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Consent, Contract, and the Responsibilities of Insurance Defense Counsel

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CONSENT, CONTRACT, AND THE RESPONSIBILITIES OF INSURANCE DEFENSE COUNSEL

*Robert H. Jerry, II**

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INTRODUCTION

When one of my young children and I build something with blocks or Legos™¹ (the current favorite), we succeed because the shapes with which we work are unambiguous. Their contours are clearly defined. Most of the pieces are rigid, but even those that are flexible have constant characteristics and predictable applications. When employed for a particular purpose, the pieces do not disappoint. Legal principles are not much like blocks or Legos™, even

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1. “Lego™” refers to a brick-shaped plastic building block (as well as many other shapes) with studs on top and tubes underneath. The interface of these bricks, etc., results in a snugness that allows large assemblies to hold together without becoming fused; the bricks pull apart almost as easily as they snap together. For more information, visit the Lego™ website at www.lego.com.

if we often wish they were. True, we sometimes refer to rules of law as “building blocks”² and we use these rules and corollary ideas to build elaborate structures (or “models” or “paradigms”). Beckoned, perhaps, by recollection of a time when the problems with which we dealt seemed simpler, we sometimes invoke the geometry of childhood play to explain legal relationships. Thus, many writers have explored the terrain of the triangle—the relationship of insurer, insured, and defense counsel.³ Professor Tom Baker is correct to urge that the triangle’s geometry is too simple to illustrate adequately all of the complexity inherent in insurers’ defense of policyholders under liability insurance contracts, and he offers the tetrahedron as the appropriate geometric explanation.⁴ Because a four-cornered three-dimensional shape figured less prominently in our childhood construction projects, most of us are less comfortable with the tetrahedron, but this is how it should be, for there is plenty to be uncomfortable about in the area of insurance defense.

Geometry works, at least in my reckoning, only when there is certainty with respect to certain assumptions. If some elements of these assumptions or the assumptions themselves are soft or disputed, the larger structure is unstable or even shapeless. As a metaphor for law in action, this will not do; the geometry must be Euclidean, because non-Euclidean geometry, like Chaos Theory and Cosmology, makes most of us very uncomfortable. Yet this is, in fact, the heart of the problem in assessing the ethical responsibilities of defense counsel. Too many fundamental assumptions are contested, and too many are

2. See, e.g., *Scott v. Heckler*, 768 F.2d 172, 178 (7th Cir. 1985) (“The obligation of an agency to follow its own regulations is the primary building block of administrative law”), *overruled by Bauzo v. Bowen*, 803 F.2d 917 (7th Cir. 1986); See also *In re Federal Skywalk Cases*, 93 F.R.D. 415, 420 (W.D. Mo. 1982) (“The Court views [Fed. R. Civ. P.] Rule 23 as the key building block in the federal courts’ continuing effort to make the civil procedure system more responsive to the needs of contemporary litigation”), *vacated*, 680 F.2d 1175 (8th Cir. 1982); *Continental Bankers Life Ins. Co. v. Simmons*, 561 S.W.2d 460, 464 (Tenn. Ct. App. 1977) (“Applicable equitable principles will be the building blocks of the Court’s decision”); *State v. Collins*, 409 S.E.2d 181, 200 (W. Va. 1990) (Workman, J., dissenting) (“One must admire the skillful manner in which the majority makes subtle mischaracterizations and then uses them as tiny little building blocks with which to construct major new principles of law.”)

3. See, e.g., Douglas R. Richmond, *Lost in the Eternal Triangle of Insurance Defense Ethics*, 9 GEO. J. LEGAL ETHICS 475 (1996); Robert E. O’Malley, *Ethics Principles for the Insurer, the Insured, and Defense Counsel: The Eternal Triangle Reformed*, 66 TUL. L. REV. 511 (1991); Robert B. Gilbreath, *Caught in a Crossfire Preventing and Handling Conflicts of Interest: Guidelines for Texas Insurance Defense Counsel*, 27 TEX. TECH L. REV. 139, 142 (1996) (describing the “triangular model”).

4. Tom Baker, *Liability Insurance Conflicts of Interest and Defense Lawyers: From Triangles to Tetrahedrons*, 4 CONN. INS. L.J. 101 (1997).

murky. Fortunately, much recent work in this area sheds important light on these issues, and a real possibility exists that a more stable geometric metaphor is imminent. Professor Baker, for example, deserves praise for taking us closer to that objective.

This paper examines some of the assumptions on which many contemporary assessments of defense counsel's relationship with the insurer and the policyholder rest, contends that some of the current turmoil in this area is traceable to shaky assumptions, and argues that the drafting of clearer liability insurance contracts would add stability to the relationships. Part I briefly describes the current uncertainty confronting policyholders and defense counsel. Part II explores what the most widely-used liability insurance contracts say about the responsibilities of insurance defense counsel, examining both the context in which these policies are sold and the texts themselves. It contends that current liability policies do not support a dual-client model when conflicts between insurer and policyholder arise. Part III discusses the ramifications of the conclusion reached in Part II. In brief, those who have concluded that counsel owes his or her allegiance to the policyholder in such circumstances have reached the right conclusion. Clearer liability insurance contracts would be helpful, however, in affirming this answer—or providing a different one if the insurance industry believes the current weight of opinion has reached the wrong result.

I. THE UNCERTAIN IMPLICATIONS OF UNCERTAIN RULES

Although in some states the rules appear clear⁵ even if some commentators think the rules are clearly wrong,⁶ the range of answers to the simple question "whom does defense counsel represent" is surprisingly broad. In many cases, it is said that defense counsel's only client is the insured, and that the insurer is not a client.⁷ In other cases, courts have said that both insurer and insured

5. See, e.g., *In re Youngblood*, 895 S.W.2d 322 (Tenn. 1995); *MGM, Inc. v. Liberty Mut. Ins. Co.*, 855 P.2d 77 (Kan. 1993); *White Mountain Constr. Co. v. Transamerica Ins. Co.*, 631 A.2d 907 (N.H. 1993).

6. For a spirited critique of precedents in Texas, Tennessee, and California, see Charles Silver & Michael S. Quinn, *Wrong Turns on the Three Way Street: Dispelling Nonsense About Insurance Defense Lawyers*, 5 COVERAGE 1 (Nov./Dec. 1995).

7. See, e.g., *Gibbs v. Lappies*, 828 F. Supp. 6, 7 (D.N.H. 1993) ("When an attorney is retained by an insurance company to provide a defense under a liability policy, the attorney's client is the insured, not the insurer."); *Booth v. Continental Ins. Co.*, 634 N.Y.S.2d 650 (N.Y. Sup. Ct. 1995); *In re Youngblood*, 895 S.W.2d 322 (Tenn. 1995); *L&S Roofing Supply Co., Inc. v. St. Paul Fire & Marine Ins. Co.*, 521 So. 2d 1298 (Ala. 1987); *Atlanta Int'l Ins. Co. v. Bell*, 475 N.W.2d 294 (Mich. 1991); *Bradt v. West*, 892 S.W.2d 56, 77 (Tex. App. 1994) (citing *Employers Cas. Co. v. Tilley*, 496 S.W.2d 552, 558 (Tex. 1973)) ("There is no attorney-

are clients of the defense counsel; the representation is, or at least can be, joint, at least until a conflict between the interests of insurer and insured arise.⁸ The Model Rules of Professional Conduct provide no answer.⁹ This kind of contradiction is precisely the circumstance where academics are inclined to come to the rescue and provide the clarity so lacking in the cases. Indeed, many recent works in addition to the other papers in this symposium shed important light on the question. But one who desires the comfort of a consensus will not find relief in these works.¹⁰

For an attorney, few things are as fundamental as understanding whom he or she represents and the precise scope of that representation. The ramifications for lawyers who misunderstand the nature of these responsibilities can be enormous. Such was the situation facing defense counsel in one recent case¹¹ who found himself a witness in the insured's suit against the insurer for bad faith refusal to settle. When asked at trial about his role as defense counsel, he said, "I was employed by them [the insurer]."¹² Initially, he explained that this employment entailed some duties he owed to the insurer, but that his "first duty"—presumably meaning his primary responsibility—was owed to the insured.¹³ He later qualified this answer by stating that his "only duty" ran to the insured, necessarily suggesting that no

client relationship between an insurer and an attorney hired by the insurer just to provide a defense to one of the insurer's insureds").

8. See, e.g., *Home Indem. Co. v. Lane, Powell, Moss & Miller*, 43 F.3d 1322 (9th Cir. 1995) (applying Alaska law); *Rogers v. Robson*, 392 N.E.2d 1365 (Ill. App. Ct. 1979); *Moritz v. Medical Protective Co.*, 428 F. Supp. 865 (W.D. Wis. 1977); *Moeller v. Am. Guar. & Liab. Ins. Co.*, 1996 WL 532387 (Miss. Sept. 19, 1996). See also N.C. STATE BAR REVISED RULES OF PROFESSIONAL CONDUCT Rule 91 (1991) ("Whenever defense counsel is employed by an insurance company to defend an insured against a claim, he or she represents both insurer and insured.").

9. See ABA Comm. on Ethics and Professional Responsibility, Formal Op. 46-403 at 2 (1996) [hereinafter Formal Op. 96-403] ("The Model Rules of Professional Conduct offer virtually no guidance as to whether a lawyer retained and paid by an insurer to defend its insured represents the insured, the insurer, or both.").

10. See, e.g., Charles Silver & Kent Syverud, *The Professional Responsibilities of Insurance Defense Lawyers*, 45 DUKE L.J. 255 (1995) (supporting dual client model); Charles Silver & Michael S. Quinn, *Are Liability Carriers Second-Class Clients? No, But They May Be Soon—A Call to Arms Against the Restatement (Third) of the Law Governing Lawyers*, 6 COVERAGE 21 (Mar./Apr. 1996) (supporting dual client model); Thomas D. Morgan & Charles W. Wolfram, *Lawyers Retained by Liability Carriers to Represent Insureds in the Restatement of the Law Governing Lawyers*, 6 COVERAGE 44 (Mar./Apr. 1996) (favoring view that insurer is third-party fee payer, and attorney's sole client is insured).

11. See *Carrier Express, Inc. v. Home Indem. Co.*, 860 F. Supp. 1465 (N.D. Ala. 1994).

12. *Id.* at 1482 (quoting trial transcript at 2217).

13. See *id.* (quoting trial transcript at 2230: "my first duty would be to the insured that I am representing").

duty was owed the insurer.¹⁴ Having answered the same question two different ways but at least being consistent on the point that he owed duties to the insured, he was then asked how he justified failing to communicate to the insurer the insured's demand that the insurer settle the case within policy limits. He responded, and one can imagine his distress as the difficulties of his predicament became more apparent, "No, my client was [the insurer], who I was being paid, but my client was [the insured] and I—that is not my job. I made my recommendation and that is all I did."¹⁵ When asked whether the insurer was his client in the underlying action, he said, "Obviously, I represented, I was paid by [the insurer]. But I represented—my first duty was to [the insured]"¹⁶ The court concluded that the attorney's "confusion about his role was apparent from his testimony in the case at bar."¹⁷ The jury awarded the insured \$2.46 million in compensatory damages and \$4.81 million in punitive damages, awards which were not altered by the judge when ruling on post-trial motions.¹⁸ If Alabama's law (the applicable law in the foregoing case) regarding defense counsel's responsibilities were clear, perhaps the attorney should have been grateful that the court described him only as "confused."¹⁹ But the wide range of opinion on the correct answers in this area caution against being too critical of any defense attorney who finds himself or herself caught in the mire. This, of course, provides little comfort to the attorney who is actually stuck in it.

If lawyers encounter difficulty in sorting through the relevant rules, it is plainly inapt to expect lay policyholders to have much sense about the nature of the insurer's obligations under a standard liability insurance contract. More will be said on this subject in Part II,²⁰ but the essence of the issue is captured by an advertisement which ran on national television networks in 1996 on behalf of a large insurance company. The advertisement was noteworthy in its focus on the insurer's duty to defend, as distinguished from the insurer's duty

14. See *id.* (quoting trial transcript at 2266-67).

15. *Id.* (quoting trial transcript at 2267-68).

16. *Id.* (quoting trial transcript at 2267-68).

17. *Id.*

18. See *id.* at 1486, 1487.

19. In *L&S Roofing Supply Co., Inc. v. St. Paul Fire and Marine Ins. Co.*, 521 So. 2d 1298 (Ala. 1987), the Alabama Supreme Court held that when the insurer defends the insured under a reservation of rights, "RPC [Rules of Professional Conduct] 5.4(c) demand that counsel understand that he or she represents only the insured, not the company." *Id.* at 1303. The defense counsel in the *Carrier Express* litigation "testified that he was unaware of the reservation of rights until his deposition was taken in the case at bar even though a copy of the reservation of rights letter was in his case file." 860 F. Supp. at 1469.

20. See *infra* text accompanying notes 43-65.

to indemnify.²¹ The opening image is of a middle-aged man standing on what appears to be a multi-lane divided highway, with vehicular wreckage all around him. The figure is dressed in a business suit, but his tie is loose around the neck of his white business shirt, and he is obviously fretful and concerned. The scene implies that he alone is responsible or at least allegedly responsible for all of the damage around him. The narrator begins with bad news: "You are about to be sued by thirty-two people." As this message is conveyed, two more collisions are heard in the background, implying that the number of lawsuits needs to be recalculated. The good news follows: "[Insurer] defends over fifty thousand [or some large number] lawsuits against its customers every year," the implication being that the fretful figure, if he is a policyholder, can take comfort in the security provided by the insurer.²²

In all likelihood,²³ the foregoing is about all the typical insured will understand about the insurer's obligations under the defense insurance policy. There is much that the insured will not understand, and there is much that the advertisement does not say. The advertisement does not communicate that if the first two of the thirty-four anticipated claims result in a good faith settlement or judgment that exhausts the policy limits, the insurer's duty to

21. The author and others with whom he has spoken cannot recollect another insurance company television advertisement for the general public's consumption which focuses on the insurer's defense obligation. There may, however, have been some others in times past. Also, the author has been unable to secure a copy of the advertisement (either videotape or text), thus his summary of the advertisement may be erroneous in some respects.

22. Professor Ellen Smith Pryor aptly suggests that the use of a middle-aged, implicitly middle-income professional is intended to encourage this kind of mainstream customer to reexamine his or her policy to ascertain whether sufficiently high limits have been purchased. Clearly, the advertisement is directed at litigation-averse individuals who, because of their knowledge of what litigation entails and what it can cost, may be predisposed to purchase additional coverage. This more subtle subplot has a substantial free-rider dimension, in that it encourages insureds with other companies to check the adequacy of their policies, which says little or nothing about the wisdom of switching companies. While the advertisement has subtexts, its dominant message is that the insured is (or would be) well protected by this particular insurer's good hands, even in the face of the catastrophe he has encountered.

23. This paper, like many others, infers what policyholders expect without offering solid empirical support. This is a weakness in many analyses of insurance coverage issues. Although the assertion in the text is probably a good description of what most policyholders understand, it is appropriate to be skeptical of such assertions. For my part, I did walk into the office of an agent for the insurer that provides my personal insurance. After explaining my purpose to "Wanda," I asked, "If I get into an auto accident and the insurer decides to defend an eventual lawsuit filed against me, whom will the attorney appointed by the insurer represent—me alone, or the insurer and me?" Wanda, perhaps puzzled by my visit as much as anything, answered, "I have no idea. That's a legal question, and we don't get into those." Generalizing about the understanding of this (and other insurers') agents is risky, but I suggest that Wanda's answer is typical of what most agents and brokers would say if presented with the same question. Whatever agents and brokers comprehend about the issue, lay policyholders understand less.

defend will be at an end.²⁴ The advertisement does not communicate that the insurer may claim the right to control the lawsuit and to make strategic decisions about the conduct of the defense without obtaining the insured's approval.²⁵ The advertisement does not communicate that the insurer may act to protect only the insured's economic interests, and that the insurer in conducting the litigation might disregard any of the insured's reputational or other non-economic interests.²⁶ Although the policy is clear about the insurer's retained discretion to settle claims against the insured without the insured's consent, the advertisement does not communicate this important limitation on the insurer's obligations to the insured. If the advertisement tells little about the insurer's obligations to the insured, it tells even less about the role that the attorney will play in carrying out the insurer's obligations.

