

SUBROGATION:

“THE INSURER STRIKES BACK,”

OR

**“WE CAN’T BE LEFT HOLDING THE BAG,
SO IT HAS TO BE. . . .”**

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These materials are educational in that the content is intended to encourage discussion and interaction. The views expressed in the following pages are not necessarily those of the Authors, Johnson & Condon, P.A. or their clients. The Authors encourage questions or comments.

I. INTRODUCTION.

Subrogation has been described as a “salvage operation,”¹ or a “restless remedy” that “keeps the litigation fires alive years after the first loss is paid.”² The “culprit” for this endless litigation is the insurance carrier who has made some payment under a policy, only to then impose the responsibility for the amount at issue upon an entity other than its Insured.

Regardless of how a party characterizes an Insurer’s role in resolving a claim, Subrogation allows an Insurer to pay a legitimate, covered claim without foreclosing an ability to recover the amount paid from the ultimately responsible party at a later date. This ability to recoup payments encourages early cost-sharing agreements, or interim or final settlements with Insureds and others, and should in many instances limit the ultimate litigation to a single proceeding against the ultimately liable or financially responsible entity.

Because insurance companies are generally focusing on the day to day response to the claim submission, Subrogation opportunities are not necessarily the first focus of claim handling. This is especially true when the claim involves numerous potential entities, Insurers and contractual relationships. The Claims Professional should remember, however, that these complex relationships may well provide fertile ground to recover most if not all the monies an Insurer may pay on a claim.

The purpose of these materials is to assist the Claims Professional in identifying these sources of recovery, especially when the claim involves mold allegations. As with Subrogation in other complex matters such as construction cases, the key to a mold-based recovery action is an early and aggressive assessment of the facts, the Insured's exposures, the Insured's contractual or common law rights as against other parties and/or other Insurers, and an appreciation of how the Reinsurance covering the claim may respond. Only a full understanding of these complicated interrelationships will allow the Claims Professional to design and implement a strategy to simultaneously fulfill the Insurer's obligations to its Insured, and obtain a maximum return of monies paid on the claim.

II. TRADITIONAL SUBROGATION PRINCIPLES.

Subrogation provides the Insurer with the ability to recover payments which the Insurer is obligated to make to or on behalf of its Insured. Subrogation has no impact on an Insurer's obligations to its Insured; instead, Subrogation arises *because of* the Insurer's obligations to its Insured.

Subrogation operates by allowing the Insurer to acquire and enforce the Insured's rights against others by "standing in the shoes" of its Insured.³ The subrogating Insurer

possesses no greater rights than those held by its Insured.⁴ Therefore, an effective Subrogation effort must begin with an identification of those rights.

A correlative and equally important concept is that the Insurer's Subrogation right prohibits the Insured from obtaining an "unjust enrichment" or "double recovery" for the loss first from its own Insurer, and then from another party.⁵ Once an Insurer makes a payment, its Subrogation right accrues. If the tortfeasor is released in exchange for a payment to the Insured before the Insurer makes a payment under the Policy, no Subrogation right will generally arise.⁶ Further, no Subrogation right will generally accrue where the payment was voluntary.⁷

A Carrier's subrogation right exists either by contract, operation of law (equitable) or statute.⁸ A Subrogation, or "Transfer of Recovery Rights," clause may exist in the insurance contract itself. These provisions are found in a variety of standard insuring forms utilized by the industry where the policy indemnifies the Insured for loss or damage. For instance, a standard form Property Policy Subrogation clause is entitled (after 1986) "Transfer of Recovery Rights;"⁹ a Builders Risk form may contain a Subrogation clause against, e.g., architects and engineers;¹⁰ a Commercial General Liability (CGL) Policy form¹¹ or Owners and Contractors Protective (OCP) Liability Coverage form¹² will generally contain a Transfer of Recovery Rights Condition.

Even if the policy does not contain an express Subrogation clause, Equitable Subrogation, or Subrogation by Operation of Law, may exist where state law recognizes that the Insurer has discharged its contractual payment obligation to its Insured, but that the liability for the damages satisfied by the payment should have been incurred by the original tortfeasor.¹³

Finally, Subrogation rights may arise by statute. Two examples of the statutory establishment of a Subrogation right are seen in statutory fire policies, and in workers compensation laws. Statutory form fire insurance policies, promulgated in about half of the states,¹⁴ generally contain a Subrogation provision.¹⁵ These statutes typically provide that the Insurer "may require from the insured an assignment of all right of recovery against any party for loss to the extent that payment thereof is made by" the Insurer.¹⁶ In the workers compensation forum, state laws in nearly all jurisdictions provide the Workers Compensation Carrier with a Subrogation right.¹⁷

III. COMMON LAW LIMITATIONS TO SUBROGATION RECOVERY.

Despite the initial broad right to subrogate, the Insurer may be limited in its ability to recover under its Subrogation claim. The Insurer's Subrogation claim may run afoul of

some states' "Anti-Subrogation Rule," or prohibitions against recovery until the Insured is "Made Whole."

A. "ANTI-SUBROGATION" RULE.

The typical Anti-Subrogation Rule scenario involves a Carrier who pays a claim, then subrogates against a tortfeasor who is insured by the subrogating Carrier. In these scenarios, most states recognize that an Insurer may not subrogate against its own Insured. While the general rule is based on common law,¹⁸ some states have enacted Anti-Subrogation Statutes to address certain scenarios.¹⁹ Courts rationalize the Rule by stating that a Carrier should not be able to pass the loss on to another of its Insureds when the Insurer was willing to insure the particular risk involved in the first place; in addition, the Rule eliminates any potential conflict of interest which might arise because of the Insurer's separate and independent relationships with its Insureds.²⁰

The Anti-Subrogation Rule generally does not differentiate between types of insured statuses under the policy. Therefore, not only is the subrogating Insurer barred from recovering from the named Insured tortfeasor, but the subrogating Insurer is also barred from seeking recovery from any "Co-Insured," "Additional Insured" or Omnibus Insured who may be liable for the loss.²¹ The Anti-Subrogation Rule typically bars a Carrier's Subrogation claim for not only the amount of coverage sold to the tortfeasor-Insured by the

Carrier or an affiliated company, but also any self-insured or underinsured amounts, or amounts insured by other Carriers.²²

The principles behind the Anti-Subrogation Rule have been utilized to bar a Landlord's Property Carrier's Subrogation claim for damages caused by the Tenant, even where the Tenant is not an Insured under the Policy. These Courts have adopted the rationale first set out in Sutton v. Jondahl, 532 P.2d 447 (Okl. Ct. App. 1975) that a Tenant should be deemed an additional Insured under the Landlord's fire insurance policy because of the leasehold interest, and the Property Insurance's function to protect the Tenancy interest. Several states have adopted the Sutton rationale, and hold that, absent an express agreement to the contrary, a Tenant is an implied co-Insured under the property policy, and that this status bars the Subrogation claim.²³ Some courts have extended this rationale to commercial tenancies.²⁴ Others reject the doctrine in commercial tenancies because of the difference circumstances and considerations involved with commercial leases such as the lessee's sophistication and requirements that the lessee purchase liability insurance.²⁵ Instead, the court will look to the terms of the lease to determine if there was an intent to have the lessee held responsible for its damage.²⁶

B. “MADE WHOLE” DOCTRINE.

Another obstacle an Insurer faces is whether the applicable state common law recognizes the “Made Whole” Doctrine. Under this theory, the subrogating Insurer may only recover when the Insured has been fully compensated for its loss.²⁷ Application of the Doctrine typically involves a fact pattern where there are insufficient funds available from entities other than the subrogating Insurer to pay the Insured’s entire loss. The rationale for this Doctrine is that the risk of loss should more properly fall on the entity paid to assume the risk.²⁸

