INSURANCE LAW OUTLINE

WHAT IS INSURANCE

I) Defining Insurance

A) The nature of the risk: Risk = the inherent uncertainty of events described in terms of chance or probability.

1) Risk-transfer: this is like betting that you will get more than you give: the insurance company will decide how much the bet will cost.

B) Coping with Risk

1) Here you are looking at the probable benefits and costs about an activity.
2) You can cope with risk via limiting the probability of loss, i.e. creating safety devices to dangerous machinery to limit the amount of injuries that could occur.
3) You can cope with risk via limiting the effects of loss, i.e. wearing a seat belt or getting a car with an air bag to limit what loss could occur.
4) Via diversification, i.e. having a stock portfolio instead of investing all money into one company in case of a stock market crash.
5) Self insurance, i.e. a restaurant owner trains his cooks to prepare the chicken well enough no patron will get salmonella.
6) Ignore risk or assume the risk, i.e. tight rope walker.

C) The Economics of Transferring and Distributing Risk

1) The Value of Transferring Risk
   a) Risk preferring = people who would choose to forego the certain loss in the hope of incurring no loss, despite the equal probability of suffering a large loss
   b) Risk neutral = person indifferent to the alternatives
   c) Risk adverse = people who would choose to lose $500 with the certainty of confronting the 50% chance of losing twice as much
   d) Note definitions of insured, insurance contract, market, pooling, distributed, insurance premium
2) Economic Effects of the Transfer and Distribution of Risk
   a) Moral hazard = Becoming careless: when a mechanic is less likely to lock up his tools if he knows his insurance company would pay for them to be replaced if they were stolen.
   b) Deductible / coinsurance = where the insured retains some responsibility for the risk, i.e. bearing a portion of the cost [to replace] and prevent against moral hazards
3) Deductible: this is the way insurance companies make sure that the holder does not engage in riskier behavior.
   a) Also, co-insurance: the holder pays a % of every claim (like 80-20) up to a certain total amount. This is to help keep the costs down and to protect against moral hazard.
4) Computation of premiums
   a) Compute the probability that a risk will happen
      i) The amount of the probable loss
      ii) Figure out the probably of loss based on the statistical characteristics of groups (grouping)
   b) Insurance companies group similar risks to determine what should be charged.

i) Any group will have a higher proportion of less desirable risks, since more applications for the insurance will tend to come from those who get a better bargain: This is called "adverse selection"

c) Social ramifications with grouping
i) How much information should people have to give to insurance companies.
ii) Revealing too much information could lead to no insurance coverage or to higher rates.

II) Classification of Insurance

You must classify insurance in order to determine what type of policy and inherent nature of risk would best be utilized.
3 types of classifications: (A) marine and inland (B) life (C) fire and casualty

A) *Marine and Inland*
1) Modern marine insurance has several branches:
a) Transportation insurance for goods in transit; Instrumentalities of transportation insurance (for bridges, tunnels, piers, etc.); Insurance for the vessels; bailees' customers policies; Personal and commercial floaters (for movable personal or business property); insurance for loss due to the unavailability of a particular vessel or conveyance; and insurance protecting a carrier against liability to those who ship their goods.
2) Inland marine insurance: Deviated from traditional definition
a) Initially covered ships and cargoes in inland waterways
b) But expanded to cover goods that were subjected to other kinds of transportation risks and ultimately to goods that were capable of being moved;
c) Expands actual shipping, to ground transportation etc.

B) *Life Insurance* – contract under which the insurer promises to pay proceeds upon the death of the person whose life is insured.
1) Term versus Whole Life
a) **Term** = pure insurance; the insured purchases coverage for a specified duration and the designated beneficiary collects the proceeds only if the insured dies with the specified term.
b) **Whole life** = a policy of term insurance and a savings plan, i.e. part of every premium covers the cost of the insurance and the remainder goes into the savings component of the product- as years go by less goes into premium and more goes into savings component; amount of savings = cash value.
i) Credit insurance = if insured debtor dies or becomes disabled before a debt is discharged, the insurer discharges the debt or makes the periodic payments on the debt. Excess goes to the insured's estate.
ii) Deposit term insurance = a blend of whole life and term; coverage looks like renewable term coverage with a large 1st year premium that drops significantly over time.
iii) Whole life insurance can either be straight life / ordinary life, limited-payment life, or based of a graded premium
iv) Endowment life insurance = limited payment life insurance
v) Convertible term insurance = gives the insured the option in the future to convert the policy from term to whole life by agreeing to pay the appropriate premiums for whole
vi) Universal life = where the insured can modify the amount of the death benefit and the change the timing of the premium payment to respond to the changing economic conditions
vii) Variable life = identical to universal except that the cash value amount if not cash per se, rather invested in stocks and bonds of the insured's choice.

2) Other Categories of Life Insurance
   a) Industrial Life = kind of life insurance written in small amounts and for which the insured pays small, frequently assess sums.
   b) Participating policy = dividends based upon the company's earnings are paid by the company to the policy holder; dividends are held in a fund for the insurer.
      i) Mutual life insurance = the insured under a mutual life insurance policy pays a premium slightly larger than the expected loss of the of the administrative expenses , i.e. the holder of the mutual life insurance policy participates in the carrying of the risk
   c) Non-participating policy= policy where no dividends are paid.
   d) Annuities = a K between a financial institutions and an individual under which the institution, in exchange for the individual's prior payment promises to make periodic payments to the individual; opposite of a life insurance policy or insurance against the risk of long life so an not to cause burdens on others from old age (more an investment than insurance) ---- so do both: get life insurance plus and annuity.

3) Life Insurance and taxes = important tool for individuals who wish to avoid income taxes as their wealth accumulates

C) *Fire and Casualty Insurance*
1) Fire = coverage for loss caused by hostile fire.
2) Casualty = the insured's legal liability for injuries to others or for damage to other's property.
3) Worker's compensations = liability for injury or death related to the job where the employer is legally responsible.
4) Suretyship = the practice of one person agreeing to guarantee the debts or obligations of another. Surety bond is essentially a promise, evidenced by as writing, to a creditor that one person or company (the surety) will pay the debt or perform the obligation of some other person (the obligee) should that person fail to pay or perform.
5) Accident insurance = reimbursement for pecuniary loss suffered as a result of injuries sustained in an accident.
6) Health insurance = reimburses for pecuniary loss arising out of disease related illness

D) Other kinds of insurance
1) Title insurance = insurance against defects in legal title to property.
2) Reinsurance = form of insurance for insurance companies where insurer underwrites the consumer's risk by transferring a part of the assumed risk to some other insurance company; here the insured reduces the potential liability which enables the insurer to write more insurance directly to the consumers.

III) Purpose of **Insurance**
A) First insurance is a risk / transfer like gambling, i.e. the insurance company decides if it wants to accepts a bet based on the risk involved and then the insurance company determines how much the bet will cost based on the opinion of the underwriter
1) Note: Government Immunities Act gives the government immunity from claims that could be made against them. Also additional immunities like spousal and parental immunity.

IV) ***First Party versus*** Third ***Party Insurance***
A) First party = the K between the insurer and the insured indemnifies the insured for a loss suffered directly by the insured, i.e. you are the one who has the K with the insurance company. Insures for a loss suffered directly by the insured.

B) Third party = the interests protected by the contract are ultimately those of third parties injured by the insured's conduct, i.e. if you are the claimant under someone else's policy against or with the insurance company.
C) Different duties
1) Companies have no duty against bad faith for 3rd parties but do for 1st parties.
2) In Wyoming, a first party can bring a bad faith claim, not a third party.

V) Judicial *Regulation* – the legislature functions as the most important lawmaker in the field b/c it sets the policy, as it is the branch of government that possess the authority to create the entities to implement that policy.
A) Court as Regulators – insurers will adjust their conduct to comply with the court's ruling, as conduct will not be tolerated in the future if it has already been condemned.
1) Interplay between Legislative and Judicial Regulation- judicial interpretation of legislative enactment's can have an enormous impact on how the business of insurance is conducted.

THE INSURANCE POLICY AS A CONTRACT

I) Contract Interpretation
A) Interpretation = the process by which a court determines the meaning that it will give the language used by the parties in a contract.
B) Insurance policies have special characteristics from the normal insurance policy and therefore must be construed with reference to special and unique standards, and therefore often times has a separate law which applies

II) Characteristics of the insurance policy
A) The Insurance Policy DEC sheet
1) States who the insureds are (important that this is accurate and contains the correct legal entity)
2) Term of policy
3) How much each type of coverage costs
4) Endorsements
5) Legal description of what is insured
6) Description of coverage's
7) Definitions
8) Exclusions [of policy]: G/R clauses in policy that provide coverage are interpreted very broadly; clauses in policy that exclude coverage are interpreted very narrowly.
a) POLICY: Insurer is better equipped to handle a loss than insured

III) Origin of insurance contracts
A) Much of the standard language of insurance policies is written by the insurance service organization. Companies start with these policies and then modify them.

IV) Judicial Interpretation of Statutory requirements – statutes which specifically state certain requirements that must be included in the insurance K.
A) Even though the legislature mandates certain language requirements to be included in an insurance policy, there are still ambiguities about the scope of the coverage.

1) *Pin Pin H Sue v. Kemper* – here a provision in the policy differed from the statutory requirements and the court was asked to determine what the legislature had mandated and whether the insurer's provision truly varied from this mandate

B) Example: Financial Responsibility Act for auto insurance.

V) Insurance Policies as Adhesion Contracts

A) Adhesion contract = a description of the manner by which the contract is formed: one party having superior bargaining power imposes its choice of terms on the other party- only a "take it or leave it" option for the insured.

B) G/R: Policies are construed with a lay person's understanding.

C) An exclusion in an adhesion contract of insurance must be expressed in words which are 'plain and clear.'

VI) Doctrine of Reasonable Expectations (**G/R: if a K is not ambiguous, doctrine of reasonable expectation does not apply)**

A) Reasonable expectations doctrine = when two interpretations exist as to what an insured might expect a policy to mean, and one is inapt or absurd while the other is reasonable, the reasonable one if selected.

1) *Valstos v. Sumitomo Marine* – court held the insured had a reasonable understanding of the ambiguous clause and no reason to know the insurer's narrower understanding, while the insurer had reason to know that the insured would not appreciate the insurer's understanding, i.e. court favored the understanding of the insured.

2) *Kievit v. Lloyd Protection Life Ins.*- court endorse the premise that insurance policies should be enforced in accordance with the insured's reasonable expectation.

B) First must determine if language is ambiguous- is not, go with what is stated in policy; if it is ambiguous, G/R: construed against insurer.

1) Reasonable expectations doctrine does not apply unless the contract language is ambiguous.
   a) It is ambiguous if it is capable of more than one meaning.
   b) Because this is an adhesion contract, it is strictly construed against the insurer.
   c) This is a very broad definition that allows courts to do what they want with the facts of the case.

2) If the contract language is ambiguous, interpretation is a matter of law. Once the ambiguity is discovered, use reasonable expectations and it is up to the jury to decide what is reasonable.

C) Factors:

1) The expectations by both the insured and the insurer must be OBJECTIVELY reasonable, not subjective.

2) An objective inquiry must be used: a person is entitled to rely upon a reasonable understanding of manifestations of the other party.

3) The extent to which the insured could gain an understanding of the situation through a reasonable effort.
   a) Note: reasonable effort will vary from situation to situation, i.e. individual vs. corporation.
   b) Case law varies if court should look at the reasonable person versus the specific instance and / or specific person.

D) Farmers Insurance Exchange v. District Court (Shirley I)

1) FACTS: B. Shirley sustained severe injuries due to an accident. She then sought additional sums under the underinsured motorist provision of the policy.

2) ISSUE: Does Insurance policy provide for coverage for bodily injury claims where insured was injured by a third party tort feaser when limits for underinsured portion of the policy was already paid?
3) HOLDING: NO- Farmers is under no obligation to Shirleys under the policy provision and therefore is entitled to JML. Here court said there was no ambiguity in the contract and therefore doctrine of reasonable expectations is not applicable.
4) REASONING: court set out three standards to use when examining insurance policy:
   a) Words will be given their common and ordinary meaning and language will not be "tortured" to create an ambiguity.
   b) The intention of the parties is the primary consideration and is to be ascertained if possible, from the language employed in the policy, viewed in the light of what the parties must reasonable have intended.
   c) Such insurance policy contracts should not be so strictly construed as to thwart the general object of the insurance.
   d) Absent ambiguity there is no room for construction and the policy will be enforced according to its terms.
   e) Where there is ambiguity, contract will be construed liberally against the insurer and in favor of the insured.

