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## Self-Insurance as Insurance in Liability Policy "Other Insurance" Provisions

Rory A. Goode

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# Self-Insurance as Insurance in Liability Policy "Other Insurance" Provisions

Rory A. Goode\*

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### I. Introduction

It is not uncommon for multiple insurers to find themselves liable for the same loss.<sup>1</sup> When two different insurers would each cover a particular loss in the absence of other insurance, one or both insurers may attempt to limit their respective liability through the use of "other insurance" clauses in their policies.<sup>2</sup> In essence, "other insurance" clauses provide that if another insurance policy covers the same loss, the issuer of the second policy has primary or sole responsibility to pay or both insurers are responsible for a stated portion of the loss.<sup>3</sup> The allocation of liability between insurers when more than one insurance policy covers the same risk and one or both insurance contracts contain an "other insurance" provision is a commonly litigated issue.<sup>4</sup> When an "other

1. See Thomas M. Jones & Jon D. Hurwitz, *An Introduction to Insurance Allocation Issues in Multiple-Trigger Cases*, 10 VILL. ENVTL. L.J. 25, 26 (1999) ("With the advent of complex multi-claim litigation, cumulative exposure cases, long-term environmental damage claims and toxic tort litigation, courts have faced the question of how to allocate indemnity payments among multiple insurers and their insureds on an increasingly frequent basis.").

2. See BARRY R. OSTRAGER & THOMAS R. NEWMAN, *HANDBOOK ON INSURANCE COVERAGE DISPUTES* § 11.01, at 470 (7th ed. 1994) (stating that "other insurance" clauses may operate to convert primary policy into excess policy); Mark C. Guthrie, Note, *"Other Insurance" Conflicts: A Common-Sense Proposal*, 36 BAYLOR L. REV. 689, 690 n.4 (1984) (citing academic comment on conflicting "other insurance" clauses).

"Other insurance" clauses occur most frequently in automobile liability policy provisions respecting coverage available when another party is driving the insured's vehicle or when the insured is driving an automobile other than his own. See Marcy Louise Kahn, *The "Other Insurance" Clause*, 19 FORUM 591, 591-93 (1984) (discussing origin and use of "other insurance" clause). However, other insurance clauses are now also found in policies covering aircraft liability, property damage, comprehensive general liability, professional errors and omissions, garage liability, premises, lessors and lessees, mortgagors and mortgagees, life insurance with special death benefits, and burial insurance. *Id.* In every one of these contexts, the purpose of the other insurance clause is to limit or eliminate one insurer's liability when another insurer provides coverage for the same loss. *Id.*

3. See OSTRAGER & NEWMAN, *supra* note 2, § 11.02, at 471-73 (describing excess, escape, and pro rata "other insurance" clauses). The following policy language contains examples of both a pro rata provision, which applies when another insurance policy covers the same automobile, and an excess provision, which applies to any vehicle not owned by the insured driver:

If there is another applicable similar insurance we will pay only our share of the loss. Our share is the proportion that our limit of liability bears to the total of all applicable limits. However, any insurance we provide with respect to a vehicle you do not own shall be excess over any other collectible insurance.

Champlain Cas. Co. v. Agency Rent-A-Car, Inc., 716 A.2d 810, 811 (Vt. 1998).

4. See OSTRAGER & NEWMAN, *supra* note 2, § 11.03, at 474-93 (discussing possible "other insurance" conflicts and citing cases involving those conflicts); Guthrie, *supra* note 2, at 690 n.4 (citing academic comment on conflicting "other insurance" clauses); 44 AM. JUR. 2d *Insurance* §§ 1781-82, 1785, 1791-1792 (1982 & Supp. 1998) (discussing cases involving disputes over which insurer has primary liability when one or both policies contain clause that attempts to limit insurer's liability); A. S. Klein, Annotation, *Uninsured Motorist Insurance:*

insurance" conflict involves two or more traditional insurance policies, the issue is not whether the insured has coverage but which insurer has the primary responsibility to pay.<sup>5</sup>

An interesting and more complex issue arises when one source of coverage is not a traditional insurance policy, but one of the many available forms of self-insurance.<sup>6</sup> The term self-insurance applies to any portion of a risk for which an entity lacks commercial insurance.<sup>7</sup> Forms of self-insurance range from a deductible, the first portion of a loss that an insurance policy does not cover,<sup>8</sup> to risk retention groups whose members contribute money to cover losses suffered by any of their members.<sup>9</sup> Risk retention groups may resemble traditional insurance companies; however, risk retention groups are member-owned.<sup>10</sup>

Jurisdictions differ on how they treat self-insurance for the purposes of "other insurance" clauses.<sup>11</sup> Several courts have relied strictly on the definition of insurance in finding that self-insurance is not "other insurance" for the

*Validity and Construction of "Other Insurance" Provisions*, 28 A.L.R.3d 551 (1969) (discussing applicability of "other insurance" clauses in context of uninsured motorist coverage and citing cases on point).

5. See Douglas R. Richmond, *Issues and Problems in "Other Insurance," Multiple Insurance, and Self-Insurance*, 22 PEPP. L. REV. 1373, 1378 (1995) (stating that "other insurance" clauses are often irrelevant to insureds, but that presence of another insurer on particular risk is of appreciable economic concern to all carriers).

6. See *id.* at 1450-59 (discussing cases in which courts decided whether self-insurance was other insurance for purpose of "other insurance" clause in liability insurance policy). Richmond describes self-insurance mechanisms whereby entities retain all or a portion of their risk. *Id.* at 1448-1450. A self-insurer may forgo purchasing any form of insurance policy, or it may purchase an insurance policy that provides that the insurance company initially pays losses and defends suits and that the self-insurer reimburses the insurance company for these expenses. *Id.*

Self-insurance involves a conscious choice to retain risk and does not refer to a situation in which an insured merely discovers that it lacks insurance for a particular occurrence because of some fortuitous circumstance, such as the insolvency of the insurance company. See Jill B. Berkely, *Recent Developments in Self-Insurance Law*, 33 TORT & INS. L.J. 693, 694 (distinguishing self-insurance from mere unconscious failure to insure).

7. See Berkely, *supra* note 6, at 693-94 (describing self-insurance as "broad and relatively amorphous term" that describes any entity that retains portion of its own risk or lacks insurance altogether).

8. See M. Paige Berry, *Self-Insurance: Is It Right for Your Clients*, 192 N.J. LAW. 8, 8 (Aug. 1998) (describing formation of risk retention groups, one form of self-insurance, as similar to formation of liability insurance companies, except that risk retention groups are owned by their members).

9. See *id.* at 8-12 (describing how certain forms of self-insurance, including risk retention groups, allow members to pool their funds to cover members' potential losses).

10. *Id.* at 8.

11. See *infra* notes 112-14 and accompanying text (citing cases deciding whether self-insurance is "other insurance").

purposes of "other insurance" clauses in liability policies.<sup>12</sup> These courts and some commentators have emphasized that self-insurance is not insurance, but "is actually the antithesis of insurance as that term is commonly used."<sup>13</sup> Although such a viewpoint might apply to some situations, particularly those in which the self-insured simply forgoes insurance in the hope that it will have no losses or only manageable losses,<sup>14</sup> many modern self-insurance schemes have characteristics of traditional insurance policies, such as the spreading of risk between several entities.<sup>15</sup> For this reason, other courts have applied detailed, fact-based analyses to determine whether insurance companies can treat a particular form of self-insurance like a traditional insurance policy.<sup>16</sup> Several courts have expressly considered the public policy and fairness issues surrounding the treatment of self-insurance in deciding the issue.<sup>17</sup>

Determining whether self-insurance is "other insurance" necessarily entails the consideration of whether self-insurance is a form of insurance. When courts determine the nature of self-insurance in the "other insurance" clause context, the decisions may have implications beyond assigning liability between insurance providers and self-insureds. For example, in some jurisdictions, a governmental entity waives sovereign immunity by purchasing insurance.<sup>18</sup> In those jurisdictions, the issue of whether or not self-insurance is "insurance" may determine whether the municipality is immune from a law-

12. See *infra* notes 144-49 and accompanying text (discussing courts' reasons for finding that self-insurance is not "other insurance").

13. See *Universal Underwriters Ins. Co. v. Marriott Homes, Inc.*, 238 So. 2d 730, 732 (Ala. 1970) (determining that "other insurance" provision of workmen's compensation policy did not include self-insurance obtained by insured under compensation statute); see also OSTRAGER & NEWMAN, *supra* note 2, § 13.13, at 603 (asserting that, because insurance is mechanism for transference of risk from one person or organization to another and different entity, self-insurance is not insurance).

14. See LEE R. RUSS & THOMAS F. SEGALLA, 1 COUCH ON INSURANCE § 10:2, at 10-4 to 10-5 (3d ed. 1995) (stating that determination of whether self-insurer is providing insurance depends in part on "whether the entity has made a conscious, calculated decision to estimate its risk and set aside sufficient funds to cover expected losses, or simply and somewhat offhandedly decided to save the cost of purchasing insurance by merely hoping that no losses would occur").

15. See *Berry*, *supra* note 8, at 8-11 (explaining how risk retention groups spread the risk of liability exposure among their members).

16. See *Richmond*, *supra* note 5, at 1454-55 (stating that some self-insurance mechanisms so strongly resemble insurance that courts must treat them as such and that inquiry requires fact-specific analysis).

