



1974

Ursprung v. Safeco Insurance Company: The Duty of an Insurer to Appeal a Judgement in Excess of Policy Limits

Damon W. Harrison Jr.
University of Kentucky

Follow this and additional works at: <https://uknowledge.uky.edu/klj>

 Part of the [Insurance Law Commons](#)

Click here to let us know how access to this document benefits you.

Recommended Citation

Harrison, Damon W. Jr. (1974) "Ursprung v. Safeco Insurance Company: The Duty of an Insurer to Appeal a Judgement in Excess of Policy Limits," *Kentucky Law Journal*: Vol. 62 : Iss. 3 , Article 9.
Available at: <https://uknowledge.uky.edu/klj/vol62/iss3/9>

This Comment is brought to you for free and open access by the Law Journals at UKnowledge. It has been accepted for inclusion in Kentucky Law Journal by an authorized editor of UKnowledge. For more information, please contact UKnowledge@lsv.uky.edu.

COMMENTS

URSPRUNG V. SAFECO INSURANCE COMPANY: THE DUTY OF AN INSURER TO APPEAL A JUDGMENT IN EXCESS OF POLICY LIMITS

The Court of Appeals of Kentucky in *Ursprung v. Safeco Insurance Co.*¹ recently confronted the issue of whether an insurance company's contractual obligation to defend incorporates a duty to prosecute an appeal of a judgment in excess of policy limits, which is rendered against one of its insured. The Court held that the duty to defend does include an obligation to appeal where there are reasonable grounds for the appeal. Apart from this, the traditional standard for measuring a breach of the duty to defend will apply.²

This decision is significant for its potential effect upon a wide segment of society. The public has increased its use of automobile liability insurance³ in order to protect itself financially against the greater number of accidents⁴ that have occurred because of an increasing number of automobiles.⁵ The standard automobile insurance policy contains provisions regarding the extent of liability for per-

¹ 497 S.W.2d 726 (Ky. 1973).

² The standard used to measure a breach of the duty to defend under an insurance policy is one of bad faith or fraud. This is the standard which controls in all the relationships and dealings that fall under the policy terms. 44 AM. JUR. 2d *Insurance* § 1531 (1969).

³ The amount of money spent on automobile liability insurance coverage was as follows:

1965—\$5,424,000,000
1969—\$7,866,000,000
1970—\$8,850,000,000

U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 465 (93d ed. 1972).

⁴ From 1967 through 1971 the number of reported automobile accidents in the United States was as follows:

1967—13,700,000 accidents
1968—14,600,000
1969—15,500,000
1970—16,000,000
1971—16,300,000 (preliminary figure)

Id. at 551.

⁵ From 1967 through 1971 the number of new automobiles in the United States was as follows:

1967— 8,458,000 autos
1968—10,442,000
1969—10,071,000
1970— 8,470,000
1971—11,172,000

Id. at 547.

sonal injury and for property damage. Nearly always included in the policy is a clause relating to the insurance company's defense of any suits against the insured alleging damages for which the policy provides coverage.⁶ These clauses are designed to give the insured assurance that his contractual rights will be protected. In actual practice, however, this does not always happen; insurance companies attempt to minimize their expenses and obligations with respect to any accident. Consequently, questions of the extent of the liability coverage and, particularly, of the obligation to defend frequently arise.

Before *Ursprung*, this particular issue regarding the scope of the duty to defend had not been resolved by the Kentucky Court. The Court surveyed other courts' treatment of the contractual duty to defend and the standards imposed upon insurance companies under this duty in arriving at its conclusion that the duty to appeal exists where reasonable grounds for appeal are present.

The factual situation of *Ursprung* is rather involved. An automobile operated by Sherry Ann Clark collided with a motorcycle operated by James Ursprung, resulting in serious injury to Ursprung. Evidence indicated that Ursprung was operating his motorcycle without lights. Clark had a \$10,000 liability insurance policy with Safeco Insurance Company, which included a standard defense clause.⁷ Ursprung sued Clark for \$182,500 damages, and pursuant to the policy defense clause, Safeco employed an attorney to represent her. The attorney sent the usual excess liability letter,⁸ but, upon the advice of another attorney, Clark decided not to employ additional counsel.