VII) General principles of contract

A) To be enforceable, contract parties must...
   1) Complete successfully the mechanics of offer and acceptance: Applicant usually makes the offer.
   2) Give consideration to each other: In insurance contracts, consideration usually not an issue; Insured's reliance on the insurer's promise will be enough to make the insurer's promise enforceable.
   3) Have capacity to contract: Capacity rarely presents any difficulty in insurance matters.
   4) Satisfy writing requirement.
      a) Oral insurance contracts need to be sufficiently specific to show the parties' mutual assent on certain core terms, including the subject mater, the risk insured against, the premium, the duration of coverage, policy limits, and identities of the parties.
      b) If an oral contract meets this test, the oral contract is enforceable, assuming there is not separate requirement that the contract be in writing.
      c) Oral contract of guaranty insurance is not unenforceable under the statute of frauds
         i) One-year provision requires contracts that cannot be performed within a year to be in writing. To extent either party has the right to terminate the contract prior to passing of a year, contract is one of uncertain duration and therefore need not be in writing
   5) Contract for purpose that is not against public policy.
      a) Contracts against public policy won't be enforced. Public policy is more often consulted for the purpose of determining the scope of coverage

B) Ability to revoke an offer prior to acceptance is a basic rule of contract law.
   1) Statutes usually give applicant a period to rescind after the policy is delivered; Statutes and regulations give consumers a power they do not possess at common law, to void a contract after the mechanics of offer and acceptance have been completed.

C) Whether insurance contracts are unilateral or bilateral is subject to debate.
   1) Usually bilateral: each party gives a promise to the other: the insured promises to pay premiums and perform other duties in the event of a loss in exchange for the insurer's promise to pay proceeds if the loss occurs.

2) Unilateral idea comes from fact that insured has no continuing obligation to make premium payments.

FORMING THE INSURANCE CONTRACT

5 Steps in forming the Insurance Contract: Initial contract (usually between the applicant and the intermediary); submission of application, issuance of binder, investigation by the insurer, and delivery of the policy.

I) **INITIAL** CONTRACT

A) The key is knowing how much authority the agent or the broker has and what your remedy is should the agent or the broker make a mistake. The area of agent liability is hard on the insured; there usually has to be a special relationship.

B) Agent v. Broker
1) Most agents are considered employees and most brokers are considered independent contractors.
   a) A broker has access to a number of insurers and is actually an agent of the insured.
2) Importance of the distinction
   a) Insured's reliance on what the agent/broker says.
   b) Does the agent have the authority to bind the insurer?
      i) Authority is from a liability point of view: insurance agents can commit malpractice (There is errors and omissions insurance for this kind of malpractice).

C) The duty of the agent / broker to the potential insured
1) The agent has a duty to act, or interact, with the insured in a manner that is reasonable under the circumstances.
   a) Primary duty is to obtain the insurance that the potential insured requests; the agent does not have the duty to offer advise, but once the agent undertakes to offer advice, he is then responsible and liable for the advice offered.
2) Does the agent have a duty to tell the insured what kind of insurance to get? **Yes when**:
   a) The agent is a specialist in the area;
   b) It is required by statute;
   c) Or there is a special relationship: Courts define special relationships as long and special in the nature of insurance. (Old customer with different insurance needs).

D) Policies against finding a fiduciary duty
1) The insured knows better what the risks are; finding of a fiduciary duty could result in increased litigation; results in after the fact decision making; the amount of insurance to buy is a matter of opinion; the agent would practice defensive insurance (get extra coverage to avoid liability).

E) Is the agent responsible to explain to the Insured the words of the policy? This is fact dependent / factors to consider: (1) if the policy is ambiguous or clear (2) who is best able to determine if there is coverage (3) how much agent takes upon themselves and what representations are made – **G/R:** go through everything with the insured or don't go through anything at all.

1) The agent has a duty to explain what the general terms mean (like "full coverage")
2) The agent has a duty to explain the terms of the policy if the agent knows the insured misinterprets the policy.
3) If the market changes, the agent does not have a duty to come back and advise 5 years later; additionally, most modern policies have built-in inflation provisions.

F) An agent can purchase malpractice insurance, i.e. "Errors and Omissions Ins." b/c agents are not employees and therefore there is no doctrine of respondent superior to protect them.
G) The duty of the agent to the company is the same as in agency law, i.e. act with due care and act only in the authority of what the principal or the company has given to you.

H) Duty between the agent and the insurance company
1) The agent has a duty to act within the authority granted to it and to abide by the company's rules.
2) The agent can be sued by the insurer
a) By orally binding the company to a contract it has not agreed to.
b) Misrepresenting a material fact (more $)

3) When can the gent bind the insurance company
a) If he has either express or implied authority. (apparent or actual authority).
b) Authority of the agent is based on the facts of the case.
c) Insurer will be bound by the acts of its agent if showing is made that agent did certain things with the permission or acquiescence of the insurer (even if agent acted in excess of person's actual authority)

II) **APPLICATION**

A) The applicant of the agent may fill out the application
1) Usually the agent will fill in the application for you, so the **G/R** of thumb is always check what is written to make sure it is an accurate description of what you said/want.
2) Errors could void the policy.

B) Elements of misrepresentation (know the factors and consider and weigh those).
1) Is untrue or misleading: does not have to be intentional but practically does.
a) Fact: Can misrepresent without intent. This is easier to prove.
b) Opinion: subjective so intent is hard to prove.
2) Materiality
a) How important the fact is; did the insurer make a decision based on the fact.
b) Look at materiality at the time the contract is formed.
3) Reliance: The insurer relied on the information and was induced to issue the policy. (would have required a different premium).
a) If the insurer knows that the misrepresentation was a mistake then reliance is unreasonable.
b) The insurance company will always want to argue this point, i.e. especially if the information that was misrepresented is not material.

III) **BINDER**

A) <u>Binder</u> = a temporary contract for insurance which is usually issued to the insured prior to receiving official authorization for insurance and immediately following the application for insurance.
1) The binder obligates the insurer to pay the insurance if a loss occurs before the insurers act upon the application.
2) Always get something in writing because the insured is usually not covered until the application is accepted. Also, one should always request this to identify what you have paid for.

3) Binder must meet all requirements for forming a contract: mutual assent, consideration, sufficiently definite.

B) Binders include: name of insured, description of insurance, description of coverage, date and time the coverage begins, duration of the coverage, the premium amount owed, the max time the binder will be in effect.

C) Types of binders

1) **Approval binder**: provides that the coverage takes effect as of the date of the binder, except that the application must first be approved by the company.

2) **Conditional binder**: creates an immediate contract of coverage conditional upon the applicant's insurability, meaning that the coverage does not exist until insurer is satisfied that the risk is acceptable.

a) Conditional binder is broader than approval binder b/c losses prior to the insurer's expression of satisfaction with the insurability of the risk are covered if it turns out that the insurer was satisfied with the insurability of the risk.

b) Problem with conditional binder: insurer might decide to reject an application simply because a loss occurred before the insurer communicated what would have been, but for the loss, an acceptance of the application.

3) **Unconditional temporary binder**: creates contract under which insurer provides immediate coverage, except that the insurer's duty to pay proceeds terminates if the company determines that it does not wish to undertake the risk.

4) Types compared

a) Conditional: condition to coverage functions as condition precedent: insurer need not perform its duty unless and until the condition is satisfied.

b) Unconditional temporary: condition to coverage functions as a condition subsequent: insurer has duty to pay proceeds upon a loss, a duty subject to being discharged if the condition is not satisfied. Approval or conditional binders more often used in life insurance than in property or liability insurance.

D) Judicial regulation of binders: To achieve advantages of system where people are not misled about the coverage provided by the temporary receipt, it is essential that binders be treated as unconditional temporary binders.

IV) **INVESTIGATIONS**

A) Depends on type of coverage and the insurance company as to how far an investigation will go.

B) It is the 4th step because of the time period between the binder issued and the policy issued

V) **DELIVERY OF THE POLICY**

A) Always important to note who from the company will make the delivery, etc. Payment of the premium is more important, delivery of the contract is more of an end point. Delivery is the act of putting the insurance policy into the possession of the insured

B) **G/R**: insurance company must reasonably and promptly reject or accept the policy

C) Why is delivery important?

1) Evidentiary value

2) Delivery may be the means by which the insurer communicates to the applicant its acceptance of the applicant's offer.

3) Delivery may affect the term of coverage

Form policies = contracts of adhesion and give the insured no bargaining power; that is why the policy must be strictly construed

VI) **Trouble spots in contract formation**

A) Insurer's delay in responding to the application
   1) Applicant is at risk when application under consideration. When there's no binder, applicant has not coverage.
   2) If insurer has issued binder, applicant is still at risk b/c insurer might decline to provide coverage and in meantime some event renders the applicant a higher risk, applicant will have even more trouble getting insurance.
   3) Some jurisdictions impose upon insurer a duty to respond promptly; in this situation insurer who's unreasonably late in responding to application loses right to reject it.
   4) Retaining premium and failing to reject constitutes acceptance.
   5) Theories of insurers duty to respond
      a) **Contract** duty
      b) **Estoppel:** insurer, b/c of delay is estopped to assert non-coverage by denying that it accepted the application.
      c) **Waiver:** by delaying its response to the application, the insurer waives its reliance on the general rule that silence does not constitute acceptance.
      d) **Tort** doctrine: negligence by not responding.

B) Insured's duty to read the policy.
   1) Mutual assent requirement is objective: no requirement that a party intend or comprehend the consequences of his or her actions.
   2) Many courts have granted relief to relying party when misrepresentations are made, even if insured didn't read policy.
   3) Insured's failure to read the policy is typically overlooked if the insured is illiterate or unable to read English.

C) Duty of insurer to explain policy
   1) Duty to explain coverage is effectively imposed upon insurer.
   2) Duty to explain seems to differ from jurisdiction to jurisdiction.
   3) If agent has duty to explain, insurer will be liable for failure to explain.

D) Role of standardization and the use of forms: Form contracts pervade in the industry
   1) Advantages:
      a) Considerable time saved
      b) Judicial interpretation of one contract can serve as a guide for the interpretation of all contracts of that class.
      c) Risks can be evaluated by the insurer on a more predicable basis
   2) Disadvantages:
      a) One party with superior knowledge and bargaining power may impose its will on a weaker, less informed party.
      b) Drafter is typically in position of telling other party to take it or leave it.
      c) Potential for overreaching, unfairness, and deception in this process is greater than in the classic bargaining model
   3) Vending machine marketing: Basically, it seems like a scam

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INSURABLE INTEREST

I) Origins and Purpose of Creating the Doctrine

A) The purpose of insurance is prevent against risks and put the person back into the position he would have been in had the loss not occurred (make the person whole)
   1) The insurable interest = would a person suffer a loss if that particular thing was destroyed

2) the insurance co cares if a person has a interest in that which is insured b/c they want the person to have an incentive in the item insured so there is not intentional destroying of it
3) This whole idea comes down to whose risk is it and how does it affect the premium rate based on that risk
4) Insurable interest is only important to the insurance company

B) The Purpose of creating the Doctrine
1) Discourage the practice of using insurance as a device for gambling or wagering
2) Remove incentive for destroying the insured object
3) Increased moral hazard

II) Relationship of Insurable Interest Requirement to Principle of Indemnity

A) insurable interest = interest which the law requires the owner of an insurance policy to have in the thing or the person insured

B) This links the interest required with principle of indemnity = compensation necessary to reimburse the insured's loss
1) this doctrine is a TEST that attempts to identify those situations where the courts are concerned that insurance contracts might create incentives for wagering or the intentional destruction of property or life

II) Property Insurance and Insurable Interest Requirements

A) Legal Interest Test -- There are 3 kinds of interest which provide an insurable interest: (1) property rights (2) contractual rights (3) legal liability
1) Property Rights – **G/R:** legal or equitable title of any nature will satisfy the test (even future interest); because shareholders of corporations, joint tenants, spouses in community property, etc. all hold interest in something, they meet the test
2) Contract Rights – **G/R:** one whose contract rights depend directly on the continued existence of property has an insurable interest and thus meets the test
3) Legal Liability – **G/R:** if a person would suffer legal liability in the event the property is lost or damages, the person has an insurable interest and thus meets the test

B) Factual Expectancy Test – this is the expectation of economic advantage if the insured property continues to exist or expectation of economic loss should damage occur
1) The expectancy must be substantial and insured must have a current relationship to the property which directly affects the insured's economic well-being
2) Broader than the Legal Interest Test

III) Life Insurance and Insurable Interest Requirements

A) Life Insurance – here insurable interest must exist at the time the contract is made and the lack of interest at the time of the insured's death is irrelevant.
1) For divorce, **G/R:** divorce does not terminate the beneficiary's interest in a preexisting policy on the life of an ex-spouse

B) Test:
1) Is there a close relationship by blood or by law; or
2) The person has some pecuniary interest in the other person continuing life (includes alimony and child support).

IV) Liability Insurance – here the concept of insurable interest isn't that important as long as one qualifies as an insured b/c the essence of liability insurance is providing coverage for legal liability that one might incur to others and an insured always have an interest in protecting against this liability

A) **G/R:** legal interest test for an insurable interest is satisfied by entering into a K under which one is liable for failing to obtain insurance on a given piece of property
B) An issue may be how broad is the coverage
   1) The language is usually broad
   2) There are exclusions for things like intentional acts.
   3) Some policies now specifically exclude sexual abuse and harassment.

