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# THE SUBTLY IMPORTANT SUPPLEMENTARY PAYMENTS PROVISION IN LIABILITY INSURANCE POLICIES

*Douglas R. Richmond*

## I. INTRODUCTION

Liability insurance is essentially litigation insurance.<sup>1</sup> Liability insurance may be so described because of the insurer's duty to defend the insured against lawsuits and equivalent proceedings that the policy potentially covers.<sup>2</sup> In a typical case, the insurer hires a lawyer to defend the insured and thereafter controls the insured's defense in the litigation.<sup>3</sup> The insured has a corresponding obligation to allow the insurer to control the defense and to cooperate with the insurer in the process.<sup>4</sup> If the insured prevails in the trial court and the plaintiff appeals, the insurer generally must defend the appeal.<sup>5</sup> If the insured loses in the trial court, then the insurer's duty to defend may obligate it to pursue an appeal on the insured's behalf.<sup>6</sup>

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\* Managing Director, Aon Risk Solutions, Overland Park, Kansas. Opinions expressed in this Article are solely those of the author.

1. *Cont'l Res., Inc. v. C & D Oilfield Servs., Inc.*, No. 1:13-cv-154, 2015 WL 4417323, at \*5 n.2 (D.N.D. July 20, 2015); *Lott v. Scottsdale Ins. Co.*, 827 F. Supp. 2d 626, 630 (E.D. Va. 2011); *Miller v. Westport Ins. Corp.*, 200 P.3d 419, 423 (Kan. 2009) (quoting ROBERT H. JERRY, II & DOUGLAS R. RICHMOND, *UNDERSTANDING INSURANCE LAW* 826 (4th ed. 2007)); *BGE Home Prods. & Servs., Inc. v. Owens*, 833 A.2d 8, 14 (Md. 2003) (quoting *Brohawn v. Transamerica Ins. Co.*, 347 A.2d 842, 851 (Md. 1975)); *Hanover Ins. Co. v. Golden*, 766 N.E.2d 838, 841 (Mass. 2002) (quoting *Rubenstein v. Royal Ins. Co. of Am.*, 708 N.E.2d 639, 642 (Mass. 1999)); *Auto. Ins. Co. of Hartford v. Cook*, 850 N.E.2d 1152, 1155 (N.Y. 2006) (quoting *Seaboard Sur. Co. v. Gillette Co.*, 476 N.E.2d 272, 275 (N.Y. 1974)).

2. While a standard liability insurance policy obligates the insurer to defend the insured against "suits" seeking covered damages and insurers routinely defend insureds in civil litigation, courts have held various actions to be "the functional equivalent of a suit." 1 ALLAN D. WINDT, *INSURANCE CLAIMS AND DISPUTES* § 4:1, at 4-4 to -5 (6th ed. 2013). These include arbitrations and administrative proceedings. *Id.* § 4:1, at 4-5 n.4 (collecting cases).

3. *Doe v. Allstate Ins. Co.*, 653 So. 2d 371, 373-74 (Fla. 1995).

4. *Id.* at 374.

5. ROBERT H. JERRY, II & DOUGLAS R. RICHMOND, *UNDERSTANDING INSURANCE LAW* 849 (5th ed. 2012).

6. *See, e.g., Associated Auto. Inc. v. Acceptance Indem. Ins. Co.*, 705 F. Supp. 2d 714, 725 (S.D. Tex. 2010) (stating that absent contrary policy language, "an insurer's duty to defend includes a duty to appeal an adverse judgment against its insured if there are reasonable grounds for the appeal"). An insurer's duty to defend does not, however, give rise to a duty to appeal every adverse judgment against an insured. *See, e.g., First Advantage Litig. Consulting, LLC v.*

Most liability insurance policies obligate the insurer to pay the defense lawyer's fees and other defense costs in addition to the policy's liability limits.<sup>7</sup> This obligation flows from the policy's supplementary payments provision. A standard commercial general liability (CGL) policy provides:

SUPPLEMENTARY PAYMENTS – COVERAGES A AND B

1. We will pay, with respect to any claim we investigate or settle, or any "suit" against an insured we defend:
  - a. All expenses we incur.
  - b. Up to \$250 for cost of bail bonds required because of accidents or traffic law violations arising out of the use of any vehicle to which the Bodily Injury Liability Coverage applies. We do not have to furnish these bonds.
  - c. The cost of bonds to release attachments, but only for bond amounts within the applicable limit of insurance. We do not have to furnish these bonds.
  - d. All reasonable expenses incurred by the insured at our request to assist us in the investigation or defense of the claim or "suit", including actual loss of earnings up to \$250 a day because of time off from work.
  - e. All court costs taxed against the insured in the "suit". However, these payments do not include attorneys' fees or attorneys' expenses taxed against the insured.
  - f. Prejudgment interest awarded against the insured on that part of the judgment we pay. If we make an offer to pay the applicable limit of insurance, we will not pay any prejudgment interest based on that period of time after the offer.
  - g. All interest on the full amount of any judgment that accrues after entry of the judgment and before we have paid, offered to pay, or deposited in court the part of the judgment that is within the applicable limit of insurance.

These payments will not reduce the limits of insurance.<sup>8</sup>

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Am. Int'l Specialty Lines Ins. Co., 525 F. App'x 60, 62 (2d Cir. 2013) (holding that the insurers did not have a duty to defend First Advantage through appeal where, given the verdict, there was no basis on which they would have to indemnify First Advantage). For example, where an adverse judgment is within the policy limits, the insurer may opt to satisfy the judgment rather than appeal. *JERRY & RICHMOND*, *supra* note 5, at 851. Or, an insurer might choose to settle with a plaintiff in exchange for a complete release of the insured rather than appeal. *See Bruce v. Junghun*, 912 N.E.2d 1144, 1148 (Ohio Ct. App. 2009) (suggesting this possibility).

7. *Amerisure Mut. Ins. Co. v. Arch Specialty Ins. Co.*, 784 F.3d 270, 274 (5th Cir. 2015).

8. *Ins. Servs. Office, Inc., Commercial General Liability Coverage Form (CG 00 01 04 13)*, at 8–9 (2012). "Coverage A" refers to coverage for bodily injury and property damage liability, while "Coverage B" refers to coverage for personal and advertising injury liability. *Id.* at 1, 6.

Homeowners and auto insurance policies also contain supplementary payments provisions. For example, a standard homeowner's insurance policy provides:

We cover the following in addition to the limits of liability:

A. Claim Expenses

We pay:

1. Expenses we incur and costs taxed against an "insured" in any suit we defend;
2. Premiums on bonds required in a suit we defend, but not for bond amounts more than the Coverage E limit of liability. We need not apply for or furnish any bond;
3. Reasonable expenses incurred by an "insured" at our request, including actual loss of earnings (but not loss of other income) up to \$250 per day, for assisting us in the investigation or defense of a claim or suit; and
4. Interest on the entire judgment which accrues after entry of the judgment and before we pay or tender, or deposit in court that part of the judgment which does not exceed the limit of liability that applies.<sup>9</sup>

The supplementary payments provision is an essential part of liability insurance policies. The insurer's obligation to pay defense costs, in addition to the liability limits of its policy, is particularly important because defense costs can—and often do—exceed policy limits.<sup>10</sup> But as its language makes clear, a supplementary payments provision is more than just a mechanism for funding a defense. By providing for the payment of defense costs outside of the policy limits, a supplementary payments provision assures all concerned that the insurer will have its full policy limits available to settle a case or to indemnify the insured in the event of an adverse judgment. Where a supplementary payments provision obligates the insurer to pay court costs taxed against the insured or interest on a judgment against the insured, it offers valuable benefits that complement the insurer's duty to indemnify the insured against covered losses.

At the same time, it is important to understand what a supplementary payments provision does *not* do. First, a supplementary payments provision does not create coverage.<sup>11</sup> Coverage under the policy is

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9. Ins. Servs. Office, Inc., Homeowners-3 Special Form (HO 00 03 05 11), at 20–21 (2010). The "Coverage E" referred to in paragraph 2 of the supplementary payments provision is the "Personal Liability" coverage afforded by a standard homeowners insurance policy. *Id.* at 20.

10. Timothy H. Wright, *Key Coverage Issues Presented by the Supplementary Payments Provision*, NEW APPLEMAN CURRENT CRITICAL ISSUES IN INS. LAW, Spring 2016, at 53, 54.

11. *Hargob Realty Assocs., Inc. v. Fireman's Fund Ins. Co.*, 901 N.Y.S.2d 657, 660 (App. Div. 2010).

created by the insuring agreements.<sup>12</sup> Second, a supplementary payments provision does not increase the policy's liability limits; the policy's liability limits are always those stated in the declarations.<sup>13</sup> Thus, and by way of example, a provision stating that the insurer will pay pre- or post-judgment interest or first aid expenses does not increase the policy limits for purposes of determining in a bad faith case whether the plaintiff offered to settle within the limits.<sup>14</sup> Third, a supplementary payments provision does not create or expand an insurer's duty to defend.<sup>15</sup> Again, it simply enables the insurer's payment of defense expenses in addition to its policy limits. Furthermore, the obligation to pay defense expenses is limited to cases the insurer actually defends.<sup>16</sup> A supplementary payments provision neither requires the insurer to reimburse the insured's expenses in a case the insured defends without the insurer's participation, nor requires the insurer to pay the insured's pre-tender defense expenses.<sup>17</sup> Fourth, a supplementary payments provision does not grant third parties rights under the policy.<sup>18</sup> A supplementary payments provision is intended to benefit the insured, not strangers to the contract.<sup>19</sup> Third parties are at

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12. *Id.*

13. *Levin v. State Farm Mut. Auto. Ins. Co.*, 510 S.W.2d 455, 458–59 (Mo. 1974); *see Levin v. Allstate Ins. Co.*, 764 N.Y.S.2d 452, 455 (App. Div. 2003) (explaining that a policy's "limit of insurance" and "applicable policy limits" do not include costs and interest payable under a supplementary payments provision).

14. *Levin*, 510 S.W.2d at 458–59.

15. An insurer's duty to defend flows from the insuring agreements in its policy. *See, e.g.*, *Ins. Servs. Office, Inc., Commercial General Liability Coverage Form (CG 00 01 04 13)*, at 1 (2012) (stating in the bodily injury and property damage insuring agreement: "We will have the right and duty to defend the insured against any 'suit' seeking those damages. However, we will have no duty to defend the insured against any 'suit' seeking damages for 'bodily injury' or 'property damage' to which this insurance does not apply.").

16. *Amex Assur. Co. v. Allstate Ins. Co.*, 5 Cal. Rptr. 3d 744, 750 (Ct. App. 2003); *Interface Flooring Sys., Inc. v. Aetna Cas. & Sur. Co.*, No. X02CV930151595S, 2001 WL 238148, at \*14–15 (Conn. Super. Ct. Feb. 16, 2001) (applying Georgia law).

17. *Interface Flooring Sys., Inc.*, 2001 WL 238148, at \*11, 14–15.

18. *See, e.g., DeMent v. Nationwide Mut. Ins. Co.*, 544 S.E.2d 797, 801 (N.C. Ct. App. 2001) (discussing a first aid clause in a supplementary payments provision in a personal auto policy).

19. *Mulvey Constr., Inc. v. BITCO Gen. Life Ins. Corp.*, No. 1:07-0634, 2015 WL 6394521, at \*8 (S.D. W. Va. Oct. 22, 2015); *see, e.g., San Diego Hous. Comm'n v. Indus. Indem. Co.*, 116 Cal. Rptr. 2d 103, 120–22 (Ct. App. 2002) (concluding that a judgment creditor could not recover under a supplementary payments provision on a third-party beneficiary theory); *Town & Country Mut. Ins. Co. v. Sharp*, 538 N.E.2d 6, 10 (Ind. Ct. App. 1989) ("[G]iven that the clearly stated purpose of the [first aid or Good Samaritan clause in the supplementary payments provision] was to reimburse only the insured for any expenditures incurred in obtaining medical relief for others . . . the [plaintiffs] fall outside the scope of the coverage provided . . ."); *McCarter v. Allstate Ins. Co.*, 388 N.Y.S.2d 732, 732–33 (App. Div. 1976) ("Under the circumstances presented, the provision for indemnity in [the first aid or Good Samaritan clause in the supplementary payments provision] runs to the insured for expenses incurred by him, and no cause of action exists on behalf of this plaintiff, who is not such an insured party . . .").

best incidental beneficiaries of supplementary payments provisions and cannot enforce them.<sup>20</sup>

As important as supplementary payments provisions are to both insureds and insurers, related caselaw is relatively scarce,<sup>21</sup> and they have drawn little scholarly attention. As a result, courts and lawyers have little authority to guide them when analyzing associated issues. This Article aims to fill that void.

Our exploration of supplementary payments provisions begins in Part II with a discussion of an insurer's obligation to pay attorneys' fees or costs assessed against an insured, or interest on a judgment awarded against an insured, in a case in which the insurer defends but does not indemnify the insured. Under the majority approach, an insurer's supplementary payments obligation is linked to coverage, meaning that the insurer has no duty to pay these items where it has no duty to indemnify the insured. After reviewing the majority rule and the minority view, which uncouples an insurer's supplementary payments obligation from its duty to indemnify, Part II concludes that the majority approach represents the correct approach.

Part III examines insureds' repeated allegation that a supplementary payments provision that states the insurer will pay the insured's reasonable expenses incurred at the insurer's request requires the insurer to pay the insured's attorneys' fees incurred litigating coverage with the insurer. Insureds contend—and some courts have agreed—that by filing a declaratory judgment action against its insured, an insurer “requests” that the insured incur associated fees and costs. The majority rule, however, rejects this theory as word play that is inconsistent with the parties' intent. Part III endorses the majority rule.

Part IV analyzes insurers' obligations to pay premiums for appeal or supersedeas bonds, and bonds to release attachments. In doing so, it discusses the most commonly disputed issues in this area: whether an insurer must pay the premium for an appeal or supersedeas bond where its policy is silent on that obligation; whether an insurer must pay for an appeal or supersedeas bond to cover the portion of a judgment that exceeds the applicable liability limit of its policy; and whether an insurer that pays the cost of a bond to release an attachment can confine its obligation to bond amounts within the applicable limit of insurance.

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20. *DeMent*, 544 S.E.2d at 801.

21. See Michael Sean Quinn & Olga Seelig, *Liability Insurance and Supplementary Payments*, 25 INS. LITIG. REP. 133, 133 (2003) (stating that “[t]here is remarkably little law” on supplementary payments provisions).

Part V discusses pre- and post-judgment interest as supplementary payments. It focuses on (a) the scope of the insurer's obligation to pay post-judgment interest; and (b) an insurer's ability to terminate its post-judgment interest obligation by offering to pay the applicable liability limit of its policy.

Part VI looks at first aid or Good Samaritan clauses in supplementary payments provisions. For example, a Good Samaritan clause might state that the insurer will pay, in addition to its limit of liability, expenses the insured incurs "for immediate medical and surgical treatment for others necessary and the time of the accident resulting in bodily injury" covered by the policy.<sup>22</sup> These clauses benefit the insured, not a third party who is injured as a result of the insured's conduct. Third parties have no right to claim benefits under them. As Part VI further explains, an insured does not "incur" a plaintiff's medical expenses as a result of tort liability imposed by a judgment.

Finally, Part VII discusses an insurer's duty to defend a contractual indemnitee of the insured under the supplementary payments provision in a standard CGL policy. As a consequence of the many conditions attached to the insurer's promise to defend the insured's indemnitee and to treat attendant litigation expenses as supplementary payments, the insurer's obligation will arise in very few cases.

## II. SUPPLEMENTARY PAYMENTS IN CASES WHERE THE INSURER HAS A DUTY TO DEFEND BUT ULTIMATELY NO DUTY TO INDEMNIFY THE INSURED

Liability insurers owe insureds two distinct contractual duties: a duty to defend them in litigation and equivalent proceedings, and a duty to indemnify them against covered judgments.<sup>23</sup> Although courts regularly say that the duty to defend is broader than the duty to indemnify,<sup>24</sup> both duties are linked to coverage;<sup>25</sup> their differences are

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22. Farmers Ins. Grp., E-Z Reader Car Policy (56-5058 3d ed. 5-07), at 5, [http://doi.nv.gov/uploadedFiles/doinvgov/\\_public-documents/Consumers/56-5058.pdf](http://doi.nv.gov/uploadedFiles/doinvgov/_public-documents/Consumers/56-5058.pdf).

23. *Allen v. Cont'l W. Ins. Co.*, 436 S.W.3d 548, 552 (Mo. 2014); *Summerhaze Co., L.C. v. FDIC*, 332 P.3d 908, 920 (Utah 2014); *United Servs. Auto. Ass'n v. Speed*, 317 P.3d 532, 538 (Wash. Ct. App. 2014).

24. *See, e.g., Mid-Continent Cas. Co. v. Advantage Med. Elecs., LLC*, 196 So. 3d 238, 243 (Ala. 2015); *Devine v. Great Divide Ins. Co.*, 350 P.3d 782, 788 (Alaska 2015); *Quihuis v. State Farm Mut. Auto. Ins. Co.*, 334 P.3d 719, 727 (Ariz. 2014); *Kolbek v. Truck Ins. Exch.*, 431 S.W.3d 900, 905 (Ark. 2014); *Hartford Cas. Ins. Co. v. Swift Distrib., Inc.*, 326 P.3d 253, 258 (Cal. 2014); *Capstone Bldg. Corp. v. Am. Motorists Ins. Co.*, 67 A.3d 961, 988 n.36 (Conn. 2013); *Carlyle Inv. Mgmt. L.L.C. v. Ace Am. Ins. Co.*, 131 A.3d 886, 896 (D.C. 2016) (quoting *Centennial Ins. Co. v. Patterson*, 564 F.3d 46, 50 (1st Cir. 2009)); *Nautilus Ins. Co. v. Lexington Ins. Co.*, 321 P.3d 634, 640 (Haw. 2014); *AMCO Ins. Co. v. Erie Ins. Exch.*, 2016 IL App (1st) 142660, ¶¶ 31–32, 49 N.E.3d 900, 913–14; *Piatt v. Ind. Lumbermen's Mut. Ins. Co.*, 461 S.W.3d 788, 792 (Mo. 2015);

attributable to their conditions. The duty to indemnify exists as soon as the contract is formed, but it is conditional; it is not due and owing until the insured's liability is established.<sup>26</sup> The duty to defend is not so conditioned; it exists as soon as a claimant pleads allegations potentially within coverage, regardless of whether the law would impose liability in the circumstances.<sup>27</sup> Because the duty to indemnify is conditioned on the insured's liability and the duty to defend is not subject to the same condition, the duty to defend is triggered in more cases.<sup>28</sup> This imbalance does not, however, alter the essential relationship between the duty to defend and the existence of coverage.<sup>29</sup>

Because an insurer's duty to defend arises at the outset of litigation while its duty to indemnify is determined at the conclusion of the litigation, an insurer may have to defend a case in which it will have no

Cizek Homes, Inc. v. Columbia Nat'l Ins. Co., 853 N.W.2d 28, 33 (Neb. Ct. App. 2014); Scottsdale Indem. Co. v. Beckerman, 992 N.Y.S.2d 117, 120 (App. Div. 2014); Granger v. Auto-Owners Ins., 40 N.E.3d 1110, 1115 (Ohio 2015); Babcock & Wilcox Co. v. Am. Nuclear Insurers, 131 A.3d 445, 456 (Pa. 2015); Demaray v. De Smet Farm Mut. Ins. Co., 801 N.W.2d 284, 287 (S.D. 2011); AES Corp. v. Steadfast Ins. Co., 715 S.E.2d 28, 32 (Va. 2011) (quoting Va. Elec. & Power Co. v. Northbrook Prop. & Cas. Ins. Co., 475 S.E.2d 264, 265–66 (Va. 1996)); Water Well Sols. Serv. Grp., Inc. v. Consol. Ins. Co., 881 N.W.2d 285, 292 (Wis. 2016).

