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Motor Vehicle Liability Self-Insurance: The Coverage Gap

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MOTOR VEHICLE LIABILITY SELF-INSURANCE: THE COVERAGE GAP

Self-insurance and commercial insurance are two different methods of treating risks. Commercial insurance involves the transfer of risk from one firm to another while self-insurance involves the retention of risk by a certified self-insured firm. Although the *methods* of risk treatment are distinct, self-insurance and commercial insurance *practices* are similar. Both the commercial insurer and self-insurer evaluate risks in analogous fashions. They also investigate, adjust, and pay claims in similar ways.

Despite the similarities in their practices, motor vehicle liability commercial insurers and self-insurers are not required to "insure" identical risks.[1] California financial responsibility laws[2] allow a firm to use self-insurance instead of commercial insurance[3] but do not require the self-insurer to assume coverages identical to those covered by a firm's commercial insurer. For example, the commercial insurer is required by statute to provide uninsured motorist coverage while the self-insurer is not.[4] As a result of the disparity in coverages provided by self-insurers and commercial insurers, persons injured on California highways can be left without financial protection, or the coverage normally afforded by the commercially insured firm can be shifted to other insurance carriers and their insureds, if one of the parties involved in a motor vehicle accident is self-insured.

California courts acknowledge that public policy may favor self-insurers "insuring" risks identical to those insured by commercial insurers.[5] The courts hold, however, that because the California Vehicle Code and Insurance Code sections requiring certain coverages apply only to motor vehicle liability *policies* of insurance, the code sections do

1. Metro U.S. Servs., Inc. v. City of Los Angeles, 96 Cal. App. 3d 678, 683, 158 Cal. Rptr. 207, 210 (1979); O'Sullivan v. Salvation Army, 85 Cal. App. 3d 58, 63, 147 Cal. Rptr. 729, 732 (1978); Glens Falls Ins. Co. v. Consolidated Freightways, 242 Cal. App. 2d 774, 785, 51 Cal. Rptr. 789, 796-97 (1966).

2. CAL. VEH. CODE §§ 16000-16560 (West 1971 & Supp. 1979), *as amended by* Act of Sept. 10, 1979, ch. 549, §§ 1-10, 1979 Cal. Legis. Serv. 1907 (West). *See* notes 54-67 *infra* and accompanying text.

3. *See* note 60 *infra* and accompanying text.

4. O'Sullivan v. Salvation Army, 85 Cal. App. 3d 58, 62, 147 Cal. Rptr. 792, 731 (1978) (discussed at notes 85-95 *infra* and accompanying text).

5. *Id.*

not apply to self-insured firms.[6] The California judiciary has concluded that it is powerless to institute the necessary changes and has opted to leave the task of rewriting the Vehicle and Insurance Codes to the legislature.[7]

The legislature, thus far, has shown little interest in regulating self-insurers.[8] By not specifically including the practice of self-insurance in statutory regulations governing motor vehicle commercial insurers, the legislature has frustrated the principal purposes of the financial responsibility and uninsured motorists laws.[9] Amending the vehicle code so that the self-insurer's certificate of self-insurance is defined as a valid and collectible policy of insurance would bring the coverage provided by self-insurance into accord with the coverage required of commercial insurers.

I. SELF-INSURERS AND COMMERCIAL INSURERS TREAT RISKS IN SIMILAR FASHIONS

All business firms are subjected to risks. "Risk" is defined as the possibility of an occurrence that will deviate from expectations.[10] Occurrences of undesireable contingencies give rise to losses that could jeopardize the financial stability of a firm if they were to occur with great frequency or extreme severity. Thus, to ensure its financial stability, the firm must prepare for the contingency that losses will occur.[11]

Firms may choose from several methods of treating risk.[12] The *transfer* method is most commonly utilized. A firm transfers or shifts

6. Metro U.S. Servs., Inc. v. City of Los Angeles, 96 Cal. App. 3d 678, 682-83, 158 Cal. Rptr. 207, 209-10 (1979); O'Sullivan v. Salvation Army, 85 Cal. App. 3d 58, 65, 147 Cal. Rptr. 729, 733 (1978); Glens Falls Ins. Co. v. Consolidated Freightways, 242 Cal. App. 2d 774, 785-86, 51 Cal. Rptr. 789, 796-97 (1966).

7. "If the statutory design leaves the self-insured motorist . . . outside the purview of a statute . . . it is not our function to provide our concept of whether the Legislature would have done it or not." Metro U.S. Servs., Inc. v. City of Los Angeles, 96 Cal. App. 3d 678, 683, 158 Cal. Rptr. 207, 210 (1979).

8. *Id.*

9. For a discussion of the purposes of the financial responsibility laws, see text accompanying notes 55-56 *infra*.

10. J. ATHEARN, RISK AND INSURANCE 3 (1977) [hereinafter cited as ATHEARN]. Risk has also been defined technically as "the variation in the outcome that could occur over a specified period in a given situation." C. WILLIAMS & R. HEINS, RISK MANAGEMENT AND INSURANCE 3 (1976) [hereinafter cited as WILLIAMS & HEINS].

11. Every firm is subject to the risk that its capital may be depleted or exhausted by the occurrence of a chance event that is beyond its control. Criddle, *Evaluation of Risks*, in RISK MANAGEMENT 19, 19-20 (W. Snider ed. 1964).

12. *See* R. GOSHAY, CORPORATE SELF-INSURANCE AND RISK RETENTION PLANS 11-13 (1964) [hereinafter cited as GOSHAY].

the economic consequences of risk to a third party: the commercial insurer.[13] Alternatively, a firm may retain its risks: rather than transferring risks to the commercial insurer, the firm either intentionally or unintentionally retains financial responsibility for its own losses.[14] There are many types of risk retention:[15] "no-insurance," which occurs when a firm neglects to procure insurance for a given risk,[16] "self-insurance," whereby a firm consciously elects to forego purchasing insurance for certain risks,[17] and "captive insurance," in which a large corporation with significant insurance needs either purchases or forms its own insurance company.[18]

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13. E. LALLEY, SELF-ASSUMPTION, SELF-INSURANCE AND THE CAPTIVE INSURANCE CONCEPT 4 (1975) [hereinafter cited as LALLEY].

14. ATHEARN, *supra* note 10, at 18. "Retention is simply a result when risk is not transferred or prevented. Whether the retention occurred consciously or unconsciously is irrelevant; the result is still retention." GOSHAY, *supra* note 12, at 13.

15. Authors utilize a variety of labels for these categories. *Compare* There Is No Insurance in Self-Insurance 2 (an unpublished pamphlet circulated by the Union Labor Life Insurance Company) [hereinafter cited as There is no Insurance in Self-Insurance] *with* LALLEY, *supra* note 13, at 4.

16. The most familiar example of "no-insurance" is the uninsured motorist. This individual does not *intend* to retain his risk but merely fails to purchase insurance. No-insurance is not a form of self-insurance. *See* GOSHAY, *supra* note 12, at 20.

17. Self-insurance differs from no-insurance in that "it is not merely an unwitting assumption of the risk. Self-insurance carries with it the expectation losses *will occur* from risks and will be absorbed up to a pre-determined limit." *Id.* (emphasis in original). *See* LALLEY, *supra* note 13, at 4-5; Head, *Risk Financing—Retention*, in SELF-INSURANCE 13 (1975) [hereinafter cited as Head]; Parrett, *Risk Retention*, in RISK MANAGEMENT 49 (W. Snider ed. 1964) [hereinafter cited as Parrett].