⁶ The exact language of the duty to defend clauses varies from policy to policy. The following two clauses are typical:

. . . and the Company shall defend any suit alleging such bodily injury or property damage and seeking damages which are payable under the terms of this policy, even if any of the allegations of the suit are groundless, false or fraudulent; but the Company may make such investigation and settlement of any claim or suit as it deems expedient.

Fireman's Fund Insurance Company Comprehensive Automobile Policy pt. 1, coverage B.

. . . to defend, with attorneys selected by and compensated by the company, any suit against the insured alleging such *bodily injury or property damage* and seeking *damages* which are payable hereunder even if any of the allegations of the suit are groundless, false or fraudulent; but the company may make such investigation, negotiation and settlement of any claim or suit as it deems expedient.

State Farm Mutual Automobile Policy § 1, coverage B (original emphasis).

⁷ The wording of this defense clause was: "And Safeco shall defend any suit alleging such damages which are payable under the terms of this policy, even if any of the allegations of the suit are groundless, false or fraudulent. . . ." *Ursprung v. Safeco Ins. Co.*, 497 S.W.2d 726, 728 (Ky. 1973).

⁸ The letter advised Clark that because the amount sued for exceeded the coverage of the policy, she should feel free to employ additional counsel to represent her interests beyond the insurance policy limits. *Id.* at 727.

Prior to the trial neither side in the suit made any effort to settle the claim within the policy limits or for a sum less than the amount claimed.⁹ The action was tried on October 7, 1969, and the jury delivered a verdict awarding Ursprung \$22,969.30. Counsel for Clark filed motions for judgment notwithstanding the verdict and for a new trial. These motions were overruled.

On January 30, 1970, the insurance company's attorney sent a letter informing Clark and her attorney that Safeco had decided to pay the limits of the policy in partial satisfaction of the judgment rather than appeal. This letter also informed them of an offer by Ursprung to settle the judgment for \$15,000 and advised them that an appeal must be taken within thirty days of January 15, 1970. Clark's attorney informed the other attorney that there would be no appeal as they had made other arrangements to protect Clark. At no time did Clark or her attorney demand that Safeco appeal the judgment.

In a later letter Safeco's attorney reiterated the company's decision not to appeal. He also stated:

. . . I hope the defendant will appeal the judgment in this case, as I have strongly felt that the court should have directed a verdict for the defendant on the ground that the plaintiff was contributorily negligent as a matter of law.¹⁰

On March 5, in consideration of the agreement of Ursprung to forgo issuance of an execution against her on the unpaid balance of the judgment, Clark assigned and transferred to Ursprung any and all claims, demands, causes of action, or rights she had or might acquire against Safeco arising out of or by reason of its handling of her rather than appeal. This letter also informed them of an offer by defense. On May 11, 1970, Ursprung, as assignee of Clark, filed against Safeco alleging that Safeco's failure to prosecute an appeal of the judgment was a breach of its contractual duty to defend. The suit sought \$12,696.30, the amount of the judgment in excess of the policy liability limits which Safeco had paid.¹¹ Upon a motion for summary judgment, the court dismissed with prejudice, stating that as a matter of law the exhaustion of policy limits relieves the insurance

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* at 728. This suit placed Ursprung in the difficult position of arguing that the judgment was correct in order to protect his own interests, but that the insurance company had a duty to appeal the judgment under its obligation to defend. The Court, however, did not even treat the problems this sort of position raises. Instead, it focused solely upon the insurance company's duty to defend.

company of any further duty with respect to the policy.¹² This conclusion formed the basic issue of the case before the Court of Appeals.

