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State Farm Mutual Automobile Insurance Company v. Partridge: Expanding The Scope Of Insurance Liability In California

JAMES J. MARCHIANO*

In 1973 the California Supreme Court outlined a new approach to realizing increased insurance coverage in deciding the case of *State Farm Mutual Automobile Insurance Co. v. Partridge*.[1] The *Partridge* case presents the possiblity of multiple insurance coverage for an injury arising from concurrent, individually-insured negligent acts, and appears to be a significant addition to the assortment of instances wherein coextensive policy coverage is available. As a result, attorneys are provided with an untapped potential of additional monetary relief for the injured plaintiff as well as the possibility of additional insurance coverage for the tortfeasor.

The purpose of this article is to examine the *Partridge* case in order to identify the factors which influenced the supreme court's decision to make new law in the insurance field, as the identification of these factors is crucial to the attorney seeking to use the *Partridge* decision for the benefit of his client. The article then focuses on a comparison of the traditional concept of overlapping insurance coverage and the emerging concept of multiple insurance coverage,[2] and how these concepts are

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1. 10 Cal. 3d 94, 514 P.2d 123, 109 Cal. Rptr. 811 (1973).

2. For the purposes of this article, the term "*overlapping* coverage" refers to the situation where two or more policies of insurance are construed so as to provide in-

affected by the *Partridge* decision. Finally, the discussion analyzes the possible impact of *Partridge* on the rights and duties of involved insurance carriers.

THE PARTRIDGE FACTS

In *Partridge*, the litigation arose from a gunshot injury sustained by a passenger in the insured's automobile. Essentially, the injured's cause of action for negligence was based upon two acts: first, that the insured had filed the trigger mechanism of his pistol in order to avail himself of the hunting advantages of "hair-trigger" action, and second, that at the time of the discharge of the pistol, he was driving his automobile on rough, off-the-road terrain, chasing rabbits at night with the gun in his hand.[3] The tortfeasor was insured for liability under both an automobile policy and a homeowner's policy. A declaratory relief action was commenced by the insurer to determine which of the two policies provided coverage under these facts, the automobile policy or the homeowner's policy. The automobile policy contained the following language:

> [The insurer] agrees . . . [t]o pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of (A) bodily injury sustained by other persons . . . caused by accident arising out of the ownership, maintenance or use, including loading or unloading, of the owned motor vehicle . . . .[4]

The homeowner's policy provided:

> [The insurer] agrees to pay on behalf of the Insured all sums which the Insured shall become legally obligated to pay as damages because of bodily injury or property damage, to which this insurance applies, caused by an occurrence.[5]

The homeowner's policy, however, expressly excluded coverage pertaining to:

> . . . Bodily Injury or Property Damage Arising Out of the Ownership, Maintenance, Operation, Use, Loading or Unloading of . . .

demnity for an injury caused by a *single* negligent act. The term "*multiple* coverage" refers to the situation where two or more policies are construed to cover *two or more* independent negligent acts which have concurred to cause a single injury. Hence, under multiple coverage, each insurer is obligated to indemnify the insured for the injury proximately caused by one of these distinct acts of negligence. Although this nomenclature is not universally accepted in the insurance area, the author feels that it most adequately identifies the two types discussed in this article. It should be pointed out that the supreme court did not make any distinction between the different coverages in *Partridge*. The court utilized the term "overlapping coverage" throughout its opinion to refer to any situation where more than one policy was found to provide indemnity for an injury.

3. 10 Cal. 3d at 99-100, 514 P.2d at 127, 109 Cal. Rptr. at 815.
4. *Id.* at 98 n.4, 514 P.2d at 126 n.4, 109 Cal. Rptr. at 814 n.4.
5. *Id.* at 99 n.5, 514 P.2d at 126 n.5, 109 Cal. Rptr. at 814 n.5.

> [a]ny Motor Vehicle Owned or Operated By, or Rented or Loaned to, any Insured . . . .[6]

The court recognized that the language of the automobile policy and of the exclusionary clause of the homeowner's policy were nearly identical, and that both policies were issued by the same company. Nonetheless, it held that both policies afforded coverage for the insured's obligation to the injured party.[7] In so holding, the court found that both the act of filing the trigger mechanism and the act of driving off the road in pursuit of rabbits were independent proximate causes of the injury jointly resulting in the insured's liability.[8] In the court's language: "both [negligent acts] are concurrent proximate causes of the accident, the negligent driving constituting an intervening, but non-superseding, cause of the accident."[9]

In an attempt to invoke the provisions of the homeowner's policy's exclusionary clause, the insurer argued that although the two independent negligent acts did concurrently cause the injury, both acts "arose out of the use ". . . of a motor vehicle."[10] The court held that a question of construction was presented respecting the breadth of the phrase "arising from the use of an automobile," but that by applying the well established rules of insurance contract interpretation, the argument that the two policies were mutually exclusive was without merit.[11] The court stated that the language "arising from the use," when appearing in a coverage clause of an insurance policy, must be given a "broad and comprehensive application."[12] Depending upon the factual setting of the case, "almost *any* causal relation with the vehicle," not necessarily with the *use* of the vehicle, will suffice to provide coverage.[13] As a consequence, under a *coverage* provision, it is probable that both of the negligent acts involved in *Partridge* would have been deemed to have "arisen from the use of an automobile," or to have been auto-related.

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6. *Id.* at 99 n.6, 514 P.2d at 126 n.6, 109 Cal. Rptr. at 814 n.6.
7. *Id.* at 101, 514 P.2d at 128, 109 Cal. Rptr. at 816.
8. *Id.* at 104-05 & n.10, 514 P.2d at 130-31 & n.10, 109 Cal. Rptr. at 818-19 & n.10.
9. *Id.* at 104 n.10, 514 P.2d at 130 n.10, 109 Cal. Rptr. at 818 n.10.
10. *Id.* at 101, 514 P.2d at 128, 109 Cal. Rptr. at 816.
11. *Id.* The *Partridge* court, in rejecting the insurer's arguments, reiterated the following clearly accepted rules of insurance policy construction. Coverage clauses are interpreted broadly so as to afford the greatest possible protection. *E.g.*, Ensign v. Pac. Mut. Life Ins. Co., 47 Cal. 2d 884, 888, 306 P.2d 448, 450 (1957); Continental Cas. Co. v. Phoenix Constr. Co., 46 Cal. 2d 423, 437-38, 296 P.2d 801, 809-10 (1955). On the other hand, exclusionary clauses are interpreted narrowly against the insurer. *E.g.*, Prickett v. Royal Ins. Co., 56 Cal. 2d 234, 237, 363 P.2d 907, 909, 14 Cal. Rptr. 675, 677 (1961); Arenson v. Nat'l Auto. & Cas. Ins. Co., 45 Cal. 2d 81, 83, 286 P.2d 816, 818 (1955).
12. *Id.* at 100, 514 P.2d at 127, 109 Cal. Rptr. at 815.
13. *Id.* at 101-01, 514 P.2d at 127-28, 109 Cal. Rptr. at 815-16.