24. *See, e.g.,* Texas Farmers Ins. Co. v. Soriano, 881 S.W.2d 312 (Tex. 1994); Pareti v. Sentry Indem. Co., 536 So. 2d 417 (La. 1988); Gibson v. Preferred Risk Mut. Ins. Co., 456 S.E.2d 248 (Ga. Ct. App. 1995); Levier v. Koppenheffer, 879 P.2d 40 (Kan. Ct. App. 1994). The upshot of these cases is that the insurer can make good faith settlements of some claims even if this exhausts the policy limits and leaves the insured personally responsible for the remaining claims. If, however, the insurer enters into settlements for the purpose of exhausting the policy limits so that the insurer can avoid defending and indemnifying the insured on other claims, the insurer is not acting in good faith and may be held liable for damages caused the insured.

25. *See* Silver & Syverud, *supra* note 10, at 265 ("For the last century, these common [liability] insurance arrangements have permitted the company . . . to supervise counsel's litigation and settlement strategy, and to settle claims within policy limits at the company's discretion").

26. *See, e.g.,* Western Polymer Tech., Inc. v. Reliance Ins. Co., 38 Cal. Rptr. 2d 78 (Cal. Ct. App. 1995); Arana v. Koerner, 735 S.W.2d 729, 735 (Mo. Ct. App. 1987). These cases are to be distinguished from those holding that the insurer has no duty to defend because an alleged reputational harm is not an injury within the coverage of the policy and there is no separate allegation of bodily injury or property damage. *See, e.g.,* Waller v. Truck Ins. Exch., Inc., 900 P.2d 619 (Cal. 1995); Reams v. State Farm Fire & Cas. Ins., 683 A.2d 179, 187 (Md. Ct. Spec. App. 1996). Even if the insurer can disregard reputational interests in formulating defense and settlement strategy, this rule must have some limits. The logic of the general principle—that an insurer can enter into a good-faith settlement within policy limits without the insured's consent, even against the insured's contention that settling rather than defending hurts the insured's reputation—is that the settlement reduces the insured's exposure to covered financial risks (whereas damage to reputational interests are not covered), even as it promotes the insurer's interest (which is shared by all insureds) in minimizing total claims expenses, including defense costs. Suppose, however, that plaintiff and insurer agree to settle a claim against the insured for \$X, but the plaintiff offers thereafter to accept a sum less than \$X if the insurer will agree to a non-confidential settlement document that contains language "testifying" to the insured's negligence in ways that disparage the insured's reputation. The cheaper settlement would further the insurer's claims-cost minimization objectives, but surely such an arrangement would run afoul of the insurer's duty of good faith and fair dealing. Once one enters this territory, the insurer's ability to ignore the reputational interests of its insureds becomes less than absolute.

It would be highly unrealistic, of course, to expect an advertisement to convey much, if any, information about the coverage of a liability insurance contract or to explore any of the knotty details of an insurer's obligations to policyholders. The point is that information such as that provided in the advertisement, or a similar communication, often is both the beginning and the end of the consumer's understanding of his or her coverage. The bounds of this understanding do not, of course, define the bounds of the insurer's obligations of defense and indemnity, but what the insurer knows or has reason to know about the shape of the insured's expectations pours meaning into the language of the insurance contract. This, in turn, pours meaning into what policyholders are likely to expect of an attorney appointed by the insurer to protect the insured's interests when a claim within coverage is filed against him or her. This is given more attention in Part II.

II. INSURANCE POLICY TEXT AND ITS RAMIFICATIONS

A. Some First Things About "Consent"

"Consent" is a word of no small moment in the Anglo-American legal tradition.²⁷ In the law of promissory relationships, "consent" is the anchor for many of the principles that define and regulate those relationships. In this important usage, "consent" refers to the voluntary acquiescence, assent, compliance, approval, or agreement with what someone else proposes to do.²⁸

27. Democratic theory utilizes "consent" to anchor the principle under which people organize a society and grant to a government the authority to regulate the behavior of individuals within that society. This finds its early expression in the writings of John Locke, the U.S. Declaration of Independence, and the Federalist Papers, to name a few prominent examples. Consistently with the basic premise, many of the principles which order that society and define the bounds between acceptable and intolerable conduct depend on the existence of "consent" for their application. See, e.g., *Pan Eastern Exploration Co. v. Hufo Oils*, 855 F.2d 1106, 1121 (5th Cir. 1988) (conversion is defined as "taking without consent"); *Rawls v. Conde Nast Publications, Inc.*, 446 F.2d 313, 315 (5th Cir. 1971) (with regard to defense of consent in tort, "one may not complain of acts to which he had consented," quoting HARPER & JAMES, *THE LAW OF TORTS*, § 1.11, at 38 (1956)); *Shedd v. Lamb*, 553 N.W.2d 241 (S.D. 1996) (consent of parties is necessary for formation of contract). In these usages and many others, consent is the essential first step to the creation of authority to act. This is the proper order of things in a society that readily concedes the importance of cooperative enterprises, but gives priority in a great many situations to a person's desire to remain a unilateral actor unless he or she "consents" to some joint or cooperative relationship.

28. These terms conflate the various ideas in various dictionaries. See, e.g., WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 482 (1993); THE OXFORD ENGLISH DICTIONARY 760-61 (2d ed. 1989); BLACK'S LAW DICTIONARY 305 (6th ed. 1990). Much more can, of course, be said about the meaning of "consent" in this context. Consent presupposes that one has the capacity to give it. See *Reavis v. Slominski*, 551 N.W.2d 528, 533 (Neb. 1996) ("[C]onsent

Consent is also the anchor for the creation of attorney-client relationships, and in this context consent has a meaning that is essentially identical to that which it enjoys in the law of promissory relationships.

How does defense counsel acquire a client? The general rule is that a lawyer-client relationship arises when “a person manifests to a lawyer the person’s intent that the lawyer provide legal services for the person” and “the lawyer manifests to the person consent to do so.”²⁹ In the absence of the lawyer’s manifestation of consent, the lawyer-client relationship is established “if the lawyer knows or reasonably should know that the person reasonably relies on the lawyer to provide the services.”³⁰ The insurer that appoints defense counsel does not automatically become a client of the attorney appointed to defend the insured; indeed, it may be that the insurer will prefer to carry out its obligations to the insured under the liability insurance contract by assuming the posture of a third-party payor of the expenses of an attorney retained for the purpose of representing only the insured.³¹ Sometimes, then, the insurer and attorney will explicitly agree that the insurer is or is not the attorney’s client. In the absence of an agreement, the possibility looms that the

is ineffective if the person lacks capacity to consent to the conduct.”); *Wythe v. Blair*, 885 P.2d 791, 794 (Utah 1994); ([C]onsenting parties must show ... capacity to give consent.”). See *Shedd v. Lamb*, 553 N.W.2d 241, 244 (S.D. 1996) (with regard to contract formation, “Consent is not real or free if obtained through fraud, undue influence, or mistake.”); *Hazel v. State*, 157 A.2d 922, 925 (Md. 1960) ([S]ubmission to a compelling force, or as a result of being put in fear, is not consent.”). All of this points toward a conscious, knowing understanding of what one is doing when one consents. See e.g., *Stewart v. Pantry, Inc.* 715 F. Supp. 1361, 1368 (W.D. Ky. 1988) ([N]o facts exist from which it can be inferred that the plaintiffs did not voluntarily and knowingly consent to [polygraph tests]”). Consent can be implied, however, from circumstances. See e.g., *Rawls v. Conde Nast Publications, Inc.*, 446 F.2d 313, 315 (5th Cir. 1971) (“Consent may be implied from custom, local or general, from usage or from the conduct of the parties, or some relationship between them.” (quoting *HARPER & JAMES*, *supra* note 28, § 1.11, at 38); *Lawyers Title Ins. Corp. v. Dearborn Title Corp.*, 904 F. Supp. 818, 821 n.2 (N.D. Ill. 1995) (“[C]onsent may be implied by silence where a reasonable person would speak if objecting.”).

29. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 26 (Proposed Final Draft No. 1, Mar. 29, 1996) [hereinafter RESTATEMENT]. Section 26 also provides that the relationship can be formed without the lawyer’s manifested consent if “a tribunal with power to do so appoints the lawyer to provide the services.”

30. *Id.*

31. This is precisely what the “Proposed Movants’-Reporters’ Text on Liability-Insurance Issues,” states in proposed comment f to section 215 of the Restatement. See also RESTATEMENT, *supra* note 29, §26, cmt. i (“Duties may be owed to a liability insurance company that designates a lawyer to represent the insured even if the insurer is not a client of the lawyer”). Florida State Bar Assoc. Comm. on Professional Ethics, Formal Op. 81-5 (1981) (“The insurer may choose to proceed by employment of counsel for the insured alone, and separate counsel for the insurer, or by employment of counsel jointly for the insurer and insured”).

insurer is relying on the attorney to provide representation for the insurer, and because the attorney should reasonably (or may actually) know this, the attorney will have the insurer as a client.³²

As Professors Silver and Syverud observe in their important 1995 article in the *Duke Law Journal*³³ where they sought to clarify the state of things for insurance defense counsel, how the insured comes to be the attorney's client is not so simple.³⁴ In the usual case, the insured upon receipt of service of process will forward the service, the complaint, and other suit papers to the insurer and ask the insurer to undertake the defense, a request which can reasonably be construed as including a request that the insurer appoint a lawyer to represent the insured.³⁵ But as Silver and Syverud state, again correctly, the fact of the insured's consent to representation by defense counsel at the time the defense is requested "is too weak to show that the insured consents to *joint* representation by demanding a defense."³⁶

The importance of the question of consent to *joint* representation is apparent when one isolates the role that consent plays in the broader thesis advanced by Professors Silver and Syverud. They conclude that with respect to within-limits claims where coverage is not disputed,³⁷ defense counsel (if the insurer so chooses) has an attorney-client relationship with both the insurer and the insured,³⁸ and that the liability insurance contract, the terms of which "bleed" into the retainer agreement between insurer and defense counsel,³⁹ can severely constrain defense counsel's obligations to the insured.⁴⁰ The second part of the Silver-Syverud thesis depends on the validity of the first. If the

32. This raises some interesting possibilities in jurisdictions where the governing rules insist that the attorney represent only the insured. Is it reasonable to presume that the insurer knows of such rules? Should such knowledge be imputed to the insurer? If those questions are answered in the negative, does the attorney who fails at the time of appointment to explain the situation to the insurer find himself or herself in an attorney-client relationship with the insurer in violation of the jurisdiction's applicable law? The case discussed in the introduction, *Carrier Express, Inc. v. Home Indem. Co.*, 860 F. Supp. 1465 (N.D. Ala. 1994), gives one possible answer: "counsel beware."

33. See Silver & Syverud, *supra* note 10, at 255.

34. See *id.* at 280.

35. See *id.* at 280-82.

36. *Id.* at 284.

37. See *id.* at 263. These are important limiting assumptions, and will receive more attention later in this piece. See *infra* note 117.

38. See *id.* at 273.

39. See *id.* at 271-73.

40. This conclusion (and the word "severely" is their own) appears at the end of the Silver & Syverud article. However, the bulk of the article is devoted to articulating the argument in favor of this conclusion, as well as illustrating the operation of the framework in a variety of situations.

first part of the argument is incorrect, i.e., if defense counsel's only client is the insured, the default rules of agency law and professional responsibility law govern counsel's obligations to the insured. It would be highly inapt to suggest that the liability insurance policy, which exists as a bilateral contract between insurer and insured, is irrelevant; after all, the policy creates the insurer's defense obligation and outlines what the insurer must do to fulfill that obligation. But the policy, to which counsel is not a contracting party, does not by virtue of its mere existence "bleed" into the retainer agreement between insurer and counsel and does not, whether through "bleeding" or otherwise, limit the obligations that counsel owes the insured.⁴¹ Instead, the entirety of the argument that defense counsel's obligations to the insured are constrained hinges on the existence of the insured's consent to joint representation.

Silver and Syverud purport to find the insured's consent to joint representation in the liability insurance contract and, more specifically, in the insurer's widely-recognized right to control the defense:

The company is entitled to control the defense. The company expects to take the helm and can defend the liability suit effectively only if it is a co-client. In contrast, the insured has no right of control, and, in a full coverage case, has no reasonable expectation of asserting control (and perhaps no actual expectation as well). In these circumstances, it is proper to conclude that the insured, by demanding a defense, impliedly agrees to allow the company to become a co-client.⁴²

Here, then, is an indispensable and fundamental premise upon which the structure of the joint representation paradigm is erected: the insurer has a right

41. It may be that the insurer will appoint the attorney to provide a narrower range of services to the insured, and that this limited engagement will reflect the insurer's view that the liability insurance contract obligates the insurer to provide a narrower range of services. The policyholder will consent to and accept the appointment if the policyholder is satisfied that the proposed representation fulfills the insurer's obligations. If the policyholder believes otherwise, the policyholder may decline the appointment. However, this is not an issue for defense counsel. Rather, the issue is for insured and insurer to determine, i.e., what must be done by the insurer to discharge the insurer's contract obligations owed to the insured.

42. See Silver & Syverud, *supra* note 10, at 284-85. ("It is our judgment that *an insured who demands a defense thereby consents* both to representation by company-selected counsel and to joint representation because of the context in which the demand is presented.") (emphasis added). *Id.* at 284. See also *id.* at 288 ("Thus far, we have shown that . . . relationships with both clients arise *at the time the company retains counsel* for the insured.") (emphasis added).

to control the defense, and the insured does not; the insured has no reasonable or actual expectation of a right of control, and the insurer does; therefore, the insured *consents* to joint representation. Much is missing from this argument. As discussed shortly, the so-called "right of control" is more murky than commonly supposed. The insured's expectations, if he or she has any, are more complex than the Silver-Syverud argument credits; and in the absence of actual expectations, what expectations the insured might *reasonably* have is another matter altogether. Unlike Silver and Syverud and contrary to the recent writings of William Barker,⁴³ I believe there are reasons that insureds, at the time of contracting, do *not* expect the insurer to enjoy the status of a co-client if it becomes necessary for the insurer to appoint defense counsel to represent the insured.

B. *Interpreting Insurance Contracts*

Before turning to the texts of the widely-used liability insurance forms, it is useful to consider the context in which liability insurance contracts are marketed to and purchased by insurance consumers. But before examining either text or context, the standards which guide this assessment must be sketched.

Generalizing about insurance contract interpretation in a brief space is difficult, and other sources provide a fuller description of the intricacies of the interpretive process.⁴⁴ Insurance policies are contracts,⁴⁵ and the core principle is that the words of a contract are to be given the meaning that the parties intended. There is little disagreement about this basic point,⁴⁶ even if the

43. See William T. Barker, *The Tripartite Relationship and Protection of the Insured: Beyond Professional Responsibility*, 18 INS. LIT. RPTR. 528 (Oct. 1996) ("As an original proposition, it would seem strange to think that the insurer would *not* be a client.") (emphasis in original).

