CLM Claims & Litigation Management Alliance™
ADVANCING ETHICS, COOPERATION AND EDUCATION

CLM 2015 New York Conference
December 3, 2015 in New York City

Why Can't We All Just Get Along? Bad Faith in Excess Policy Claims

I. Introduction

A. Increasing Importance of Excess Insurance

Excess insurance in today's litigation is more prevalent than in prior years. Excess policies frequently are implicated in construction defect litigation, catastrophic injury litigation, death cases, as well as some of the personal and advertising injury lawsuits. Even more frustrating to an excess insurer, is excess exposure coming into play for no other reason than a venue offering Vegas jackpot verdicts. Accordingly, an excess carrier should take as many practical steps as possible over the course of a claim to hopefully minimize exposure to bad faith.

B. Basics of Excess/Umbrella Insurance

Excess insurance is a secondary layer of coverage protecting an insured when a judgment or settlement exceeds the primary policy's limits of liability.[1] An excess policy often covers the same risks as the primary insurer, but liability under the excess policy attaches only after a predetermined amount of primary coverage has been exhausted.[2] In other words, the excess policy increases the amount available to compensate for a loss, but does not increase the scope of coverage. Excess insurance may "follow form" to the underlying primary insurance, meaning it incorporates all of the terms, conditions or exclusions of the primary policy, or it may be a stand-alone policy with its own, terms, conditions and exclusions. An excess policy typically does not include a defense obligation until the limits of the underlying primary insurance are exhausted, but usually gives an insurer a right to participate in the investigation, defense or settlement of a claim, at the insurer's expense.[3]

An umbrella policy is similar to an excess policy because it protects an insured against losses exceeding the limits of the primary policy. An umbrella policy, however, may afford broader coverage than the underlying primary policy, insuring against certain risks that a primary policy does not cover. That is, an umbrella policy can be a "gap filler" when there is no coverage under the primary underlying policy. By design, it may provide first dollar coverage when a primary policy does not. Umbrella policies include their own terms, conditions, definitions and exclusions. Umbrella policies are generally understood to provide the broadest coverage available.[4]

II. Bad Faith Standards

Bad faith is viewed differently among jurisdictions. In some jurisdictions the claim sounds in tort, while in other jurisdictions the claim is considered to be derivative of a contract claim. Moreover, the standards of proof can vary. To complicate matters further, some jurisdictions also have statutory bad faith, which is not addressed in this paper, but can impact the potential damages for bad faith.

A. Tort

Bad faith, as a tort, typically is described in the failure to settle context as breaching the duty to act in good faith. The tort is derived from the notion that insurance policies include an implied duty of good faith and fair dealing, which in a liability context usually means that the insurer must not place its own financial interests above that of its insured. In Florida, the obligation to act in good faith is a fiduciary duty, described as the duty to use the same degree of care and diligence as a person of ordinary care and prudence should exercise in the management of his own business.[5] Other jurisdictions such as Texas require that an insured must prove that an ordinarily prudent insurer would have accepted a settlement offer, considering the likelihood and degree of the insured's exposure to an excess judgment.[6] In Minnesota, an insurer must consider the situation as though no policy limits applied to the claim and "give equal consideration to the financial exposure of the insured." Bad faith is required; a mere mistake in judgment is insufficient.[7]

B. Contract

Other courts find that bad faith is not "extra-contractual," but is within the nature of a contract, with damages awarded to place the insured in the same position it would have been had the insurer's breach of the policy never occurred.[8] New York has declared that its bad faith action sounds in contract, requiring the insured to demonstrate a gross disregard of the insured's interest, that is, a failure to place on equal footing the interests of the insured with its own interests when considering a settlement.[9]

III. Bad Faith Landmines

Certain situations can create the setting for bad faith in claims involving excess insurance. Discussed below are some of those situations and practical ways to address them should those situations arise.

A. Notice

Notice of a claim that could potentially reach an excess carrier's layer is a "hot button" issue for all excess carriers. Any adjuster that has handled a number of excess claims has experienced the early on mantra—"this claim will not reach your layer,"—followed by "this claim is expected to reach your layer, mediation is scheduled in two weeks, and you have been ordered to be present" or " this claim is going to trial in a month and could expose your layer" or even better, "this claim went to trial and resulted in a verdict that is in your layer." The excess adjuster is less than pleased—how can a legitimate evaluation be performed on such short notice so as to justify setting a reserve or paying or appealing a judgment?

First, an excess claim representative should be aware of the terms of the notice provision in its policy. Contractual notice provisions vary in language, but the purpose of all notice provisions is to ensure that an insurer can adequately investigate and respond to the claims against the insured.[10] Thus, while the contractual duty to notify the carrier usually lies with the insured, practically speaking, the potential for exposure to reach an excess layer may not be ascertainable until somewhat late in the litigation, leaving insureds, adjusters, and attorneys in a quandary.