WHO IS AN INSURED

I) The Meaning of an Insured
   A) Insured = the person whose loss triggers the insurer's duty to pay proceeds; almost always the person who enters into a contract with the insurer and almost always the person who receives the proceeds in the event of a loss

   B) Identifying the Insured (Payee)- here we are talking about where the insurance policy identifies the insured
      1) Specific Designations – most common technique where the policy flat out states the person whose life, property or other interests are covered (may be more than one person)
         a) Can add people after the policy is in effect through an endorsement on the policy

   C) Omnibus Clause and Coverage – this is where liability policies designate at least one insured by name and other insureds by description, usually as classes of people who have some relationship to the names insured.
      1) The clause usually defines "insured" in terms of four classes of people, i.e. actual person, spouse, members of household, etc.- usually all included individuals have as specified relationship to the named insured.
      2) Each person within each described class is an insured for purposes of the policy's coverage
      3) An insurer cannot have subrogation against its own insured, therefore each person listed / class is immune from subrogation

   D) Reasonable belief clause = excludes coverage for a family member who is operating the vehicle without permission of the named insured. Courts however, go 1 of 3 ways when interpreting these clauses:
      1) LIBERAL APPROACH= maximize the amount of coverage by broadening the class of insureds
      2) CONSERVATIVE APPROACH = any use outside of the scope of permission is not covered; thus any use that violates geographical limitations, time limitations, or limitations on the nature of the use is outside the coverage [also known as conversion rule].
      3) MINOR DEVIATION RULE = <u>general rule for most jurisdictions</u> = some deviation for the scope of permission will not prevent coverage, but too much deviation will; this approach seeks to accommodate the 1st two approaches competing values

   E) The "Loss Payable Clause" – this refers to the measure of reimbursement a person is entitled to receive when multiple parties share an interest in property

II) Interest in Life Insurance Policy
   A) Here, often the person who owns a life insurance policy is not necessarily the insured; therefore the rights of ownership belong to the purchases, not the insured.

III) Beneficiaries Under Life Insurance Policies

A) Beneficiary = person who, although not a party to a K, is entitled to receive the proceeds of the insurance

B) 2 Types of Life Insurance Relationship Recognized:
   1) family
   2) pecuniary (business)
      G/R: the more you can show a close and pecuniary interest in the person, the better your chances are to receive on the policy (note: you only have to show this when you purchase the policy b/c paying premiums will prove this interest in the future)

C) When the Beneficiary's Rights Vest: **G/R:** modern policies explicitly reserve to the insured the power the change the beneficiary without the designated beneficiary's consent; the insured is reserved the power to receive cash value of the policy, take out loans against the policy, or assign the policy all without the beneficiary's consent; the insured does not have a vested right and only has an expectancy of receiving proceeds under the insurance

D) Naming and Designating the Beneficiary: **G/R:** person who takes out the policy has the right to name and change the beneficiary
   1) **Limitation:** beneficiary must have an insurable interest in the insured

E) Changing the Beneficiary
   1) **G/R:** follow procedures laid out in the policy and then the change is effective even though the change is not made with the consent or knowledge of either party
      a) Most court require that the person substantially complies rather than exactly procedurally complies
      b) Procedures can be WAIVED by the insurer when (1) the insurer endorses the change of beneficiary in absence of insured's compliance with specified procedures and (2) where insurer files an interpleader

F) Claims to Proceeds- here we are talking about when a dispute arises between a beneficiary and someone else claiming the proceeds
   1) Creditor vs Beneficiary
      a) **G/R:** state law exempts insurance polices from creditor claims depending on (1)whether cash value of proceeds are being claimed as exempt (2) kind of policy involved (3) relationship of debtor to policy (4) if debtor is owner or has right to change in beneficiary (5) relationship of beneficiary to insured
   2) Creditor as Beneficiary
      a) Majority **G/R:** courts infer the insured intended to designate the creditor as a beneficiary only to the extent of the debt
      b) Minority **G/R:** will allow the creditor to keep all of the proceeds
   3) Trustee in Bankruptcy vs Beneficiary
      a) **G/R:** a bankrupt debtor is allowed to choose between state exemptions and federal exemptions unless a state prohibits election of federal exemptions
   4) Assignee vs Beneficiary
      a) **G/R: (**follow procedures outlines in policy) owners of policies assign the right to receive insurance proceeds to their creditors, and absent some expression of intent to the contrary, the assignee has the superior rights to the extent of the debt

   5) Disqualification of the Beneficiary

a) **G/R:** No insured can recover for proceeds of a loss the insured has intentionally caused

RISKS COVERED

I) Preliminary- it is marketing technique how exact risk are defined within a policy
- A) "all risks" = a policy states all risks are covered; very important to make agent show where this is stated in policy, b/c often times it is just a ploy
- B) "specific risk" = specific risks are actually outlined in the policy

II) Nature of Coverage Problems
- A) Note: even though insurance can be grouped, i.e. personal, property, liability, etc., they all have a common element in that they are PERSONAL
- B) Various Kinds of Common Coverage
  - 1) homeowners policy- incorporates into one policy several kinds of property coverage, additional living expenses, comprehensive personal liability coverage, replacement cost coverage, coverage on the dwelling, etc.
  - 2) auto policy – Personal Auto Policy (PAP) covers many types of liability
    - a) Dec sheet
    - b) liability coverage
    - c) medical payments coverage
    - d) coverage for damages of an uninsured motorist
    - e) property damage coverage
    - f) insured's duties after accident or loss
    - g) general provisions, i.e. subrogation, termination, etc.

- fire policy- usually limited to the perils covered
- umbrella policy- provides a layer of liability insurance in excess of that provided by the homeowners and auto policies; normally cheap b/c they only apply when catastrophic things happen and they usually don't; usually have to show you have the maximum with primary policy before allowed to purchase umbrella coverage
- commercial liability coverage (CGL)- provides general coverage to an insured regardless of the nature of the insured's business

<u>Personal Insurance guards against these risks:</u>
1. premature death [life insurance]
2. long life [annuities]
3. illness and high medical expenses [health insurance]
4. disability by illness or accident [disability insurance]

II. Expanding Coverage Beyond the Policy's Literal Language

A. Promissory Estoppel = reasonable reliance upon a representation to your detriment
G/R: contractual obligations can be created through estoppell (not likely to work!)

B. Parol Evidence Rule = when parties to a K put their agreement in writing, intending the writing to be the final expression of their agreement, the terms of the writing may not be contradicted or supplemented by evidence of any prior contemporaneous agreement or negotiations

Strict view = the K is clear on its face as indicted by evaluation of the "four corners" of the document
Broader / Modern view = all evidence is admissible to determine is the K is integrated

LIMITATIONS OF COVERAGE

I. Limitations of Coverage - generally
   A. Explicit limitations = appear in the K either in affirmative grants of coverage or in specific limitations on those grants of coverage
   B. Exclusions / Exceptions = areas carved out in the K where no coverage will be provided
   C. Public Policy = gives rise to implicit limitations on coverage; there isn't clear reference to them in the policy, however they are very judicially enforceable

II. Explicit Limitation: Duration of Coverage
   A. Commencement of Coverage
      G/R: coverage starts when the K IS formed
      CAVEAT: You need to check and make sure you know when this forming date is (auto usually states so within the K, but life insurance may require physical, etc.); Often times coverage does not become effective until all conditions are met. Also sometimes the date the coverage begins is not the same date as on the face of the policy

   B. Insurance for Past Events
      G/R: One cannot insure against the consequences of an event which has already begun
      CAVEAT: (1)it is common for an insured to purchase coverage for claims made against the insured during the current year arising out of past events (2) some contracts have been sold for coverage of past losses (ex: fire in Vegas MGM)- this is really more of an annuity than actual insurance

   C. Termination of Coverage
      G/R: policy terminates on the date of breach of warranty, the misrepresentation, or the concealment
      G/R: when an insurance contract has been fully performed, the parties' duties are discharged and the contract terminates
      G/R: a renewal agreement is a new contract entered into by an insurer and insured and its validity will be tested against all of the normal requirements for forming a K
      G/R: an insurer is not obligated to either to notify the insured that the coverage has expired by its own terms or to renew the coverage automatically
         CAVEAT: agents might act within their scope to bind the company to give notice otherwise not required
      G/R: when there is a claim, look for any possible coverage. because many times there is overlapping coverage available

   D. Cancellation of Coverage
      1. General Principles- Coverage can be cancelled in 4 ways: (1) the K may be rescinded by mutual agreement (2) an insured has a unilateral right to cancel by not paying the next premium (3) the insured may have an explicit right under the K to cancel unilaterally (4) an insurer has this same right if not restricted by statute
      2. Unilateral Cancellation

a) Insurer can cancel when there is misrepresentation, concealment, breach of warranty, or premium is not paid
b) Insured usually can unilaterally cancel the policy at any time and no consideration is required to effect the cancellation b/c the K is a continuing obligation by insurance company to pay benefits, subject to unilateral power of termination by insured
c) when a K gives the right to a party to cancel, consent of other party is not necessary to effect the cancellation
d) If insurer wrongfully cancels the insurance, the insured has 3 options: (1) consider policy to be terminated and recover damages court allows (2) institute action to obtain specific performance of the K (3) wait until the policy becomes payable and then test the cancellation in an action on the policy

3. Statutory Cancellation Procedures
G/R: most state statutes require the insurer to give notice to the insured to effect a cancellation [courts say that if notice is not given by the insurer, the cancellation is void]
Policy: to give the insured both the opportunity and sufficient time to procure other insurance to replace the cancelled policy
4. Public Policy Restrictions on Cancellation by the Insurer
a) Some courts have held for reasons of public policy it may constitute a breach of K for a liability insurer to exercise the cancellation
5. Reinstatement = provisions within personal insurance policies allowing the insured to reinstate the policy in the event it lapses for nonpayment of premiums by complying with specified provisions
G/R: Absent a specification in the policy, most courts treat the reinstated policy as a mere continuation of the old; therefore, where the reinstatement is procured through fraud or misrepresentation, the reinstated policy should be violable by the insurer
G/R: reinstatement "cures" the lapse, except the losses suffered between the time of the lapse and the reinstatement
6. Defining the Time which Loss must be Suffered
a) <u>occurrence policies</u> = protect insureds against liability imposed upon them as damages because of bodily injury or property damage if the insured's policy was in effect when the bodily injury or property damage occurred---- the time of the occurrence is when the bodily injury or property damage occurs (most common for lay person)
b) <u>claims-made policies</u> = provide coverage if the act or neglect is discovered and brought to the insurer's attention during the policy's term, regardless of when the act occurred --- here is where you need tails (most common for malpractice insurance)

III. Conditions as Explicit Limitations on Coverage

A. Overview

condition = an event uncertain to occur which must occur, unless excused, before performance of a duty becomes due

- condition precedent = a condition that must occur before a duty is due and owing
- warranty = gives an assurance on the part of the policy holder that a certain situation exists or will continue which diminishes the likelihood that the event insured against will occur
- condition subsequent = a condition that must be satisfied in order to avoid the discharge or termination of a duty that is already due and owing

B. Evidentiary Conditions [doctrine] = if a condition is this, it imposes a rule of evidence upon the insured to establish that a loss was caused by a risk that the policy was intended to cover and failure to satisfy the literal language of the condition will not prevent coverage so long as the insured carries the evidentiary burden

C. Some Common Conditions and their Legal Effects
   1. Increase of Hazard Clauses – these clauses provide a modern day warranty for the insurer to protect against some sort of damage that was enhanced by the control or knowledge of the insured // what constitutes an increase in hazard requires a common-sense judgment about what constitutes a normal, expected use property, the character of and necessity for the risk-increasing conduct and the extent to which the likelihood of a loss is enhanced
      moral hazard = the probability that the insured will destroy, or permit to be destroyed, the insured's property for the purposes of collecting insurance
      G/R(1): the insured's knowledge is required and that insured's mere control if not, by itself, sufficient to eliminate coverage
      G/R(2): courts require that the increase of hazard constitute a substantial change of circumstances materially increasing the risk
   2. Reporting Conditions- here the insured will report the value of its merchandise to insurer each month, and the insurer uses these reports to determine the value of the property to be covered under the policy and the premium to be paid
   3. Vacancy and Occupancy Clauses
      G/R: no coverage exists in the event the premises become vacant or unoccupied (usually provision is within policy)
      vacancy = the absence of inanimate objects
      occupancy = the presence or absence of people

IV. Intentional Conduct: An Overview
G/R: An insurer will only pay for a loss that is fortuitous, i.e. the loss must be accidental
POLICY: public policy so strong behind this, that even if the policy does not expressly state this, courts will imply it automatically

V. Intentional Conduct: Property Insurance

see sample policy, pg 17, #4

G/R: If insured intentionally causes damage to his property, the loss is not covered
POLICY: insured should not receive coverage for destroying their own property, otherwise insureds would have an incentive to destroy their property to collect the insurance money
G/R: when insured intentionally fails to take steps to preserve property after it is damages, he cannot recover for additionally loss caused by this failure, i.e. mitigating damages
G/R: **When you have an injury or harm and you do not do what is reasonable to sustain and minimize the loss, you will not be able to recover- Must MITIGATE damages!** (this is a common-law provision; therefore it is implied in every policy)
POLICY: avoid economic waste

<u>For Co-Owners of Insurance</u>
Modern G/R: departs from traditional thought that recovery is prohibited, and permits recovery by an innocent co-insured for a loss intentionally caused by another co-insured
POLICY: (1) even thought the interest in property may be joint, the interest in the policy insuring the property may not be joint (2) it is one individual responsible for the wrongdoing, not all the insureds especially if there is some underlying retribution