25. See F.H. Stoltze Land & Lumber Co. v. Am. States Ins. Co., 352 P.3d 612, 614 (Mont. 2015) (“An insurer’s duty to defend or indemnify a party depends on whether an insurance policy establishes such a duty.”); Gen. Accident Ins. Co. of Am. v. Allen, 689 A.2d 1089, 1095 (Pa. 1997) (“Although the duty to defend is separate from and broader than the duty to indemnify, both duties flow from a determination that the complaint triggers coverage.”); City of Hartsville v. S.C. Mun. Ins. & Risk Fin. Fund, 677 S.E.2d 574, 578 (S.C. 2009) (observing that an insurer’s duties to defend and indemnify “are interrelated”).

26. State Farm Mut. Auto. Ins. Co. v. LogistiCare Sols., LLC, 751 F.3d 684, 692 (5th Cir. 2014) (applying Mississippi law and quoting Estate of Bradley v. Royal Surplus Lines Ins. Co., 647 F.3d 524, 529 (5th Cir. 2011)); Buss v. Super. Ct., 939 P.2d 766, 773 (Cal. 1997); State Farm Fire & Cas. Co. v. Young, 2012 IL App (1st) 103736, ¶ 12, 968 N.E.2d 759, 763 (citing Outboard Marine Corp. v. Liberty Mut. Ins. Co., 607 N.E.2d 1204, 1221 (Ill. 1992)); Irving Oil Ltd. v. ACE INA Ins. Co., 91 A.3d 594, 599 (Me. 2014); Remodeling Dimensions, Inc. v. Integrity Mut. Ins. Co., 819 N.W.2d 602, 616 (Minn. 2012); Barron v. Shelter Mut. Ins. Co., 220 S.W.3d 746, 747 (Mo. 2007); State Farm Mut. Auto. Ins. Co. v. Freyer, 312 P.3d 403, 410–11 (Mont. 2013); Mid-Continent Cas. Co. v. Castagna, 410 S.W.3d 445, 449–50 (Tex. App. 2013).

27. See Trailer Bridge, Inc. v. Ill. Nat'l Ins. Co., 657 F.3d 1135, 1142 (11th Cir. 2011) (stating that the merits of a suit have “no bearing” on the duty to defend); Hart v. Ticor Title Ins. Co., 272 P.3d 1215, 1225 (Haw. 2012) (quoting two Hawaii Supreme Court cases); Renco Grp., Inc. v. Certain Underwriters at Lloyd's, London, 362 S.W.3d 472, 479 (Mo. Ct. App. 2012) (stating that an insurer has a duty to defend “based on the facts known at the outset of the case, no matter how unlikely it is that the insured will be found liable or whether the insured is ultimately found liable”); Abouzaid v. Mansard Gardens Assocs., LLC, 23 A.3d 338, 347 (N.J. 2011) (stating that when evaluating an insurer's duty to defend, “the potential merit of the claim is immaterial”); Tibert v. Nodak Mut. Ins. Co., 816 N.W.2d 31, 44 (N.D. 2012) (stating that “the ultimate result in the case does not affect the duty to defend”).

28. JERRY & RICHMOND, *supra* note 5, at 794.

29. *Id.*

duty to indemnify the insured.<sup>30</sup> Where the insurer recognizes this possibility, it typically defends the insured under a reservation of rights.<sup>31</sup> In short, the insurer agrees to defend the insured while reserving its right not to indemnify the insured in the end.<sup>32</sup> The insurer may also file a declaratory judgment action to determine its obligations under its policy.<sup>33</sup>

An insurer that defends an insured under a reservation of rights must pay for the insured's defense as the litigation proceeds, just as it would do if it were defending the action without reservation.<sup>34</sup> Questions arise, however, where the insurer is ultimately held to owe no duty to indemnify the insured. Does the insurer's promise in its supplementary payments provision to pay "with respect to . . . any 'suit' against an insured we defend" post-judgment interest accrued before the insurer has paid, offered to pay, or deposited into court the part of the judgment that is within the applicable policy limits oblige it to pay interest on a judgment it does not owe?<sup>35</sup> Must the insurer pay costs taxed against the insured even if a court hearing a related declaratory judgment action or equitable garnishment case decides that the insurer's policy does not afford coverage? Most courts answer these questions "no,"<sup>36</sup> although there are competing minority views.<sup>37</sup>

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30. *Hartford Cas. Ins. Co. v. DP Eng'g, L.L.C.*, 827 F.3d 423, 430 (5th Cir. 2016) (applying Texas law); *N. Counties Eng'g, Inc. v. State Farm Gen. Ins. Co.*, 169 Cal. Rptr. 3d 726, 739 (Ct. App. 2014); *Ill. Tool Works Inc. v. Travelers Cas. & Sur. Co.*, 2015 IL App (1st) 132350, ¶ 19, 26 N.E.3d 421, 426; *Arch Ins. Co. v. Sunset Fin. Servs., Inc.*, 475 S.W.3d 730, 733 (Mo. Ct. App. 2015) (quoting *Lumber Mut. Ins. Co. v. Reload, Inc.*, 113 S.W.3d 250, 253 (Mo. Ct. App. 2003)); *Auto. Ins. Co. of Hartford v. Cook*, 850 N.E.2d 1152, 1155 (N.Y. 2006); *ZRZ Realty Co. v. Beneficial Fire & Cas. Ins. Co.*, 266 P.3d 61, 66 (Or. 2011).

31. WILLIAM T. BARKER & RONALD D. KENT, *NEW APPLEMAN INSURANCE BAD FAITH LITIGATION SECOND EDITION* § 3.03[1], at 3–33 (2010 & Supp. 2013).

32. *See Hoover v. Maxum Indem. Co.*, 730 S.E.2d 413, 416 (Ga. 2012) ("A reservation of rights is . . . designed to allow an insurer to provide a defense to its insured while still preserving the option of litigating and ultimately denying coverage."); *Mastellone v. Lightning Rod Mut. Ins. Co.*, 884 N.E.2d 1130, 1139–40 (Ohio Ct. App. 2008) ("[A] reservation of rights means that the insurer does not believe that coverage is available . . . but that it is proceeding to defend a claim in order to control the defense.").

33. *See Gregory P. Deschens & Kurt M. Mullen, Determining the Insurer's Response, in 1 NEW APPLEMAN INSURANCE LAW PRACTICE GUIDE* § 11.13[1], at 11-1, 11-47 (Leo P. Martinez et al., eds. 2016 ed.) ("[I]f the insurer is defending . . . under a 'reservation of rights' but nonetheless would like to challenge its duty to defend, initiating a declaratory judgment action . . . may be the wisest and safest course of action."); 2 WINDT, *supra* note 2, § 8:3, at 8-5 to -12 (discussing why an insurer may pursue a declaratory judgment action).

34. *Am. & Foreign Ins. Co. v. Jerry's Sport Ctr., Inc.*, 2 A.3d 526, 542–43 & n.14 (Pa. 2010).

35. *Ins. Servs. Office, Inc., Commercial General Liability Coverage Form (CG 00 01 04 13)*, at 8–9 (2012).

36. *See, e.g., Athridge v. Aetna Cas. & Sur. Co.*, 604 F.3d 625, 631–32 (D.C. Cir. 2010) (applying District of Columbia law and discussing post-judgment interest); *Scottsdale Ins. Co. v. City of Hazelton*, No. 3:07-CV-1704, 2009 WL 1507161, at \*10 (M.D. Pa. May 28, 2009) (discussing costs taxed against an insured); *State Farm Gen. Ins. Co. v. Mintarsih*, 95 Cal. Rptr. 3d 845, 855 (Ct.

A. *Linking Supplementary Payments to Coverage*

*Athridge v. Aetna Casualty & Surety Co.*<sup>38</sup> is a leading case in this area. *Athridge* arose out of the serious injury of Tommy Athridge, who was run over by his teenage friend Jorge Iglesias during an ill-conceived game of chicken, in which Iglesias was in his cousins' car and Athridge was afoot.<sup>39</sup> Iglesias had secretly taken the car from his cousins' home.<sup>40</sup> Tommy and his father sued Iglesias and won a \$5.5 million judgment that Iglesias could not pay.<sup>41</sup> They then tried to collect the judgment from Aetna, which insured Iglesias under a personal auto policy.<sup>42</sup> A jury determined that Aetna did not owe coverage for the accident because Iglesias did not reasonably believe that he was entitled to drive his cousins' car.<sup>43</sup> The Athridges asserted that even if Aetna had no duty to indemnify Iglesias for the judgment, it was nevertheless obligated to pay post-judgment interest on the award because it had defended Iglesias in the tort case.<sup>44</sup> The district court disagreed and awarded Aetna summary judgment, and the Athridges appealed to the Court of Appeals for the D.C. Circuit.<sup>45</sup>

The Athridges were acutely interested in collecting post-judgment interest from Aetna because by this time, the accumulated interest

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App. 2009) (discussing costs taxed against an insured and post-judgment interest); *Golden Eagle Ins. Corp. v. Cen-Fed, Ltd.*, 56 Cal. Rptr. 3d 279, 292–93 (Ct. App. 2007) (involving costs assessed against an insured); *Combs v. State Farm Fire & Cas. Co.*, 49 Cal. Rptr. 3d 917, 923 (Ct. App. 2006) (discussing costs assessed against an insured); *First Mercury Ins. Co. v. Nationwide Sec. Servs., Inc.*, 2016 IL App (1st) 143924, ¶¶ 39–41, 54 N.E.3d 323, 335 (involving pre- and post-judgment interest); *Hanneman v. Cont'l W. Ins. Co.*, 575 N.W.2d 445, 454–55 (N.D. 1998) (discussing costs taxed against an insured); *World Harvest Church v. Grange Mut. Cas. Co.*, 68 N.E.3d 738, 746–47 (Ohio 2016) (involving a fee award and post-judgment interest); see also *Wright*, *supra* note 10, at 54 (“Insureds have argued that this prefatory clause requires insurers to make supplementary payments for any lawsuit they defend under a reservation of rights, regardless of whether there is coverage . . . or a duty to defend. Most courts have rejected that argument.”) (footnote omitted).

37. See, e.g., *Pac. Emp'rs Ins. Co. v. Alex Hofrichter, P.A.*, 670 So. 2d 1023, 1025 (Fla. Dist. Ct. App. 1996) (stating that because the insurer defended the insured, “substantive coverage was not necessary to trigger the obligation to pay costs taxed against the insured”); *Emp'rs Mut. Cas. Co. v. Donnelly*, 300 P.3d 31, 35 (Idaho 2013) (concluding that the insurer was obligated to pay attorneys' fees and costs taxed against the insured even though it had no duty to indemnify the insured); *Pasco v. State Auto. Mut. Ins. Co.*, No. 99AP-430, 1999 WL 1221633, at \*4–5 (Ohio Ct. App. Dec. 21, 1999) (holding that the insurer had to pay costs assessed against the insured even though its policy did not cover the related cause of action).

38. 604 F.3d 625 (D.C. Cir. 2010).

39. *Id.* at 628.

40. *Id.*

41. *Id.*

42. *Id.* at 628–29.

43. *Id.* at 628.

44. *Athridge*, 604 F.3d at 629.

45. *Id.*

exceeded \$3 million.<sup>46</sup> They contended that Aetna owed this amount under its policy's supplementary payments provision, which stated that Aetna would pay on an insured's behalf "[i]nterest accruing after a judgment is entered in any suit we defend."<sup>47</sup> The Athridges argued that this language required Aetna to pay post-judgment interest any time it defended a lawsuit against an insured, regardless of whether it owed coverage for the judgment.<sup>48</sup> As they saw things, the only way for Aetna to terminate its duty to pay post-judgment interest would be to pay a judgment it did not owe.<sup>49</sup> The district court rejected this argument, and the D.C. Circuit affirmed.<sup>50</sup>

Like the district court, the appellate court reasoned that an insurer's obligation to pay post-judgment interest under its supplementary payments provision is contingent upon its duty to indemnify the insured.<sup>51</sup> The court observed that because an insurer's duty to defend is broader than its duty to indemnify, an insurer frequently will defend an insured even though exclusions in the policy may absolve the insurer of its duty to indemnify the insured.<sup>52</sup> To adopt the Athridges' view that Aetna had to accept liability for a judgment to avoid paying post-judgment interest potentially exceeding its policy limits would effectively erase the exclusions in the policy in any case Aetna defended.<sup>53</sup> This would, in turn, violate the court's duty to construe the Aetna policy "as a whole, giving effect to each of its provisions, where possible."<sup>54</sup>

Pushing back, the Athridges pointed to cases in which courts held that insurers had a duty to pay costs assessed against insureds even though the insurers had no duty to satisfy the judgments.<sup>55</sup> The court was unimpressed, reasoning that the cases did not support "allowing the defense of a suit to create de facto indemnification liability."<sup>56</sup>

Finally, the Athridges argued that although the court's policy interpretation was plausible, the doctrine of *contra proferentem* compelled the court to construe the policy as they did.<sup>57</sup> But as the court ex-

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46. *Id.* at 631.

47. *Id.* (quoting the Aetna policy).

48. *Id.*

49. *Id.*

50. *Athridge*, 604 F.3d at 631.

51. *Id.*

52. *Id.* (citing *Stevens v. United Gen. Title Ins. Co.*, 801 A.2d 61, 67 (D.C. 2002)).

53. *Id.*

54. *Id.* (quoting *Akassy v. William Penn Apts. Ltd. P'ship*, 891 A.2d 291, 303 (D.C. 2006)).

55. *Id.* at 632 (citing *Knippen v. Glens Falls Ins. Co.*, 564 F.2d 525, 530 (D.C. Cir. 1977); *Pac. Emp'rs Ins. Co. v. Alex Hofrichter, P.A.*, 670 So. 2d 1023, 1025 (Fla. Dist. Ct. App. 1996)).

56. *Athridge*, 604 F.3d at 632.

57. *Id.*

plained, *contra proferentem* does not require courts to engage in forced constructions of policy language to create coverage.<sup>58</sup> The Athridges' reading of the Aetna policy, which would permit "a *supplementary* payments provision to manufacture *primary* liability where none otherwise exist[ed]," was "the epitome of such a forced construction."<sup>59</sup> The court refused to go along.<sup>60</sup>

After dispatching two other issues related to the conduct of the trial, the *Athridge* court upheld the jury verdict for Aetna and affirmed the district court's judgment.<sup>61</sup>

The court in *State Farm General Insurance Co. v. Mintarsih*<sup>62</sup> reached a similar conclusion. *Mintarsih* arose out of Mimin Mintarsih's lawsuit against State Farm's insureds, the Lams, for imprisoning her in their home and enslaving her.<sup>63</sup> The Lams tendered Mintarsih's lawsuit to State Farm under their homeowners and umbrella policies, and State Farm agreed to defend them under a reservation of rights.<sup>64</sup> The case went to a jury on counts for false imprisonment, fraud, negligence, negligence per se, and wage and hour violations under the California Labor Code.<sup>65</sup> The jury found for Mintarsih on all counts and awarded her approximately \$750,000 in damages.<sup>66</sup> As the prevailing party, Mintarsih also received over \$733,000 in attorneys' fees as costs under the Labor Code, and over \$161,000 in other costs.<sup>67</sup>

State Farm filed a declaratory judgment action against Mintarsih and the Lams.<sup>68</sup> State Farm contended that the conduct for which the Lams were held liable was not an accident within the meaning of its policies and therefore was not covered.<sup>69</sup> It further argued that the award for attorneys' fees was based on wage and hour claims that its policies did not cover, and thus those fees were not costs payable under the supplementary payments provisions in its policies.<sup>70</sup> The trial court held that State Farm's policies covered \$87,000 in damages assessed against the Lams for false imprisonment and negligence, and that State Farm had to pay the approximately \$161,000 in costs

58. *Id.* (quoting *Cameron v. USAA Prop. & Cas. Ins. Co.*, 733 A.2d 965, 968 (D.C. 1999)).

59. *Id.*

60. *Id.*

61. *Id.* at 635.

62. 95 Cal. Rptr. 3d 845 (Ct. App. 2009).

63. *Id.* at 850.

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Mintarsih*, 95 Cal. Rptr. 3d at 850.

69. *Id.*

70. *Id.*

awarded against the Lams.<sup>71</sup> Both Mintarsih and State Farm appealed.<sup>72</sup>

On appeal, Mintarsih argued that regardless of coverage, the supplementary payments provisions in the State Farm policies (1) required State Farm to pay the costs awarded against the Lams, including attorneys' fees; and (2) bound State Farm to pay interest on the entire judgment until it paid the policy limits.<sup>73</sup> Under the homeowners policy, State Farm agreed to pay "'expenses we incur and costs taxed against an Insured in suits we defend.'" <sup>74</sup> Under the umbrella policy, it agreed to pay "'the expenses we incur and costs taxed against you in suits we defend,'" provided that the suit was not covered by any other insurance policy.<sup>75</sup> The court observed that this language made State Farm's obligation to pay costs awarded against an insured dependent on its duty to defend.<sup>76</sup> The court also noted that "costs," as used in a supplementary payments provision, was generally interpreted consistently with the use of that term in California Code of Civil Procedure § 1033.5(a)(10), which establishes that a prevailing party may recover as costs attorneys' fees authorized by contract, statute, or law under another section of the Code.<sup>77</sup>

The *Mintarsih* court explained that in an earlier case, *Golden Eagle Insurance Corp. v. Cen-Fed, Ltd.*,<sup>78</sup> it had "rejected a literal interpretation" of the phrase "any 'suit' against an insured we defend," and concluded that an insurer had to pay costs taxed against an insured only if it owed a duty to defend the insured.<sup>79</sup> As the court further explained the holding in *Golden Eagle*:

We stated that just as an insured could not reasonably expect an insurer to pay defense costs for a suit in which there was no potential for coverage, an insured could not reasonably expect an insurer to pay costs awarded against the insured in such a suit. We also stated that requiring an insurer to pay costs awarded against an insured only if the insurer defended the action would discourage insurers from providing a defense . . . where coverage was in doubt, contrary to the principle that the law should encourage insurers to provide a defense in such cases. Accordingly, we held that because no duty to defend ever arose, the insurer had no obligation to pay

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71. *Id.* at 851.

72. *Id.*

73. *Id.*

74. *Mintarsih*, 95 Cal. Rptr. 3d at 853 (quoting the State Farm homeowners policy).

75. *Id.* (quoting the State Farm umbrella policy).

76. *Id.*

77. *Id.*

78. 56 Cal. Rptr. 3d 279 (Ct. App. 2007).

79. *Mintarsih*, 95 Cal. Rptr. 3d at 854 (citing *Golden Eagle*, 56 Cal. Rptr. 3d at 293).

costs awarded against the insured, including attorney fees awarded as costs.<sup>80</sup>

Therefore, under a supplementary payments provision like those at issue here, an insurance company must pay costs assessed against an insured only if it had a duty to defend.<sup>81</sup> The court reasoned that this was what the parties intended in referring to “suits we defend” because they expected that the insurer would defend a lawsuit only if it had a duty to do so.<sup>82</sup> Of course, an insurer’s duty to defend extends only to claims that its policy at least potentially covers.<sup>83</sup> An insurer has no duty to defend the insured against claims that are not even potentially covered under its policy.<sup>84</sup>

An insurer’s duty to defend an entire “mixed action”—that is, a case in which some claims are potentially covered and others are not<sup>85</sup>—will not support a duty to pay costs awarded against the insured that can be attributed solely to claims the policy did not potentially cover.<sup>86</sup> The duty to defend uncovered claims in a mixed action is implied as a matter of law rather than a contractual dictate, and a supplementary payments provision’s reference to “suits we defend” envelopes only claims that the insurer contractually agreed to defend.<sup>87</sup> An insured cannot reasonably expect an insurer to pay costs, including attorneys’ fees, tied solely to claims that its policy did not even potentially cover.<sup>88</sup>

Mintarsih conceded that the State Farm policies did not even potentially cover her wage and hour claims.<sup>89</sup> Because her entitlement to attorneys’ fees as costs rested solely on those claims, she could not recover those fees from State Farm.<sup>90</sup>

After resolving Mintarsih’s attorneys’ fees claim, the court concluded that under the California Insurance Code, State Farm need not indemnify the Lams for Mintarsih’s false imprisonment and negli-

80. *Id.* (citations and footnote omitted).

