, the contract language was different but the result the same. In this case, the Seventh Circuit concluded that an excess insurer was not required to drop down because its policy excluded coverage until all underlying insurance was exhausted. The insured, New Process, carried a $500 thousand policy for primary coverage, a $20 million policy issued by Mission as a first level of excess coverage, and a $10 million policy issued by Federal as a second level of excess coverage. New Process settled a case against it for $850 thousand and sought to recover the amount exceeding its primary coverage from its excess carriers. It could not assert a claim against Mission because it was insolvent. Federal refused to pay the claim on the theory that its liability did not attach until claims exceeded the sum of the primary and first level of excess insurance.

Relying on the insurance contract, the court agreed with Federal and held that it did not have to drop down and provide coverage. The policy extended coverage to amounts "in excess of and after all underlying insurance has been exhausted" and cross-referenced the Mission policy to define the underlying insurance. The court then concluded that exhaustion does not occur until the underlying insurance limits have been met through payment. As result, Federal was not obligated to drop down since the claim would not have exhausted the right to payment from Mission.

Excess Carrier's Duty to Pay Legal Fees

Continental Casualty Co. v. Pittsburgh Corning Corp., 917 F.2d 297 (7th Cir. 1990).

In a curious foray into an insurance contract's history, the Seventh Circuit in another excess coverage case concluded that a policy excepting an exception did not obligate an excess insurer to pay legal fees. The insurer sued for a declaration that its policy did not cover legal expenses incurred in defending asbestos claims. The policy extended coverage to losses defined as settlements of losses for which the insured was liable. The definition, however, excluded costs. Costs included legal expenses but excluded all expenses for salaried employees and retained counsel. The obvious problem facing the insurer was that the exception to the exception might render it liable for all legal fees since retained counsel incur most legal costs.

Rather than sort out the meaning of the provision as part of the policy, the court turned to the reason the unusual drafting occurred. The court found