Jurisdictions vary as to who should provide notice to the excess carrier. As noted above, an insured typically has a contractual obligation to provide notice. That said, a primary carrier arguably could be in the better position to evaluate the severity of a claim. Accordingly, some jurisdictions impose a duty upon the primary carrier to notify an excess carrier of potential exposure in its layer.[11] The direct duty position between primary and excess carriers sounds in bad faith, but appears to be the minority position.[12]

When an excess carrier wants to deny a claim for late notice, the majority of jurisdictions hold that the excess carrier must demonstrate prejudice.[13] A few jurisdictions, however, apply a strict late notice rule, not requiring any prejudice.[14] Some states, such as New York, long a strict late notice state, enacted legislation providing that an insurer cannot deny a claim for late notice unless the failure to provide notice materially impairs the insurer's ability to investigate or defend the claim.[15] Oddly enough, Alabama draws a distinction on the prejudice issue between primary and excess carriers—no prejudice is required for primary carriers, while excess carriers must show prejudice.[16] As to an excess carrier, prejudice is typically couched as the denial of the opportunity "to associate with defense and control of the case, attempt to negotiate a settlement in cooperation with the underling insurer, or take an appeal."[17] As one commentator has concluded, the excess carrier should not be compelled to rely upon the insured to protect its interests, and that an excess carrier needs the option to defend and protect itself when the primary carrier is not mounting a strong defense.[18] Thus, when an excess carrier receives notice after verdict or judgment, prejudice is much more easily found.[19]

Prejudice also raises the question of the burden of proof. Generally, the burden falls on the carrier,[20] although some states shift the burden to the insured by imposing a rebuttable presumption of prejudice.[21] Commonly espoused reasons for placing the burden on the insurer are: equity (the carrier is seeking to disclaim coverage); the difficulty to the insured in proving a negative (that there was no prejudice); the superior position of the carrier from an evidentiary standpoint; and encouraging a carrier to timely undertake a preliminary investigation.[22] On the other hand, at least one court has explained the rationale for placing the burden on the insured: the impossibility for a carrier to prove prejudice—the witnesses it might have called; the defenses it may have raised; and what disposition it might have reached in settlement if it had received notice earlier.[23] Notably, if prejudice is required, the prejudice must typically be "material"[24] or "substantial."[25]

If the case has been worked up properly, more likely than not, the potential for excess exposure should not be a last minute surprise and notice should be a non-issue. Nevertheless, for a myriad of reasons, the excess carrier will almost certainly face a last minute notice of potential exposure. Thus, for that last minute excess evaluation, the excess carrier should obtain copies of all evaluations provided by defense counsel, as well as responses to interrogatories, requests for admission and copies of expert reports (if there are "smoking gun" documents, obviously request those as well). If time allows, request copies of key depositions,

or at least summaries of those depositions. Review and analysis of these items will provide a better idea of whether late notice and prejudice should be considered by the excess carrier. Additionally, have a conversation with the defense attorney, not just the primary carrier's adjuster. Matters not in writing may otherwise be disclosed by the defense attorney in a conversation.

B. Tenders and Settlement Demands

In claims presenting exposure clearly within the excess layer, the primary carrier is often ready to tender its limits, only to find that no one wants to take it. A plaintiff who knows that excess coverage is available doesn't want the primary limits, and the excess carrier doesn't want to assume the obligation of defending an expensive case. Fortunately for the excess carrier, the primary carrier cannot simply "wash its hands" of the duty to defend the common insured.[26] But practically speaking, an excess insurer faced with clear exposure should evaluate whether to accept a tender from the primary carrier and assume the defense, especially if the excess carrier believes that the primary carrier is not putting forth an aggressive defense. Otherwise, as discussed below, the excess carrier has other options.

Notably, it is the primary insurer's tender that triggers the excess insurer's obligations to settle in most jurisdictions.[27] Under this circumstance, the excess insurer should be subject to the same duty to settle principles as a primary insurer.[28] That the excess carrier has no duty to defend at this juncture (because the primary carrier should continue defending), is irrelevant. The duty to settle exists independently of the duty to defend.[29] This is not to say that without an offer on the table the excess carrier must seek out a settlement just because the primary carrier has tendered.[30] Most jurisdictions impose the duty to settle upon an excess carrier only after a settlement demand and after a tender of the primary carrier's limits.[31] Generally, those courts find that excess carriers owe their insureds a duty to "exercise good faith . . . in considering any offer of compromise within the limits of [their] polic[ies]."[32] Other courts view the obligation more broadly, finding that excess carriers owe their insureds a "duty of good faith in evaluating any settlement offers" coupled with a duty not to "arbitrarily reject a reasonable settlement."[33]