Conversely, however, it has been consistently held that *exclusionary* clauses are to be interpreted narrowly against the insurer.[14] Obviously these interpretational rules are designed to provide the broadest possible coverage for the insured by guaranteeing that all ambiguities, including the most insignificant, will be decided in favor of the insured and against the insurer. Thus the court, in determining the applicability of the exclusionary clause in the homeowner's policy, narrowly construed the phrase "arising from the use of an automobile" in accordance with the aforementioned rules and held that the injury resulting from the filing of the trigger mechanism did *not* arise from the "use" of the automobile,[15] notwithstanding the fact that the reckless driving of the insured was undoubtedly a factor which contributed to the gun's discharge. Therefore, insofar as the act of filing the mechanism was concerned, the exclusionary clause was held inapplicable. However, since the other act of driving off the road with a loaded pistol was obviously auto-related, the coverage provision of the automobile policy was in effect with respect to that act.[16] The holding of the court, therefore, made both of the insurance policies available to the insured, and thus to the injured party, for the single injury suffered.

Coverage By More Than One Policy Before Partridge

Prior to *Partridge*, the circumstances under which an insured could look to more than one policy to cover his liability for negligence involving an automobile were limited in number, but were not uncommon in occurrence.[17] This type of coverage often arose due to an overlap of the language in the insured's liability policies. For example, every time one operates a non-owned automobile, two and possibly more policies may overlap and be called into play: the owner's policy insuring against accidents arising out of the "ownership" of the vehicle and the "omnibus" provision of the driver's policy insuring against accidents arising out of the use, maintenance, operation, loading, or unloading of a non-owned automobile.[18] The coverage under both a homeowner's policy and an automobile owner's policy will also overlap in the usual instance where the injury arises from the use of an automobile on or near the premises of the insured.[19] And, of course, in such a case, if the

14. *Id.* at 101-02, 514 P.2d at 128, 109 Cal. Rptr. at 816. See also authorities cited at note 11 *supra*.
15. *Id.* at 103, 514 P.2d at 129, 109 Cal. Rptr. at 817.
16. *Id.* at 106, 514 P.2d at 132, 109 Cal. Rptr. at 820.
17. *See generally* Marcus, *Overlapping Liability Insurance*, 16 Def. L.J. 549 (1967) [hereinafter cited as Marcus].
18. *Id.* at 549.
19. *Id.* at 553-54. It should be pointed out here that most exclusionary clauses

driver is not the owner of the car, it is possible that a *third* policy, the driver's "omnibus" coverage, may be applicable.[20]

Overlapping coverage may also obtain with respect to comprehensive public liability and automobile policies where the injury has occurred during the process of loading or unloading a motor vehicle. Due to the enormously flexible interpretational rules employed by the courts in reaching equitable coverage arrangements, a number of courts have broadly interpreted the coverage provisions of automobile policies and have held that loading or unloading does not cease until the entire operation is "completed."[21] In one case this reasoning was extended to bring into effect the automobile coverage of the owner of a delivery truck when a store employee, while checking goods being loaded onto the truck, bumped a pedestrian on the sidewalk.[22]. Another case in which public liability and automobile liability insurance were held to overlap involved an injury caused by an employee of a parking garage who was moving a customer's car to provide additional parking space.[23] The court found that, in addition to the owner's consent coverage under the automobile policy, there was coverage under the public liability policy of the garage *notwithstanding* its exclusionary clause pertaining to injuries arising from the use, operation, maintenance or ownership of a vehicle of any description.[24] By narrowly construing the term "use" in the exclusionary clause, the court decided that the attendant was not "using" the automobile; to "use" means to put to one's personal use, which the attendant certainly had not done with respect to the involved automobile.[25]

Prior to the *Partridge* decision, there were no California cases holding that the negligent driver of an automobile owned by him was entitled to coverage under a comprehensive personal liability (homeowner's) policy in addition to an automobile policy where the accident occurred off the insured's premises. In part this may have been attributable to the impact of *Herzog v. National American Insurance Co.*[26] In *Herzog*, the

in comprehensive personal liability insurance policies (homeowner's policies) expressly do not apply to instances in which the family automobile is used on the premises of the home, or on the ways immediately adjoining them. *Id.* at 554.

20. *Id.* at 554.

21. The "completed operations" rule is the most widely-accepted approach used to define "loading and unloading" of an insured automobile. The alternative "at rest" rule which placed a more restrictive interpretation on what constitutes loading and unloading has been largely rejected in the United States. The "efficient cause" theory, requiring the establishment of a casual connection between the loading or unloading of a vehicle and the injury, enjoys only the most limited acceptance. *See id.* at 559-64.

22. Wagman v. Am. Fidelity Cas. Co., 304 N.Y. 490, 109 N.E.2d 592 (1952).

23. Challis v. Commercial Standard Ins. Co., 117 Ind. App. 180, 69 N.E.2d 178 (1946).

24. *Id.* at 182, 69 N.E.2d at 179.

25. *Id.*

26. 2 Cal. 3d 192, 465 P.2d 841, 84 Cal. Rptr. 705 (1970).

insured argued that, in light of the announced public policy to incorporate within automobile liability insurance policies all relevant statutory provisions,[27] California Vehicle Code Section 16451[28] expanded the provision of his homeowner's policy which provided automobile coverage for use "on the premises and the ways immediately adjoining" his property to provide coverage for accidents occurring "within the continental limits of the United States."[29] Essentially the insured's argument was that his homeowner's policy was, in fact, an automobile liability policy, and thus should cover clearly auto-related risks. The California Supreme Court rejected this reasoning, stating that the small premiums and the type of information sought upon application for the policy indicated that general automobile liability coverage was not contemplated by the insured or the insurer.[30] This court, however, merely reiterated what has always been the case regarding exclusions of auto-related risks from homeowner's policy coverage: risks which *are* construed to arise from the use of an automobile will not be covered under the ordinary homeowner's policy.

Although *Herzog* did not deal with alternative constructions of the phrase "arising from the use of an automobile," it is possible that the case has caused some consternation regarding the efficacy of future assertions of overlapping homeowner and automobile insurance coverage where conspicuously auto-related acts of negligence are involved. Whatever the reason, there had been no successful attempt to extend coverage under more than one policy to accidents involving an owner-driver occurring away from the home premises or the ways adjoining thereto until the *Partridge* decision.

Concurrent Causation as a New Path to Multiple Insurance Coverage

Overlapping coverage potentially results from alternative broad and

27. *Id.* at 196, 465 P.2d at 842, 84 Cal. Rptr. at 706. *See* Wildman v. Gov't Employees' Ins. Co., 48 Cal. 2d 31, 40, 307 P.2d 359, 364-65 (1957).

28. 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 [insured], 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, or 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.

CAL. VEH. CODE §16451 (emphasis added).

29. 2 Cal. 3d at 196, 465 P.2d at 842, 84 Cal. Rptr. at 706.