17. See *infra* Part IV.D (discussing courts' public policy and fairness arguments).

18. See, e.g., GA. CODE ANN. § 33-24-51(b) (1999) ("Whenever a municipal corporation, a county, or any other political subdivision of this state shall purchase . . . insurance . . . its governmental immunity shall be waived to the extent of the amount of insurance so purchased."); N.C. GEN. STAT. § 160A-485 (1994) (authorizing any city to waive its immunity from civil liability in tort by purchasing liability insurance).

suit.<sup>19</sup> The question is also important in determining responsibilities associated with litigation management and settlement.<sup>20</sup> Therefore, prior court decisions on these issues are relevant to determining whether self-insurance is "other insurance."

This Note considers when, if ever, courts should treat self-insurance as other insurance for the purpose of "other insurance" clauses in liability insurance policies. Part II discusses why many governmental and business entities are electing to self-insure all or part of their risks, and it briefly describes some of the more common forms of self-insurance that businesses and governments currently employ.<sup>21</sup> Part III provides background information on the uses of "other insurance" clauses in common liability policies and how these clauses can lead to conflicts between insurers over their respective responsibility for a loss.<sup>22</sup> In Part IV, this Note discusses the various approaches that different courts have taken regarding the issue of whether the phrase "other insurance" includes self-insurance.<sup>23</sup> Part IV also identifies factors that some courts have considered in resolving the issue, including the role of state law.<sup>24</sup> Part V proposes a structured approach to determining whether courts should treat self-insurance as "other insurance" that is based on the relationship between the tortfeasor and the self-insured and that incorporates relevant state law.<sup>25</sup>

19. See *infra* notes 229-36 and accompanying text (citing cases and authorities discussing whether self-insurance waives sovereign immunity). Laws in some jurisdictions explicitly state whether an entity waives sovereign immunity by self-insuring. See *infra* note 236 (listing state statutes that provide that entities waive sovereign immunity by self-insuring and listing statutes of other states that provide that entities do not waive sovereign immunity by self-insuring).

20. See generally Hall F. McKinley III et al., *Issues in the Selection of Counsel and Control of Litigation When the Insured Has a Self-Insured Retention*, 32 TORT & INS. L.J. 769 (1997) (discussing litigation management issues involving self-insured retentions). The authors assert that finding a self-insured entity is an "insurer" in one context necessitates that a self-insured be an "insurer" for other purposes. *Id.* at 775. But cf. RUSS & SEGALLA, *supra* note 14, § 10:2, at 10-4 (stating that whether self-insured party is providing insurance depends in part on purpose of analysis).

For a discussion of the issues surrounding litigation and settlement negotiations when an insurance policy contains a self-insurance feature, see generally William T. Barker, *Combining Insurance and Self Insurance: Issues for Handling Claims*, 61 DEF. COUNS. J. 352 (1994), McKinley et al., *supra*, and Douglas R. Richmond, *Self-Insurance and the Decision to Settle*, 30 TORT & INS. L.J. 987 (1995).

21. See *infra* Part II (discussing why entities choose to self-insure and describing common hybrid forms of self-insurance).

22. See *infra* Part III (explaining use of "other insurance" clauses).

23. See *infra* notes 116-120 and accompanying text (discussing approaches courts have taken to determine whether self-insurance is "other insurance").

24. See *infra* Part IV.C.-C.1 (discussing impact of state financial responsibility laws on determining whether self-insurance is "other insurance").

25. See *infra* Part V (suggesting method of analysis for resolving self-insurance as "other insurance" conflicts).

## II. Self-Insurance

Self-insurance refers to an entity's deliberate risk retention by failure to purchase insurance.<sup>26</sup> However, an entity need not be wholly without coverage to be self-insured.<sup>27</sup> Courts and commentators have inconsistently applied the term to any situation for which an entity lacks commercial insurance, including situations in which the self-insured has retained only a portion of its own risk.<sup>28</sup> For example, a company may determine that its financial interest is to purchase an amount of liability insurance that is less than what may be necessary to cover its entire exposure to liability.<sup>29</sup> The policyholder would be self-insured for the portion of potential risk above its policy limit.<sup>30</sup> Alternatively, a company may choose to retain a portion of the risk before its policy is called into effect.<sup>31</sup>

### A. The Rise of Self-Insurance

The number of entities choosing to self-insure increased significantly in the 1980s because of dramatic increases in insurance premiums.<sup>32</sup> Numerous articles described the phenomenon affecting the insurance industry in the 1980s as an "insurance crisis."<sup>33</sup> During this period, insurance companies made drastic revisions to ordinary commercial insurance policies that reduced

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26. Barker, *supra* note 20, at 352.

27. See BLACK'S LAW DICTIONARY, 1360 (6th ed. 1990) (defining self-insurance as "[t]he practice of setting aside a fund to meet losses instead of insuring against such through insurance" and noting that "[a] common practice of business is to self-insure up to a certain amount, and then to cover any excess with insurance").

28. See Berkely, *supra* note 6, at 693-94 ("Self-insurance is a broad and relatively amorphous term that has been inconsistently used to describe any entity that lacks commercial insurance, either altogether or that otherwise retains ascertainable portions of its own risk.").

29. See OSTRAGER & NEWMAN, *supra* note 2, § 13.13, at 600 (discussing excess liability insurance over self-insured retentions).

30. *Id.*

31. See Lori Tripoli, *The Perils and Premiums of Self-Insurance Practice*, 15 No. 10 OF COUNSEL 1, 10 (May 20, 1998) (describing stop-loss policy whereby company accepts certain level of risk and purchases insurance policy that sits on top of self-insured amount); see also *infra* Part II.C (describing "hybrid" methods of combining self-insurance features with traditional insurance policies).

32. See George L. Priest, *The Current Insurance Crisis and Modern Tort Law*, 96 YALE L.J. 1521, 1526-27 (1987) (describing 1980s insurance crisis); Berry, *supra* note 8, at 8 (stating that self-insurance first appeared in variety of forms in 1980s due to lack of policy availability and escalating cost of insurance).

33. See generally, e.g., Kenneth S. Abraham, *Making Sense of the Liability Insurance Crisis*, 48 OHIO ST. L.J. 399 (1987) (discussing possible causes of insurance crisis and potential solutions); Priest, *supra* note 32 (describing 1980s insurance crisis); Nancy Blodgett, *Premium Hikes Stun Municipalities*, A.B.A. J., July 1986, at 48 (describing effects of insurance crisis on municipalities).

coverage and, at the same time, increased premiums.<sup>34</sup> In addition, insurers began to refuse coverage at any price to certain types of entities with the potential for extremely high tort liability.<sup>35</sup> Although authorities dispute the precise cause of the crisis,<sup>36</sup> declining interest rates that greatly reduced insurance companies' investment profits and the trend in modern tort law of expanding corporate and municipal liability exposure exacerbated the industry's problems.<sup>37</sup>

Insurance buyers during the 1980s insurance crisis turned to self-insurance primarily because insurance was either unavailable or unaffordable.<sup>38</sup> In recent years, however, buyers' reasons for self-insuring have focused on the advantages of self-insurance.<sup>39</sup> In fact, self-insurance appears to be a growing practice despite improvements in the insurance market and insurance companies' efforts to win back clients.<sup>40</sup> Experimenting with self-insurance during the insurance crisis of the 1980s may have convinced management in many corporations and municipalities that they can, at least in some respects, do better on their own.<sup>41</sup> Furthermore, despite the current favorable insurance

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34. See Priest, *supra* note 32, at 1526-27 (describing 1980s insurance crisis).

35. See *id.* at 1521, 1527 (noting that many insurers refused to insure products and services such as intrauterine devices and day care, and also refused to insure entities such as nurse-midwives, municipalities, and daycare centers).

36. See generally *id.* (discussing three possible theories to explain insurance crisis).

37. See *id.* at 1524 ("[T]he characteristic of contemporary tort law most crucial to understanding the current crisis is the judicial compulsion of greater and greater levels of provider third-party insurance for victims. . . . The decline in interest rates . . . has led the most fragile of these markets . . . to collapse."); Tamara D. Coffey, Comment, *Waiving Local Government Immunity in North Carolina: Risk Management Programs Are Insurance*, 27 WAKE FOREST L. REV. 709, 713 (1992) (stating that leading reasons for premium hikes during insurance crisis were slow erosion of governmental immunity and unpredictability of modern tort law); Blodgett, *supra* note 33, at 48 (describing erosion of municipal sovereign immunity and falling interest rates as factors contributing to "insurance panic").

38. See Priest, *supra* note 32, at 1522 (stating that municipalities and commercial entities joined mutual insurance groups because municipalities and commercial entities were unable to obtain market insurance).

39. See Barker, *supra* note 20, at 352-53 (discussing why insurance buyers have turned to alternative risk transfer vehicles).

40. See Tripoli, *supra* note 31, at 14 (describing effect of end of 1980s insurance crisis on self-insurance law); Albert B. Crenshaw, *Liability's Soft Landing: '80s Crunch Gives Way to Lower Insurance Costs as Communities Adapt*, WASH. POST, Oct. 25, 1998, at H01 (discussing why some municipalities choose to remain self-insured despite improved cost and availability of commercial insurance).

41. See Crenshaw, *supra* note 40, at H01 (discussing why some municipalities choose to remain self-insured, despite improved cost and availability of commercial insurance).

