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 that the language of the provision resulted from court approval of similar language in insurance contracts extending coverage for legal fees. As approved by the courts, the provision excluded legal coverage for corporate counsel of the insured and those attorneys on general retainer. The insurance company then placed the provision without revision into a contract which expressly attempted to exclude legal fees. Rather than construe the contract against the drafter, the court treated the mistake as a nullity, stating, "That exclusion is significant only when the policy insures against legal expense." The court then offered an interpretive rule to explain its result. It noted that an exclusion cannot create coverage. As a result, the exclusion from an exclusion could not have any meaning.

Excess Insurer Required to Drop Down to Provide Defense

Hocker v. New Hampshire Insurance Co., 922 F.2d 1476 (10th Cir. 1991).

Because of a provision in an excess insurance contract that appeared to warrant a drop down, an insurer was liable for damages for failing to provide a defense when the primary insurer refused a valid request. In this case, the plaintiffs, two employees of the bankrupt insured, suffered a default judgment for over $2 million. Both the primary insurer, providing $500 thousand in coverage, and the excess insurer, providing $10 million, received notice of the claim against the employees. After the default judgment was taken against the employees, they in turn sued the two insurers for failure to defend and breach of the duty of good faith. The excess insurer defended itself on the ground that its policy did not obligate it to take on the employees' defense. The trial court found a duty to drop down and the court of appeals affirmed the decision.

Holding that the excess insurer had a duty to drop down, the court of appeals noted that the excess policy provided for defense of a claim when an occurrence was not covered "as warranted" by the primary carrier. The court concluded that this language addressed the possibility that the primary carrier might refuse to defend and obligated the excess carrier to provide a defense.

The court then refused to allow the excess carrier a recovery against the primary carrier. It denied subrogation on the ground that the excess carrier lacked clean hands and therefore was not entitled to a claim in equity. In refusing to permit a negligence action, the court held that the primary carrier did not have a duty to the excess insurer when the latter had also breached its duty to the insured.

Accidental Death Defined

American Family Assurance Co. v. Bilyeu, 921 F.2d 87 (6th Cir. 1990).

The Sixth Circuit Court of Appeals affirmed a decision that a death resulting from drunk driving and excessive speed was accidental within the meaning of a life insurance policy. The insured died in a single car accident. At the time of his death, his blood alcohol level was .2, and his estimated speed was 55–60 mile an hour in a 35 mile an hour zone. The insured's mother sued