30. *Id.* at 197, 465 P.2d at 843, 84 Cal. Rptr. at 707.

narrow constructions of the phrase "arising from the use of an automobile," which thereby render a *single act* auto-related for purposes of coverage under the automobile policy, but nonauto-related for purposes of the exclusionary clause in the homeowner's policy. This type of coverage has not been found to exist, with the exception of situations involving loading and unloading of the owned automobile,[31] in the common situation where a negligent act has been committed by the owner-driver of an automobile away from home. Assuming that a large proportion of automobile accidents could fall within the above category, a means by which *multiple coverage* can be afforded should be of enormous benefit to both the plaintiff seeking resources and to the defendant facing the unhappy prospect of an insurance deficiency. *Partridge,* although not a case involving *overlapping* coverage, suggests that *multiple coverage* might be realized upon a finding of *two or more* independent acts of negligence, each constituting a proximate cause of a single injury.[32]

As mentioned above, the *Partridge* court found two separate negligent acts: first, filing the trigger mechanism of a pistol to create a "hair-trigger" action; second, pure and simple reckless driving.[33] Moreover, the court found that each independent act was a proximate cause of the single injury.[34] Finally, the court determined that one act, the reckless driving, was auto-related and thus covered under the automobile policy;[35] the other act of filing the pistol's trigger mechanism was held to be nonauto-related for purposes of the homeowner's policy's exclusionary clause, and was thus covered by that policy.[36] It is important to note that by narrowly construing the "use" language of the homeowner policy's exclusionary clause the court ignored the fact that the gun would not have discharged and caused the injury had it not been for its use during the operation of the automobile. Therefore, there is at least a tenable argument that even this portion of the owner-driver's negligence was auto-related, which suggests that the court's approach was somewhat result-oriented. This being the case, it appears that the courts may, under the proper circumstances, be persuaded to reach the same result in future cases notwithstanding minor factual dissimilarities with the *Partridge* case. The decision is thus significant because it suggests a means by which an innovative attorney might avail his client of the

31. See text accompanying notes 17-25 *supra.*
32. The meaning of the terms "overlapping" and "multiple" coverage has previously been identified. See note 2 *supra.*
33. 10 Cal. 3d at 99-100, 514 P.2d at 127, 109 Cal. Rptr. at 815.
34. *Id.* at 102, 514 P.2d at 129, 109 Cal. Rptr. at 817.
35. *Id.* at 100-01, 514 P.2d at 127-28, 109 Cal. Rptr. at 815-16.
36. *Id.* at 103, 514 P.2d at 129, 109 Cal. Rptr. at 817.

benefits of multiple coverage in situations where even the most liberal courts have not yet extended overlapping coverage.

The isolation of two or more independent negligent acts concurring to cause an injury is, it appears, a prerequisite to securing the benefits *Partridge* will bestow, *i.e.* coverage under both a homeowner's and an automobile policy. Some examples may serve to illustrate the concurrence of auto and nonauto-related negligent acts visualized as a *Partridge*-situation: first, an injury is caused when the driver of the insured automobile, operating the automobile in an erratic manner, drops a lighted firecracker which he had intended to toss out the window; second, an injury is caused when the driver of the insured automobile, while proceeding too rapidly over speed-control bumps in a residential development, drops a lighted cigarette onto the gasoline-covered floor of the automobile; third, an injury is caused when a hunting rifle, kept cocked with the safety off in the gunrack of the insured's pickup truck, discharges while the truck is being driven in an erratic manner. The number of instances in which auto and nonauto-related negligent acts can be found to concur in causing an injury is as great as the creativity of the mind of the attorney seeking multiple coverage. This could be particularly true in light of the narrow construction courts will utilize when interpreting "arising from the use of an automobile" in an exclusionary clause of a homeowner's policy.[37] An act which initially appears to bear "some causal connection"[38] with the use of the insured automobile may be narrowly construed, as in *Partridge*, to have *not* arisen from "the use of an automobile," thereby rendering inapplicable the exclusionary provisions.

It might be argued that in order to satisfy a court of the existence of a *Partridge*-type factual situation, there must be a clearly auto-related negligent act concurring with another nonauto-related negligent act to cause an injury. As the examples and the *Partridge* case illustrate, this second act may approach recklessness or be inherently dangerous; *e.g.*, filing the trigger mechanism of a pistol, tossing lighted firecrackers from a window, smoking in the immediate presence of gasoline, or carrying about a cocked and unsecured hunting rifle. However, an attorney wishing to avail his client of the benefits of multiple coverage where the facts are not conducive to a finding of overlapping coverage should be alerted by *any* auto accident caused by a driver preoccupied with an activity other than his driving.

37. *E.g.*, State Farm Mut. Auto. Ins. Co. v. Partridge, 10 Cal. 3d 94, 101, 514 P.2d 123, 128, 109 Cal. Rptr. 811, 816 (1973); Glens Falls Ins. Co. v. Rich, 49 Cal. App. 3d 390, 395, 122 Cal. Rptr. 696, 699 (1975).
38. 10 Cal. 3d 94, 101 n.8, 514 P.2d 123, 128 n.8, 109 Cal. Rptr. 811, 816 n.8,

This conclusion is somewhat supported by the recent decision in *Glens Falls Insurance Co. v. Rich,*[39] which used the *Partridge* rationale to find coverage under a homeowner's policy in a case involving an automobile. Although *Glens Falls* did not involve coverage under more than one policy, the case is significant because it indicates that the California courts are willing to remove the barriers created by the exclusionary clause of a homeowner's policy, even in fact situations where there is not a great degree of negligence or recklessness. In *Glens Falls* the insured, while driving on a logging road in a Travelal automobile, saw a squirrel sitting on a stump. He brought his vehicle to a stop and reached across his body to open the door with his right hand while reaching under the seat for the shotgun with his left hand. As he touched the stock, the shotgun went off and injured the third party plaintiff, even though the safety had been on.[40] The court held that a homeowner's policy would provide coverage for the third party plaintiff's claim for injuries arising out of the negligent firing of the shotgun.[41] It refused to accept the argument that the insured was unloading a *dangerous* instrument from a vehicle, which would constitute an accident arising out of the "use" of an automobile which would be excluded from coverage under the homeowner's policy.[42] The court permitted recovery because the cause of the accident did not involve the "use" of the vehicle. Under the court's analysis, the accident did not arise so clearly from the use of the automobile as it did from the insured's use of the shotgun, or conversely, the use of the shotgun caused the accident at least as much as the use of the automobile.[43] Therefore, since the shotgun was not being used in a dangerous fashion by the insured, the case arguably could stand for the proposition that the nonauto-related act need not approach recklessness in order for the *Partridge* rationale to apply.

A possible limitation on the length to which California courts will go in a *Partridge*-type situation to remove the barrier created by a homeowner's policy's exclusionary clause may be suggested by *United Services Automobile Association v. United States Fire Insurance Co.,*[44] a recent intermediate appellate decision. This case involved a dispute as to whether an automobile policy and/or a homeowner's policy would provide indemnity for an injury. The court refused to construe as

39. 49 Cal. App. 3d 390, 122 Cal. Rptr. 696 (1975).
40. *Id.* at 392, 122 Cal. Rptr. at 697-98.
41. *Id.* at 394-95, 122 Cal. Rptr. at 699.
42. *Id.* at 395-96, 122 Cal. Rptr. at 699-700.
43. *Id.* at 397, 122 Cal. Rptr. at 701.
44. 36 Cal. App. 3d 765, 111 Cal. Rptr. 595 (1973).

nonauto-related an injury which arose when the insured tossed a burning can of gasoline away from an automobile.[45] He had been attempting to start the automobile by priming the carburetor with gasoline from the can when the fuel ignited.[46] In holding the "entire sequence of events" to be auto-related, the court reasoned that "while the activity involving the vehicle was peripheral it was not an activity wholly disassociated from, independent of and remote from its use."[47] According to the court, "using" an automobile necessarily includes activities seeking to make the automobile operative; priming the carburetor with gasoline, it concluded, is a common method used to start an automobile which has run out of fuel.[48] This holding suggests that California courts will refuse to give effect to the exclusionary clause in a homeowner's policy by narrowly construing the phrase "arising from the use of an automobile" only to the extent that the assertedly nonauto-related act remains clearly divorced from the normal operating procedures of the involved automobile.