Corporations and municipalities currently employ sophisticated methods of self-insuring that resemble traditional insurance policies in certain respects. See Berry, *supra* note 8, at 8 (describing formation of self-insurance cooperatives, or "risk retention groups," as similar to



market, many entities are second-guessing insurance companies' analyses of costs.<sup>42</sup> Although a number of former self-insureds have gone back to insurance companies because of increased competition among insurers and because of lower insurance rates, many of these companies are combining commercial insurance and traditional insurance and are retaining a larger portion of the risk than they did before they became self-insured.<sup>43</sup> In some situations, commercial insurance policies are still not available, particularly for entities or products with especially high liability exposure, and self-insurance is a necessity.<sup>44</sup> Other entities have made a conscious risk management decision not to return to any form of traditional insurance.<sup>45</sup>

### B. *Advantages of Self-Insurance*

A traditional insurance policy is a device to transfer risk.<sup>46</sup> Insurance companies accept many risks knowing that some will involve losses.<sup>47</sup> The insured benefits from spreading its potential losses over many insureds' risks, which allows the insured to purchase coverage at a slight fraction of its potential losses.<sup>48</sup> When an entity or its insurer can reliably predict a certain level of losses, the entity cannot transfer the risk to the insurer without paying the insurer the full cost of the losses, plus a transaction fee.<sup>49</sup> In these situa-

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formation of liability insurance companies); *Self-Insurance and Risk Managers: Annual Survey*, 29 TORT & INS. L.J. 391, 403 (Gary D. Nelson ed., 1994) [hereinafter *Self-Insurance and Risk Managers*] (stating that sophisticated insurance consumers, particularly corporations, are self-insuring and acting more and more like insurers, causing adverse parties to seek to impose equivalent duties on self-insureds). Some self-insurance mechanisms so closely resemble insurance policies that courts have determined that they are not self-insurance, but rather are insurance. See *Eakin v. Indiana Intergovernmental Risk Management Auth.*, 557 N.E.2d 1095, 1102 (Ind. Ct. App. 1990) (determining that Indiana Intergovernmental Risk Management Authority was actually offering insurance through members' contractual relationship, rather than, as townships contended, providing mechanism whereby townships could self-insure).

42. See Tripoli, *supra* note 31, at 11 (explaining why companies choose to self-insure).

43. See *id.* at 14 (stating that self-insured companies that go back to commercial insurance companies because of improved insurance rates generally retain a higher level of risk than they did before becoming self-insured).

44. See *id.* at 11 (stating that some companies are self-insuring because they cannot obtain insurance elsewhere).

45. See *id.* at 14 (quoting insurance practitioner as saying that, once company experiences controlling its own risk and claims handling, it may continue to self-insure despite favorable insurance market); *infra* notes 46-57 (discussing benefits of self-insurance that may not be obtainable through a traditional insurance policy).

46. Barker, *supra* note 20, at 352.

47. *Id.*

48. *Id.* (describing traditional insurance mechanism that allows insurer to accept risk at slight fraction of insurer's potential liability).

49. See *id.* ("Where the size of the prospective insured and the frequency of the losses is such that a certain level of losses is fully predictable, the losses . . . [c]annot be transferred

tions in which the losses are certain, self-insuring may simply be more economical.<sup>50</sup> Large, sophisticated entities with predictable levels or types of losses are particularly likely to make a risk management decision to bear some or all of the losses themselves.<sup>51</sup> Corporations, charitable organizations and municipalities and other forms of governmental entities have benefitted from obtaining self-insurance.<sup>52</sup>

The advantages of self-insurance extend beyond having no premiums or reduced premiums. Self-insureds can elect a form of self-insurance that allows them to maintain control over their own litigation.<sup>53</sup> Once a self-insured controls its own litigation, it can build a reputation for taking a strict approach to settlement and can possibly discourage plaintiffs' lawyers who might otherwise pursue weak cases with the hope of getting the insurance company to settle.<sup>54</sup> A company also may want to present a vigorous defense and risk a large verdict in order to protect its reputation, particularly in a products liability context.<sup>55</sup> Moreover, reputation is also of vital concern to professionals

without paying another entity the full cost of those losses, plus something extra . . .").

50. See *id.* (describing transaction costs associated with transferring risks to insurers).

51. See Richmond, *supra* note 5, at 1447-48 (identifying reasons why insureds choose to self-insure); Tripoli, *supra* note 31, at 11 (quoting insurance lawyer as stating that entities are likely to self-insure portion of their risk that is predictable).

52. See RUSS & SEGALLA, *supra* note 14, § 10:1, at 10-3 ("It is primarily large entities like corporations, charitable institutions, and governmental entities that tend to conclude that self-insurance would be less costly to them than purchasing insurance from a commercial insurer."); Berkely, *supra* note 6, at 693 (listing several advantages of self-insurance to municipalities). Among the benefits to self-insurers are independence from the traditional commercial market and control over risk and litigation management issues. *Id.* However, participation in self-insurance vehicles may constitute a waiver of sovereign immunity. See *id.* (discussing outcome of cases in several jurisdictions in which courts determined whether entities waived sovereign immunity by self-insuring); *infra* note 18 & *supra* note 229-36 (citing cases and authorities discussing whether self-insurance waives sovereign immunity).

53. See Tripoli, *supra* note 31, at 11 (describing company's opportunity to direct and control its own litigation as advantage of self-insurance).

54. See McKinley et al., *supra* note 20, at 779-80 (noting that large corporations that self-insure often repeatedly face same type of litigation involving same product or issue and must factor business considerations, such as setting favorable precedent, into their approach to litigation and settlement); Tripoli, *supra* note 31, at 11 (stating that opportunity to be more "defense oriented" is one advantage of self-insurance).

55. See *Self-Insurance and Risk Managers*, *supra* note 41, at 411 (stating that businesses self-insure in order to protect their reputation). Nelson and Manning explain that insurance companies and self-insurers have different priorities in handling tort claims:

Business consumers in particular have adopted the self-insurance mode because the insurance industry was not capable of protecting the intangible interests such as reputation, product integrity and competitive balance which are integral to the business activities of the sophisticated consumer but not relevant to the economic equations of the liability insurer.

*Id.*

such as physicians who may agree to pay higher premiums under a traditional policy in exchange for the right to require consent before the insurer settles.<sup>56</sup> Because entities that self-insure enjoy these various benefits, the number of entities that self-insure is likely to grow, creating more opportunities for litigating self-insurance issues.<sup>57</sup>

### C. Combining Self-Insurance and Commercial Insurance Policies

Pure self-insurance, or the absence of any form of commercial insurance for a risk, is not practical for most companies.<sup>58</sup> Even if a small or mid-sized company had a substantial likelihood of saving money overall by self-insuring, it would run the risk of a catastrophic loss or a runaway verdict that could bankrupt the company.<sup>59</sup> For this reason, entities that elect to self-insure often mix features of traditional insurance with deliberate risk retention.<sup>60</sup> Traditional commercial insurance policies take one of four forms: primary insurance, excess insurance, umbrella insurance, and reinsurance.<sup>61</sup> When an insurance policy designates that it is "primary insurance," the insurer usually controls defense and settlement and pays all claims up to the policy limit.<sup>62</sup> An insurer may sell an "excess insurance" policy when some form of primary insurance is in effect.<sup>63</sup> The excess insurer has no responsibility to act unless the primary coverage is insufficient to cover the loss.<sup>64</sup> "Umbrella insurance" provides coverage that is excess over a separate primary insurance policy and also provides primary coverage for some risks that the primary policy does not cover.<sup>65</sup> A "reinsurance" policy insures some portion of the initial insurer's

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56. See Barker, *supra* note 20, at 357 ("Some insureds, most notably physicians, fear [the] collateral consequences to reputation or professional licensure of a settlement, and policies issued to such insureds often require the insured's consent before the insurer may settle.").

57. See Tripoli, *supra* note 31, at 14 (describing self-insurance legal practice as growing niche).

58. See McKinley et al., *supra* note 20, at 771 (stating that possibility of catastrophic loss or runaway verdict makes pure self-insurance impractical for most companies).

59. *Id.*

60. See *id.* (stating that advantages of self-insurance are still available through hybrid self-insurance mechanisms to companies that cannot afford pure self-insurance); Barker, *supra* note 20, at 353 (stating that "legal or business obligations may require that insurance be in force as means of assuring solvent source for payment of claims").

61. See Barker, *supra* note 20, at 354 (describing traditional forms of insurance).

62. *Id.*

63. See *id.* (stating that excess insurance coverage assumes that some primary insurance is in force).

64. See *id.* (noting that primary insurer will do all or most claim administration and adjustment with the excess insurer having no responsibility to act unless the primary coverage is insufficient).

65. See *id.* (describing umbrella policies).

exposure, and the reinsurer has little or no control of claims handling.<sup>66</sup> Common hybrid self-insurance mechanisms incorporate some of these traditional insurance mechanisms and include deductibles,<sup>67</sup> self-insured retentions,<sup>68</sup> fronting policies,<sup>69</sup> and retrospectively rated policies.<sup>70</sup>

### 1. Deductibles

A traditional insurance policy frequently incorporates a deductible.<sup>71</sup> The deductible is the amount that the insured must pay, depending on how the policy is written, on each claim, on all claims in the aggregate, or on some defined class of claims.<sup>72</sup> A dispute exists among authorities over whether a deductible is a form of self-insurance.<sup>73</sup> Courts also are inconsistent in their treatment of deductibles.<sup>74</sup> At least one court has determined that a policy

66. See *id.* (describing reinsurance policies).

67. See *infra* notes 73-74 and accompanying text (noting dispute between authorities regarding characterization of deductibles as self-insurance). Compare *State Farm Mut. Auto. Ins. Co. v. Universal Atlas Cement Co.*, 406 So. 2d 1184, 1186 (Fla. Dist. Ct. App. 1981) (referring to party as being self-insured for one million dollar deductible) with *American Nurses Ass'n v. Passaic Gen. Hosp.*, 484 A.2d 670, 673 (N.J. 1984) (noting that, although deductible is frequently referred to as self-insurance, its functional purpose is simply to alter point at which insurance company's obligation will ripen).