44. For more discussion, see generally JEFFREY W. STEMPEL, *INTERPRETATION OF INSURANCE CONTRACTS* (1994); 2 ERIC M. HOLMES & MARK S. RHODES, *HOLMES' APPLEMAN ON INSURANCE*, 2D §§ 5.1-9.8 (1996); ROBERT H. JERRY, II, *UNDERSTANDING INSURANCE LAW* § 25A (2d ed. 1996); Kenneth S. Abraham, *A Theory of Insurance Policy Interpretation*, 95 MICH. L. REV. 531 (1996); Peter Swisher, *Judicial Interpretations of Insurance Contract Disputes: Toward a Realistic Middle Ground Approach*, 57 OHIO ST. L.J. 543 (1996); James M. Fischer, *Why Are Insurance Contracts Subject to Special Rules of Interpretation?*, 24 ARIZ. ST. L.J. 995 (1992).

45. See STEMPEL, *supra* note 44, at 296 ("[T]he insurance policy remains a species of contract. Contract law, as modified over the years in the insurance context, is the starting point for analysis of coverage issues by both claims departments and courts . . . [T]he current hybrid of basic contract law infused with a number of largely pro-policyholder modifications continues to dominate policy coverage questions").

46. Professor Arthur Corbin offered the classic explanation of interpretation: "[I]t is certain that the purpose of the court is in all cases the ascertainment of the 'intention of the

apparent simplicity of the observation disguises some rather subtle, and important, difficulties.⁴⁷ Although some courts, Professor Williston, and others have encouraged the notion that language has an objective or “plain” meaning apart from the parties’ intention,⁴⁸ resort to a “plain meaning” approach to interpretation normally produces results in accord with the parties’ intentions at the time of contracting, given that most people during contract-formation communications use words consistently with their customary or usual meaning. If a contracting party uses a word that has a customary meaning shared by

parties’ if they had one in common.” 1 ARTHUR L. CORBIN, *CONTRACTS* § 106 (1963). Professor Williston’s premise is virtually identical: “In the case of contracts, the avowed purpose and primary function of the court is the ascertainment of the intention of the parties.”; 4 SAMUEL J. WILLISTON, *WILLISTON ON CONTRACTS* § 601, at 303-04 (3d ed. 1961). See also HOLMES & RHODES, *supra* note 44, § 5.1 at 4 (“Under the classical method, a court’s function is to determine the parties’ law through the judicial process of interpretation of the ‘meaning’ the parties intended.”).

47. Because what a party subjectively intends is often impossible to know and because parties rely on what others externally manifest, a party’s mental assent is not necessary to form a contract, but parties will be bound to the objectively reasonable meanings of their external manifestations. See G. ALLAN FARNSWORTH, *CONTRACTS* 118-20 (2d ed. 1990). The objective view of assent compromises classical notions of consent, in that assent is based not on actual consent, but on objective manifestations of it. If “assent” to a contract need not be actual, it is a relatively short step to the observation that the content of contractual obligations should depend less on assent and more on the relational aspects of the exchange. See also IAN R. MACNEIL, *THE NEW SOCIAL CONTRACT*, 47-50, 71-117 (1980); Ian R. Macneil, *Contracts: Adjustment of Long-Term Economic Relations Under Classical, Neoclassical, and Relational Contract Law*, 72 *NW. U. L. REV.* 854, 884 (1978) (using insurance contracts to illustrate limitations of “neoclassical” objective theory). A rich literature developing relational contract theory has emerged in the late twentieth century, but the idea that insurance is a “relation” rather than a contract finds its expression in much earlier works. See ROSCOE POUND, *THE SPIRIT OF THE COMMON LAW* 15 (1921) (“[W]e have taken the law of insurance practically out of the category of contract, and we have established that the duties of public service companies are not contractual, as the nineteenth-century sought to make them, but are instead relational; they do not flow from agreements which the public servant may make as he chooses, they flow from the calling in which he has engaged and in his consequent relation to the public”).

The extent to which relational theory should be used to adjust reciprocal rights and duties of policyholders and insurers is an intriguing question, the exploration of which must await another day. Insurance law, at least for now, is dominated by the traditional (i.e., classical or neoclassical) model. As Professor Stempel has explained, “the current hybrid of basic contract law infused with a number of largely pro-policyholder modifications continues to dominate policy coverage questions. Insurance law may be different but it remains contract law, at least in theory, rhetoric, and (for the most part) application.” STEMPER, *supra* note 45, at 296. See also HOLMES & RHODES, *supra* note 44, § 5.1 at 8 (“More often, however, policies of insurance are traditionally treated much the same as other contracts; they are matters of agreement by the parties. The task for the courts is to determine what the parties intended in that agreement and enforce it accordingly”); Fischer, *supra* note 44, at 1002 (“The special rules governing insurance contract interpretation build on the general rules applicable to all contracts.”).

48. See FARNSWORTH, *supra* note 47, at 503-04, 522-28.

most in the community, that party should understand that the recipients of the communication will take the speaker's meaning to be in accord with that customary, or "plain," meaning; if the speaker intends a different meaning, it is the responsibility of the speaker to make that intention known.

The obvious difficulty is that parties to a contract have a proclivity to use words without conferring about what the words mean. This is not to be lamented, for expecting more from parties would cause a great many desirable relationships never to come into existence; conferring over the meaning of terms is very often economically counterproductive. This reality increases the likelihood that parties will attach different meanings to their words, or that one or both of the parties will not pay any particular attention to the words and may have no particular understanding about the meaning of words at the time of contracting. When a party is disappointed with the performance of a contract, it may become convenient for that party to attach a different meaning to a pivotal term or phrase than he or she possessed at the time of contracting, or to articulate for the first time a meaning of the term which, even if articulated in good faith, happens to coincide with benefits to be gained by that party if the contract is interpreted in accordance with this "recently discovered" meaning. A "plain language" approach to interpretation reduces the risk of strategic or opportunistic re-interpretations of contract language that enable contracting parties to reduce the losses that accompany what were, with the benefit of hindsight, unwise exchanges. Thus, champions of this approach should be understood (or interpreted) to mean not that words have an intrinsic meaning apart from the parties' intention when they invoke words, but that "plain meaning" normally accords with mutually intended meanings (or an objectively reasonable intended meaning if the parties appeared to have no actual intentions) held at the time of contracting.⁴⁹

49. Even Professor Williston, the most important of all classical contract scholars, can be read as concurring with the referenced proposition:

Thus, it has been said that many of the highest courts in this country have decided that, when the meaning of words is not ambiguous, proof of usage will not be received in the interpretation of contracts.

The accuracy of such statements *cannot be admitted*, but the cases where they are made may generally be readily supported on the ground that even if the proffered evidence were considered, the meaning of the contract clearly still remained the meaning apparent from the normal meaning of the words when unexplained by extrinsic evidence.

WILLISTON, *supra* note 46, § 609, at 412 (emphasis added). Other portions of his treatise, however, point the other direction. *See, e.g., id.* §95 at 359 ("The court will give that language [in a contract] its natural and appropriate meaning; and, if the words are unambiguous, will not even admit evidence of what the parties may have thought the meaning to be").

Just as scientists studying nuclear particles must be concerned about whether their acts of observation are altering the substance of what they are observing, judges must be concerned that their interpretive efforts will favor a meaning that the parties did not intend. These efforts are complicated by the mere fact that the judicial process is invoked simply because and only when the parties give different meanings to contract language. This requires a court to choose among the meanings offered by the parties or, in rare circumstances, some other objective meaning if no party offers a reasonable one. The core principle—determining what the parties intended at the time of contracting—does not change, even if each party hopes to convince the court that its proffered meaning best explains what the parties must have understood at the time the contract was formed and even if the chasm between these proffered meanings is large. It is in this context that appeals to a “plain” or “objective” meaning of disputed language may occur; but the subtext of any such appeal is that the only conclusion to be reasonably drawn in the circumstances is that the parties’ common understanding at the time of contracting was in accordance with the language’s “plain meaning.”

In urging a court to prefer one meaning of disputed language to the exclusion of another, one party (or both) may argue that the other contracting party knew or had reason to know the meaning (whether or not a “plain” one) attached by the first party, whereas the first party did not know or have reason to know the meaning attached by the other party. In such circumstances, the first party argues that its meaning controls, given that the other party understood at the time of contracting the meaning attached to the disputed language by the first party.⁵⁰ An appeal to “plain meaning” simplifies the argument, but not the essential issue: the first party argues that the other party knew or had reason to know the meaning attached to the term by the first party simply because this meaning is a “plain” one; ergo, the other party knew or should have known about the first party’s “meaning,” and the other party’s superior knowledge requires that the meaning favored by the first party controls.⁵¹

50. This framework is set forth in RESTATEMENT (SECOND) OF CONTRACTS § 201 (1981). Analogous rules apply to contract formation; if A knows that B means “cow #1” when A and B contract for the sale of “B’s cow,” but B does not know or have reason to know that A intends the contract to be for “cow #2,” the contract is for the sale of “cow #1.” *See id.* § 201.

51. Extending from the prior footnote: If A and B contract for the sale of a “horse” but A and B both know that “horse” means A’s cow in this instance, the plain meaning approach would require the delivery of the horse. This seems odd, but if in fact both parties agree that “horse” means “A’s cow,” A will deliver his cow and nothing more will be heard from the parties, particularly in the presence of a judge. If, however, B seeks delivery of the cow under the foregoing contract and A opposes this, the plain meaning approach, as interpreted above, is not so much an endorsement of the intrinsic meaning of the word “horse” as it is a statement

The foregoing principles assume the presence of the give-and-take associated with contracts formed through bargain and negotiation. The widespread use of standardized form contracts in the twentieth century has put pressure on many principles of classical contract law, including interpretation. Standardization can become a cover for the imposition of unfair terms by parties with disproportionate economic power, and a significant portion of the policing jurisprudence in late twentieth-century contract law is aimed at precisely that problem.⁵² It is common to refer to standardized contracts as “adhesive,” and on that account to give the benefit of all doubts to the “adhered party,” the recipient of the form, to the detriment of the party that drafted the form.

“Standardization” thus becomes a proxy for a vision of the contracting process that involves the imposition of terms by a stronger party upon the weaker. Such a vision provides a nearly-automatic answer when disputes over meaning arise in connection with a standardized form: naturally, the weaker party, who has had the terms thrust upon him or her and is the functional equivalent of the “shorn lamb driven to” slaughter,⁵³ is the party that needs protection; therefore, the drafter must lose. The flaw in this vision is that standardization, in and of itself, does not prove that monopoly or oligopoly power is being asserted against weaker parties. Suppliers in many highly competitive markets use standardized forms to reduce costs, and insurance is often used to illustrate the point.⁵⁴

The more serious problem presented by standardization is the information imbalance between a standardized form’s provider (i.e., drafter) and the form’s recipient. The drafter of the standardized form is a repeat player with the

that allowing B to succeed in forcing the sale of the cow is, in all likelihood, trampling on the parties’ mutual understanding at the time of contracting—which was to sell A’s horse because the parties said “horse.” The plain meaning approach endorses the simple, and reasonable, point that most parties do not say “horse” when they mean “cow.” Few cases are this simple, however, and a broader assessment of the context in which the parties spoke their words is in most situations more likely to get closer to the parties’ intended meaning at the time of contracting.

52. See, e.g., *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 448-49 (D.C. Cir. 1965); *Henningsen v. Bloomfield Motors, Inc.*, 161 A.2d 69, 94-95 (N.J. 1960); *Jones v. Star Credit Corp.*, 298 N.Y.S.2d 264 (N.Y. Sup. Ct. 1969); *Parton v. Mark Pirtle Oldsmobile-Cadillac-Isuzu, Inc.*, 730 S.W.2d 634, 637-38 (Tenn. Ct. App. 1987).

53. The metaphor, interestingly enough, is Professor Williston’s. See 7 WILLISTON, *supra* note 47, § 900, at 19-20.

54. See MICHAEL J. TREBILCOCK, *THE LIMITS OF FREEDOM OF CONTRACT* 119 (1993); Fischer, *supra* note 45, at 1013 (“Insofar as the scope of coverage is concerned, the issue is not so much disparity in bargaining power, as lack of information available to the insured, which disables him from fully assessing his insurance needs”); Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173, 1205 (1983).

expertise that comes from familiarity with the transaction; the recipient of the form, a one-shot or few-shot player, is at the other end of the spectrum. The drafter typically benefits from expert legal advice, which may not be available to the form's recipient.⁵⁵ The recipient of the form is not expected and may not even have the opportunity to read the form, let alone scrutinize it; and the recipient may lack even the basic skills needed to understand the form's content, even if the recipient were encouraged to read it. Indeed, in most situations the recipient of the standardized writing has no particular desire "to understand or even read the standard terms."⁵⁶ These circumstances render classical contract rules pertaining to contract formation and interpretation less meaningful,⁵⁷ but courts have for the most part held onto the classical framework while acknowledging the need for and implementing more aggressive policing of exchanges under standardized forms.⁵⁸

Under the classical framework, one who signs a contract without reading it—even if the contract is a standardized form—may well be held bound to its terms. There is, however, considerable authority recoiling from that position.⁵⁹

If reading and understanding a proposed form would be irrelevant due to the absence of an opportunity to bargain over terms,⁶⁰ it is counter-intuitive to penalize non-readers of forms; encouraging more reading and greater awareness of the content of the forms would, in the best of circumstances, change nothing. Even if one takes a classical view and gives great weight to whether a contracting party has read and understood the terms to which he or she is assenting, the fact that the insured lacks an actual expectation about the meaning of words in a standardized form—even if this understanding is accompanied by failing to read and to attempt to understand the form—does not allow the words to mean whatever the insurer wishes.

In one sense, the flexibility displayed by some courts in excusing parties from the full measure of standardized contracts they signed or adopted but never read or attempted to understand is a logical extension of classical contract doctrine. Drafters of standardized forms know or have reason to know that the recipients of the forms will have considerably less understanding of the

55. The imbalance in expertise was noted by Professor Williston. See WILLISTON, *supra* note 46.

56. RESTATEMENT (SECOND) OF CONTRACTS § 211 cmt. b (1981).

57. See TREBILCOCK, *supra* note 54, at 119 ("to hold parties bound to standard form contracts which they had entered into but which they had not read or understood does not rest comfortably with a theory of contractual obligation premised on individual autonomy and consent. Clearly, in many, perhaps most cases, meaningful consent is absent").

58. For a more detailed discussion, see STEMPEL, *supra* note 45, §§ 3.5, 10.1-10.4, at 97-107, 283-96.

59. See JERRY, *supra* note 44, § 32(b), at 182-84.

60. See Rakoff, *supra* note 54, at 1180-83.

terms of the contract (and the recipient will not know, or have reason to know, the meanings attached by the drafter to particular terms or provisions); this implies that specialized meanings favored by drafters will not trump objectively reasonable understandings held by the recipients of the form, and instead *may be trumped* by the inferred reasonable understanding that the insured would have if he or she had considered the matter at all—which, of course, probably never occurred. The foregoing observation leads one to the brink of embracing the doctrine of reasonable expectations⁶¹ or the pro-consumer standard in *Restatement (Second) of Contracts* § 211.⁶² But one need not go that far. Whether one chooses to embrace doctrines that rewrite contract language or discard terms that cause unfair surprise, one basic point cannot be escaped (unless one is prepared to jettison the idea that consent, or at least the objective manifestations of consent, is needed to form a contract): modern contract law requires, quite simply, that anyone who presents a standardized form to a less knowledgeable recipient must make the language of the contract reasonably understandable.⁶³ This is a hurdle over which the

61. As approved by many courts, the doctrine of reasonable expectations holds that the insured's objectively reasonable expectations will be upheld even though a painstaking analysis of the policy's provisions would have resulted in a denial of coverage. For more discussion of the doctrine of reasonable expectations, see generally Roger C. Henderson, *The Doctrine of Reasonable Expectations in Insurance Law After Two Decades*, 51 OHIO ST. L. J. 823 (1990); JERRY, *supra* note 44, § 25D, at 141-47.