When settlement demands involve an excess carrier's layer, the excess carrier may have to walk a fine line. One often cited opinion states:

> Even when [the excess carrier] has not assumed the defense or control of settlement negotiations, [it] has the right under the policy to consent to any settlement reaching its coverage level. The excess insurer has an implied obligation to exercise that right in good faith.[34]

Almost certainly, the excess carrier's participation in or control of settlement negotiations "ups the ante" for a potential bad faith claim should the settlement negotiations fail.[35] But, failing to participate when the negotiations are within the excess carrier's layer could similarly "up the ante" for a bad faith failure to settle. Accordingly, the safest position for an excess carrier is to always have some ongoing monitoring of a claim. Even claims with great liability defenses may nevertheless expose an excess layer for other reasons, such as a bad venue. An excess carrier is also wise to make its own independent evaluation of liability and exposure. In the face of any potential bad faith, the excess carrier will want to have

documented its file with any issues it may have with liability or damages as assessed by defense counsel.

C. Coverage Issues

Primary carriers and excess carriers may disagree on whether the claims against the insured are covered. The issue may become more complicated if both policies include exclusions for certain conduct (assault, molestation), but the exclusions are worded differently resulting in different coverage. Sometimes a primary carrier settles a claim on behalf of the insured, purportedly exhausting the primary carrier's coverage, but the excess carrier may dispute exhaustion believing the primary carrier paid claims that were not covered.[36] Other times, a follow form excess carrier may simply disagree with the primary carrier's coverage position, which it is free to do.[37]

Obviously, excess carriers should carefully consider coverage under their policies, engaging coverage counsel if necessary. Undoubtedly, one of the most difficult issues in assessing the excess carrier's duty to settle within limits is when the allegations against the insured arguably fall outside of the excess policy's coverage. So, does the excess carrier get to consider whether some or all of the claims ultimately may not be covered in its analysis of the reasonableness of a settlement offer, whether the excess carrier should respond to the offer, and how it should respond? As with many of the issues discussed, the answer is jurisdiction specific.

For instance, in California, at least one court has held that factors such as the limits imposed by the policy or a belief that the policy does not provide coverage should not affect a decision as to whether a settlement offer is reasonable.[38] Notably, the excess insurer can fund the settlement under a reservation of rights, and seek reimbursement from the insured.[39] This option, however, is of no solace to the excess insurer whose insured is otherwise insolvent or judgment proof. On the other hand, other jurisdictions find that coverage is relevant to the determination of whether bad faith exists in the context of a failure to settle within limits.[40] Further complicating the excess coverage issue is that, often, the excess insurer may be unable have coverage determined early or while the underlying claim is pending. The duty at issue under an excess policy is indemnity (as opposed to defense), which typically is not ripe for determination until such time that a judgment or settlement exists.

IV. Potential Ways to Avoid Bad Faith

A. Association in the Defense or Excess Monitoring Counsel

After having had a chance to review the information provided by the insured, primary carrier and defense counsel, the excess carrier must decide whether it agrees that the excess policy could be implicated and whether it has a comfort level with the defense of the claim. Sometimes the lack of comfort is simply the "unknown" of the attorney defending the case (not panel counsel for the excess carrier), other times the excess carrier may believe that the defense attorney is entirely capable, but perhaps is understaffed for the complexity of the case, while other times the excess carrier has serious concerns about the defense being provided.

The excess carrier can usually, by the terms of its policy, associate in the defense of the claim. In this instance, the excess carrier may retain (at its expense) an attorney to make an appearance on behalf of the insured to defend as co-counsel. Exercising this right may alleviate

the excess carrier's concerns. Sometimes the excess carrier's concerns rise to the level that it wants the defense counsel removed. The excess carrier likely does not have the contractual right to demand this course of action. Accordingly, some type of compromise should be offered. For instance, the primary carrier and the excess carrier may agree to substitute defense counsel, sharing the cost. If no compromise can be reached, the excess carrier would be wise to document proof of the dispute in the claim file or by correspondence.

At other times, the excess carrier may retain monitoring counsel. Monitoring counsel represents the excess carrier's interests and does not participate in the defense. The extent of monitoring counsel's involvement in the claim often depends on the existence and nature of a coverage issue. If there is no coverage issue or the coverage issue is not one raising a conflict of interest between the excess carrier and the insured (such as a reservation of rights on punitive damages), monitoring counsel can be more directly involved in communications and strategy with the defense counsel. If there is a serious coverage issue, monitoring counsel's involvement should be limited strictly to facts developed in the litigation, as opposed to defense counsel's evaluation of facts germane to the coverage issue.