68. See *infra* notes 80-83 and accompanying text (discussing respective responsibilities of insurer and insured when insured has self-insured retention).

69. See *infra* notes 84-88 and accompanying text (describing fronting policy, which does not transfer risk from insured to insurer).

70. See *Barker, supra* note 20, at 353-54 (describing forms of self-insurance that incorporate features of traditional insurance); see also *Richmond, supra* note 5, at 1448 (listing true self-insurance, or pure risk retention, self-insured retentions, fronting policies, and retrospective premiums as possible schemes of self-insurance); *infra* notes 91-96 and accompanying text (discussing how calculation of premiums of retrospectively rated policies results in insured retaining some or all of risk of loss).

71. See *Barker, supra* note 20, at 354 (describing forms of self-insurance that incorporate features of traditional insurance).

72. *Id.*

73. Compare *id.* (describing deductible as form of self-insurance hybrid and noting that "[c]ourts frequently treat deductibles and self-insured retentions as interchangeable terms, so descriptions of the policies at issue in decided cases may characterize those policies inaccurately"), and *ALLAN D. WINDT, INSURANCE CLAIMS AND DISPUTES: REPRESENTATION OF INSURANCE COMPANIES AND INSURED* § 11.31, at 348 (3d ed. 1995) (stating that self-insured retentions are, in effect, large deductibles), with *Richmond, supra* note 5, at 1449-49 (listing self-insurance schemes and distinguishing self-insured retention from deductible).

74. Compare *American Nurses Ass'n v. Passaic Gen. Hosp.*, 484 A.2d 670, 673 (N.J. 1984) (noting that, although courts frequently refer to deductible as self-insurance, its functional purpose is simply to alter point at which insurance company's obligation will ripen) with *State Farm Mut. Auto. Ins. Co. v. Universal Atlas Cement Co.*, 406 So. 2d 1184, 1186-87 (Fla. Dist. Ct. App. 1981) (stating that company "is self-insured for the \$1 million deductible").

holder is self-insured for the amount of a deductible only with respect to the insurer issuing the policy containing the deductible.<sup>75</sup>

Several features distinguish deductibles from another category of risk retention – self-insured retentions.<sup>76</sup> First, insurers subtract a deductible from the policy limits, thereby reducing the insurer's indemnity obligation.<sup>77</sup> Second, the insurer is responsible for the amount of the deductible, up to the policy limit, in the case of an insolvent insured.<sup>78</sup> Finally, the insured generally is not responsible for providing its own defense under a policy containing a deductible.<sup>79</sup>

## 2. Self-Insured Retentions

An entity that purchases an insurance policy with a self-insured retention agrees to pay all claims up to a certain amount before the insurance policy becomes available.<sup>80</sup> The full policy limits are available once the insured pays the self-insured retention.<sup>81</sup> Self-insured retention arrangements also differ from deductibles in that the insurer is generally liable only for the portion of the loss that exceeds the self-insured retention if the insured become insolvent.<sup>82</sup> Under policies containing a self-insured retention, the insured assumes

75. See *Pacific Power & Light Co. v. Transport Indem. Co.*, 460 F.2d 959, 961-62 (9th Cir. 1972) (holding that when two policies covered accident and when both policies contained "other insurance" clauses and one policy contained deductible feature, both companies must pay prorated portion of loss, with deductible resolved between insured and insurer under policy having such feature). In *Pacific Power*, two insurers issued policies to different entities that covered the same accident. *Id.* at 960. Both policies contained "other insurance" clauses, but only one policy contained a deductible. *Id.* at 961-62. One insurer argued that because its "other insurance" clause also contained the phrase "or self-insurance," its policy should be secondary to the self-insurance that was in the form of a deductible contained in the other insurer's policy. *Id.* at 961. The *Pacific Power* court decided that the policy holder was not a self-insurer with respect to the insurance company that had issued a separate policy to another entity. *Id.* Instead, the court determined that the "other insurance" clauses were mutually repugnant and the insurers had to share the loss pro rata, and only the insurer who contracted for the deductible was able to benefit from it. *Id.* at 962.

76. See Richmond, *supra* note 5, at 1449 (explaining that deductibles and self-insured retentions are superficially analogous, but differ significantly).

77. *Id.*

78. *Id.*

79. See WINDT, *supra* note 73, § 11.31, at 348 (describing difference between self-insured retention and deductible).

80. See Richmond, *supra* note 5, at 1449 (describing forms of self-insurance, including self-insured retention whereby entity purchases liability insurance coverage that is less than entity's entire exposure). When a self-insured retention is under an excess or umbrella policy, it is commonly referred to as the "retained limit." *Id.*

81. *Id.*

82. *Id.*

the obligation of providing itself a defense until the insured exhausts the retention.<sup>83</sup>

### 3. Fronting Policies

The self-insurance form that most closely resembles pure self-insurance, or total risk retention, is the fronting policy.<sup>84</sup> Fronting policies have no transfer of risk from the insured to the insurer associated with them.<sup>85</sup> The insurer functions purely as a surety for the insured's ability to pay claims, and the benefit extends only to third parties in situations in which the policy holder is unable to pay a liability owed to the third party.<sup>86</sup> The insured administers and adjusts all claims and agrees to reimburse the insurer for all payments that the insurer must make.<sup>87</sup> A company that prefers to retain its own risk may purchase a fronting policy to meet governmental insurance requirements.<sup>88</sup>

### 4. Retrospectively Rated Policies

An insured may agree to have an insurer determine its insurance policy rates retrospectively based on the insured's claim experience.<sup>89</sup> This form of self-insurance is common in private workers' compensation insurance policies.<sup>90</sup> Under a retrospectively rated policy, the insurer annually determines the premium cost based on the insured's losses in the previous year.<sup>91</sup> At the end of the year, if actual losses are less than the estimated losses, the insured

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83. WINDT, *supra* note 73, § 11.31, at 348. An additional difference between a self-insured retention and a deductible is that when a liability policy includes a self-insured retention, the insured generally adjusts claims, whereas with a deductible, the insurer adjusts claims. *See* Richmond, *supra* note 5, at 1449 (describing difference between deductible and self-insured retention). Some entities favor self-insured retentions because they generally allow the insured to maintain control over its own litigation, at least for claims up to the policy limits. *Id.*

84. *See* McKinley et al., *supra* note 20, at 770 (distinguishing "true self-insurance" from forms of self-insurance in which self-insurer accepts only portion of risk).

85. *See* Barker, *supra* note 20, at 353 (stating that holder of fronting policy agrees to reimburse insurer for all payments that insurer must make on holder's behalf).

86. *See id.* (stating that insurer functions as surety for fronting policy holder).

87. *Id.*

88. *See* Playtex FP, Inc. v. Columbia Cas. Co., 609 A.2d 1087, 1091 (Del. Super. Ct. 1991) ("Large companies use fronting policies to comply with statutory filing requirements, and for business purposes such as leasing property or equipment and satisfying vendors' requirements for insurance coverage.").

89. *See* Barker, *supra* note 20, at 353 (discussing retrospectively rated insurance policies).

90. *See* Richmond, *supra* note 5, at 1450 ("Retrospective premiums are commonly encountered in workers' compensation insurance policies.").

91. *See id.* (discussing retrospectively rated insurance policies).

receives a partial rebate.<sup>92</sup> If the actual losses are greater than the estimated losses, the insured pays an additional premium.<sup>93</sup> Under a retrospective premium arrangement, an insurer may structure its rates so that it is fully reimbursed for all losses and expenses and bears no risk other than the continued solvency of the insured.<sup>94</sup> Alternatively, the insured may contract for some form of risk sharing.<sup>95</sup> A common retrospective premium arrangement entitles the insurer to reimbursement for a percentage of all losses and to an additional sum to cover defense or claim administration costs.<sup>96</sup>

### III. "Other Insurance" Clauses

Frequently, more than one insurance policy may cover the same loss.<sup>97</sup> The insured may have intended to purchase overlapping coverage or may have done so inadvertently.<sup>98</sup> When more than one policy covers a particular risk of loss, one of the policies usually provides primary coverage with the other providing secondary or excess coverage.<sup>99</sup> These designations may be explicit either in the scheme of insurance that the insured established or in the policies themselves.<sup>100</sup> In other situations, a court may determine the designation of coverage after a dispute between the carriers over which policy is the primary policy or whether the insurance carriers are co-insurers and therefore share the responsibility to pay.<sup>101</sup>

"Other insurance" clauses usually take one of the following four forms: (1) a "pro-rata" clause, (2) an "excess" clause, (3) an "escape" clause, or (4) a hybrid "excess escape" clause.<sup>102</sup> Pro-rata clauses provide for the apportion-

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92. *Id.*

93. *Id.*

94. *See* Barker, *supra* note 20, at 353 (stating that one form of retrospectively rated insurance policy combines claim administration agreement with fronting policy and leaves insurer with no risk except continued solvency of insured).

95. *See id.* at 353-54 (stating that retrospectively rated insurance policy may involve self-insurance up to point and traditional insurance for larger losses or involve risk sharing on some types of claims).

96. *See* Richmond, *supra* note 1247, at 1450 ("The retrospective premium is a percentage of the losses, often coupled with some portion of defense costs or a charge for claims administration.").

97. *See* Kahn, *supra* note 1246, at 591-92 (describing purpose and operation of "other insurance" clause as limiting insurer's liability when another policy covers same loss).

98. *Id.* at 592.

99. *Id.* at 592-93.

100. *Id.* at 593.