It appears the majority of states recognizing an Equitable Subrogation recovery right limit that right to funds which exceed the amount fully compensating the Insured for the loss.²⁹ While at least one court has rejected the assertion that the Made Whole Doctrine only applies if the right upon which Subrogation arises is itself equitable,³⁰ other courts will not allow the equitable rule to override an Insurer’s specific contractual³¹ or statutory rights.³²

Another issue arising in the application of the Made Whole Doctrine is at what point is the Insured “made whole.” Courts employ two different approaches in answering this question. The first, more rigid, approach suggests that an Insured has been made whole only when the Insured has been compensated for all the elements of damage, not merely for those

damages indemnified by the Insurer.³³ The overriding principle of the rigid approach is that equity entitles an Insurer to subrogate only where the Insured would otherwise receive a double payment because of its recovery from the tortfeasor. Therefore, especially if a settlement is involved, most courts conclude that the settlement amount is not conclusive of the Insured's actual damages.³⁴

Conversely, a minority of courts confronting the issue have taken a less rigid approach and held that, if the separate elements of a damage award can be identified and credited to the subrogated claim, Subrogation for those amounts will lie regardless of whether the Insured has been fully compensated for other elements of the claim.³⁵ This is especially true where the dollar amount of the segregated portions of the claim are reflected in a Judgment defining the scope of the Insured's damages.³⁶

IV. SUBROGATION INVOLVING THIRD PARTY LIABILITY POLICIES.

Despite Subrogation's traditional First-Party policy focus, a Claims Professional addressing a Third Party mold claim may be able to limit the Insurer's overall coverage exposure if Subrogation concepts are considered as part of the liability claims handling process. Multiple Subrogation opportunities arise if there are contractual indemnification agreements or additional Insured statuses involved, or if there are various kinds of third

party coverage potentially applicable to the loss. Identification of these potential Subrogation recovery sources may allow the Insurer to take advantage of an early reasonable settlement scenario, and preserve rights to recoup monies from the contractually liable entity (or its Insurer), or another Insurer closer to the risk at issue.

A. WHICH LIABILITY POLICY INITIALLY RESPONDS?

1. CONCURRENT COVERAGES.

Most construction projects of any size will involve written contracts which likely obligate the various parties to create a number of different insuring arrangements between pre-existing liability carriers and other parties to the contract, or obligate one of the parties to possibly procure specialized liability coverage beyond a party's CGL coverage already in place. The difficulty with multiple policies providing overlapping, or concurrent, coverage to the same Insured comes in determining whether one of the policies has priority over other coverages, or whether there is some sharing of the coverage obligations. This issue arises regardless of whether the policies involved provide "general," or more specialized, liability coverage. Resolution of this issue may well involve Subrogation as each Policy contains a separate obligation to the Insured, and an Insurer may not be able to escape its initial liability simply because its Policy may have language which could implicate another Carrier.

If a particular Insured is afforded overlapping, or concurrent, primary coverage through two or more policies, the courts will resolve the priority of coverage issue by typically comparing the “Other Insurance” clauses in the policies. “Other Insurance” clauses limit the amount of an Insurer’s liability where more than one policy covers the same loss.³⁷ There are generally three types of “Other Insurance” clauses:

- “Pro-Rata:” The Policy will pay a certain portion of the loss with the other Policy;
- “Excess:” The Policy will pay after the other Policy’s indemnity coverage is exhausted;
- “Escape:” The Policy never pays if another Policy covers the loss.³⁸

Typically, standard CGL Policy forms will contain a hybrid “Other Insurance” clause which generally makes the Policy excess over other applicable Insurance (with a few exceptions); other, more specialized coverages such as OCP Liability Policy forms³⁹ will typically contain none of the above clauses, but instead will contain a rare “Primary” coverage clause which compels the OCP Liability Policy to take on the initial insuring responsibilities for the Insured.⁴⁰

If the “Other Insurance” clauses in the competing Policies are harmonious, Courts will generally allow the Policies’ provisions to govern the priority of coverages.⁴¹ However, it is more likely that the Insured is protected under two or more CGL Policies with

conflicting Excess “Other Insurance” clauses; in this scenario, the question is which (or both) policies are required to respond? Historically, Courts would employ the “Lamb-Weston” Doctrine to prorate the loss among the Insurers on the basis of the Policies’ respective limits.⁴² However, some Courts are now looking at the “total policy insuring intent” to determine which policy should initially respond.⁴³ Under this approach, if it appears one of the coverages more closely contemplates the particular risk involved with the loss, that policy should initially protect the Insured for the loss as it is “closer to the risk.”⁴⁴

2. EXCESS CARRIER SUBROGATION AGAINST THE PRIMARY INSURER.

Situations may arise where a Primary Insurer has refused to perform under its contract with the Insured, and the Insured seeks the Excess Carriers’ assistance in defending and indemnifying a claim. While some states hold that the excess carrier does not have an obligation under the Policy until the primary limits are exhausted,⁴⁵ some states recognize that an Excess Carrier may have duties regardless of the Primary Carrier’s coverage position. An Excess Carrier may be required to defend if the Primary Carrier wrongfully refuses to defend.⁴⁶ Therefore, if the Excess Carrier incurs a cost which should have properly been incurred by the Primary Carrier, can the Excess Carrier recover back against the Primary Insurer? Courts will generally allow such a recovery, usually under the theory

that the Excess Insurer is subrogated, equitably or otherwise, to the Insured's rights against the Primary Carrier.⁴⁷

3. CONSECUTIVE COVERAGES.

If a claim involves damage or injury occurring over consecutive policy periods in a fashion which "triggers" more than one policy,⁴⁸ the Carriers will likely be required to allocate the damages arising from the injury within each policy period to the triggered policies. While a full discussion of these issues is beyond the scope of this Article,⁴⁹ Carriers should determine whether the applicable state law imposes joint and several liability on the Insurer for all damages arising from all injuries, or whether allocation approaches such as "pro-rata by time on the risk" would apply. Under both of these allocation theories, an Insurer may have an opportunity to recoup payments made to or on behalf of an Insured from another Insurer.

B. ASSERTING THE INSURED'S RIGHTS AGAINST THIRD PARTIES.

Once the threshold priority or coordination of coverage issues are addressed, and the Insurer has made a payment to or on behalf of its Insured, the Insurer needs to determine whether Subrogation is actually viable against Third Parties. As will be seen, while this issue is fairly straight forward in typical case patterns, it becomes muddled in the complex contractual scenarios which may be involved in mold litigation.

1. THE INSURED'S COMMON LAW INDEMNITY/CONTRIBUTION RIGHT.

At times it may be advantageous to conclude a claim on behalf of the Insured by obtaining a General Release of the Claimant's cause of action which will necessarily release possible co-defendants. So long as a liability Insurer, on behalf of an Insured, has paid more than the Insured's fair share in settlement of the underlying Claimant's claim, and the state's law allows contribution between joint tortfeasors, a Carrier may likely be able to pursue Subrogation through an Indemnity or Contribution Action against other potentially liable entities.⁵⁰

2. THE INSURED'S CONTRACTUAL INDEMNIFICATION RIGHT.

Third Party Liability mold claims often arise out of relationships between parties which are in part defined by contractual agreements. These contracts may provide the subrogating Carrier with additional possible recovery avenues. However, whether the Insurer actually has a Subrogation right when contractual relationships are involved will turn on the contracts themselves, the applicable state's common and statutory law, and how the insurance involved is structured. An immediate and careful analysis of each of these factors will determine whether there is any Subrogation possibilities available.