United Services, however, can be distinguished from the *Partridge* situation and thus may not be a limitation at all. In *United Services,* the controversy arose in the context of a potential overlap of coverage since only *one* negligent act was involved, *i.e.* tossing the burning can of gasoline. As a consequence, the *United Services* case involved a declaration as to which of the two involved insurance carriers, the automobile or the homeowner's carrier, would be required to indemnify the insured. Hence, the court had to examine the "sequential relationship" of the single negligent act with the use of the automobile. Since it found this act to be auto-related, the homeowner's exclusionary clause was of necessity applicable, and therefore coverage under that policy was precluded.[49] This would have been the result in *Partridge* had there not been the second, nonauto-related negligent act, *i.e.* the filing of the trigger mechanism. However, since that case did involve a second negligent act, the *Partridge* court was able to find coverage under the homeowner's policy with respect to that act. This requisite second act was not present in the *United Services* fact situation and thus, once the court found the sole negligent act to be auto-related, it could not have found coverage under the homeowner's policy without resorting to overlapping coverage.

It should be noted that while the "sequential relationship" of the

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45. *Id.* at 771, 111 Cal. Rptr. at 599.
46. *Id.* at 767, 111 Cal. Rptr. at 596.
47. *Id.* at 771, 111 Cal. Rptr. at 599.
48. *Id.* at 770, 111 Cal. Rptr. at 598.
49. *Id.* at 771, 111 Cal. Rptr. at 599.

negligent act or acts with the use of the automobile is a factor of prime importance, there are other factors inherent to a situation where overlapping coverage is at issue. These factors would undoubtedly include procurement of the broadest coverage available to the insured and an examination of the relative size of the premiums paid for each policy.[50] However, in a *multiple* coverage situation such as that before the court in *Partridge*, there will be no need to consider these other factors because the existence of *two* negligent acts should enable a court to find coverage under both policies. If such is the case, a court will not be forced to make a choice between coverage under one policy or the other and then to adapt its rules of construction accordingly.[51] Therefore, *United Services* should have little effect, if any, upon a *Partridge*-type situation because different circumstances and considerations are involved. In further support of this conclusion, it should also be pointed out that the *United Services* court did not gainsay multiple coverage in a *Partridge*-type setting, noting that the two situations are distinguishable.[52] Thus, it would seem that the case would present little difficulty for the attorney seeking the benefits of *Partridge*.

Reciprocal Rights and Duties Between Coinsurers

An encounter with multiple liability insurance coverage arising under a factual situation similar to *Partridge* necessarily brings to bear the frustrating and recurring dilemma of determining rights and duties between coinsurers. Prior to *Partridge*, this dilemma ordinarily arose where an overlapping coverage situation was presented, *e.g.*, an accident involving a nonowner-driver of an automobile where both the owner's liability policy and the nonowner-driver's omnibus coverage are applicable.[53] Determining the availability of contribution, primary and excess liability, the existence of a duty to defend the insured, and the existence and extent of an obligation to contribute to the defense or settlement, costs, is a first order priority in the above situation. However, *Partridge* does not present a situation of overcoverage, due to the fact that each of two negligent acts is independently insured. Thus the potential hazards encountered in determining reciprocal rights and

50. *See* Herzog v. Nat'l Am. Ins. Co., 2 Cal. 3d 192, 197, 465 P.2d 841, 843, 84 Cal. Rptr. 705, 707 (1970).

51. The statement above implies that many insurance cases may be result-oriented. The author believes that a fair reading of *Partridge* indicates this to be true of at least that case. See text preceding note 37 *supra*. Due to the enormous flexibility of the interpretational rules with regard to insurance contracts, it may be, in the proper case, a simple matter for a court to find coverage under the policy or policies it wishes.

52. 36 Cal. App. 3d 765, 772, 111 Cal. Rptr. 595, 599.

53. See text accompanying notes 17-20 *supra*.

duties between coinsurers may be obviated to some degree by a finding of multiple coverage.

A. The First Step: Reciprocal Rights of Insurers—Determining the Extent to Which Each Policy Must Offer Coverage

Only in the most unusual case does the inquiry raised by overlapping policy coverage reduce itself to the simple question of which policy is primary and which is excess; that is, which policy must exhaust its coverage and which need only cover the deficiency, if any. In the usual case the issues which arise in the analysis of reciprocal rights of insurers will involve the reconciliation of other-insurance clauses, which are contained as a matter of standard procedure in most liability insurance policies.[54]

Generally speaking, there are three types of other-insurance clauses in use today: the *prorata* clause, the *excess* clause, and the *escape* clause. The prorata clause in substance proclaims that in the event of the existence of other "valid and collectible insurance,"[55] the policy containing the clause will provide coverage *only* for that amount of the liability equal to the proportion of the limits of this policy to the total amount of valid and collectible insurance.[56] For example, if the limit of a policy containing such a clause is $100,000 and there is other valid and collectible insurance for $50,000, the coverage of the first policy will extend to two-thirds of the total amount of the liability or to the policy limits, whichever is the lesser amount. The excess clause provides that in the event there is other valid and collectible insurance, the policy containing the clause will provide coverage *only* to the extent that such

54. The rules of insurance policy construction are generally governed by the law of contracts. Therefore, the manifest intent of the parties will control unless the agreement violates the law or is contrary to public policy. Billington v. Interinsurance Exch., 71 Cal. 2d 728, 742, 456 P.2d 982, 990, 79 Cal. Rptr. 326, 334 (1969); Linnastruth v. Mut. Benefit etc., Ass'n, 22 Cal. 2d 216, 218, 137 P.2d 833, 834 (1943). Yet, it is still unclear in California whether the terms of the insurance contract concerning other insurance control over the parties' right to indemnification. *Compare* Universal Underwriters Ins. Co. v. Aetna Ins. Co., 249 Cal. App. 2d 144, 153, 57 Cal. Rptr. 240, 247 (1967) (insurance contract controlled indemnification rights) *with* Rossmoor Sanitation, Inc. v. Pylon, Inc., 13 Cal. 3d 622, 634, 532 P.2d 97, 104, 119 Cal. Rptr. 449, 456 (1975) (right of indemnification controlled contract containing other-insurance clauses). The author believes that apportionment of the loss pursuant to other-insurance clauses would effectively negate the indemnification agreement, thus imposing liability on a party which had expressly bargained to avoid such a result. Such a result seems contrary to the freedom of contract.

55. Insurance is "valid and collectible" if the terms of the policy are construed to cover the particular risk involved, and remains such notwithstanding the existence of technical grounds upon which the insurer could have otherwise avoided disbursement to the insured, *e.g.*, a failure by the insured to give timely notice of an accident to the insurer. Marcus, *supra* note 17, at 552-53.

56. Russ, *The Double Insurance Problem—A Proposal*, 13 HAST. L.J. 183, 184 n.4 (1961) [hereinafter cited as Russ].

other insurance, applied to its limits, is deficient.[57] In other words, any other obligated insurance carrier will be the primary insurer. It should be noted, however, that an excess clause is not tantamount to a "true excess policy" which, in consideration for lowered premiums, is expressly excess in operation with respect to another specified policy of insurance.[58] The condition precedent of exhaustion of a primary policy is bargained for in this instance, and the excess policy will provide excess coverage only, regardless of the presence of other-insurance clauses in the other specified policy.[59] Finally, the escape clause states simply that in the event of the existence of other insurance, the policy containing the clause shall provide no coverage whatsoever.[60] That is, the nonexistence of other valid and collectible insurance is an express condition precedent to the operation of a policy containing this clause.