101. *Id.*

102. *See* Richmond, *supra* note 5, at 1382-87 (describing four forms of other insurance clauses).

ing of the loss between insurers and usually state that the insurer will pay its share of the loss in proportion either to the insurers' respective liability limits or to the amount that each insurer would pay if it alone insured the loss.<sup>103</sup> Through the use of an excess clause, an otherwise primary insurer attempts to make itself only secondarily liable if "other valid and collectible insurance" is available.<sup>104</sup> An excess clause provides that the insurer is liable only for the amount of loss that exceeds the other policy's limits.<sup>105</sup> The excess insurer will apply the full excess policy amount to the amount of loss remaining once the loss exceeds the limits of the other policy.<sup>106</sup> An escape clause provides that the insurer is not liable if any other insurance policy covers the same loss.<sup>107</sup> Excess escape clauses, commonly employed in uninsured motorist coverage, provide that the insurer is not liable when the limits of the other insurance equal or exceed its own policy limit. Additionally, when its policy limit exceeds the other insurance limit, the insurer is liable only for the difference between its policy limit and that of the other insurance.<sup>108</sup>

When two or more policies that insure the same risk each contain some form of "other insurance" clause, the policies may conflict. For example, one policy may contain an excess clause and another a pro-rata provision. Under these circumstances, jurisdictions have developed various methods to determine which party has the primary liability for the claim.<sup>109</sup>

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103. See *id.* at 1382-85 (providing example of standard pro rata clause that provides for equal contribution from each insurer or for payment in proportion to each insurer's policy limit).

104. See *id.* at 1385 (noting that some courts disfavor excess clauses as unfairly favoring insurers that use them).

105. See *id.* (discussing operation of excess clause).

106. *Id.*

107. See *id.* ("An excess 'other insurance' clause provides that the insurer's liability is limited to the amount of the loss exceeding all other valid and collectible insurance, up to the limits of the policy.").

108. See *id.* (providing example of excess escape clause used in uninsured motorist coverage policy). With certain exceptions, courts generally enforce "other insurance" clauses, although courts disfavor escape clauses. See also *Carolina Cas. Ins. Co. v. Insurance Co. of North Amer.*, 595 F.2d 128, 138 (3d Cir. 1979) (stating that when case concerns responsibility as between insurance carriers, and not policy of protecting public, court should consider express terms of parties' contracts (citing *Allstate Ins. Co. v. Liberty Mut. Ins. Co.*, 368 F.2d 121, 125 (3d Cir. 1976))); *Richmond*, *supra* note 5, at 1380, 1387 (stating that courts frequently view escape clauses as contrary to public policy and describing certain circumstances in which law may circumvent or supersede "other insurance" clauses).

109. See *Guthrie*, *supra* note 2, at 691-701 (describing courts' treatment of "other insurance" conflicts). *Guthrie* divides judicial treatment of "other insurance" conflicts into three distinct approaches. *Id.* Initially, some courts have attempted to resolve these conflicts by applying certain criteria to identify the "primary" insurer. *Id.* at 691-93. The second generation of resolution methods, adopted by a majority of jurisdictions, attempts to reconcile the language of both clauses. *Id.* at 693-98. The third method, which a growing minority of courts employ,



#### IV. Self-Insurance as "Other Insurance"

Insurance policies are contracts, and the same principles that are applicable to contracts in general govern the interpretation of insurance contracts.<sup>110</sup> Before a court will limit an insurer's liability under the "other insurance" provision in its insurance policy, the court must determine whether "other insurance" is available. "Other insurance" refers to the existence of another insurer that insures the same risk, for the benefit of the same entity, during the same period of time.<sup>111</sup>

A majority of the courts that have considered the issue have held that when an entity chooses to retain the risk of a particular loss rather than obtain a traditional insurance policy, self-insurance is not insurance for the purposes of "other-insurance" clauses in liability policies.<sup>112</sup> A substantial minority of

views the clauses as mutually repugnant, and prorates liability. *Id.* at 698-701. The Supreme Court of Oregon employed this third method in *Lamb-Weston, Inc. v. Oregon Auto. Ins. Co.*, 341 P.2d 110 (Or. 1959), and courts and commentators commonly refer to it as the "Lamb-Weston Rule." Guthrie, *supra* note 1246, at 698-99.

110. See 7 WILLISTON ON CONTRACTS § 900, at 28 (Walter H.E. Jaeger ed., 3d ed. 1998 Cum. Supp.) ("Unless contrary to statute or public policy, a contract of insurance will be enforced according to its terms."). *But cf.* James M. Fischer, *Why Are Insurance Contracts Subject to Special Rules of Interpretation?: Text Versus Context*, 24 ARIZ. ST. L.J. 995, 1003 (1992) (stating that rules of insurance contract construction have pro-insured bias that distinguishes them from general rules of contract construction).

111. See Paul R. Koepff, "Other Insurance" Clauses, in 13TH ANNUAL INSURANCE, EXCESS, AND REINSURANCE COVERAGE DISPUTES, at 249, 251 (Barry R. Ostrager & Thomas R. Newman eds., 1996) (noting that these situations become significant issues only when there is more than one insurer for the same accident); Richmond, *supra* note 5, at 1376 (explaining what constitutes "other insurance").

112. See *Wake County Hosp. Sys., Inc. v. National Cas. Co.*, 804 F. Supp. 768, 777 (E.D.N.C. 1992) (holding that hospital's self-insured retention did not constitute "other valid and collectible insurance" within meaning of "other insurance" clause of nurse's policy); *Universal Underwriters Ins. Co. v. Marriott Homes, Inc.*, 238 So. 2d 730, 732 (Ala. 1970) (determining that "other insurance" provision of workmen's compensation policy did not include self-insurance obtained by insured under compensation statute); *State Farm Mut. Auto. Ins. Co. v. Universal Atlas Cement Co.*, 406 So. 2d 1184, 1186-87 (Fla. Dist. Ct. App. 1981) (stating that self-insurance, even when someone else administers it, does not fall within definition of insurance and, therefore, is not "other collectible insurance" within meaning of automobile policy); *Idaho v. Continental Cas. Co.*, 879 P.2d 1111, 1116 (Idaho 1994) (stating that, because self-insurance does not involve transfer of risk of loss, but retention of risk, it is not insurance and does not trigger "other insurance" clause in insurance policy); *American Family Mut. Ins. Co. v. Missouri Power & Light Co.*, 517 S.W.2d 110, 114 (Mo. 1974) (holding that automobile owner's statutory obligations as self-insurer did not constitute other valid and collectible insurance within meaning of liability policy issued to employee driver); *American Nurses Ass'n v. Passaic Gen. Hosp.*, 484 A.2d 670, 673-74 (N.J. 1984) (ruling that nurse's own insurance provider, and not self-insured hospital, was responsible for first \$100,000 of settlement claim against nurse, when hospital held insurance policy covering its employees that included \$100,000 annual self-insured sum and nurse's policy provided that it was excess over other

courts have held to the contrary.<sup>113</sup> Moreover, depending on the facts of the

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valid and collectible insurance); *Physicians Ins. Co. v. Grandview Hosp. & Med. Ctr.*, 542 N.E.2d 706, 707 (Ohio Ct. App. 1988) (determining that self-insured hospital's contract to provide professional liability coverage for its residents was not "other insurance" within meaning of residents' professional liability policy); *United Nat. Ins. Co. v. Philadelphia Gas Works*, 289 A.2d 179, 181 (Pa. Super. Ct. 1972) (determining that certificate of self-insurance issued pursuant to Pennsylvania Motor Vehicle Code was not insurance policy); *Home Indem. Co. v. Humble Oil & Ref. Co.*, 314 S.W.2d 861, 864 (Tex. Civ. App. 1958) (determining that certificate of self-insurance filed by owner of motor vehicle did not constitute "other insurance" within excess coverage provisions of driver's liability policy).

113. See *U. S. Steel Corp. v. Transport Indem. Co.*, 50 Cal. Rptr. 576, 585 (Cal. Ct. App. 1966) (deciding that when corporation carried policy of \$1,100,000 and was self-insured for first \$100,000, self-insurance triggered excess insurance clause of shipper's insurance policy and corporation was responsible for first \$100,000); *United States Gypsum Co. v. Admiral Ins. Co.*, 643 N.E.2d 1226, 1261-62 (Ill. App. Ct. 1994) (affirming trial court's ruling that insured must exhaust all available primary coverage, including limits of fronting policy under which insured is, in effect, self-insured, before proceeding against excess carrier when that carrier's policy contains "other insurance" clause); *White v. Howard*, 573 A.2d 513, 515 (N.J. Super. Ct. App. Div. 1990) (stating that car rental agency's decision to act as self-insurer and secure applicable New Jersey certificate was functional equivalent of it writing separate insurance policy covering itself); *Fleming v. Parsons*, 206 N.E.2d 46, 47 (Ohio Ct. App. 1965) (finding contractual financial responsibility bond to be insurance and within meaning of "other insurance" as used in standard policies); *Southern Home Ins. Co. v. Burdette's Leasing Serv., Inc.*, 234 S.E.2d 870, 872 (S.C. 1977) (stating that, because self-insurer qualified under statute must provide same protection that statutory liability policy provides, self-insurance constitutes "other valid and collectible insurance" within meaning of policy); *Hartford Cas. Ins. Co. v. Budget Rent-A-Car Sys., Inc.*, 796 S.W.2d 763, 769 (Tex. App. 1990) (holding that liability coverage provided by licensed self-insured car rental agency was "other valid and collectible" insurance within meaning of excess insurance clause of renter's liability policy); *Chambers v. Agency Rent-A-Car, Inc.*, 878 P.2d 1164, 1169 (Utah Ct. App. 1994) (stating that car rental agency's choice to self-insure its vehicle fleet did not relieve it of primary responsibility for claims arising from accidents involving permissive use by others of its cars); *Champlain Cas. Co. v. Agency Rent-A-Car, Inc.*, 716 A.2d 810, 814 (Vt. 1998) (concluding that self-insured rental car agency provided to lessees insurance which constituted "other collectible insurance" for purposes of automobile liability policy); *Hillegass v. Landwehr*, 499 N.W.2d 652, 655-56 (Wis. 1993) (concluding that corporation's self-insurance of its automobiles constituted "other collectible insurance" as provided in injured motorist's own automobile insurance policy).