Typically, retaining monitoring counsel should not rise to the level of participation in the defense and settlement negotiations such that potential bad faith exists. As one court stated:

> Unless Underwriters' lawyers assumed the otherwise non-existent duty to participate in settlement negotiations, the comparative fault defense must fail. Hiring a lawyer in and of itself certainly cannot be considered active participation in settlement negotiations. So long as General Accident maintained sole authority to approve settlement offers and to set litigation strategy (an inference General Accident does not contest), Underwriters' lawyers could not participate in the action in any meaningful way. As this opinion has repeatedly stressed, to expect Underwriters' lawyers to participate in settlement negotiations before the primary policy limits were exhausted would be to alter the essential nature of the excess insurance contract.[41]

B. Focus Groups/Mock Trial

A high exposure excess liability case often raises the issue of participating in mock jury trials, focus groups and even witness counseling. If a primary carrier is virtually certain that damages, if awarded, will exceed the layer of its coverage, the expense of these strategies seems unnecessary. To the contrary, the excess carrier desiring to have some idea of potential exposure may be very interested in pursuing these strategies. Again, the primary carrier has contractual control of the defense, but must also look after the insured's best interest. Thus, a compromise is warranted.

A good trial consultant can make the difference between winning and losing or a significant difference in the damage award. A claims professional can and should, step in and insist on retaining trial consultants, particularly in cases with high exposure, implicating multiple layers of insurance. Trial consultants understand the psychology of how jurors attribute blame. Consequently, attorneys and claim professionals are wise to learn what to do to influence how jurors place blame. Good trial consultants help create strong themes for litigation and provide witnesses with the tools and techniques for effective communication with the jury. In cases of

limited budgets, difficult witnesses, or in cases you know will never see the inside of a courtroom, trial consultants can be used to prepare clients and even experts for deposition.

The most realistic way to evaluate a case for trial—or to determine its settlement value—is to preview the case and observe the responses. A focus group is an interactive research study where a consultant facilitates the presentation of information pertinent to the case and elicits responses from the participants. In a mock trial, attorneys present both the plaintiff's and defendant's cases, then observe as the mock jury deliberates. These tools may also help with the presentation of serious damages, providing excess and primary carriers defense verdicts without alienating the jury.

V. Reimbursement From a Primary Carrier

If an excess carrier funds a settlement to potentially avoid bad faith, but knows or believes that the matter could have had more favorable results absent certain conduct by the primary carrier, does the excess carrier have any claims for reimbursement from the primary carrier? What remedy, other than the proverbial, "I told you so," does the excess carrier have when the jury comes back with a verdict that exceeds the primary carrier's policy limits?

A. Direct Duty Claims Against the Primary Carrier

Some jurisdictions hold that a primary carrier owes an independent duty of good faith to the excess carrier by virtue of the unique relationship in which the excess carrier relies upon the primary carrier to act in good faith in the processing and handling of claims. In these jurisdictions, the excess carrier can bring a direct action against the primary insurer for an inadequate defense of the claim or negotiation of a settlement based upon this implied duty of good faith. The New Jersey Superior Court explained:

> The primary insurer has certain duties and obligations that it owes to the excess insurer as a result of the distinctive relationship between the two carriers. The unique relationship results because the excess insurer relies upon the primary carrier to act in good faith in processing claims. This includes reliance upon a primary carrier to act reasonably in: (1) discharging its claims handling obligations; (2) discharging its defense obligations; (3) properly disclosing and apprising the excess carrier of events which are likely to effect that carrier's coverage; and (4) safeguarding the rights and interests of the excess carrier by not placing the primary carrier's own interests above that of the excess insurer. The actions of the primary carrier can affect the rights of the excess carrier. This duty then is protected by industry custom and the common law.[42]

B. Subrogation Claims Against the Primary Carrier

The majority of jurisdictions reject a direct duty theory, primarily reasoning that an excess carrier, as subrogee, stands in the shoes of its insured, having rights no greater than the insured. Courts typically place a "reasonableness" standard on the primary carrier, reasoning that "placing the excess insurer in the shoes of the insured advances the public interest in obtaining prompt and just settlement of claims. The existence of excess or umbrella coverage must not relieve the primary insurer of its responsibility to accept reasonable settlement offers lest, in those situations where a claim exceeds the amount of primary coverage, the primary insurer be encouraged to attempt to place its financial burden upon the excess insurer."[43]

Finally, some jurisdictions, through the doctrine of equitable subrogation, also allow an excess carrier to sue the defense counsel retained by the primary carrier to defend the insured for malpractice to recover amounts paid within its layer.[44] Not surprisingly, other courts reject this this cause of action by excess carriers due to the personal nature of malpractice claims.[45]

---

[1] *Certain Underwriters at Lloyd's London v. Central Mut. Ins. Co.*, 12 N.E.3d 762, 765 (Ill. Ct. App. 2014).