VI. Intentional Conduct: Personal Insurance, Life and Accidental Death
A. Suicide
   G/R: death due to suicide two years after the policy has been issued excludes coverage

POLICY: to prevent and individual from purchasing insurance while having intent to kill oneself for the enrichment of the beneficiaries

- American View: allows beneficiary to recover life insurance benefits when the insured takes his life b/c the death is seen to be fortuitous
- English Rule: does not allow beneficiary to recover when the insured commits suicide b/c suicide is inherently non-accidental

B. Death While Intentionally Involved in Unlawful Conduct
Approach #1
Majority G/R: allow recovery for beneficiary b/c the loss is considered fortuitous
Minority G/R: if insured violated the law, no recovery for beneficiary b/c permitting recovery would be encouraging crime
Approach #2
Here, the Q to be asked is whether the occurrence was a foreseeable consequence of the acts of the insured from the insured's viewpoint
G/R: Where the insured is innocent of aggression or wrongdoing and is killed in an encounter with another, the insured's death is considered accidental within the meaning of the usual accident policy, but if the insured is the aggressor in an assault and knew, or should have anticipated, that the other might kill the insured in the encounter, the death is not to be considered accidental
Approach #3
G/R: if one advances on another while the other is armed and the person dies in the encounter, the death is not accidental

C. Execution of Insured
G/R: Recovery is prohibited for beneficiary when insured is executed for wrongful conduct

D. Accidental Death Benefit: Distinguishing Intentional Acts and Accidents
Here, courts are attempting to distinguish an intentionally caused death which is not covered and an accidental death
There is no G/R- use facts and circumstances to rule based on what's fair

VII. Intentional Conduct and Liability Insurance

A. "Intended" and "Expected"- do they have different meanings?
(1) plain-meaning analysis = begin with observation that the provision has two separate prongs, both though referring to the insured's state of mind
"intended" = the insured has a desire that the injury or damage occur
"expected" = when the insured anticipates that injury or damage will occur
(2) "expected" + "intended" = an exclusion from coverage in circumstances where the insured's state of mind with respect to desire is not clear, but the circumstances are such that the insured, even if not clearly desiring to cause harm, should surely have anticipated that harm would result
To Make this work: you look at (1) probability of harm (2) awareness of harm (3) specificity of the expectation of harm

B. "Intended" Construed
Here, we are deciding if the injury or damage caused by the insured was "caused intentionally" so as to deprive the insured- an victim- of coverage

Majority G/R: the insured must have intended both the act and to cause some kind of injury or damage [middle]
Minority G/R: if intentional act by insured results in injuries or damage that are a natural and probable result of the act, the loss is considered intentional and there is no coverage [narrowest]
3rd G/R: for exclusion to apply, the insured must have had specific intent not only to injure but also cause the particular type of injury suffered [broadest]

C. Self-defense (split in the courts)
G/R(1): allows recovery for an intentional act, if acting out of self-defense
G/R(2): prevents recovery for any intentional act, even if acting out of self-defense

D. Diminished Mental Capacity
G/R(1): if an insured suffered from a lack of mental capacity when he acted with apparent intent to injure another, the insured's act cannot be treated as ”intentional”
G/R(2): an injury inflicted by an insane person is intentional if the actor understands the physical nature and consequences of the act
POLICY: insurance is purchased for fortuitous losses; where the insured has some control over the risk no coverage should exist, but in other cases no good reason exists to deny the victim access to the resources necessary to reimburse the victim’s loss

VIII. Particular Coverage Issues in Personal Insurance
A. Life Insurance
1. Accidental death: defining accident – here the dispute arises over the manner in which the death occurred
(a) accident = an unusual event that the insured does not foresee; the event happens unexpectedly and without the insured’s intent
(b) determining whether a death was accidental involves: (1) deciding if the event was fortuitous (2) the Q of causation
G/R: determining fi the insured’s death was accidental is determined from the point of view of the insured

- beyond this, you must look to particular facts and circumstances of the case, etc.
- the only test, is:
(1) determine whether the death producing event was an accident, i.e. was the event unforeseen and unexpected from the viewpoint of the insured?
(2) if the event was accidental, did the accident cause the death
If there are multiple causes of death, ask,
1. was the accident not too remote
2. was the accident the dominant cause of the loss

2. Accidental Death: Limits on the Time Between the Accident and the Death
The Provisions in accidental death endorsements requiring that the insured’s death be within a specified number of days of the death-inducing injury are controversial and will become more so as the medical profession’s ability to prolong life improves

B. Disability Insurance
1. disability insurance coverage provisions are defined in terms of the loss of one’s capacity to work, not one’s loss of income
2. occupational disability = provide coverage if the insured is disabled from transacting duties of the particular occupation in which the insured is then engaged

3. general disability policy = provides that the insured must be unable to pursue an occupation for profit for which he is reasonably suited by education, training or experience

C. Health Insurance
No G/R, just general policy to assure adequate access to health care is there at an affordable cost
1. Preexisting Condition = provision that excludes from coverage for sickness or illness commencing before the effective date of coverage
G/R(1): preexisting illnesses are exclusions
G/R(2): the insured must prove that the illness or injury for which he seeks coverage arose during the term that the policy was in effect
2. Experimental Treatments
G/R: no coverage for experimental treatments
POLICY: cost-containment
3. Medically Necessary Services- treatment which does not comport with medically accepted medical care protocols is not medically necessary
4. Mandated Coverages
these statutes require that health of disability insurance policies sold in the state contain certain minimum coverages

COVERAGE PROBLEMS IN LIABILITY INSURANCE

I. Particular Coverage Issues in Liability Insurance

A. The scope of the CGL
1. CGL = provides general liability coverage for businesses and then individuals receive their liability coverage through other policies
2. The CGL provides for (1) bodily injury and (2) property damage
3. "to which this insurance applies" = recognizes that there are specified perils covered by the CGL as well as specific exclusions to the affirmative grants of coverage
4. "bodily injury" = bodily injury, sickness or disease sustained by any person which occurs during the policy period, including death at any time resulting therefrom
5. "property damage" = (a) physical injury to tangible property including all resulting loss of use of that property [all such loss shall be deemed to occur at the time of the physical injury that caused it] (b) loss of use of tangible property that is not physically injured [all such loss shall be deemed to occur at the time of the occurrence that caused it]

B. The meaning of Occurrence = an accident including continuous or repeated exposure to conditions which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured (denotes wider coverage than using the term "accident")
<u>When determining an Issue of Coverage</u>:
1. determine if it an "occurrence" under the policy
2. determine if there is a resulting bodily injury or property damage during the policy period of coverage

C. Problems with the Word "Accident"
1. accident = unforeseen, unexpected and unintended event that results from some cause either known or unknown
2. the problems with this are:

- there can be no liability coverage for losses intentionally caused by the insured

- there can be no coverage for loss that the insured knows about at the time the policy is issued
- the foreseeability test excludes the negligent factors

D. Problems of Multiple Losses from a Single Cause
Majority G/R: "cause analysis" = the number of occurrences depends on the number of causes
Minority G/R: "effect analysis" = situation is viewed from the perspective of the injured party so that multiple results constitutes multiple occurrences

E. Problems of what Triggers Coverage
1. ,MANIFESTATION RULE = limits coverage solely to liability for injuries that manifest themselves during the policy period
   - provides narrowest coverage of all
   - liability tends to fall on the small group of insurers that provided coverage when the existence of a disease becomes obvious
2. EXPOSURE RULE = exposure to the injury or damage causing substance triggers coverage; all insurers who provided coverage while exposure occurred whether it be the first exposure or a continuing exposure must contribute to reimbursing the insured's tort liability
   - insurers cannot escape their obligation once a disease is diagnosed on a widespread basis
   - broader approach, but doesn't necessarily conform with the insured's expectations
3. INJURY-IN-FACT APPROACH = an injury-in-fact occurs and coverage is triggered when the body's defenses are overwhelmed and disability or premature death becomes inevitable / the injury-in-fact comes later than the exposure and whenever injury-in-fact occurs, insurers on the risk after the date of actual injury are bound to provide coverage
4. MULTIPLE TRIGGERS APPROACH = combines the coverage of various individual approaches and says any insurer that was on the risk during the progression of the disease is liable
   - broadest view

- deemer clause = in circumstances where an occurrence spans multiple years, the occurrence is deemed to occur during the policy term that is the latest of all of the potentially applicable coverages

F. Coverage of Punitive Damages Assessed Against the Insured
1. punitive damages = sums awarded to a þover and above the þ's actual loss for the purposes of punishing a Ð for outrageous conduct and deterring the Ð and other from engaging in similar conduct in the future

2. ISSUE 1: is award of punitive damages covered by insurance policy?
   G/R: punitive damages for intentional torts are not within the scope of any liability policy's coverage
   CAVEAT: where liability coverage is compulsory by statute for the benefit of 3rd parties

3. ISSUE 2: does public policy of the state permit the insured to shift punitive damages to an insurer?
   G/R: No G/R, but look at freedom of contract, deterrence, fair allocation of the burden of the remedy, and collectibility---- 2/3 of states have held punitive damages are insurable b/c (1) state statutes authorize the issuance of liability insurance (2) punitive damages constitute a legal liability

Note: In WY, it is not against policy to have coverage and it is presumed intended unless specifically excluded

Sinclair Oil v. Columbia Casualty Co. (Wyo. 1984)

G/R: court said one cannot contract for anything one wants unless it is against public policy and said unless is specifically excluded, its included

4. doctrine of respondent superior = holds employer strictly liable for punitive damages assessed against the employee for þto recover damages, all þmust show is the employee committed willful, wanton, or malicious acts with the scope of the employment

II. Particular Coverage Issues in Property Insurance: The Friendly Fire Rule

- friendly fire = new that burns in an ordinary place where a fire is expect to be found, i.e. stove, fireplace, etc.
- hostile fire = fire that occurs in a place where they are not supposed to be, i.e. fire that begins in a place where they are unexpected or a friendly fire that escapes from its place of containment

G/R: insurance policies will provide coverage for friendly fires, but not hostile fires

III. Coverage of Remote or Distant Causes of Loss

A. The Basic Problem- language of causation is simple, but it disguises extremely complex and difficult legal questions, i.e. how far back to you look in the chain of events?

B. Doctrine of Efficient or Predominant Causes

1. **Majority G/R** for multiple causation = if multiple concurrent causes exist and if the dominant most significant or most important cause is a covered peril, coverage exists for the entire loss; otherwise, the coverage is not covered

   TEST: where a peril specifically insured against sets other causes in motion which in an unbroken sequence and connection between the act and the final loss, produce the result for which recovery is sought, the insured peril is regarded as the proximate cause of the entire loss

C. The Liberal View of Causation = so long as the insured can point to one covered cause in a multiple-cause situation where the causes are arguable independent, the insured has a good chance establishing coverage; as long as one of the causes is covered, the entire loss is covered, notwithstanding the presence of excluded or noncovered causes

D. The Conservative View of Causation = if a covered cause combines with an excluded clause to produce the loss, the insured may not recover

1. excluded clauses = specifically excluding from coverage
2. noncovered clause = one not covered but not specifically excluded

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MECHANICES OF THE CLAIM PROCESS

I. OVERVIEW

- To receive proceeds in the event of the loss, the insurer typically has to file a claim
- The process to do this is usually specified in the policy
- Notice must be given to the insurer ASAP
- Insured has no affirmative duty to comply with the claims processing requirements, rather the duty of the insured arises from paying proceeds and performing other obligations; In other words, the insured's non-compliance with the claims processing requirements provides the insurer with an excuse for not performing the duties it has undertaken

- Insurance companies have policies that insured must follow b/c (1) it is a condition to the K (2) to make the process more orderly staring from the investigation point

II. NOTICE OF LOSS PROVISIONS

A. Purpose of Notice of Loss Provision

1. The purpose of requiring insured to give notice of a loss to the insurer is to enable the insurer to investigate the circumstances of the loss of claim before information's becomes stale or disappears
2. helps assist insurer toward dealing with fraudulent claims
3. reduces costs of coverage, i.e. with promptness

B. Manner of Giving Notice

1. If not specified in policy that notice must be in writing, oral notice is sufficient
2. Notice must contain enough information to enable the insured to commence an investigation, i.e. the notice must contain enough detail to inform the insurer that a loss occurred or that a claim is likely to be asserted against the insured
3. Notice is timely
4. Most courts have held that notice is a immaterial breach (if breached), i.e. if there is a breach of notice it does not discharge the insurer's duty to perform assuming the insured learns of the loss or claim through some other means aside from personal knowledge
5. Should give notice immediately so as to not deprive a 3rd party from important compensation
6. Notice must be given to the proper authority, i.e. insurer's authorized agent

C. When Notice is due

1. 1st you must determine what events or circumstances trigger the obligation to give notice
   G/R: most policies require notice to be given as soon as insured as information where reasonable conclusions can be made that an occurrence or loss has occurred which would invoke coverage [most policies actually use language as "immediately" "ASAP", etc.]

   SUMMARY: notice of loss must be filed within a reasonable time, but what is reasonable varies with the circumstances, the courts, and the parties
   SO, protected yourself by (1) calling insurer immediately and (2) make a record of giving notice—document everything!