62. The Restatement (Second) of Contracts cuts a significant path through the plain-meaning forest by suggesting that courts sometimes disregard even clear terms in a standardized writing. Section 211(3) provides:

Where the other party has reason to believe that the party manifesting such assent would not do so if he knew that the writing contained a particular term, the term is not part of the agreement.

RESTATEMENT (SECOND) OF CONTRACTS § 211(3) (1981).

Comment (f) to the section elaborates:

Although customers typically adhere to standardized agreements and are bound by them without even appearing to know the standard terms in detail, they are not bound to unknown terms which are beyond the range of reasonable expectation [A] party who adheres to the other party's standard terms does not assent to a term if the other party has reason to believe that the adhering party would not have accepted the agreement if he had known that the agreement contained the particular term.

Id. at cmt. f.

Few courts have explicitly approved the formulation suggested in Section 211; for a notable case to the contrary, see *Rawlings v. Apadoca*, 726 P.2d 565 (Ariz. 1986) (en banc).

drafter must jump; there is some uncertainty about the height at which the hurdle will be set in any particular situation, but failing to exceed it will produce outcomes that favor the recipient and go against the drafter.⁶⁴

All of this may appear to place a difficult burden on the drafter of a standardized form who wishes to limit the insurer's responsibilities, but the drafter's position is hardly hopeless. In this framework, if the insurer cares deeply about a particular term, the principles contemplate that the insurer clearly manifest its expectation about the term to the insured so that the insured is not later subjected to unfair surprise. Clear drafting of contract language can go a long way down this road, but even clear drafting does not guarantee that the insurer can make its term binding. If a term is so disadvantageous to the insured that it might be found to be "beyond the range of reasonable expectation," the insurer must bring the term and the insurer's understanding of it to the insured's attention in a manner sufficient to cause the insured to expect the term, even if the insured acquires no actual knowledge of the term because he or she is not paying attention to what the insurer is attempting to communicate.

C. *The Context of Liability Insurance Contracting*

Contextual factors of considerable force place any contract term pursuant to which defense counsel's loyalties are divided between insured and insurer outside the range of the insured's expectations.⁶⁵ Initially, it must be conceded that the actual expectations of insureds with respect to the obligations of insurers lack specificity and detail. Insureds rarely read their policies until they have a reason to do so, and even then are unlikely to understand much of what they read. I submit that relatively few insureds realize, for example, that their homeowners insurance provides general liability protection; most insureds believe a homeowners policy provides coverage for the structure of the insured residence and its contents. These insureds are far from understanding the general parameters, let alone the nuances, of the insurer's defense obligations. Insureds probably understand that their automobile policies have a liability

63. E. ALLAN FARNSWORTH & WILLIAM F. YOUNG, *CONTRACTS: CASES AND MATERIALS* 413-14 (5th ed. 1995) ("Presenting a standard form contract to a consumer for assent entails a certain obligation to make it intelligible. This general proposition, though not yet fully defined, is exemplified by widespread decisions, statutes, and regulations, quite various in detail.").

64. In his 1996 article on interpretation of insurance contracts, Professor Abraham articulates and describes the various standards courts have approved in their application of the doctrine of *contra proferentum*; some of the standards are stricter than others, and by necessity produce different outcomes in similar cases. See generally Abraham, *supra* note 44, at 537-56.

65. I concede that it would be interesting to test this proposition empirically, but I believe that the results of such a test would confirm these assumptions.

coverage component; in most states, liability insurance is compulsory, insureds are reminded of this when they seek to obtain license plates or a drivers license, and most people are probably attuned to the risk of automobile transportation and the attendant liability exposures. Yet even here, most insureds probably view the liability exposure as the risk of a bankrupting civil judgment, and thus think of the insurance protection largely in terms of indemnity.⁶⁶ The exposures associated with the expenses of defending against claims for such judgments are probably secondary in most insureds' range of expectation, if they have any expectation at all about the process through which such judgments are obtained.

It is fair to suggest that insureds in recent years have become more aware of the importance of the defense obligation in liability insurance policies. Some of this has resulted from widely-publicized contentions that civil litigation is both excessive and too expensive, a belief that has been encouraged by some insurers. Yet even if insureds when purchasing liability insurance desire to obtain protection against two distinct risks of loss, namely, the risk of having to pay money to a plaintiff who succeeds in securing a judgment against the insured, and the risk of incurring expenses in defending against that claim, the typical insured probably views the expense of defending the plaintiff's claim primarily in terms of the cost of retaining and paying for a lawyer. This suggests that the insured understands the solution provided by the insurer to be this: "To save you the expense of retaining a lawyer, we will take care of that problem by retaining the lawyer for you and paying the lawyer's fee." Thus, from the insured's perspective, the insurer is simply the "Uncle Joe" who

66. Professor Widiss may disagree with this assessment of insureds' comprehension of the content of their policies. In a 1990 article, he wrote:

The practice of undertaking the defense when a claim is made or a suit is filed against an insured is undoubtedly widely known to the public. Consequently, purchasers have come to expect that liability insurers provide insureds with defenses to tort suits, as well as with indemnification (up to the limits of the liability) for any judgment or settlement.

Alan I. Widiss, *Abrogating the Right and Duty of Liability Insurers to Defend their Insureds: The Case for Separating the Obligation to Indemnify from the Defense of Insureds*, 51 OHIO ST. L.J. 917, 918 (1990). Anyone who has been sued once, or has a friend who has been sued once, for alleged tortious conduct probably understands the essential aspects of the indemnity-defense distinction. Perhaps this group is now large enough that Professor Widiss is correct. My sense is that most second- or third-year law students at the beginning of the basic insurance law course do not understand the distinction or even the basics of the coverage (although they are quick to grasp it once encountering it), and this leads me to think that the general public probably understands very little about it either. As the subsequent text explains, however, whether Professor Widiss' or my assessment is more accurate does not matter much.

comes to the rescue when the unlucky and relatively resourceless nephew finds himself in need of legal help but without either the expertise or financial means to take care of this matter directly. From this perspective, the insurer is the benefactor who takes care of the insured's problem with the same detachment that the insurer pays the proceeds to substitute for the damage to the insured's house when it is damaged by a falling tree. The first-party insurer has an economic stake in minimizing the proceeds to be paid and otherwise reducing claims-processing expenses, but if the loss is covered, the insurer protects those interests through a substitute for the entirety of a within-limits loss. The expectations of the insured in the third-party setting are unlikely to be much different; the insured probably expects that his or her interests will be fully protected, assuming both that the interests are within the coverage and that the insured complies with relevant conditions of the policy relevant to claims processing. In effect, the insured, lacking a reliable or sufficiently wealthy "Uncle Joe," views his or her premium as purchasing the equivalent of a benevolent uncle whose relationship to the insured is for all practical purposes the third-party payor of the insured's defense expenses.

This assumption, just like the contrary one made by Silver and Syverud in their article, is likely to be controversial,⁶⁷ and it is important to understand that the assumption has limits. Plainly, it is not reasonable for an insured to assume that the insurer is obligated to do for the insured whatever the insured wants.

Indeed, as generous as uncles can be, they are not servants. But an expectation that defense counsel has undivided loyalty to the insured is not one that the insured is likely to form entirely on his or her own; rather, the insurer or its agents are likely to play some role in creating this expectation. It is, of course, dangerous to generalize about the quality and quantity of information brokers or agents provide to applicants at the point where insurance policies are marketed and sold, but it is safe to assert that the quality and quantity of information shared is uneven. In my own experience, the agent or broker selling liability insurance affirms that if the insured is sued, the insurer "will take care of it" for the insured; the message to the insured is that the insured, who is likely to have had little, if any, contact with the legal system and may not even be acquainted with an attorney, will not have to search for and select his or her own attorney. For one unacquainted with lawyers generally and with the specifics of how one goes about finding a lawyer well-suited for the task at hand, the insurer's promise to do this for the insured (i.e., "we will get you an attorney") is a promise of a valuable service. The important point is that the

67. My invocation of Silver and Syverud's language is deliberate, for this is the crux of the debate. See Silver & Syverud, *supra* note 10, at 273 ("This [assumption that "the agreement under which defense counsel is retained creates two attorney-client relationships"] is a controversial assumption").

insured can leave his or her conversation with the broker or agent reasonably expecting that the insurer's promise to defend any future claim is a promise to secure for the insured an attorney whose relationship to the insured will be the same as if the insured had retained the attorney directly. Many courts have conceptualized the content of the liability insurance contract in exactly this way.⁶⁸

D. The Substance of the Liability Insurance Contract

Under the interpretive approaches followed by some courts, clear contract language does not necessarily defeat reasonable expectations.⁶⁹ But the analysis cannot end here, because for some courts unambiguous contract language trumps—or, more accurately, prevents inquiry into—whatever expectations the insured has about the insurer's promises.⁷⁰ Thus, it is necessary to inquire into the language of the liability insurance contract, looking for text that, if read and understood, would dispel the expectation that the preceding section suggested most insureds bring to the liability insurance contract.

Among Silver and Syverud's working hypotheses is a concise articulation of the content of typical liability insurance contracts:

[T]he vast majority of policies give the insurance company the right to defend the case, and require the cooperation of the insured in the company's defense of any suits. For the last century, these common insurance arrangements have permitted the company to select counsel to defend an action, to supervise counsel's litigation and settlement strategy, and to settle claims within policy limits at the company's discretion.⁷¹

The quoted passage states the commonly-expressed wisdom on insurers' rights and privileges as well as insureds' obligations. In footnote 26 to the quoted passage, Silver and Syverud articulate a summary of the foregoing paragraph

68. See, e.g., *Mirchum v. Hudgens*, 533 So. 2d 194, 199 (Ala. 1988); *Palermo v. Fireman's Fund Ins. Co.*, 676 N.E.2d 1158, 1164 (Mass. App. Ct. 1997); *Illinois Masonic Med. Ctr. v. Turegum Ins. Co.*, 522 N.E.2d 611, 613 (Ill. App. Ct. 1988).

69. See *Henderson*, *supra* note 61, at 827-28 (observing that at least 16 jurisdictions have approved the application of the doctrine of reasonable expectations without regard to the presence of ambiguous language in the insurance contract).

70. See, e.g., *Alf v. State Farm Fire and Cas. Co.*, 850 P.2d 1272 (Utah 1993); *American Family Mut. Ins. Co. v. Elliot*, 523 N.W.2d 100 (S.D. 1994); *Robbins Auto Parts, Inc. v. Granite State Ins. Co.*, 435 A.2d 507, 509 (N.H. 1981); *JERRY*, *supra* note 44, § 25D, at 144.

71. *Silver & Syverud*, *supra* note 10, at 264-65.

that appears to have near-universal acceptance as well: that the forms in common use today "entitle the company to control the defense."⁷² Moreover, Silver and Syverud's observation accurately reflects the assessment of most courts that have decided to say something about the insurer's rights.⁷³ Silver and Syverud, like most who assert the foregoing conclusion, cite to but do not parse the text of these forms, probably assuming (as many do) that the matter is settled. But because the dual client argument ultimately depends on the existence of the insurer's right to control the defense, it is worth revisiting this fundamental question, and asking whether the texts of these forms unequivocally communicate this meaning to the reasonable reader. I conclude that it is far from clear that the language of the standard forms conveys to the reasonable reader that the insurer reserves unto itself a right to control the defense.

That the standard language defining the insurer's defense obligations under most liability policies is indefinite in many respects is not a new observation. Professor Abraham stated in his important 1986 book⁷⁴ that

Liability insurance policies often create obligations that are insufficiently detailed to govern insurer conduct completely. They appear to grant the insurer the privilege to settle claims but impose no obligation to do so, and they create a duty to defend the insured without specifying its breadth or limits.⁷⁵

He made the same point with respect to whether the duty to defend is triggered at all in situations where the insurer's coverage responsibility is in doubt, observing that "[t]he language of the standard liability policy provides almost no guidance."⁷⁶ Professor Morris argued in an early article on the subject that

72. Silver & Syverud, *supra* note 10, at 265 n.26.

73. See, e.g., *Merchants Indem. Corp. v. Eggleston*, 179 A.2d 505 (N.J. 1962); *American Cas. Co. v. Timmons*, 352 F.2d 563 (6th Cir. 1965); *Duke v. Hoch*, 468 F.2d 973 (5th Cir. 1972), *motion denied*, *Duke v. Hoch*, 475 F.2d 761 (5th Cir. 1972); *Vandivort Constr. Co. v. Seattle Tennis Club*, 522 P.2d 198 (Wash. 1974); *Traders & General Ins. Co. v. Rudco Oil & Gas. Co.*, 129 F.2d 621 (10th Cir. 1942); *McCrary v. U.S.*, 235 F. Supp. 33 (D. Tenn. 1964); *Ash v. Farwell*, 37 F.R.D. 553 (D. Kan. 1965); *McChristian v. State Farm*, 304 F. Supp. 748 (D. Ark. 1969); *Allstate Ins. Co. v. Wilson*, 193 S.E.2d 527 (S.C. 1972).

74. KENNETH S. ABRAHAM, *DISTRIBUTING RISK: INSURANCE, LEGAL THEORY AND PUBLIC POLICY* (1986).

75. *Id.* at 178.

76. *Id.* at 196. In a footnote appended to the bottom of that page, he observed that "[t]hree distinct kinds of doubts about when the duty of defense attaches arise because of this incompleteness of policy language." These were situations where the insurer questioned its responsibility under the policy, based on what he labeled as a policy defense (an issue about the policy's applicability to the loss in question), an enforceability defense (a defense based on

the typical liability insurance policy's language does not explicitly support the dual representation model and that the "right to defend" verbiage in the typical policy "does not limit the control [of the defense] that insureds otherwise might have."⁷⁷ His conclusion that the policy language mandates that defense counsel represent only the insured⁷⁸ goes too far in the other direction, but this early article is important for recognizing that the language of the usual liability policy allows a mismatch between what the insurer may intend and what the policyholder may reasonably expect with respect to the insurer's defense obligation. A closer look at the policy language bears out the observations of Abraham and Morris about the absence of clarity in the standard language on the duty to defend.

Consider first the standard Personal Auto Policy. Given the frequency with which this policy form (or others like it) is invoked in our country, this is an appropriate place to start. The relevant language on the insurer's duty to defend in Part A, Paragraph A provides:

INSURING AGREEMENT

A. . . . We will settle or defend, as we consider appropriate, any claim or suit asking for these damages. In addition to our limit of liability, we will pay all defense costs we incur. Our duty to settle or defend ends when our limit of liability for this coverage has been exhausted. We have no duty to defend any suit or settle any claim for "bodily injury" or "property damage" not covered under this policy.⁷⁹

The phrase "We will settle or defend, as we consider appropriate" can plausibly be read to mean "We will settle, as we consider appropriate, or we will defend, as we consider appropriate." Under such a reading, the insurer has control of the defense. This reading, however, requires repeating a phrase which the drafters only used once in the text. As the text stands, it can reasonably, and more plausibly, be read as giving the insurer the discretion to

the insured's post-loss conduct) or a coverage defense (based on someone claiming to be an unnamed but additional insured under the policy). *Id.* at 196 n.*.

77. John K. Morris, *Conflicts of Interest in Defending Under Liability Insurance Policies: A Proposed Solution*, 1981 UTAH L. REV. 457, 464.

78. *See id.* at 465 ("Only a standard of undivided loyalty is consistent with the provisions of insurance policies . . ."); *see also id.* at 493 ("That standard, undivided loyalty to the insured, is . . . contractually required by the insurance policy.").

79. Personal Auto Policies (PP 00 01 12 89), reprinted in SUSAN J. MILLER & PHILIP LEFEBVRE, 1 MILLER'S STANDARD INSURANCE POLICIES ANNOTATED 2 (4th ed. 1997) (hereinafter "MILLER'S POLICIES ANNOT.>").

settle *or* to defend, electing whichever of those two courses it “consider[s] appropriate.” This language, then, is designed, arguably, to inform the insured that the insurer may not provide an attorney to defend the suit if in its discretion the insurer thinks a settlement is more appropriate. The words “We will . . . defend” do not, in and of themselves, indicate that the insurer reserves unto itself the right to make all of the key decisions in managing the defense.