81. *Id.* (citing *Golden Eagle*, 56 Cal. Rptr. 3d at 293).

82. *Id.* at 854–55.

83. *Id.* at 855.

84. *Id.* (citing *Buss v. Super. Ct.*, 939 P.2d 766, 776 (Cal. 1997)).

85. See *Gonzalez v. Fire Ins. Exch.*, 184 Cal. Rptr. 3d 394, 403 (Ct. App. 2015) (“When a complaint states multiple claims, some of which are potentially covered by the insurance policy and some of which are not, it is a mixed action.”); *Fire Ins. Exch. v. Weitzel*, 371 P.3d 457, 461 (Mont. 2016) (“If a complaint states multiple claims, some of which are covered by the insurance policy and some of which are not, it is a mixed action.”).

86. *Mintarsih*, 95 Cal. Rptr. 3d at 855.

87. *Id.*

88. *Id.*

89. *Id.* at 856.

90. *Id.*

gence claims.<sup>91</sup> In sum, the State Farm policies covered none of Mintarsih's claims in the underlying action.<sup>92</sup> This conclusion doomed her effort to recover post-judgment interest.<sup>93</sup>

The supplementary payments provision in the Lams' homeowners policy stated that State Farm would "pay 'interest on the entire judgment which accrues after entry of the judgment and before we pay or tender, or deposit in court that part of the judgment which does not exceed the limit of liability that applies.'"<sup>94</sup> The umbrella policy terms were nearly identical.<sup>95</sup> According to the court, "these provisions contemplate[d] a covered claim and were necessarily tied to and depend[ed] upon State Farm's *indemnity* obligation."<sup>96</sup> State Farm promised to pay post-judgment interest that accrued before it paid or tendered the amount payable under each policy, up to the applicable liability limit.<sup>97</sup> The policies' liability limits applied to their personal liability coverages—not to supplementary payments.<sup>98</sup> By linking the duty to pay post-judgment interest to the failure to indemnify the insured for a covered claim rather than the failure to pay other amounts due under the policies, the supplementary payments provisions established that State Farm's post-judgment interest obligation arose only if its policies covered the damages awarded against the Lams.<sup>99</sup> Because they did not, no obligation to pay post-judgment interest ever arose.<sup>100</sup>

### B. *Disconnecting Supplementary Payments from Coverage*

A few courts depart from the reasoning of *Athridge*, *Mintarsih*, and *Golden Eagle*. Florida courts reason that an insurer's promise to pay "costs taxed against an 'insured' in any suit we defend"<sup>101</sup> and similar supplementary payments language commits the insurer to pay costs taxed against the insured regardless of whether the policy covers the

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91. *Id.* at 856–57.

92. *Mintarsih*, 95 Cal. Rptr. 3d at 858.

93. *Id.* at 857–58.

94. *Id.* (quoting the policy).

95. *Id.* at 858.

96. *Id.*

97. *Id.*

98. *Mintarsih*, 95 Cal. Rptr. 3d at 858.

99. *Id.*

100. *Id.*

101. Ins. Servs. Office, Inc., Homeowners–3 Special Form (HO 00 03 05 11), at 20 (2010).

causes of action or claims to which the costs relate.<sup>102</sup> As the court in *Pacific Employers Insurance Co. v. Alex Hofrichter, P.A.*<sup>103</sup> explained:

[W]e need go no further than the clear language of the insurance policy to conclude that in light of the insurer's undertaking of [the insured's] defense, it was obligated to pay the cost judgment which followed. This court has already held that the supplementary payments provision of a policy applies independent of whether or not there is coverage. The policy at issue contains no restrictions or limitations on that promise. . . . Once [the insurer] defended, substantive coverage was not necessary to trigger the obligation to pay costs taxed against the insured in any suit.<sup>104</sup>

In *Employers Mutual Casualty Co. v. Donnelly*,<sup>105</sup> the Idaho Supreme Court held that the insurer, EMC, was obligated to pay more than \$296,000 in attorneys' fees and costs awarded against its insured, RCI, even though EMC had no duty to indemnify RCI.<sup>106</sup> The policy stated that EMC would pay "with respect to any . . . 'suit' against an insured we defend . . . all expenses we incur . . . [and] all costs taxed against the insured in the suit."<sup>107</sup> The policy defined a "suit" as a "civil proceeding in which damages . . . to which this insurance applies are alleged."<sup>108</sup> The court reasoned that EMC's obligation to pay costs was tied to its duty to defend, which arose when the plaintiffs alleged the existence of covered damages.<sup>109</sup> Because EMC's policy required only that damages be *alleged* to trigger its duty to defend rather than *proven*, EMC was obligated to pay the costs and attorneys' fees despite owing no duty to indemnify RCI.<sup>110</sup>

A dissenting Justice argued that while the case was complicated by the fact that the underlying suit against RCI was a mixed action, the absence of coverage prevented an award of fees and costs.<sup>111</sup> In particular:

Once there was a final determination that [the plaintiffs] failed to recover on any "covered claims," the duty to defend ceased, as did

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102. See, e.g., *Arnett v. Mid-Continent Cas. Co.*, No. 8:08-CV-2373-T-27EAJ, 2010 WL 2821981, at \*12 (M.D. Fla. July 16, 2010) ("Having defended the action, the policies require [the insurers] to pay the judgment for costs and the cost of the attachment bond, regardless of whether the claims are or are not ultimately covered."); *Tri-State Ins. Co. of Minn. v. Fitzgerald*, 593 So. 2d 1118, 1119–20 (Fla. Dist. Ct. App. 1992) (relying on "the familiar rules of interpretation applicable to insurance policies").

103. 670 So. 2d 1023 (Fla. Dist. Ct. App. 1996).

104. *Id.* at 1025 (citations omitted).

105. 300 P.3d 31 (Idaho 2013).

106. *Id.* at 35.

107. *Id.* at 34.

108. *Id.* at 40 (Eismann, J., specially concurring).

109. *Id.* at 35.

110. *Id.*

111. *Donnelly*, 300 P.3d at 40–43 (Jones, J., dissenting).

any claim by RCI for indemnity, either for damages or for costs and fees . . . . The eventual determination that there were no covered damages necessarily means that there never were any covered claims. This fact was merely not determined until the end of the underlying action. . . .

Most importantly, the policy itself establishes that there is no coverage for costs and attorney's fees in cases in which no covered damages are awarded against the insured. . . .

. . . .

The term "suit" is . . . defined as "a civil proceeding in which damages because of 'bodily injury,' 'property damage' or 'personal advertising injury' to which this insurance applies are alleged." . . . [I]t does not say a suit is a civil proceeding in which damage from bodily injury or property damage is alleged, but only damages from bodily injury or property damage to which this insurance applies is alleged. It is beyond question that the insurance did not apply to this suit because there were no damages awarded that were covered . . . . It is incomprehensible how "supplementary payments" . . . could apply when there is no coverage . . . . Black's Law Dictionary defines "supplemental" as "that which is added to a thing . . . to complete it." What can be "added" to a coverage that does not exist?<sup>112</sup>

The dissent contended that the case would be better decided in accordance with the holding in *Mintarsih*.<sup>113</sup>

### C. Summary and Synthesis

As is so often the case in insurance, the language of the policy at issue is critical to the outcome in supplementary payments disputes where the insurer has no duty to indemnify the insured for any judgment awarded against it.<sup>114</sup> As a rule, though, an insurer should have no duty to pay interest on a judgment against an insured in a case the insurer defends absent a duty to indemnify the insured.<sup>115</sup> To hold otherwise would force the insurer to indemnify the insured for an uncovered occurrence, since only by paying its full policy limits could an insurer avoid liability potentially far exceeding those limits.<sup>116</sup> In

112. *Id.* at 42 (Jones, J., dissenting) (last alteration in original).

113. *Id.* at 43 (Jones, J., dissenting) (citing and discussing *State Farm Gen. Ins. Co. v. Mintarsih*, 95 Cal. Rptr. 3d 845, 854–56 (Ct. App. 2009)).

114. *See, e.g.*, Ins. Servs. Office, Inc., Commercial General Liability Coverage Form (CG 00 01 04 13), at 8 (2012) (stating that the insurer will pay "[a]ll court costs taxed against the insured in the 'suit,'" but that such costs "do not include attorneys' fees or attorneys' expenses taxed against the insured").

115. *Athridge v. Aetna Cas. & Sur. Co.*, 604 F.3d 625, 631 (D.C. Cir. 2010); *State Farm Gen. Ins. Co. v. Mintarsih*, 95 Cal. Rptr. 3d 845, 857–58 (Ct. App. 2009); *First Mercury Ins. Co. v. Nationwide Sec. Servs., Inc.*, 2016 IL App (1st) 143924, ¶¶ 38–40; *World Harvest Church v. Grange Mut. Cas. Co.*, 68 N.E.3d 738, 746–47 (Ohio 2016).

116. *Athridge*, 604 F.3d at 631.

other words, such a ruling would have the effect of creating coverage where none otherwise exists—and contrary to the clear and unambiguous language of the policy.<sup>117</sup> In addition, to the extent that the insurer’s obligation to pay interest on a judgment can be said either to supplement its duty to indemnify the insured or to be related to its duty to indemnify the insured,<sup>118</sup> it would be anomalous to hold that the insurer should have to pay interest on a judgment that it has no duty satisfy.

It is a closer call where the insurer is alleged to have a duty to pay court costs taxed against the insured. On the one hand, the insurer’s duty to defend extends to claims or causes of action that its policy only potentially covers,<sup>119</sup> such that a standard used to gauge its duty to indemnify should not determine its obligation to pay costs assessed against the insured. Moreover, where the defending insurer is controlling the defense, it is arguably fair to require it to bear the costs of its litigation decisions.

On the other hand, if the policy never covered the claims or causes of action at issue, the insurer never had a duty to defend them.<sup>120</sup> The fact that a court may not make this determination until after costs are incurred does not alter this principle.<sup>121</sup> For that matter, “providing a defense is hardly the same as indemnifying the insured for the other party’s costs and attorney fees that the insured [became] obligated to pay only as a result of being found liable for the underlying misconduct.”<sup>122</sup> Paying an opposing party’s costs is not a necessary aspect of defending the insured.<sup>123</sup> Indeed, because costs are taxed against an insured after liability is established, an insurer’s obligation to pay them is more like its duty to indemnify the insured, which pivots on the existence of coverage.<sup>124</sup> But even when viewed in an indemnity

117. *See id.* (requiring an insurer to pay interest on a judgment in any case it defends would “effectively render[] the policy exclusions that follow the supplementary payment provisions a dead letter”).

118. Again, an insurer’s obligation to pay interest on judgments in some circumstances is not part of its duty to indemnify the insured. A supplementary payments provision does not create coverage under the policy of which it is a part. *Hargob Realty Assocs., Inc. v. Fireman’s Fund Ins. Co.*, 901 N.Y.S.2d 657, 660 (App. Div. 2010). Coverage under the policy, if any, is created by the policy’s insuring agreements. *Id.*

119. *Hartford Cas. Ins. Co. v. J.R. Mktg., L.L.C.*, 353 P.3d 319, 325 (Cal. 2015); *Cox v. Commonwealth Land Title Ins. Co.*, 59 A.3d 1280, 1283 (Me. 2013); *see also Scottsdale Ins. Co. v. MV Transp.*, 115 P.3d 460, 466 (Cal. 2005) (explaining what is meant by “a potential for coverage” or “a potential for indemnity”).

120. *Golden Eagle Ins. Corp. v. Cen-Fed, Ltd.*, 56 Cal. Rptr. 3d 279, 292 (Ct. App. 2007).

121. *Emp’rs Mut. Cas. Co. v. Donnelly*, 300 P.3d 31, 42 (Idaho 2013) (Jones, J., dissenting).

122. *Combs v. State Farm Fire & Cas. Co.*, 49 Cal. Rptr. 3d 917, 923 (Ct. App. 2006).

123. *Id.*

124. *Id.*

light, holding that an insurer must pay a plaintiff's attorneys' fees as supplementary payments is dubious given that the insurer promised to indemnify the insured against covered damages, and attorneys' fees awarded to a prevailing party are not necessarily "damages" for liability insurance purposes.<sup>125</sup>

An insurer's control of the defense ought not determine its obligation to pay costs in the absence of a duty to indemnify because in defending the insured under a reservation of rights, the insurer is no volunteer. The insurer is defending the litigation because the insured tendered the matter to it. Once involved, the insurer must defend the case responsibly.<sup>126</sup> Furthermore, a defending insurer has limited control over the course of the litigation and thus the associated costs; the plaintiff has at least equal and perhaps greater ability to call the tune.

Finally, there is also some danger that requiring an insurer to assume liability for costs in the absence of a duty to indemnify may discourage insurers from agreeing to defend insureds where coverage is doubtful.<sup>127</sup> Fortunately, this risk is substantially lessened where the insurer's supplementary payments provision expressly disclaims the obligation to pay an opposing party's attorneys' fees as costs.<sup>128</sup> Extraordinary cost awards usually include the opponent's attorneys' fees as an element.

On balance, the majority rule that an insurer has no duty under a supplementary payments provision to pay costs assessed against an insured in a case in which it has no duty to indemnify the insured is sound. Where it is feasible to allocate costs between covered and uncovered claims or causes of action, however, the insurer should have to pay costs tied to covered claims or causes of action. A court engaged in this exercise must respect the plain and unambiguous language of the insurance policy at issue. If the policy clearly excludes

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125. See, e.g., *Cutler-Orosi Unified Sch. Dist. v. Tulare Cty. Sch. Dists. Liab./Prop. Self Ins. Auth.*, 37 Cal. Rptr. 2d 106, 114–15 (Ct. App. 1994) (discussing fees awarded under the federal Voting Rights Act).

126. See Douglas R. Richmond, *Reconnoitering Reservations of Rights*, 51 TORT TRIAL & INS. PRAC. L.J. 1, 33 (2015) (explaining that an insurance company defending under a reservation of rights must "defend the insured reasonably, responsibly, and in good faith"); see also *Cleaver-Brooks, Inc. v. Twin City Fire Ins. Co.*, 865 N.W.2d 105, 116 (Neb. 2015) ("When a claim arises, an insurer generally owes a duty to the insured to exercise reasonable care in defending the suit." (footnote omitted)).

127. *Golden Eagle Ins. Corp. v. Cen-Fed, Ltd.*, 56 Cal. Rptr. 3d 279, 292 (Ct. App. 2007).

128. See, e.g., *Ins. Servs. Office, Inc., Commercial General Liability Coverage Form (CG 00 01 04 13)*, at 8 (2012) (stating that court costs taxed against the insured "do not include attorneys' fees or attorneys' expenses taxed against the insured").

from payable costs attorneys' fees or expenses taxed against the insured,<sup>129</sup> the court must enforce that language as written.<sup>130</sup>

### III. PROPERLY INTERPRETING AN INSURER'S OBLIGATION TO PAY AN INSURED'S EXPENSES INCURRED AT THE INSURER'S "REQUEST"

Insurers' payment of interest or courts costs when coverage is debatable is but one of several recurring points of dispute under supplementary payments provisions keyed to insurers' payment of litigation related expenses. Declaratory judgment actions and other coverage litigation between insureds and insurers also spawn supplementary payment questions.

To lay some foundation, a supplementary payments provision typically states that the insurer will pay costs or expenses incurred by the insured at the insurer's "request."<sup>131</sup> It is easy to imagine such costs. In a product liability case against a manufacturer of a tool or piece of machinery, the defense lawyer may want to obtain an identical item for testing by an engineering expert. The defense lawyer's request for the exemplar constitutes a request by the insurer,<sup>132</sup> and the manufacturer deserves to be reimbursed for the cost of the item. In a case where someone is injured on the insured's property, the insurer may ask the insured to document or preserve the accident scene. The insured is entitled to be reimbursed for the reasonable cost of its efforts.

In most cases, any expenses an insurer asks an insured to incur are modest, and insureds rarely seek reimbursement.<sup>133</sup> Regardless, the key is that the insurer's request is tied to its defense or investigation of a third party's claim or suit against the insured. Only then should the insurer have to make a supplementary payment. This should be a straightforward proposition.

129. *Id.*

130. *See Haering v. Topa Ins. Co.*, 198 Cal. Rptr. 3d 291, 294 (Ct. App. 2016) ("If the language of the policy is clear and explicit, it governs."); *Travelers Prop. & Cas. Co. of Am. v. Stresscon Corp.*, 370 P.3d 140, 143 (Colo. 2016) (explaining that an unambiguous insurance policy must be enforced as written).

131. *See, e.g., Ins. Servs. Office, Inc., Homeowners-3 Special Form (HO 00 03 05 11)*, at 21 (2010) (stating that the insurer will pay "[r]easonable expenses incurred by an 'insured' at our request, including actual loss of earnings (but not loss of other income) up to \$250 per day, for assisting us in the investigation or defense of a claim or suit"); *ISO Props., Inc., Personal Auto Policy (PP 00 01 05)*, at 2-3 (2003) ("We will pay on behalf of an 'insured' . . . [o]ther reasonable expenses incurred at our request.").

132. *Bethlehem Constr., Inc. v. Transp. Ins. Co.*, No. CV-03-0324-EFS, 2007 WL 666629, at \*8 (E.D. Wash. Feb. 28, 2007); *Quinn & Seelig*, *supra* note 21, at 135.

133. *Quinn & Seelig*, *supra* note 21, at 135.

Unfortunately, some courts expand the meaning of “request” beyond all reason. In *New Hampshire Indemnity Co. v. Gray*,<sup>134</sup> for example, a Florida court determined that the supplementary payments provision in the New Hampshire Indemnity Co. (NHIC) policy, which stated that NHIC would pay, in addition to its policy limits, “[o]ther reasonable expenses incurred at [its] request,”<sup>135</sup> required it to pay more than \$135,000 in costs assessed against its insured, Damil Belizaire, following a verdict against him.<sup>136</sup> As the court explained:

[U]nder insurance policies such as the one here, insurers enjoy the sole right to settle or litigate claims against their insureds; therefore, choosing to litigate is no different than a request or “expressing a desire” to do so. Any such expression, or request, necessarily encompasses incurring litigation costs, which may mean not only the insurer’s litigation costs, but also those incurred by the opposing party should that party prevail. It is the insurer’s choice to litigate—a decision only it can make—that results in these costs being incurred; thus, “those expenses [are] incurred at the insurer’s request.”<sup>137</sup>

The *Gray* court got it wrong. NHIC did not “choos[e] to litigate” on Belizaire’s behalf; it defended him when he was sued by the plaintiff, John Gray.<sup>138</sup> It was Gray who chose to litigate—not NHIC. NHIC could neither refuse to defend Belizaire nor do so apathetically and thereby reduce any costs that might be awarded against him if Gray prevailed,<sup>139</sup> nor could it prevent Gray’s lawyers from undertaking expensive activities in pursuing his case. While NHIC might have settled with Gray before he filed suit or soon thereafter, nothing in the opinion indicates that NHIC had the opportunity to do so. To the contrary, the size of the verdict against Belizaire—\$2.3 million—and Gray’s catastrophic injury suggest that NHIC never could have settled the case for the clearly inadequate liability limits of its policy.<sup>140</sup>

134. 177 So. 3d 56 (Fla. Dist. Ct. App. 2015).

135. *Id.* at 61.

136. *Id.* at 58–59.

137. *Id.* at 63 (quoting Fla. Ins. Guar. Ass’n, Inc. v. Johnson, 654 So. 2d 239, 240 (Fla. Dist. Ct. App. 1995)).

138. *Id.* at 61.