Many contracts commonly used in the building maintenance or construction industry contain indemnity provisions requiring the Indemnitor to protect the Indemnitee from the

Indemnitor's negligence or fault. For example, the standard American Institute of Architects (AIA) Form A201, *General Conditions of the Contract for Construction*, is typically part of an Owner/Contractor Construction Agreement. This form's Indemnification Clause, Section 3.18.1, obligates the Contractor to indemnify the Owner, Architect, and Architect's consultants from certain damages and expenses (including attorneys fees) which arise out of or result from performance of the Project's "Work"⁵¹ if the damages and expenses are caused by the Contractor, a subcontractor, or others for which the Contractor may be held liable. In other words, Form A201's Indemnification Clause does not compel the Contractor to indemnify the Owner for the Owner's negligence.

It is possible that the indemnification clause may be different than the scope of the clause found in the A201. Therefore, any Indemnification clauses must be read in conjunction with the state's "Anti-Indemnification" Statute.⁵² In a construction setting, these statutes often limit the indemnification right to the negligence or fault of the promising party, and bars an Indemnitee's ability to obtain indemnification for its own the negligence or fault.⁵³

However, this typically does not end the analysis in a construction setting. An exception in some Anti-Indemnification Statutes will expose the Indemnitor to liability if the Indemnitor failed to procure insurance for the benefit of another. If a party promises to

procure insurance for the benefit of the at-fault party, and the promise is not kept, an Anti-Indemnification statute may allow an indemnification claim over against the breaching party.⁵⁴ In these scenarios, the indemnifying party is statutorily obligated to the at-fault party to the extent of the insurance which was to have been procured.⁵⁵

In non-construction contexts, there are still settings where a contractual relationship between, for example, an Owner and a building maintenance company, includes an Indemnification Clause which may be broad enough to protect the at-fault party. Depending on the particular state's common or statutory law's limitation on the ability to enforce such provisions, this insured right may be available as a Subrogation avenue. If this is the case, the Insurer must be sure that the standard exception to the Indemnitee's CGL Policy's Contractual Liability Exclusion which provides "Insured Contract" coverage has not been altered. A typical CGL form will exclude Contractual Liability, but not apply the exclusion to liability for damages which are assumed in an "Insured Contract" agreement.⁵⁶ An "Insured Contract" includes that part of an agreement where the Insured assumes the tort liability of another.⁵⁷ If this coverage is available, it may well include that Insurer's assumption of the defense costs under "an addition to limits" approach, so long as the Indemnitee is not the sole defendant in the action, and other conditions are met.⁵⁸

V. CONTRACTUAL LIMITATIONS TO THE INSURER'S SUBROGATION RIGHT.

A. THE INSURED'S CONTRACTUAL WAIVER OF SUBROGATION.

Despite a carrier's general Subrogation right, the Insured can knowingly or unknowingly alter this right by its activities before the loss. Therefore, the Insurer must ascertain whether there has been any waivers of the Subrogation right, or, if not, whether the right has been limited or eliminated because of a particular state's common law given the structuring of the Insured's contractual and insuring relationships.

It is generally accepted that the Insured may waive the Carrier's subrogation right if the waiver occurs before the loss.⁵⁹ However, the scope of the waiver should be examined to determine exactly what is being waived. For example, a waiver may only bar a portion of the Subrogation right; this is generally the case in how courts interpret Paragraph 11.4.7 of the AIA Form A201. This provision prospectively waives the Owners and Contractor's rights against each other (and against sub-contractors), and against the Architect and its agents, for damages to the extent of the "Work."⁶⁰ "Work" is defined generally as:

“. . . the construction and services required by the Contract Documents, whether completed or partially completed, and includes all other labor, materials, equipment and services provided or to be provided by the Contractor to fulfill the Contractor's obligations. The Work may constitute the whole or part of the Project.”⁶¹

Therefore, some courts hold that damage to “non-work” property is not within the scope of this Waiver provision.⁶²

A greater number of courts, however, analyze the issue from the standpoint of how the insured purchased the insurance it was required to obtain under the construction contract. An Owner is generally obligated under the standard Form A201 to procure first party property insurance.⁶³ In response to this obligation, an Insured may decide to purchase a new and separate Builders Risk or All-Risk policy to cover the Work. Alternatively, the Insured may rely on its pre-existing first-party policy to meet its contractual obligation to procure property insurance. This decision has great ramifications to the Insurer, as most courts addressing this issue hold that an Insured’s reliance on its pre-existing property coverage to protect the “work” waives that Carrier’s Subrogation right to all damages, both “work” and “non-work.”⁶⁴ The rationale is that the waived subrogation “is not defined by what property is harmed (*i.e.*, ‘any injury to the Work’); but, rather, are limited by the source of any insurance proceeds paying for the loss (*i.e.*, whether the loss was paid by a policy ‘applicable to the Work’).”⁶⁵

Under this approach, it would seem logical that, if an insured procures specific separate coverage to protect the “Work,” the pre-existing coverage for damage to the “Non-Work” portions of the project should not be limited by the Waiver of Subrogation clause.

Several Courts have held that only the separate coverage for “Work-only” damage Subrogation right is so waived, and that the Carrier covering the pre-existing “Non-Work” is to pursue subrogation.⁶⁶

Here, however, is yet another area where the Insured’s insurance purchasing decision can eliminate the Insurer’s subrogation right. A typical cost savings approach utilized by Carriers and Insureds is the endorsement of builder’s risk coverage onto the already in-place first party property coverage. Under this approach, it would appear the intent of the parties is that the builder’s risk coverage applies to the “Work,” and the pre-existing first party coverage applies to the already standing “Non-Work.” This is the coverage procured for the separate premiums paid to the Insurer. However, this approach is not without peril. At least one court has stated that adding an endorsement coverage to the present policy does not meet the separate *policy* procurement requirement needed to preserve the Subrogation right as to “non-work” damages.⁶⁷ The Bor-Son decision held that, although additional coverage is satisfied by purchasing an endorsement, an endorsement cannot stand on its own as it becomes a part of the existing policy; because of this, the coverage, despite being separate coverage, can not be considered a separate/new policy sufficient to retain the Insurer’s Subrogation right.⁶⁸

Therefore, in order to not run afoul of this rule, an Insurer, when asked to add a Builder's Risk Endorsement to its current policy, should instead issue a separate Builder's Risk Policy to its Insured.

B. STATUTORY WAIVERS OF SUBROGATION.

Certain creatures of statute contemplate that insurance procured in those relationships will waive subrogation. Statutory waiver of subrogation rights can be seen in the Uniform Condominium Act and the Uniform Common Interest Act. For example, the insurance provisions of the Uniform Condominium Act state as follows:

3-112 Insurance.

“(a) Commencing not later than the time of the first conveyance of a unit to a person other than a declarant, the association shall maintain, to the extent reasonably available:

“(1) property insurance on the common elements insuring against all risks of direct physical loss commonly insured against or, in the case of a conversion building, against fire and extended coverage perils.⁶⁹

* * *

“(d) Insurance policies carried pursuant to subsection (a) must provide that:

“(2) The insurer waives its right to subrogation under the policy against any unit owner or members of his household;”

Similar language exists in the Uniform Common Interest Ownership Act.⁷⁰

C. THE INSURER’S WAIVER OF SUBROGATION ENDORSEMENT.

At times, an Insured will request that the Insurer endorse its policy to expressly waive the Insurer’s Subrogation right. This is most typically seen in a construction context where a OCP Liability Policy is procured as part of the Project. Risk Management materials suggest that, as a standard procedure, OCP Liability Policies should be amended to waive the Policy’s subrogation rights. The International Risk Management Institute recommends that “OCP policies should always be amended by the attachment of a subrogation waiver endorsement, such as ISO endorsement CG 29 88.”⁷¹ Therefore, the Policy under which Subrogation is sought may limit the Insurer’s ability to do so.