Although reading “we will . . . defend” as “we are going to do this, *not* you; you will not be involved, even if you want to be”—is not implausible, this phrase “we . . . will defend” can also reasonably be read as a simple way of manifesting the insurer’s intent to “take care of” the insured. The second sentence manifests only that the insurer will pay the bills, without regard to the limits of liability found elsewhere in the policy. This sentence is qualified by the third, but the third relates to circumstances under which the duty terminates, not to the insurer’s right of control. The last sentence speaks to when the duty is triggered, not to the insurer’s right of control. In short, nothing in this paragraph communicates unequivocally or in a way likely to bring home to the insured that the insured gives up control of the defense to the insurer.

Other sections of the Personal Auto Policy form impose obligations on the insured to cooperate with the insurer. These provisions are found in Part E, Paragraphs A-D,⁸⁰ but the strongest language in this Part indicates only that “A person seeking any coverage must: 1. Cooperate with us in the investigation, settlement or defense of any claim or suit.” “Cooperation” reasonably implies to the reader that the insured (or other person seeking coverage) must strive to “get along” with the insurer; indeed, cooperating normally connotes “working *together with*” someone, not relinquishing, giving up, or taking a position of subservience to another.⁸¹ Whatever else the cooperation clause may mean,⁸² it is a stretch from this language to conclude that the policy “entitles the company to control the defense of liability suits.”⁸³

Although not invoked as often as the automobile forms, the liability coverage in the standard homeowners form is perhaps the next most pervasive liability coverage in force today. The standard language provides:

80. These provisions are reprinted in full in the Appendix to this article.

81. See WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY, *supra* note 28, at 501 (defining “cooperate” as “to act or work with another or others to a common end”; “to act together”).

82. See JERRY, *supra* note 44, at 717-27.

83. Silver & Syverud, *supra* note 10, at 265 n.26.

Section II-Liability Coverages

If a claim is made or a suit is brought against an “insured” for damages because of “bodily injury” or “property damage” caused by an “occurrence” to which this coverage applies, we will:

* * *

2. Provide a defense at our expense by counsel of our choice, even if the suit is groundless, false, or fraudulent. We may investigate and settle any claim or suit that we decide is appropriate. Our duty to settle or defend ends when the amount we pay for damages resulting from the “occurrence” equals our limit of liability.⁸⁴

The language “we will . . . provide a defense at our expense by counsel of our choice” is the strongest phrase favoring insurer control in the paragraph. That the insurer can choose counsel is unambiguous, and, as with the Personal Auto Policy form, it is plausible to read the phrase “we will . . . provide a defense” as indicating that the insurer will control the defense. It is, however, no less plausible to read the paragraph as manifesting that the insurer will protect the insured against the risk of having to underwrite the defense directly. This reading is strengthened if one places emphasis on the phrase “at our expense.” The second sentence of paragraph 2 articulates in clear language the insurer’s option to settle any claim or suit if it thinks it appropriate to do so. Noticeably absent from that sentence, which more clearly articulates the privileges the insurer is reserving than the preceding one, is the insurer’s articulation of its prerogative to control the defense of the suit. The last sentence of the paragraph refers to when the insurer’s duty to defend ends, not how the insurer is to perform that duty. In short, this paragraph falls short of communicating in unequivocal terms to the insured that it “entitles the company to control the defense.”⁸⁵

The homeowners form imposes a number of duties on insureds after loss which can fairly be summarized as an obligation to “cooperate” even if the

84. Homeowner’s Policy Form (HO 00 03 04 9) in 1 MILLER’S POLICIES ANNOT., *supra* note 79, at 199.

85. Silver & Syverud, *supra* note 10, at 265 n.26.

policy does not use that precise term.⁸⁶ The language is mandatory—"You will help us by seeing that these duties are performed"—and the duties are set forth with a fair amount of specificity. For example, in Paragraph 3(c), the insured is required to "help us: . . . (3) With the conduct of suits and attend hearings and trials," but nothing in that language or elsewhere in the paragraph explicitly states that the insured's assistance when the insurer is providing the defense is tantamount to surrendering control of the defense to the insurer.

Before proceeding to the Commercial General Liability policy ("CGL"), the principal commercial form, it is worth pausing to note that if these policies fail to communicate clearly to the insured that the insurer has reserved to itself the privilege to control the defense, how can it be said that these policies express the insurers' intent to establish a joint-client relationship with the insured when the insured is sued on a claim within coverage? On the contrary, these policies cannot reasonably be read as unequivocally expressing this intent. But under hornbook contract law principles, that is not even the correct question to ask. The correct question is, what would a reasonable person standing in the shoes of the insured reasonably understand these words to mean? The absence of any reference to a co-client relationship, or even an explicit reference to the insurer's privilege to control the defense, makes it difficult to contend that a reasonable person in the insured's position would comprehend from the texts that the insurer intends dual representation, if indeed that is what the insurer does in fact intend from the quoted texts. This, too, can be reasonably doubted given the fact that an attorney-client relationship between insurer and defense counsel is not necessary to implement the terms of the contract.

Although one might assume that commercial insureds are more savvy on insurance matters than policyholders in the personal lines, this is a risky assumption, even if there are many commercial entities with a considerable amount of corporate understanding of insurance coverages. Many businesses are sole proprietorships, or so-called "mom and pop" enterprises, and these businesses are functional equivalents of individual consumers in the personal lines. Commercial status does not guarantee that an insured has an enhanced understanding of what the insurer promises by way of a defense to covered claims. Fairly read, however, the Insuring Agreement in the Commercial General Liability policy ("CGL") is more explicit than the Personal Automobile and Homeowners policies: in the CGL, the insurer reserves unto

86. Homeowners Form, §II, ¶3, (HO 00 03 04 91) in MILLER'S POLICIES ANNOT., Vol. 1, *supra* note 79, at 199.

itself a “right . . . to defend” any suit within coverage; this text does not appear in the other forms.⁸⁷

The relevant language of the CGL reads in full as follows:

COVERAGE A. BODILY INJURY AND PROPERTY DAMAGE LIABILITY

1. Insuring Agreement.

a. We will pay those sums that the insured becomes legally obligated to pay as damages because of “bodily injury” or “property damage” to which this insurance applies. We will have the right and duty to defend any “suit” seeking those damages. We may at our discretion investigate any “occurrence” and settle any claim or “suit” that may result.

But:

(2) Our right and duty to defend end when we have used up the applicable limit of insurance in the payment of judgments or settlements under Coverages A or B or medical expenses under Coverage C.⁸⁸

The second and third sentences of subparagraph (a) are the key ones. Read together, the sentences make clear that the insurer can defend the suit if it desires rather than pay the claim, or may settle the suit if it desires, rather than defend the claim or pay it in full. The insurer, not the insured, is privileged to make this call. This was the reading of the CGL urged by Professor Morris in his 1981 article:

87. If this enhanced clarity makes a difference (and I suggest shortly that it does not), it may follow that the conclusions urged by Silver & Syverud in their Duke article must be limited to defenses provided under CGL policies and may not apply to defenses provided in the personal lines. In their footnote 27, Silver & Syverud state that “[t]he working hypotheses advanced in this Part and the views on professional responsibility advanced later in this Article are tailed to the Commercial General Liability Coverage Form When insurance is governed by a policy other than the CGL Policy, the working hypotheses and the views on professional responsibility advocated here may not apply.” Silver & Syverud, *supra* note 10, at 265 n.27.

88. Commercial General Liability Form, (CG 00 01 10 93), MILLER’S POLICIES ANNOT., *supra* note 79, at 409.

[T]he phrase “right . . . to defend” does not limit the control that insureds otherwise might have. Instead, the phrase means only that insurers have a right to insist that a case against their insureds be competently defended, rather than decided by default. The phrase speaks only of the right to provide a defense, not the right to control a defense once provided.⁸⁹

I disagree with Professor Morris that this is the *only possible* reading of the CGL, but Professor Morris’s reading is certainly *one possible* reading of the CGL, and is one that a reasonable insured could reasonably give to it. Whatever might be said about the drafters’ intention, the language by its terms falls short of clearly expressing the insurer’s intention to reserve control of the defense to itself.

As with the other policies, the CGL contains provisions explicitly requiring the insured to cooperate with the insurer in the investigation, defense, and settlement of the claims,⁹⁰ but these provisions do not by their own terms explicitly surrender control of all aspects of these functions to the insurer. The CGL contains a provision proscribing the insured from incurring expenses without the insurer’s consent, except at the insured’s own cost,⁹¹ but this language can fairly be read as requiring the insurer’s participation in the decision to incur costs, not the insurer’s exclusive right to control how these expenditures are made.

These are not the only liability forms in use today, but a survey of the others⁹² shows that there are no material variations in the remaining forms which would change, one way or the other, one’s assessment of whether insurers have succeeded in manifesting to their insureds their desire to reserve unto themselves the right to control the defense. When the right to control falters, the co-client paradigm falters along with it.

E. Prevailing Constructions of the Contract

My conclusion—that the language of the policy forms does not clearly manifest the insurer’s intention to control the defense—is definitely at odds with the conclusion asserted by most courts that have had anything to say on

89. Morris, *supra* note 77, at 464.

90. See Commercial General Liability Form, § IV, ¶ 2, (CG 00 01 10 93) in MILLER’S POLICIES ANNOT., *supra* note 79, at 409.

91. “No insureds will, except at their own cost, voluntarily make a payment, assume any obligation, or incur any expense, other than for first aid, without our consent.” Commercial General Liability Form, § IV, ¶ 2 (d), (CG 00 01 10 93), in MILLER’S POLICIES ANNOT., Vol 1, p. 409 at 416.

92. See forms in Appendix.

the matter.⁹³ Some of these decisions cite, and may be explainable by virtue of the influence through the decades of, the Appleman multivolume treatise *Insurance Law and Practice*.⁹⁴ In section 4681 of the first edition, the treatise opines that the insurer's right to control the defense is very nearly absolute:

To insure an orderly and proper disbursement of these funds [i.e., funds established with premiums] and minimize unwarranted claims, the insurer has exclusive control over litigation against the insured, and the latter is required to surrender all control over the conduct of the defense. . . . The right is a valuable one in that it reserves to the insurer the right to protect itself against unwarranted liability claims and is essential in protecting its financial interest in the outcome of litigation.⁹⁵

These sweeping observations are unaccompanied by any analysis of the language of policy forms in customary use. Yet for many courts, the words of a distinguished, authoritative treatise writer are the beginning and the end of the answer to a question of law, and the words quoted above have received such application in many opinions.⁹⁶

Other portions of section 4681, however, indicate that the quoted passage is subject to some important limitations. The paragraph in section 4681 which follows the quoted passage is one sentence long:

A policy provision giving the insurer the right to control the defense has been held in early Massachusetts cases to be inserted primarily for the benefit of the insurer, in the sense that where there is a conflict of interests, the insurer may exercise the right to defend for its own advantage, even

93. See cases cited *infra* notes 104-09.

94. JOHN A. APPLEMAN, *INSURANCE LAW AND PRACTICE* (Walter F. Bernal ed., 1979) [hereinafter APPLEMAN]. For another secondary source in accord with Appleman's treatise, see William T. Barker, *The Right and Duty to Defend: Conflicts of Interest and Insurer Control of the Defense*, in *LITIGATING THE COVERAGE CLAIM: DENIAL OF COVERAGE AND DUTY TO DEFEND* 195 (Tort and Insurance Practice Section, American Bar Association, 1992).

95. 7C APPLEMAN, *supra* note 94, § 4681, at 2, 3.

96. See, e.g., *Aberle v. Karn*, 316 N.W.2d 779 (N.D. 1982); *Moritz v. Med. Protective Co.*, 428 F. Supp. 865 (W.D. Wis. 1977); *Merchants Indem. Corp. v. Eggleston*, 179 A.2d 505 (N.J. 1962); *American Cas. Co. v. Timmons*, 352 F.2d 563 (6th Cir. 1965); *Duke v. Hoch*, 468 F.2d 973 (5th Cir. 1972), *motion denied*, 475 F.2d 761 (5th Cir. 1972); *Nandorf, Inc. v. CNA Ins. Co.*, 479 N.E.2d 988 (Ill. App. Ct. 1985).

though a different course would have been preferable from the standpoint of the insured.⁹⁷

The stated principle—that when the interests of insurer and insured diverge, the insurer is free to promote its own interests without regard to the interests of the insured—is one that few seriously urge today. The footnote to the quoted passage says as much, but the footnote is interesting for what it adds:

Such is no longer the rule, of course, as will be seen subsequently under cases dealing with the duty owing to the insured. The insurer has the right to come into court *solely as the professional champion of the insured*; and where a conflict arises as to their respective interests, those of the insured must be served first.⁹⁸

Because this last statement appears in the same section often cited approvingly by courts for allowing the insurer exclusive control of the defense, the clear implication of the Appleman treatise is that exclusive control rests with the insurer only when the interests of the insured and insurer coincide.⁹⁹

Of course, when the interests of the insured and insurer are identical, the fact that the insurer has exclusive control makes no difference to the insured. Moreover, a sentence in the 1996-97 pocket part to the treatise¹⁰⁰ underscores that the insurer's right to control the defense can be subject to significant constraints: "An insurer's desire to control the defense must yield to its obligations to defend the insured."¹⁰¹ With all of the considerable respect that

97. APPLEMAN, *supra* note 94, § 4681, at 2,3.

98. *Id.* at 4 n.8.

99. In their discussion of impeachment of the insured, Silver & Syverud quoted the first paragraph from the Appleman text, see Silver & Syverud, *supra* note 10, at 317, but did not mention the footnote in Appleman which essentially retracts the statement in the treatise's text, indicating that it is no longer the law. Silver & Syverud, however, described the retracted text as "the prevailing doctrine," *id.* at 317, and reasoned from this passage that "insurance law does permit the company to request impeachment of the insured." *Id.* This is not a fair reading of Appleman and, by extension, the applicable insurance law rules regarding impeachment.

100. See JOHN A. APPLEMAN, INSURANCE LAW AND PRACTICE § 4681 (Stephen L. Liebo, ed. Supp. 1997).

101. *Id.* at 1. One case is cited for this proposition, and this case comes from New York, a jurisdiction where the attorney owes undivided loyalty to the insured in the event of a conflict, Public Service Mut. Ins. Co. v. Goldfarb, 425 N.E.2d 810, 815 (N.Y. 1981), Allstate Ins. Co. v. Riggio, 509 N.Y.S.2d 594, 595 (N.Y. App. Div. 1986), and where there is some authority that the attorney's allegiance is owed solely to the insured. See Booth v. Continental Ins. Co., 634 N.Y.S.2d 650, 654 (Sup. Ct. 1995) (quoting 6 NY JUR. 2d Attorneys at Law § 70: "When counsel, paid by an insurance company, undertakes to represent the policyholder, he owes to

is due the Appleman treatise, it is not possible to argue from that platform that "[t]he law is clear that, absent certain conflicts of interest, the company possesses exclusive and plenary control of the defense"¹⁰² under the text of the liability insurance forms in current usage.