[2] *Certain Underwriters at Lloyd's London v. Central Mut. Ins. Co.*, 12 N.E.3d 762, 765 (Ill. Ct. App. 2014); *Scottsdale Ins. Co. v. Safeco Ins. Co. of Am.*, 111 F. Supp. 2d 1273, 1278 (M.D. Ala.2000) ("Excess policies provide an additional step of coverage above underlying primary insurance and, as such, generally do not provide any broader coverage than that provided by the underlying policy.").

[3] *See, e.g., General Motors Acceptance Corp. v. Nationwide Ins. Co.*, 828 N.E.2d 959, 961 (N.Y. 2005); *Insurance Co. of the West v. County of McHenry*, 2002 WL 1803743 (N.D. Ill. Aug. 6, 2002); *Institute of London Underwriters v. First Horizon Ins. Co.*, 972 F.2d 125, 126 (5th Cir. 1992) (applying Louisiana law); *Continental Cas. Co. v. Pittsburgh Corning Corp.*, 917 F.2d 297, 298 (7th Cir. 1990) (applying Pennsylvania law); *General Motors Acceptance Corp. v. Nationwide Ins. Co.*, 828 N.E.2d 959, 961 (N.Y. 2005).

[4] *Scottsdale Ins. Co. v. Safeco Ins. Co. of Am.*, 111 F. Supp. 2d 1273, 1278 (M.D. Ala.2000) ("umbrella policies provide the broadest coverage available").

[5] *See Berges v. Infinity Ins. Co.*, 896 So.2d 665, 668, 677 (Fla. 2004).

[6] *See Phillips v. Bramlett*, 407 S.W.3d 229, 232 n.5 (Tex. 2013) (citing *American Phys. Ins. Exchg. v. Garcia*, 876 S.W.2d 842, 849 (Tex. 1994).

[7] *Short v. Dairyland Ins. Co.*, 334 N.W.2d 384, 387-88 (Minn. 1983).

[8] *See Associated Wholesale Grocers, Inc. v. Americold, Corp.*, 934 P.2d 65, 88 (Kan. 1997); *Charbonneau v. Chartis Prop. Cas. Co.*, 2015 WL 3999592 (E.D. Pa. June 30, 2015) (citation omitted) ("A party to an insurance contract can bring a contract cause of action for breach of the implied duty of good faith and fair dealing.").

[9] *See Pavia v. State Farm Mut. Auto. Ins. Co.*, 626 N.E.2d 24, 27 (N.Y. 1993). *But cf. HDI-Gerling Am. Ins. Co. v. Navigators Ins. Co.*, 2015 WL 5315190 (E.D. Pa. Sept. 11, 2015) (questioning whether under New York law bad faith arises from contract or is a tort). *Cf. Scottsdale Ins. Co. v. Addison Ins. Co.*, 448 S.W.3d 818, 833 (Mo. 2014) (en banc) (breach of the duty of good faith while a tort arises from a contract which is not of a purely personal nature).

[10] *See Barrington Consolidated High School v. American Ins. Co.*, 319 N.E.2d 25, 27 (Ill. 1974) (A notice provision affords an "insurer an opportunity to make a timely and thorough investigation and to gather and preserve possible evidence"); *Ferrando v. Auto-Owners Mut. Ins. Co.*, 781 N.E.2d 927, 944 (Ohio 2002) ("Notice provisions allow the insurer to become aware of occurrences early enough that it can have a meaningful opportunity to investigate.").

[11] *See American Centennial Ins. Co. v. Warner-Lambert Co.*, 681 A.2d 1241, 1246 (N.J. Super. Ct. 1995); *U.S. Fire Ins. Co. v. American Nat'l Ins. Co.*, 2001 WL 1807773 at *5-6 (Pa. Com. Pl. April 6, 2001) (following *American Centennial*); *New England Ins. Co. v. Healthcare Under. Mut. Ins. Co.*, 352 F.3d 599, 607 (2nd Cir. 2003); *Travelers Indem. Co. v. Western Am. Specialized Transp. Serv., Inc.*, 409 F.3d 256, 260 (5th Cir. 2005).

[12] *See Scottsdale Ins. Co. v. Addison Ins. Co.*, 448 S.W.3d 818, 833 (Mo. 2014) (en banc) (no direct duty exists between a primary carrier to an excess carrier to settle); *Electric Ins. Co. v. Nationwide Mut. Ins. Co.*, 384 F. Supp. 2d 1190, 1193 (W.D. Tenn. 2005) (no direct duty to settle owed to excess carrier by primary carrier).