139. See *Cleaver-Brooks, Inc. v. Twin City Fire Ins. Co.*, 865 N.W.2d 105, 116 (Neb. 2015) (“When a claim arises, an insurer generally owes a duty to the insured to exercise reasonable care in defending the suit.” (footnote omitted)); *JERRY & RICHMOND*, *supra* note 5, at 818 (“An insurer undertaking to defend the insured must perform with due care.” (footnote omitted)).

140. See *Gray*, 177 So. 3d at 58 (stating the verdict amount and calling Gray’s injury “catastrophic”).

More fundamentally, even if “request” could be assigned the meaning the *Gray* court gave it, which is doubtful,<sup>141</sup> in doing so the court violated the cardinal rule of contract construction that policy terms must be read in context.<sup>142</sup> Nothing about the context in which the word was used in the NHIC policy implied an obligation to pay costs taxed to Belizaire. By interpreting the term “request” as it did, the *Gray* court effectively rewrote the NHIC policy, which it was not empowered to do.<sup>143</sup>

Finally, even if NHIC negligently defended Gray’s lawsuit or otherwise failed to protect Belizaire against liability for the disputed costs, the answer was not to torture the NHIC policy until it revealed an obligation to pay.<sup>144</sup> Rather, the solution was for Belizaire to sue NHIC for breach of contract, negligence, or bad faith, or for Gray to do so as his assignee.

Other courts employ even more dubious reasoning in connection with insurers’ declaratory judgment actions against policyholders. These courts hold that an insurer that files a declaratory judgment action against its insured and is held to owe coverage must pay the successful insured’s attorneys’ fees incurred in defending that litigation because the insurer’s suit was a “request” that the insured incur those fees.<sup>145</sup> *Upland Mutual Insurance Co. v. Noel*<sup>146</sup> figures prominently in this line of authority.

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141. See THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1482 (4th ed. 2009) (defining “request” as to “express a desire for; ask for,” to “ask (a person) to do something,” “[t]he act of asking,” or “[s]omething asked for”).

142. *Ritrama, Inc. v. HDI-Gerling Am. Ins. Co.*, 796 F.3d 962, 970 (8th Cir. 2015); *Hartford Cas. Ins. Co. v. Swift Distrib., Inc.*, 326 P.3d 253, 259 (Cal. 2014) (quoting *Bank of the W. v. Super. Ct.*, 833 P.2d 545, 552 (Cal. 1992)); *CT Inv. Mgmt. Co. v. Chartis Specialty Ins. Co.*, 9 N.Y.S.3d 220, 224 (App. Div. 2015).

143. *Zeller v. AAA Ins. Co.*, 40 N.E.3d 958, 961 (Ind. Ct. App. 2015) (“The power to interpret insurance policies does not extend to changing their terms.” (quoting *Keckler v. Meridian Sec. Ins. Co.*, 967 N.E.2d 18, 28 (Ind. Ct. App. 2012))).

144. See *Pharmacists Mut. Ins. Co. v. Urgent Care Pharmacy, Inc.*, 413 F. Supp. 2d 633, 637 (D.S.C. 2006) (stating that courts should not torture insurance policy language to extend coverage the parties never intended).

145. See, e.g., *Milwaukee Mut. Ins. Co. v. Val Pro, Inc.*, Case No. 12-CV-1658 (JNE/JJK), 2013 WL 6388669, at \*3 (D. Minn. Dec. 6, 2013) (applying Minnesota law); *Sentry Select Ins. Co. v. Meyer*, 594 F. Supp. 2d 1193, 1198–99 (D. Nev. 2009) (involving insureds who were not sued in the underlying tort action); *Great W. Cas. Co. v. See*, 185 F. Supp. 2d 1164, 1173 (D. Nev. 2002) (citing *Upland Mut. Ins. Co. v. Noel*, 519 P.2d 737, 743 (Kan. 1974)); *Olympic S.S. Co. v. Centennial Ins. Co.*, 811 P.2d 673, 681 (Wash. 1991)); *Guar. Nat’l Ins. Co. v. McGuire*, 173 F. Supp. 2d 1107, 1116 (D. Kan. 2001) (applying Kansas law); *Occidental Fire & Cas. Co. v. Cook*, 435 P.2d 364, 368 (Idaho 1967) (stating that the insurer could not escape its obligation “on the ground that the action [was] for declaratory relief, when the effect upon the insured [was] as burdensome in its consequences as any other type of legal action”); *State Farm Fire & Cas. Co. v. Sigman*, 508 N.W.2d 323, 325–26 (N.D. 1993) (finding the supplementary payments provision ambiguous); see also *Flannery v. Allstate Ins. Co.*, 49 F. Supp. 2d 1223, 1232–33 (D. Colo. 1999) (reasoning that

*Noel* was a declaratory judgment action by Upland Mutual against its insureds, Raymond and Viola Noel, to determine whether Upland Mutual had a duty to defend and indemnify them under a homeowners insurance policy.<sup>147</sup> The underlying case arose out of an accident in which two cars driven by the Noels' sons collided, killing both young men and one of their passengers, and injuring another passenger.<sup>148</sup> The Noels had sought coverage for the plaintiffs' claim that Raymond Noel negligently entrusted his car to his son, Steven.<sup>149</sup>

The Kansas Supreme Court concluded that Upland Mutual had a duty to defend the Noels in the underlying litigation.<sup>150</sup> The *Noel* court also held that because Upland Mutual had a duty to defend the Noels, the Noels were entitled to recover from Upland Mutual their attorneys' fees and expenses incurred in defending the underlying case.<sup>151</sup> The court then went further to hold that the Noels could recover their attorneys' fees and expenses incurred defending the declaratory judgment action.<sup>152</sup> In so holding, the *Noel* court agreed with the trial court that this result flowed from the supplementary payments provision in the Upland Mutual policy, which stated, "With respect to such insurance as is afforded by this policy . . . this Company shall pay, in addition to the applicable limits of liability: . . . (d) all reasonable expense, other than loss of earnings, incurred by the insured at this Company's request."<sup>153</sup> The court reasoned that "the filing of this suit constituted a 'request' by Upland and therefore the company [was] obligated under its policy to reimburse the . . . Noels for all reasonable expenses incurred at the company's request."<sup>154</sup>

The result might well have been different had the Upland Mutual policy stated that Upland Mutual would pay the insureds' reasonable expenses with respect to any claim or suit it defended, thus explicitly confining its obligation to expenses incurred in the underlying ac-

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the insured could recover his fees in a declaratory judgment action he filed because the carrier's delay in suing that allowed him to win the race to the courthouse was equivalent to initiating litigation, and thus constituted a request that he incur attorneys' fees); *Olympic S.S. Co. v. Centennial Ins. Co.*, 811 P.2d 673, 680-81 (Wash. 1991) (involving a successful declaratory judgment action filed by the insured).

146. 519 P.2d 737 (Kan. 1974).

147. *Id.* at 738.

148. *Id.*

149. *Id.* at 738-39.

150. *Id.* at 741.

151. *Id.* at 742.

152. *Noel*, 519 P.2d at 742.

153. *Id.* at 739.

154. *Id.* at 743.

tion.<sup>155</sup> Insurers do themselves a substantial favor by expressly stating that they will pay an insured’s reasonable expenses only in connection with a claim or suit the insurer defends, and by further explicitly limiting the obligation to reasonable expenses incurred by the insured to assist in the defense or investigation of that claim or suit.<sup>156</sup> For instance, a standard CGL policy states:

[The insurance company] will pay, with respect to any claim we investigate or settle, or any “suit” against an insured we defend:

....

- d. All reasonable expenses incurred by the insured at our request to assist us in the investigation or defense of the claim or “suit”, including actual loss of earnings up to \$250 a day because of time off from work.<sup>157</sup>

To interpret that clause as requiring the insurer to pay the insured’s attorneys’ fees and costs in a declaratory judgment action would be absurd.<sup>158</sup> Even without such a limitation, however, the *Noel* court erred by interpreting the Upland Mutual policy as it did.<sup>159</sup>

An insurer’s pursuit of a declaratory judgment action is not a “request” that the insured incur attorneys’ fees and expenses.<sup>160</sup> Indeed, the insurer is requesting nothing of the insured; rather, it is *asking the court* to determine its contractual obligations to the insured. The insurer would be delighted if the insured did not contest the declaratory judgment action. Even if a court were to reason that the term “re-

155. See, e.g., *Citizens Ins. Co. of Am. v. Charity*, 871 F. Supp. 1401, 1403–04 (D. Kan. 1994) (differentiating between one supplementary payments provision that did not tie the insurer’s obligation to pay expenses to its defense of the insured and a supplementary payments provision in another insurer’s policy that did, and holding that the first insurer had to pay the insured’s attorneys’ fees and expenses in the declaratory judgment action, but the second insurer did not).

156. See, e.g., *Liberty Mut. Ins. Co. v. Wynn Las Vegas, LLC*, 2:13-cv-852-LDG-PAL, 2015 WL 5731904, at \*2 (D. Nev. Sept. 30, 2015) (“[T]he plain and unambiguous reading of this provision requires that any expenses . . . would be paid by Liberty Mutual only if they are ‘incurred by the insured at [Liberty Mutual’s] request to assist [Liberty Mutual] in the investigation or defense of the claim or ‘suit’.” The facts do not indicate that Liberty Mutual requested defendants to assist it in the investigation or defense of a claim or suit.”); *Citizens Ins. Co. of Am.*, 871 F. Supp. at 1403–04 (concluding that a policy containing such language did not obligate the insurer to pay the insured’s attorneys’ fees and expenses in a declaratory judgment action).

157. Ins. Servs. Office, Inc., Commercial General Liability Coverage Form (CG 00 01 04 13), at 8–9 (2012).

158. See, e.g., *Cont’l W. Ins. Co. v. Heritage Estates Mut. Hous. Ass’n, Inc.*, 77 P.3d 911, 914 (Colo. Ct. App. 2003) (involving a declaratory judgment action filed by the insurer in which the insured counterclaimed; the insured argued that the insurer had to pay its fees and costs for defending the declaratory judgment action and for prosecuting its counterclaims, which the court characterized in the former instance as “at best” a “strained construction” of the supplementary payments provision, and in the latter instance as an “absurd interpretation” of the policy).

159. See 2 WINDT, *supra* note 2, § 8:14, at 8-43 (branding the policy interpretation in *Noel* and other cases taking the same approach “manifestly unreasonable”).

160. *Green v. Allstate Ins. Co.*, Case No. 3:11-cv-00210-TMB, 2015 WL 10939709, at \*10 (D. Alaska Mar. 26, 2015).

quest” was unclear or uncertain when read in isolation,<sup>161</sup> that conclusion would not automatically render it ambiguous and thus justify its construction against the insurer.<sup>162</sup> When interpreting an insurance policy, a court’s task “is not only to examine the words in controversy but to examine them in light of the policy as a whole.”<sup>163</sup> When reading these clauses in the context of the supplementary payments provision as a whole, it is clear that an insurer that litigates coverage with its insured is not requesting the insured to incur attorneys’ fees and expenses for the insurer to pay if the insured prevails. The fact that the insurer might have included additional clarifying language in its supplementary payments provision does not render the policy ambiguous.<sup>164</sup>

Fortunately, most courts hold that an insurer that litigates coverage with its insured does not thereby request that the insured incur reasonable fees and costs that the insurer must pay if the insured prevails.<sup>165</sup> This line of authority traces back over sixty years to the

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161. *See, e.g.*, *M-B Co. v. Parker Hannafin Corp.*, 447 N.W.2d 394, 1989 WL 111968, at \*3 (Wis. Ct. App. July 12, 1989) (unpublished table decision) (applying Ohio law and reading policy language in isolation).

162. *Bartkowiak v. Underwriters at Lloyd’s, London*, 2015 IL App (1st) 133549, ¶¶ 32–35, 39 N.E.3d 176, 184.

163. *Id.*

164. *Just v. Farmers Auto. Ins. Ass’n*, 877 N.W.2d 467, 479 (Iowa 2016).

165. *See, e.g.*, *Green*, 2015 WL 10939709, at \*10–11 (predicting how the Alaska Supreme Court would rule); *Liberty Mut. Ins. Co. v. Wynn Las Vegas, LLC*, 2:13-cv-852-LDG-PAL, 2015 WL 5731904, at \*2 (D. Nev. Sept. 30, 2015) (“[T]he plain and unambiguous reading of this provision requires that any expenses . . . would be paid by Liberty Mutual only if they are ‘incurred by the insured at [Liberty Mutual’s] request to assist [Liberty Mutual] in the investigation or defense of the claim or ‘suit’. The facts do not indicate that Liberty Mutual requested defendants to assist it in the investigation or defense of a claim or suit.”); *Am. Family Mut. Ins. Co. v. Teamcorp., Inc.*, 835 F. Supp. 2d 1083, 1090–91 (D. Colo. 2011) (applying Colorado law); *Hartford Accident & Indem. Ins. Co. v. Capella Grp., Inc.*, No. 4:09-CV-295-A, 2009 U.S. Dist. LEXIS 118669, at \*17–19 (N.D. Tex. Dec. 21, 2009) (applying Texas law); *Travelers Indem. Co. v. Arena Grp. 2000, L.P.*, No. 05-CV-1435 JLS (CAB), 2008 WL 696932, at \*3–4 (S.D. Cal. Mar. 13, 2008) (applying California law); *Atl. Cas. Ins. Co. v. Epstein*, No. Civ.A.03-6506, 2004 WL 2075038, at \*5–6 (E.D. Pa. Sept. 15, 2004) (applying Pennsylvania law and noting that because the insurer was not defending the insured in the declaratory judgment action, the supplementary payments provision did not apply); *Liberty Mut. Ins. Co. v. Black & Decker Corp.*, 383 F. Supp. 2d 200, 222 (D. Mass. 2004) (predicting Massachusetts law); *Diocese of Winona v. Interstate Fire & Cas. Co.*, 916 F. Supp. 923, 933 (D. Minn. 1995) (interpreting Minnesota law); *Cont’l Cas. Co. v. Cole*, No. 79-1849, 1984 U.S. Dist. LEXIS 15836, at \*20–25 (D.D.C. June 15, 1984) (explaining that the policy linked supplementary payments to the defense of a third-party action against the insured); *Clark v. Exch. Ins. Ass’n*, 161 So. 2d 817, 819 (Ala. 1964) (concluding that a provision stating the insurer would reimburse the insured for “all reasonable expenses . . . incurred at the company’s request” did not entitle the insured to recover its fees in a declaratory judgment action); *Carroll v. Hanover Ins. Co.*, 71 Cal. Rptr. 868, 871 (Ct. App. 1968) (deciding that the insured’s urged policy interpretation was unreasonable); *Allstate Ins. Co. v. Huizar*, 52 P.3d 816, 819 (Colo. 2002) (“[T]he . . . insurance policy . . . cannot be reasonably construed to obligate the insurer to defend the insured against a claim of the insurer itself, much less to pay the insured’s

Fifth Circuit's seminal decision in *Milwaukee Mechanics Insurance Co. v. Davis*.<sup>166</sup>

The supplementary payments provision embedded in the insuring agreements in the policy in *Milwaukee Mechanics* included this clause: "The Company shall reimburse the insured for all reasonable expenses, other than loss of earnings, incurred at the Company's request."<sup>167</sup> The insured argued that this language required the insurer to pay the insured's attorneys' fees incurred in the parties' declaratory judgment action as well as those incurred defending the underlying tort action, and the district court agreed.<sup>168</sup> The Fifth Circuit did not:

To say that a plaintiff in a declaratory judgment action, or for that matter in any law suit, "requests" the defendant to employ attorneys to contest the action, is a mere play upon words and is contrary to the real substance of the transaction. Due process would, of course, accord the insured the privilege of resisting the company's claim of non-liability and to that end the insured would have the right to employ attorneys, but it would be contrary to every interest of the company to say that the company "requested" such action. We do not think that either the insurance company or the insured could have had the intention that the insurance company could defend a suit on its policy or could file a declaratory judgment action only at the risk of being liable for attorney's fees incurred by the insured. In our opinion, the attorney's fees incurred by the insured

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legal expenses to challenge the validity of the . . . the contract. It is clear . . . that the insurer's obligation to defend extends only to suits by third parties with claims against the insured person."); *Buell Indus., Inc. v. Greater N.Y. Mut. Ins. Co.*, No. X04CV 980116309S, 1999 WL 566969, at \*1 (Conn. Super. Ct. July 21, 1999); *Nat'l Union v. Rhone Poulenc*, No. 87C-09-11, 1995 Del. Ch. LEXIS 107, at \*6-7 & n.1 (Del. Ch. Mar. 17, 1995) ("What the insured has contracted for . . . is freedom from *tort* liability, not freedom from the burden of litigating a contract action. The burden of coverage litigation has not been contractually transferred from the insured to the insurer . . ."); *Fla. Ins. Guar. Ass'n, Inc. v. All the Way With Bill Vernay, Inc.*, 864 So. 2d 1126, 1130 (Fla. Dist. Ct. App. 2003) (quoting and citing *Steele v. Kinsey*, 801 So. 2d 297, 299 (Fla. Dist. Ct. App. 2001)) (stating that an insurer's obligation is to pay only those expenses that it expressly authorized, and thus that its supplementary payments obligation does not extend to a declaratory judgment action); *Int'l Ins. Co. v. Rollprint Pkg. Prods., Inc.*, 728 N.E.2d 680, 694 (Ill. App. Ct. 2000) (citing *Duke Univ. v. St. Paul Mercury Ins. Co.*, 384 S.E.2d 36, 46 (N.C. Ct. App. 1989)); *Union Mut. Ins. Co. v. Inhabitants of the Town of Topsham*, 441 A.2d 1012, 1018-19 (Me. 1982); *Litho Color, Inc. v. Pac. Emp'rs Ins. Co.*, 991 P.2d 638, 648 (Wash. Ct. App. 1999); *Farmers Ins. Co. of Wash. v. Rees*, 617 P.2d 747, 749 (Wash. Ct. App. 1980) (adopting the reasoning of a seminal Fifth Circuit decision); *see also* *Foremost Ins. Co. v. Putzier*, 606 P.2d 987, 993 (Idaho 1980) (stating that the insurer's duty to defend the insured did not require the insurer to pay the insured's attorneys' fees in a declaratory judgment action); *Mikel v. Am. Ambassador Cas. Co.*, 644 N.E.2d 168, 171 & n.1 (Ind. Ct. App. 1994) (reasoning that the insurer could not have requested that the insured incur fees and expenses where the insured filed the declaratory judgment action, but not deciding whether the result would be different where the insurer initiated the litigation).

166. 198 F.2d 441 (5th Cir. 1952).

167. *Id.* at 444 (quoting the insurance policy).

168. *Id.*

in the declaratory judgment action were not recoverable from the insurance company.<sup>169</sup>

The *Milwaukee Mechanics* court corrected the judgment to eliminate the attorneys' fees awarded to the insured for defending the declaratory judgment action.<sup>170</sup> The Fifth Circuit affirmed the judgment in all other respects.<sup>171</sup>

The majority approach is unquestionably correct. If an insured that prevails in litigation with its insurer is entitled to recover its reasonable attorneys' fees, any fee award must be based on a statute or administrative regulation,<sup>172</sup> or rest on a common law exception to the American Rule.<sup>173</sup> A supplementary payments provision is no basis for awarding an insured its attorneys' fees and expenses incurred in connection with a declaratory judgment action, regardless of who initiated the litigation.

An unusual Nevada federal case, *Sentry Select Insurance Co. v. Meyer*,<sup>174</sup> in which the court acknowledged the majority rule but deviated from it, offers no reason to reject the majority rule or to pick and choose when to apply it. *Meyer* has no precedential value regardless.<sup>175</sup>

In *Meyer*, Michael Thieman, who was driving a tractor-trailer that he leased from Dean and Billie Meyer, hit a motorcycle driven by Lance Otterstein.<sup>176</sup> Otterstein sued Thieman, but did not sue the Meyers.<sup>177</sup>

Thieman tendered his defense in Otterstein's suit to Sentry Select Insurance Co. (Sentry), which had issued a truckers liability policy to

169. *Id.* at 445.