A closer look at the cases approving the insurer's right to control the defense yields additional insights of interest. In several of these cases, the court's approval of the insurer's right to control is pure dictum, given that in those cases the insurer had refused to defend the insured and the issue was whether this refusal was wrongful.¹⁰³ In other cases, the question was whether an excess insurer had the right to control the defense, which did not implicate the insured's rights vis-a-vis the insurer,¹⁰⁴ or whether the policy provided coverage or a right to recovery at all.¹⁰⁵ In short, in many of the cases espousing the general rule, no issue was presented involving a contest between insurer and insured as to who should control the defense.¹⁰⁶ In other decisions where the insurer's right to control was recognized, the court made clear that the right to control ended when a conflict arose between insurer and insured.¹⁰⁷ In other cases, the court made clear that the insurer's right is not absolute when the claim against the insured exceeds the policy limits.¹⁰⁸ As it turns

his client, the insured, an undeviating and single allegiance."; note, however, that other passages assume that counsel can represent both insurer and insured); N.Y. Cty. Lawyer's Ass'n Comm. on Prof. Ethics, Eth. Op. 669 (89-2) (May 17, 1989) ("Despite the payment of legal fees by the insurance company and the fact that the lawyer may have a long-standing relationship with the insurance company, the lawyer's client in the matter is the insured.").

102. Silver & Syverud, *supra* note 10, at 272 n.37.

103. See, e.g., Stevens v. Gulf Oil Corp., 274 A.2d 163 (R.I. 1971); Waste Management v. International Surplus Lines Ins. Co., 579 N.E.2d 322 (Ill. 1991); White Mountain Constr. Co v. Transamerica Ins. Co., 631 A.2d 907 (N.H. 1993); Hartford Accident & Indem. Co. v. Sherwood Brands, Inc., 680 A.2d 554 (Md. Ct. Spec. App. 1996), *cert. granted*, Mutual Life Ins. Co. v. Ins. Comm'r Md, 685 A.2d 450 (Md. 1996); Hodges v. State Farm Mut. Auto. Ins. Co., 488 F. Supp. 1057 (D.S.C. 1980).

104. See Diamond Heights Homeowners Ass'n v. National Am. Ins. Co., 277 Cal. Rptr. 906 (Cal. Ct. App. 1991).

105. See, e.g., Clark v. Bellefonte Ins. Co., 169 Cal. Rptr. 832 (Cal. Ct. App. 1980); International Ass'n of Chiefs of Police, Inc., v. St. Paul Fire and Marine Ins. Co., 686 F. Supp. 115 (D. Md. 1988).

106. See American Cas. Co. v. Timmons, 253 F.2d 563 (6th Cir. 1965) (holding that insurer could not assert that contractor could not sue on policy based on lack of final determination of contractor's obligation to pay for damaged electrical duct).

107. See, e.g., Nandorf, Inc. v. CNA Ins. Cos., 479 N.E.2d 988 (Ill. App. Ct. 1985); Parker v. Agric. Ins. Co., 440 N.Y.S.2d 964 (N.Y. Sup. Ct. 1981). One case standing apart from these others is Duke v. Hoch, 468 F.2d 973 (5th Cir. 1972), where the court discussed the issue at some length and observed that the insurer's "duty to control the defense and the insured's correlative duty to cooperate in the defense derive from the policy itself." *Id.* at 978 n.1.

108. See, e.g., Traders & Gen. Ins. Co. v. Rudco Oil & Gas Co., 129 F.2d 621, 627 (10th Cir. 1942).

out, these cases are consistent with the weight of authority holding that when the interests of insurer and policyholder diverge, the insurer's right to control the defense must yield and the insured's interests must be protected.¹⁰⁹

The essential point is that who possessed the right to control the defense made little difference in most of the cases pronouncing that the right belongs to the insurer. It is therefore uncertain whether these cases tell us anything particularly significant about the number of clients defense counsel represents. If the interests of insurer and insured are coterminous, as they are in most full-coverage cases where the plaintiff's claim is within the policy limits, putting the defense in the insurer's control is of no consequence to the insured. It is problematic, therefore, to extend from a proposition articulated and approved in a situation where the answer makes no difference to a situation where the proposition, if applied, will allow the insurer to favor its own interests to the

109. *Id.* ("the rights of the insurer [where the claim exceeds the policy limits] are not absolute"); *Collier v. Union Indem.*, 31 P.2d 697, 700 (N.M. 1934) ("where the liability of the insurer is limited and that of assured is open . . . [t]he responsibility primarily assumed is to defend the assured against the charge and total amount sued for; [the insurer's] own defense is incidental . . . The courts could not permit counsel to appear nominally for the assured, but actually in the interest of another."); *Point Pleasant Canoe Rental, Inc. v. Tincicum Township*, 110 F.R.D. 166, 170 (E.D. Pa. 1986) ("When conflicts-of-interest arise between an insurance carrier and its insured, the lawyer representing the insured must act exclusively on behalf of, and in the best interests of the insured."); *CHI of Alaska, Inc. v. Employers Reinsurance Corp.*, 844 P.2d 1113, 1117 (Alaska 1993) ("most courts hold that in conflict situations the insured has the right to independent counsel to conduct its defense and the insurance company has the obligation to pay the reasonable value of the defense conducted by independent counsel"); *Hartford Acc. & Indem. Co. v. Foster*, 528 So. 2d 255, 270 (Miss. 1988) ("When there is a question of coverage . . . and the insurance company notifies the insured that it will fulfill its obligation to defend the suit, while at the same time reserving a right to deny coverage of the insured's conduct, . . . [t]he lawyer may be required to withdraw from the case altogether, or be restricted his continuing representation with the insurance company furnishing at its expense an independent counsel chosen by the insured to represent his own interests."); *Booth v. Continental Ins. Co.*, 634 N.Y.S.2d 650, 654 (N.Y. Sup. Ct. 1995) ("where an insurer disclaims coverage or reserves the right to do so, it is generally improper for an attorney to represent both the insured and insurer in the same action"); *Illinois Advisory Op. 92-02* (1992) ("the attorney represents both the insured, as well as the insurance company, in furthering the interests of each. In the usual case, those interests are compatible, or at least not antagonistic . . . Where the interests of the insurance company and its insured are in direct conflict, . . . the insurer will not be permitted to control, or even to participate in, the defense. In such a case, the insured is entitled to representation by counsel of his own choosing, and the insurer's duty to defend is satisfied by reimbursement of the insured for the costs of the defense"); *Michigan Ethics Op. RI-89* (1991) (Syllabus: "If a lawyer represents the insured and the insurer in a matter, and one client later wishes the lawyer to assert a factually sustainable theory that serves that client's interest but is adverse to the other, the lawyer must withdraw from representation of both clients."); *See also Vigilant Ins. Co. v. Behrenhausen*, 889 F. Supp. 1130, 1135 (W.D. Mo. 1995) (conflict of interest disappears because "this attorney [appointed by insurer] has a duty to defend the interests of only its client, [the insured]").

detriment of the insured. This is particularly problematic in circumstances where much of what is said in the cases is consistent with defense counsel owing undivided loyalty to the insured when the interests of policyholder and insurer diverge.

III. RAMIFICATIONS

A. Disclosure, Consent, and Defense Counsel's Responsibilities

Professors Silver and Syverud are correct that depending on the agreement between insurer and insured, defense counsel might represent the insured only, or might represent the insurer and insured together.¹¹⁰ Thus, I agree that a co-client relationship between insurer and insured is possible; furthermore, I agree that joint representation is desirable in many situations for reasons of efficiency, cost, and effectiveness of the defense.¹¹¹ I disagree, however, with their contention that consent to joint representation is given at the time the insured requests the insurer to provide a defense. As discussed in Part II, neither the language of standard liability policies nor the context in which they are marketed and sold supports the conclusion.¹¹² An important ramification of Silver and Syverud's argument that consent devolves from the liability policy and the context in which the request for a defense is made is that defense counsel need not provide any disclosures or obtain any further consent at the time defense counsel undertakes to provide a defense. This is incorrect; because the current forms and the context in which they are marketed are insufficient to establish the insured's consent, defense counsel cannot assume the presence of consent. As a recent ABA Formal Opinion warned, "[w]e cannot assume that the insured understands or remembers, if he ever read, the insurance policy, or that the insured understands that his lawyer will be acting

110. See Silver & Syverud, *supra* note 10, at 274-76. See also Formal Op. 96-403, *supra* note 9, at 2 (1996) ("The insurer, the insured, and the lawyer may agree on the identity of the client or clients the lawyer is to represent at the outset.").

111. This is also the position of Professor Baker. See Tom Baker, *supra* note 4, at 105.

112. Note that the gap between the Silver-Syverud position and my own may be narrower than the text supposes. The Silver-Syverud article's analysis was explicitly predicated on the language of the CGL, which, as discussed in Part II, comes the closest of any of the kinds of widely-used forms to articulating the insurer's right of control. In a footnote, Silver and Syverud stated that their conclusions may not apply under the language of forms other than the CGL. See Silver & Syverud, *supra* note 10, at 265 n.27 ("When insurance coverage is governed by a policy other than the CGL Policy, the working hypotheses and the views on professional responsibility advocated here may not apply.") This allows the possibility that they might agree with my own position at least when personal liability policies are involved.

on his behalf, but at the direction of the insurer without further consultation with the insured."¹¹³

Of course, consent to joint representation (and the concomitant constraints on defense counsel's obligations to the insured) need not occur as early as the time of contracting between insurer and insured, or as early as the time the insured requests a defense or the insurer retains an attorney. If, however, consent is not given at any of these times, it must be given (and the constraint created) at the outset of the representation. To this point in the analysis, Professor Pepper agrees.¹¹⁴ After this point, Professor Pepper, relying on a close reading of Model Rule of Professional Conduct 1.7(b), contends that the potential for conflict in every liability defense representation requires a robust disclosure to the insured of all foreseeable, possible future conflicts (and there are many, even if none of them is likely to materialize in most situations), followed by the insured's consent to the joint representation. I read the prescriptions of Rule 1.7(b) more flexibly; although conceding that Pepper's more literal reading of the Rule can be justified by its text, I urge the appropriateness of a more flexible reading when the rule is applied to insurance defense counsel.

Before examining the subtleties of Rule 1.7(b), it is useful to return briefly to the question of the insured's expectations, because what the reasonable insured typically expects and wants from the insurer is relevant to what the insured expects defense counsel to provide in counsel's capacity as the agent designated to discharge the insurer's duties.¹¹⁵ In some situations, although it is impossible to know how many, the insured is probably asked to and does in fact give an informal, but informed consent to joint representation; in many other situations, including those where some kind of consent is sought and given but the quality of the consent falls short of being fully informed, the insured would willingly give an informed consent if asked to do so. Why should this be? Although future conflicts are always possible, the chance that a conflict will materialize is small. If the claim is covered and within the policy limits, the insured has no financial stake in the outcome. If the insured has no reputational interests at stake, and usually none will be, the insured will not perceive significant benefits from insisting upon the appointment of counsel with an undivided loyalty, and the insured will have no reason to incur

113. Formal Op. 96-403, *supra* note 9, at 4.

114. See Stephen L. Pepper, *Applying the Fundamentals of Lawyers' Ethics to the Insurance Defense Practice*, 4 CONN. INS. L.J. 25, 37 (1997) ("there is nothing in the contract stating or implying that the defense must be provided by a lawyer who has the company as a client as well").

115. The justification for taking the insured's expectations into account is the same one set forth *supra*, in the text accompanying notes 45-65.

the additional inconvenience of insisting upon and possibly locating and appointing his or her own counsel. In short, when defense counsel first communicates with the insured and explains what the nature of the relationship will be, the insured is likely to say, "please proceed and take care of this problem for me; let me know what I must do to help, but bother me as little as possible."¹¹⁶

To be able to give this answer consensually, the insured must first be informed about what the answer entails, and this brings us back to the question of what disclosures defense counsel must make at the outset of the representation. What Model Rule 1.7(b)¹¹⁷ requires by way of disclosure to the insured as a prerequisite to joint representation is important, but my view is that Rule 1.7(b) is not sufficiently nuanced to speak clearly about defense counsel's responsibilities. The phrase "may be materially limited" can be read in a way that requires each and every insurance defense to be accompanied by a disclosure of an extensive list of each and every kind of conflict that *might* arise in the course of the representation.¹¹⁸ Such a formal, literal reading is inappropriate in insurance defense. A more contextual, functional reading of the Rule suggests that the attorney is expected to exercise judgment about the

116. Professor Pepper disagrees, believing that an insured is "highly unlikely" to consent to joint representation "if that consultation is competently performed." See Pepper, *supra* note 114, at 35. We may disagree on the amount of disclosure required; a blunderbuss disclosure in the type of case where no conflict is apparent or likely to arise may create sufficient insecurity to scare the insured into seeking, at his expense, legal advice about how to respond, but good advice would recommend that consent be given. My view is that the insurer's promise to take over the suit from beginning to end, including the process of selecting defense counsel, is very valuable to the insured, and the insured is likely to welcome it in within-limits cases where coverage is not, and probably will not be, contested.

117. Model Rules of Professional Conduct Rule 1.7(b) states:

A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless

(1) the lawyer reasonably believes the representation will not be adversely affected, and

(2) the client consents after consultation. When a representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7(b) [hereinafter MODEL RULES].

118. I do not read Professor Pepper as going this far, but he takes a strong view of Model Rule 1.7(b), and considers it triggered in every insurance defense representation. See Pepper, *supra* note 114, at 31-33. A more contextual reading of the Rule might concede that it is always triggered, but that "triggering" is a relative concept, with "soft triggering" requiring less disclosure than a "hard trigger."

amount of disclosure necessary as a prerequisite to the insured's consent based on a reasoned assessment of the "likelihood that a conflict will eventuate" and "if it does, whether it will materially interfere with the lawyer's independent professional judgment."¹¹⁹ This suggests that a more modest explanation of the risks of dual representation (along the lines of the explanation suggested by William Barker,¹²⁰ along with a brief explanation that if a conflict arises in the future counsel may have to withdraw¹²¹) is appropriate at the outset of the representation,¹²² but unfolding circumstances may create more serious

119. MODEL RULES, *supra* note 117, Rule 1.7(b) cmt. In context, these phrases describe considerations relevant to whether "[a] possible conflict" precludes representations, not the amount of disclosure that counsel must give. A contextual reading of Model Rule 1.7(b) would argue that these issues cannot be neatly separated.

120. See William T. Barker, *Insurance Defense Ethics and the Liability Insurance Bargain*, 4 CONN. INS. L.J. 75, 89 (1997).

121. In his discussion of the "defeasible client" model, which appears to be the same as the law in most jurisdictions, see *infra* note 123 and accompany text, except that it allows an attorney to cease representing the insurer without notifying it (a position with which I disagree, see *infra* note 123), Professor Pepper explains that the possibility of this event needs to be disclosed at the outset of the joint representation in order to meet the requirements of Rule 1.7(b). See Pepper, *supra* note 114, at 70-71.