18. The use of captive insurance companies is a growing risk management trend. The captive insurance concept is generally regarded as a logical extension and formalization of the self-insurance program. LALLEY, *supra* note 13, at 9. The captive insurance company is advantageous because it overcomes the technical restrictions placed upon self-insurance in some states by gaining access to reinsurance markets, and thereby acquires a potential tax advantage that a self-insurer cannot obtain. A. PEARCE & F. NUTT, PRACTICAL SELF-INSURANCE 8-10 (1978) [hereinafter cited as PEARCE & NUTT]. Possible tax breaks for captive insurers have come under Internal Revenue Service scrutiny. Premiums paid to a commercial insurer are currently deductible as ordinary and necessary business expenses. *See* LALLEY, *supra* note 13, at 11. Prior to 1978, "premiums" paid to captive insurers were also thought to be deductible. Carnation Co. v. Commissioner, 71 T.C. 400 (1978) partially laid this supposition to rest. In that case, Carnation purchased a blanket insurance policy from an unrelated domestic insurance company. On the day this policy became effective, the domestic insurance company contracted with Carnation's captive insurance company, Three Flowers, to reinsure 90% of the insurer's liability under Carnation's policy. Notwithstanding the reinsurance contract, the local insurer remained liable under its policy with Carnation. The court held that those premiums eventually reinsured by Three Flowers could not be deducted by Carnation. It stated that "[t]he agreement by Three Flowers to 'reinsure' Carnation's risks and the agreement by Carnation to capitalize Three Flowers . . . counteracted each other. Taken together, these two agreements are void of insurance risk . . . . '[I]n this combination the one neutralizes the risk customarily inherent in the other.' " *Id.* at 409 (quoting Helvering v. Le Gierse, 312 U.S. 531, 541 (1941)). For a general discussion of

Self-insurance and commercial insurance are distinct *methods* of risk treatment: a firm either primarily insures its risks with commercial insurers or self-insures its risks itself.[19] The *practices* of the two risk-treatment methods, however, are similar. The commercial insurer is profit-oriented and the self-insurer is savings-oriented. Both "insure" similar risks. Both handle claims adjusting procedures in similar manners. In short, the self-insurer acts as its own insurer.

Commercial insurers accept transferred risks and self-insurers retain their own risks based upon profit or savings motives. Firms transfer the risk of specific losses to commercial insurers.[20] The insurer is paid a premium in consideration for assuming financial responsibility for these risks.[21] Because similar risks are transferred by many firms to an insurer, it can predict the approximate number of losses it will be required to compensate. The insurer then adjusts its premium rates to ensure sufficient revenues to compensate its insureds for losses, pay overhead expenses, and make a profit.[22]

Self-insurance is the planned retention[23] of risk by a firm, limited

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captive insurers, see LALLEY, *supra* note 13, at 9-20; Goshay, *Captive Insurance Companies*, in RISK MANAGEMENT 80-121 (W. Snider ed. 1964); Freeman, *Revenue Ruling 77-316's Implication for Captives*, 1977 INS. L.J. 678-85.

19. For the purposes of this comment, a firm either commercially insures or self-insures its motor vehicle risks. Self-insurance (retention) and commercial insurance (transfer) are usually combined. *See* notes 44-53 *infra* and accompanying text.

20. The California Insurance Code requires the term "insurance" to refer exclusively to risk transfer. It defines "insurance" as "a contract whereby one undertakes to indemnify another against loss, damage or liability arising from a contingent or unknown event." CAL. INS. CODE § 22 (West 1972). *See* CAL. CIV. CODE § 2527 (West 1974) (similar definition). *See generally* California Physicians Serv. v. Garrison, 28 Cal. 2d 790, 172 P.2d 4 (1946). *See also* Helvering v. Le Gierse, 312 U.S. 531 (1941); Allied Fidelity Corp. v. Commissioner, 572 F.2d 1190 (7th Cir. 1978), *cert. denied*, 439 U.S. 358 (1979); Estate of Barr, 104 Cal. App. 2d 506, 231 P.2d 876 (1951).

21. *See* CAL. INS. CODE § 480 (West 1972).

22. Because risk is the variation between expected and actual losses, the entity determines risk by evaluating average loss statistics.

> For example, in the life insurance field the statement that "the mortality risk for 100,000 individuals at age thirty-five is .00459" means that the expected deaths for this group at this age number is 459. Risk thus is an average or mean "probability of loss" statistic (4.59/1,000) to this group of insureds. To the insurer, however, the "risk" is not the 4.59/1,000 death rate but the variation between the expected death rate and the actual death rate.

GOSHAY, *supra* note 12, at 10-11.

To the extent that the insurer predicts with some accuracy the losses to which it will be subjected, *i.e.*, the variation between expected losses and actual losses is minimal, it adjusts its rates accordingly. "The fee (premium) charged for assuming a risk is based on such predictions and the predictions, in turn, are based on probability estimates." ATHEARN, *supra* note 10, at 28.

23. The conscious choice aspect of self-insurance cannot be overemphasized. As stated by Professor Goshay, "self-insurance is the conscious retention of risk, the level of which has

by the firm's financial capabilities.[24] Firms financially able to self-insure select a less expensive risk treatment method.[25] A self-insured firm internally generates funds to cover losses as they occur without recourse to a commercial insurer.[26] The firm thus avoids the premiums charged to cover the insurer's administrative costs, taxes, and acquisition expenses,[27] improves its cash flow,[28] and achieves broader coverage of its risks.[29] Thus, while a commercial insurer accepts risks based

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been limited within the financial capacity of the firm, emanating from a distribution of exposures which permit reasonable predictions as to future loss probabilities." GOSHAY, *supra* note 12, at 21 (emphasis omitted).

24. The determinative criterion for assessing financial feasibility is "whether or not the losses anticipated as being retained are within the financial capacity of the firm given its various capital requirements." *Id.* at 22.

Financial ability to assume risk does not, however, mandate retention. The nature of the risk involved also plays a part in the retain/transfer decision. For example, a firm may be able to retain the risk of a $1,000,000 fire loss to its property or transfer that risk to an insurance company for a $500 annual premium. For the same premium, assume the firm could retain the risk of a $1,000,000 meteor collision loss to property. The fire risk should be commercially insured while the meteor risk should be retained. "The odds of a meteorite hitting a particular property are so long it makes assuming the risk the obvious answer. Fires, however, do happen and can happen. The $500 premium . . . is little compared to the $1 million risk." R. Gentry, *Assessing a Company's Ability To Self-Assume Risk*, in SELF-INSURANCE 11 (1975) [hereinafter cited as Gentry].

25. *See* note 31 *infra*.

26. These funds can be made available in several ways. They may be charged to a current expense account with no reserve accumulation, funded through a reserve account, insured through a captive insurance company, or paid with a stand-by loan procured from a bank or lending institution. Head, *supra* note 17, at 13-15. *See* LALLEY, *supra* note 13, at 6-9.

Self-assumption and self-insurance are technically distinguishable. The latter utilizes a reserve fund while the former does not. Both methods, as well as borrowing, are, however, risk retention methods. LALLEY, *supra* note 13, at 4-5.

27. Commercial insurers maintaining "staffs of underwriters, accountants, claims adjusters, loss prevention specialists and various attendant administrative personnel, rarely return more than 65% of the premium dollar for actual claims payment." PEARCE & NUTT, *supra* note 18, at 1. *See* Barron's, Feb. 6, 1978, at 20, col. 3.

28. Under most insurance programs, commercial insurers require fixed "annual payments of premiums, even though the money for payment of losses incurred during the policy period may not actually be dispersed for months or even years after the policy has expired." PEARCE & NUTT, *supra* note 18, at 2. On the average, only 32% of each claim dollar is paid during the first year. The next year, an additional 23% is generally paid to claimants. *See* Kipp, *Evaluating the Feasibility of Self-Insuring Worker's Compensation*, in SELF-INSURANCE 19-20 (1975). The insurer either invests or retains the unpaid balance and earns interest thereon at its insured's expense. PEARCE & NUTT, *supra* note 18, at 2. By self-insuring, the firm's cash flow is improved, for it does not pay claims until they become due. Thus, in the first policy year, the firm retains control of 68% of each claim dollar.

29. The commercial insurer may be reluctant to insure risks that have subjected it to severe losses in the past. "Since self-insurance permits absolute flexibility with respect to breadth of coverage, it enables the business enterprise to achieve . . . far more comprehensive and uniform coverage than that obtainable from commercial insurers." PEARCE &

upon the profit motive,[30] a self-insurer retains risks based upon a similar profit motive: the minimization of risk treatment costs.[31]

Self-insurers and commercial insurers treat risks in analogous fashions. Both the commercial insurer and self-insurer must be able to predict the approximate number of losses to which each will be subjected in order to either set premium rates or cover losses as they occur.[32] Effective prediction requires large numbers: the larger the number of similar exposure units insured, the more closely the actual result approximates the expected result.[33] These exposure units must also be well distributed so that a single catastrophe cannot cause severe losses to many units at the same time.[34] After statistically evaluating its risks, a firm self-insures only those risks which it is financially capable of self-insuring. Those risks not retained are transferred to a commercial insurer,[35] just as commercial insurers reinsure risks exceeding the level they wish to absorb.[36]

NUTT, *supra* note 18, at 5. *But see* There Is No Insurance in Self-Insurance, *supra* note 15, at 5 (the economic climate prompting insurers to pull out of certain insurance markets could jeopardize the self-insurer's stability).