D. Excuse for Non-compliance

1. Insured will be excused from complying with notice requirements in extenuating circumstances, i.e. insured was an additional unnamed party to policy and was unaware of notice requirements within the policy, etc.

E. Effect of Non-compliance

1. **G/R:** timely notice is a condition precedent to coverage and unexcused delay in giving notice will relieve the insurer of its obligations to the insured, whether or not the delay prejudiced the insurer
   Policy: notice is what is necessary to inform the insurer that an event has occurred and delayed notice usually frustrates the insurer's investigation which in turn can prejudice the company's ability to prepare an adequate defense
2. Who bears the burden that there is prejudice?
   Majority G/R: burden is on insurer to show it was prejudiced by lack of timely notice

Minority G/R: insured must demonstrate why the insurer was not prejudiced by the delay in notice

3. Prejudice = something to do with the purpose of the notice of loss condition, i.e. courts will inquire into whether the notice impaired or frustrated the insurer's ability to investigate or defend the claim (dependent on facts of the circumstances)

III. PROOF OF LOSS

A. General Stuff

proof of loss = the insured will have to provide some proof with their claim for coverage to give the insurer an adequate opportunity to investigate the loss and to prevent fraud against the insurer

Requirements are more strict that for Notice of Loss

sample policy, pg 18, 2(e)

B. Substantive Requirements

1. policy will usually specify what is required; varies dependent on what type of policy you are dealing with
2. Becky says great way to document is to use video or photo and then place this is a fireproof safe

C. Effect of Noncompliance

G/R: noncompliance with providing proof of loss will only relieve the insurer from providing liability if there was a lack of substantial compliance

D. False Swearing

1. **G/R**: most policies void the policy if the insured willfully concealed or misrepresents a material fact concerning a loss
2. if the insured makes a mistake, courts do not usually construe it as "false swearing"
3. Some state statutes requires that the insurer show the false swearing actually misled the insurer in order to stick liability on the insured – Antitechnicality statutes
4. Note: whatever reasons exist for the denying of coverage must be the reasons that were available before litigation, i.e. courts do not like it when insurers develop reasons for denying coverage throughout the litigation process
5. **Hatch case**

   Issue: what does insurer have to prove to show insured falsely sweared?

   Law: Insurer must show that the insured intentionally concealed or misrepresented a material fact

   Caveat: Insurer will still have to pay if the false swearing was not of material nature to the claim, i.e. they can only get out of paying if the false swearing was a bulk of the claim

IV. DISPOSTION OF CLAIMS; ALTERNATIVES TO LITIGATION

A. **Appraisal** = outside people (usually two) who will determine the price of the value of the destroyed property or amount from the loss if the insured and insurer cannot agree on its value

1. the appraisal proceeding is a limited kind of arbitration, i.e. will reach conclusions and then submit to the courts to consider with other proceedings

sample policy, pg 3- shouldn't it be included on pg 18 "loss of settlement"?

B. **Arbitration** = method of alternative dispute resolution where the contending parties submit the disputed matter to one or more persons designated for the purposes of resolving the claim outside an official judicial proceeding

sample policy, pg 40, pg 5 #40

1. Courts are very reluctant to mess with the results from an arbitration if the parties willing agreed to enter the mediation
2. much cheaper and quicker than litigation
3. SOL applies, i.e. K claims are 10 years and torts are 6 years in WY

V. DISPOSTION OF CLAIMS; LITIGATION

A. Timeliness of the Suit against the insurer

1. **G/R**: insurer must process the claim of the induced in a timely manner
   Note: many contracts provide specific language within the policy as to what the time limit is; contractual time limitations cannot unreasonably shorten or lengthen the time allotted under the SOL

B. No-action clauses and direct action statutes

1. In 1st party situations, the insured sues if the insurer fails to perform
2. In 3rd party situations, "No action clause" prohibits that no action lies against the insurer until the underlying liability of the insured to the 3rd party is established
   G/R: most states require a person to seek remedy by suing Jon Doe directly who then pursues action with his own insurance company
   Problems with direct action statutes: we don't want juries to see that the insurance company if the one who will actually pay!

   4 EXCEPTIONS where direct actions are allowed against the insured:
   (1) if 3rd party has judgment against the insured
   (2) in uninsured motorist situations if insurer providing coverage for the insured is viewed as the same insurer for the uninsured motorist
   (3) Direct action statutes = making insurer directly liable to the injured party and permitting liability to be established in a single action against the insured and the insurer jointly, or against insurer alone
   (4) When the insurer unjustifiably denies a claim, when insurer unjustifiably denies a settlement, or insurer fails to conduct an adequate defense – Note this has opened the floodgates to claims against the insurer

VI. INSURED'S DUTY TO COOPERATE WITH THE INSURER

The duty to cooperate may be expressly stated or implied through the contract / policy

A. Duties, Conditions, Express and Implied Terms

G/R: the duty to cooperate doesn't have to be expressly stated for it to be required
A non-breaching party is not allowed to suspend acting in accord with its duties just because the other party did breach; only if the breach of the duty to cooperate is <u>material</u> is the other party allowed to suspend and ultimately discharge its performance obligations

G/R: insured must cooperate because it is the only way that the insurer can obtain the needed information; Note: by telling insured that if they don't cooperate they will lose coverage places you in an adversarial position

1. As applied to Insurance – general contract law makes the insured's performance of the duty to cooperate a constructive condition to the insurer's duty to pay proceeds

2. What Constitutes Noncooperation – general contract law applies, i.e. when you have a material breach, the other side will be discharged from their duties; but if you have an immaterial breach, the other party still must perform and uphold its part of the contract

3. When Non-cooperation gives the insurer a Valid defense- K law states that the first party to commit the material breach gives the other party the right to suspend performance, i.e. a party can't breach and then later come back and say the other side did to when that side has suspended its performance

An insurer cannot suspend its own performance unless it has made some efforts to secure the cooperation of the insured- there are many factors the courts look at to decide if the insurer secured reasonable efforts, but main factor is was the insurer prejudiced by the lack of cooperation?

BAD FAITH // BREACH OF COVENANT OF GOOD FAITH & FAIR DEALING

I. Preliminary Notes

A. Elements of Tort Claim
   1. duty - this is area where reference is made / must show there was a relationship between insured and insurance company and as a result there was an act or omission of something within the relationship to cause the……
   2. breach – this is area where reference is made
   3. cause
   4. harm

B. Hybrid between tort and contract – technically due to K between insured and insurer where the duty initially stems from, i.e. almost all bad faith cases are a hybrid of a contract and tort claim because every tort breach is a K breach [but not every K breach is a tort breach]. Usually you have in the example of Randy and girlfriend drag-racing (1) br/K for failure to fix the car and defend the law suit and then (2) tort for bad faith

C. Before determining if there is bad faith, you must first determine if there is a duty OR a standing to sue (see hypos in notes)
   G/R: Only 1st party insureds can sue insurance company for bad faith, however a 3rd party can sue the 1st party to then sue the insurance company

D. Summary Judgment = ask the court to dismiss case because as a matter of fact and law there are no issues available to be tried

E. Declaratory Judgment = there is a question of law and you as the court to interpret the issue "as a matter of law"

F. Interpleader / FRCP 22 = when there are multiple Ps to a suit and the amount of damages the Ps wish to recover is disproportionate to the funds available based on the policy limits

G. Reverse Bad Faith is when an insurance company brings suit against an insured (usually won't happen b/c it is a waste of time and money (may be used as a defense though) and if allegations are serious enough, insurance company will normally just purse a fraud action

II. Meaning of Bad Faith

A. bad faith = an insurer that opts to deny a claim that is not fairly debatable, i.e. failure to handle a claim in a manner that would alleviate the insured's hardship without impairing the insurer's interest in circumstances where the insurer is aware of the insured's dire straight (must be actions beyond that of mere negligence)

B. bad faith raises issues of what is "bad enough" to constitute punitive damages // G/R = if tort is accompanied by some kind of egregious, wanton misconduct a punitive award may be appropriate.

A. ***McCullough v. Golden Rule Insurance***

FACTS: þfiled suit because Ð refused to pay her medical bill claims as the insurance company said her illness was a preexisting illness prior to obtaining this policy

ISSUE: (1) Does and insurance company owe a duty of good faith to its policyholders not to unreasonably deny a claim for benefits under the policy, the breach of which duty gives rise to an independent tort action

(2) if such a tort action is permitted, in addition to showing that the claim was denied unreasonably and without proper cause, must the policy holders demonstrate that the insurance company intentionally, knowingly, or recklessly denied the claim for benefits

HOLDING: (1) YES (2) new standard of proof

REASONING: **standard of bad faith in WY** = **fairly debatable**, it is a standard like that of reasonableness because it promotes all facts of claim to be properly investigated and developed for issue at hand

- usually just requires the Insurance company to show some level of investigation was taken at the onset of the claim

B. ***Hatch v. State Farm Fire and Casualty Co.***

FACTS: fire occurred in the basement of the þ's house and a claim was made to an agent of the Ð. Ð did nothing about the fire, i.e. no investigation, reviewing, estimates, etc.

ISSUE: what are the requirements of the standard of bad faith, i.e. fairly debatable?

HOLDING: for the þ

REASONING: even though the insurance company here had a fairly debatable reason for not paying the claim, it cannot properly go beyond a reasonable denial of the claim and engage in unreasonable or unfair behavior to gain some sort of advantage

court expands standard from McCullough and states there can be bad faith even is there is no br/K, i.e. and adjuster can act so badly when investigating a claim (even if there ends up being no liability for the insurance company) that the insurance company can still be liable for bad faith

- really scared insurance industry since it raised the standard for duty of bad faith considerably

C. ***Farmers Exchange v. Shirley***

see above for facts, etc.

the standard to succeed on a first party bad faith case the insurer must:

(1) act without justification
(2) act intentionally AND
(3) use deceit
(4) nondisclosure
(5) reneg on promises
(6) engage in a violation of industry custom AND
(7) deliberate attempts to obstuscate

III. Duty to Defend

A. duty to defend = the insurance company's contractual obligation to provide you a defense in a lawsuit as soon as a claim within coverage is filed against you regardless of whether the law of negligence would find liability in the circumstances

B. **G/R: the insurer has a duty to defend any lawsuit alleging claims against its insured for which, if liability were later established, the insurer would be required to pay damages on behalf of the insured**
   1. this duty to defend is based upon the ALLEGATIONS within the complaint, not necessarily their truthfulness, i.e. if the allegations were true no matter what and within coverage provided for by the policy, then there is a duty to defend
   2. if some of the claims alleged are covered and some aren't, insurance company has a duty to defend all the claims – doesn't make sense, but justification is policy, i.e. efficiency, etc.

   First Wyoming Bank v. Continental
   FACTS: here Þbrought suit and Ð sought summary judgement on all claims and was indemnified from its duty to defend
   ISSUE: because the complaint used the word "negligence" does this create an automatic duty to defend?
   HOLDING: NO
   REASONING: ?

C. If there is a question of coverage, the safest way for the insurance company to proceed is:
   (1) provide a defense
   (2) send out a RESERVATION OF RIGHTS letter, which explains why there may not be a defense available to the insured by the insurance company in the future
   (3) simultaneously start an investigation into the claims
   (4) file a declaratory judgment action on "fast trace"- this will clarify any questions of law that exist, but note: a court will not rule on this when there are questions of fact still remaining in dispute

   Morris v. Farmers Insurance Exchange
   FACTS: Morris shoots Sanchez. Farmers denies a defense for Morris because apparently the shooting was intentional on Morris's behalf. However, this intentional aspect is in dispute because Morris was drunk at the time of the shooting.
   ISSUE: Should Farmers be indemnified from the suit?
   HOLDING: No, summary judgment will not be granted when there are still facts in dispute.
   REASONING: **G/R: if there are facts in dispute a declaratory judgment will not be given because:**
   (1) court does not want a dress rehearsal, i.e. the court isn't going to allow the parties to set their theories out
   (2) collateral estoppel, i.e. if the court here determines the facts in one way, then this binds the Þin any other subsequent actions
   (3) court is concerned about the insurance company taking over the litigation from the Þ i.e. the insurance company is going to be making arguments against the insured, leading back to collaterally estopping the Þ
   (4) judicial economy, i.e. the court doesn't want the same issues to be tried twice
   (5) interference with another court, i.e. most likely these two issues will create two separate suits in different courts
   (6) the court doesn't want to give the Þany advantage over the Ð/insured
   DISSENT: Note, Judge Morris here wants to be the fact finder and determine the facts the way he wants to believe them

D. The duty to defend ends when releases are obtained from both the insurance company, the Þs and the Ðs OR an interpleader is filed

E. This is a sticky issue with many complications

INSURER'S DUTY TO PAY PROCEEDS

I. SOURCE OF DUTY = firmly grounded within the contract that the insurer will pay proceeds of a loss if it is within the coverage that is available

II. FAILURE OF THE INSURED TO MITIGATE THE AMOUNT OF LOSS

G/R: the insured must take reasonable steps to avoid the consequences of a loss; you cannot recover for damages which could have reasonably been avoided

Policy: we want to prevent <u>waste</u> in all circumstances

IV. MEASURING THE AMOUNT OF LOSS; PROPERTY INSURANCE

A. Principle of Indemnity

sample policy, pgs 18-19

G/R: goal of indemnity = to reimburse the insured for the loss sustained and no more

Objective if to put the insured in the position the insured would have been in had the loss not occurred; the insured is not entitled to recover more than the damages property is worth or more than its decline in value as a result of the damage

The insurer must pay and the insured can claim no more (which ever is smaller $ amount / Ins. company will pay the lesser of the two evils always!) :

(1) applicable limit of liability
(2) amount of insured's interest in the property at the time of loss
(3) value of the property at the time of loss
(4) cost to repair or replace the property with property of like kind and quality

<u>Some more general rules</u>:

G/R: if insured's loss is partial, insured cannot be allowed to recover an amount exceeding the policy limits, even if the insured's actual loss were greater

G/R: whatever the limits of policy, the insured will not be allowed to recover more than the insured's interest in the property

G/R: in no event can the insured recover more than the value of the property

G/R: if the insured can show that the "car" cannot by repaid be placed in as good of condition as it had before the incident, some courts will allow the insured to recover, in addition to the cost of repairs, the difference between the reasonable value of the car before the incident and the reasonable market value after repair

G/R: an insurer will pay the loss if you are the one insured based on the policy which states you can (a) either keep the money or (b) you must get the repairs done—if you are not the insured, you can always keep the money!—Use your bargaining power to get this option provided that best fits and helps you!