A situation similar to the "other insurance" problem arises when an insurer that state law would normally consider primary, such as the insurer who is closest to the risk, provides coverage in the form of self-insurance. See generally *State Farm Mut. Auto. Ins. Co. v. Budget Rent-A-Car Sys., Inc.*, 359 N.W.2d 673 (Minn. Ct. App. 1984) (determining that, when car rental agency held insurance policy and was self-insured for first \$100,000 of exposure, agency's responsibilities were same as any other insurer). These kinds of cases suggest that the same principles would apply to determining whether self-insurance is "other insurance." Compare *id.* (treating self-insured company like ordinary insurer) with *Aetna Cas. & Sur. Co. v. World Wide Rent-A-Car, Inc.*, 284 N.Y.S.2d 807, 809-10 (App. Div. 1967) (refusing to equate certificate of self-insurance with insurance contract or policy and ruling insurer that issued policy covering leased automobile provided only coverage).

case, some jurisdictions accord different treatment to different forms of self-insurance,<sup>114</sup> and the issue remains undecided in other jurisdictions.<sup>115</sup>

Courts have considered various factors in determining whether "other insurance" clauses include self-insurance. Some courts have framed the question as whether the relationship between the self-insurer and the tortfeasor resembles insurance.<sup>116</sup> Many other courts base their decisions on whether self-insurance fits an ordinary definition of "insurance,"<sup>117</sup> or whether a lay person's understanding of insurance includes self-insurance.<sup>118</sup> Under some circumstances, state financial responsibility laws affect courts' analysis of what the term "insurance" encompasses.<sup>119</sup> Public policy considerations also affect some courts' determinations.<sup>120</sup>

### A. Relationship of the Parties

One way to approach the "other insurance" question is to determine whether the relationship between the self-insurer and the tortfeasor closely resembles insurance.<sup>121</sup> Posing the question in this manner makes it possible to reconcile some cases that seem to be contradictory when the question is posed simply as whether self-insurance is "other insurance."<sup>122</sup> Two Texas

114. Compare *American Nurses Ass'n v. Passaic Gen. Hosp.*, 484 A.2d 670, 673-74 (N.J. 1984) (holding that nurse's own insurance provider, and not self-insured hospital, was responsible for first \$100,000 of settlement claim against nurse, when hospital held insurance policy covering its employees that included \$100,000 annual self-insured sum and nurse's policy provided that it was excess over other valid and collectible insurance) with *White v. Howard*, 573 A.2d 513, 515 (N.J. Super. Ct. App. Div. 1990) (stating that car rental agency's decision to act as self-insurer and secure applicable New Jersey certificate was functional equivalent of its writing separate insurance policy covering itself).

115. See *Richmond*, *supra* note 5, at 1454-55 (stating that too few courts have decided whether self-insurance constitutes "other insurance" to safely declare majority position).

116. See *infra* Part IV.A (discussing cases that have considered relationship between tortfeasor and self-insurer).

117. See *infra* notes 144-49 and accompanying text (noting that courts have relied on definition of insurance to conclude that self-insurance is not insurance).

118. See *infra* note 149 and accompanying text (citing cases in which courts determined that self-insurance is not included in lay definition of insurance).

119. See *infra* Part IV.C (discussing role of state financial responsibility law in analyzing self-insurance).

120. See *infra* Part IV.D (discussing courts' public policy and fairness arguments regarding treating self-insurance as "other insurance").

121. *Champlain Cas. Co. v. Agency Rent-A-Car, Inc.*, 716 A.2d 810, 814 (Vt. 1998) (concluding that car rental agency's rental contract and self-insurance obligation under state financial responsibility and compulsory insurance laws were "other collectible insurance" as provided in lessor's own automobile insurance policy).

122. See *id.* at 813 (stating that, viewed from perspective of relationship between self-insured and tortfeasor, there is far less disagreement in cases than superficial perusal would suggest).

appellate court decisions, *Home Indemnity Co. v. Humble Oil & Refining Co.*<sup>123</sup> and *Hartford Casualty Insurance Co. v. Budget-Rent-A-Car Systems, Inc.*,<sup>124</sup> illustrate this point.

In *Home Indemnity*, an automobile liability insurer sought to charge a self-insured oil company with the sole financial responsibility to pay a claim that arose from an accident caused by an employee of the oil company.<sup>125</sup> The insurance company's potential responsibility came from the driver's own liability policy that covered his operation of any unowned automobile.<sup>126</sup> The insurance company argued that its coverage was excess to the self-insurance that the oil company provided because of an excess coverage provision in the driver's liability policy.<sup>127</sup> The provision stated that the insurer was liable only for damages that were not covered by "other valid and collectible insurance."<sup>128</sup>

As a prerequisite for qualifying as a self-insurer under Texas law, the oil company had agreed to pay "the same judgments and in the same amounts that the insurer would be obligated to pay under an owner's motor vehicle liability policy if it had issued such policy to said self-insurer."<sup>129</sup> The Texas appellate court differentiated between a responsibility to pay the same amounts as a standard liability policy and the responsibility to assume all the obligations

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123. 314 S.W.2d 861 (Tex. Civ. App. 1958).

124. 796 S.W.2d 763 (Tex. App. 1990).

125. See *Home Indem. Co. v. Humble Oil & Ref. Co.*, 314 S.W.2d 861, 865 (Tex. Civ. App. 1958) (determining that certificate of self-insurance that owner of motor vehicle filed did not constitute "other insurance" within excess coverage provisions of driver's liability policy). The question in *Home Indemnity* was whether a certificate of self-insurance that self-insurer filed under the Texas Motor Vehicle Safety-Responsibility Law constituted "other valid and collectible insurance" within the meaning of the provisions of a liability insurance policy that an insurance company issued. *Id.* at 864. An automobile liability insurer sued the self-insured party, seeking a judgment that the self-insured party had sole responsibility for the settlement of a claim against the driver of the self-insured's motor vehicle. *Id.* at 862. The driver carried a personal liability insurance policy issued by the automobile liability insurer. *Id.* at 862-63. The court looked to the legislative intent of the Motor Vehicle Safety-Responsibility Law, which the court concluded to be protecting the public from judgment proof negligent drivers. *Id.* at 865. According to the court, the certificate of self-insurance was no more than a contract with the State of Texas to compensate an injured party for negligent acts of the driver, if the law would require an insurance company to do so had it issued a liability insurance policy to the self-insurer. *Id.* The court noted that the certificate operated only for the benefit of the state and the injured party and was not meant to benefit the negligent driver. *Id.* at 866. The court distinguished the self-insurance certificate from a liability insurance policy, which includes the obligation to indemnify the negligent driver against loss. *Id.* at 865. The insurance company had contracted with the tortfeasor for precisely this type of indemnification and therefore, the court concluded, it had primary responsibility for indemnifying the negligent driver. *Id.* at 866.

126. *Id.* at 863.

127. *Id.*

128. *Id.*

129. *Id.* at 862-63, 864.

that exist under that policy.<sup>130</sup> The critical relationship was between the self-insurer and the tortfeasor.<sup>131</sup> The court stated that an insurer has a responsibility to indemnify the insured against loss, even in the case of the insured's own negligence.<sup>132</sup> In contrast, the self-insurer's liability was secondary to that of the driver.<sup>133</sup> Under the relevant Texas statute, according to the court, a self-insured car owner contracts with the State of Texas to compensate an injured party for negligent acts of a judgment-proof driver.<sup>134</sup> The court in *Home Indemnity* found that the relationship between the self-insured employer and its employee was not one of insurance because the self-insurer was not obligated to indemnify the negligent employee because it could recover from the employee any damages it paid the injured party.<sup>135</sup> Unlike a true insurance policy, the self-insurer's obligation did not operate for the benefit of the employee.<sup>136</sup>

The second Texas case, *Hartford Casualty*, involved a personal injury suit by a third party against the driver of a rented automobile.<sup>137</sup> The driver

130. *Id.* at 865-66.

131. *See id.* at 866 ("The guarantee by a self-insurer to pay any judgment that an insurance carrier would have to pay can operate only for the benefit of the State of Texas and the injured party and cannot . . . be construed to operate for the benefit of the negligent driver . . . and deprive the self-insurer of his right of judgment over him.")

132. *See id.* at 865 (describing obligation to indemnify insured against loss from insured's own negligence as obligation of standard liability policy).

133. *See id.* (noting that had injured party sued driver, driver's automobile liability insurance company, and driver's self-insured employer, employer could have pleaded against driver and could have recovered judgment against driver for such sum as was decreed against employer).

134. *See id.* at 865 ("[T]he car owner has merely contracted with the State of Texas that *he too* agrees to compensate an injured party for negligent acts of the driver, if an insurance company would be required to do so, has it issued a policy of liability insurance to the self-insurer.")

135. *See id.* (describing obligation to indemnify insured against loss, including loss from insured's own negligence, as most important obligation of standard liability policy); *cf.* *Champlain Cas. Co. v. Agency Rent-A-Car, Inc.*, 716 A.2d 810, 813-14 (Vt. 1998) (determining that self-insured lessor provided "insurance" to lessee because rental contract provided that lessor would indemnify lessee and operated for lessee's benefit).