170. *Id.*

171. *Id.*

172. *See, e.g.*, FLA. STAT. § 627.428(1) (2016) ("Upon the rendition of a judgment or decree by any of the courts of this state against an insurer and in favor of any named or omnibus insured or the named beneficiary under a policy or contract executed by the insurer, the trial court or, in the event of an appeal in which the insured or beneficiary prevails, the appellate court shall adjudge or decree against the insurer and in favor of the insured or beneficiary a reasonable sum as fees or compensation for the insured's or beneficiary's attorney prosecuting the suit in which the recovery is had."); TEX. INS. CODE § 541.152(a)(1) (2011) (providing for the award of "court costs and reasonable and necessary attorney's fees" in addition to actual damages in an action alleging an unfair method of competition or an unfair or deceptive act or practice in the business of insurance).

173. *See* 2 WINDT, *supra* note 2, § 8:14, at 8-36 to -40 (discussing attorneys' fee awards to insureds who prevail over insurers in declaratory judgment actions).

174. 594 F. Supp. 2d 1193 (D. Nev. 2009).

175. *See* *Vertex Surgical, Inc. v. Paradigm Biodevices, Inc.*, 648 F. Supp. 2d 226, 231 (D. Mass. 2009) ("As Judges Posner and Easterbrook have repeatedly and accurately observed, with characteristic bluntness, district court decisions are neither authoritative nor precedential.").

176. *Meyer*, 594 F. Supp. 2d at 1194.

177. *Id.* at 1194-95.

Dean Meyer.<sup>178</sup> The Meyers stayed out of the matter.<sup>179</sup> Sentry denied that its policy covered the tractor-trailer and then filed a declaratory judgment action in which it named Thieman and the Meyers as defendants.<sup>180</sup> Oddly, despite naming the Meyers as defendants, Sentry sought no relief concerning them.<sup>181</sup>

The Meyers incurred around \$20,000 in attorneys' fees defending the declaratory judgment action and sought reimbursement under the supplementary payments provision in the Sentry policy, which stated that Sentry would "pay for the 'insured'. . . [a]ll reasonable expenses incurred by the 'insured' at [Sentry's] request."<sup>182</sup> While recognizing that the Meyers' claim contradicted the majority rule discussed above, the court agreed that the Meyers had incurred their defense costs at Sentry's request:

In [the] cases [articulating the majority rule], the insureds sought and were denied coverage by their insurers. After obtaining judgments establishing that their insurers should have defended them, the insureds became parties to separate actions in which they sought reimbursement for attorney fees incurred in obtaining those judgments. Here, in contrast, the insureds never sought . . . coverage for any party or enforcement of any right (besides a contractual right to attorney fees addressed here). Neither, apparently, had any party claimed entitlement to recovery against them in the underlying action . . . . Sentry likewise [made] no allegation that they breached the terms of the policy. The Meyers incurred no defense costs in the underlying action and were never a party to it, as they apparently ha[d] no stake in the litigation. Indeed, the Meyers' role in the underlying action and accident appear[ed] inconsequential at best. . . . [T]he Meyers [were] not a necessary party to this action, and their inclusion here was gratuitous and solely for the benefit of their insurer.

For this reason . . . Sentry's decision to name the Meyers as defendants and compel them to defend the suit [was] . . . a "request," within the meaning of the policy provision at issue, that the Meyers participate as parties to this action and incur related attorney fees.<sup>183</sup>

If the *Meyer* court's frustration with Sentry's inept pleading or litigation strategy was understandable, its reasoning was not. As explained earlier, Sentry requested nothing of the Meyers; it asked the court to determine its obligations under its policy. Sentry would have

178. *Id.* at 1195.

179. *Id.*

180. *Id.*

181. *Id.*

182. *Meyer*, 594 F. Supp. 2d at 1195 (internal quotation marks omitted).

183. *Id.* at 1198–99.

been happy for the Meyers to sit out the declaratory judgment action. For that matter, it is a mystery how the Meyers' lawyer could have charged \$20,000 to defend them. If the court believed that Sentry should be made to pay the Meyers' legal costs as a penalty for baselessly suing them or for clumsily pleading its cause of action, it should have imposed sanctions. The Meyers perhaps could have sued Sentry for malicious prosecution or abuse of process, but whatever the proper remedial approach may have been, the court's misconstruction of the supplementary payments provision in the Sentry policy was an error.

#### IV. THE INSURER'S OBLIGATION TO PAY PREMIUMS FOR BONDS

##### A. *Appeal or Supersedeas Bonds*

While, as we have just seen, litigation between insurers and insureds gives rise to supplementary payments controversies, most supplementary payment disputes relate to suits by third parties against insureds. In light of the frequency of appeals in civil litigation and insurers' duty to defend insureds through appeal in some cases, as well as efforts to collect or secure judgments that are a regular part of litigation, it is no surprise that insurers' duties under those portions of their supplementary payments provisions that concern the costs of bonds are more than occasionally tested.<sup>184</sup>

Supplementary payments provisions often state that the insurer will pay some limited amount for certain bail bonds or for bonds to release the cost of attachments as long as the bond amount is within the liability limits of the policy.<sup>185</sup> These provisions do not say that the insurer will pay the cost of appeal bonds, also known as supersedeas bonds. Other policies state that the insurer will pay "premiums on bonds required" in suits the insurer defends but do not expressly identify appeal bonds.<sup>186</sup> Still other policies state that the insurer will pay premiums on appeal bonds in any suit the insurer defends.<sup>187</sup> There is, quite simply, great variation among policies when it comes to appeal or supersedeas bonds.

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184. *See, e.g.*, Charter Oak Ins. Co. v. Maglio Fresh Food, 45 F. Supp. 3d 461, 474 (E.D. Pa. 2014) ("The [p]olicy provides for the payment of 'cost' of a bond. The parties do not dispute that this provision would apply to appellate bonds; however, it remains unclear what the [p]olicy means by the 'cost' of a bond. The Court interprets that term to include whatever amount would be necessary to secure a bond.").

185. *See, e.g.*, Ins. Servs. Office, Inc., Commercial General Liability Coverage Form (CG 00 01 04 13), at 8 (2012).

186. *See, e.g.*, Ins. Servs. Office, Inc., Homeowners-3 Special Form (HO 00 03 05 11), at 20 (2010).

187. *See, e.g.*, ISO Props., Inc., Personal Auto Policy (PP 00 01 01 05), at 2 (2003).

If a supplementary payments provision states that the insurer will pay premiums for appeal bonds, the insurer must do so in accordance with the policy language. If the policy further states that the insurer need not apply for or furnish an appeal bond, then that language will be effective.<sup>188</sup> In that case, an insured that wants to bond an appeal may need to procure the bond and get reimbursed for the premium by the insurer. The insurer does not breach its duty to defend by requiring the insured to follow that procedure rather than initiating or leading efforts to obtain a bond for the insured.<sup>189</sup>

What if the policy does not expressly provide for the payment of premiums for appeal bonds? A policy's promise to pay for bonds to release attachments does not create a duty to pay the premium for an appeal bond. These two types of bonds do not secure similar obligations.<sup>190</sup> An appeal or supersedeas bond is not a bond to release an attachment.<sup>191</sup> Bonds to release attachments are posted to allow the repossession of property that has been seized in a prejudgment process, or to clear title to property that has been attached.<sup>192</sup> In contrast, an appeal or supersedeas bond prevents a judgment creditor from attempting to collect a judgment by levying on the insured's assets or garnishing the insured's accounts or wages pending appeal.<sup>193</sup>

Courts have required insurers to pay premiums for appeal bonds in cases where the policies were silent on that obligation.<sup>194</sup> In *Franklin v. National General Assurance Co.*,<sup>195</sup> for example, the court stated that National General's "contractual obligations involving the posting of an appeal bond [fell] within [its] duty to defend its insured."<sup>196</sup> The *Franklin* court's position is consistent with courts' general view that an insurer's duty to defend includes a duty to appeal when there are reasonable grounds for appeal and an appeal would serve the insured's

188. See, e.g., *James River Ins. Co. v. Interlachen Propertyowners Ass'n*, No. 14-3434 ADM/LIB, 2016 WL 3093383, at \*5-6 (D. Minn. June 1, 2016) (applying Minnesota law).

189. *Id.* at \*6.

190. Wright, *supra* note 10, at 61.

191. *Wiegert-Stathes v. Am. Family Mut. Ins. Co.*, No. A-08-1041, 2009 WL 3381578, at \*6 (Neb. Ct. App. Oct. 20, 2009).

192. Wright, *supra* note 10, at 61.

193. *Id.*

194. See also *Wiegert-Stathes*, 2009 WL 3381578, at \*7 ("We can envision that posting a supersedeas bond . . . could be required as a 'cost of defense' [and thus encompassed by a supplementary payments provision even if not expressly identified] in certain situations. The obvious example would be where the appealed judgment is less than the policy limits and the insured justifiably expects to be protected from levy while the adverse judgment is on appeal.").

195. No. 2:13-CV-103-WKW, 2013 WL 3854486 (M.D. Ala. July 25, 2013).

196. *Id.* at \*2.

interests.<sup>197</sup> In *Merritt v. J.A. Stafford Co.*,<sup>198</sup> the California Supreme Court noted that an insurer's failure to obtain a bond "may result in the insured losing large amounts of property due to execution sales during the appeal and thus losing . . . the benefits of the insurance."<sup>199</sup> The *Merritt* court therefore held that an insurer's implied duty of good faith and fair dealing obligates it to file an appeal bond "in an amount sufficient to cover the part of the judgment for which it is liable."<sup>200</sup>

In comparison, other courts have held that an insurer has no duty to pay for an appeal bond where its policy does not expressly impose that obligation. In *United Fire & Casualty Co. v. Shelly Funeral Home, Inc.*,<sup>201</sup> for example, the Iowa Supreme Court agreed with the trial court that United Fire did not act in bad faith by appealing on the insureds' behalf while declining to post a supersedeas bond to protect them against possible execution on the judgment against them during the appeal.<sup>202</sup> The *Shelly* court observed that the policy did not require United Fire to obtain a bond and the insurer reasonably doubted its duty to indemnify the insureds.<sup>203</sup> Considering United Fire's "good-faith doubts about coverage, and the underlying purpose of the bond to secure the judgment," the court believed that it was reasonable for United Fire not to chance assuming liability on the bond regardless of the result of the appeal.<sup>204</sup>

Assuming that an insurer must pay the premium for an appeal bond—whatever the source of that obligation—the question then becomes the scope of the insurer's duty. If the amount of the judgment exceeds the policy limits, must the insurer pay for a bond in the full amount of the judgment, or must it only procure a bond to cover the portion of the judgment that is within its policy limits? It appears to be the majority rule that the insurer need only pay for a bond that covers that portion of the judgment that is within its policy limits.<sup>205</sup>

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197. See, e.g., *Delmonte v. State Farm Fire & Cas. Co.*, 975 P.2d 1159, 1168 (Haw. 1999) (stating that an insurer has a duty to appeal only if reasonable grounds exist); *Pharmacists Mut. Ins. Co. v. Myers*, 993 A.2d 413, 421 (Vt. 2010) (concluding that the insurer should have appealed in a mixed action).

198. 440 P.2d 927 (Cal. 1968).

199. *Id.* at 931.

200. *Id.*

201. 642 N.W.2d 648 (Iowa 2002).

202. *Id.* at 658. The insureds' personal counsel persuaded the plaintiffs to delay execution on their judgment until the insureds resolved their coverage dispute with United Fire. *Id.* at 652.

203. *Id.* at 658.

204. *Id.*

205. See *Bowen v. Gov't Emps. Ins. Co.*, 451 So. 2d 1196, 1198 (La. Ct. App. 1984) (describing this as the majority rule); see, e.g., *St. Paul Fire & Marine Ins. Co. v. Nolen Grp., Inc.*, Nos. 02-8601, 03-3192, 03-3651, 2007 WL 4245740, at \*4 (E.D. Pa. Nov. 30, 2007) (interpreting Pennsylvania law); *Merritt v. J.A. Stafford Co.*, 440 P.2d 927, 931 (Cal. 1968) ("[T]he insurer cannot

After all, if the insurer were to purchase a bond for the full amount of the judgment and the case was affirmed on appeal, the insurer would be liable on the bond for the entire judgment.<sup>206</sup> This would effectively rewrite the policy to increase the liability limits beyond those for which the insured contracted.<sup>207</sup>

*Wiegert-Stathes v. American Family Mutual Insurance Co.*<sup>208</sup> is instructive. In that case, Erich Wiegert won a \$360,000 judgment against Fretaco, Inc., which was a Taco John's restaurant franchisee. Wiegert was one of several customers who contracted hepatitis A as a result of eating at the restaurant.<sup>209</sup> By the time of his judgment, Fretaco had exhausted all but about \$800 of the \$500,000 per occurrence liability limit of its American Family policy through settlements with other sick customers.<sup>210</sup> Fretaco's owners understood that the final settlement that effectively exhausted the policy limits meant that American Family would have no obligation to post a supersedeas bond in Wiegert's case should there be an appeal.<sup>211</sup> They nonetheless preferred that strategy because, for reasons not relevant here, it eliminated their personal exposure.<sup>212</sup>

American Family appealed Wiegert's judgment on behalf of Fretaco, but did not post a supersedeas bond.<sup>213</sup> The judgment was

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be required to post a bond for the entire judgment when its liability does not extend to the entire judgment. Fairness . . . requires that the insurer be permitted to fulfill its covenant of good faith and fair dealing by filing an appeal bond in an amount sufficient to cover the part of the judgment for which it is liable . . . ."); *Cansler v. Harrington*, 643 P.2d 110, 115 (Kan. 1982) (stating that an insurer may avoid being garnished by procuring a bond in the amount of its policy limits rather than the full amount of the judgment); *State ex rel. Brickner v. Saitz*, 664 S.W.2d 209, 214 (Mo. 1984) ("There is no reason to put the insurance company to the choice of paying the plaintiff the full amount of its coverage, with restitution in the event of reversal possibly in jeopardy, or of putting up a bond for the non-covered as well as the covered portion of the judgment so as to provide effective coverage which the insured did not buy."); *Courvoisier v. Harley Davidson of Trenton, Inc.*, 742 A.2d 542, 547 (N.J. 1999) ("We think that the majority rule is sensible. The relationship of the insured and the insurer in these circumstances is one of contractual indemnification. . . . The insurer has agreed, in return for a premium, to be responsible to pay a judgment against the insured up to the face amount of the insurance contract." (citations omitted)). *But see Burford Equip. Co. v. Centennial Ins. Co.*, 857 F. Supp. 1499, 1504-05 (M.D. Ala. 1994) (concluding that an insurer had to bond the full amount of the judgment where its policy stated that if it defended a suit, it would pay in addition to the applicable limits of liability "premiums on appeal bonds required in any such suit").

206. *Bowen*, 451 So. 2d at 1198.

207. *Id.*

208. No. A-08-1041, 2009 WL 3381578 (Neb. Ct. App. Oct. 20, 2009).

209. *Id.* at \*1.

210. *Id.* at \*1-2.

211. *Id.* at \*1.

212. *Id.*

213. *Id.* at \*2.

affirmed on appeal.<sup>214</sup> Unable to collect his judgment from American Family, Wiegert accepted \$47,000 and an assignment of its claims against American Family from Fretaco, which promptly went out of business.<sup>215</sup>

Wiegert, as Fretaco's assignee, then sued American Family for bad faith and breach of contract, among other theories.<sup>216</sup> He lost in the trial court and his bad luck turned worse when he died after appealing to the Nebraska Court of Appeals.<sup>217</sup> Hedy Wiegert-Stathes, the personal representative of his estate, pursued the appeal.<sup>218</sup>

The trial court had found that American Family had no responsibility to obtain a supersedeas bond beyond its policy limits.<sup>219</sup> The *Wiegert-Stathes* court agreed:

[A] supersedeas bond becomes a guarantee of payment of the judgment, and in exchange . . . the judgment creditor loses the right to levy on its judgment during the . . . appeal. Therefore . . . it becomes clear that the insurer's duty to post a supersedeas bond . . . is dependent on what coverage remains. . . . [I]f the judgment . . . is more than the coverage, then the . . . requirements for supersedeas bonds under [a Nebraska statute] necessarily result in an expansion of the policy limits if such a bond is posted and the judgment is upheld. In that situation, the judgment debtor is underinsured and has no rightful expectation that the judgment will be superseded because doing so necessarily expands the policy limits.<sup>220</sup>

When it came time to appeal Wiegert's judgment, American Family had about \$800 of its policy limits left, meaning that the policy was not exhausted and it thus had a duty to defend Fretaco through appeal.<sup>221</sup> But the bond for that appeal would have had to be for at least \$360,000, that being the amount of Wiegert's judgment.<sup>222</sup> The *Wiegert-Stathes* court reasoned that if it were to require American Family to post such a bond, and if the judgment was upheld, it would be "judicially enlarging" the policy limits from \$500,000 to more than \$860,000.<sup>223</sup> In other words, it would be imposing a burden on the insurer "far greater than it contracted for and was paid premium for, and on the other hand, the insured would gain a benefit it did not contract for or pay premium for," all of which would be "completely

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214. *Wiegert-Stathes*, 2009 WL 3381578 at \*2.

215. *Id.*

216. *Id.*

217. *Id.*

218. *Id.*

219. *Id.* at \*3.

220. *Wiegert-Stathes*, 2009 WL 3381578 at \*7.

221. *Id.*

222. *Id.*

223. *Id.*

contrary to the explicit language of the policy limiting American Family's obligation to \$500,000 per occurrence."<sup>224</sup> As a result, the *Wiegert-Stathes* court affirmed the trial court's decision in favor of American Family.<sup>225</sup>

The *Wiegert-Stathes* court noted that an insured concerned about execution on the excess portion of a judgment may protect itself by procuring a bond for that amount.<sup>226</sup> The court in *Bowen v. Government Employees Insurance Co.*<sup>227</sup> went a step further to hold that while an insurer need not pay to bond a judgment that exceeds its policy limits, its duty of good faith and fair dealing requires it "to assist the insured in attempting to arrange bond for the excess amount."<sup>228</sup> This holding is questionable at best because it appears to create a new duty in the guise of good faith and fair dealing, even though the implied duty of good faith and fair dealing relates to existing contractual duties—it does not create new ones.<sup>229</sup> If a *Bowen* duty does exist, the insurer should be able to satisfy it by referring the insured to brokers who can help it procure a bond.<sup>230</sup> It may be enough that the insurer simply keeps the insured informed about the status of the appeal so that she is positioned to protect herself against personal liability.<sup>231</sup> An insurer's duty to assist the insured, if any, cannot include furnishing collateral for the insured's bond because requiring the insurer to do so would effectively rewrite the policy to impose a new obligation on the insurer.

224. *Id.*

225. *Id.* at \*11.

226. *Wiegert-Stathes*, 2009 WL 3381578 at \*7.

227. 451 So. 2d 1196 (La. Ct. App. 1984).

228. *Id.* at 1198.

229. *Armed Forces Bank, N.A. v. Hicks*, 365 P.3d 378, 387 (Colo. Ct. App. 2014); *Hanaway v. Parkersburg Grp., LP*, 132 A.3d 461, 471 (Pa. Super. Ct. 2015).

230. If the policy disclaims an obligation to apply for or furnish appeal bonds, a *Bowen* duty cannot include these activities or any other steps that might be reasonably so characterized because the implied duty of good faith and fair dealing cannot alter or override express policy language. *QBE Ins. Corp. v. Chalfonte Condo. Apt. Ass'n, Inc.*, 94 So. 3d 541, 548 (Fla. 2012); *Dave's Inc. v. Linford*, 291 P.3d 427, 435 (Idaho 2012) (citing *Huyett v. Idaho State Univ.*, 104 P.3d 946, 952 (Idaho 2004)); *Glenn v. HealthLink HMO, Inc.*, 360 S.W.3d 866, 877 (Mo. Ct. App. 2012); *Landye Bennett Blumstein, LLP v. Jeffrey S. Mutnick, P.C.*, 346 P.3d 1265, 1274 (Or. Ct. App. 2015); *Young Living Essential Oils, LC v. Marin*, 266 P.3d 814, 817 (Utah 2011); *SAK & Assocs., Inc. v. Ferguson Constr., Inc.*, 357 P.3d 671, 676 (Wash. Ct. App. 2015) (citing *Myers v. State*, 218 P.3d 241, 244 (Wash. Ct. App. 2009)).