B. Co-insurance

1. <u>co-insurance</u> = a kind of loss-sharing agreement between the insured and the insurer where insured bears a portion of the loss that is a function of the percentage of the property's total value not covered by the insurance
2. the insured is also an insurer along with the underwriter, i.e. if the underwritten amount is less than the value of the property, the insured is a coinsurer in the sense that the owner bears a portion of the risk
3. Policy: causes both insurer and insured to bear the risk and ultimately reduces moral hazard; also encourages insureds to buy insurance in amounts closer to actual value of their property

So, Coinsurance basically means you pay beyond a deductible before the Insurance will provide coverage. The insurer uses this because it reduces moral hazard, i.e. someone will think twice before having a test done b/c he will have to pay 20% of it; also encourages responsible behavior. This is a fair system b/c insurance really exists to prevent against catastrophic events.
Example:

C. Valued Policies (fairly unusual; usually only in commercial situations)
G/R: in most nonmarine insurance, the parties do not stipulate the value of the property (except for works of art or antiques)
G/R: when the value of insured property is stipulated to and a total loss occurs, this stipulation is conclusive, assuming there is no fraud, collusion or misrepresentation, or gross overvaluation of the property- the insurer must pay the amount stipulated to
G/R: when a partial loss occurs, a % is usually specified to reach the amount

1. open policies = the agreed sum written on the face of the policy designates, not the value of the property insured, but the maximum limit of recovery of the property is destroyed; so the insurer is free to attempt to prove after the loss that the value of the property was less than the stated limits of coverage
2. valued policies = require a stated value conclusive with regard to the proceeds payable in the event of a total loss
   a) if a person has more than 1 valued policies, courts will limit how much the person can receive, i.e. may be able to recover the max of one policy, but prohibit recovery from both policies
   b) valued polices are severely criticized b/c of "overcompensation" to the insured

D. Actual Cash Value
Many policies will state that insured cannot recover more than something's actual cash value

Subject of litigation because it is not clear how to compute it.
How is actual cash value defined / determined?
1. REPLACEMENT COST LESS DEPRECIATION
2. MARKET VALUE
3. REPLACEMENT COST
4. BROAD EVIDENCE RULE = trier of facts is allowed to consider any conclusive evidence logically tending to establish the correct estimate of the value of property at the time of loss; criticism is that this method begs the question, i.e. which method of valuation is best in the circumstances?
5. CHOOSING MEASUREMENT: Problematic areas are: used goods, appreciated property, onscolecent property (destroyed or unattainable) coinsurance calculations, interest [Prejudgment and Judgment interest is available if insurer fails to pay]

V. MEASURING THE AMOUNT OF LOSS; PERSONAL INSURANCE

A. General Stuff

1. In life insurance, the proceeds are payable at death and amt is specified in the policy

2. In disability, once the finding of disability is made, the calculation of benefits is straightforward based on what is stated in the policy
3. In health and accident, the proceeds are set by schedules incorporated into the policy, subject to deductibles or coinsurance

So basically everything is very straightforward because they are based on certain sums.

B. Accelerated Benefits in Life Insurance

Just basically deals with someone who has a terminally ill disease can accelerate their benefits provided by their life insurance plan to cover the high expenses incurred at the end of the life.

VI. MEASURING THE AMOUNT OF LOSS; LIABILITY INSURANCE

A. General Stuff

1. Most of all cases go to litigation b/c of all the factors involved
2. Liability is measured by the judgment against the insured
3. the insurer will limit their liability to a given amount, so that the insurer's liability terminates if multiple judgments are entered against insured

B. Interest, Expenses, and Costs

G/R: insurer not only must pay costs to defend an action against insured, but also for any other expenses which arise, i.e. bonds, interest in judgment, etc.

C. Insolvency Clauses and Statutes

G/R: an insured's insolvency or bankruptcy does not relieve the insured of its obligations (this is codified in statutes to refute the old common law rule which prevented this)

D. **Immunity of Insureds**

This basically just deals with the trend toward immunities of different levels, i.e. state, federal, etc,. Liability insurance is designed to pay for liability imposed by law, but if something is declared by the law as immune, then the law imposes no liability

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SUBROGATION

I. INSURER'S RIGHT OF SUBROGATION

A. General Stuff

Subrogation = an equitable right that enables one who is secondarily liable for a debt and who pays it to succeed the rights, if any, that the creditors hold against the debtor; But asserting these rights, the party that pays the debt is made whole, while simultaneously, the loss is placed on the person who ultimately has the primary legal responsibility for the loss

G/R: an insurer who has indemnified his assured for a property loss is subrogated to the assured rights against any person wrongfully causing the loss

Policy: securing fairness
(1) enable the loss to fall on the person who is legally responsible for causing it
(2) prevent insured from a windfall, i.e. recovering twice

B. Equitable subrogation vs Conventional

1. arises out of principles of equity, and therefore, doesn't need to be contracted for
2. Equitable subrogation = an equitable right whereby a nonvolunteer who has made a payment to another for a debt for which he is only secondarily liable succeeds to that party's rights against the 3rd party who is primarily responsible for the debt

Elements:
(1) the party claiming subro must have paid the debt 1st
(2) the party claiming subro must not have voluntarily paid the debt, but must have been under some legal compulsion
(3) the party claiming subro must be secondarily liable for the debt
(4) no injustice will be done by allowing subro

3. Conventional subro = identical to equitable, EXCEPT conventional subro is given the right via contract, i.e. the "volunteer" requirement is irrelevant and you don't have to consider equitable principles

C. Existence or non-Existence of Subro by line of Insurer

1. A court is going to decide is subro is allowed based on the type of insurance involved and whether the insurance policy is one of indemnity.

D. Requirement that the Insurer must have paid the debt

1. **G/R**: an insured is always entitled to be fully compensated- remember this if the insurer cannot adequately reimburse the insured for the full amount of loss sustained

2. **So**… we have a problem: How should a recovery from a 3rd party (tortfeasor) be allocated between the insured and the insurer?

   G/R: insurer must have fully reimbursed the insured before the insurer can peruse rights of subro; allow the insurer to own the claim of the insured (you can only get ownership once the insured has been paid in full
   Policy: until the insured is paid in full, the insurer is competing with the insured for the recovery- undesirable situation!

3. **However….** This G/R is not always reality, i.e. the insurer will often assert rights of subro to go after the 3rd party before the insured has been paid in full. To permit this, the insured and the insurer agree to subro via contract

4. Ok, so now that we have gone after the 3rd party, HOW SHOULD THE SUM BE APPORTIONED that is collected from the 3rd party?

   G/R: insured must be reimbursed first for loss not covered by the insurance; once the insured is reimbursed in full, the insurer can receive any extra funds
   Policy: conventional subro really shouldn't be treated any differently than equitable

5. Settlement = negotiated end to avoid the risks of a lawsuit and litigation
   G/R: because of all the confusion, handle this be having insured and insurer agree how the costs will be allocated before the settlement is actually reached

E. **Requirement that the Insurer not be a volunteer**
If insured's claim against the insurer is outside the coverage and the insurer pays it anyway, the insurer will not be entitled to subrogation against the party who caused the insured's loss (this is only for equitable subro)

F. **Subro against Insured not allowed!**
G/R: no right of subro exists in favor of an insured against its own insured; subro rights exist only against 3rd parties to whom the insurer owes no duties
Policy: to allow an insurer subro rights against its own insured would allow insurer to pass the loss from itself to its own insured, thereby avoiding coverage which the insured purchased

G. Defenses to Subro and the Effect of Releases on Coverage

1. **G/R regarding defenses** = insurer is subrogated only to such rights that the insured has against other parties at the time of loss; any defense that the 3rd party has which is good against the subrogor is good against the subrogee (examples: it was insured's choice to settle, i.e. voluntary settlement; contributory or comparative negligence on the part of the insured)
2. **Release of tortfeasor prior to loss**
G/R: if the insured prior to a loss (or even prior to becoming an insured) releases a 3rd party from prospective liability, that release is good against the insured under the rule that defenses are good against the subrogor are also good against the subrogee
3. **Release of tortfeasor after the loss**
G/R: if the insured after a loss releases a 3rd party without the insurer's assent, the insured has interfered with the insurer's right of subro; BUT the release will be effective against the insurer
Caveat: if the tortfeasor secures the insured's release after acquiring knowledge that an insurer has an interest in the insured's actual or potential subrogee; In other words, the release is ineffective as a defense against the insurer's subro claim if at the time the tortfeasor obtained the release the tortfeasor knew of the insured's coverage

So…. all these things tell us that the insured should not release tortfeasors or other 3rd parties with a relationship to the loss without the insurer's express consent

H. Parties in interest
a lawsuit can only be brought by the party in interest
G/R: the real party in interest on a claim is the party who owns the claim or who has the right to bring and control the action and enforce it

G/R: usually both the insured and the insurer have the right to bring the claim, even if the claim has not been paid in full by the insurer- depends on the state!

OTHER INSURANCE CLAUSES

I. GENERAL STUFF

A. other insurance clauses = attempt to prioritize or coordinate the coverage of two or more applicable policies

see sample policy, pg 19, #18 and pg 31, #7

B. purpose = to address the risk of moral hazard that accompanies multiple coverage which in combination exceed the value of interest insured
C. stacking of policies = combining all of the policies you have to avoid the least amount of personal liability for a [judgment] against you; this may or may not be prohibited based on the policy language b/c it is fair for a person to stack when he has specifically bought more insurance to prevent such personal liability
D. In theory, it may seem good to have more than one insurance policy, but be very careful because they could end up canceling each other out!

II. OTHER INSURANCE CLAUSES IN PERSONAL INSURANCE

A. Life insurance = doesn't contain other insurance clauses because it is not indemnity insurance
B. Health insurance = clauses are widely used; usually called "coordination of benefit clauses" which relieve the insurer from liability if other coverage exists

III. TYPES OF INSURANCE CLAUSES

1. PRO RATA = most common kind of clause; declares that the insurer's liability shall be limited to a portion of the loss not exceeding its proportion of the total insurance coverage

Formula = if a loss covered by this policy is also covered by other insurance, we will pay only the proportion of the loss that the limit of liability that applies under this policy bears to the total amount of insurance covering the loss

2. EXCESS = provide the insurer shall reimburse only the loss exceeding the coverage of other valid and collectible insurance

Formula = the company shall not be liable for loss if at the time of loss, there is any other insurance which would attach if this insurance has not been effected, except that this insurance shall apply only as excess and in no event as contributing insurance and then only after all other insurance has been exhausted

3. ESCAPE / AVOID = (least common) provides the insurer shall have no liability if there is other valid and collectible insurance

Formula = it is hereby agreed that if other insurance is written on the insured interest….this Company will be notified of the amounts of such other insurance….It is further agreed that unless or until so notified of such other insurance the coverage under this policy shall be suspended

IV. CLONFLICTS AMONG OTHER INSURANCE CLAUSES (and other problems of enforcement)

A. General Stuff

1. Because public policy favors other insurance clauses, they are usually enforceable; the problems arise when there is conflicting language in the policies

Two approaches:

G/R(1): look for semantic differences; the most specific policy will be primary, or the policy most clearly intended to provide coverage for the particular kind of risk will be primary (hard for drafters)

G/R(2): declares clauses mutually repugnant and unenforceable; knockout approach leaves the general coverage of all the pollicies in force, requiring that only a formula to prorate the loss among the insurers be chosen

B. Pro rata vs. Excess / Escape

G/R: policy with pro rata is the primary policy and the excess is the secondary

C. Excess v. Excess
G/R: Oldest policy is primary

D. Excess vs. Escape
G/R: policy with escape clause is primary and the policy with the excess clause is "excess" or secondary