The advantages inuring to a carrier by including other-insurance clauses in his policies, and the corresponding disadvantages suffered by carriers faced with such clauses who may be left holding the proverbial bag, are so patent that a policy without such a clause will be rare. Consequently, most liability policies do contain other-insurance clauses, and the melange of problems which arises from the need to reconcile such clauses diminishes the advantages to be gained from the availability of coextensive policy coverage. It is in this respect, however, that *Partridge* once again emerges as a potentially invaluable tool by which the insured may realize the benefits of multiple coverage without suffering the inconvenience of the protracted litigation necessary to extricate opposing inconsistent other-insurance clauses.

In order to fully comprehend the value of *Partridge* in this context it is first necessary to explore what has been called the dilemma of "interlacing" other-insurance clauses,[61] one of the most perplexing areas of insurance law.[62] A number of commentators have dealt with various aspects of this subject,[63] and there seems to be at least tacit agreement as to its complexity. The reconciliation or "interlacing" of opposing other-

57. *Id.* at 184 n.5.
58. *Id.* at 192.
59. *See* Reed v. Pac. Indem. Co., 101 Cal. App. 2d 151, 158-59, 225 P.2d 255, 260 (1950); Russ, *supra* note 56, at 192.
60. Russ, *supra* note 56 at 184, n.6.
61. Marcus, *supra* note 17 at 570-76.
62. One federal court has stated that "[p]robably in no field of law is there more confusion among the courts as to the proper rule to be followed than in the field of excess insurance." Ins. Co. of Texas v. Employers' Liab. Assurance Corp., 163 F. Supp. 143, 145 (S.D. Cal. 1958).
63. *E.g.*, Note, *Concurrent Coverage in Automobile Liability Insurance*, 65 COLUM. L. REV. 319 (1965); Snow, *Other Insurance Clauses—Multiple Coverage*, 40 DEN. L.J. 259 (1963); Comment, *"Other Insurance" Clauses Conflict*, 5 STAN. L. REV. 147 (1952); Comment, *Effect of Conflicting "Other Insurance" Clauses*, 41 WASH. L. REV. 564 (1966).

insurance clauses is often the task faced whenever two or more valid and collectible insurance policies are applicable to a given situation. In such cases, there will always be a clash of terms requiring resolution unless the only other-insurance clause presented is of the prorata variety, in which case coverage will be extended according to the formula announced above.[64] Any other combination of clauses is inherently inconsistent and will require judicial reconciliation. For example, if more than one policy is valid and collectible, one policy containing an excess clause and the other a prorata clause, the excess clause will demand that the policy containing the prorata clause cover the liability up to its policy limits, while the prorata clause will insist that the policy containing the excess clause cover the liability on a prorata basis. In a situation where the clauses are of the prorata and escape varieties, the predicament is identical. Where each policy contains an excess clause, in effect each maintains that the other is liable and both insurers refuse to pay. The same result obtains when one clause is of the escape variety and the other is of the excess type, or where all policies contain escape clauses.

The method of judicial reconciliation enjoying the widest use throughout the United States is called "pairing."[65] This approach prescribes certain uniform results depending only upon what *pair* of other-insurance clauses is presented. Under this method, where the other-insurance clauses are of the same sort, the policies will always be prorated.[66] Thus, where there are opposing excess or escape clauses, the treatment will be precisely the same as if both clauses were prorata clauses, *i.e.* each policy will offer a portion of the amount of the liability equal to, but not in excess of, that proportion of the overall combined total of insurance coverage represented by each policy.[67]

Unfortunately, no uniform result has been reached where the other-insurance clauses are of different varieties, *i.e.* prorata and either escape or excess, or escape and excess. In cases where the opposing clauses are of the prorata and excess varieties, the majority rule requires that the policy with the prorata clause be deemed the "other valid and collectible insurance."[68] Thus, in essence, the prorata clause is disregarded and the

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64. See text accompanying note 56 & 57 *supra.*
65. *See* Russ, *supra* note 56, at 186-87.
66. *See* Oil Base, Inc. v. Transport Indem. Co., 143 Cal. App. 2d 453, 299 P.2d 952 (1956) (excess clauses); Trader's & Gen. Ins. Co. v. Pac. Employers Ins. Co., 130 Cal. App. 2d 158, 278 P.2d 493 (1955). There are no reported California cases dealing with escape clauses. Two cases from other jurisdictions have held that escape clauses are mutually repugnant and thus the coverage must be prorated. Travelers Indem. Co. v. Chappell, 246 So. 2d 498 (Miss. 1971); Drude v. Ryals, 216 So. 2d 647 (La. 1969) *cert. denied,* 253 La. 734, 219 So. 2d 513 (1969).
67. See text accompanying note 56 *supra.*
68. *See* Annot., 76 A.L.R.2d 502 (1961).

excess clause is given effect. Although its cases have been divided,[69] California probably is in accord with the majority rule in light of the supreme court's decision in *American Automobile Insurance Co. v. Republic Indemnity Co.*[70] In *American Automobile,* a nondriver-owned auto was involved in an accident. The driver's policy contained other-insurance clauses of both the excess and prorata varieties, while the owner's liability policy was of the prorata type.[71] The court reasoned that the insurers intended that the excess clause in the driver's policy be given effect, which was evidenced by their use of the "standard" insurance policy forms.[72] This decision has been consistently followed by subsequent appellate courts and thus it seems safe to say that California courts have adopted the majority rule.[73] On the other hand, in situations where one policy contains a prorata clause and the other an escape clause, the California cases have disregarded the escape clause and prorated both policies.[74]

Where the opposing clauses are of the excess and the escape varieties, the majority of states and California generally refuse to enforce the escape clause.[75] However, California differs from the majority in its treatment of the excess clause. Under the majority rule, the excess clause is honored and primary liability is imposed on the insurer who has utilized the escape clause,[76] which in effect penalizes him for attempting to evade liability under the policy. California, however, has taken a more moderate stance, insisting that the coinsurers prorate the coverage, notwithstanding the express policy language.[77] Indeed, this posture appears to be a step toward what could possibly be called the ultimate

69. See Donahue Constr. Co. v. Transport Indem. Co., 7 Cal. App. 3d 291, 301-03, 86 Cal. Rptr. 632, 639-40 (1970), which examined and cited the two lines of California decisions dealing with the prorata-excess dilemma.

70. 52 Cal. 2d 507, 341 P.2d 675 (1959).

71. *Id.* at 509-10, 341 P.2d at 676.

72. *Id.* at 512-13, 341 P.2d at 678.

73. *See, e.g.,* Hartford Acc. & Indem. Co. v. Civil Serv. Employees Ins. Co., 33 Cal. App. 3d 26, 34, 108 Cal. Rptr. 737, 743 (1973). Owens Pac. Marine, Inc. v. Ins. Co. of No. America, 12 Cal. App. 3d 661, 668-69, 90 Cal. Rptr. 826, 830-31 (1970); Donahue Constr. Co. v. Transport Indem. Co., 7 Cal. App. 3d 291, 301-03, 86 Cal. Rptr. 632, 639-40 (1970).

74. *E.g.,* Peerless Cas. Co. v. Continental Cas. Co., 144 Cal. App. 2d 617, 622-23, 301 P.2d 602, 606-07 (1956). However, in policies covering liability arising out of the ownership, maintenance, or use of a motor vehicle, by statute in certain situations, escape clauses are given effect and thus will not be prorated. CAL. INS. CODE §§11580.1, 11580.9; *see also* Argonaut Ins. Co. v. Transport Idem. Co., 6 Cal. 3d 496, 492 P.2d 673, 99 Cal. Rptr. 617 (1972).