The lower court in stating its conclusions of law followed one theory dealing with the duty to defend. This view holds that when the insurance company has exhausted its coverage, it is under no further obligation to the insured. *Lumbermen's Mutual Casualty Co. v. McCarthy*,¹³ a leading case, held that the primary obligation under the insurance contract is to pay the insured's legal liability for damages upon certain specified contingencies. The other provisions of the policy, including the obligation to defend, were designed to implement the primary obligation. Consequently, the insurance company would not be required to defend a second suit once it had fulfilled its primary obligation. Having paid the policy liability limits, the insurance company was no longer bound by the policy.¹⁴

Courts which adhere to this theory treat phrases like "any suit, coming within terms of this policy"¹⁵ and "such insurance as is afforded by this policy"¹⁶ as referring to the type and amount of the coverage.¹⁷ As generally construed, this obligates the insurance company to defend suits for which it assumed responsibility for liability payments under the terms of the policy.¹⁸ In *Liberty Mutual Insurance Co. v. Mead Corp.*,¹⁹ a Georgia court looked to the parties' intention as expressed in the contract language. This case involved Mead Corporation's attempt to recover expenses incurred in the defense of suits

¹² The exact wording of the decision was as follows:

1. There is no genuine issue of material fact on the question of bad faith. Even if supported by evidence, which is totally lacking, the allegation of negligent failure to settle the claim within policy limits does not state a claim upon which relief may be granted.

2. When policy limits had been exhausted by paying such limits plus interest and Court costs the Defendant had no duty to appeal or to take any further steps with respect to the policy.

Id. The latter holding is of importance here. The Boyle Circuit Court set forth a concise rule of law defeating Ursprung's claim.

¹³ 8 A.2d 750 (N.H. 1939). The case before the court was upon a petition for declaratory judgment where plaintiff sought to have its obligations clarified. McCarthy had an insurance policy with liability limits of \$5,000 and a clause providing for the defense of "any suit, coming within the terms of this policy, seeking damages on account of . . ." McCarthy was involved in an auto accident with R. Bullard, a minor. The plaintiff defended McCarthy in a suit by Bullard for personal injuries and paid the \$5,000 policy limit in settlement of the judgment. Lumbermen's Mutual refused to defend McCarthy in a suit brought by Bullard's father for loss occasioned by him personally by reason of the injury to his son. The court stated that the insurance company was not required to defend in the suit brought by Bullard's father.

¹⁴ *Id.* at 752.

¹⁵ *Id.* at 750.

¹⁶ *Liberty Mut. Ins. Co. v. Mead Corp.*, 131 S.E.2d 534, 535 (Ga. 1963).

¹⁷ *Id.* at 536

¹⁸ *Lumbermen's Mut. Cas. Co. v. McCarthy*, 8 A.2d 750, 752 (N.H. 1939).

¹⁹ 131 S.E.2d 534 (Ga. 1963).

arising out of an automobile accident. Liberty Mutual settled two claims against Mead out of court, thereby exhausting its policy liability. Mead then paid amounts in excess of policy limits to fully satisfy the settled claims; and when Liberty Mutual refused to defend the company in two remaining suits arising out of the same accident, Mead provided for its own defense. Reasoning that the covenant to defend and the covenant for payment of liability must be construed together, the court denied recovery of defense expenses because the insurance company had fulfilled its obligations under the policy. The insurer, thus, completes its contractual obligations when it pays the full limit of its liability in complete or partial extinguishment of the insured's liability.

The same reasoning is applied with regard to the duty to appeal. If the limits of the policy have been paid into the court in partial satisfaction of a judgment, the insurer has no further duty to defend and thus, no duty to appeal.²⁰ Once an insurance company's liability limits are exhausted, there is no further insurance afforded by the policy which would obligate a defense or appeal.

These cases treat the duty to defend as subordinate to the liability limits of the policy. However, the courts do not usually permit the insurer to relieve itself of the obligation to defend suits by simply paying the policy limits into court before pending actions have been liquidated or have reached a final judgment.²¹ To allow the insurance company to so pay the policy limits would cast the entire burden of defense upon the insured.²² If the insurance company wants this course of action to be available, it should provide for it in its contract with the insured.²³

The Court of Appeals points out in *Ursprung* that this construction of policy clauses is a harsh one.²⁴ Instead of treating the liability clause and defense obligation as indivisible, the Kentucky Court follows the other major theory which construes the term, "insurance as

²⁰ *General Cas. Co. v. Whipple*, 328 F.2d 353 (7th Cir. 1964).