122. This appears to be the import of Formal Op. 96-403, which concluded: "After appropriate disclosure to the insured as to the limited nature of the representation being offered under the insurance contract, a lawyer may proceed with the representation of an insured at the direction of the insurer in accordance with the terms of the insurance contract." Formal Op. 96-403, *supra* note 9, at 6-7. Interestingly, the Opinion did not discuss Model Rule 1.7(b). However, it addressed what Model Rule 1.2(a), which pertains to limitations on the objectives of a representation, requires by way of "consultation," the same word that appears in Model Rule 1.7(b). Thus, the Opinion was concerned with the extent of disclosures needed at the commencement of representation where the policy "authorizes the insurer to control the defense and settlement of the claim in its sole discretion without consultation with the insured." *Id.* at 1. The Committee "presume[d] that in the vast majority of cases the insured will have no objection to proceeding in accordance with the terms of the insurance contract. Nonetheless, communication between the lawyer and the insured is required [by Model Rule 1.2]." *Id.* at 4. The Opinion then stated that "[a] short letter clearly stating that the lawyer intends to proceed at the direction of the insurer in accordance with the terms of the insurance contract and what this means to the insured" is sufficient, and that "extended discussion" is not required. All that is needed is that the insured be "clearly apprised" of the limitations in the representation and that the lawyer will follow the directions of the insurer; if this is done, "the insured has sufficient information to decide whether to accept the defense offered by the insurer or to assume responsibility for his own defense at his own expense." *Id.* at 4. One might argue that the disclosures needed to satisfy the conflict rule in Model Rule 1.7(b) must necessarily be more detailed than the disclosures needed to meet the "scope" rule of Model Rule 1.2(a). See Nancy J. Moore, *The Ethical Duties of Insurance Defense Lawyers: Are Special Solutions Required?*, 4 CONN. INS. L.J. 259, 272 (1997). If it is true, however, that in the "vast majority" of cases the insured has no objection to proceeding with a defense pursuant to a joint representation, and there is no particular reason to suspect that conflict will arise, the logic of the Opinion would seem equally appropriate for determining the extent of disclosure needed

concerns and a concomitant obligation to make further disclosures (and perhaps even to withdraw from the representation).¹²³

Indeed, in some situations, more than additional disclosures and the insured's reaffirmation of consent to joint representation will be required. If the insured's consent to joint representation is given at a time when no conflict is apparent or foreseen, and thereafter an actual conflict arises for a reason unforeseen when the representation began, defense counsel will need to consider whether the conflict is one to which consent can be given at all and whether the representation can continue without materially impairing the rights of one client or the other. In some situations, the answer will be "no" to one or both questions, and the attorney will need to withdraw, even if this encourages the insurer to investigate the circumstances of the coverage and the defense of the claim more closely.¹²⁴

under Model Rule 1.7(b). Indeed, because the circumstances presented to the Committee involved a conflict between insurer and insured over the insurer's right to settle a suit against the insured without the insured's consent, a conflict which was at least "potential" if unlikely at the outset of the representation, a fair reading of the Opinion is that the Committee thought more robust disclosures at the outset of the representation were unnecessary, even under Model Rule 1.7(b).

Professor Pepper may not disagree. In his discussion of the primary client model, he states: "If in fact [defense counsel] will serve the interest only of the insured in the event a conflict arises, it is also arguable that the type of informed consent required under Rule 1.7(b) and discussed in Part I above might not be required, or at least might be much less elaborate." See Pepper, *supra* note 115, at 69. My position is that the point Pepper says is "arguable" is more than arguable; indeed, it is exactly right.

123. Consent to joint representation must always be "fully informed," but the amount of information needed to *fully* inform the insured can vary based on the likelihood and severity of any perceived future conflict. Model Rule 1.4(b) is entirely consistent: "A lawyer shall explain a matter *to the extent reasonably necessary* to permit the client to make informed decisions regarding the representation." MODEL RULES, *supra* note 117, Rule 1.4(b) (emphasis added). What is "reasonably necessary" must vary from situation to situation. This appears to be consistent with Professor Silver's views on the matter; see Lexis Counsel Connect conversation referenced in Pepper, *supra* note 114 at 33 n.14. This analysis is equally pertinent to Model Rule 1.8(f), which proscribes a lawyer from accepting compensation from a third party for representing a client "unless . . . the client consents after consultation." MODEL RULES, *supra* note 117, Rule 1.8(f). Professor Pepper concludes, however, that the disclosures necessary to satisfy Rule 1.8(f) are much less than what is needed to meet Model Rule 1.7(b). See Pepper, *supra* note 114, at 33 n.14. Mr. Barker, like me, reads Model Rule 1.7(b) more contextually. See Barker, *supra* note 120, at 87 ("the key issue [in satisfying Rule 1.7(b)] is whether there will be adequate opportunity to address any such conflict before it adversely affects either client").

124. I agree with Professor Moore that withdrawal of counsel is not an answer that needs to be avoided at all costs. See Moore, *supra* note 122, at 281-83. See also *Moeller v. American Guar. & Liab. Ins. Co.*, 1996 WL 532387 at *8 (Miss. Sept. 19, 1996) ("such counsel must be careful at the time he is asked to represent the insurance carrier and the insured, and if there is any reason indicating a possible conflict of interest at the time of his employment, he should

It is argued by Professor Pepper and others that dual representation, even if ethically possible, is "very risky" because of potential conflicts of interest inherent in any joint representation provided by defense counsel pursuant to the provisions of a liability insurance policy.¹²⁵ That conflicts might arise in virtually any dual representation involving insured and insurer is well understood by all.¹²⁶ The question, however, is whether a prophylactic rule prohibiting *all* dual representation in the liability defense setting is necessary when it is known that in the vast number of situations where coverage is not disputed and the claim is within the policy limits no conflict will surface.¹²⁷

under no circumstances undertake to represent them both. Furthermore, any attorney representing two clients must remain on alert and ever watchful for any possible conflict of interest arising between the two, because the moment that happens, counsel should not attempt to represent them both."); California Ethics Op. 1995-139 (1995) ("In coverage question situations where there has not been a Civil Code section 2860 disclosure and consent to the representation, or where subsequent to disclosure and consent, new information has come to light which affects the question of coverage, the attorney may be required to withdraw.").

125. See Pepper, *supra* note 114, at 72.

126. See, e.g., Silver & Syverud, *supra* note 10, at 266-67; JERRY, *supra* note 45, at 779 ("Conflicts between the interests of insurers and insureds are inevitable in insurance."); ROBERT E. KEETON & ALAN I. WIDISS, *INSURANCE LAW* 809 (student ed. 1988) ("There is a very substantial prospect that actual or potentially conflicting interests between an insurer and insured will exist in regard to almost any tort claim that may be covered by liability insurance.").

127. Although it is often said that conflicts are inevitable and arise frequently, it is easy to lose sight of the fact that in the vast majority of insurance defense relationships, conflicts do *not* arise. See KEETON & WIDISS, *supra* note 126, at 808 ("In most situations, there is an accord, reached either explicitly or implicitly, between the insurer and the insured as to an appropriate course of action to be pursued in response to the tort claim."); MALLIN & SMITH, *LEGAL MALPRACTICE* § 28.14, at 553 (4th ed. 1996) ("Dual representation by defense counsel usually is harmonious and equally beneficial to both the insurer and insured since they share the same goals during the pendency of the litigation."); Barker, *supra* note 120, at 91-92.

Professor Pepper argues that if coverage is not at issue and the claim is within limits, the insurer should be willing to waive its right to later contest coverage, which would make it easier for the insured to give consent. See Pepper, *supra* note 114, at 35. The argument's two-way-street appeal discounts the economic realities of insurance contracting, where combating policyholder fraud is a very important consideration. When an insurer issues a policy, it does not surrender indefinitely the right to contest coverage at some future time (except in some lines of personal insurance where the interests of third-parties in not having to defend against insurers' contests many years in the future trumps the insurers' interest in paying invalid or fraudulent claims). The process of application and evaluation enables the insurer to elicit material information without the expense of original investigation; the insurer is entitled to rely on this information; if the information turns out to be false, the insurer is entitled (assuming materiality, reliance, etc.) to rescind the coverage. Indefinite incontestability would increase the incidence of policyholders defrauding the insurer, a cost which must be built into the rate base and paid by all policyholders. In insurance defense, the insurer's waiver is tantamount to creating indefinite incontestability, and the effect is to provide a vehicle for insureds to escape the consequences of what should be a disqualification of coverage. Stated otherwise, the claims of policyholders bent on fraud are not strong ones. In the absence of compelling countervailing

Professor Pepper's careful analysis recognizes that it is far from clear that such a rule is necessary.¹²⁸ Indeed, in the absence of a genuine conflict, there is nothing to be gained by forcing the parties to act as if there is such a conflict.

The reality is that there are many joint representations which work well, and there are joint representations which do not play out so neatly. It should be presumed that the insured will decline to give consent to joint representation if the interests of insurer and insured have already diverged, or are thought to be likely to diverge at some point in the future. In that circumstance, the insurer must evaluate whether the grounds for the insured's refusal to accept a joint representation are sound. The insurer has a duty to defend, but the insured has an essentially reciprocal duty to cooperate,¹²⁹ and the insured's refusal to cooperate with defense counsel selected by the insurer where no conflict exists or is reasonably foreseeable should be construed as a breach of the insured's duty¹³⁰ (unless the insured exercises his or her prerogative to decline the benefits of the contract, i.e., decline the defense, and undertake personally the risk and the cost of the defense¹³¹). If the insured's breach is a material one,¹³² as would be the case where the insured unqualifiedly refuses to assist in the defense, the insurer may suspend the performance of its duty to defend and, once it is clear that cooperation will not be forthcoming, treat its own duty as discharged.¹³³

considerations (such as protecting accident victims through compulsory auto insurance, where insurers lose some defenses, *see* JERRY, *supra* note 45, at 861-63, 865), legal rules should not be designed and implemented in ways that make fraud easier to commit.

128. *See* Pepper, *supra* note 114, at 69.

129. *See* Jerry, *supra* note 44, at 719-24.

130. If one concludes that the insurer has no right to control the defense because of inadequacies in the language of current policy forms, *see* discussion accompanying notes 93-109 *supra*, an insured's rejection of the insurer's non-existent right of control could not constitute a breach of the insured's duty to cooperate. This is one reason clearer policy forms would be helpful; by describing the insurer's rights more clearly, the policy would better explain the insured's reciprocal cooperation duties. *See infra* note 137 and accompanying text.

131. *See* Formal Op. 96-403, *supra* note 9, at 5 ("the insured retains the power to reject the defense offered by the insurer under the policy and to assume the risk and expense of his own defense").

132. *See* JERRY, *supra* note 44, at 724-25. This is simply an application of basic contract law principles, which require that a party's breach of a contractual duty be material (i.e., that the party's performance of the duty fall short of substantial performance) before the other party is entitled to suspend performance in response to the breach. *See* RESTATEMENT (SECOND) OF CONTRACTS § 237 (1981).

133. This simply refers to the fact that when parties exchange duties, each side's duty is a constructive condition to the other side's duty, and that the two legal effects of nonsatisfaction of a condition, including constructive conditions, is suspension followed by discharge. *See* RESTATEMENT (SECOND) OF CONTRACTS § 225(1).

The insurer is not required, of course, to respond to the insured's breach by suspending performance. Indeed, there is some risk in doing so because the insurer's erroneous judgment that the insured breached first will cause the insurer's suspension to be the first material breach. Under the same analysis, if the insured contends that a conflict of interest exists necessitating the appointment of independent counsel for the insured and if the insurer erroneously refuses to proceed on this basis, it is the insurer that will have committed the first material breach. Instead of suspending performance in response to the insured's breach (or perceived breach), the insurer may elect to provide a defense with counsel whose loyalty runs exclusively to the insured. In contract law terms, this is a straightforward application of the principle that whenever a condition, whether express or constructive, to a duty is not satisfied, the party whose duty is conditioned can elect to waive the nonsatisfaction of the condition.¹³⁴ As for the indemnity obligation, the insurer that chooses not to withhold a defense should be expected to reserve rights to contest coverage at a later time. In doubtful or close cases, the insurer will usually choose to provide the defense under reservation simply because the consequences to the insurer of being wrong are severe.

The relationship between insurer and defense counsel is a different side of the triangle, but the analysis complements what happens on the insured-defense counsel side. Defense counsel can undertake a joint representation of insurer and insured as long as the interests are not divergent. If, however, a conflict should arise that requires the attorney's withdrawal,¹³⁵ the insurer might appoint new defense counsel to represent only the interests of the insured. If the insurer believes, based either on the fact of defense counsel's withdrawal or its own investigation, that the insured is not entitled to coverage, another alternative is for the insurer to provide no counsel and to refuse to defend. The logic of such a response is that either the insurer owes no contract duties to the insured or the insurer is entitled to suspend its own contract performance because of the insured's first material breach of the contract through non-cooperation or otherwise. Unless the insurer is prepared to take the position that the insured has no rights under the contract and that no defense is owing, the insurer's duty to defend remains an undischarged duty, and it must be fulfilled through the appointment of counsel.

134. *See id.* § 237.

135. Model Rules of Professional Conduct Rule 2.2(c) states that a lawyer acting as an "intermediary" must withdraw from the joint representation and cannot thereafter represent either client if the conditions allowing the joint representation, as set forth in Model Rule 2.2(a), cease to exist. Comments to the Rule indicate that it applies "when the lawyer represents two or more parties with potentially conflicting interests." *See* MODEL RULES, *supra* note 117, Rule 2.2(c), cmt. (a).

Thus, at the end of the analysis, one reaches a best answer, even if it is not a perfect one: if defense counsel cannot serve the interests of both clients without compromising the interests of either, counsel appointed by the insurer must give undivided loyalty to one client, and this client is the insured. This, in fact, is what the substantial weight of authority holds.¹³⁶

136. In the absence of a conflict, the representation can be joint. See, e.g., *Home Indem. Co. v. Lane*, 43 F.3d 1322, 1330 (9th Cir. 1995) (applying Alaska law; "In a typical insurer-insured relationship, where there is no reservation of rights, there is no actual conflict of interest that would preclude an attorney from representing both the insurer and the insured"); *Moeller v. American Guar. & Liab. Ins. Co.*, 1996 WL 532387 at *8 (Miss. Sept. 19, 1996) (defense counsel "represent[s] two separate and distinct clients"); *Rogers v. Robson*, 392 N.E.2d 1365, 1369 (1979) ("an attorney represents both the insured as well as the insurance company in furthering the interests of each . . . The fact that the attorney also represents the insurer in no way alters his obligations or responsibilities to the insured."); North Carolina Ethics Op. RPC 91, Jan. 17, 1991 ("Whenever defense counsel is employed by an insurance company to defend an insured against a claim, he or she represents both the insurer and the insured."); Michigan Ethics Op. RI-89 (1991) ("When an insurer retains a lawyer to defend an insured, the insured is the lawyer's client . . . dual representation is ethically permitted only if the interests of the insurer and the insured do not conflict."). See also *Moritz v. Med. Protective Co.*, 428 F. Supp. 865, 872 (W.D. Wis. 1977) (defense counsel was "common attorney of two clients . . . and . . . the two sets of attorney-client relationships had come into being simultaneously"). This draws support from ABA Comm. on Professional Ethics and Grievances, Formal Op. No. 282 (May 27, 1950), which stated that "a community of interest exists between the company and the insured growing out of the contract of insurance with respect to any action brought by a third person against the insured within the policy limits." In conflict situations, the insured has a right to counsel whose loyalty runs only to the insured. See cases cited *supra* note 124.

Both of the foregoing ideas were reflected in California Ethics Op. 1995-139 (1995), which stated: "Clearly, insurer is denominated a 'client' by case law' . . . But while insurer is indeed a client in some respects . . . it is a client whose rights under case law are clearly limited. . . . Although insurance defense counsel's representation of divergent interests can be attempted 'provided there is full disclosure and consent,' this dual role cannot diminish counsel's responsibility to the insured." The same idea is reflected in those formulations which recognize the appropriateness of dual representation but consider the insured to be the primary client. See, e.g., North Carolina Ethics Op. RPC 92 (1991) ("The representation of insured and insurer is a dual one, but the attorney's primary allegiance is to the insured, whose best interest must be served at all times"); Oregon Ethics Op. 1991-121 (1991) ("As a general proposition, an attorney who represents an insured in an insurance defense case has two clients: the insurer and the insured. . . both the ethical rules and insurance law require that an attorney hired by the insurer to defend an insured must treat the insured as 'the primary client' whose protection must be the attorney's 'dominant' concern," citing ABA Standing Comm. on Ethics and Professional Responsibility, Informal Op. No. 1476 (1981)).

The foregoing rule needs tempering when a claim exceeding the policy limits is involved. The language of the standard policy gives control of settlement decisions to the insurer; it may be that the agreement between defense counsel and insured will explicitly remove advice and counsel with regard to settlement issues from the scope of the representation. See North Carolina Ethics Op. RPC 91 (Jan. 17, 1991); JERRY, *supra* note 44, at 807-08.