75. *See* Russ, *supra* note 56, at 187.

76. *E.g.,* Zurich Gen. Acc. & Liab. Ins. Co. v. Clamor, 124 F.2d 717 (7th Cir. 1941); Continental Cas. Co. v. Curtis Pub. Co., 94 F.2d 710 (3d Cir. 1938); Grasberger v. Liebert & Obert, Inc., 335 Pa. 491, 6 A.2d 925 (1939).

77. *See, e.g.,* Employers Liab. Assurance Corp. v. Pac. Employers Ins. Co., 102 Cal. App. 2d 188, 227 P.2d 53 (1951). *But see* Underground Constr. Co. v. Pac. Indem. Co., 49 Cal. App. 3d 62, 122 Cal. Rptr. 330 (1975) (giving effect to the escape clause).

solution to the interlacing dilemma: across-the-board proration of coverage.

Across-the-board proration was first utilized in 1952 by the Ninth Circuit Court of Appeals in *Oregon Auto Insurance Co. v. U.S. Fidelity and Guaranty Co.*,[78] which involved a clash between an escape clause and an excess clause. The court expressly rejected all previously accepted methods used to reconcile other-insurance clauses, stating that where a repugnancy of terms exists, *both* clauses must be disregarded and the insurance coverage prorated.[79] By imposing a proration where ever such a repugnancy exists, however, the court transformed all other-insurance provisions into the prorata type, thereby effectively eliminating both the escape and excess varieties. This simple solution of prorating insurance coverage in all cases of overlapping coverage appears to be gaining support in the western states, particularly in Oregon[80] and California. In a recent California appellate decision involving two prorata clauses, the court, by dicta, reiterated the position adopted in *Oregon Auto* and recommended the across-the-board proration approach of reconciling inconsistent other-insurance clauses.[81] However, as of this time, no California court has gone so far as to adopt the *Oregon Auto* approach, possibly due to the infringement upon individual freedom to contract involved therein.[82]

In light of its adhesion to a modified version of "pairing," as illustrated above, it would appear that the California judiciary is unlikely to adopt *in toto* the *Oregon Auto* method of proration at the present time. This conclusion seems warranted by the California Supreme Court's decision in *American Automobile.* As mentioned previously, the court recognized that the intent of the parties to the nonowner-driver's insurance policy, as reflected by the use of standard insurance forms and in the premium schedule, was that the insured would be fully and primarily covered only with respect to expressly considered vehicles; accidents

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78. 195 F.2d 958 (9th Cir. 1952).
79. *Id.* at 960.
80. The *Oregon Auto* rationale has since been adopted by the Oregon Supreme Court. *See, e.g.*, Sparling v. Allstate Ins. Co., 249 Or. 471, 439 P.2d 616 (1968); Lamb-Weston, Inc. v. Oregon Auto. Ins. Co., 219 Or. 110, 341 P.2d 110 (1959). The case is also being followed in the federal circuit that originally decided it. Globe Indem. Co. v. Capital Ins. & Sur. Co., 352 F.2d 236 (9th Cir. 1965). Additionally, it appears that Ohio may be in the process of adopting *Oregon Auto*; *see* Fleming v. Parsons, 2 Ohio App. 2d 12, 206 N.E.2d 46 (1965).
81. Rossmoor Sanitation, Inc. v. Pylon, Inc., 40 Cal. App. 3d 417, 428, 115 Cal. Rptr. 91, 98 (1974), *vacated* 13 Cal. 3d 622, 532 P.2d 97, 119 Cal. Rptr. 449 (1975) (making no mention of *Oregon Auto*).
82. As noted previously, the manifest intent of the parties to the insurance policy will control unless the agreement violates the law or is contrary to public policy. Billington v. Interinsurance Exch., 71 Cal. 2d 728, 742, 456 P.2d 982, 990, 79 Cal. Rptr. 326, 334 (1969); Linnastruth v. Mut. Benefit etc., Ass'n., 22 Cal. 2d 216, 218, 137 P.2d 833, 834 (1934).

emanating from the insured's use of nonowned automobiles were to be covered only to the extent that other valid and collectible insurance proved deficient.[83] There has been no indication since this case was decided, at least in the area of nonowned automobile liability coverage, that California is prepared to disregard contractual intent to the extent demanded by *Oregon Auto*.

Possibly the ultimate solution to the interlacing dilemma will have to be the legislation effecting a compromise between the strict prorata approach suggested in *Oregon Auto* and the widely utilized "pairing" method,[84] which, unhappily, is of no aid where *more* than two other-insurance clauses require reconcilation. It is possible, however, that this entire tangle can be circumvented by successfully invoking the *Partridge* rationale of multiple liability insurance coverage for an insured.

As mentioned above, *Partridge* is not a case involving overlapping coverage, due to the concurrence of *two* independent acts of negligence to cause a single injury. Therefore, since each negligent act was covered by a separate policy of insurance, as to each act, neither the homeowner's nor the automobile policy could possibly have been "other valid and collectible insurance." With respect to the risk of injury from reckless driving the only valid and collectible insurance was undisputedly the automobile policy. Similarly, with respect to the risk of injury from the negligent filing of the pistol's trigger mechanism, the homeowner's policy was the only valid and collectible insurance. Had either policy contained an other-insurance clause, there could have been no repugnancy of terms requiring the difficult task of reconciliation. Therefore, the finding of multiple coverage in a *Partridge*-type fact situation will usually provide a means of avoiding the problems encountered when other-insurance clauses come into conflict in the overlapping coverage situation.

It should be noted that the necessity to reconcile other-insurance clauses could arise in a *Partridge*-type situation in some instances. For example, had the insured been driving a nonowned automobile at the

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83. 52 Cal. 2d 507, 510-11, 341 P.2d 675, 678-79.

84. One commentator has proposed legislation to solve this problem, which in many ways represents a compromise approach. He suggests three basic provisions: (1) escape provisions should be eliminated entirely; (2) proration should be utilized in *any* situation where two or more other-insurance clauses are used; and (3) the use of excess clauses should be limited to policies insuring the operation of nondriver-owner automobiles. Russ, *supra* note 56, at 191-93.

One California appellate court has also urged that legislation be adopted in this area of insurance law. The court stated that it was "persuaded that definite statutory rules which will obviate this large volume of intricate litigation would be plainly in the public interest." Truck Ins. Exch. v. Jones, 193 Cal. App. 2d 483, 488 n.3, 14 Cal. Rptr. 408, 411 n.3 (1961).

time of the injury, the reckless driving risk would have been insured by both the driver's liability policy and the policy of the owner of the automobile. In such a factual setting any other-insurance clauses respecting the reckless driving risk would have to be reconciled in order to determine the reciprocal rights of the coinsurers. However, as between these insurers and the homeowner's liability carrier, no disputes could arise because the automobile liability coverages would not be "other valid and collectible insurance" respecting the trigger mechanism filing risk. Thus, even in the aforementioned situation, the *Partridge* decision may act as a vehicle by which an attorney may obtain maximum insurance coverage for his client without facing the entire array of problems presented by other-insurance clauses.