136. *See Home Indem. Co. v. Humble Oil & Ref. Co.*, 314 S.W.2d 861, 865 (Tex. Civ. App. 1958) (stating that employee could not sustain a suit against his self-insured employer for recoupment of damages paid by employee in satisfaction of judgment rendered against him as a result of his primary negligence).

137. *See Hartford Cas. Ins. Co. v. Budget Rent-A-Car Sys., Inc.*, 796 S.W.2d 763, 769 (Tex. App. 1990) (holding that liability coverage provided by licensed self-insured car rental agency was "other valid and collectible" insurance within meaning of excess insurance clause of renter's liability policy). The court in *Hartford Casualty* decided whether an automobile rental agency's liability coverage constituted other valid and collectible insurance under the

held a comprehensive automobile liability policy that covered the use of other cars, but the policy contained a clause providing that coverage was excess over any other policy.<sup>138</sup> The car rental agency was a licensed self-insurer.<sup>139</sup> The court in *Hartford Casualty* determined that the principles announced in *Home Indemnity* were applicable in determining which insurer had primary liability.<sup>140</sup> The *Hartford Casualty* court, however, reached a different result based on the provisions of the car rental contract at issue.<sup>141</sup> The car rental contract expressly stated that the self-insured rental company would provide automobile liability coverage under the standard provisions of the basic Texas automobile liability insurance policy and that the insurance so provided would apply before any other insurance available to the lessee.<sup>142</sup> Because the car rental agency provided that the tortfeasor could collect the insurance, the *Hartford Casualty* court decided that the rental agency had provided "other valid and collectible insurance."<sup>143</sup>

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excess insurance clause of the lessee's comprehensive automobile insurance policy, thereby making the self-insured rental agency responsible for providing primary liability coverage. *Id.* at 769. The rental agency and lessee entered into a rental agreement wherein the agency agreed to provide automobile liability coverage in accordance with the standard provisions of a basic automobile liability insurance policy for liability that the lessor incurred arising from the operation of the rented vehicle. *Id.* at 765. The agreement also stated that the liability insurance described therein would apply before any other insurance available to the lessor. *Id.* In contrast, the lessor's own liability insurance contained a clause stating that coverage provided by it would be excess over any other valid and collectible insurance with respect to a hired automobile. *Id.* at 765-66. According to the court, under the principles delineated in *Home Indemnity*, other valid and collectible insurance must be collectible insurance inuring to the benefit of the insured driver. *Id.* at 768. The court distinguished *Home Indemnity*, in which the only pertinent contract was an agreement between Humble and the State of Texas, based on the existence of a contract between the self-insurer and the lessor in the present facts. *Id.* Central to the opinion was the fact that the rental agency had agreed to indemnify the lessor and the agreement was for the benefit of the lessor. *Id.* The court noted its obligation to enforce the written intentions of the parties, as expressed in the rental agreements, and it held that the rental agency was responsible for providing primary coverage. *Id.* at 769.

138. *Id.* at 765-66.

139. *Id.* at 766.

140. *See id.* at 767 (discussing court's determination in *Home Indemnity* that self-insurer's guarantee to pay any judgments that insurance carrier would pay operates only for benefit of State and injured party).

141. *See id.* at 768 (distinguishing *Home Indemnity* from *Hartford Casualty* based on existence of contract for liability coverage between self-insurer and negligent driver in *Hartford Casualty*).

142. *Id.* at 766.

143. *See id.* at 769 (noting that contract between driver and self-insured rental car agency provided that rental car agency would provide liability coverage in accordance with standard provisions of basic automobile liability insurance policy).

### B. Defining Insurance

Many of the courts that have considered whether self-insurance is "other insurance" have attempted to classify self-insurance either as a form of insurance or as the "antithesis of insurance."<sup>144</sup> Several courts have relied on a narrow definition of insurance in holding that self-insurance is not "other insurance" for the purpose of determining primary liability.<sup>145</sup> These courts have based their holdings on the absence of a "contract whereby one party indemnified another against loss from certain specified contingencies or perils."<sup>146</sup> Under this and similar definitions, courts exclude common self-insurance schemes from classification as insurance because the self-insurance mechanisms lack an insurance contract<sup>147</sup> or a transfer of risk from one party to another.<sup>148</sup> Courts also have considered what a lay person would consider constitutes "insurance" and have determined that the ordinary understanding of insurance does not include self-insurance.<sup>149</sup>

In *American Nurses Association v. Passaic General Hospital*,<sup>150</sup> the Supreme Court of New Jersey focused on contract principles to interpret the

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144. *Champlain Cas. Co. v. Agency Rent-A-Car, Inc.*, 716 A.2d 810, 812-13 (Vt. 1998) (noting disagreement between jurisdictions on issue of whether self-insurance is "other collectible insurance" and stating that basing decision on definition of insurance is not helpful when self-insurer has some obligation to pay for consequences of another's negligence).

145. *See Universal Underwriters Ins. Co. v. Marriott Homes, Inc.*, 238 So. 2d 730, 732 (Ala. 1970) (stating that self-insurance "is actually the antithesis of insurance as that term is commonly used"); *Southeast Title & Ins. Co. v. Collins*, 226 So. 2d 247, 248 (Fla. Dist. Ct. App. 1969) (stating that certificate of financial responsibility issued under Florida Financial Responsibility Law was not "a contract, whereby, for an adequate consideration, one party undertakes to indemnify another" and was therefore not "other insurance" for purpose of excess clause in automobile liability insurance policy).

146. *State Farm Mut. Auto. Ins. Co. v. Universal Atlas Cement Co.*, 406 So. 2d 1184, 1186 (Fla. Dist. Ct. App. 1982).

147. *See American Nurses Ass'n v. Passaic Gen. Hosp.*, 484 A.2d 670, 674 (N.J. 1984) (distinguishing insurance contract from other risk-shifting agreements); *Physicians Ins. Co. v. Grandview Hosp. & Med. Ctr.*, 542 N.E.2d 706, 707 (Ohio Ct. App. 1988) (same).

148. *See Idaho v. Continental Cas. Co.*, 879 P.2d 1111, 1116 (Idaho 1994) ("Because 'self-insurance' does not involve a transfer of the risk of loss, but a retention of that risk, it is not insurance.").

149. *See Passaic General*, 484 A.2d at 673 (identifying key question to be what was objectively reasonable expectation of holder of policy with "other insurance" provision and determining that lay persons would consider "insurance" to refer to another insurance policy comparable to one insurance company issued to them); *Physicians Ins.*, 542 N.E.2d at 707 (defining insurance contract). According to the *Physicians Ins.* court, "[a]s a matter of common understanding, usage, and legal definition, an insurance contract denotes a policy issued by an authorized and licensed insurance company whose primary business is to assume specific risks of loss of members of the public at large in consideration of the payment of a premium." *Id.*

150. 484 A.2d 670 (N.J. 1984).

"other insurance" provision of a nurse's professional liability policy.<sup>151</sup> *Passaic General* involved a suit by the National Fire Insurance Company (National) seeking a declaratory judgment that the policy it issued to a nurse covering her professional liability was secondary to the obligation of the hospital that employed the nurse to indemnify her.<sup>152</sup> National's policy provided that it was excess over any existing "valid and collectible insurance."<sup>153</sup> The hospital held a liability policy that covered the hospital and its employees and included a \$100,000 deductible.<sup>154</sup> The court framed the issue as whether the nurse could reasonably expect the "other insurance" provision to include the obligation of the hospital to pay a deductible.<sup>155</sup> It concluded that a lay person would consider insurance to refer to another insurance policy comparable to the one that National issued.<sup>156</sup> "Other insurance" the court defined as "a policy of insurance of like kind issued by an insurance company in exchange

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151. See *American Nurses Ass'n v. Passaic Gen. Hosp.*, 484 A.2d 670, 673 (N.J. 1984) (stating that key question in "other insurance" inquiry was what was objectively reasonable expectation of purchaser of liability insurance). In *Passaic General*, the court determined whether a nurse's insurance policy was primary with respect to first \$100,000 of settlement claim against nurse. *Id.* at 672. The nurse's employer hospital held an insurance policy covering it and its employees that included \$100,000 annual self-insured sum. *Id.* at 672. The nurse had a contractual agreement with the American Nurses Association (Association) in the form of a liability insurance policy and was an Association member. *Id.* at 671. The National Fire Insurance Company (National) had issued an insurance policy covering the contractual obligations of the Association to its members. *Id.* at 672. National's policy provided that it was excess over other valid and collectible insurance. *Id.* The hospital that employed the nurse had a liability insurance policy with the Insurance Company of North America (INA) that contained a \$100,000 deductible or "annual self-insured sum." *Id.* National sued for a declaratory judgment that its policy came into effect only after the Hospital and INA had met their obligations under the INA policy. *Id.* The appellate court below concluded that the hospital's \$100,000 self-insured sum was merely a deductible and did not constitute "other insurance" within the meaning of the National policy. *Id.* at 672-73. On appeal, the Supreme Court of New Jersey framed the issue as whether an Association member would reasonably expect the "other insurance" provision to include the hospital obligation to indemnify its employees. *Id.* at 673. According to the court, a lay person would consider the clause to refer to a traditional insurance policy and would not expect the clause to include the obligation of the hospital to pay a deductible. *Id.* The court noted that there was nothing in the INA policy that required the hospital to indemnify its employees and did not consider the hospital's voluntary obligation to protect employees who had no insurance coverage to be insurance. *Id.* at 673-74. Therefore, the court held that National's policy was primary insurance with respect to the first \$100,000 of the settlement claim against the nurse. *Id.* at 674.