30. *See* GOSHAY, *supra* note 12, at 27-28. *See generally* R. MEHR & E. CAMMACK, PRINCIPLES OF INSURANCE 41-42 (5th ed. 1972) [hereinafter cited as MEHR & CAMMACK].

31. The "opportunity to achieve economic savings is the most important factor influencing the use of self-insurance today." PEARCE & NUTT, *supra* note 18, at 1. *See* GOSHAY, *supra* note 12, at 51-59. "Since it is difficult to imagine the risk department of any given enterprise producing a profit, *savings* over alternative forms of risk treatment would appear more suitable a measure than profits." *Id.* at 27 (emphasis in original).

32. *See* note 22 *supra*.

33. Probability estimates are partly based upon the statistical stability found in the law of large numbers. GOSHAY, *supra* note 12, at 15. This concept holds that the larger the number of attempts, the nearer the actual experience will approximate the expected or true probability. A common illustration of this law is coin flipping. The odds are 50-50 that on a given toss, the coin will land facing heads up. If the coin is flipped only three times, it could land facing heads up three times; this experience does not closely approximate expected or true probability. If the coin is flipped five hundred times, it is more likely that it will land heads up or heads down in equal numbers; thus, actual experience more closely approximates the expected or true probability. ATHEARN, *supra* note 10, at 28-29.

34. GOSHAY, *supra* note 12, at 15. For example, the risk that an accident will involve two company-owned automobiles on the open highway is less than the risk that an accident involving the same cars will occur in the company's parking lot where both cars park. *See* Gallagher, *Position of the Risk Manager in a Business Organization Structure*, in RISK MANAGEMENT 3-4 (W. Snider ed. 1964).

35. "Very few organizations are large enough to internally retain all the potentially catastrophic losses which they wish to survive. Therefore, for extremely severe losses, most organizations couple some form of risk transfer with their risk retention plans in order to finance losses that exceed their retention capacity." Head, *supra* note 17, at 15.

The presence of catastrophic insurance in a risk retention plan does not transform the self-insurer into a commercially insured; the entity still retains the majority of risks that occur below the catastrophic limit. GOSHAY, *supra* note 12, at 26.

36. "Reinsurance is the insurance of insurance. When a company has received from an

Commercial insurers and self-insurers perform similar claims services. For example, once a loss occurs and a claim is made, the commercial insurer's adjusting staff investigates, pays, and, if necessary, litigates the claim.[37] The self-insurer must either perform or procure a claims servicing company to provide these adjusting services.[38] Commercial insurers also furnish loss prevention and premises inspection services to aid insured firms in decreasing the frequency and severity of potential losses.[39] Self-insured firms must either design their own loss prevention programs, utilizing the expertise of either in-house or professional prevention specialists,[40] or go without loss control services entirely.

It is not practical, however, to self-insure all risks. For example, a small firm with three company cars should not self-insure its automobile collision risks.[41] If the firm is insured commercially, the annual cost of collision risk is fixed by a yearly premium charge. Costs incurred by a self-insured firm vary from year to year and could be as high as the replacement value of all three vehicles. Because a commercial insurer accepts many collision risks, it can reasonably predict the losses to which the class of vehicles will be subjected. Unlike a commercial insurer, a self-insured firm does not assume a similar volume of risks and thus cannot predict the losses to which its vehicles will be subjected. Furthermore, a commercial insurer's risks are well distributed so that a loss to one vehicle will not affect another. This independence of exposure units may not be available to a self-insurer. For

agent a volume of insurance . . . in excess of the amount it wishes to retain, it can reinsure the contract." MEHR & CAMMACK, *supra* note 30, at 633. For a discussion of reinsurance practices and principles, see *id.* at 633-37.

37. For a discussion of the mechanics of loss-adjustment, see *id.* at 720-25.

38. "By electing to 'self-insure' . . . a company is choosing to assume not only the risk, but the costs of administering that risk as well. Some companies want their own employees to be involved in these functions, while others prefer that the entire task be handled by a services company." Aetna Technical Services, Inc., Claims Services 3 (an unpublished pamphlet summarizing claims services of Aetnatec, a subsidiary of Aetna Life & Casualty Co.).

39. The insurer may encourage its insured to take preventive steps to reduce a particular risk or eliminate it entirely. For example, a firm may attempt to prevent the occurrence (frequency) of fires in its plant and, at the same time, take steps to provide effective alarm systems so that, should a fire occur, its severity will be minimized. *See* ATHEARN, *supra* note 10, at 17.

40. "[S]elf-insurers have the flexibility to design their own loss prevention programs and selectively procure external specialized services where assistance is warranted." PEARCE & NUTT, *supra* note 18, at 3.

41. This example is based upon one provided by ATHEARN, *supra* note 10, at 36-37. In most states, a firm may not self-insure motor vehicle fleets with less than 25 vehicles. *See, e.g.*, CAL. VEH. CODE § 16053 (West Supp. 1979).

example, a self-insured firm's vehicles may be parked in a central garage in which a catastrophe could affect all its vehicles.

A large firm with many vehicles located statewide, however, can opt for self-insurance. The greater number of vehicles "covered" allows the firm to predict more accurately the risks to which all of the vehicles as a class are exposed. The spread of vehicles throughout the state provides that element of independent exposure such that a catastrophe could not affect many of the firm's vehicles simultaneously. Thus, a large firm can self-insure its motor vehicle collision risks because the risk retained has the same characteristics as one suitable for commercial insurance.[42] The self-insured firm acts as its own insurer.[43]

In summary, self-insurance and commercial insurance practices are similar. Commercial insurance utilizes risk transfer; self-insurance utilizes risk retention. Thus, the practices are technically distinguishable. Nonetheless, both forms treat risks in analogous fashions. Both the commercial insurer and the self-insurer are profit or savings motivited. Both evaluate, select, and treat only those risks that are economically feasible. A self-insurer transfers catastrophic risks to a commercial insurer while a commercial insurer reinsures its catastrophic risks. Both perform claims adjustment services. The practices, although different, differ more in degree than kind.

II. DISTINGUISHING HIGH-DEDUCTIBLE INSURANCE FROM SELF-INSURANCE

Self-insurance should be distinguished from high-deductible insurance. Corporate insurance policies containing sizeable deductibles, often exceeding $10,000, can be confused with self-insured retentions because each enables the firm to retain high levels of risk while transferring excesses to commercial insurers.[44] Although both practices are thus forms of risk retention, they are materially different.

The critical difference between high deductible insurance and self-

42. ATHEARN, *supra* note 10, at 37. *See* GOSHAY, *supra* note 12, at 18.

43. "Self-insurance is not insurance, because there is no transfer of the risk to an outsider. Self-insurers and insurers, however, share the ability, though in different degrees, to predict their future loss experiences." WILLIAMS & HEINS, *supra* note 10, at 190. *See* ATHEARN, *supra* note 10, at 37; GOSHAY, *supra* note 12, at 18-19.

44. "The term 'self-insurance' in corporate insurance circles is generally regarded to mean the planned retention of a particular risk or peril . . . ." Parrett, *supra* note 17, at 49. Since high-deductible insurance and self-insured retentions constitute planned retention of risks, both are technically considered self-insurance. *See* GOSHAY, *supra* note 12, at 7. *See generally* Gentry, *supra* note 24, at 9-12.

insured retentions[45] lies in the commercial insurer's responsibilities vis-à-vis its insured.[46] High deductible insurance requires the commercial insurer to assume control of claims adjustment services for the entire loss. When claims are settled the insurer either pays the loss and seeks reimbursement for the deductible from its insured[47] or pays the amount in excess of the deductible.[48] The firm carrying a self-insured retention, however, assumes responsibility for all claims adjustment within the limits of its retention. Under present practice, the excess[49] insurer has neither control over nor interest in the claim until the loss exceeds the limit of the self-insured retention.[50] Thus, high deductible insurance is essentially commercial insurance with an underlying deductible, while the self-insured retention is self-insurance coupled with excess insurance.[51]

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45. That is, self-insurance coupled with excess insurance. For a description of a self-insured retention, see Rankin v. West Am. Ins. Co., 84 Cal. App. 3d 829, 834, 149 Cal. Rptr. 57, 59 (1978).