231. *See Bowen*, 451 So. 2d at 1198 (discussing the insurer's satisfaction of its duty of good faith and fair dealing).

*B. Bonds to Release Attachments*

The supplementary payments provision in a standard CGL policy states that the insurer will pay with respect to a claim it investigates or settles, or a suit it defends, the “cost of bonds to release attachments, but only for bond amounts within the applicable limit of insurance.”<sup>232</sup> A common question, here again, is whether the insurer must pay for bond amounts in excess of the liability limits of its policy. The short answer is no, as the *Graf v. Hospitality Mutual Insurance Co.*<sup>233</sup> court explained.

Hospitality Mutual Insurance Co. insured Torcia & Sons, Inc. (Torcia), which owned the Fat Cat Bar & Grill.<sup>234</sup> The insurance policy had liability limits of \$500,000 per person.<sup>235</sup> Katie Graf was hurt at Fat Cat’s and sued Torcia.<sup>236</sup> She was awarded \$500,000 in damages and just over \$111,000 in pre-judgment interest.<sup>237</sup> Hospitality denied coverage for the pre-judgment interest award because it exceeded the policy limits, so Graf attached Torcia’s liquor license to secure her excess judgment.<sup>238</sup> When Graf and Torcia asked Hospitality to pay the cost of a bond to release the attachment, Hospitality refused again because the judgment exceeded its policy limits.<sup>239</sup> So, Graf and Torcia entered into a settlement agreement, whereby Graf released the attachment on Torcia’s liquor license and Torcia assigned to her its rights against Hospitality.<sup>240</sup>

Graf then sued Hospitality, which successfully moved to dismiss the lawsuit.<sup>241</sup> The district court determined that the \$500,000 damage award represented full recovery under the policy.<sup>242</sup> To require Hospitality to pay for the bond, the court reasoned, would “expand Hospitality’s liability in contravention of the express terms of the Policy.”<sup>243</sup> Graf appealed the dismissal to the First Circuit.

The First Circuit agreed with the district court that the Hospitality policy was unambiguous.<sup>244</sup> The supplementary payments provision

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232. Ins. Servs. Office, Inc., Commercial General Liability Coverage Form (CG 00 01 04 13), at 8 (2012).

233. 754 F.3d 74 (1st Cir. 2014).

234. *Id.* at 75.

235. *Id.*

236. *Id.*

237. *Id.*

238. *Id.*

239. *Graf*, 754 F.3d at 75–76.

240. *Id.* at 76.

241. *Id.*

242. *Id.*

243. *Id.*

244. *Id.* at 77.

stated that Hospitality would pay the cost of bonds to release attachment, but only insofar as they were for amounts “within the applicable limit of insurance.”<sup>245</sup> Here, the limit of insurance was reached through the \$500,000 damage award, and Hospitality had no obligation under its policy to pay the cost of a bond covering a prejudgment interest award beyond that amount.<sup>246</sup>

Graf argued that Hospitality was obligated to pay for the bond because the bond amount of \$115,000 was within the \$500,000 policy limit.<sup>247</sup> The *Graf* court quickly dispatched this argument:

Taken to its conclusion, Graf’s argument would obligate Hospitality to pay for a bond . . . so long as the amount of the bond was \$500,000 or less, irrespective of whether the coverage limit had already been reached, potentially increasing Hospitality’s exposure by 100% (or even more, depending on the applicability of the occurrence limitation). This . . . makes no sense and cannot be squared with the plain language of the [p]olicy.<sup>248</sup>

Furthermore, Graf’s position was belied by other policy provisions, all of which made clear that Hospitality’s liability was confined to its policy limits.<sup>249</sup> The First Circuit reasoned that even if the meaning of the supplementary payments provision, standing alone, was uncertain (which it wasn’t), it would not provide the coverage Graf sought when read in light of the policy’s other terms.<sup>250</sup>

Finally, Graf contended that because in Massachusetts attachment bonds are available only where recoverable proceeds exceed available liability insurance coverage, the Hospitality policy had to contemplate an additional \$500,000 liability limit for the cost of attachment bonds.<sup>251</sup> The court was not persuaded by this argument because it could envision scenarios in which a plaintiff might obtain an attachment for a bond amount within the limit of insurance for which Hospitality would have to pay.<sup>252</sup> For example, a court might order pretrial attachment in a case where the nature and extent of the defendant’s insurance coverage was uncertain.<sup>253</sup>

245. *Graf*, 754 F.3d at 77.

246. *Id.*

247. *Id.*

248. *Id.* at 78.

249. *Id.*

250. *Id.* (citing *USM Corp. v. Arthur D. Little Sys., Inc.*, 546 N.E.2d 888, 893 (Mass. App. Ct. 1989)).

251. *Graf*, 754 F.3d at 79.

252. *Id.*

253. *Id.* (citing *Erkan v. New England Compounding Pharmacy, Inc.*, Nos. 12-12052-FDS, 12-12066-FDS, 2012 WL 5896530, at \*2 (D. Mass. Nov. 21, 2012)).

The *Graf* court concluded that the Hospitality policy obligated the company to pay the cost of bonds only for bond amounts that, together with any other liabilities, fell within the policy's \$500,000 liability limit.<sup>254</sup> It therefore affirmed the district court's dismissal of Graf's action.<sup>255</sup>

#### V. PRE- AND POST-JUDGMENT INTEREST AS SUPPLEMENTARY PAYMENTS

Bond costs are not the only judgment-related source of supplementary payment disputes—insurers' obligations to pay pre- and post-judgment interest are regularly litigated.<sup>256</sup> For example, the supplementary payments provision in a standard CGL policy states that the insurer will pay in addition to its policy limits:

- f. Prejudgment interest awarded against the insured on that part of the judgment we pay. If we make an offer to pay the applicable limit of insurance, we will not pay any prejudgment interest based on that period of time after the offer.
- g. All interest on the full amount of any judgment that accrues after entry of the judgment and before we have paid, offered to pay, or deposited in court the part of the judgment that is within the applicable limit of insurance.<sup>257</sup>

Notably, paragraph (f) limits the insurer's obligation to pay pre-judgment interest to the portion of the judgment the insurer pays, while paragraph (g) does not similarly limit the insurer's obligation to pay post-judgment interest.<sup>258</sup>

Supplementary payments provisions in personal lines policies typically provide that the insurer will pay only post-judgment interest. For example, a standard personal auto policy states that the insurer will pay on behalf of an insured, "[i]nterest accruing after a judgment is entered in any suit we defend. Our duty to pay interest ends when we offer to pay that part of the judgment which does not exceed our limit of liability for this coverage."<sup>259</sup> A standard homeowners policy states that the insurer will pay in addition to its limits of liability: "Interest on the entire judgment which accrues after entry of the judg-

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254. *Id.*

255. *Id.*

256. *See, e.g.,* Farquhar v. Alaska Nat'l Ins. Co., 20 P.3d 577, 579–80 (Alaska 2001) (rejecting the insured's argument that by agreeing in its supplementary payments provision to pay post-judgment interest the insurer necessarily agreed to also pay prejudgment interest).

257. Ins. Servs. Office, Inc., Commercial General Liability Coverage Form (CG 00 01 04 13), at 8–9 (2012).

258. Wright, *supra* note 10, at 68.

259. ISO Props., Inc., Personal Auto Policy (PP 00 01 01 05), at 2 (2003).

ment and before we pay or tender, or deposit in court that part of the judgment which does not exceed the limit of liability that applies.”<sup>260</sup>

An insurer’s obligation to pay pre- or post-judgment interest as expressly stated in a supplementary payments provision obviously requires a judgment.<sup>261</sup> An insurer has no obligation to pay interest on a settlement that it pays.<sup>262</sup> A settlement, after all, is not a judgment.

### A. *The Scope of the Insurer’s Obligation to Pay Post-Judgment Interest*

As noted above, a standard CGL policy does not limit the insurer’s obligation to pay post-judgment interest to the portion of the judgment the insurer pays. Rather, the insurer agrees to pay in addition to its policy limits, interest on the full amount of any judgment that accrues between entry of the judgment and the time the insurer pays, offers to pay, or deposits into court that part of the judgment that is within the applicable limit of insurance.<sup>263</sup> Courts reviewing this language and similar wording have rejected insurers’ attempts to confine their post-judgment interest obligation to interest on that part of a judgment for which they are liable, as compared to interest on the entire judgment.<sup>264</sup> In short, the policy language means what it says. This point is sharpened by the preceding paragraph in the standard CGL policy’s supplementary payments provision, which limits the insurer’s obligation to pay prejudgment interest awarded against the insured to that part of the judgment the insurer pays. It is logical to

260. Ins. Servs. Office, Inc., Homeowners-3 Special Form (HO 00 03 05 11), at 21 (2010).

261. *State Farm Fire & Cas. Co. v. Haley*, 916 A.2d 952, 954 (Me. 2007); *Liimatta v. Lukari*, 460 N.W.2d 251, 253 (Mich. Ct. App. 1990).

262. *See, e.g., Haley*, 916 A.2d at 954 (holding that the insurer did not owe prejudgment interest on a settlement it paid); *Liimatta*, 460 N.W.2d at 253 (“There was no judgment in this case and thus no obligation to pay interest.”); *Miller ex rel. Miller v. Twin City Fire Ins. Co.*, No. 07-98-0061-CV, 1999 WL 7892, at \*2 (Tex. App. Jan. 11, 1999) (stating that “even if the policy provided that Twin City would pay, in addition to the applicable limit of liability, prejudgment interest awarded against the insured on that part of the judgment Twin City pays, there would still have to be a judgment before Twin City has any obligation to indemnify [the insured]”).

263. *See supra* note 257 and accompanying text.

264. *See, e.g., Vazquez-Filippetti v. Cooperitiva de Seguros Múltiples de Puerto Rico*, 723 F.3d 24, 29 (1st Cir. 2013) (discussing Puerto Rico law); *Rockwell Automation, Inc. v. Nat’l Union Fire Ins. Co.*, 544 F.3d 752, 759–61 (7th Cir. 2008) (applying Missouri, Pennsylvania, and Wisconsin law); *Aetna Cas. & Sur. Co. v. Protective Nat’l Ins. Co.*, 631 So. 2d 305, 309 (Fla. Dist. Ct. App. 1993); *Se. Atl. Cargo Operators, Inc. v. First State Ins. Co.*, 456 S.E.2d 101, 103–04 (Ga. Ct. App. 1995); *Glenn v. Fleming*, 799 P.2d 79, 87–88 (Kan. 1990); *Davis v. Allstate Ins. Co.*, 747 N.E.2d 141, 146–47 (Mass. 2001); *Burns v. Smith*, 303 S.W.3d 505, 514 (Mo. 2010); *In re Tichota’s Estate*, 215 N.W.2d 885, 887 (Neb. 1974); *Weimer v. Country Mut. Ins. Co.*, 575 N.W.2d 466, 473 (Wis. 1998).

conclude that the insurer could have similarly limited its post-judgment interest obligation if it wished to do so.

In *Fratus v. Republic Western Insurance Co.*,<sup>265</sup> the court held that Republic had to pay over \$1 million in post-judgment interest even though it was liable for only \$25,000 of the subject judgment under its umbrella policy.<sup>266</sup> The Republic policy provided: “In addition to our limit of liability, we will pay for the insured . . . [a]ll interest accruing after the entry of judgment in a suit we defend. Our duty to pay interest ends when we pay or tender our limit of liability.”<sup>267</sup> As the *Fratus* court explained:

It may, at first, seem shocking to impose this immense obligation on Republic for a failure to deliver a relatively small sum to the plaintiffs. Yet, the clear majority of modern courts that have interpreted a standard interest clause under similar circumstances have concluded that the policies mean what they say. These opinions not only apply the straightforward terms of the contracts, but produce sound policy. Compelling the insurer to pay all of the interest which accrues pending appeal protects the insureds, who may wish to pay the portion of the judgment in excess of policy limits and stop the tolling of interest, but whose lack of control over the litigation prevents them from doing so. The rule also serves to protect plaintiffs from unreasonable delay on the part of insurers, or, as in this case, compensate them for such delays. The rule does not impose an unfair burden on insurers because they remain in control of both the tolling of interest and the litigation, and can fairly be expected to understand how the majority of jurisdictions interpret standard interest clauses.<sup>268</sup>

An insurer that wants to stop the running of post-judgment interest must pay, offer to pay, or deposit into court that portion of the judgment that is within the applicable policy limit. To that option we now turn.

### *B. Paying, Offering to Pay, or Depositing into Court the Covered Portion of a Judgment*

Standard liability policies provide that the insurer may limit its obligation to pay pre- or post-judgment interest by satisfying specified conditions. Again, a standard CGL policy states that if the insurer “make[s] an offer to pay the applicable limit of insurance, we will not pay any prejudgment interest based on that period of time after the

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265. 147 F.3d 25 (1st Cir. 1998)

266. *Id.* at 28–29.

267. *Id.* at 28.

268. *Id.* at 29 (citations omitted).

offer.”<sup>269</sup> With respect to post-judgment interest, a standard CGL policy provides that the insurer’s obligation to pay ends when it has “paid, offered to pay, or deposited in court the part of the judgment that is within the applicable limit of insurance.”<sup>270</sup> A standard personal auto policy provides that the insurer’s “duty to pay interest ends when [it offers] to pay that part of the judgment which does not exceed [its] limit of liability for this coverage.”<sup>271</sup> Other policies use various forms of very similar language.

An insurer’s offer to pay its policy limits may be oral or written.<sup>272</sup> The insurer need not furnish a check or draft at the time it offers to pay its policy limits to make the offer effective.<sup>273</sup> The insurer must, however, convey the offer to the plaintiff; simply communicating the offer to the insured is not sufficient.<sup>274</sup>

Courts frequently hold that an offer to pay policy limits must be unconditional to terminate the insurer’s interest obligation.<sup>275</sup> Some courts distinguish between offers to pay and settlement offers, and reason that an insurer’s offer to pay its policy limits in exchange for the insured’s release will not extinguish the insurer’s post-judgment

269. Ins. Servs. Office, Inc., Commercial General Liability Coverage Form (CG 00 01 04 13), at 8 (2012).

270. *Id.* at 9.

271. ISO Props., Inc., Personal Auto Policy (PP 00 01 01 05), at 2 (2003).

272. *See, e.g.,* Colella v. Occidental Fire & Cas. Co., 2013 IL App (1st) 121338-U, ¶¶ 14–17 (holding letter confirming conversation to be sufficient); *Sproles v. Greene*, 407 S.E.2d 497, 502–04 (N.C. 1991) (finding oral offer to pay to be sufficient).

273. *See, e.g.,* Sentry Select Ins. Co. v. TIG Ins. Co., No. 1:02-CV-1875-LJM-WTL, 2004 WL 1689391, at \*5 (S.D. Ind. June 30, 2004) (rejecting the argument that Sentry had to formally tender a check to the clerk of court to make an “offer”); *Sproles*, 407 S.E.2d at 504 (reasoning that the insurer’s offer to pay was sufficient to terminate its post-judgment interest obligation even though actual payment was made thirteen days later).

274. *Richmond v. Nobel Ins. Co.*, 22 F. App’x 246, 247 (4th Cir. 2001); *Great Am. Ins. Co. of N.Y. v. Fed. Ins. Co.*, No. M2009-00833-COA-R3-CV, 2010 WL 1712947, at \*6–9 (Tenn. Ct. App. Apr. 28, 2010).

275. *See, e.g.,* Safeway Ins. Co. of Ala., Inc. v. Amerisure Ins. Co., 707 So. 2d 218, 220–21 (Ala. 1997) (holding that offers conditioned on the plaintiffs’ release of all claims against the insured for liability in excess of the policy limits did not terminate the insurer’s post-judgment interest obligation); *Sours v. Russell*, 967 P.2d 348, 355 (Kan. Ct. App. 1998) (reasoning that the insurer’s offer of its policy limits conditioned on the plaintiff’s promise not to execute on the insured’s assets did not terminate the insurer’s post-judgment interest obligation); *Davis v. Allstate Ins. Co.*, 747 N.E.2d 141, 147–49 (Mass. 2001) (distinguishing an offer to pay, which requires an offer to tender, and an offer to settle, and explaining that an offer to pay policy limits conditioned on the plaintiff’s release of the insured did not terminate Allstate’s post-judgment interest obligation); *Tex. Farmers Ins. Co. v. Miller*, No. 03-97-00233-CV, 1997 WL 746027, at \*3 (Tex. App. Dec. 4, 1997) (“[I]f we were to allow the carrier to escape liability for postjudgment interest after having made a conditional offer . . . the burden of postjudgment interest would fall entirely on the insured. This defeats both the purpose and the policy of the Supplementary Payment provision. It would be unreasonable to think that a third party would ever release its claims against an insured having a judgment in hand.”).

interest obligation.<sup>276</sup> Other courts reach the same result by interpreting “offer to pay” to mean “tender,” which in common legal usage describes an unconditional offer of money to satisfy an obligation.<sup>277</sup> Not all courts require unconditional offers, however.<sup>278</sup>

For example, in *Weimer v. Country Mutual Insurance Co.*,<sup>279</sup> Paul Weimer was badly hurt when his car was hit by a truck driven by Ronald Trace. Trace was insured under a Country Mutual business automobile policy with per person liability limits of \$100,000.<sup>280</sup> In an initial letter, Country Mutual offered its \$100,000 policy limits in “full settlement” of Weimer’s claims against both it and Trace.<sup>281</sup> Weimer rejected the offer because he was still investigating other potential defendants’ liability.<sup>282</sup> In a subsequent letter, Country Mutual acknowledged Weimer’s rejection but stated that its offer of its \$100,000 policy limits in exchange for a full release would remain open.<sup>283</sup> Weimer later sued Trace and Country Mutual, ultimately winning a judgment of just over \$610,000.<sup>284</sup>

The supplementary payments provision in the Country Mutual policy stated that Country Mutual would pay all interest accruing after entry of a judgment against an insured, but that its duty ended when it tendered its policy limits.<sup>285</sup> Country Mutual argued that its letters offering its policy limits in full settlement of all claims against it and Trace were tenders that excused its obligation to pay interest.<sup>286</sup> Weimer argued in response that the letters failed the “common legal meaning of ‘tender’” because (1) they were conditioned on settlement, and (2) Country Mutual never surrendered control of the money.<sup>287</sup> Thus, he argued, Country Mutual owed interest on the full

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276. See, e.g., *Davis*, 747 N.E.2d at 147–49.

277. BLACK’S LAW DICTIONARY 1606 (10th ed. 2014); see also *Levit v. Allstate Ins. Co.*, 764 N.Y.S.2d 452, 454 (App. Div. 2003) (discussing a New York regulation requiring an insurer to pay, tender or deposit its policy limits into court to cut off its post-judgment interest obligation).

278. See, e.g., *State Farm Mut. Auto. Ins. Co. v. Crane*, 266 Cal. Rptr. 422, 426–28 (Ct. App. 1990) (approving of an offer that included a requirement of “full settlement”); *Campbell v. Turner*, 744 So. 2d 1261, 1263 (Fla. Dist. Ct. App. 1999) (concluding that an offer to pay coupled with a request for the insured’s release terminated the insurer’s obligation to pay post-judgment interest).

279. 575 N.W.2d 466 (Wis. 1998).

280. *Id.* at 468.

281. *Id.*

282. *Id.*

283. *Id.* at 468–69.