VI. “WELL, THERE’S ALWAYS THE REINSURER”

“Reinsurance, at its simplest, has been defined as ‘the insurance of insurance companies.’”⁷² More specifically, reinsurance represents a relationship between two Insurers “whereby the reinsurer, for a consideration, agrees to indemnify the reinsured company against all or part of the loss the company may sustain under the policy or policies it has issued.”⁷³

Historically, it was not uncommon for the reinsurance relationship to exist for years without the benefit of a written agreement. Today, most relationships are governed by a written contract. Traditionally, the reinsurance agreement was subject to confidential

arbitrations pursuant to contractual arbitration clauses. However, despite an emerging understanding that the reinsurance relationship is governed by traditional contract law concepts, research reveals few reinsurance court opinions to guide the reinsurance lawyer. The lack of reported cases is changing as more and more reinsurance disputes are being litigated in Courts.⁷⁴

Key to the reinsurance relationship are the two similar but distinctive Doctrines of “Follow the Fortunes” and “Follow the Settlements.” These interrelated Doctrines are based on the reinsurance relationship’s governing principle of utmost good faith, which *requires* each party’s full, timely and candid disclosure of any factors having a material affect on the risks assumed by the Reinsurer.⁷⁵ Although the two Doctrines are commonly treated as one and same, a careful examination of each Doctrine’s focus underscores their distinctiveness.⁷⁶

“Follow the Fortunes” deals with the Reinsured’s underwriting fortunes.⁷⁷ Dr. Strain explains:

“Following the fortunes means that, so long as the reinsured acts in good faith, its losses from underwriting that looks improvident in retrospect or was simply unlucky will be indemnified within the terms of the reinsurance contract. This may include the misfortune of an insurer where coverage was not anticipated or intended by it but nevertheless is imposed by a court’s interpretation of the insurance policy.”⁷⁸

In other words, the Follow the Fortunes Doctrine obligates the Reinsurer to abide by developments which bear on the Reinsured's business that are beyond the Reinsured's control, including the loss experience of the Reinsured's policyholders.⁷⁹

Common Follow the Fortunes clauses seen in reinsurance Agreements include:

“All claims involving this reinsurance, when settled by the reinsured, shall be binding on the reinsurer.”

“The liability of the reinsurers shall follow that of the company in every case and shall be subject in all respects to all of the general and special stipulations, clauses, waivers and modifications of the company's policy.”

“The reinsurer shall pay as may be paid by the [ceding insurer.]”

“All reinsurances for which the Reinsurer shall be liable by virtue of this Agreement shall be subject in all respects to the same rates, terms, conditions, interpretations adopted by the Company, waivers, modifications, alterations and cancellations, as the respective insurances of the Company to which such reinsurances relate, the true intent of this Agreement being that the Reinsurer shall in every case to which this Agreement applies, and in the proportions specified, follow the fortunes of the Company.”⁸⁰

The Follow the Settlements Doctrine on the other hand obligates the Reinsurer to “be bound to pay claims falling within the reinsurance that have been paid by the cedent through settlement or judgment, providing that the ceding company has acted reasonably and in good faith.”⁸¹ Therefore, the two Doctrines can be distinguished as one Federal District Court has described:

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“The ‘follow the fortunes’ doctrine requires reinsurers to accept a reinsured's good faith decision that a particular loss is covered by the terms of the underlying policy, while the "follow the settlements" doctrine requires reinsurers to abide by a reinsured's good faith decision to settle, rather than litigate, claims on that policy.”⁸²

The Follow the Settlements Doctrine is designed “to prevent the reinsurer from ‘second-guessing’ the settlement decisions of the ceding company.”⁸³ “In short, if the payments are properly ascribed to an underlying policy obligation, the Reinsurer will follow the actions of the company in matters of compromising coverage positions, liability, and other assessment questions.”⁸⁴

The Aetna Court’s citations to earlier cases provides a detailed description of the Follow the Settlements Doctrine:

“As the First Department stated in Insurance Co. of New York v. Associated Mfrs. Mut. Fire Ins. Co.:

‘What is claimed * * * is that the [reinsurer] is not bound by the adjustment made by the [ceding company], but that, in order to entitle the [ceding company] to recover against [its reinsurer], it was required to prove every fact which the [insured] would have been required to prove, had the [ceding company] resisted its claim and an action been brought to recover under the original policy. We think that a proper construction of the contract of reinsurance fails to sustain this claim. * * * When, therefore, the plaintiff [ceding company] had ascertained by a proper investigation that it was legally liable to pay a certain amount to the [insured] under its contract, and such payment had been made, the defendant [reinsurer] could not question the validity of the [ceding

company's] act, unless it alleged and proved that the plaintiff had acted fraudulently or collusively to its injury.'

"70 A.D. at 70-71, 74 N.Y.S. at 1039.

* * *

"This is not to say that the reinsurer is bound to follow all settlements of the ceding company. No such obligation would exist, for example, if the ceding company were to pay a loss that was categorically outside the scope of coverage; such a settlement might make good business sense to the cedent, but it would not trigger a duty on the part of the reinsurer. See North River Ins. v. Philadelphia Reinsurance Group, 831 F.Supp. 1132, 1142 (D.N.J. 1993).⁸⁵ Rather, the reinsurer may only be bound to follow the interpretation placed by the ceding company on its own policy when the settlement proceeds from a reasonable judgment on the part of the ceding company that the insured's interpretation of the scope of coverage is meritorious. In Mentor Ins. Co. v. Norges Brannkasse, the Second Circuit appositely wrote:

'The follow-the-fortunes [or follow-the-settlements] principle does not change the reinsurance contract; it simply requires payment where the cedent's good-faith payment is at least arguably within the scope of the insurance coverage that was reinsured.

"996 F.2d 506, 517 (2d Cir.1993) (emphasis added)."⁸⁶

The Reinsurer, thus, is bound by the cedent's adjustment and settlement of the loss unless the Reinsurer can present evidence that the Cedent's adjustment and settlements were manifestly outside of the original policy's coverage, or were fraudulent or not made in good faith.⁸⁷

The public policy reasons in favor of the Follow the Settlements Doctrine and against

“second guessing” was described in International Surplus Lines:

“This standard is purposefully low. Were the Court to conduct a de novo review of ISLIC's decision-making process, the foundation of the cedent-reinsurer relationship would be forever damaged. The goals of maximum coverage and settlement that have been long established would give way to a proliferation of litigation. Cedents faced with de novo review of their claims determinations would ultimately litigate every coverage issue before making any attempt at settlement. Such a consequence this Court will not abide.”⁸⁸

Common Follow the Settlement clauses seen in reinsurance Agreements include:

“Reinsurers agree to follow the settlements of the ceding insurer in all respects and bear their proportion of any expenses incurred, whether legal or otherwise, in the investigation and defense of any claim hereunder.”