46. Other commentators perceive this distinction. "[U]nder deductible insurance the insurer usually provides safety engineering and claims adjustment services for the entire loss, while under excess insurance the insured must arrange for outside services or provide them on . . . [its] own. Consequently excess insurance is . . . useful only to large businesses." WILLIAMS & HEINS, *supra* note 10, at 212-13. Business Insurance, Sept. 17, 1979, at 71, col. 1.

47. *E.g.*, United States Steel Corp. v. Transport Indem. Co., 241 Cal. App. 2d 461, 475, 50 Cal. Rptr. 576, 585 (1966).

48. *See, e.g.*, Beaumont-Gribin-Von Dyl Mgmt. Co. v. California Union Ins. Co., 63 Cal. App. 3d 617, 625, 134 Cal. Rptr. 25, 28-29 (1976); Daspit v. Midstates Marine Ins. Co., 209 So. 2d 66 (La. Ct. App. 1968).

49. Excess insurance is often referred to as "umbrella insurance." *See* WILLIAMS & HEINS, *supra* note 10, at 317.

50. A commercial insurer may be held liable to its insured for judgments in excess of policy limits when the insurer unreasonably refuses to accept a settlement offer within policy limits. Crisci v. Security Ins. Co., 66 Cal. 2d 425, 430, 426 P.2d 173, 176-77, 58 Cal. Rptr. 13, 16-17 (1967). The self-insurer, however, does not owe a reciprocal duty to its excess insurer to settle within the limits of its retention. Commercial Union Assurance Cos. v. Safeway Stores, Inc., 26 Cal. 3d 912, — P.2d —, — Cal. Rptr. — (1980). The self-insured firm purchases excess insurance to protect itself from liability exceeding its self-insured retention. In making settlement decisions, the self-insurer gambles as much with its own money as with that of the carrier. Thus, the excess carrier has no legitimate expectation that the self-insurer will give at least as much consideration to the financial well-being of the insurance company as it does to its own interests. *Id.* at 919, — P.2d at —, — Cal. Rptr. at —. *See generally* Business Insurance, Sept. 17, 1979, at 71.

51. Nevertheless, the California Court of Appeal in United States Steel Corp. v. Transport Indem. Co., 241 Cal. App. 2d 461, 475, 50 Cal. Rptr. 576, 585 (1966), analogized high-deductible insurance to self-insurance. An employee of Bigge Drayage Company was injured when the truck he was driving ran off the road. The truck had been loaded at the plant of a U.S. Steel subsidiary. The injured driver sued U.S. Steel, alleging that its employees negligently loaded the truck and that the consequent shifting of the load was the cause of his injury. U.S. Steel was the named insured under an Insurance Company of North America (INA) policy with a $1,100,000 limit. Bigge was the named insured under a

Small deductibles are not considered self-insurance because a firm merely contracts for small deductibles to avoid the high premiums charged when an insurer compensates *every* loss.[52] In addition, the amount retained is small when compared to the amount of risk transferred.[53]

$10,000,000 Transport Indemnity Company (Transport) policy. The *Steel* court first concluded that both the INA and Transport policies provided primary coverage for the employee's loss. The court noted that the INA deductible provision required U.S. Steel to pay the first $100,000 of any loss. The policy contained an endorsement that INA would pay any claims and U.S. Steel would reimburse it. The court then stated that "practically speaking, Steel is a self-insurer for $100,000." *Id.* at 475, 50 Cal. Rptr. at 585. The court found that the INA and Transport policies provided coverage only for those amounts exceeding U.S. Steel's $100,000 "self-insured deductible." *Id.* The opinion thus suggests that high deductibles and self-insurance are equivalent.

There are two reasons why the *Steel* opinion should not be accepted as persuasive authority on the issue of self-insurance and deductibles. First, the court neither recognized nor discussed the inherent distinction between the two risk treatment forms. U.S. Steel merely agreed to reimburse INA to the extent of its deductible; it did not assume claims adjustment responsibility for losses within that amount. *Id.* Thus, *practically speaking* U.S. Steel was insured, not self-insured.

Second, the court failed to properly apportion the loss between the insurers. It found that each policy provided concurrent coverage. *Id.* Thus, the loss should have been paid by the insurers according to the relative coverage limits of each policy. *See generally* Kurtock, *Overlapping Liability Coverage — The "Other Insurance" Provision*, 25 FED'N INS. COUNSEL Q. 45 (1974). Instead, U.S. Steel paid the initial $100,000 of the loss. The Transport policy became effective only after the deductible was exhausted, even though it should have paid its percentage of the first $100,000. Essentially, the court gave Transport the benefit of U.S. Steel's deductible even though Transport had not bargained for its benefit (this criticism of *Steel* was made in Pacific Power & Light Co. v. Transport Indem. Co., 460 F.2d 959, 962 n.5 (9th Cir. 1972)). The *Steel* opinion should not be given great weight.

In Stewart v. Morosa Bros. Trans. Co., No. 77-3126 (9th Cir. Jan. 15, 1980), the Ninth Circuit Court of Appeals reversed a judgment of the United States District Court for the District of Arizona. The district court had held a trucking company liable for the injuries one of its employees sustained while riding in one of the company's trucks. The district court recognized that firms assuming claims servicing and defense responsibilities within their deductibles are considered self-insurers. It compared the company's self-insurance to a policy of insurance that provided coverage for the employee's injuries. The court's judgment was reversed by the Ninth Circuit because, without a contract of insurance between the insurer and the insured, there can be no "insurance."

52. Small losses frequently cost the insurer as much as the value of the claim itself. "[E]very time . . . damage occurs, . . . the insurer has to pay for the repairs. . . . In such a case, the cost of repairs might be $15 and the cost of processing the claim $15. It is easy to see that this approaches a maintenance contract and is, therefore, very expensive." ATHEARN, *supra* note 10, at 81.

53. "It is an accepted insurance dictum that small deductible policies, whose purposes are the elimination of nuisance and maintenance cost claims, are not forms of self-insurance . . . or even forms of risk retention, because amounts involved under such deductibles are minute relative to total amount of risk . . . ." GOSHAY, *supra* note 12, at 7.

III. STATUTORY AND JUDICIAL TREATMENT OF SELF-INSURANCE

The financial responsibility laws of the California Vehicle Code regulate commercial insurers and self-insurers.[54] Ideally the laws are "intended to discourage careless driving or mitigate its consequences"[55] by assisting injured persons in securing financial redress for their injuries and preventing financially irresponsible drivers from driving on public highways.[56] To attain these goals, the financial responsibility laws require the driver and/or owner of a motor vehicle involved in an accident resulting in bodily injury or death or property damage in excess of $500 to report the accident to the Department of Motor Vehicles within fifteen days.[57] The owner or driver must then establish proof of ability to respond in damages[58] by either posting a bond as security[59] or by certifying that the motor vehicle is insured or self-insured.[60]

Commercial insurers and self-insurers are required to demonstrate in identical ways their ability to respond in damages. Both must provide identical minimum coverage limits of $5,000 for property damage in excess of $500, $15,000 for personal injuries to one person and $30,000 for injuries to two or more people in one accident.[61] Designed to enhance the financial protection of injured persons, the financial responsibility laws do not differentiate between coverage provided by

54. CAL. VEH. CODE §§ 16000-16560 (West 1971 & Supp. 1979), *as amended by* Act of Sept. 10, 1979, ch. 549, §§ 1, 3-10, 1979 Cal. Legis. Serv. 1907 (West).

55. Kesler v. Department of Pub. Safety, 369 U.S. 153, 158 (1962).

56. *See* CALIFORNIA DEP'T OF MOTOR VEHICLES, FINANCIAL RESPONSIBILITY MANUAL ¶ 1.100 (rev. ed. 1962) [hereinafter cited as FINANCIAL RESPONSIBILITY MANUAL]; Comment, *The Supreme Court of California 1968-69*, 58 CALIF. L. REV. 80, 135-37 (1970).