[13] *See Weaver Bros., Inc. v. Chappel*, 684 P.2d 123, 126 (Alaska 1984); *Unigard Ins. Co. v. Leven*, 983 P.2d 1155, 1161 (Wash. Ct. App. 1991); *Prince George's County v. Local Gov't Ins. Trust*, 879 A.2d 81, 96-97 (Md. 2005); *Berkley Reg. Ins. Co. v. Philadelphia Indem. Co.*, 690 F.3d 342, 349 (5th Cir. 2012) (Tex. law)

[14] *See Bolivar County Bd. of Supervisors v. Forum Ins. Co.*, 779 F.2d 1081, 1085-86 (5th Cir. 1986) (Miss. law); *Greenway v. Selected Risks Ins. Co.*, 307 A.2d 753, 756 (D.C. 1973); *Caldwell v. State Farm Fire & Cas. Ins. Co.*, 385 S.E.2d 97, 99 (Ga. Ct. App. 1989).

[15] McKinney's Insurance Law § 3420; *see also* TEX. STATE BOARD OF INS. Order 23080 (precluding forfeiture of coverage for failure to comply with a notice provision unless the insurer is prejudiced).

[16] *Midwest Employers Cas. Co. v. East Ala. Health Care*, 695 So.2d 1169, 1173 (Ala. 1997).

[17] *Allstate Ins. Co. v. Kepchar*, 592 N.E.2d 694, 699 (Ind. Ct. App. 1992).

[18] *See* Douglas R. Richmond, *Rights and Responsibilities of Excess Insurers*, 78 Denv. U. L. Rev. 29, 44-45 (2000).

[19] *See Berkley Reg. Ins. Co. v. Philadelphia Indem. Ins. Co.*, 2013 WL 6145979 at *9 (W.D. Tex. 2013), aff'd, 600 Fed. Appx. 230 (5th Cir. 2015) (finding prejudice to excess carrier as a matter of law under facts of notice post-verdict); *Lemuel v. Admiral Ins. Co.*, 414 F. Supp. 2d 1037, 1066 (M.D. Ala. 2006) (finding prejudice to the excess carrier notified after entry of default judgment).