“[The ceding insurer] shall be the sole judge as to what shall constitute a claim or loss covered under [its] policies and [its] liability thereunder and as to the amount or amounts which it shall be proper for [it] to pay thereunder and [the reinsurers] shall be bound by the judgment of [the ceding insurer] as to the liability and obligation of [the ceding insurer] under [its] policies. [A]ny and all payments made [the ceding insurer] in settlement of loss or losses under its policies . . . shall be unconditionally binding upon the [reinsurers].”⁸⁹

“All loss settlements made by the Company, whether under policy terms and conditions or by way of compromise, shall be binding upon the Reinsurer, and the Reinsurer agrees to pay or allow, as the case may be, its share of each such settlement in accordance with this Contract.”⁹⁰

While many reinsurance Agreements contain explicit follow the fortunes/follow the settlements clauses, many do not. If an Agreement does not contain these clauses, do the

Doctrines never-the-less apply? Some courts read these conditions into the Agreement.⁹¹ Others do not.⁹² English courts have ruled that reinsurance agreements must explicitly contain follow the settlements clauses for the Doctrine to apply.⁹³

Whether or not the Doctrines apply independent of specific Agreement clauses, it seems clear the Reinsurer will only be liable for a loss of the kind reinsured, and only in amounts not exceeding the limits of coverage as stated in the reinsurance Agreement.⁹⁴ Accordingly, the first step in resolving any reinsurance dispute is to read the Agreement.⁹⁵

ENDNOTES

1. COUCH ON INSURANCE 3D §222.8 at p. 222-33.
2. Linder, *Contractor's Insurance and Bonds: Essential Tools for Successful Projects*, Practice Notes, Vol. 5, No. 1 (August,1992). The article is available at the following Web address: <http://www.aepronet.org/pn/vol5-no1.html>.
3. See, e.g., Employers Mut. Cas. Co. v. Chicago , St. P., M. & O. Ry. Co. 23 N.W.2d 689 (Minn.1952); Signode v. Normandale, 177 Ill. App. 3d. 526, 532 N.E.2d 725 (1979); Schwab v. Town of Daute, 492 So. 2d 708 (Fla. 4th DCA 1986).
4. See e.g., Share Health Plan v. Marcotte, 495 N.W.2d 1 (Minn. App. 1993); Great West Cas. Co. v. MSI Ins. Co. 482 N.W.2d 527 (Minn. App. 1992); Atlantic Mut. Ins. Co. v. Poseidon Shiffart, 206 F.Supp. 15 (N.D. Ill.), aff'd, 313 F.2d 872 (7th Cir. 1962).
5. See, e.g., Westendorf by Westendorf v. Stasson, 330 N.W.2d 699 (Minn. 1983); Garrity v. Rural Mut. Ins. Co., 77 Wis.2d 537, 253 N.W.2d 512 (1977).
6. See, e.g., Great Northern Oil Co. v. St. Paul Fire & Marine Ins. Co., 291 Minn. 97, 99-100, 189 N.W.2d 404, 406-07 (1971).
7. See, e.g., American Continental Ins. Co. v. PHICO Ins. Co., 132 N.C. App. 430, 512 S.E.2d 490, aff'd, 351 N.C. 45, 519 S.E.2d 525 (1999); Employers Ins. of Wausau v. Musick, Peeler & Garrett, 948 F.Supp. 942 (S.D. Cal. 1995).
8. See, generally, Appleman, *Insurance Law and Practice*, § 4941, (1981).
9. Robinson. Linda, et. al., *Commercial Property Insurance*, p. V.C.23, (International Risk Management Institute, Inc., 2000).
10. Id. at IX.J.19.
11. Gibson, Jack P., et. al., *Commercial Liability Insurance*, p. V.J.23 (International Risk Management Institute, Inc., 2001).
12. Id., at VI.Q.207.

13. See, e.g., Johnson v. State Farm Fire & Cas. Co., 151 Ill. App. 3d. 672, 503 N.E.2d 602 (1987); Offer v. Superior Court, 194 Cal.114, 228 P. 11 (1924).

14. Wisconsin Statutes Annotated, Ch. 632, Subchapter I, FIRE AND PROPERTY INSURANCE, Prefatory Comments at p. 157. This authority reports that another third of the states have standardized language promulgated by the states' Insurance Commissioners.

15. Minnesota's Standard Form Fire Insurance Policy at Minn. Stat. § 65A.01, Subd. 3, contains the following provision:

“This company is subrogated to, and may require from the insured an assignment of all right of recovery against nay party for loss to the extent that payment therefor is made by this company; and the insurer may prosecute therefor in the name of the insured retaining such amount as the insurer has paid.”

16. Garrity v. Rural Mut. Ins. Co., 253 N.W.2d 512 (Wis. 1977). See also, Capitol Indemnity Corp. v. Strike Zone, S.S.B. & B. Corp., 646 N.E.2d 310, 311 (Ill. App. 1995); Pennsylvania Lumberman's v. Nicholas, 253 F.2d 504 (5th Cir. 1958), appeal after remand, 296 F.2d 905 (5th Cir. 1961); Dibble v. San Joaquin, 47 Cal. App. 3d 730, 190 P.198 (1920).

17. See, e.g., Ala. Code § 25-5-11(a); Ariz. Rev. Stat. § 23-1023; Alaska Stat. § 23.30.015; Cal. Labor Code § 3852-60; Colo. Rev. Stat. § 8-41-203; Conn. Gen. Stat. § 31-293; Del. Code Ann. Tit. 19 § 2363; D.C. Code Ann. § 36-335; Fla. Ch. 440.39; Ga. Code Ann. § 34-9-11.1; Haw. Rev. Stat. Ann. § 386-8; Idaho Code § 72-223; 820 Ill. Comp. Stat. 305/5; Ind. Code Ann. § 22-3-2-13; Iowa Code § 85.22; Kan. Stat. Ann. § 44-504 ; Ky. Rev. Stat. Ann. §342.700; La. Rev. Stat. §§23.1101-03; Me. Rev. Stat. Ann. tit. 39-A § 107; Mass. Ann. Laws ch.152, § 15; Mich. Comp. Laws § 418.487 (Mich. Stat. Ann. § 17.237(827)); Minn. Stat. §176.061; Miss. Code Ann. § 71-3-71; Mo. Rev. Stat. § 287.150; Mont. Codes Ann. § 39-71-414; Neb. Rev. Stat. Ann. § 48-118; Nev. Rev. Stat. Ann. § 616C.215; N.H. Rev. Stat. Ann. § 281-A:13; N.M. Ann. § 52-5-17; N.J. Stat. Ann. § 34.15-40; N.Y. Workers' Comp. Law § 29; N.C. Gen. Stat. § 97-10.2; N.D. Cent. Code § 65-01-09; Or. Rev. Stat. §§ 656.578-.595; Ohio Rev. Code Ann. §§ 4123.93-93.1; S.C. Code Ann. § 42-1-560; S.D. Codified Laws §§ 62-4-38-40; Tex. Lab. Code §§ 417.001-004; Tenn. Code. Ann. § 50-6-112; Utah Code Ann. §§ 34A-2-106; Vt. Stat. Ann. tit. 21, § 624; Va. Code Ann. § 65.2-309; W. Va. Code § 23-2A-1; Wis. Stat. Ann. § 102.29; Wyo.

Stat. Ann. § 27-14-105.

18. See, e.g., U.S. Fire Ins. Co. v. Ammala, 334 N.W.2d 631, 634 (Minn. 1983); North Star Reinsurance Corp. v. Continental Ins. Co., 604 N.Y.S.2d 510 (Ct. App. 1993); Kehoe v. Commonwealth Edison Co., 694 N.E.2d 1119 (Ill. App. 1998); Smith v. Ryan, 142 So. 2d 561 (Fla. 2d DCA 1962); National Union Fire Ins. Co. v. Engineering Science, 884 F.2d 1208 (9th Cir. 1989).

19. See, e.g., Minn. Stat. § 60A.41.

20. See, e.g., North Star Reins. Corp. v. Continental Ins. Co., 82 N.Y.2d 281, 604 N.Y.S.2d 510 (1993); Kurtin v. National Railroad Passenger Corp., 1996 WL 194296 (S.D.N.Y. 1996).

21. See, e.g., Landy v. Oceanic Contractors, Inc., 731 F.2d 299 (5th Cir. 1984); Oakland Stadium v. Underwriter's at Lloyd's, 152 Cal. App. 2d 292, 313 P.2d 602 (1957).

22. See, e.g., Home Ins. Co. v. Pinski Bros., Inc., 500 P.2d 945 (Mont. 1972)(court held that "Home Indemnity Company," the liability insurer, was deemed to be the same corporate entity as "Home Insurance Company," the subrogating insurer, and therefore barred recovery); National Union Fire Ins. Co. of Pittsburgh v. Engineering-Science, Inc., 673 F. Supp. 380, 382-84 (N.D. Cal. 1987) (In denying subrogation the court rejected an argument that a "Chinese Wall" existed between the department handling "builder risk" coverage and the department handling "errors and omissions" coverage).