57. Act of Sept. 10, 1979, ch. 549, § 1, 1979 Cal. Legis. Serv. 1907 (West) (amending CAL. VEH. CODE § 16000 (West Supp. 1979)). Originally, the law concerned only those whose *negligent* use of the highways caused injury. Continental Cas. Co. v. Phoenix Constr. Co., 46 Cal. 2d 423, 434, 296 P.2d 801, 807-08 (1958); Escobedo v. State, 35 Cal. 2d 870, 878, 222 P.2d 1, 6 (1950). Because the owner or driver must furnish security or lose his driving privilege, the California Supreme Court stated, in overruling *Escobedo*, that the sanctions were based upon a presupposed likelihood of negligence and therefore could not be constitutionally imposed without a hearing to establish fault. Rios v. Cozens, 7 Cal. 3d 792, 798, 499 P.2d 979, 983, 103 Cal. Rptr. 299, 303 (1972). *See* Comment, *Financial Responsibility Laws in Constitutional Perspective*, 61 CALIF. L. REV. 1072 (1973); Comment, *The Constitutionality of the California Financial Responsibility Law*, 4 CAL. W.L. REV. 89 (1968).

58. "Proof of ability to respond in damages" means that the driver must demonstrate his ability to pay for injuries or damages for which he may be held liable in the future, in amounts of an least $15,000 for personal injury and $5,000 for property damage. FINANCIAL RESPONSIBILITY MANUAL, *supra* note 56, at ¶ 5.310. *See* CAL. VEH. CODE § 16430 (West Supp. 1979).

59. CAL. VEH. CODE §§ 16054.2, 16056 (West Supp. 1979).

60. *Id.* §§ 16052, 16054. In addition, the driver need not establish his financial responsibility if the motor vehicle is owned by a governmental entity. *Id.* § 16021(c).

61. *Id.* § 16430.

commercial insurers and self-insurers. The laws implicitly recognize that the practices are similar means of achieving the same ends.

The Insurance and Motor Vehicle Codes, however, do not require the self-insurer to cover the same risks that commercial insurers are required to assume. For example, Insurance Code section 11580.1 provides that "[n]o *policy* of automobile liability insurance . . . covering liability arising out of the ownership, maintenance, or use of any motor vehicle shall be issued or delivered in this state"[62] unless the policy provides minimum coverage limits for the named insured *and* any other person using the vehicle with the permission of the owner.[63] Section 11580.1(a)(2), however, provides that this requirement does not apply to policies with "a retained limit of self-insurance."[64] Vehicle Code section 16451 also requires insurance *policies* to provide permissive user coverage.[65] Insurance Code section 11580.2 requires insurance *policies* to provide, absent an express waiver, uninsured motorist coverage.[66] Insurance Code section 11580.9 prescribes the order in which multiple motor vehicle liability *policies*, covering the same loss, provide coverage. Because the term "policy" applies only to motor vehicle liability policies, these sections are held inapplicable to self-insurers, who do not issue insurance policies to themselves.[67]

Thus, although the firm opting for self-insurance merely *substitutes* one method of risk treatment for another,[68] the firm does not con-

62. CAL. INS. CODE § 11580.1 (West Supp. 1979) (emphasis added), *as amended by* Act of Sept. 30, 1979, ch. 1173, § 1, 1979 Cal. Legis. Serv. 4795 (West).

63. *Id.* § 11580.1(b)(4). Each policy must contain: (1) the minimum coverage limits; (2) designations by explicit description or appropriate reference of the vehicles covered; (3) explicit descriptions of excluded coverages; and (4) permissive user coverage. *Id.* § 11580.1(b).

64. *Id.* § 11580.1(a)(2).

65. CAL. VEH. CODE § 16451 (West Supp. 1979) provides as follows:

> An owner's policy of motor vehicle liability insurance shall insure the person named therein and any other person, as insured, using any owned motor vehicle with the express or implied permission of said assured, against loss from the liability imposed by law for damages arising out of ownership, maintenance, or use of such motor vehicle within the continental limits of the United States to the extent and aggregate amount, exclusive of interest and costs, with respect to each motor vehicle, of fifteen thousand dollars ($15,000) for bodily injury to or death of each person as a result of any one accident and, subject to said limit as to one person, the amount of thirty thousand dollars ($30,000) for bodily injury to or death of all persons as a result of any one accident and the amount of five thousand dollars ($5,000) for damage to property of others as a result of any one accident.

66. CAL. INS. CODE § 11580.2 (West 1972), *as amended by* Act of Sept. 30, 1979, ch. 1173, § 2, 1979 Cal. Legis. Serv. 4797 (West).

67. The self-insured firm does not issue formal policies but usually maintains formal statements as to what the firm's self-insurance fund does and does not "insure." Parrett, *supra* note 17, at 49.

68. Proof of insurance or the issuance of a certificate of self-insurance are two methods

tinue to provide the same coverage. The self-insurer "insures" the same motor vehicles that would be covered if the firm had commercial insurance. But because motor vehicle liability self-insurers only certify their "ability to pay *judgments* obtained against them,"[69] they need not provide coverage in some cases for permissive users or for damages caused by an uninsured motorist. For example, in *Glens Falls Insurance Co. v. Consolidated Freightways*,[70] Consolidated's truck driver was injured during the loading of its truck at Basalt Rock Company. Basalt was the named insured under a "ground-up"[71] policy issued by Glens Falls. Consolidated was an authorized self-insurer. It had only purchased indemnity insurance to treat risks that exceeded $20,000 in one occurrence. Glens Falls argued that since the injury occurred during the loading and unloading, *i.e.*, the *use* of the truck, Consolidated's "(self-) insurance" provided primary coverage for the driver's injuries.[72]

The California Court of Appeal recognized that Vehicle Code sections 16451[73] and 17150[74] required every motor vehicle liability policy to cover permissive users even though the policy did not so provide.[75]

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to satisfy the requirements of the financial responsibility laws. CAL. VEH. CODE § 16054 (West Supp. 1979).

69. A self-insurer only certifies that it "is possessed and will continue to be possessed of ability to pay judgments obtained against [it]." *Id.* § 16053. The self-insurer does "not undertake to insure third parties against liability." Aetna Cas. & Sur. Co. v. World Wide Rent-A-Car, Inc., 28 App. Div. 2d 286, 289, 284 N.Y.S.2d 807, 810 (1967). *See* O'Sullivan v. Salvation Army, 85 Cal. App. 3d 58, 147 Cal. Rptr. 729 (1978) (discussed in text accompanying notes 85-95 *infra*).

70. 242 Cal. App. 2d 774, 51 Cal. Rptr. 789 (1966).

71. That is, a policy providing primary coverage.

72. Therefore, if [Basalt's employee] . . . was "using" the Consolidated truck, he was insured under the Consolidated insurance. Since Consolidated is a self-insurer, there are no policy terms to construe other than the terms supplied by the Vehicle Code Section 16451. Accordingly, the question is whether the word "using" as contained in Vehicle Code Section 16451 includes loading of the Consolidated truck.

Brief for Appellant at 4, Glens Falls Ins. Co. v. Consolidated Freightways, 242 Cal. App. 2d 774, 51 Cal. Rptr. 789 (1966).

73. *See* note 65 *supra*.

74. CAL. VEH. CODE § 17150 (West 1971). This section provides:

Every owner of a motor vehicle is liable and responsible for death or injury to person or property resulting from a negligent or wrongful act or omission in the operation of the motor vehicle, in the business of the owner or otherwise, by any person using or operating the same with the permission, express or implied, of the owner.

Because the truck was not being operated at the time of the accident, the court held that this section did not apply. 242 Cal. App. 2d at 786, 51 Cal. Rptr. at 797.

75. This doctrine was set forth in Wildman v. Government Employees' Ins. Co., 48 Cal. 2d 31, 307 P.2d 359 (1957). In that case, Government Employees' issued an automobile liability policy which afforded no permissive user coverage. The court stated that "for an

It also recognized that a person who loads or unloads a motor vehicle uses the vehicle and is thus entitled to protection by the owner's permissive user coverage.[76] Had Consolidated commercially insured its motor vehicle liability risks, its insurance policy would have provided coverage for the driver's injuries.[77] The court, however, did not require Consolidated, as a self-insurer, to provide coverage. The court stressed that self-insurers do not issue policies of insurance. It noted that the code sections requiring permissive user coverage apply only to *policies* of insurance and not to self-insurance. It explained that a certificate of self-insurance "is not a motor vehicle liability *policy* of insurance,"[78] and stated that "[t]he simple answer here is that this case does not involve the contractual obligations of an insurance company. Nor are any obligations or any rules of extended coverage for 'use' in insurance policy situations in any way imposed upon Consolidated."[79] Glens Falls thus paid the entire loss.