E. Problem of secondary or True Excess Coverage"
look at what your jurisdiction will do

F. **Impact of Insolvency of Primary Insurer**
Issue: What happens when primary insurer can't pay because of insolvency?
G/R: most courts have held that the excess insurer need not drop down and participate at the primary level

V. PRORATION FORMULAS

when two or more pollicies are mutually repugnant, how do you prorate the loss among the various insurer? 3 Rules for handling this:

1. Majority G/R: the insurers pay shares of the loss proportional to their limits of coverage
2. Minority G/R: "equal shares approach" where each insurer shares the loss equally up to the limits of the lower policy
3. apportion the loss according to premiums, i.e. each insurer's contribution is based on the % of premiums receive compared to the total premiums paid to all the insurers

VI. OTHER TROUBLESPOTS

A. Sharing defense costs = G/R: defense costs should be apportioned according to the same formula used to apportion the cost of indemnifying the insured

B. Invalidity of otherwise collectible "other Insurance" due to act or Neglect of Insured = if an insured acts through neglect or negligence and thereby eliminates one of its insurers from helping pay the costs, then the other insurance company can demand that the insured incur some of the costs

C. Self Insurance as "other insurance" = courts do not generally construe a self-insurer as another insurer for purposes of other insurance clauses

D. Deductibles and Co-insurance Requirements
3 points to keep in mind:
(1) if all contributing policies have a deductible of some size, the insured should be expected to contribute to or bear a portion of the loss equal to the smallest deductible
(2) after calculating the contributions of various insurers, the insured should not receive less coverage than he or she would have received if any one of the policies had been in force alone
(3) the calculations of the contributions of various insurers should reflect the fact that different deductibles in different policies equates to the insurers assuming varying proportions o the risk, which in turn must be translated into the insurers contributing different amounts to reimburse any given loss

VII. RESOLVING DISPUTES ON WHO GETS THE PROCEEDS:

Interpleader = enables a person subjected to multiple claims to give the action to the court to settle and divvy out based on the limits of liability

VIII. REMEDIES FOR THE INSURER'S BREACH OF DUTY TO PAY PROCEEDS

A. Loss of the Bargain = put person in position they would have been in had the contract not been breached

B. Other Loss

1. incidental damages = additional costs incurred after the breach such as interest on the amount owed by the breaching party and any costs incurred in a reasonable attempt to avoid further loss
2. consequential damages = all injuries to person or property arising out of the breach of contract, including loss profits, mental anguish, etc.

C. Attorneys Fees and Penalties

G/R: attorneys fees are not recoverable

Caveat: if insured can prove the insurer acted in bad faith- all dependent on state statutes

D. Punitive Damages = dependant on jurisdictions, but there must be more than a simple breach of contract- In WY, punitive are available for torts only

E. Tort Remedies = greater available when a tort is committed rather than just a breach of contract

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GROUP INSURANCE

I. NATURE OF GROUP INSURANCE

- really it is the same as individual insurance
- the only difference rests on the fact that group insurance is marketed in a manner that special rules govern which are irrelevant to individual pollicies

II. TRIPARTITE CONTRACT: PROBLEMS OF AGENCY

A. We have 3 groups involved in the relationship:
   (1) insurer
   (2) group representative = usually the employer who secures the policy for the benefit of the group of individuals and somehow associated with the representative, usually the employees; actually an intermediary between the insurer and the actual insureds
   (3) certificate holders

B. Is the Group representative an <u>agent</u> for the insurer or insured?

G/R: because the group rep is not appointed by the insurer to serve as its agent and does not act solely for the insurer's benefit, the group rep is not the insurer's agent, but rather the agent for members of the group: So EMPLOYER = AGENT FOR EMPLOYEES

Courts vary though on this, so use this **TEST** to determine if the employer is an agent for the employees:
   (1) was task in question expressly delegated to the employer by the insurer
   (2) does the insurer supervise and control the employer's performance of the task
   (3) is there any evidence of collusion between the employer and employee to defraud the insurer
   (4) what degree of involvement did the employer have determined if the insurance company will be bound by what was told by the employer to the employee

C. However, when an employer does act as an agent for Insurance company or insured, agency law governs

D. the failure of the employer to pay a premium terminates coverage for the employees

III. SPECIAL PROBLEMS OF CONTRACT INTERPRETATION

A. Problem of multiple documents

G/R: courts will look first to the master policy = the primary contract between the group representative and the insurer (not the certificate given to each insured)

Minority G/R: when the terms in the master policy conflict with the certificate, the court will go off of the certificate

Policy: how is an insured supposed to know that the master policy is different from what he has received, i.e. the certificate

B. **The actively at work problem**

This comes up due to eligibility requirements, i.e. what constitutes full-time employment

G/R: courts do not require regular continuous employment at a particular place to constitute active and full-time

IV. SPECIAL PROBLEMS OF RISK CONTROL

1. One of the advantages of group insurance is that per-risk marketing costs are substantially reduced, which in turn reduce the cost the insured bears
2. because there is adverse selection of insureds, the % of high-risk insureds can cause problems; therefore, **G/R:** most group insurance is sold in the employment setting because workers are less of a risk than non-workers

V. TERMINATION AND MODIFICATION

1. a person can be covered under group insurance only if they are actively part of the group; Policies may contain <u>continuity provisions</u> which allow coverage to extend beyond termination from the group
2. If changes are going to be made to the policy or an employer is going to terminate the policy,
   Majority G/R: an employer does not need to inform the represented
   Minority G/R: consent must be received before any changes can occur
3. If a gap exists between switches from policy to the next, the **G/R:** is that the new insurer assumes right and obligations of the former company as they exist on the date of succession
4. Many provisions allow for a "roll-over period" which allows an individual to just automatically roll into individual insurance with the same company

VI. ASSIGNMENTS: CHANGING THE BENEFICIARY; STANDING TO SUE

1. A member of the group has the ability under a group policy to designate a beneficiary
2. However, a member is not allowed to assign the policy

VII. LEGISLATION AFFECTING GROUP INSURANCE

NAIC adopted model

- requires that a group insurance plan conform to one of several descriptions, each of which is structured around a certain group; also prescribes certain provisions the policy must contain

COBRA

- enacted by Congress which specifies requirements for group health insurance plans regarding continuity of coverage

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<u>AUTO INSURANCE</u>

I. CURRENT LANDSCAPE FOR COMPENSATING AUTO ACCIDENT INJURIES

A. General Stuff

Our system compensates the injured through tort remedies which holds the person responsible who caused the loss for compensating using liability insurance and personal assets.

B. **Liability Insurance Component**

Statutes require you must have insurance in a minimal specific amount to be able to cover any unforeseen losses

The statutes provide victims with access to funds to cover their loss by requiring each vehicle owner in the state to have security for any judgments that may be registered against the owner

C. **Financial Responsibility Requirements**

Statutes also require the vehicle owner to demonstrate financial responsibility for both accidents which have occurred in the past AND any future accidents

D. **Observations**

see sample policy, pg 34

Med Pay = covers expenses incurred by insured and insured is defined by the definition specifically in the medpay section of the policy; this is a no-fault type of coverage, i.e. insurer just requires a copy of the bills and then you are paid back (subro may kick in)

II. UNINSURED AND UNDERINSURED MOTORIST INSURANCE

A. Purpose = when a person doesn't have enough assets to compensate the injured party

1. <u>UM coverage</u> = under this, a person injured by an UM will be compensated by his or her insurer in an amount equal to what the uninsured tortfeasor's liability insurer would have paid had the tortfeasor had insurance / same goes for the underinsured motorist (just instead of having no liability, there is too little liability)

B. Nature of Uninsured Motorist coverage

1. <u>Four elements of coverage</u>
   (1) the amount for UM coverage must be no less than the statutory minimum for compulsory liability insurance
   (2) the UM statute version of the definition of UM must be contained in the policy
   (3) insured must establish a legal right that he can recover, i.e. has the substantive right to recover from the insured
   (4) insured must prove the amount of damage

2. The Legally entitled Requirement and Immunity
   If an immunity exists (parent / child), then the person is deemed not to have the legally entitle requirement to collect UM coverage

3. Exclusions
   examples: farm-type equipment or off roading vehicles are usually excluded in pollicies from being apt to receive UM coverage

   Other vehicle exclusion = one of most controversy, i.e. when a UM hits a person driving a vehicle owned by the him, but not on his policy; most courts declared this excuse as invalid

4. Hit-and Run Accidents

This varies in states depending on the laws and the policies; in WY under the sample policy, it is contractually eliminated because the policy declares a hit-and-run as an UM; therefore, you just go to that section of the policy

In the other states, the **G/R**: is that policies will provide coverage to insured who suffer bodily injury in the hit-and-run, but require that (1) a physical contact was made and (2) follow state statute outlining the scope of the UM coverage invalidating the physical contact requirement

C. Nature of Underinsured Coverage

2 Statutory approached:

(1) if the injured person had liability insurance in excess of the liability insurance carried by the tortfeasor and the injured person's loss exceeds the limits of the tortfeasor's coverage, the injured person's own insurance picks up the difference

(2) makes the amount of insured's liability coverage an add-on to the amount of the tortfeasor's liability coverage if the tortfeasor's coverage is inadequate to reimburse the insurer's loss; i.e. this type focuses less of "topping-off:" the tortfeasor's liability insurance and more on providing resources to compensate the insured victim

"topping off statutes" cap the amount of UM recovery

III. PROPERTY COVERAGE IN AUTO INSURANCE

1. Collusion coverage = protects the insured against damage to the insured vehicle caused by the vehicle's upset or its impact with another vehicle or object, i.e. NOT fire, theft, hail, etc.
2. Comprehensive coverage = protects the insured against damage to the insured caused by perils which are not collisions, i.e. hail, fire, theft, etc.

Two approaches if there is ambiguity as to what type of coverage there is:

(1) treat comprehensive coverage as covering those losses that occur when the vehicle is not being operated and collision coverage for all other losses

(2) distinguish among the risk that involve the vehicle's operation and those that don't, i.e. bridge falling on a car, etc.

IV. OTHER ISSUES IN AUTO INSURANCE

A. What constitutes "Use" of an auto

1. typically means covering losses "arising out of the ownership, maintenance, or use of an insured vehicle"
2. Approach #1 = limit coverage to losses occurring when the vehicle is being used as a vehicle, meaning while the vehicle's control are being manipulated for the purpose of propelling the vehicle
3. Approach #2 = only requires that the vehicle be employed for some purpose, even if not the ordinary purposes for which vehicles are used

B. What constitutes "Ownership"

G/R: policies limits their coverage to vehicles that are owned and deny coverage for losses occurring from vehicles that are not owned

G/R: "Owner" = only persons who are able to give permission to use the vehicle and who have the right and power to control it

V. THE HOUSEHOLD OR FAMILY EXCLUSION

G/R: Such a provision states that no coverage exists for any obligation for bodily injury to the insured or any member of the family of the insured residing in the same household as the insured
Policy: eliminate the insurer's liability under liability coverage's when one family member's negligence causes injury to another family member; we don't want familial collusion (note there has been great opposition to this amongst our society)

In Wyoming: the law will not completely allow an insurance company to invoke the household exclusions- see policy, Dec sheet pg 3, b/c it places you in the lowest possible insured range of 25/25.
Guest statutes = owner or operator of a vehicle is not liable for the injury or death of a passenger in the vehicle being transported without payment unless the operator is guilty of something more than mere negligence

VI. STACKING OF AUTO INSURANCE BENFITS

A. General stuff

1. stacking = term that refers to obtaining a single loss insurance proceeds from duplicate coverage's; if an insured is allowed to stack coverage's, the insured is allowed to recover for damages received a sum up to the stated limit of each policy that provides coverage
2. intra policy stacking = one policy provides multiple coverage
3. interpolicy stacking = multiple polices applying to a specific incident
4. must look to state statutes to determine if stacking is permitted or prohibited

B. Liability Insurance

G/R: stacking is not permitted if the victim of the insured tort would receive more than the damages (unless statute says otherwise)

C. UM Insurance

1. occupancy insured = one whose claim for coverage is based on the fact that the insured occupied the vehicle that was insured and was hit by an UM
2. named insured = one who is the owner of the policy and whose coverage is therefore not limited to being in any particular location when the UM causes the injury

horizontal stacking = when the named insured attempts to stack his own policies
vertical stacking = when the named insured attempt to stack his policy ontop of someone else's

interpolicy vertical stacking = when the insured attempts to recover from both the insured's own policy and the policy of the driver of the vehicle
interpolicy horizontal stacking = when insured attempts to recover under two separate policies he has on two different vehicles
intrapolicy horizontal stacking = when insured has paid multiple premiums under one policy for multiple vehicles; therefore the insured is seeking multiple recoveries
interpolicy horizontal stacking by an occupancy insured = if a guest in an auto accident suffers injury when an UM hits the vehicle in which the guest was riding, the guest may seek to recover under the insured's policy and any of his own policies

D. No-fault coverage

G/R: courts will allow multiple recoveries if there have been multiple premiums paid