²¹ *Sutton Mut. Ins. Co. v. Rolph*, 244 A.2d 186 (N.H. 1968).

²² *Contra*, *Commercial Union Ins. Co. v. Adams*, 237 F. Supp. 860 (S.D. Ind. 1964). The court allowed the insurance company to place the liability funds into the court through an interpleader and avoid the duty to defend, because the amount of recovery sought was so far in excess of the liability coverage. To avoid the bad effects of placing the burden of defense entirely upon the defendant, the court required the insurance company to place the funds into the court unconditionally and with no right to defend in order to defeat the claims and no right to the funds even if the insured were held not liable.

²³ *Lumbermen's Mutual Casualty Co. v. McCarthy*, 8 A.2d 750, 752 (N.H. 1939).

²⁴ Specifically, the Court says that the interpretation is ". . . an extremely harsh construction and in many instances will, in the course of litigation, leave the insured without adequate or any protection." 497 S.W.2d 726, 729 (Ky. 1973).

afforded," as descriptive of the type of coverage afforded by the policy.²⁵ *American Employers Insurance Co. v. Goble Aircraft Specialties, Inc.*²⁶ is a leading case which holds that the clause setting out the obligation to defend is entirely independent of the clause relating to the extent of liability. In that case, the insurance company was required to defend several suits arising out of one accident because the duty to defend related to the type of accidents within the scope of the coverage and not to the amounts of the coverage. The New York court relied upon the idea that "[t]he duty to defend is broader than the duty to pay."²⁷ It treated the two clauses as separate and distinct and reasoned that the obligation to defend was still present when the suit involved an injury of the type described in the policy, even though the liability limits had been exhausted.

In *American Casualty Co. v. Howard*,²⁸ the Fourth Circuit found that the obligation to defend exists where a suit alleges damages covered by the policy even though the complaint also seeks relief clearly outside the scope of the policy. The court stated that the duty to defend existed even though the amount sought within the policy limits was inconsiderable compared to the total recovery sought.²⁹ More importantly, the court stated that the insurance com-

²⁵ *Id.*

²⁶ 131 N.Y.S.2d 393 (Sup. Ct. 1954). This was a declaratory judgment suit in which American Employers sought to have its duty to defend extend only so far as suits that fell within the monetary limits of the policy. Goble Aircraft, on the other hand, argued that the insurance company should defend against any suit arising out of the accident which the policy covered.

²⁷ *Goldberg v. Lumber Mut. Cas. Ins. Co.*, 77 N.E.2d 131 (N.Y. 1948). The court's discussion in the *Goldberg* case involved two aspects of the duty to defend. The policy states a clear duty to defend when the allegations of the complaint may impose a risk liability upon the insured. It is of no importance whether the insurer will ultimately be liable because policy limits are exhausted or because the suit is decided under a claim for which coverage does not extend. The insurance company's duty to defend arose from the allegations of the complaint. The policy protects the insured against lawsuits which upon their face constitute a risk against which the insurance was taken.

This reasoning would also be appropriate in the cases involved. The fact that liability limits have been exhausted in no way affects the allegations in the complaint. The insurance company's duty to defend depends upon the complaint, and not on whether it is ultimately liable to pay.

²⁸ 187 F.2d 322 (4th Cir. 1951). The applicable portion of this case was an appeal from a federal district court's ruling that the insurance company was liable for expenses incurred in the defense of a second suit arising out of an accident. The company had previously defended the insured in a suit, and the judgment in that suit exhausted the policy limits. The plaintiff sought \$25,000 damages for the pain and suffering endured by Roberts before his death. The relief sought here was not within the terms of the policy. Later the plaintiff amended the complaint to include a claim for property damage which was within the \$5,000 property damage liability coverage. The inclusion of the claim for recovery of property damage activated the insurance company's duty to defend.