284. *Id.* at 469.

285. *Weimer*, 575 N.W.2d at 472–73.

286. *Id.* at 473.

287. *Id.*

judgment.<sup>288</sup> The trial court held for Country Mutual, but the Wisconsin Court of Appeals reversed, relying on Black's Law Dictionary to bolster its application of "the well-known legal construction of the word 'tender.'"<sup>289</sup> Country Mutual appealed this determination to the Wisconsin Supreme Court.<sup>290</sup>

The Wisconsin Supreme Court concluded that Country Mutual had tendered its policy limits and therefore did not owe post-judgment interest.<sup>291</sup> In doing so, the court disavowed the lower appellate court's resort to Black's Law Dictionary, explaining that because the objective was "to determine the ordinary, common meaning of a word as understood by a reasonable insured, guidance [was] more appropriately sought in a non-legal dictionary."<sup>292</sup> Citing two such dictionaries, the *Weimer* court concluded that Country Mutual's letters constituted tender of its policy limits.<sup>293</sup> Country Mutual's offer to pay was "formal in the sense that it was presented to Weimer in writing and signed by counsel for Country Mutual."<sup>294</sup> Plus, Country Mutual made the offer in accordance with its contractual obligations.<sup>295</sup>

The *Weimer* court further explained that the language in Country Mutual's two letters offering to pay the policy limits in exchange for Trace's release as well as its own did not constitute a condition that would negate the court's conclusion that Country Mutual had tendered its limits.<sup>296</sup> Requiring Trace's release was critical to the court's analysis because it was "an integral part of Country Mutual's duty to defend Trace."<sup>297</sup> Indeed, had it not requested Trace's release, Country Mutual might have exposed itself to bad faith liability.<sup>298</sup>

In *Overbeek v. Heimbecker*,<sup>299</sup> Richard Hellenbrand allowed his drunken friend, Charles Heimbecker, to drive his car while he rode as a passenger. Heimbecker veered across the center line and struck Brian Overbeek's motorcycle, catastrophically injuring Overbeek.<sup>300</sup> Overbeek's only possible source of compensation was Hellenbrand's

288. *Id.*

289. *Id.*

290. *Id.* at 468.

291. *Weimer*, 575 N.W.2d at 474.

292. *Id.* at 473.

293. *Id.*

294. *Id.*

295. *Id.*

296. *Id.* at 473–74.

297. *Weimer*, 575 N.W.2d at 474.

298. *Id.*

299. 101 F.3d 1225 (7th Cir. 1996).

300. *Id.* at 1226–27.

\$25,000 auto policy with General Casualty.<sup>301</sup> General Casualty made 13 policy limits offers to settle, but Overbeek rejected them all.<sup>302</sup> Instead, he took the case to trial and won a \$2.2 million judgment against Heimbecker and Hellenbrand.<sup>303</sup>

After years of delays, Overbeek claimed that General Casualty owed post-judgment interest on the \$2.2 million judgment.<sup>304</sup> The General Casualty policy stated that the company's obligation to pay post-judgment interest ended once it offered to pay its policy limits.<sup>305</sup> The district court concluded that General Casualty had no duty to pay the interest that Overbeek sought and he appealed to the Seventh Circuit.<sup>306</sup>

The *Overbeek* court reasoned that requiring General Casualty to pay interest on the \$2.2 million judgment would make no sense.<sup>307</sup> Post-judgment interest is intended to encourage prompt payment of judgments and compensate a plaintiff for another party's use of its money.<sup>308</sup> General Casualty "could not have been more prompt" in offering its policy limit.<sup>309</sup> Plus, the \$2.2 million judgment was against Heimbecker and Hellenbrand, not General Casualty. It followed that General Casualty could not have unfairly retained use of the money and did not owe interest on the entire judgment.<sup>310</sup>

In conclusion, "[o]nce General Casualty offered the policy limits, it was no longer on the hook for any interest."<sup>311</sup> The *Overbeek* court accordingly affirmed the district court judgment in favor of General Casualty.<sup>312</sup>

Interestingly, the *Overbeek* court allowed General Casualty to terminate its post-judgment interest obligation through *pre-judgment* settlement offers. Other courts hold that to terminate its post-judgment interest obligation, an insurer must make a post-judgment offer to pay.<sup>313</sup> In *Gann v. Oltesvig*,<sup>314</sup> for example, the policy provided that

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301. *Id.* at 1227.

302. *Id.*

303. *Id.*

304. *Id.* at 1227–28.

305. *Overbeek*, 101 F.3d at 1227–28.

306. *Id.* at 1227.

307. *Id.* at 1228.

308. *Id.* (citing *Nelson v. Travelers Ins. Co.*, 306 N.W.2d 71, 76 (Wis. 1981)).

309. *Id.*

310. *Id.*

311. *Overbeek*, 101 F.3d at 1228.

312. *Id.*

313. *See, e.g.*, *Gann v. Oltesvig*, 508 F. Supp. 2d 654, 657–58 (N.D. Ill. 2007) (applying Wisconsin law); *Sours v. Russell*, 967 P.2d 348, 354 (Kan. Ct. App. 1998) ("Obviously, prejudgment offers cannot include interest on a judgment which has not yet been entered."); *Lancer Ins. Co.*

the insurer, RLI, would pay “[a]ll interest on the full amount of any judgment that accrues after entry of the judgment in any ‘suit’ against the ‘insured’ we defend; but our duty to pay interest ends when we have paid, offered to pay or deposited in court the part of the judgment that is within our Limit of Insurance.”<sup>315</sup> The court observed that the provision referred to RLI’s offer to pay the portion of the *judgment* that was within its policy limits.<sup>316</sup> Because there is no pre-trial judgment, the court believed that it would be unreasonable to read this provision as contemplating termination of RLI’s duty to pay post-judgment interest through a pretrial offer.<sup>317</sup> The *Gann* court thus concluded that this provision was triggered only after a judgment had been entered.<sup>318</sup>

Regardless of whether the insurer chooses to offer its applicable policy limit, pay it, or deposit it into court, the plaintiff may contend that the insurer’s action does not stop the clock on its interest obligation unless the amount offered, paid, or deposited includes interest then accrued.<sup>319</sup> A majority of courts have rejected this argument.<sup>320</sup> This is the correct result. To hold otherwise would contravene the plain language of the policy.<sup>321</sup> This does not mean, however, that the insurer can avoid paying accrued post-judgment interest. It means only that the insurer need not include that amount in its terminating offer, payment, or deposit.<sup>322</sup>

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v. Sunrise Removal, Inc., 914 N.Y.S.2d 174, 176 (App. Div. 2010) (requiring a final judgment before the insurer could terminate its obligation to pay post-judgment interest).

314. 508 F. Supp. 2d 654 (N.D. Ill. 2007).

315. *Id.* at 657.

316. *Id.*

317. *Id.* at 657–58.

318. *Id.* at 658.

319. Wright, *supra* note 10, at 73.

320. See, e.g., *Vazquez-Filippetti v. Cooperitativa de Seguros Multiples du P.R.*, 723 F.3d 24, 29 (1st Cir. 2013) (discussing Puerto Rico law); *Cox v. Peerless Ins. Co.*, 774 F. Supp. 83, 87 (D. Conn. 1991) (applying Connecticut law); *S. Gen. Ins. Co. v. Ross*, 489 S.E.2d 53, 56–57 (Ga. Ct. App. 1997); *White v. Auto Club Inter-Ins. Exch.*, 984 S.W.2d 156, 159 (Mo. Ct. App. 1998); *Levit v. Allstate Ins. Co.*, 764 N.Y.S.2d 452, 455 (App. Div. 2003). *But see* *Grimes v. Swaim*, 971 F.2d 622, 624–26 (10th Cir. 1992) (applying Oklahoma law); *Sours v. Russell*, 967 P.2d 348, 354 (Kan. Ct. App. 1998) (requiring the insurer to pay post-judgment interest until tender of the amount due under the policy); *Birmingham Fire Ins. Co. v. Am. Nat’l Fire Ins. Co.*, 947 S.W.2d 592, 606 (Tex. App. 1997) (requiring offer or payment of accrued post-judgment interest in addition to limit of liability to terminate post-judgment interest obligation).

321. *Vazquez-Filippetti*, 723 F.3d at 30.

322. As a practical matter, an insurer may choose to include accrued post-judgment interest in any sum offered, paid, or deposited into court to terminate its post-judgment interest obligation.

## VI. FIRST AID OR GOOD SAMARITAN CLAUSES

Some supplementary payments provisions state that the insurance company will pay, in addition to the policy limits, certain medical expenses that the insured incurs. A personal auto policy might state: “We will repay an insured person for . . . any expense incurred for first aid to others at the time of an auto accident involving the insured auto.”<sup>323</sup> Or, a policy might state: “In addition to our limit of liability, we will pay these benefits as respects an insured person. . . . Expenses you incur for immediate medical and surgical treatment for others necessary and the time of the accident resulting in bodily injury covered by this [policy].”<sup>324</sup> These clauses are described as “first aid” or “Good Samaritan” clauses.

Plaintiffs sometimes claim that a first aid or Good Samaritan clause is intended to benefit them, such that the insurer must pay their medical expenses (leaving the policy’s liability limits available for settlement or to pay a judgment). Or, a plaintiff may claim that by injuring her, the insured “incurred” expenses for her medical care under a first aid or Good Samaritan clause. These arguments do not hold water.

Starting with fundamental principles, first aid or Good Samaritan clauses are a form of first party coverage; they are intended to benefit the insured.<sup>325</sup> They are not intended to benefit third parties who are injured as a result of the insured’s conduct.<sup>326</sup> A third party has no standing to enforce a Good Samaritan or first aid clause.<sup>327</sup> The question is whether *the insured* incurred expenses for another person’s immediate medical care, such as by agreeing or promising to pay for that treatment, in turn obligating the insurer to reimburse the insured or pay the medical provider on the insured’s behalf.<sup>328</sup>

Furthermore, these clauses are meant to cover expenses incurred by an insured for *immediate* medical treatment of another, such as care provided at the accident scene or in an ambulance en route to a hospital. At the latest, immediate medical or surgical treatment might take

323. Allstate Ins. Co., Allstate Auto Insurance Policy (AU127-1), at 3–4, [http://doi.nv.gov/uploadedFiles/doinvgov/\\_public-documents/Consumers/AU127-1.pdf](http://doi.nv.gov/uploadedFiles/doinvgov/_public-documents/Consumers/AU127-1.pdf).

324. Farmers Ins. Grp., E-Z Reader Car Policy (56-5058 3d ed. 5-07), at 5, [http://doi.nv.gov/uploadedFiles/doinvgov/\\_public-documents/Consumers/56-5058.pdf](http://doi.nv.gov/uploadedFiles/doinvgov/_public-documents/Consumers/56-5058.pdf).

325. *Mulvey Constr., Inc. v. BITCO Gen. Life Ins. Corp.*, No. 1:07-0634, 2015 WL 6394521, at \*8 (S.D. W. Va. Oct. 22, 2015); *Town & Country Mut. Ins. Co. v. Sharp*, 538 N.E.2d 6, 10 (Ind. Ct. App. 1989); *McCarter v. Allstate Ins. Co.*, 388 N.Y.S.2d 732 (App. Div. 1976); *Dalrymple v. Lumbermens Mut. Cas. Ins. Co.*, 380 N.Y.S.2d 900, 903 (Super. Ct. 1976); *DeMent v. Nationwide Mut. Ins. Co.*, 544 S.E.2d 797, 801 (N.C. Ct. App. 2001).

326. *Town & Country Mut. Ins. Co.*, 538 N.E.2d at 10; *Dalrymple*, 380 N.Y.S.2d at 903.

327. *DeMent*, 544 S.E.2d at 801.

328. *McCarter*, 388 N.Y.S.2d at 732 (referring to reimbursement of the insured by the insurer).

the form of diagnostic, critical care, or lifesaving procedures in a hospital emergency room or trauma center.<sup>329</sup>

The temporal limitation is clearest where the policy refers to “first aid,” which is “[e]mergency treatment administered to an injured or sick person before professional medical care is available.”<sup>330</sup> In fact, if a policy confines any payment to “first aid” expenses, the cost of care provided by an ambulance crew should not be compensable because paramedics and emergency medical technicians deliver “professional medical care.”<sup>331</sup> Even under the most liberal interpretation of “immediate” medical treatment, a first aid or Good Samaritan clause simply does not apply to the vast majority of an injured person’s post-accident care.<sup>332</sup>

Wherever courts draw the line between immediate medical or surgical treatment for which an insurer has to reimburse an insured and other medical care for which the insurer has no obligation, the insured must first “incur” the associated expenses. That is, the insured must agree or promise to be primarily responsible for paying them.<sup>333</sup> An insured who simply seeks emergency aid for an injured person does

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329. See *Gilbert v. Am. Cas. Co.*, 27 S.E.2d 431, 433 (W. Va. 1943) (explaining when a lay person might consider certain surgical intervention to be “immediately imperative”).

330. THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 664 (5th ed. 2011).

331. See, e.g., *Erie Ins. Prop. & Cas. Co. v. Johnson*, No. 6:09-cv-01532, 2011 WL 3607950, at \*4 (S.D. W. Va. Aug. 15, 2011) (finding that “the first aid clause covers the costs, if any, incurred in providing immediate emergency medical care, rendered at the scene of the accident *before trained medical personnel arrived* and assumed control of [the plaintiff’s] care” (emphasis added)); see also *Abramson v. Ritz Carlton Hotel Co., LLC*, 480 F. App’x 158, 162 (3d Cir. 2012) (“[A] common understanding of ‘first aid’ does not encompass the use of an oxygen tank or AED . . . . Rather, ‘first aid’ involves simple procedures that can be performed with minimal equipment and training, such as bandaging and repositioning. CPR—which [the decedent] indisputably received—lies at the outer limit of the term.”); *Pacello v. Wyndham Int’l, Inc.*, No. CV030477014S, 2006 WL 1102737, at \*6 (Conn. Super. Ct. Apr. 7, 2006) (discussing an innkeeper’s duty to protect guests and stating that “first aid requires no more assistance than that which can be provided by an untrained person”); *L.A. Fitness Int’l, LLC v. Mayer*, 980 So. 2d 550, 559 (Fla. Dist. Ct. App. 2008) (explaining that the obligation to provide first aid to business invitees “does not encompass the duty to perform skilled treatment, such as CPR”).

332. See, e.g., *Nationwide Prop. & Cas. Co. v. Lacayo*, No. 2:07cv809-MHT, 2008 WL 4831743, at \*3 (M.D. Ala. Nov. 3, 2008) (observing that “first aid expenses” did not include the cost of emergency room treatment, which did not qualify as first aid); *Vega v. State Farm Auto. Ins. Co.*, 401 So. 2d 368, 374 (La. Ct. App. 1981) (finding no obligation to pay where the plaintiffs incurred massive medical bills, but there was no evidence that the insureds incurred any expense for immediate medical or surgical treatment).

333. See, e.g., *Martinez v. Gulf Ins. Co.*, 358 P.2d 1003, 1007 (N.M. 1961) (determining that the insurer was liable under a Good Samaritan clause where the insured’s wife promised a doctor that she and the insured “would be responsible for all expenses” necessary for the accident victim’s emergency treatment). *But cf. Gilbert*, 27 S.E.2d at 435 (finding that the insured incurred no expenses for purposes of a Good Samaritan clause where his promise to pay was at most a guaranty and the hospital’s practice was to treat emergency patients without regard for payment).

not thereby incur the associated expense.<sup>334</sup> An insured who injures another person does not by mere operation of tort liability incur that person's medical expenses for purposes of a first aid or Good Samaritan clause.<sup>335</sup> *Gaines ex rel. Walton v. Allstate Insurance Co.*<sup>336</sup> is illustrative.

The plaintiff in *Gaines* obtained a \$15,700,000 judgment against Allstate's insured, which dwarfed Allstate's policy limits.<sup>337</sup> The plaintiff then moved for judgment against Allstate.<sup>338</sup> She argued that the first aid clause in the Allstate policy provided "unlimited coverage which would pay all or a part of" her excess judgment against the insured.<sup>339</sup> Under that clause, Allstate agreed to pay in addition to the applicable limit of liability, "expenses incurred by the insured for such immediate medical and surgical relief to others as shall be imperative at the time of an accident involving an automobile insured hereunder and not due to war."<sup>340</sup> According to the plaintiff, this language was ambiguous, and thus had to be construed in favor of coverage.<sup>341</sup>

The *Gaines* court rejected the plaintiff's ambiguity argument as lawyerly sleight of hand,<sup>342</sup> explaining that "[i]n the ordinary meaning of the words used, the clause provides 'first aid' coverage to the insured for expenses incurred by him for care of the injured at the time of the accident; nothing more, nothing less."<sup>343</sup> In any event, the court

334. See *Gilbert*, 27 S.E.2d at 435 (involving an insured who drove his two injured passengers to a hospital).

335. *Ross v. Allstate Ins. Co.*, Case No. LA-1404-3, 1996 WL 1065668, at \*2 (Va. Cir. Ct. Dec. 20, 1996). A plaintiff cannot avoid this rule by reference to a dictionary that defines "incur" as "[t]o become liable or subject to as a result of one's actions." THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 889 (5th ed. 2011). Again, words used in an insurance policy must be read in context, and the use of the dictionary definition of "incur" in the fashion attributed to creative plaintiffs here would violate that rule. As Judge Posner once wrote in explaining the role reasonableness plays in interpreting insurance policy language:

[A]n interpretation of an insurance policy is not rendered doubtful . . . just because a snippet of contractual language taken out of context provides literal support to the insured's position. That way madness lies. Suppose you order a *Cosmopolitan* in a bar, and the bartender gives you a copy of the woman's magazine and insists that you pay for it; can he appeal to literal meaning to defeat your contention that it is not what you agreed to?

*Great W. Cas. Co. v. Mayorga*, 342 F.3d 816, 818 (7th Cir. 2003) (Posner, J.).

336. No. LF-1879-3, 2000 WL 33258522 (Va. Cir. Ct. Jan. 4, 2000).

337. *Id.* at \*1.

338. *Id.*

339. *Id.*

340. *Id.*

341. *Id.*

342. See *Gaines*, 2000 WL 33258522, at \*1 ("Any language can be made to appear ambiguous especially when skilled lawyers attempt to make it so. That is the nature of the ambiguity here.").

343. *Id.*

reasoned, the clause did not provide for payment of a judgment that included within the damages medical expenses incurred by an injured party.<sup>344</sup>

The plaintiff countered that the judgment against the insured meant that he had “incurred liability for medical expenses” under the policy.<sup>345</sup> The court disagreed.

The judgment is a determination that the tortfeasor is indebted to the plaintiff for damages sustained in the accident. It does not establish any debt to health care providers notwithstanding the statutory lien given them. The lien simply requires that, where payment is made by a tortfeasor, he must pay the lienor before paying anyone else. . . . It does not give the lienor an independent cause of action against the tortfeasor. *At best, the tortfeasor has an obligation to the plaintiff for damages sustained which may include medical expenses which she incurred. The tortfeasor has incurred no obligation to pay any expenses described in the supplemental payments clause; the clause cannot, therefore, apply to plaintiff's claim.*<sup>346</sup>

The *Gaines* court concluded that the plaintiff had failed to state a cause of action against Allstate.<sup>347</sup> It therefore dismissed her motion for judgment.<sup>348</sup>

In reaching its decision, the *Gaines* court cited another case from the same court, *Ross v. Allstate Insurance Co.*,<sup>349</sup> which involved an identical Good Samaritan clause.<sup>350</sup> In *Ross*, Allstate argued that its obligation under the clause was limited to reimbursing the insured, Kevin Dawson, for out-of-pocket emergency medical expenses he incurred.<sup>351</sup> Plaintiff Barbara Ross, on the other hand, asserted that “medical expenses are incurred when one ‘pays or is legally obligated to pay’ for them.”<sup>352</sup> She contended that by incurring liability for damages resulting from their accident, Dawson became legally bound to pay her emergency medical bills in the approximate amount of \$70,000.<sup>353</sup>

344. *Id.*

345. *Id.*

346. *Id.* (emphasis added).