Glens Falls demonstrates the inadequate statutory regulation of self-insurance. The court based its holding upon a technically correct distinction between the two practices: the self-insurer issues no *policy* of insurance. This distinction ignores the practical realities of a self-insurer's function. The self-insurer acts as its own insurer: it evaluates its risks and investigates, pays, and litigates its claims as does a com-

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insurer to issue a policy of insurance which does not cover an accident which occurs when a person, other than the insured is driving with the permission and consent of the insured, is a *violation of the public policy of this state.*" *Id.* at 39, 307 P.2d at 364 (emphasis added). For a discussion of the "*Wildman* doctrine" and its subsequent application, see D. MELNICK, CALIFORNIA AUTOMOBILE INSURANCE LAW GUIDE 79-94 (1973 & Supp. 1977).

76. The term "use" as used in a motor vehicle liability policy is given a broad meaning. State Farm Mut. Auto Ins. Co. v. Partridge, 10 Cal. 3d 94, 100, 514 P.2d 123, 127, 109 Cal. Rptr. 811, 815 (1973). Thus, a vehicle is being "used" during its loading or unloading. *But see* IBM v. Truck Ins. Exch., 2 Cal. 3d 1026, 474 P.2d 431, 89 Cal. Rptr. 615 (1970) (mere maintenance of premises used for loading and unloading is not in itself sufficient to find shipper was "user").

77. For an analogous case in which both parties were insured, see Argonaut Ins. Co. v. Transport Indem. Co., 6 Cal. 3d 496, 492 P.2d 673, 99 Cal. Rptr. 617 (1972). Because self-insurance provided no coverage, the court did not determine whether Consolidated's self-insurance provided primary or excess coverage. Enacted after *Glens Falls*, Insurance Code § 11580.9(c) provides that the owner of the premises upon which loading/unloading occurs is primarily liable. CAL. INS. CODE § 11580.9(c) (West Supp. 1979).

78. 242 Cal. App. 2d at 785, 51 Cal. Rptr. at 797 (emphasis in original).

79. *Id.* at 785-86, 51 Cal. Rptr. at 797. The *Glens Falls* rationale is not followed in New Jersey. In Comorote v. Massey, 110 N.J. Super. 124, 264 A.2d 478 (1970), the court required Firestone Tire & Rubber Company, a self-insurer, to provide permissive user coverage. It noted that the New Jersey legislature "evidenced a strong public policy to protect persons wrongfully injured by motor vehicles. In this light, there appears no sound basis for excluding a self-insurer from providing omnibus coverage." *Id.* at 128, 264 A.2d at 481.

mercial insurer.[80] While it may function as its own insurer, a self-insured firm should not be allowed to limit its liability merely because it retains rather than transfers risk. To permit a self-insurer to evade coverage that public policy and statutory law require of a commercial insurer unjustly enriches the self-insurer.[81] A self-insured firm not only avoids premium payments but also avoids paying claims that statutory law requires commercial insurers to cover. Furthermore, as more firms become self-insured,[82] an increasing number of claim payments that should have been made by self-insurers will be shifted to commercial insurers that otherwise would not have provided coverage. The resulting increase in payments by commercial insurers will be absorbed by individual insureds in the form of increased insurance rates.[83]

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80. *See* Transport of N.J. v. Watler, 161 N.J. Super. 453, 464, 391 A.2d 1240, 1245 (1978). The *Transport* court concluded that a self-insurer is not entitled to reimbursement from New Jersey's Unsatisfied Claim and Judgment Fund. It stated: "Transport is an insurer—a self-insurer—although not literally within the [statutory] definition of 'insurer'."

81. *Cf.* Meritplan Ins. Co. v. Universal Underwriters Ins. Co., 247 Cal. App. 2d 451, 467, 55 Cal. Rptr. 561, 571 (1966) (when an insurance company is entitled to contribution to cover a loss by a co-insurer, "[f]ailure to grant contribution unjustly enriches . . . the recalcitrant insurer"). *But see* Mid-Century Ins. Co. v. Hutsel, 10 Cal. App. 3d 1065, 89 Cal. Rptr. 421 (1970). In some situations, *e.g.*, when an insurance agent negligently fails to procure insurance, merely because other insurance *should* have provided primary coverage, the commercial insurer is not entitled to reimbursement. The insurer's liability arises from the terms of its contract for which it was paid a premium and from the fact that its insured was the driver involved in the accident.

82. Because self-insurance is often less expensive and provides better coverage than commercial insurance, "[i]nsurance executives . . . are now beginning to recognize that reliance upon the commercial insurance mechanism for financing small, expected losses is frequently not economically prudent for either the insurer or the insured." PEARCE & NUTT, *supra* note 18, at 5.

Economic inflation and an increased propensity for litigation have contributed to the steady rise in most premium rates. INSURANCE INFORMATION INSTITUTE, INSURANCE FACTS 6-7 (1978). These factors, coupled with severe insurance industry losses cause "insurance companies to concentrate on those areas that have been most profitable and to drastically increase premiums in less profitable areas." Feasibility of Self-Insurance for All City Programs for Which Insurance Is Purchased 2 (Dec. 20, 1977) (Report to Los Angeles City Council by the City Administrative Officer, Council File No. 76-4901). The lack of affordable insurance may force firms to become self-insured. In the early 1970's, for example, municipal water districts began to experience a premium price spiral. For some districts, premiums tripled within a one-year period, although the insurers' loss records did not justify an increase. The *threat* of large losses was sufficient to cause commerical insurers to increase premiums. Because insurance was prohibitively expensive, many districts elected to self-insure. Some districts have formed insurance pools, which combine retention with catastrophic protections. *Compare* L.A. Times, June 10, 1977, Part I, at 3, col. 1 *with* Business Insurance, August 20, 1979, at 6, col. 1.

83. [T]he practical result of [the] . . . decision is to shift the payment of judgments from the self-insurer to other insurance companies . . . , with the public at large sharing the burden in increased insurance rates. Another result . . . is that self-insurers reap an extravagant windfall. They not only save all the premiums they

Glens Falls argued that not requiring self-insurance to cover permissive users leaves a "coverage gap," in which an uninsured individual, whose only source of financial protection is a self-insured entity, is left without protection.[84] Twelve years later, the California Court of Appeal was faced with just such a situation in *O'Sullivan v. Salvation Army*.[85] O'Sullivan was a passenger in a vehicle owned by the Salvation Army. A negligent, uninsured motorist rear-ended the vehicle, injuring O'Sullivan. The Salvation Army was a certified self-insurer and carried excess insurance written by Eagle Star Insurance Company. O'Sullivan did not possess motor vehicle liability insurance at the time of the accident. He contended that the Salvation Army should assume financial responsibility for his injuries because he was a permissive user injured by an uninsured motorist.

O'Sullivan predicated his argument upon California Insurance Code section 11580.2, which states in pertinent part that "[n]o policy of bodily injury liability insurance . . . shall be issued or delivered in this state . . . unless the policy contains . . . a provision . . . insuring the insured . . . for bodily injury or wrongful death resulting from the owner or operator of an uninsured motor vehicle."[86] O'Sullivan argued that, because uninsured motorist coverage cannot be waived unless there is an express waiver,[87] and because the Salvation Army's certificate of self-insurance contained no such waiver, the Salvation Army was obligated to cover the injuries he sustained while permis-

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> would otherwise have to pay, . . . but they also force other people to pay increased premiums for insurance coverage for the accidents which are bound to occur . . . . In addition, . . . the self-insurer escapes payment of damages . . . for which its coverage, under established insurance law . . . is the primary coverage. All this is in addition to the fact that the self-insurer does not have to prove the existence of liability insurance on its cars nor post a deposit of cash or securities as everyone else is required to do who has an accident where more than $100 property damage to another vehicle is involved.

American Family Mut. Ins. Co. v. Missouri Power & Light Co., 517 S.W.2d 110, 115-16 (Mo. Sup. Ct. 1974) (en banc) (Seiler, J., dissenting).