²⁹ In reaching this conclusion, the court followed the general rule that the insurer's duty to defend is determined by the allegations of the complaint rather

(Continued on next page)

pany could not just offer to pay for damages up to policy limits and escape the responsibility of defending the action. The policy included a defense clause upon which the insured had relied. This case broadly construes the duty to defend and strongly asserts the independence of the two clauses. To support its view, the court quoted the district court judge's opinion that "[t]he two obligations are assumed in different paragraphs of the contract and under distinctive subheads,"³⁰ thus relying on the physical placement of the duties within the contract as effective evidence that they are to be applied independently.

Courts make their evaluation of the extent of the clause outlining the duty to defend in light of the contractual nature of insurance policies. It is assumed that the bargaining process and terms of the policy result in benefits to both parties. The insurer wants to control the defense of any suit arising under the policy,³¹ and the duty to defend clause achieves this end while providing for the cooperation of the insured with regard to any suit arising under the policy. By the terms of the standard liability policy the insured agrees to allow the insurance company to select an attorney to handle the defense of suits arising under the policy. However, the insured may also obtain separate counsel to ensure that his legal rights beyond the insurance policy are protected. In exchange for relinquishing his right to completely control the defense,³² the insured receives the insurer's promise to defend suits whenever there is a threat of liability based on claims that come within the policy.³³

The general rule in interpreting contracts is to give the words and phrases their plain and ordinary meaning. If ambiguity exists, then the ambiguous language must be construed against the author,³⁴ which in the case of an insurance policy is the insurer. The policies involved

(Footnote continued from preceding page)

than the actual circumstances of the incident upon which the suit is based. 14 G. COUCH, *INSURANCE* § 51:40 (2d ed. 1965). The mere allegation of damages within the policy coverage is the triggering mechanism for the insurance company's duty to defend.

³⁰ *American Cas. Co. v. Howard*, 187 F.2d 322, 327 (4th Cir. 1951).

³¹ The control of the defense by the insurance company is of benefit to it in several ways. First, it allows the insurer to provide an adequate defense in order to minimize any judgment against the insured and thus often lessen the amount the insurance company will have to pay. Secondly, the insurance company is able to limit the claims that fall within the policy coverage so as to again minimize its costs. Comment, *The Insurer's Duty to Defend Under a Liability Insurance Policy*, 114 U. PENN. L. REV. 734 (1966).

³² Insurance policies, *supra* note 6.

³³ Comment, *The Insurer's Duty to Defend Under a Liability Insurance Policy*, *supra* note 31, at 748.

³⁴ *American Casualty Co. v. Howard*, 187 F.2d 322, 326 (4th Cir. 1951).

in the cases considered above included clauses such as this one contained in the Safeco Policy: “. . . shall defend any suit alleging such damages which are payable under the terms of this policy. . . .”³⁵ This language is clear and without restriction. “[U]nder an unlimited agreement to do so, the insurance company assumes the expense of all the components of a proper defense.”³⁶ If the insurance company wishes to limit its duty to defend to suits arising while it still owes liability under the policy limits, it must expressly state this in the policy. Otherwise, as in the clauses here, the language shows an unlimited duty to defend.³⁷

Of course, the courts often consider factors extrinsic to the contract, because it is not always possible to elicit the parties' intentions merely from the words of the contract. The insurance company does not intend to assume the defense of every suit alleging injuries covered by the policy. In fact, the Forms Committee of the National Bureau of Casualty Underwriters recognized the ambiguity of the policy language and interpreted the two clauses—the clause setting out the duty to defend and the clause relative to liability—as dependent and indivisible.³⁸ Any other interpretation, it is argued, would involve the insurance company in numerous suits in which it is not an interested party, since its liability limits will have been exhausted.³⁹ Public policy opposes such a disinterested involvement because it places control of the case in the hands of one not ultimately liable.⁴⁰

The insurer's efforts to deny the duty to defend where policy limits have been exhausted clearly evidences a lack of intent to be involved in such a sweeping obligation to defend. In 1955 insurers

³⁵ 497 S.W.2d 726, 728 (Ky. 1973).