23. See, e.g., New Hampshire Ins. Group v. Labombard, 155 Mich. App. 369, 339 N.W.2d 527, leave to appeal denied, 428 Mich. 911 (1986); United Fire & Cas. Co. v. Bruggeman, 505 N.W.2d 87 (Minn. App. 1993), pet. for rev. denied (Minn., Oct. 19, 1993); Community Credit Union of New Rockford, North Dakota v. Homelvig, 487 N.W.2d 602, 603 (N.D.1992); Monterey Corp. v. Hart, 216 Va. 843, 224 S.E.2d 142 (1976); Cascade Trailer Court v. Beeson, 50 Wash.App. 678, 749 P.2d 761 (1988).

24. Alaska Ins. Co. v. RCA Alaska Communications, Inc., 623 P.2d 1216 (Alaska 1981); Liberty Mut. Fire Ins. Co. v. Auto Spring Supply Co., 59 Cal.App.3d 860, 131 Cal. Rptr. 211 (1976); Continental Ins. Co. v. Kennison, 661 So.2d 325 (Fla.Ct.App. 1995); Safeco Ins. Co. v. Capri, 101 Nev. 429, 705 P.2d 659 (1985); Fashion Place, Ltd. v. Salt Lake County/Salt Lake County Mental Health, 776 P.2d 941 (Utah Ct.App.), cert. denied, 783 P.2d. 53 (Utah 1989); Tate v. Trialco Scrap, Inc., 745 F.Supp. 458 (M.D.Tenn. 1989),

aff'd, 908 F.2d 974 (6th Cir. 1990).

25. Seaco Ins. Co. v. Barbosa, 435 Mass. 772, 761 N.E.2d 945 (2002); 56 Assoc. v. Frieband, 89 F.Supp. 189 (D.R.I. 2000).

26. Barbosa, 435 Mass. at 779-81, 761 N.E.2d at 951-52.

27. See, e.g., Higginbotham v. Arkansas Blue Cross and Blue Shield, 312 Ark. 199, 849 S.W.2d 464 (1996); Winkelmann v. Excelsior Ins. Co., 85 N.Y.2d 577, 626 N.Y.S.2d. 994 (1995); Westendorf by Westendorf v. Stasson, 330 N.W.2d 699, (Minn. 1983).

28. See, COUCH ON INSURANCE 3D § 223:136 at pp. 223-152-153.

29. See, e.g., COUCH ON INSURANCE 3D § 223:134 at pp. 223-146-151.

30. COUCH ON INSURANCE 3D, § 223.134 at p. 223-151, citing Sapiano v. Williamsburg Nat. Ins. Co., 28 Cal. App. 4th 533, 33 Cal. Rptr. 2d 659 (2d Dist. 1994).

31. Capitol Indem. Corp. v. Strike Zone, 269 Ill. App. 3d 594 646 N.E.2d 310 (4th Dist. 1995)(policy terms override the equitable principles); Hershey v. Physicians Health Plan of Minnesota, Inc., 498 N.W.2d 519 (Minn. App. 1993)(same).

32. See, e.g., Minn. Stat. § 176.061 (workers compensation statutory distribution formula); Ramsey County Medical Center, Inc. v. Breault, 189 Wis.2d 269, 525 N.W.2d 321 (Ct. App. 1994)(ERISA).

33. See e.g., Rimes v State Farm Mut. Auto. Ins. Co, 316 N.W.2d 348 (Wis. 1982) (where either the Insurer or the Insured must to some extent go unpaid, the loss should be borne by the Insurer for that is a risk the Insured has paid it to assume (quoting Garrity)). See, also, Powell v. Blue Cross and Blue Shield, 581 So.2d 772 (Ala.1990) (a Subrogation right does not exist until an Insured has been fully compensated for a loss); Westendorf 330 N.W.2d 699 (Minn.1983)(notwithstanding the Insurer's payment of an Insured's medical expenses, an insurance policy's Subrogation clause does not entitle the Insurer to reimbursement from the Insured's settlement proceeds when the recovery failed to fully compensate the Insured); Ortiz v. Great Southern Fire & Cas. Ins. Co., 597 S.W.2d 342 (Tex.1980)(summary judgment is improper in a suit on a fire insurance policy covering a structure when the record failed to disclose what portion of the Insured's settlement was allocated to the loss of real property); Wimberly v. Am. Cas. Co. of Reading, Pa., 584

S.W.2d 200 (Tenn.1979) (Insurer has no subrogation right in the Insured's recovery from a tortfeasor where the Insured has not been fully compensated for the loss); Skauge v. Mountain States Tel. & Tel., 172 Mont. 521, 565 P.2d 628 (1977) (when an Insured has sustained a loss exceeding the amount paid by the Insurer, the Insured is entitled to full compensation for the entire loss before the Insurer can assert its right of legal subrogation against the Insured or the tortfeasor); Lyon v. Hartford Accident and Indem. Co., 25 Utah 2d 311, 480 P.2d 739 (1971), overruled on other grounds, Beck v. Farmers Ins. Exchange, 701 P.2d 795 (Utah 1985) (an Insured must make a full recovery for a loss before the Insurer is entitled to any part of a recovery from the tortfeasor); Mattson v. Stone, 32 Wash.App. 630, 648 P.2d 929 (1982) (if an Insured has recovered all damages by a tortfeasor, the Insurer has a subrogation interest in the recovery).

34. See, e.g., Complete Health, Inc. v. White, 638 So. 2d 784 (Ala. 1994) (Insurer denied Subrogation for \$74,252 in medical expenses paid despite \$500,000 settlement); Hill v. State Farm Mut. Auto. Ins. Co., 765 P.2d 864, 867 (Utah 1988); Bell v. Federal Kemper Ins. Co. 693 F.Supp. 446 (S.D. W.Va. 1988); Shelter Ins. Cos. v. Frohlich, 498 N.W.2d 74 (Neb. 1993).

35. See Ludwig v Farm Bureau Mutual Insurance Co, 393 N.W.2d 143, 146 (Iowa. 1986); See, also, Mutual Hospitals Ins. Inc. v. McGregor, 174 Ind.App. 550, 368 N.E.2d 1376 (1977) (\$10,000 settlement; court determined approximately \$5,000 should be attributed to medical expenses, and allowed Insurer's Subrogation claim for medical expenses); Voss v. Mike and Tony's Steakhouse, 230 So.2d 470 (La.App.1969) (Insurer subrogation permitted against the segregated settlement amount of a property damage and personal injury lawsuit which represented the damage to the automobile); Davenport v. State Farm Mut. Auto. Ins. Co., 81 Nev. 361, 404 P.2d 10 (1965) (Insurer subrogation claim against segregated amount of settlement related to medical expenses allowed).

36. See, e.g., Florida Farm Bureau Ins. Co. v. Martin, 377 So. 2d 827 (Fla. Dist. Ct. App. 1979); Rimes v. State Farm Mut. Auto. Ins. Co., 316 N.W.2d 348 (Wis. 1982); David Associates, Ltd. v. National Income Realty Trust, 436 S.E.2d 721 (G.A. App. 1993).

37. COUCH ON INSURANCE 3D, § 219:1 at p. 219-6.

38. Id. at § 219:5, p. 219-12.

39. OCP Liability coverage protects the Owner from liability which might arise from risks which arise because of the construction project despite the lack of any of the Owner's

active fault on the site. Examples of these indirect Owner exposures include liability arising from the hiring of an incompetent Contractor, liability associated with non-delegable duties invoked because of certain obligations such as “safe workplace” statutes, and liability associated with any Contractor or Subcontractor inherently dangerous activities. Gibson, et. al., supra at note 11, p. VI.Q.1.