B. The Second Step: Reciprocal Duties of Insurers—Defense of the Insured, Contribution of Defense and Settlement Costs

Reciprocal duties of insurers do not, of course, arise from their respective contracts with the insured because there is no privity of contract between or among the various insurance carriers. As a result, the duties between insurers flow from principles of equity rather than from contractual obligations individually owed to the insured for indemnity.[85]

Normally, the defense of the insured will be undertaken by the primary carrier if there is one.[86] In addition, if this defense is not adequate or complete, the excess insurer may have a cause of action against the primary carrier for bad faith.[87] It stands to reason, therefore, that the carrier facing the greatest potential liability in a prorata situation will wish to supervise the defense in an attempt to effectively minimize his obligations under the policy. However, all involved insurers are duty-bound to either defend or defray defense expenses if requested to participate by the insured.[88] A carrier with a smaller financial interest in the outcome of an action cannot, under the principles of equitable subrogation, escape liability for its ratable portion of the defense or settlement costs by refusing to participate in the defense.[89]

85. Am. Auto. Ins. Co. v. Seaboard Sur. Co., 155 Cal. App. 2d 192, 196, 318 P.2d 84, 86 (1957).
86. Woodhead, *Duty to Defend—Primary and Excess Insurance (California)*, 42 INS. COUNSEL J. 128, 128 (1975). However, in a conflict of interest situation, the insured can select his own attorney and may be entitled to reimbursement for attorney's fees incurred. Executive Aviation, Inc. v. Nat'l Ins. Underwriters, 16 Cal. App. 3d 799, 94 Cal. Rptr. 347 (1971).
87. Palmer v. Financial Indem. Co., 215 Cal. App. 2d 419, 30 Cal. Rptr. 204 (1963); Ivy v. Pac. Auto. Ins. Co., 156 Cal. App. 2d 652, 320 P.2d 140 (1958).
88. Continental Cas. Co. v. Zurich Ins. Co., 57 Cal. 2d 27, 37, 366 P.2d 455, 461, 17 Cal. Rptr. 12, 18 (1961).
89. *Id.*

The *Partridge* case presents special problems for insurance carriers with respect to the above considerations. In a typical *Partridge* situation, *both* the homeowner's policy and the automobile policy occupy primary insurer roles due to the fact that each policy is providing coverage for a separate negligent act committed by the insured. This factual setting differs from a situation involving overlapping coverage, where, as mentioned above, the insurer with the greatest financial involvement will usually undertake the supervision of the defense. In this latter setting, all insurers have contracted to indemnify the insured against a *single* negligent act causing an injury, and thus it is reasonable that the degree of financial involvement will be a key factor in determining which carrier is responsible for conducting the defense. However, in a *Partridge* setting, since more than one act of negligence has resulted in a single injury, giving rise to primary liability on the part of two insurers, it follows that both should be obligated to pursue an active role in the defense, notwithstanding the relative degree of their financial involvement. It would not seem to comport with accepted principles of insurer defense obligations that one insurer would be responsible for supervising the defense relative to a risk for which he has not contracted to afford coverage.

As mentioned previously, concomitant to the duty to participate in the defense is the coinsurers' obligation to bear the settlement and defense costs if called upon to do so.[90] In a *Partridge* situation, where arguably each primary insurer is obligated to actively participate in the defense, it follows that each is also obligated to actively participate in all settlement activities.

This position is strengthened when one considers the ramifications of a bad faith refusal to settle by either an excess or ratably less-involved coinsurer. The California Supreme Court has made it clear in *Crisci v. Security Insurance Co.*[91] that the refusal to participate in a reasonable settlement, based on an implied covenant of good faith and fair dealing, may result in liability to the insured for damages resulting from a verdict in excess of policy limits.[92] Such damages may also include compensation for mental suffering, as well as punitive damages.[93]

The impact of *Crisci* has been augmented by a very recent supreme court decision in *Johansen v. California State Automobile Association*

90. *Id.*
91. 66 Cal. 2d 425, 426 P.2d 173, 58 Cal. Rptr. 13 (1967).
92. *Id.* at 430-31, 426 P.2d at 176-77, 58 Cal. Rptr. at 16-17.
93. *Id.* at 433-34, 426 P.2d at 179, 58 Cal. Rptr. at 19. For an in-depth discussion of the *Crisci* rationale, *see* Comment, *Silberg v. California Life Insurance Company: A New Dimension In The Tort Of Insurer Bad Faith?*, 6 PAC. L.J. 590 (1975).

Inter-Insurance Bureau,[94] in which the court held that an insurance company breaches the implied covenant of good faith whenever it fails to accept any reasonable settlement offer that is within the policy limits of its insured.[95] In *Johansen*, the insurer rejected a settlement offer for the amount of its policy limits in the belief that it was not liable under the policy. After this rejection, the case went to trial and a verdict was returned against the insured in excess of the settlement offer. The assignee of the insured then sued the insurer for the difference between the settlement offer and the subsequent verdict.[96] The court held that even if it had been subsequently determined that the insurer was in fact free from liability under the policy, the insurer took its chances when it refused to settle with the personal injury plaintiff.[97] According to the court, the insurer in such a case must settle and then seek reimbursement from the insured.[98] Hence, the net result of *Crisci* and *Johansen* is that an insurer is probably best advised to accept any settlement offer within its policy limits, even though the chances of a verdict in that amount may appear slight.[99]

The consequences of a bad faith refusal to settle as contemplated by the *Crisci* and *Johansen* decisions become particularly important in a *Partridge* situation. For example, assume that the coverage carried by the insurer of "risk A" is $100,000, and the coverage carried by the insurer of "risk B" is $50,000. The risk A insurer, having a greater financial interest in the outcome of the action, *i.e.* a two-thirds prorata share of the eventual disbursement, will probably wish to take charge of the defense and settlement of the action. If this insurer, however, receives a settlement offer in excess of its policy limits, *e.g.*, $120,000, to which the coinsurer refuses to contribute its ratable portion, no settlement will be possible. Thus, even if this first insurer is willing to pay off the settlement offer to its policy limits of $100,000, it probably cannot remove itself from the litigation due to the conduct of the other primary, but less financially-involved, insurer. Consequently, if the litigation culminates in a verdict in excess of the aggregated policy limits of both carriers, leaving the insured liable for the excess, the refusing

94. 15 Cal. 3d 9, 538 P.2d 744, 123 Cal. Rptr. 288 (1975).
95. *Id.* at 15-16, 538 P.2d at 748, 123 Cal. Rptr. at 292.
96. *Id.* at 13-14, 538 P.2d at 746-47, 123 Cal. Rptr. at 290-91.
97. *Id.* at 15-16, 538 P.2d at 748, 123 Cal. Rptr. at 292.
98. *Id.* at 19, 538 P.2d at 750, 123 Cal. Rptr. at 294.
99. *See id.* at 17 n.6, 538 P.2d 749 n.6, 123 Cal. Rptr. 293 n.6. In a footnote the *Johansen* court left open the issue of whether an insurer must accept *any* settlement offer within its policy limits, regardless of its reasonableness. However, the court implied that it saw good reasons for adopting such a rule. This rule has already been adopted by the New Jersey Supreme Court. Rova Farms Resort, Inc. v. Investors Ins. Co. of Am., 65 N.J. 474, 323 A.2d 495 (1974).

insurer will arguably be liable to the insured for the entire deficiency under the rationale of *Crisci* and *Johansen*.