³⁶ *American Employers Ins. Co. v. Goble Aircraft Specialties, Inc.*, 131 N.Y.S.2d 393, 401 (Sup. Ct. 1954).

³⁷ *Id.*

³⁸ The Forms Committee expressed its intention that the “right of defense [under insurance policies] . . . is a co-extensive right with the policy limits provided, and in effect, expires with payment of the full policy obligations.” Montgomery, *The Effect of Exhausting Policy Limits on the Duty of the Insurer to Defend*, 1965 *Ins. L.J.* 651, 658.

³⁹ See, *Liberty Mut. Ins. Co. v. Mead, Corp.*, 131 S.E.2d 534 (Ga. 1963); *American Employers Ins. Co. v. Goble Aircraft Specialties, Inc.*, 131 N.Y.S.2d 393 (Sup. Ct. 1954).

⁴⁰ The court in the *Lumberman's Mutual* case pointed out the public policy problems inherent in imposing a duty to defend when policy limits have been exhausted. Public policy is violated by

. . . placing the duty of defense upon the shoulders of one not obligated to pay, and in removing control over settlement and litigation from the hands of the insured who, in the event of a verdict and final judgment against him, would have to pay damages.

8 A.2d 750, 752 (N.H. 1939).

attempted to limit this duty by changing the wording of standard policy clauses.⁴¹ This language change was intended to bring duty to defend clauses under the cloak of the introductory paragraph of the standard policy, which includes a reference to the coverage of the policy as being subject to the limits of liability.⁴²

So far, few courts have viewed the changes in language as effecting such a result.⁴³ Because the language is unclear to most courts, attorneys, and laymen, the courts still look to the terms of the policy and note the absence of any express qualification on the obligation to defend. With this in mind, courts consider the insured's perspective of the insurance policy defense clause and expectations of the protection afforded.

Most insureds are probably unaware of the full provision of their policies. However, if the insurance policy is to survive as an enforceable contract, courts must assume that the parties bargained over the provisions and that the insured sought the defense clause. To focus upon the insured's intent, ". . . [t]he test to be imposed is one of reason—that is, whether the defense sought is for a coverage which the insured desired to purchase and for which he paid premiums."⁴⁴

Justice Branch's brief dissent in the *Lumbermen's Mutual* case concisely reflects the implications of construing the clauses as indivisible.⁴⁵ Such an interpretation renders the exchange made by the parties a nullity. The insured would be giving up his right to control the

⁴¹ The revision in 1955 changed the policy phrase from the pre-1955 language of "[a]s respects the insurance afforded by the other terms of this policy" to the post-1955 wording of "[w]ith respect to such insurance as is afforded by this policy." Montgomery, *supra* note 38, at 657.

⁴² John Faude, associate counsel for Aetna Casualty and Surety Company, commented in a paper before the Section of Insurance Law of the American Bar Association that the

. . . 1955 revision contains editorial amendments in the defense insuring agreement which, while seemingly minor in nature, are designed to make the defense provision more clearly subordinate to the main introductory paragraph of the policy, which states the company's entire contractual undertaking as "subject to the limits of liability, exclusions, conditions and other terms of the policy."

Faude, *The New Standard Automobile Policy: Coverage (Insuring Agreements and Exclusions)*, 1955 *Ins. L.J.* 647, 650 (original emphasis).

⁴³ The New Hampshire Supreme Court is one which has viewed the 1955 language change as effecting a limiting result upon the defense clause. This is keeping with its traditional construction of the clauses as closely linked. The court in *Travelers Indem. Co. v. New England Box Co.* stated that the policy ". . . expressly stipulates that this right and duty is 'with respect to such insurance as is afforded by this policy' which is the language of the Standard Automobile Liability Policy as revised in 1955." 157 A.2d 765, 769 (N.H. 1959).

⁴⁴ 7A J. APPLEMAN, *INSURANCE LAW AND PRACTICE* § 4684 (1962).