40. Supra at note 11, p. VI.Q.206.

41. See, e.g., Sentry Ins. Co. v. Aetna Ins. Co., 450 So.2d 1233 (Fla. Dist. Ct. App. 2d Dist. 1984); Integrity Mut. Ins. Co. v. State Auto. & Cas. Underwriters Ins. Co., 307 Minn. 173, 239 N.W.2d 445 (1976).

42. Lamb-Weston, Inc. v. Oregon Auto. Ins. Co., 219 Or. 110, 341 P.2d 110 (1959).

43. See, e.g., South Carolina Ins. Co. v. Fidelity and Guar. Ins. Underwriters, Inc., 327 S.C. 207, 489 S.E.2d 200 (1997); St. Paul Fire & Marine Ins. Co. v. American Home Assur. Co., 444 Mich. 560, 514 N.W.2d 113 (1994); Federal Ins. Co. v. Prestemon, 278 Minn. 218, 153 N.W.2d 429 (1967);

44. See, e.g., Integrity Mut. Ins. Co. v. State Auto. & Cas. Underwriters Ins. Co., 307 Minn. 173, 239 N.W.2d 445 (1976).

45. See, e.g., Ticor Title Ins. Co. v. Employers Ins., 48 Cal. Rptr. 2d 368 (Cal. App. 1 Dist. 1995).

46. See, e.g., Hocker v. New Hampshire Ins. Co., 922 F.2d 1476 (10th Cir. 1991).

47. See e.g., Northfield Ins. Co. v. St. Paul Surplus Ins. Co., 545 N.W.2d 57 (Minn. App. 1996). See generally, cases and commentary in COUCH ON INSURANCE 3D at § 222.18, pp. 222-43-46.

48. Liability Policies may be triggered in several ways depending on a particular state’s law. Trigger theories may include the “exposure” rule, the “manifestation” rule, the “continuous trigger” rule, or the “actual injury” or “injury-in-fact” rule. Northern States Power Co. v. Fidelity & Cas. Co. of New York, 523 N.W.2d 657 (Minn. 1994). A full discussion of trigger and allocation theories is beyond the scope of this Article.

49. Several secondary sources are available to more thoroughly discuss allocation, including Robinson, R.R., *Coverage Allocation Law: A Primer on the History, Evolution*

and Current State of Court Mandated Shared Indemnity and Defense Obligations, 519 PLI/LIT 1495, Practising Law Institute (1995).

50. See, e.g., Hawkeye-Security Ins. Co. v. Lowe Const. Co., 251 Iowa 27, 99 N.W.2d 421 (1959). But see, Government Employees Ins. Co. v. State Farm Mut. Auto. Ins. Co., 242 So.2d 162 (Fla. Dist. Ct. App. 1st Dist. 1970).

51. “Work” is defined generally as the construction or services to be provided in the Construction Contract. AIA Form A201 ¶ 1.1.3 (1997).

52. See, e.g., Minn. Stat. Ch. 337.02; N.Y. Gen. Obligations Law § 5-322.1; 740 ILL. COMP. STAT. 35/1.

53. Id.

54. See e.g., Minn. Stat. § 337.05.

55. Of course, the difficulty with asserting this statutory indemnification right in the Subrogation action is that the party failing to procure the insurance may not have insurance coverage itself for the breach of contract claim. Therefore, there may not be any available unless the breaching party is independently viable, there may not, as a practical matter, be any proceeds from which to recover.

56. Supra at note 11, p. V.D.4.

57. Supra at note 11, p. V.L.16-19.

58. Supra at note 11, p. IV.F.7-9.

59. See Baxter v. I.S.T.A. Ins. Trust, 749 N.E.2d 47 (Ind. App., 2001). See, also, Acadia Ins. Co. v. Buck Const. Co., 756 A.2d 515 (Me., 2000); Emery Waterhouse Co. v. Lea, 467 A.2d 986 (Me. 1983); Dolphine Mfg. Inc. v. Tehaar, 404 N.W.2d 295 (Minn. Ct. App. 1987); Interstate Fire Ins. Co. v. First Tape, Inc., 817 S.W.2d 142 (Tex. App. Houston 1st Dist. 1991), writ denied, (Feb. 12, 1992); National Union Fire Ins. Co. of Pittsburgh, Pa. v. John Zink Co., 972 S.W.2d 839 (Tex. App., Corpus Christi, 1998); Ins. Co. of North America v. Universal Mort. Co. of Wisconsin, 262 N.W.2d 92 (1978); Island Villa Developers, Inc. v. Bonner Roofing and Sheet Metal Co., 175 Ga. App. 713, 334 S.E.2d 241 (1985).

60. See generally, AIA Form A201, ¶ 11.4.7 (1997).
61. AIA Form A201, ¶ 1.1.3 (1997).
62. See e.g. Fidelity & Guar. Ins. Co. v. Craig-Wilkinson, Inc., 948 F.Supp. 608 (S.D.Miss. 1996, aff'd, 101 F.3d 699 (5th Cir. 1996); Town of Silverton v. Phoenix Heat Source Sys., Inc., 948 P.2d 9 (Colo.Ct.App. 1997); S.S.D.W. Co. v. Brisk Waterproofing Co., 76 N.Y.2d 228, 557 N.Y.S.2d 290, 556 N.E.2d 1097 (1990).
63. See, e.g., AIA Form A201, ¶ 11.4.1 (1997).
64. See e.g. Lloyd's Underwriters v. Craig and Rush, Inc., 26 Cal.App.4th 1194, 32 Cal. Rptr.2d 144 (1994); Housing Inv. Corp. v. Carris, 389 So.2d 689 (Fla. Dist. Ct. App. 1980); Employers Mut. Cas. Co. v. A.C.C.T., Inc., 580 N.W.2d 490 (Minn. 1998); Trump-Equitable Fifth Avenue Co. v. H.R.H. Constr. Corp., 106 A.D.2d 242, 485 N.Y.S.2d 65 (N.Y.App.Div.), aff'd, 497 N.Y.S.2d 369 (1985); Commercial Union Ins. Co. v. Bituminous Cas. Corp., 851 F.2d 98 (3rd Cir. 1988); Tokio Marine & Fire Ins. Co. v. Employers Ins. of Wausau, 798 F.2d 101 (2nd Cir. 1986); ASIC II Ltd. v. Stonhard, Inc., 63 F.Supp. 85 (D.Me. 1999);
65. Trinity Universal Ins. Co. v. Bill Cox Construction, Inc., 75 S.W.3d 6, 13 (Tex.App. - San Antonio 2001).
66. See, e.g., Fidelity & Guar. Ins. Co. v. Craig-Wilkinson, Inc., 948 F.Supp. 608, 611 (S.D.Miss.1996), aff'd, 101 F.3d 699 (5th Cir.1996)(plaintiff's claim for damage to non-work property not barred because contractual waiver provided solely for waiver of claims for damage to Work); Town of Silverton v. Phoenix Heat Source Sys., Inc., 948 P.2d 9 (Colo.Ct.App.1997) (waiver limited to value of work performed under contract and inapplicable to other parts of town hall damaged by fire); S.S.D.W. Co. v. Brisk Waterproofing Co., 76 N.Y.2d 228, 557 N.Y.S.2d 290 556 N.E.2d 1097 (1990) (waiver applies only to damage to areas within the limits of the Work); Travelers Ins. Cos. v. Dickey, 799 P.2d.625 (Okl.1990) (concludes that the agreement is ineffective to exonerate the contractor from liability for negligently inflicted harm to the owner's interior property).
67. See, Independent School District 833 v. Bor-Son Construction, Inc., 631 N.W.2d 437 (Minn. Ct. App. 2001), review denied, (Minn. October 16, 2001).
68. Id.