[20] *See Clementi v. Nationwide Mut. Fire Ins. Co.*, 16 P.3d 223, 230 (Colo. 2001) (en banc) (noting the plurality of courts placing the burden of proof on the insurer); *Alcazar v. Hayes*, 982 S.W.2d 845, 855-56 (Tenn. 1998) (same).
[21] *See Alcazar*, 982 S.W.2d at 855-56.
[22] *See Prince George's County*, 879 A.2d at 97 (citing cases).
[23] *See Washington v. Federal Kemper Ins. Co.*, 482 A.2d 503 (Md. Ct. App. 1984).
[24] *See Employers Liability Ass. Corp. v. Hoechst Celanese Corp.*, 684 N.E.2d 600, 607-08 (Mass. Ct. App. 1997) (the prejudice shown must be material and specific; it must be actual prejudice not just possible prejudice); *Coastal Refining & Marketing, Inc. v. U.S. Fidelity and Guar. Co.*, 218 S.W.3d 279, 289 (Tex. App.—Houston [14th Dist.] 2007, pet. denied) ("the insured's breach of a notice provision is material when the insurer has sustained "actual" prejudice"); *Wilson v. Progressive N. Ins. Co.*, 868 A.2d 268, 272 (2005) (noting that, although the insurer need not show actual loss of evidence to demonstrate prejudice from insured's delay in providing notice, it must at the very least provide the court with facts showing prejudice and not merely surmise that it may be prejudiced because certain events may have occurred in the abstract during the period of delay); *Canron, Inc. v. Fed. Ins. Co.*, 918 P.2d 937 (Wash. Ct. App. 1996) (determining that evidence that a liability insurer's ability to investigate underlying environmental contamination claim against its insured was compromised by insured's delayed notice of claim, standing alone, is insufficient to support jury's conclusion that insurer had suffered the actual prejudice necessary to deny coverage based on the delayed notice; what is lost or changed must be material and not otherwise available or subject to reasonable reconstruction).
[25] *See Jones v. Bituminous Cas. Corp.*, 821 S.W.2d 798, 803 (Ky. 1991) (requiring a carrier to show a reasonable probability that it suffered substantial prejudice).
[26] *See Yonkers Contracting Co. v. General Star Nat'l Ins. Co.*, 14 F. Supp. 2d 365, 371 (S.D. 1998); *Texas Employers Ins. Ass'n v. Underwriting Members of Lloyds*, 836 F. Supp. 409-10 (S.D. Tex. 1993); *National Union Fire Ins. Co. v. Travelers Ins. Co.*, 214 F.3d 1269, 1273-74 (11th Cir. 2000).
[27] *See, e.g., Hilco Capital, LP v. Federal Ins. Co.*, 978 A.2d 174, 179 (Del. 2009) (excess carrier acted in good faith even though it was not willing to contribute to a settlement unless the primary insurer agreed to tender its policy limit); *Employers Nat. Ins. Co. v. General Acc. Ins. Co.*, 857 F. Supp. 549, 551 (S.D. Tex. 1994) (excess insurer had no duty to act upon a settlement until the primary carrier "'tendered' its limits, which would allow [the excess insurer] discretion to use [the primary carrier's policy limit] as it saw fit"); *Berglund v. State Farm Mut. Auto. Ins. Co.*, 121 F.3d 1225, 1228 (8th Cir. 1997) (Iowa law) (until the primary insurer offered its limits, the excess insurer "had no obligation to pay anything or to evaluate seriously" the claim made against the insured); *Noonan v. Vermont Mut. Ins. Co.*, 761 F. Supp. 2d 1330, 1335 (M.D. Fla. 2010) (excess carrier had no obligation to the insured until the primary carrier tendered its limit); *New Jersey Mfrs. Ins. Co. v. National Cas. Co.*, 923 A.2d 315, 324-25 (N.J. Super. Ct. 2007) (once a primary carrier offers its limit, the excess carrier has a fiduciary duty to shield the insured from further liability); *Keck, Mahin & Cate v. National Union Fire Ins. Co. of Pittsburgh, Pa.*, 20 S.W.3d 692, 701 (Tex. 2000).
[28] *E.g., New Jersey Mfrs. Ins. Co. v. National Cas. Co.*, 992 A.2d 837, 842 (N.J. App. Div. 2010).
[29] *E.g., Associated Wholesale Grocers, Inc. v. Americold Corp.*, 934 P.2d 65, 81 (1997).
[30] *See SRM, Inc. v. Great Am. Ins. Co.*, ___F.3d ___, 2015 WL 5011719 at *5 (10th Cir. Aug. 25, 2015).
[31] *See Keck, Mahin & Cate v. National Union Fire Ins. Co. of Pittsburgh, Pa.*, 20 S.W.3d 692, 701 (Tex. 2000).
[32] *See Kelley v. British Comm. Ins. Co.*, 34 Cal. Rptr. 564, 569 (Ct. App.1963) (holding that excess carrier was liable for over-limits judgment when it rejected pre-trial within-limits offers); *see also North Am. Van Lines, Inc. v. Lexington Ins. Co.*, 678 So.2d 1325, 1333–34 (Fla. Ct. App.1996) (holding that excess carrier may be liable for insured's out-of-pocket payment to settle case when excess insurer refused reasonable within-limits settlement offers).
[33] *See North Am. Van Lines*, 678 So.2d 1325, 1333–34 (relying heavily on *Diamond Heights Homeowners Assn. v. National Am. Ins. Co.*, 277 Cal. Rptr. 906, 916 (Ct. App.1991)).
[34] *Associated Wholesale Grocers, Inc. v. Americold Corp.*, 934 P.2d 65, 81 (Kan. 1997) (citation omitted); *see also Rocor Internat'l, Inc. v. National Union Fire Ins. Co. of Pittsburgh PA*, 77 S.W.3d 253, 263-64 (an excess carrier has extracontractual exposure for a failure to reasonably settle even though the excess carrier has no duty to defend); *Diamond Heights Homeowners Ass'n. v. National Am. Ins. Co.*, 277 Cal. Rptr. 906, 916 (Ct. App. 1991) (an excess carrier does not have the right to veto an otherwise reasonable settlement and force a primary carrier to trial, bearing the full cost of defense).
[35] *See Certain Underwriters of Lloyd's v. General Acc. Ins. Co. of Am.*, 699 F. Supp. 732, 739-40 (S.D. Ind. 1988) (only proof of an excess insurer actually participating in and assuming the duty of settling will give rise to bad faith in failing to settle).
[36] *See Dresser Industries, Inc. v. Underwriters at Lloyd's, London*, 106 S.W.3d 767, 769 (Tex. App.—Texarkana 2003, pet. denied) ("The primary issue in this case is whether Dresser has exhausted its primary coverage in accordance with the underlying insurance contracts and thus is allowed to recover from the excess carrier. The trial court agreed with the excess carrier that the underlying claims were not covered and could not serve to exhaust the underlying

coverage so the excess carrier could not be reached. Dresser argues that the previous judgment is now res judicata and precludes the carrier from asserting lack of exhaustion in this case. The excess carrier argues . . . that the underlying claims were for fraud and uncovered . . . .").