84. Appellant's Petition for a Hearing by the Supreme Court at 6, Glens Falls Ins. Co. v. Consolidated Freightways, 242 Cal. App. 2d 774, 51 Cal. Rptr. 789 (1966).

85. 85 Cal. App. 3d 58, 147 Cal. Rptr. 729 (1978).

86. CAL. INS. CODE § 11580.2 (West Supp. 1979), *as amended by* Act of Sept. 30, 1979, ch. 1173, § 2, 1979 Cal. Legis. Serv. 4797 (West).

87. Absent an express waiver, this provision, like permissive "use" provisions, is deemed to be included in all motor vehicle liability policies, even if not expressly made a part thereof. Eliopulos v. North River Ins. Co., 219 Cal. App. 2d 845, 855, 33 Cal. Rptr. 449, 454 (1963). *See* Feldman, *Analysis of the Uninsured Motorist Act*, in CALIFORNIA UNINSURED MOTORIST PRACTICE 4-7, 33-37 (1973) [hereinafter cited as Feldman]; Appellant's Opening Brief at 4, O'Sullivan v. Salvation Army, 85 Cal. App. 3d 58, 147 Cal. Rptr. 792 (1978).

sively using the Salvation Army vehicle.[88]

The court rejected O'Sullivan's argument. Although the court determined that the legislature intended to afford individuals comprehensive protection from injuries caused by financially irresponsible drivers, the court concluded that nothing short of legislative amendment could impose coverage on the Salvation Army. It cited *Glens Falls* with approval and held that neither the Insurance nor Vehicle Code requires the self-insurer to provide uninsured motorist coverage.[89] Similar holdings have occurred nationwide.[90]

Although the court drew the proper technical distinction between commercial insurance and self-insurance,[91] its holding is contrary to public policy. The financial responsibility laws, under which the Salvation Army became self-insured, and Insurance Code section 11580.2 were enacted to protect injured persons from the financial hardships caused by motor vehicle accidents.[92] The uninsured motorist rarely has funds to cover the losses he causes. Thus, without uninsured motorist coverage, the injured party is without financial protection. If the Salvation Army had been commercially insured, its insurance would have been *required* to provide coverage.[93] Because the Salvation Army in-

88. Appellant's Opening Brief at 3-7, O'Sullivan v. Salvation Army, 85 Cal. App. 3d 58, 147 Cal. Rptr. 792 (1978).

89. Insurance Code § 11580.1, in setting forth required *policy* provisions, does not apply to policies including "retained limit[s] of self-insurance." CAL. INS. CODE § 11580.1(a) (West Supp. 1979), *as amended by* Act of Sept. 30, 1979, ch. 1173, § 1, 1979 Cal. Legis. Serv. 4795 (West). Section 11580.2(c)(4) excludes workers' compensation self-insurers from uninsured motorist requirements. *Id.* § 11580.2(c)(4). *See* O'Sullivan v. Salvation Army, 85 Cal. App. 3d 58, 62-64, 147 Cal. Rptr. 729, 731-33 (1978).

90. *See, e.g.*, Mountain States Tel. & Tel. Co. v. Aetna Cas. & Sur. Co., 116 Ariz. App. 225, 568 P.2d 1123 (1977); Guarado v. Greyhound Rent-A-Car, Inc., 340 So. 2d 510 (Fla. Dist. Ct. App. 1976); Johnson v. Yellow Cab Co., 456 Pa. 256, 317 A.2d 245 (1974); Yellow Cab Co. v. Adinolfi, 204 Va. 815, 134 S.E.2d 308 (1964).

91. "Insurance and self-insurance are not equivalents. Insurance exists when a contractual relationship between the insurer and the insured shifts to the insurer the risk of loss of the insured. Self-insurance is the assumption of risk of his own loss by one having an insurable interest." United States v. Newton Livestock Auction Mkt., Inc., 336 F.2d 673, 676 (10th Cir. 1964). *See* Universal Underwriters Ins. Co. v. Marriott Homes, Inc., 286 Ala. 231, 232, 238 So. 2d 730, 732 (1970).

92. O'Sullivan v. Salvation Army, 85 Cal. App. 3d at 61, 147 Cal. Rptr. at 731. *See* Firemen's Ins. Co. v. Diskin, 255 Cal. App. 2d 502, 505, 63 Cal. Rptr. 177, 180 (1967); Feldman, *supra* note 87, at 4-6.

93. For example, in Cocking v. State Farm Mut. Auto. Ins. Co., 6 Cal. App. 3d 965, 86 Cal. Rptr. 193 (1970), a permissive user was struck by an uninsured motorist while the user was standing behind the vehicle. The court found that the user was covered by the owner's uninsured motorist insurance. The court explained that "there is ample and significant authority holding that the purpose of uninsured motorist statutes is to give monetary protection to persons who, while lawfully using highways themselves, suffer grave injury through the negligent use of those highways by others." *Id.* at 969, 86 Cal. Rptr. at 196.

sured itself, however, it was not required to provide uninsured motorist protection. Thus, under the rule that self-insurance is not insurance, the court was compelled to leave an innocent and injured victim, for whose protection section 11580.2 was designed, without coverage. Uninsured motorist coverage should be required of *both* commercial insurers and self-insurers.[94] Both register with the financial responsibility section of the California Department of Motor Vehicles and declare their ability to respond in damages to injured persons. The self-insurer should be required to assume the responsibilities that section 11580.2 imposes upon commercial insurers.[95]

The California judiciary recently decided another case involving self-insurance in *Metro U.S. Services, Inc. v. City of Los Angeles*.[96] Metro U.S. Services (Metro) leased a dump truck to the City of Los Angeles (the City). While in regular service, the truck was involved in an accident that caused injury to several individuals. The injured parties brought suit against the City and Metro. Metro was commercially insured, while the City was self-insured. The parties stipulated that Metro was not responsible for the accident. Metro thus contended that the City had the primary duty of defense by operation of Insurance Code section 11580.9.[97] Section 11580.9 conclusively prescribes the order in which multiple motor vehicle liability insurance policies covering the same accident will apply.[98] Section 11580.9(b) declares that should two or more policies of insurance cover the same loss while one is issued to a named insured engaged in leasing motor vehicles for six

94. *Cf.* Transport of N.J. v. Watler, 161 N.J. Super. 453, 391 A.2d 1240 (1978). The court held that self-insurers, like commercial insurers, are not entitled to compensation from New Jersey's Unsatisfied Claims & Judgment Fund. Although the question was not before it, the court recognized that treating commercial insurers and self-insurers alike may require self-insurers to provide uninsured motorist protection to their passengers. *Id.* at 465, 391 A.2d at 1246.

95. "To deny a tort victim relief simply because the insurance certificate is self generated . . . would allow one class of tort victims . . . to be unjustifiably excluded from the broad protections [of] . . . Section 11580.2 . . . ." Appellant's Opening Brief at 7, O'Sullivan v. Salvation Army, 85 Cal. App. 3d 58, 147 Cal. Rptr. 729 (1978).

96. 96 Cal. App. 3d 678, 158 Cal. Rptr. 207 (1979).

97. Because Metro was not independently liable or responsible for the accident, both its insurance and the City's self-insurance provided concurrent coverage for the same cause of action. If Metro's insurance had been excess over the City's self-insurance, its contractual duty to defend would not have arisen until the City's self-insurance had been exhausted. *See, e.g.*, Continental Cas. Co. v. Zurich Ins. Co., 57 Cal. 2d 27, 34-35, 366 P.2d 455, 456-60, 17 Cal. Rptr. 12, 16-17 (1961); Pacific Indem. Co. v. Universal Underwriters Ins. Co., 232 Cal. App. 2d 541, 543-44, 43 Cal. Rptr. 26, 27-28 (1965). *Cf.* Aetna Cas. & Sur. Co. v. Certain Underwriters at Lloyd's of London, 56 Cal. App. 3d 791, 129 Cal. Rptr. 47 (1976) (duty to defend after primary policy limits are exhausted).