⁴⁵ Justice Branch stated that an interpretation of the clauses as indivisible ". . . construes the promise . . . to defend not as an undertaking for the benefit of the assured, but as a stipulation for the benefit of the insurer." 8 A.2d 750, 753 (N.H. 1939) (Branch, J., dissenting).

defense, but the benefit of receiving a defense would take effect only at the insurer's whim, when it would prove beneficial to him. The principles of contract would not permit such a result.⁴⁶ Instead, such a clause must be treated as a bargained-for provision that benefits both parties. The contractual obligation to defend requires the insurance carrier to conduct the whole defense, and "if necessary to vindicate the rights of the insured, to prosecute an appeal."⁴⁷ This duty is only tentative, as the covenant would require an appeal only where there are reasonable grounds.⁴⁸ The reasonableness is determined by the particular circumstances of the case; a more exacting rule regarding the prosecution of an appeal would be impractical.⁴⁹

This view, that the duty to appeal is effective only when reasonable grounds for appeal exist, is the most widely adopted rule. *Hawkeye-Security Insurance Co. v. Indemnity Insurance Co.*⁵⁰ holds that a contract to defend does not necessarily create an obligation to appeal. In the proper circumstances,⁵¹ however, a covenant to defend would effectuate a duty to appeal. Finding that *Hawkeye-Security* had not breached its contract by failing to appeal, the court held that the company would be liable for failure to defend only if it acted fraudulently or in bad faith. The decision whether an appeal is

⁴⁶ I. A. CORBIN, *CONTRACTS* §§ 121, 122 (1963).

⁴⁷ *Mannheimer Bros. v. Kansas Cas. & Sur. Co.*, 184 N.W. 189, 190 (Minn. 1921).

⁴⁸ *Kaste v. Hartford Accident & Indem. Co.*, 170 N.Y.S.2d 614 (App. Div. 1958).

⁴⁹ Justice Frank in a concurring opinion in the *Kaste* case took a stricter view of this issue. He agreed with the outcome of the case, which held the insurer to a duty to appeal because there were reasonable grounds for appeal. However, he would go a step further and make the duty to appeal absolute. He saw nothing in the insurance contract which conditioned the obligation of the carrier upon the reasonableness of an appeal or limited the insurer's obligation to supplying a defense up to and including the trial. The contract terms were specific and absolute on their face. They must be so construed against the insurer who could have included limiting language, if he did not desire to assume this obligation. *Id.* at 617 (Frank, J. concurring).

⁵⁰ 260 F.2d 361 (10th Cir. 1958). This case involved a suit by Indemnity Insurance Co. against Hawkeye-Security. Indemnity sought to recover expenses paid in the prosecution of an appeal of a judgment against Northern Utilities. Northern Utilities had a liability policy with Hawkeye-Security and an excess liability policy with Indemnity. Both policies included covenants to defend. Hawkeye-Security defended in the lower court and refused to make a settlement within policy limits, upon its attorney's advice that *res ipsa loquitur* would not apply. Following the judgment, Hawkeye-Security decided to pay its policy limits and refused to appeal unless the costs of the appeal were pro-rated against each insurance company. Indemnity took the appeal and instituted a suit for recovery of expenses.

⁵¹ Proper circumstances would be the existence of reasonable grounds for appeal. To determine this, the insurance company must consider the rights of all the parties involved. *Fidelity Gen. Ins. Co. v. Aetna Ins. Co.*, 278 N.Y.S.2d 787 (App. Div. 1967); *Kaste v. Hartford Accident & Indem. Co.*, 170 N.Y.S.2d 614 (App. Div. 1958); see 44 AM. JUR. 2d *Insurance* § 1552 (1969).

reasonable must be made by the insurer, and the failure to take the advice of an attorney is not sufficient grounds to establish bad faith.

*Ursprung v. Safeco Insurance Co.*⁵² treats the duty to prosecute an appeal in a similar manner. The Court holds that the contractual obligation to defend carries an obligation to take an appeal from a judgment against an insured where reasonable grounds for appeal exist. This sets forth a relatively absolute standard, but the holding in this particular case seems incongruous, since the Court does not really elucidate the means by which it evaluated Safeco's performance of the contractual obligation to defend. Apparently the Court applied a dual approach to the question. Initially, it must be determined whether there were reasonable grounds for appeal.⁵³ If such reasonable grounds existed, then the obligation to defend embraced a duty to prosecute an appeal. Secondly, although not specified in the decision, the Court apparently would apply the traditional bad faith or fraud test to determine if the duty to defend has been breached.