69. Interestingly, Minnesota altered this language as follows:

“(a) Commencing not later than the time of the first conveyance of a unit to a unit owner other than a declarant, the association shall maintain, to the extent reasonably available:

“(1) Property insurance on the common elements *and units*, exclusive of land, excavations, foundations, and other items normally excluded from property policies, insuring against all risks of direct physical loss.”

Minn. Stat. § 515A.3-112 (2000)(emphasis added).

70. “SECTION 3-113. INSURANCE.

“(a) Commencing not later than the time of the first conveyance of a unit to a person other than a declarant, the association shall maintain, to the extent reasonably available:

“(1) property insurance on the common elements and, in a planned community, also on property that must become common elements, insuring against all risks of direct physical loss commonly insured against or, in the case of a conversion building, against fire and extended coverage perils.

* * *

(b) In the case of a building that is part of a cooperative or that contains units having horizontal boundaries described in the declaration, the insurance maintained under subsection (a)(1), to the extent reasonably available, must include the units, but need not include improvements and betterments installed by unit owners.

* * *

(d) Insurance policies carried pursuant to subsections (a) and (b) must

provide that:

“(2) the insurer waives its right to subrogation under the policy against any unit owner or member of his household;”

71. Supra at note 11, p. VI.Q.9.
72. Leitner, Simpson & Bjorkman, Law and Practice of Insurance Coverage Litigation § 41.4 (2000).
73. Robert W. Strain, Reinsurance, p. 783 (rev. ed. 1997) (hereinafter Reinsurance). See also Ostrager & Newman, Handbook on Insurance Coverage Disputes § 15.01(a) (10th ed. 2000) (noting reinsurance “is a contractual arrangement whereby [the ceding Insurer] transfers all or a portion of the risk it underwrites pursuant to a policy or group of policies to [a Reinsurer].” (citing Colonial Am. Life Ins. Co. v. Commissioner, 491 U.S. 244 (1989))).
74. For example, Swiss Re filed a declaratory judgment action in the U.S. District Court for the Southern District of New York on October 22, 2001 seeking a determination of whether the attack on the World Trade Center towers was one insurable loss or two. The resolution of that dispute will determine whether the Insurers and Reinsurers pay \$7 billion, or \$3.5 billion for property damage and rent interruption. See E.E. Mazier, Swiss Re Presses ‘One Attack’ Theory, National Underwriter (Property & Casualty/Risk & Benefits Management Edition), Oct. 29, 2001, p. 5 (Vol. 105, No. 44).
75. Reinsurance, p. 24.
76. Reinsurance, p. 26 (citing North River Ins. Co. v. CIGNA Reinsurance Co., 52 F.3d 1194, 1199 (3d Cir. 1995)); 14 Holmes’ Appleman on Insurance 2d, Law of Reinsurance, § 106.2, p. 412-13 (2000).
77. Reinsurance, p. 25.
78. Reinsurance, p. 25.
79. 14 Holmes’ Appleman on Insurance 2d, Law of Reinsurance, § 106.2, at p. 413.
80. 14 Holmes’ Appleman on Insurance 2d, Law of Reinsurance, § 106.2 at p. 408 (brackets in original).

81. Leitner, et. al., § 41.8.
82. Commercial Union Ins. Co. v. Seven Provinces Ins. Co., 9 F.Supp. 2d 49, 66 (D.Mass. 1998).
83. Aetna Cas. & Sur. Co. v. Home Ins. Co., 882 F.Supp. 1328, 1346 (S.D.N.Y. 1995).
84. Reinsurance, p. 568; Aetna, 882 F.Supp. at 1346 n. 9 (noting that “‘follow the settlements’ refers to the duty to follow the actions of the cedent in adjusting and settling claims.”); Ostrager & Newman, Handbook on Insurance Coverage Disputes, § 15.04(b) (10th ed. 2000)(stating “[o]nce the ceding insurer pays a claim, the reinsurer becomes obligated to indemnify the ceding insurer in accordance with the reinsurance contract.”).
85. Rev’d on other grounds, North River Ins. Co. v. CIGNA Reinsurance Co., 52 F.3d 1194, 1199 (3rd Cir. 1995) (noting Reinsurer not liable for risks beyond reinsurance agreement).
86. Aetna, 882 F.Supp. at 1346-47 (brackets and italicization in original) (underscoring added).
87. Aetna at 1346. See, North River Ins. Co. v. CIGNA Reins Co., 52 F.3d 1194, 1207 (3d Cir. 1995); Christiania General Ins. Corp. v. Great Am. Ins. Co., 979 F.2d 268, 280 (2d Cir.1992); International Surplus Lines Ins. Co. v. Certain Underwriters and Underwriting Syndicates at Lloyd's of London, 868 F.Supp. 917, 920-21 (S.D. Ohio 1994); Ostrager & Newman, Handbook on Insurance Coverage Disputes, § 16.01(b) (10th ed. 2000) (citing American Marine Ins. Group v. Neptunia Ins. Co., 775 F.Supp. 703, 708 (S.D.N.Y. 1991), aff’d, 961 F.2d 372 (2d Cir. 1992).
88. 868 F.Supp. at 921.
89. 14 Holmes’ Appleman on Insurance 2d, Law of Reinsurance, § 106.2, p. 410-11 (2000) (brackets in original).
90. Kathleen M. Carroll, Guy Carpenter & Co., Inc. Understanding Property and Casualty Reinsurance Agreements, p. 50, presented at “Demystifying Reinsurance: A Basics of Reinsurance Course” hosted by The Reinsurance Association of American and The Kelley Insurance Center Drake University, Des Moines, IA, May 15-17, 2001 (on file with author).

91. See e.g., Aetna, 882 F.Supp. at 1350 (“[I]t is customary within the reinsurance industry for reinsurers to follow the claim settlement decisions of the ceding company even in the absence of an explicit loss settlements clause.”); International Surplus Lines Ins. Co. v. Certain Underwriters and Underwriting Syndicates at Lloyd's of London, 868 F.Supp. 917 (S.D.Ohio 1994) (noting that Follow the Fortunes Doctrine implicit in all reinsurance contracts even if not formally expressed therein, citing Mentor Ins. Co. v. Norges Brannkasse, 996 F.2d 506, 516 (2nd Cir.1993)); Henry T. Kramer, The Nature of Reinsurance, Reinsurance, p. 11-12 (Robert W. Strain, ed. 1980)); State Auto Mut. Ins. Co. v. American Reinsurance Co., 748 F.Supp. 556 (S.D. Oh. 1990); Ambassador Ins. Co. v. Fortress Re, Inc., No. C-79-101-G, 1983 U.S.Dist. LEXIS 14685 (D.D.N.C. 1983).

92. Michigan Miller Mut. Ins. Co. v. Northern American Reinsurance Corp., 452 N.W.2d 841 (Mich. Ct. App. 1990); National American Ins. Co. of California v. Certain Underwriters at Lloyd's of London, 93 F.3d 529, 537 (9th Cir. 1996) (holding whether there existed implied follow the settlements obligation was question of fact; on remand case was settled before resolution of that issue); Travelers Casualty v. Certain Underwriters at Lloyd's of London, Nos. 124 and 124, slip op. 17-19 (N.Y. Ct. App. Oct. 16, 2001) (noting follow the fortunes clause cannot supercede language of the policy).

93. See Leitner, et. al., § 41.8 (citing Ins. Co. of Africa v. SCOR (UK) Reinsurance Co., Ltd. 1 Lloyd's Rep. 312 (C.A. 1984)).

94. 14 Holmes' Appleman on Insurance 2d, Law of Reinsurance, § 106.2 at p. 421.

95. Id., § 106.1 at p. 404 (stating “liability of a reinsurer depends on the terms of the policy of reinsurance, and not on the question of whether the insured suffered a legal loss on the original policy.”).