347. *Id.* at \*2.

348. *Gaines*, 2000 WL 33258522, at \*2.

349. No. LA-1404-3, 1996 WL 1065668 (Va. Cir. Ct. Dec. 20, 1996).

350. Compare *Gaines*, 2000 WL 33258522, at \*1 (quoting the Allstate policy), with *Ross*, 1996 WL 1065688, at \*1 (quoting the Allstate policy). The plaintiff in *Gaines* argued that *Ross* was inapposite because in her case, unlike in *Ross*, “judgment ha[d] been rendered against the insured tortfeasor which establishe[d] that he ha[d] incurred liability for medical expenses of the type described in the policy.” *Gaines*, 2000 WL 33258522, at \*1. The *Gaines* court rejected this argument. *Id.*

351. *Ross*, 1996 WL 1065688, at \*1.

352. *Id.* (quoting *Va. Farm Bureau v. Hodges*, 385 S.E.2d 612, 614 (Va. 1989)).

353. *Id.*

The question for the *Ross* court, then, was “what exactly does an individual ‘incur’ when he or she becomes liable in an accident?”<sup>354</sup> The court answered that question as follows:

The liability incurred by the tortfeasor, Dawson, was not to pay [Ross’s] medical bills, but to make her whole. If [Ross] had incurred medical bills, she still would have had a cause of action against Dawson. By insuring the liability for the accident, Dawson [did] not incur [Ross’s] medical bills. Had [Ross] not paid the bills herself, the doctors would have [had] no cause of action against Dawson directly. Dawson’s liability [was] to reimburse [Ross] for her injuries. Damages may be calculated, in part, by adding together medical bills, but Dawson is not liable to pay those medical bills directly.<sup>355</sup>

Although *Ross* was correct that the term “incurred” includes the legal obligation to pay a debt as well as the actual payment of a debt, the debt Dawson became legally obligated to pay was not Ross’s medical expenses, but the damages that she suffered.<sup>356</sup> Allstate’s duty to indemnify Dawson for those damages was determined by the liability limits of its policy, which were \$25,000.<sup>357</sup> The first aid clause afforded Ross no further source of recovery.<sup>358</sup> The *Ross* court therefore granted Allstate summary judgment.<sup>359</sup>

*Gaines* and *Ross* were correctly decided. The plaintiffs in both cases cited *Cox v. Progressive Casualty Insurance Co.*<sup>360</sup> in support of their positions,<sup>361</sup> but that case is not persuasive. Certainly, *Cox* did not influence the *Gaines* and *Ross* courts.

In *Cox*, motorcyclist Daniel Cox was hurt in a collision with fellow motorcyclist Joe Egemo.<sup>362</sup> Cox accumulated over \$100,000 in medical bills.<sup>363</sup> Egemo’s insurance policy with Progressive had a \$50,000 per person liability limit.<sup>364</sup> Progressive paid Cox \$50,000, but he sought a declaratory judgment in an effort to recover more under the

354. *Id.* at \*2.

355. *Id.*

356. *Id.* at \*3; *see also* *Deck v. Teasley*, 322 S.W.3d 536, 541 (Mo. 2010) (explaining that when a plaintiff sues to recover damages for bodily injury, “the item of damage for which recovery is sought is the *value* of services rendered, not a reimbursement of amounts paid by a collateral source”).

357. *Ross*, 1996 WL 1065668, at \*3.

358. *Id.*

359. *Id.*

360. 869 P.2d 467 (Alaska 1994).

361. *Gaines ex rel. Walton v. Allstate Ins. Co.*, No. LF-1879-3, 2000 WL 33258522, at \*1 (Va. Ct. Ct. Jan. 4, 2000) (citing *Cox v. Progressive Cas. Ins. Co.*, 869 P.2d 467 (Alaska 1994)); *Ross*, 1996 WL 1065668, at \*1 (citing *Cox*, 869 P.2d at 467).

362. *Cox*, 869 P.2d at 468.

363. *Id.*

364. *Id.*

policy's Good Samaritan clause.<sup>365</sup> That clause stated: "In addition to our limit of liability, we will pay on behalf of a covered person. . . . Expenses incurred for immediate medical treatment required by others you injure with your cycle except for passengers on your cycle."<sup>366</sup> Specifically, Cox asked the court to determine the meaning of "immediate medical treatment."<sup>367</sup>

The trial court concluded that Progressive was obligated to pay the cost of care rendered to Cox before he was admitted to the hospital.<sup>368</sup> On appeal, however, the Alaska Supreme Court determined that the policy's reference to "immediate medical treatment" meant that it covered "all medical care up until that point where treatment [became] recuperative or rehabilitative in nature."<sup>369</sup> The court reasoned that whether medical care is recuperative or rehabilitative depends on the facts; there is no bright-line test.<sup>370</sup> Nonetheless, in dicta,<sup>371</sup> the Cox court offered that the phrase "immediate medical treatment" contemplated both "on-site first aid treatment and emergency room-type care."<sup>372</sup> In yet more dicta, the court observed that a policy like Progressive's "generally will cover any medical treatment, directly attributable to the insured event and without any intervening cause, reasonably believed necessary to prevent loss of life, serious impairment to body functions, serious or permanent dysfunction of any body part or organ, or any other serious medical consequence."<sup>373</sup>

Cox is no authority for whether an insured "incurs" medical expenses by mere operation of tort law because the court never decided that issue. *Gaines* and *Ross* are proper guides for other courts considering the question. If a plaintiff did cite Cox on that point, the opinion would be inapposite in most cases because the Good Samaritan clause in Cox stated that Progressive would pay "[e]xpenses incurred for immediate medical treatment required by others,"<sup>374</sup> not medical expenses *the insured* incurred for the immediate medical treatment of

365. *Id.*

366. *Id.*

367. *Id.*

368. *Cox*, 869 P.2d at 468.

369. *Id.*

370. *Id.* at 469.

371. Everything in the Cox opinion concerning the meaning of "immediate medical treatment" after the statement that whether medical treatment is recuperative or rehabilitative is a fact-based inquiry for which there is no bright-line test is dicta, because it was not necessary to the outcome of the case. See *United States v. Crawley*, 837 F.2d 291, 292–93 (7th Cir. 1988) (explaining what makes a statement in a legal opinion dictum).

372. *Cox*, 869 P.2d at 469–70.

373. *Id.* at 470.

374. *Id.* at 468.

others, as is true in most policies with first aid clauses.<sup>375</sup> Indeed, that difference in policy wording is the reason the *Gaines* and *Ross* courts found *Cox* unpersuasive.<sup>376</sup> Finally, even a first aid or Good Samaritan clause that does not refer to expenses the insured incurs should still not expose an insurer to liability to a third party because that result would require a court to read the clause in isolation from the rest of the supplementary payments provision. A court cannot do that; it must read the clause in context.<sup>377</sup>

In summary, a first aid or Good Samaritan clause benefits the insured; it does not benefit a third party who is injured as a result of the insured's conduct. Insurers have no duty under these clauses to pay third parties' medical expenses. Rather, where an insured agrees or promises to pay for an injured person's immediate medical treatment, the insurer may have to reimburse the insured for appropriate expenses or pay those expenses on the insured's behalf (to fulfill the insured's obligation) regardless of the insured's fault.<sup>378</sup> An insured does not by virtue of potential tort liability or liability created by a judgment incur someone's medical expenses for purposes of a first aid or Good Samaritan clause. Similarly, an insured who admits fault for an accident should not be held to have incurred an injured person's emergency medical expenses under a first aid or Good Samaritan clause.

Where an insured promises or agrees to pay for an injured person's immediate medical treatment, the injured person or her family may terminate that obligation. The arrival of the injured person's spouse, partner, or parent at the scene of the accident, or at the hospital or other facility to which the injured person is transported, by itself terminates the insured's obligation to pay.<sup>379</sup> Unlike the insured, that person has the authority to consent to or guide the injured person's treatment, and he or she should thus assume related financial responsibility.<sup>380</sup> Similarly, if an injured person or her family member provides the medical provider with insurance information so that her

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375. See *supra* notes 323–24324 and accompanying text.

376. *Gaines ex rel. Walton v. Allstate Ins. Co.*, No. LF-1879-3, 2000 WL 33258522, at \*1 (Va. Cir. Ct. Jan. 4, 2000); *Ross v. Allstate Ins. Co.*, Case No. LA-1404-3, 1996 WL 1065668, at \*2 (Va. Cir. Ct. Dec. 20, 1996).

377. *Ritrama, Inc. v. HDI-Gerling Am. Ins. Co.*, 796 F.3d 962, 970 (8th Cir. 2015); *Hartford Cas. Ins. Co. v. Swift Distrib., Inc.*, 326 P.3d 253, 259 (Cal. 2014) (quoting *Bank of the W. v. Super. Ct.*, 833 P.2d 545, 552 (Cal. 1992)); *CT Inv. Mgmt. Co. v. Chartis Specialty Ins. Co.*, 9 N.Y.S.3d 220, 224 (App. Div. 2015).

378. *McCarter v. Allstate Ins. Co.*, 388 N.Y.S.2d 732, 732 (App. Div. 1976) (referring to reimbursement).

379. *Gilbert v. Am. Cas. Co.*, 27 S.E.2d 431, 435 (W. Va. 1943).

380. *Id.*

insurer or the family's insurer may be billed for the cost of care, that should terminate the insured's assumed duty to pay and thus the insurer's reimbursement obligation.

#### VII. PAYING DEFENSE EXPENSES FOR AN INSURED'S CONTRACTUAL INDEMNITEE

Finally, there is the issue of an insurer's payment for the defense of an insured's contractual indemnitee. By way of background, it is common for a commercial insured to agree to defend and indemnify another party—perhaps a property owner, landlord, or general contractor—against tort liability arising out of the insured's conduct. In this situation, the insured's CGL carrier may have to indemnify the insured for the assumed liability if the agreement imposing the indemnity obligation is an "insured contract" as defined in the policy and the bodily injury or property damage at issue occurred after the agreement was executed.<sup>381</sup> But who is responsible for paying the indemnitee's defense costs in the event of litigation within the scope of the indemnity agreement? The supplementary payments provision in the current version of the standard CGL policy addresses this issue:

If we defend an insured against a "suit" and an indemnitee of the insured is also named as a party to the "suit", we will defend that indemnitee if all of the following conditions are met:

- a. The "suit" against the indemnitee seeks damages for which the insured has assumed the liability of the indemnitee in a contract or agreement that is an "insured contract";
- b. This insurance applies to such liability assumed by the insured;
- c. The obligation to defend, or the cost of the defense of, that indemnitee, has also been assumed by the insured in the same "insured contract";
- d. The allegations in the "suit" and the information we know about the "occurrence" are such that no conflict appears to exist between the interests of the insured and the interests of the indemnitee;

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381. See Ins. Servs. Office, Inc., Commercial General Liability Coverage Form (CG 00 01 04 13), at 2 (2012) (setting forth the contractual liability exclusion and its exceptions); *id.* at 14 (defining an "insured contract"). It is important to remember that the exceptions to the contractual liability exclusion in a CGL policy do not confer coverage; any coverage derives from the insuring agreement in the indemnitor's CGL policy. In essence, the contractual liability exclusion takes away the coverage provided under the CGL insuring agreement, but the insured contract exception protects the insured by giving back this coverage. Douglas R. Richmond, *Contractual Liability Coverage*, in CONSTRUCTION-RELATED INSURANCE COVERAGE ISSUES 42, 42 (DEF. RESEARCH INST. 1997). A thorough analysis of contractual liability coverage is beyond the scope of this article.

- e. The indemnitee and the insured ask us to conduct and control the defense of that indemnitee against such “suit” and agree that we can assign the same counsel to defend the insured and the indemnitee; and
- f. The indemnitee:
  - (1) Agrees in writing to:
    - (a) Cooperate with us in the investigation, settlement or defense of the “suit”;
    - (b) Immediately send us copies of any demands, notices, summonses or legal papers received in connection with the “suit”;
    - (c) Notify any other insurer whose coverage is available to the indemnitee; and
    - (d) Cooperate with us with respect to coordinating other applicable insurance available to the indemnitee; and
  - (2) Provides us with written authorization to:
    - (a) Obtain records and other information related to the “suit”; and
    - (b) Conduct and control the defense of the indemnitee in such “suit”.

So long as the above conditions are met, attorneys’ fees incurred by us in the defense of that indemnitee, necessary litigation expenses incurred by us and necessary litigation expenses incurred by the indemnitee at our request will be paid as Supplementary Payments. Notwithstanding the provisions of Paragraph 2.b.(2) of Section I – Coverage A – Bodily Injury And Property Damage Liability, such payments will not be deemed to be damages for “bodily injury” and “property damage” and will not reduce the limits of insurance.

Our obligation to defend an insured’s indemnitee and to pay for attorneys’ fees and necessary litigation expenses as Supplementary Payments ends when we have used up the applicable limit of insurance in the payment of judgments or settlements or the conditions set forth above, or the terms of the agreement described in Paragraph f. above, are no longer met.<sup>382</sup>

This part of the supplementary payments provision is again intended to benefit the insured.<sup>383</sup> It does not afford coverage to the

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382. Ins. Servs. Office, Inc., Commercial General Liability Coverage Form (CG 00 01 04 13), at 9 (2012).

383. *Mulvey Constr., Inc. v. BITCO Gen. Life Ins. Corp.*, No. 1:07-0634, 2015 WL 6394521, at \*8 (S.D. W. Va. Oct. 22, 2015) (applying Virginia law); *see also* *Berg v. Gulf Underwriters Ins. Co.*, 756 N.W.2d 478, 2008 WL 2522341, at \*7 (Wis. Ct. App. June 26, 2008) (stating that this part of the supplementary payments provision is intended to benefit the insured and the insurer, and explaining that rationale).

insured's indemnitee or transform the indemnitee into an insured.<sup>384</sup> It does not make an indemnitee an additional insured under the policy.<sup>385</sup> At most, an indemnitee is an incidental beneficiary of the policy.<sup>386</sup>

As a result of the many conditions attached to the insurer's promise to defend the insured's indemnitee and to treat the related litigation expenses as supplementary payments, this provision will apply in very few circumstances.<sup>387</sup> Indeed, if any one condition fails the provision will not apply.<sup>388</sup> *Nordby Construction, Inc. v. American Safety Indemnity Co.*<sup>389</sup> is a representative case.

Summit State Bank contracted with Nordby Construction to build a bank.<sup>390</sup> Nordby subcontracted with Kenyon Construction to install a watertight EIFS system on the bank's exterior.<sup>391</sup> Nordby's subcontract with Kenyon required Kenyon to "defend and indemnify [Nordby] against any loss or liability arising out of, or in connection with, [Kenyon's] operations to be perform[ed] under the agreement."<sup>392</sup> The EIFS system leaked, and Summit sued Nordby and all of its subcontractors.<sup>393</sup> Nordby cross-claimed against Kenyon for indemnity and tendered its defense to Kenyon, which Kenyon denied.<sup>394</sup> The construction defect litigation settled and insurance coverage litigation followed. In the coverage case, the parties disputed whether Kenyon's CGL insurer, Ace American Insurance Co. (Ace), had a duty to defend Nordby as Kenyon's contractual indemnitee under supplementary payments provisions identical to the one quoted

384. *W. Heritage Ins. Co. v. Century Sur. Co.*, 32 F. Supp. 3d 443, 451 (S.D.N.Y. 2014) (applying New York law).

385. *Mulvey Constr., Inc. v. Bituminous Cas. Corp.*, 571 F. App'x 150, 161 (4th Cir. 2014) (applying Virginia law); *Hargob Realty Assocs., Inc. v. Fireman's Fund Ins. Co.*, 901 N.Y.S.2d 657, 660 (App. Div. 2010).

386. *Berg*, 2008 WL 2522341, at \*7.

387. *See, e.g., Mulvey Constr., Inc.*, 2015 WL 6394521, at \*11-14 (finding that the policy did not apply because a subcontract was not an "insured contract," the subcontract did not obligate the insured to defend the indemnitee, there was a conflict of interest between the insured, and the indemnitee, and the indemnitee did not meet its obligations to the insurer); *Nordby Constr., Inc. v. Am. Safety Indem. Co.*, Case No. 14-CV-04074-LHK, 2015 WL 1737654, at \*12-13 (N.D. Cal. Apr. 14, 2015) (concluding that the policy did not apply because there was a conflict of interest between the insured and its indemnitee and, further, because of the conflict, the insured and the indemnitee could not agree to common defense counsel).

388. *W. Heritage Ins. Co.*, 32 F. Supp. 3d at 451.

389. No. 14-CV-04074-LHK, 2015 WL 1737654 (N.D. Cal. Apr. 14, 2015).

390. *Id.* at \*1.

391. *Id.*

392. *Id.*

393. *Id.*

394. *Id.*

above.<sup>395</sup> The *Nordby* court held that Ace had no duty to defend Nordby.<sup>396</sup>

Ace successfully argued that Nordby could not show the absence of a conflict of interest with Kenyon, which was a condition precedent to Ace's duty to defend a contractual indemnitee of Kenyon's.<sup>397</sup> In fact, Nordby's cross-claim against Kenyon presented a clear conflict of interest.<sup>398</sup> The presence of that conflict also meant that Nordby and Kenyon could not agree to joint representation, which was another condition precedent to Ace's duty to defend an indemnitee.<sup>399</sup>

The *Nordby* court could find no California caselaw prohibiting an insurer from conditioning its duty to defend a contractual indemnitee on the absence of a conflict of interest between the insured and the indemnitee.<sup>400</sup> Relatedly, California law did not appear to require an insurer to provide a contractual indemnitee with independent counsel in the event of a conflict of interest with the insured.<sup>401</sup> For these and other reasons, the *Nordby* court granted Ace's motion to dismiss the complaint.<sup>402</sup>

An indemnitee may not always want its indemnitor's insurer to defend it.<sup>403</sup> The indemnitee may not want to accept all of the conditions in the supplementary payments provision in a CGL policy when those conditions do not appear in the indemnity agreement.<sup>404</sup> In particular, the indemnitee may not want to (1) surrender control of its defense to the insurer; or (2) notify its own insurer of the suit and potentially obligate that insurer to share related costs, which may degrade the indemnitee's loss experience and potentially affect its future insurance costs as a result.<sup>405</sup> In those instances, any defense obligation will remain with the indemnitor.

## VIII. CONCLUSION

A supplementary payments provision is an essential part of a liability insurance policy. For example, the insurer's obligation under this

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395. *Nordby*, 2015 WL 1737654, at \*12.

396. *Id.* at \*13.

397. *Id.*

398. *See id.* at \*12 (outlining Ace's argument).

399. *See id.* at \*13 (reprising Ace's argument).

400. *Id.*

401. *Nordby*, 2015 WL 1737654, at \*13.

402. *Id.* at \*14.

403. Robert H. Etnyre, Jr. & Marcus R. Tucker, *Eleven Issues Regarding Contractual Liability Coverage*, 11 J. TEX. INS. L. 2, 7 (2011).

404. *Id.*

405. *See id.* (discussing the indemnitee's likely unwillingness to notify its own CGL insurer of the lawsuit).

provision to pay defense costs in addition to the liability limits of its policy is critical because defense costs can—and frequently do—exceed a policy’s liability limits. At the same time, a supplementary payments provision is not a cornucopia of benefits for either the insured or third parties who are injured or damaged as a result of the insured’s conduct. Indeed, a supplementary payments provision does not give a third party any rights under the policy. Third parties are at most incidental beneficiaries of a supplementary payments provision and therefore cannot sue to enforce it.

As important as supplementary payments provisions are to policyholders and insurers alike, there are relatively few cases discussing them and secondary sources are similarly scarce. As a result, courts and lawyers have relatively little authority to guide their analysis or reasoning when attempting to address related issues. With any luck, this Article helps remedy that deficiency.