DUTIES IN THRID PARTY INSURANCE

*

I. THE INSURED'S DUTY TO COOPERATE AND ASSIST IN THE DEFENSE

A. General Stuff

1. the primary obligation that the insured owes the insurer in 3rd party insurance is the duty of cooperation; the duty to cooperate is the flipped of the insurer's duty to defend
2. the cooperation clause generally obligates the insured to disclose all of the facts within his knowledge and otherwise to aid in its determination of coverage under the policy
3. if the insurer requests and doe not obtain the insured' cooperation for purposes unrelated to the performance of contractual obligation, the insurer has no defense based on the insured' lack of cooperation

B. The reciprocal Nature of the Insurer's Duties and the Insured's duty to cooperate

1. G/R: under basic contract law, a party may not suspend performance in response to an insignificant or immaterial breach by the other party
2. Issue: can the insurer demand the insured's cooperation at the same time it is disavowing coverage? **G/R**: as long as the question of coverage is unresolved and the insurer has not rejected the possibility of coverage, the insured must cooperate with the insurer in providing the insured with the needed information, subject to caveat that the insured need no disclose privileged information

C. Materiality and Prejudice

G/R: at a minimum, the insurer cannot refuse to provide coverage unless the insured has committed a material breach of the Noncooperation clause

1. materiality = the equivalent of insubstantial performance
2. prejudice = occurs when a material breach has occurred

D. Burden of Proof

1. if insurer brings a claim for lack of cooperation, they have the BOP in showing that they did act reasonably in trying to bring about the insured's cooperation
2. in a minority of jurisdictions, the BOP is placed on the insured to show that they did cooperate

E. Common Instances of Noncooperation

1. Insured's Absence from Trial or other Proceedings
   G/R: a willful failure to testify constitutes Noncooperation and voids the policy
2. Making false statements to the Insurer
3. Collusion (worst kind when insured and 3rd party colludes)

F. Noncooperation and Compulsory Insurance

1. Purpose of compulsory liability insurance statutes = protect 3rd parties; acknowledging the Noncooperation defense in this situation has the effect of denying coverage to a victim of someone else's negligence; public interest is so strong here that normally lack of cooperation is not a defense where the insurance is compulsory

II. INSURED'S NON-COOPERATION

G/R: unless there is a material breach, then non-cooperation does not constitute a rescission of the policy

As the attorney, give undivided loyalty to the insured; if insured wishes certain factual choices to be made, ultimately is the attorney's responsibility to respect them, unless the insured wishes to commit fraud or otherwise assist a 3rd party (then attorney should withdraw from case)

III. SETTLEMENT

G/R: law allows an insurer to settle regardless of what insured thinks; seems unfair but the insurer has the right to run the show!

Liability insurance policies create a contractual duty to defend, but DO NOT create a duty to settle; while insurer is required to exercise good faith and always keep insured's intentions at heart, the insured is prohibited from settling or for that matter interfering with the litigation without first consulting the insurer

A. Insured's Settlement without Insurer's Consent

G/R: an insured does not have to obtain the insurer's consent when the insurer has breached the duty to defend

G/R: it has been held, that the insured's voluntary settlement does no discharge the insurer unless the insurer could demonstrate it has been substantially prejudiced by the settlement

B. Standard for Determining the Nature of the Insurer's duty to settle

1. Good Faith and Fair Dealing TEST = if the insurer acts in good faith and deals fairly when responding to a settlement offer, the insurer has complied with its duty to settle; bad faith conduct is more than making a mistake in judgment or failing to predict correctly the outcome of litigation
2. Due Care TEST = if the insurer is not negligent in deciding the accept a settlement offer within the policy limits, the insurer has fulfilled its duty; i.e. Does insurer's conduct conform to what a reasonable insurer would do?
3. Reasonable Offer Test = designed to ensure that the insurer does not sacrifice the insured's interest in order to pursue its own
4. Strict Liability Alternative = an insurer is strictly liable for the amount of any judgment whenever the insurer has rejected a settlement offer within policy limits

C. Source of the Insurer's Obligation: Tort or Control

Argument for TORT = if the duty is imposed by law, it must therefore be imposed by tort
Argument for CONTRACT = the nature of the obligations owed by the insurer to the insured

D. Insurer Conduct Constituting Breach of the Duty to Settle

G/R: an insurer cannot be held liable for breaching a duty to settle if a settlement offer was not made

E. Mechanics of Handling Settlement Offers

G/R: an insurer typically has the discretion to settle a claim even when the settlement involves the expenditure of the insured'' own funds.

If the expenditure exceeds the policy limits:

(1) take steps to try to get the settlement offer reduced, as that would benefit the insured
(2) use reasonable diligence to determine the facts which a good faith decision to settle or not settle can be reached
(3) where the likelihood of liability exceeding the policy limits exists, inform the insured of this possibility and the of the company's adverse interest sop that the insured can take steps to protects his own interest

(4) inform the insured of any settlement offers received and the process of those negotiations

F. Remedies for Breach of the duty to settle
G/R: if the insurer breaches the duty to settle, the insured is entitled to damages exceeding the policy limits, whether it is tort or contract

G. Effect of breaching the duty to defend or the duty to settle

H. **Duty to Mitigate?**

CONFLICTS OF INTEREST / TRIPARTITE RELATIONSHIP

I Preliminary: What to Include in the Letter the Insurance Co. sends to the Insured regarding representation:
1. who the defense attorney is with her credibility
2. maximum of policy limits
3. suggestion to hire a personal attorney depending of the facts, i.e. policy limits, assets of insured, sophistication of client, etc.

II.. Conflicts of Interest
A. Overview- here we are talking about when one party to a contract has different expectations than the other
1. conflict of interest = whenever one lawyer has multiple clients and the representation of one is or would be rendered less effective by reason of his or her representation of another
2. the problem arises b/c the lawyer often has two duties: (1) to the insurance company and (2) to the insured == the tripartite relationship
G/R: The Lawyer always owes a fiduciary duty to the INSURED first.

B. Basic Alternatives: to whom is Loyalty Owed?
When the attorney represents both the insured and the insurance company, there are three ways to look at where the loyalty should lie:
(1) absolute loyalty to the insured
(2) absolute loyalty to the insurer
(3) representing the interest of both parties

1. The Dual Representation Model – here the attorney owes a duty to both the insurer and the insured
(a) consent is critical
(b) when the interest of the insurer and the insured don't differ, the attorney treats the two as co-clients
(c) if the attorney subordinates anyone client's interest to the other, it is a breach of duty (as well as an ethical violation under Professional Rules of Responsibility)
(d) therefore, there must be consent from both parties to continue this co-representation for this model to work

2. When Dual Representation is no longer possible……
   (a) the defense attorney must withdraw from representing on of the parties with regard to the subject matter pending in litigation
   (b) the defense attorney must automatically with draw from representing the insured and has an undivided loyalty to the INSURED

3. Assessing the Dual Representation and One-Client Model – this is focusing on the duty dilemma especially when you take into account that normal the attorney is getting paid by the insurer
   G/R: The insured is entitled to have all necessary steps taken to provide a fully adequate defense and the attorney should represent under the guise that there is no insurance there at all, i.e. no insurance company

   However, if dual representation no longer is possible, some suggest the One-Client Model because of the problems associated with the dual model:
   (a) the model gives no guidance how to resolve problems
   (b) gives no weight to the fact that most insurance defense attorneys practice in large volumes, i.e. making it hard to ignore the fact that the insurance company pays the bills
   (c) it's not really being fair to the insured who pays a premium for a full defense when the attorney is also going to have interest in the insurer's rights
   G/R remains the same: At a minimum, the attorney owes an absolute duty of loyalty to the INSURED.

   If the Insurer and Insured's interests conflict, **G/R**: the insured is entitled to reject counsel appointed by the insurer and select his own attorney and control the defense with the insurance company bearing the costs.
   NOTE: the Insurer hates this b/c:
   (1) when insurer looses control of the defense, costs go up
   (2) attorney may still conduct litigation in a manner hoping to impress the insurance company in the hopes of getting future business from them

4. Why Someone purchases Insurance:
   (1) COST MINIMIZATION PERSPECTIVE = the primary purpose of liability is to indemnify insureds against any judgments
   (2) INDEMNIFY ONLY INSURANCE = (moral hazard) the only goal here is to make sure the judgment does not exceed the limits of the policy
   (3) INTEREST PROTECTION PERSPECTIVE = here insured purchases liability for two reasons: (1) to be protected from any judgment brought by claim of a third party and (2) be protected from the financial costs associated with defending such claims

C. Managing Conflicting Interest- how to deal when you have Conflicting Interests
   (1) DO-NOTHING APPROACH = ignore any conflict which arises [bad]
   (2) ABANDON THE INSURED APPROACH = remove yourself from the situation, however this does nothing to resolve the conflict
   (3) NONWAIVER AGREEMENT AND RESERVATION OF RIGHTS NOTICE

- nonwaiver agreement is a contract between the insured and insurer in which the insurer agrees to continue with the defense while the insured agrees the insurer shall have the right to contest any issues relating to coverage in the event the insured is found liable for ht contested action--- basically it is a reservation of rights letter to which the insured has consent

- reservation of rights is a unilateral notice sent by the insurer to the insured stating that the insurer reserves the right to contest coverage despite its undertakings to investigate the claim and defend the insured; this notice eliminates the possibility that the insurer will meet the argument that it waived its right to deny coverage or to withdraw from the defense simply because it undertook to defend the insured

  Included in this Letter is:

  1.

  G/R: If the Court views the reservation of rights approach as an alternative resolution to the conflict of interest, the notice must be given promptly to the insured, i.e. within a reasonable time or as soon as practical

  (4) DECLARATORY JUDGMENT = the insured and insurer are represented individually and they both go to the court to ask what coverage is available and/or obligation –to-defend question directly to the court before litigation even begins

  (5) JOIN LAWSUIT TO DETERMINE COVERAGE AND VALIDITY OF Þ'S CLAIM = here just combine the Q of liability and the Q of coverage into one lawsuit

  (6) SEPARATE OR INDEPENMDENT COUNSEL FOR THE INSURED = what is stated when there is no other resolution

  1. Separate Counsel Approach – here private counsel is hired for the insured by the insurer (this does nothing really b/c insurer still retains control of the defense)
  2. Independent Counsel for the Insured – here the counsel is truly independent, i.e. the insurer retains no control of the defense and insurer is obligated to pay reasonable fees for the defense

D. Particular Conflicts and their Resolutions

1. Claims Exceeding the Policy Limits – here when claim is exceeding the policy limits, you automatically have a conflict of interest b/c the insured wants to settle, where as the insurer doesn't care because they will not be responsible for the excess--- if the conflict cannot be avoided, go back to the general rule of thumb, which is the attorney has a primary duty to the insured.
2. Disclosure of Info By Insured Inconsistent with Insurer's Obligation – **G/R:** If attorney learned of something from the insured that could helped the insurer's case, he cannot disclose this info to the insurer, i.e. he has the same degree of confidentiality with the insured as he would with any other client
3. Common Issue Cases – here is when we have a Q of coverage involving the same facts or issues, i.e. was it negligence or intentional conduct- **G/R:** The existence of any conflict does not eliminate the duty to defend, rather transforms it into an obligation to assume the costs of a defense
4. Multiple Insureds with Conflicting Interest- here we have tow or more insureds named as Ðs and their interest don't coincide- **G/R:** appoint individual counsel for each from the beginning
5. One Insured with Multiple Insurance Companies- **G/R:** if damages are within the policy limits, tell the two insurance companies to split evenly; if the damages are outside the limits, tell Insurance companies to duke it out themselves
6. Insured's Counterclaims- here we have a claim made against the insured, but he wishes to sue back- **G/R:** insurer must advise the insured of the possibility of a counterclaim to act in good faith, but always allow the insured under separate independent counsel to pursue it (never combine it with the original direct claim)

III. Problems of Primary vs Excess Coverage

primary insurer = insurer responsible for providing the first layer of insurance coverage

excess insurer = provides layers of coverage beyond the policy limits of the primary insurer's policy
*** The problems arise when the insured is sued by a third party

A. "Guiding Principles" offers this **G/R:** primary insurer should promptly investigate all claims even if it appears that the policy limits will be exhausted, should attempt to settle where it appears desirable, should notify excess carrier if excess judgment seems likely, etc. Also, excess carrier should not attempt to coerce primary carrier to settle within the initial policy limits—so basically notify everyone/all companies involved from the beginning, and this involves attorney always knowing from the beginning every K a client has with an insurance company since this whole idea is a contractual matter
B. Primary Insurer's Duty and Its Source – **G/R:** a primary insurer owes an excess insurer the same good faith or due care duty it owes its insured in processing, defending and settling a claim
C. Allocating Defense Costs Between Primary and Excess Carrier – **G/R:** if the settlement or judgment is within the primary carrier's limits, the excess carrier is not obligated to pay a portion of the defense, but if the judgment exceeds into the excess limits, courts will vary on what portion of cost the excess carrier must pay towards the defense

Montana case: In the Matter of the PR and Insurer imposed Billing Rules and Procedures
Issue(1): May an attorney agree to abide by an insurer's billing and practice rules which impose conditions or directing the scope and extent of the representations of her client, the insured, i.e. can the insurance company require prior approval via the dual representation model before the attorney makes any decisions for the client?
Law: An insurer and insured are NOT co-clients of defense counsel.
No- prior approval is not allowed because it fundamentally interferes with defense counsel's exercise of their independent judgment as required by the PR rules