98. CAL. INS. CODE §§ 11580.8-.9 (West Supp. 1979).

months or longer, "the insurance afforded by such policy . . . shall be excess over any other valid and collectible insurance applicable to the same loss."[99]

The court rejected Metro's contention. It acknowledged that had the City commercially insured the truck, it would have been primarily responsible as an insurer and Metro's insurance would have been secondarily liable by operation of section 11580.9(b).[100] The court noted that the word "policy" refers to a "policy of insurance" and not self-insurance. It explained that the Insurance Code "carefully demarks self-insurers apart from insurers or holders of policies of insurance"[101] and cited *Glens Falls* and *O'Sullivan* with approval. It noted that section 11580.2 was not enacted to resolve all coverage issues and concluded that "[t]he state evidently has a broader interest in controlling insurance companies and in settling disputes between them as to coverage than it does in controlling self-insurers."[102]

The opinion misinterprets the purpose of section 11580.9(b). When two policies cover the same motor vehicle, the policy that rates or describes the vehicle usually affords primary coverage.[103] In enacting section 11580.9(b), it appears that the legislature intended that the hirer's policy provide primary coverage over other available insurance. If the hirer relinquishes control over a vehicle for an extended period, however, his responsibility for its use lapses; section 11580.9(b) then makes the hirer's policy excess over any other insurance available.[104] In *Metro*, the City leased Metro's truck for over six months. Thus, the City's "insurance" should have been considered primary because Metro had relinquished control over the vehicle. Because the City was self-insured, however, it avoided coverage and Metro's insurance paid for the accident. The underlying purpose of section 11580.9(b) does not change merely because a firm chooses to retain rather than transfer its risks. As its own insurer, a firm should be required to assume primary coverage for the vehicles it leases.[105]

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99. *Id.* § 11580.9(b).

100. 96 Cal. App. 3d at 681, 158 Cal. Rptr. at 209.

101. *Id.* at 682, 158 Cal. Rptr. at 209.

102. *Id.* at 684, 158 Cal. Rptr. at 210.

103. CAL. INS. CODE § 11580.9(d) (West Supp. 1979). *See* Zurich-American Ins. Co. v. Liberty Mut. Ins. Co., 85 Cal. App. 3d 481, 490, 149 Cal. Rptr. 472, 477 (1978) (Kaus, P.J., dissenting).

104. Government Employees Ins. Co. v. Carrier Ins. Co., 45 Cal. App. 3d 223, 228-29, 119 Cal. Rptr. 116, 119 (1975).

105. Petition for Hearing by the Supreme Court at 10-11, Metro U.S. Servs., Inc. v. City of Los Angeles, 96 Cal. App. 3d 678, 158 Cal. Rptr. 207 (1979). *Cf.* Aetna Cas. & Sur. Co. v. Market Ins. Co., 296 So. 2d 555 (Fla. Dist. Ct. App. 1974) (holding National Car Rental's

IV. PROPOSAL

Because the self-insurer is essentially its own insurer, this comment proposes that certified self-insurers of motor vehicle risks should be statutorily[106] required to provide coverage identical to that which commercial insurers are required to provide.[107] The Vehicle and Insurance Codes have not required self-insurers to assume the responsibilities required of commercial insurers. The courts, observing that self-insurers do not issue policies of insurance to themselves, have declined to bring treatment of self-insurance into accord with that of commercial insurance. Nevertheless, the practices are similar. The financial responsibility laws and certain Insurance Code sections were designed to protect persons injured on California highways. This purpose cannot be fully achieved if the statutes are applied only to commercial insurers and not to self-insurers. There appears to be no rational reason why the two risk treatment methods should be distinguished in these circumstances. "Where the reason is the same, the rule should be the same."[108]

This comment's proposal can be accomplished by amending California Vehicle Code section 16450[109] to include the certificate of self-insurance issued to firms self-insuring twenty-five or more motor vehicles. Only those firms retaining significant portions of risk[110] and ad-

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self-insurance provided primary coverage and defense for its lessee who was involved in an accident).

106. Nothing short of legislation can effect this result. O'Sullivan v. Salvation Army, 85 Cal. App. 3d at 62, 147 Cal. Rptr. at 731. *But cf.* Royal Globe Ins. Co. v. Superior Court, 23 Cal. 3d 880, 529 P.2d 329, 153 Cal. Rptr. 842 (1979) ("construction" of statute to permit third parties to sue commercial insurers for bad faith); Rowland v. Christian, 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968) (the court had no difficulty in abolishing a common law tort rule over the specific objection that the question should have been left to legislative action); Zurich-American Ins. Co. v. Liberty Mut. Ins. Co., 85 Cal. App. 3d 481, 149 Cal. Rptr. 472 (1978) ("construction" of § 11580.9(a). *See id.* at 490-92, 149 Cal. Rptr. at 477-78 (Kaus, P.J., dissenting)).

107. There may be cases, however, in which the two methods should be treated differently. *See* note 18 *supra*.

108. CAL. CIV. CODE § 3511 (West 1970).

109. Section 16450 provides in pertinent part:

> "[M]otor vehicle liability policy," . . . means an owner's policy or an operator's policy, or both, of liability insurance, certified as provided in Section 16431 as proof of ability to respond in damages, issued by an insurance carrier authorized to transact such business in this State to or for the benefit of the person named therein as assured. Any requirements set forth in said Chapters 2, 3 and 4 relating to a motor vehicle liability policy shall apply only to those policies which have been certified as proof of ability to respond in damages as provided in Section 16431.

CAL. VEH. CODE § 16450 (West 1971).

110. In 1964, Professor Goshay suggested that a minimum retention of $10,000 qualifies as self-insurance in most cases. GOSHAY, *supra* note 12, at 7. The amount retained will vary

justing their own claims[111] should be considered self-insured. This amendment would accord coverage provided by commercial insurers with coverage provided by self-insurers. A self-insurer, for example, would be required to insure those who permissively use its vehicles and those who, while riding in the firm's vehicle, are injured by an uninsured motorist. Furthermore, when two or more policies of motor vehicle insurance cover the same accident, the fact that one of the policies is a policy of self-insurance would not affect the order in which each provides coverage pursuant to Insurance Code section 11580.9(b).

The proposed amendment need not affect existing insurance code sections that contain self-insurance provisions. For example, Insurance Code section 11580.1(a)(2) exempts policies containing underlying insurance requirements and "retained limit[s] of self-insurance"[112] from providing permissive user coverage. Its exemption would not apply to certified self-insurers, because the exemption only applies to excess coverages and not to policies that conform to the financial responsibility laws.[113]

V. CONCLUSION

Commercial insurers and self-insurers of motor vehicle risks are required by the California Vehicle Code to provide identical minimum coverage limits. The commercial insurer is required by law to provide permissive user and uninsured motorist coverage. If two or more policies of motor vehicle insurance cover an identical loss, the insurance code conclusively prescribes the order in which the policies will provide coverage. All code sections pertaining to *policies* of insurance do not apply currently to self-insurers. Self-insurers, therefore, need not provide coverage for permissive users or for accidents involving uninsured motorists. This disparity in coverage leaves injured victims without the financial protection intended by the legislature and unnecessarily shifts the responsibility for losses to commercial insurers or to the individual.

The certified self-insurer is not required by statute to provide liability coverage for its motor vehicles even though self-insurance is a

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from firm to firm. *See* Brockmeier, *What to Look for in Captive Company and Self-Insurance Feasibility Studies*, in SELF-INSURANCE 7 (1975).

111. *See* notes 44-51 *supra* and accompanying text. This definition is consistent with the requirements to self-insure workers' compensation risks in California. *See generally* 8 CAL. ADMIN. CODE §§ 15200-15437 (1978).

112. CAL. INS. CODE § 11580.1(a)(2) (West Supp. 1979), *as amended by* Act of Sept. 30, 1979, ch. 1173, § 1, 1979 Cal. Legis. Serv. 4795 (West).

113. *Id. See* O'Sullivan v. Salvation Army, 85 Cal. App. 3d at 64-65, 147 Cal. Rptr. at 733.

statutorily authorized substitute for commercial insurance. Because there is no reason why self-insurers should not assume the responsibilities their carriers would have assumed had they been commercially insured, this comment proposes that the California Vehicle Code be amended to define self-insurance as a policy of insurance. This change would ensure that self-insurers are not unjustly enriched at the expense of other insurers, individual insureds, or injured victims. The amendment accords the practice of self-insurance with public policy. Although self-insurance technically is not insurance, a firm's certificate of self-insurance should be defined as "insurance" to guarantee equitable apportionment of responsibility between insurers and thereby provide adequate financial protection to drivers of motor vehicles.

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