The *Ursprung* decision is thus unclear on its face. The last sentence of the opinion⁵⁴ seems to establish a reasonableness test for the insurer's duty to appeal. However, as previously indicated, the actual test combines reasonableness of appeal and bad faith or fraud in failing to prosecute a reasonable appeal as a part of the duty to defend.

The facts of *Ursprung* obscure the holding. The Court says that reasonable grounds for appeal were lacking in the case, a valid conclusion in light of all the circumstances. *Ursprung's* driving without lights would be contributory negligence and, as a matter of Kentucky law, would bar recovery in his suit.⁵⁵ However, the jury verdict in favor of *Ursprung* indicates that this was not the law applied in the case. Since the motion for judgment notwithstanding the verdict was overruled, an appeal on this point would normally be the appropriate step. The insurance company attorney's comments in his letter to Clark and her attorney suggest that he believed an appeal to be appropriate. The crucial factor in deciding whether to appeal, how-

⁵² 497 S.W.2d 726 (Ky. 1973).

⁵³ This is a difficult determination to make; the reasonableness of an appeal is a matter of judgment of the party making the decision. The insurance company's decision whether there are reasonable grounds for appeal must be made by considering the rights of all parties (the insurance company, the insured and anyone else involved) and must be made in good faith. *Fidelity Gen. Ins. Co. v. Aetna Ins. Co.*, 278 N.Y.S.2d 787 (App. Div. 1967); *Kaste v. Hartford Accident & Indem. Co.*, 170 N.Y.S.2d 614 (App. Div. 1958); see 44 AM. JUR.2d *Insurance* § 1552 (1969).

⁵⁴ "Therefore, the issuer can not be said to have unreasonably failed to take an appeal." 497 S.W. 726, 731 (Ky. 1973).

⁵⁵ See *Williams v. Chilton*, 427 S.W.2d 586 (Ky. 1968); *Skees v. Whitaker*, 398 S.W.2d 715 (Ky. 1965).

ever, was Clark's attorney's statement to the insurance company that her rights had been protected.⁵⁶ From this, the insurance company concluded that since other steps had already been taken to insure the protection of Clark's rights, an appeal would not be necessary. The only benefit derived from such an appeal would be a potentially lessened judgment which would not necessarily reduce the amount for which Safeco was responsible. Under these circumstances, Safeco decided not to appeal, judging that such action would not be reasonable in the case. The Court agreed; and because reasonable grounds for appeal were absent, the bad faith or fraud test was not considered.

An initial reading of the *Ursprung* case gives the impression that it is a sound and progressive decision with respect to an insurer's duty to appeal a decision against an insured. The Court appears to adopt a reasonableness standard to measure the performance of the duty to defend. In actuality, the Court adopts a combined standard; and only through close scrutiny is it possible to decipher the method the Court followed to arrive at its holding in the case.

Ursprung generally samples the approaches taken by other jurisdictions. The Court pronounces its adoption of the independent interpretation of the duty to defend clause without giving a precise basis of its rationale for the choice. Apparently the Court feels this view provides equitable protection for both parties.

The lack of the Court's own reasoning for adopting the rule that an insurer's duty to defend is independent of its duty to pay liability limits does not diminish the importance of this decision. The holding sets forth the law in Kentucky and places the state among the more progressive jurisdictions. The decision protects the interests and rights of the insured while providing a means for the insurer to avoid the burden of a broad duty to defend. The insurance company needs only to include precise language in the policy to spell out clearly and unambiguously the extent of the duty to defend. The insured, in order to invoke the duty to appeal, must act reasonably with respect to the case. The decision in *Ursprung* should provide a sound basis for application and growth of Kentucky law.

Damon W. Harrison, Jr.

⁵⁶ 497 S.W.2d 726, 727 (Ky. 1973).