[37] *See Allmerica Fin. Corp. v. Certain Underwriters at Lloyd's*, 871 N.E.2d 418, 428 (Mass. 2007) ("An excess carrier's intent to incorporate the same words used in a separate agreement between the primary insurer and the insured does not imply an intent by the excess carrier to accept decisions made by the primary carrier about the extent of its obligations under its own agreement. By adopting the form of words used by [the primary insurer], the underwriters did not also cede to it the right to make decisions about the underwriters' obligation to perform in various circumstances. To conclude otherwise would undermine the distinct and separate nature of each insurer's contract....").

[38]*See Howard v. American Nat'l Fire Ins. Co.*, 115 Cal. Rptr. 3d 42 (Ct. App. 2010) (citation omitted); *see also State Farm Auto Ins. Co. v. Civil Servants Emp. Ins. Co.*, 509 P.2d 725 (Ariz. Ct. App. 1973) (good faith denial of coverage does not excuse failure to enter settlement agreement).

[39] *See Johansen v. California State Auto. Ass'n Inter-Insurance Bureau*, 538 P.2d 744, 750 (Ca. 1975).

[40] *See U.S. Fid. & Guar. Co. v. Ashley Reed Trading, Inc.*, 43 F. Supp.2d 271, 281 (S.D.N.Y. 2014) (citation omitted) (bad faith failure to settle within limits must be predicated on the existence of coverage for the loss in question); *American Fam. Mut. Ins. Co. v. Westfield Ins. Co.*, 962 N.E.2d 993, 1000 (Ill. Ct. App. 2011) (the duty to act in good faith in responding to settlement offers exists only when there is coverage under the policy); *Pride Transp., Inc. v. Continental Cas. Co.*, 804 F. Supp. 2d 520, 525 (N.D. Tex. 2011) (a duty to accept a reasonable settlement demand requires that claim against the insured to be covered); *Hinkle v. Crum & Forster Holding, Inc.*, 746 F. Supp. 2d 1047, 1052 (D. Alaska 2010) (no bad faith for failing to settle within limits due to uncertainty of insurance coverage).

[41] *See Certain Underwriters of Lloyd's v. General Acc. Ins. Co. of Am.*, 699 F. Supp. 732, 740-41 (S.D. Ind. 1988)

[42] *American Centennial Ins. Co. v. Warner-Lambert Co.*, 681 A.2d 1241, 1246 (N.J. Super. Ct. 1995); *see also Hartford Acc. & Indem. Co. v. Michigan Mut. Ins. Co.*, 463 N.E.2d 608, 610 (N.Y. 1984) ("Michigan Mutual as the primary liability insurer owed to Hartford as the excess carrier the same duty to act in good faith which Michigan owed to its own insureds").

[43] *Home Ins. Co. v. North River Ins. Co.*, 385 S.E.2d 736, 740 (Ga. Ct. App. 1989); *Great Am. Ins. Co. v. International Ins. Co.*, 753 F. Supp. 357, 363 (M.D. Ga. 1990) (the excess carrier must prove that the primary insurer "failed to use that degree of care which is exercised by an ordinary prudent insurer under the same or similar circumstances."); *National Sur. Corp. v. Hartford Cas. Ins. Co.*, 493 F.3d 752 (2007) (rationale for permitting excess insurers to recover against primary insurers for failure to settle a case is to "discourag[e] primary carriers from 'gambling' with the excess carrier's money when potential judgments approach the primary insurer's policy limits."); *National Surety Corp. v. Hartford Cas. Ins. Co.*, 439 F.3d 752, 758 (6th Cir. 2007) (equitable subrogation discourages primary carriers from forgoing "fair and reasonable settlements and roll the dice with, what is in essence, the excess insurer's money."); *Twin City Fire Ins. Co. v. Burke*, 63 P.3d 286 (Ariz. 2003) (the excess carrier should not have to pay a judgment if the primary carrier caused the excess judgment by a bad faith failure to settle within primary limits).

[44] *See American Centennial Ins. Co. v. Canal Ins. Co.*, 843 S.W.2d 480, 484 (Tex. 1992); *National Union Ins. Co. v. Dowd & Dowd, P.C.*, 2 F. Supp. 2d 1013, 1022-23 (N.D. Ill. 1998); *Great Am. E & S Ins. Co. v. Quintairos, Prieto, Wood & Boyer, P.A.*, 100 So.3d 120, 423-24 (Miss. 2012).

[45] *See Essex Ins. Co. v. Tyler*, 309 F. Supp. 2d 1270, 1274 (D. Colo. 2004); *Capitol Indem. Corp. v. Fleming*, 58 P.3d 965, 969 (Ariz. Ct. App. 2002); *Continental Cas. Co. v. Pullman, Conley, Bradley & Reeves,* 929 F.2d 103, 106-07 (2d Cir. 1991) (Conn. law).