This does not, however, help the first insurer who was willing to settle and who could have escaped further liability by paying $80,000 of the settlement offer, *i.e.*, two-thirds of the total settlement of $120,000. Therefore, since bad faith cannot be asserted against this insurer because it could not have accepted the settlement alone, one can argue that it should have a cause of action against the other insurer for bad faith refusal to settle. This result would appear to be a logical extension of the *Crisci-Johansen* rationale, which is obviously aimed at encouraging insurance settlements and thus discouraging prolonged litigation.[100] If such a cause of action were not allowed, one primary insurer would be at the mercy of the other, even though one carrier is willing to make full indemnification for the risk for which it contracted to provide coverage. The second insurer's failure to pay off its coverage for the risk it contracted to insure should not result in detriment to the insurer who is willing to accept a settlement.

Although granting the insurer acting in good faith a cause of action against the bad faith insurer is certainly an equitable solution to this problem, it could be argued that the uniqueness of a *Partridge* situation demands that stronger sanctions be imposed against this latter carrier. As noted throughout this article, a *Partridge* situation contemplates the concurrence of two or more negligent acts causing a single injury. Consequently, two or more carriers are brought in as primary insurers, each obligated to provide indemnification relating to only *one* of the negligent acts. Thus, in this multiple coverage situation we do not find two or more insurers jointly obligated to provide indemnification for a *single* negligent act. Applying these considerations to the hypothetical situation posed above, it can be argued that tender of its policy limits by the insurer of "risk A" in partial satisfaction of a settlement offer should serve to relieve it from further involvement in the litigation. As a result, the entire burden of defending the action would be placed upon the other primary carrier who refused to disburse the remainder of the settlement. This first insurer should not be required to remain a party to the litigation if it is willing to discharge all of its contractual obligations.[101] In addition, the insured will be protected because the other,

100. This result would also comport with the rule followed by some other jurisdictions that a primary insurer can be liable to the excess insurer for a bad faith refusal to settle. *E.g.*, Am. Fidelity & Cas. Inc. Co. v. All Am. Bus Line, 190 F.2d 234 (10th Cir. 1951); Peter v. Travelers Ins. Co., 375 F. Supp. 1347 (C.D. Cal. 1974); Home Ins. Co. v. Royal Indem. Co., 68 Misc. 2d 737, 327 N.Y.S.2d 745 (1972).

101. Although a primary insurer will normally have the contractual duty to defend the insured, it would seem that this duty should be excused in the case where one pri-

non-settling primary carrier will still be obligated to defend the action, which is what it apparently wishes to do in light of its failure to settle.

CONCLUSION

Partridge represents one more avenue for obtaining the benefits of multiple insurance coverage for an injured plaintiff. The case suggests a manner by which the innovative attorney may tap other resources for his client without resorting to the already strained rules of insurance contract interpretation by asserting the existence of overlapping coverage. Hence, a search for two causative factors producing an injury may well lead to multiple sources of compensation for an injured client. Although this article has attempted to furnish some guidance in determining whether a particular factual setting has the earmarks of *Partridge*, it must be recognized that at least to a small extent, the *Partridge* court relied upon its desire to provide adequate coverage for the insured in reaching its interpretational conclusions. Therefore, future attempts to retrace *Partridge* must necessarily be on an *ad hoc* basis, with the creativity and preparation of the attorney playing a key role.[102]

On the other side of the coin, the duty to defend or settle the insured's case is reduced to the far simpler concern of adequacy of representation

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mary insurer has refused to settle. The refusing insurer will still be contractually obligated to defend the insured in the action, hence there should be no hardship for the insured in that respect. Perhaps the California legislature should study this potential problem and take any appropriate legislative steps.

102. The practitioner who is confronted with a possible *Partridge*-type situation should be aware of cases with factual situations similar to *Partridge*, but with varying results. The following cases found coverage under an automobile policy only: *e.g.*, Wyoming Farm Bureau Mut. Ins. Co. v. State Farm Mut. Auto. Ins. Co., 467 F.2d 990 (10th Cir. 1972); Uniguard Mut. Ins. Co. v. State Farm Mut. Auto. Ins. Co., 466 F.2d 865 (10th Cir. 1972); Fidelity & Cas. Co. of New York v. Lott, 273 F.2d 500 (5th Cir. 1960); Ohio Farmers Ins. Co. v. Landfried, 348 F. Supp. 486 (D.C. Pa. 1972); Allstate Ins. Co. v. Valdez, 190 F. Supp. 893 (E.D. Mich. 1961); Morari v. Atl. Mut. Fire Ins., Co., 105 Ariz. 537, 468 P.2d 564 (1970); Hartford Accident and Indem. Co. v. Civil Serv. Employees Ins. Co., 33 Cal. App. 3d 26, 108 Cal. Rptr. 737 (1973); National Indem. Co. v. Corbo, 248 So. 2d 238 (Fla. 1971); Viani v. Aetna Ins. Co., 95 Ida. 22, 501 P.2d 706 (1972); Cagle v. Playland Amusement Inc., 202 So. 2d 396 (La. 1967); Suburban Serv. Bus Co. v. Nat'l Mut. Cas. Co., 237 Mo. App. 1128, 183 S.W.2d 376 (1944); Westchester Fire Ins. Co. v. Continental Ins. Co., 126 N.J. Super. 29, 312 A.2d 664 (1973); Travelers Ins., Co. v. Aetna Cas. & Sur. Co., 491 S.W.2d 363 (Tenn. 1973). The following cases either did not find coverage under an automobile policy or found liability only under some other nonautomobile policy: *e.g.*, Kraus v. Allstate Ins. Co., 379 F.2d 443 (3rd Cir. 1967); Richland Knox Mut. Ins. Co. v. Kallen, 376 F.2d 360 (6th Cir. 1967); Wirth v. Maryland Cas. Co., 368 F. Supp. 789 (W.D. Ky. 1973); Nat'l Farmers Union Property & Cas. Co. v. Gibbons, 338 F. Supp. 430 (D.C.N.D. 1972); Am. Liberty Ins. Co. v. Soules, 288 Ala. 163, 258 So. 2d 872 (1972); Vanguard Ins. Co. v. Cantrell, 18 Ariz. App. 486, 503 P.2d 962 (1972); Brenner v. Aetna Ins. Co., 8 Ariz. App. 272, 445 P.2d 474 (1968); Azar v. Employers Cas. Co., 178 Colo. 58, 495 P.2d 554 (1972); Mason v. Celina Mut. Ins. Co., 161 Colo. 442, 423 P.2d 24 (1967); United States Fidelity and Guar. Co. v. Western Fire Ins. Co., 450 S.W.2d 491 (Ky. 1970); Speziale v. Kohnke, 194 So. 2d 485 (La. 1967); Nat'l Union Fire Ins. Co. v. Bruecks, 179 Neb. 642, 139 N.W.2d 821 (1966); Raines v. St. Paul Fire & Marine Ins. Co., 9 N.C. App. 27, 175 S.E.2d 299 (1970); Norgaard v. Nodak, Mut. Ins. Co., 201 N.W.2d 871 (N.D. 1972).

since all involved carriers are primary insurers with respect to their individual risks. Hence, the *Partridge* case may offer some relief in an area of protracted litigation concerning the relative rights and liabilities of involved insurance carriers, much to the benefit of both the tortfeasor faced with clear liability and the injured party seeking compensation.

In sum, the *Partridge* decision offers distinct advantages to both the public and the practicing bar in the area of insurance litigation. Although the case cannot presently be said to apply to as many instances of insurance coverage as do the overlapping coverage cases, the advantages inhering in the approach it espouses are well worth any additional effort which may be required in a new case to convince a court of the existence of factual similarities to *Partridge.*