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

sued to collect $250 thousand as the beneficiary on her son's life insurance policy. Although the policy provided for coverage due to accidental death, it also contained two relevant exclusions. First, it excluded coverage for intentional acts that resulted in death. Second, it excluded coverage for death resulting from the commission of a crime. The insurer argued that these provisions prevented the mother's recovery since the insured's death was foreseeable and occurred while he was speeding. The court of appeals rejected both arguments.

The court initially did not accept the argument that the death was intentional. The insurer argued that the insured could have contemplated the nature of his act and foreseen the danger associated with intoxication. The court, however, held that a death was accidental unless it was the result of a plan, design, or intent on the part of the decedent. Since there was no evidence of a plan to cause the injury, the court concluded that the death was accidental.

The court then held that the policy did not define speeding as a crime. Initially, the court stated that the term "crime" was ambiguous since the policy did not define the term and the insured might interpret it to mean only serious crimes such as armed robbery or murder. Moreover, the insurer could have inserted a specific term precluding coverage due to death caused by drunkenness as it had excluded coverage for death resulting from illegal drug use.

Federal Protection of Insurance Benefits for Laid-off Employees

Jones v. Kayser-Roth Hosiery, Inc., 748 F. Supp. 1292 (E.D. Tenn. 1990).

In this case, a district court found that a self-insured employer must provide a premium payment to employees discharged in violation of the Worker Adjustment, Retraining and Notification Act. The act provides that employers must give employees a sixty day warning before terminating them in a general layoff. If an employer fails to give the warning, it is liable for back pay and lost benefits during the period in which the warning would have been effective. In this case, the employees sued to recover back pay and insurance benefits. Because the employer was self-insured, it argued it was only liable for medical payments it would have made under its plan. The federal magistrate hearing the case rejected the company's argument.

The magistrate held that the employees were entitled to the value of the benefits they would have received during the notification period. These benefits included those payments they would have received for medical care. It also included the value of the insurance benefits the employer provided through its self-insurance program. The court then calculated the value of the benefit as the cost of the program to the self-insured company.