B. The Liability Insurance Contract

As discussed in Part II, current liability insurance forms do not contain language that can be reasonably read as expressing the insurer's intent to appoint counsel who will represent the insurer and the insured jointly. Insurers could draft clearer contracts with respect to the conduct of the defense; an obvious starting point would be to have the policy state that the defense will commence as a joint representation of insured and insurer. If insurers did so, would it matter? There are reasons to think that clearer contract language would be helpful.

First, and most obviously, clearer contract language would help define the relative rights and obligations of insurer and insured, resulting in more predictable outcomes when disputes arise over the scope of these rights and obligations. Past experience with the insurer's privilege to settle illustrates the point. With regard to whether the insured has a right to consent to settlement in professional liability insurance policies, insurers have drafted clear contract language, and courts treat this language as dispositive on the insured's and insurer's relative rights.¹³⁷ That settlement decisions are generally controlled by the insurer has been resolved with clear contract language.¹³⁸ With a similar effort, the policy forms could be written to indicate unambiguously that the insurer is entitled to co-client status with the insured pursuant to the representation of the attorney selected by the insurer.¹³⁹ If co-client status at the outset of representation is the default rule, any claim of entitlement to sole-client representation must be sharply focused, clearly articulated, and based on a specific set of alleged circumstances that justify trumping the default rule.

Second, clearer contract language would elucidate the insured's duty to cooperate and the ramifications of the insured's breach of that duty. If the

137. See, e.g., *Lieberman v. Employers Ins. of Wausau*, 419 A.2d 417 (N.J. 1980) (insurer's settlement of claim in face of insured's revocation of consent to settle breached consent provision of medical malpractice policy); *Arana v. Koerner*, 735 S.W.2d 729 (Mo. Ct. App. 1987) (insured should be allowed to try to prove that defense counsel committed tort when, in violation of medical malpractice policy, settled suit without insured's consent).

138. See JERRY, *supra* note 44, at 763 ("the typical language reserves to the insurer a privilege to settle, or not to settle, as the insurer in the exercise of its discretion sees fit"), and cases cited *supra* note 2.

139. That insurers have not done so already, particularly in the face of a large number of precedents requiring that defense counsel give undivided loyalty to the insured, implies that insurers do not perceive this as a major issue or problem. See Silver & Syverud, *supra* note 10, at 338 n.196 ("When presenting drafts of this report, we have been repeatedly struck by the extent to which defense lawyers, general counsel for insurance companies, and claims personnel have internalized PCR [the rule that defense counsel owes primary loyalty to the client, the insured]").

insurer's right to control the defense in no-conflict situations is non-existent, it follows that the insured does not fail to cooperate by denying the insurer's right of control. Stated otherwise, an insured's rejection of an insurer's non-existent right cannot constitute a breach of the insured's duty to cooperate. More clearly articulating the insurer's right to control the defense would give the insurer a more reliable basis for suspending its own performance in the face of an insured's refusal to cooperate with the defense offered by the insurer.

Third, clearer contract language would reduce the risk of the insured's surprise when the insurer explains that the designated attorney will serve as counsel for both insurer and insured. Surprise can evolve into disillusionment, controversy, and conflict, particularly if the insured is predisposed to distrust the insurer. Although clear contract language cannot, in and of itself, provide the consent necessary to establish a joint representation, it can support and re-enforce the disclosures made by counsel at the outset of the representation when securing the insured's consent. In this sense, clearer contract language provides "grease for the wheels," easing the process through which the joint representation is created. If after an occurrence an insured reads his or her policy for the first time and discovers a description of the steps that will unfold should the insured submit a claim to the insurer for defense, the odds that he or she will be surprised by counsel's subsequent request for consent to dual representation are greatly reduced. Moreover, clear language describing the insurer's right to control the defense would re-enforce a message that the insurer would deliver to the insured: the insured is free to reject the joint defense, but absent legitimate grounds for doing so (i.e., conflicting interests between insured and insurer), the insurer will not provide insured with a sole-client defense because, as the policy would state, this is not one of the insurer's obligations.¹⁴⁰ Some may consider this coercive and therefore conclude that consent to joint representation can never exist, but if these are the terms on which insurers are willing to provide liability insurance, the fact that the insured must make hard choices is not a justification for creating coverage or a defense obligation where none exists.¹⁴¹

140. This is consistent with Mr. Barker's analysis: "[the liability insurance contract] can structure the options presented when consent is sought." Barker, *supra* note 120, at 76. Mr. Barker explains that the insurer's message—because it cannot be counsel's—can be delivered by counsel, but that the insured must be told that counsel cannot advise the insured about the message, and that any disputes must be resolved between insurer and insured. *See id.* at 88.

141. It is well settled that insureds under policies of property insurance whose property has been destroyed by fire and who are suspects in criminal arson investigations cannot decline to provide information to and otherwise cooperate with insurers and still recover under the policies. *See* JERRY, *supra* note 44, at 557.

Reducing the risk of surprise also re-enforces the value of consumer protection; clearer forms are, if anything, fairer to the insured. Banks, for example, must explain how much interest they are really going to charge the consumer for a loan, even if consumers do not take the time to read or understand the disclosure. Indeed, it is probably easier for an insured to relate to the concept of having one lawyer to himself or herself versus sharing a lawyer with someone else than it is to understand plain language forms explaining how interest is calculated. Fairness is enhanced if insureds are given an explanation, even if they are not listening, of what they are purchasing when they pay their premiums.

Of course, some insureds will dislike the clearer policies and the articulated limitations on what the insurer will provide by way of defense (although the number of insureds who will not read their policies or know of the change will be much larger). For example, any insured who perceives liability insurance as the insurer's commitment to provide independent counsel would dislike the content of clearer policies articulating the insured's obligation to share counsel with the insurer, but there are many limitations in insurance contracts that insureds do not like. Nor is it necessary that the insured comprehend each and every limitation in an insurance policy for the limitation to be effective; if there is no unfair surprise to the insured's reasonable expectations, the fact that the insured wants a defense on different terms is not enough to expand the insurer's obligations.

One last question raised by the prospect of clearer policy language deserves our attention: is it possible that clearer contracts would *eliminate* the need for defense counsel to obtain the insured's separate consent to joint representation? In other words, would the Silver-Syverud contention that consent to dual representation occurs at the time the request for the defense is made be correct if the language of the insurance contracts were clearer? Obviously, if these questions could be answered in the affirmative, the case for modifying the existing relevant language would be overwhelming. The extent to which clear language in a standardized form is binding on the recipient who manifests assent to it is a complex question.¹⁴² However one answers it, a more pragmatic concern is whether the party who drafts the form can count on courts enforcing it in accordance with its clear terms. The answer to this last question varies from jurisdiction to jurisdiction and from case to case, but the lessons of nearly a half-century of litigation over standardized forms gives little security to a person who has drafted what he or she thinks is a clear form. If this did not provide enough caution, the fact remains that counsel is not a party

142. For the general parameters relevant to the question, see *supra* notes 45-65 and accompanying text.

to the contract between insurer and insured. Thus, whatever the insured might manifest to the insurer, this assent does not fulfill the attorney's independent professional responsibilities,¹⁴³ which require counsel to make an independent judgment about the situation and to obtain the client's consent after consultation—which necessarily cannot occur until after the time of contracting, a request for defense by the insured, and the appointment of defense counsel. Prudence would suggest, therefore, that even with clear contract language, defense counsel should seek and obtain the insured's informed expression of assent to the dual representation.

143. *See* Barker, *supra* note 120, at 76 (“an adhesion contract cannot itself constitute informed consent”).

APPENDIX

DEFENSE AND SETTLEMENT LANGUAGE IN MODERN LIABILITY INSURANCE FORMS: EXCERPTS FROM POLICY FORMS IN *MILLER'S STANDARD INSURANCE POLICIES ANNOTATED*

The insurance policies from which the following excerpts are taken are Insurance Service Office, Inc. ("ISO") forms reprinted with the permission of the ISO in Susan J. Miller & Philip Lefebvre, *Miller's Standard Insurance Policies Annotated*.¹⁴⁴

1. Personal Auto Policy, PP 00 01 12 89 (1988)¹⁴⁵

INSURING AGREEMENT

A. . . . We will settle or defend, as we consider appropriate, any claim or suit asking for these damages. In addition to our limit of liability, we will pay all defense costs we incur. Our duty to settle or defend ends when our limit of liability for this coverage has been exhausted. We have no duty to defend any suit or settle any claim for "bodily injury" or "property damage" not covered under this policy.

2. Homeowners Composite Form, HO 00 03 04 91 (1990)¹⁴⁶

Section II-Liability Coverages

If a claim is made or a suit is brought against an "insured" for damages because of "bodily injury" or "property damage" caused by an "occurrence" to which this coverage applies, we will:

144. I MILLER'S POLICIES ANNOT., *supra* note 79. According to Miller and Lefebvre, the forms in Volume I are "the most widely used and litigated forms." *Id.* at User's Guide at 1.

145. *Id.* at 1.

146. *Id.* at 199. The Homeowners Composite Form is "a composite of six homeowners forms which differ somewhat in the property coverage they provide." *Id.*

1. Pay up to our limit of liability for the damages for which the “insured” is legally liable. Damages include prejudgment interest awarded against the “insured”; and [coverage for punitive damages awarded against an insured.]

...

2. Provide a defense at our expense by counsel of our choice, even if the suit is groundless, false, or fraudulent. We may investigate and settle any claim or suit that we decide is appropriate. Our duty to settle or defend ends when the amount we pay for damages resulting from the “occurrence” equals our limit of liability.

3. Commercial General Liability (Occurrence) Form, CG 00 01 10 93 (1992)¹⁴⁷

COVERAGE A. BODILY INJURY AND PROPERTY DAMAGE LIABILITY

1. Insuring Agreement.

a. We will pay those sums that the insured becomes legally obligated to pay as damages because of “bodily injury” or “property damage” to which this insurance applies. We will have the right and duty to defend any “suit” seeking those damages. We may at our discretion investigate any “occurrence” and settle any claim or “suit” that may result. But:

...

(2) Our right and duty to defend end when we have used up the applicable limit of insurance in the payment of judgments or settlements under Coverages A or B or medical expenses under Coverage C.

147. *Id.* at 409. Identical language to that presented here is found in the claims-made version of the form. See Commercial General Liability Form—Claims Made Coverage, CG 00 02 10 93 (1992), *id.* at 421. Also, identical language is found, with some differences in language describing the scope of the coverage, in the following forms: Owners and Contractors Protective Liability Coverage Form—Coverage for Operations of Designated Contractor, CG 00 09 10 93 (1992), *id.* at 429; Liquor Liability Coverage (Occurrence) Policy, CG 00 33 10 93 (1992), *id.* at 435; Liquor Liability Coverage (Claims-Made) Policy, CG 00 33 10 93 (1992), *id.* at 440.0; Railroad Protective Liability Coverage Form, CG 00 35 10 93 (1992), *id.* at 440.4; Products/Completed Operations Liability Coverage (Occurrence) Form, CG 00 37 10 93 (1992), *id.* at 441.0; Products/Completed Operations Liability Coverage (Claims-Made) Form, CG 00 38 10 93 (1992), at 441.8; Pollution Liability Coverage Form Designated Sites, CG 00 39 10 93 (1992), *id.* at 442.3.

4. Massachusetts Automobile Insurance Policy, 6th ed., 222-0806 (1993)¹⁴⁸

2. Our Duty to Defend You and Our Right to Settle. We have the right to defend any lawsuit brought against anyone covered under this policy for damages which might be payable under this policy. We also have a duty to defend any lawsuit, but our duty to defend ends when we offer, tender, or pay to any claimant the maximum limits of coverage under this policy. We may end our duty to defend at any time during the course of the lawsuit, by offering, tendering, or paying the maximum limits of coverage under the policy, without the need for a judgment or settlement of the lawsuit or a release by the claimant.

We have the right to settle any claim or lawsuit as we see fit. If any person covered under this policy settles a claim without our consent, we will not be bound by that settlement.

5. Farmers Comprehensive Personal Liability Policy, HO-73 (Ed. 4-80)¹⁴⁹

Section II-Liability Coverage

If a claim is made or a suit is brought against any **insured** for damages because of **bodily injury** or **property damage** to which this coverage applies, we will:

- a. pay up to our limit of liability for the damages for which the **insured** is legally liable; and
- b. provide a defense at our expense by counsel of our choice. We may make any investigation and settle any claim or suit that we decide is appropriate. Our obligation to defend any claim or suit ends when the amount we pay for damages resulting from the occurrence equals our limit of liability.

148. *Id.* at 13.

149. *Id.* at 247.

6. Business Auto Coverage Form, CA 00 01 12 90 (1990)¹⁵⁰

Section II-Liability Coverage

A. Coverage

...

We have the right and duty to defend any "suit" asking for such damages or a "covered pollution cost or expense." However, we have no duty to defend "suits" for "bodily injury" or "property damage" or a "covered pollution cost or expense" not covered by this Coverage Form. We may investigate and settle any claim or "suit" as we consider appropriate. Our duty to defend or settle ends when the Liability Coverage Limit of Insurance has been exhausted by payment of judgments or settlements.

7. Garage Coverage Form, CA 00 05 12 90 (1990)¹⁵¹

We have the right and duty to defend any "suit" asking for these damages. However we have no duty to defend "suits" for "bodily injury" or "property damage" or a "covered pollution cost or expense" not covered by this Coverage Form. We may investigate and settle any claim or "suit" as we consider appropriate. Our duty to defend or settle ends when the applicable Liability Coverage Limit of Insurance-"Garage Operations" - Other Than Covered "Autos" has been exhausted by payment of judgments or settlements.

8. Physicians, Surgeons and Dentists Professional Liability Insurance, GL 00 11 01 73 (1973)¹⁵²

I. COVERAGE AGREEMENTS

The company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of

and the company shall have the right and duty to defend any suit against the insured seeking such damages, even if any of the allegations of the suit are groundless, false or fraudulent, and may make such investigation and, with the written consent of the insured, such settlement of any claim or suit as it deems expedient, but the company shall not be obligated to pay any claim or judgment

150. *Id.* at 259.

151. *Id.* at 264. Except for language referring to the content of the policy, identical text is found in the Truckers Coverage Form, CA 00 12 12 90 (1990). *See id.* at 270.

152. *Id.* at 453.1.

or to defend any suit after the applicable limit of the company's liability has been exhausted by payment of judgments or settlements.

9. Physicians, Surgeons and Dentists Professional Liability Insurance, GL 00 12 03 81 (1981)¹⁵³

I. COVERAGE AGREEMENTS

The company will pay on behalf of the insured [all sums . . .]

The company shall have the right and duty to defend any suit against the insured seeking damages because of such injury even if any of the allegations of the suit are groundless, false or fraudulent. The company may make such investigation and settlement of any claim or suit as it deems expedient. The company shall not be obligated to pay any claim or judgment or to defend any suit after the applicable limit of the company's liability has been exhausted by payment of judgments or settlements.

10. Lawyers Professional Liability Insurance, GL 00 23 03 81 (1981)¹⁵⁴

1. COVERAGE—LAWYERS PROFESSIONAL LIABILITY

.....

The company shall have the right and duty to defend any suit against the insured seeking damages for claims to which this insurance applies even if any of the allegations of the suit are groundless, false or fraudulent. The company may make such investigation and settlement of any claim or suit as it deems expedient. The company shall not be obligated to pay any claim or judgment or to defend or continue to defend any suit after the applicable limit of the company's liability has been exhausted by payment of judgment, settlements or claims expenses.

153. *Id.* at 453.2.

154. *Id.* at 453.8. The claims-made version of this form has identical language to the paragraph quoted above. See Lawyers Professional Liability Insurance (Claims Made), GL 00 24 03 81 (1981), *id.* at 454.0.