152. *Id.* at 672.

153. *Id.*

154. *Id.*

155. *Id.* at 673.

156. See *id.* ("[L]ay persons would consider 'insurance' to refer to another insurance policy comparable to the one issued to them.")



for a premium charged."<sup>157</sup> The court did not consider the hospital's voluntary undertaking to protect employees who had no insurance coverage to be insurance and noted that the hospital's policy issued by its insurance company did not require the hospital to pay the first \$100,000 of a settlement or judgment obtained by a third person against a hospital employee.<sup>158</sup> Because the hospital's voluntary undertaking was not an insurance policy, the court held that National's policy was primary insurance with respect to the first \$100,000 of the settlement claim against the nurse.<sup>159</sup>

Relying on the definition of insurance to determine what constitutes "other insurance" does not create a bright line rule. Rather, courts applying this same test may reach different results depending on how they define insurance.<sup>160</sup> Although several courts have determined that the definition of insurance does not include self-insurance, other courts have determined that, under certain circumstances, self-insurance may fit within the definition of insurance.<sup>161</sup> Furthermore, courts may need to consider more than a standard definition of insurance when state or federal law authorizes the issuance of a particular form of self-insurance, such as a certificate of self-insurance<sup>162</sup> or

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157. *Id.*

158. *See id.* (emphasizing that hospital had no contractual obligation to indemnify its employees and did so voluntarily).

159. *See id.* (stating that private indemnity agreements are not what parties contemplated when they referred in their insurance policy to "other insurance").

160. *Compare id.* (determining that definition of insurance did not include self-insurance) with *Hillegass v. Landwehr*, 499 N.W.2d 652, 655 (Wis. 1993) (holding that self-insurer provided "insurance" within meaning of "other insurance" clause of automobile liability policy). Defining insurance as "a contract whereby, for a stipulated consideration, one party undertakes to compensate the other for loss," the *Hillegass* court rejected what it called the self-insurer's "attempt to impose an implicit contract requirement not specified in the . . . definition" and instead looked to the nature of self-insurance to determine whether the quoted definition applied to self-insurance. *Id.* at 655. The *Hillegass* court did not rest its decision only on this definition, however, but discussed public policy considerations as well. *Id.* at 654. *See infra* notes 206-224 and accompanying text (discussing *Hillegass*); *see also* *Fleming v. Parsons*, 206 N.E.2d 46, 47 (Ohio Ct. App. 1965) (holding that statutory financial responsibility bond issued to motorist was, in legal effect, insurance). The *Fleming* court defined insurance as "a contract by which one party promises, upon a consideration, to compensate or reimburse the other if he shall suffer loss from a specified cause." *Id.* at 47.

161. *See supra* note 160 (citing cases that have determined that definition of insurance includes self-insurance).

162. *Compare* *American Family Mut. Ins. Co. v. Missouri Power & Light Co.*, 517 S.W.2d 110, 112, 114 (Mo. 1974) (determining that company's certificate of self-insurance from director of revenue and agreement under financial responsibility laws to pay same judgments as insurer would have to pay did not constitute "other valid and collectible insurance" within meaning of liability policy issued to employee driver) with *Chambers v. Agency Rent-A-Car, Inc.*, 878 P.2d 1164, 1166-67 (Utah Ct. App. 1994) (determining that self-funded rental agency

a surety bond,<sup>163</sup> as a substitute for an otherwise mandatory insurance policy.<sup>164</sup> Although the definition of insurance is a helpful starting point for an analysis of whether courts should consider self-insurance to be "other insurance," it is not reliable as a single-step test.

### C. Role of State Law

The process of determining whether an entity is providing insurance becomes more difficult when the applicable state law requires certain entities to possess proof of financial responsibility and allows those entities to obtain either a commercial insurance policy or a state-issued certificate of self-insurance.<sup>165</sup> States may issue certificates of self-insurance or otherwise permit private entities to self-insure in various situations in which the law requires proof of financial responsibility, such as for registering motor vehicles<sup>166</sup> or for obtaining professional or business licenses.<sup>167</sup> When state legislatures do

had primary responsibility for accident coverage under Utah's motor vehicle financial responsibility law requiring holders of certificates of self-funded coverage to pay benefits as would insurer issuing policy to self-funded person).

163. Compare *Lumbermens Mut. Cas. Co. v. Agency Rent-A-Car*, 180 Cal. Rptr. 546, 550 (Cal. Ct. App. 1982) (stating that surety bond is nothing more than undertaking to indemnify person or public against losses resulting from acts of principle) with *Fleming*, 206 N.E.2d at 47 (stating that statutory financial responsibility bond issued to motorist is, in legal effect, automobile liability insurance and is "other insurance" within standard automobile liability policy issued by another insurer).

164. See *Chambers*, 878 P.2d at 1166 (defining "insurance" under Utah code and stating that fact that self-insured did not issue tortfeasor policy of "insurance" was immaterial to determining liability). The Utah Code defines insurance as "any arrangement, contract or plan for the transfer of risk or risks from one or more persons to one or more other persons. . . ." Utah Code Ann. § 31A-1-301(40) (West 1999). The court considered the fact that the self-insured automobile rental agency did not receive a premium from the lessor and required the lessor to acknowledge that she had other insurance to be immaterial. See *Chambers*, 878 P.2d at 1166. The self-insurer was responsible for the same obligations that an insurer would have had to pay because Utah law expressly so required. *Id.*

165. See *infra* notes 170-80 and accompanying text (discussing role of state financial responsibility law in determining whether self-insurance constitutes other insurance).

166. See 7 AM. JUR. 2d *Automobile Insurance* § 1 (1997) (stating that some states have enacted statutes providing that cash deposit, certificate of insurance, or surety bond filed to meet financial responsibility requirements are the equivalent of policy of automobile insurance for purposes of determining primary or excess coverage in event of automobile collision).

167. See, e.g., ALASKA STAT. § 46.03.100 (Michie 1998) (requiring proof of financial responsibility, including self-insurance option, as prerequisite to receiving permit for disposal of hazardous waste); COLO. REV. STAT. ANN. § 12-40-126 (West 1998) (requiring optometrists to establish financial responsibility by approved method, including approved plans of self-insurance); FLA. STAT. ANN. § 458.320 (West 1991) (requiring one form of medical malpractice insurance, including self-insurance plan, as condition of issuance or renewal of license for

not state explicitly in what situations self-insureds are to be treated like insurance agencies, courts may consider the legislative intent behind the financial responsibility laws.<sup>168</sup> Recently, some courts also have considered the public policy and fairness issues underlying the treatment of self-insurance as "other insurance."<sup>169</sup>

### 1. State Motor Vehicle Financial Responsibility Laws

State motor vehicle financial responsibility laws in most jurisdictions require that automobile owners obtain liability insurance.<sup>170</sup> Many states allow automobile owners to satisfy the compulsory insurance requirement by acquiring a commercial insurance policy or by self-insuring.<sup>171</sup> Usually, a public service commission or another state agency is responsible for issuing certificates of self-insurance to an entity that produces sufficient proof of the ability to pay judgments of a legally designated amount.<sup>172</sup> In many jurisdic-

practice of medicine); IDAHO CODE § 20-805 (Supp. 1999) (making insurance or self-insurance mandatory before award of contract to operate private prison); 105 ILL. COMP. STAT. ANN. 105/15a (West 1998) (requiring that each contractor on approved list of asbestos abatement contractors submit certificate documenting that contractor carries liability insurance or self-insurance); IND. CODE ANN. § 8-21-3-22 (West 1991) (providing for issuance of certificate of self-insurance, in order to permit aircraft owner to comply with Aircraft Financial Responsibility Act, when department is satisfied that person is possessed of financial ability to respond to judgments arising out of ownership, maintenance, use or operation of aircraft); LA. REV. STAT. ANN. § 3:3410.1 (West 1987) (providing for creation and operation of program of self-insurance for licensed warehousemen and grain dealers); MONT. CODE ANN. § 82-1-107 (1999) (providing that company commencing seismic activity must be prepared to present evidence of insurance or self-insurance); PA. STAT. ANN. tit. 3, § 111.35a (West 1995) (providing that secretary shall not grant pesticide application license until applicant has furnished evidence of financial responsibility, consisting of surety bond, self-insurance or liability insurance policy).

168. See *infra* note 200 and accompanying text (discussing cases in which courts have considered legislative intent behind financial responsibility statutes).

169. See *infra* notes 201-207 and accompanying text (discussing public policy and fairness issues).

170. See *Ellis v. Rhode Island Pub. Transit Auth.*, 586 A.2d 1055, 1059 (R.I. 1991) (stating that Rhode Island is one state in small minority of jurisdictions that does not require its motorists to carry mandatory liability insurance); Richmond, *supra* note 5, at 1452-53 (noting general rule that self-insurance is not other insurance may be inapplicable in automobile liability insurance context).

171. See 7 AM. JUR. 2d *Automobile Insurance* § 1 (1997) (stating that some states have enacted statutes providing that cash deposit, certificate of insurance, or surety bond filed to meet financial responsibility requirements are equivalent of automobile insurance for purposes of determining primary or excess coverage in event of automobile collision); see also *infra* note 184 (listing state statutes that allow automobile owners to obtain certificates of self-insurance in lieu of liability insurance policy if owner satisfies certain prerequisites).

172. See *Home Indem. Co. v. Humble Oil & Ref. Co.*, 314 S.W.2d 861, 862-63 (Tex. Civ. App. 1958) (stating that, as prerequisite to qualifying as self-insurer under Texas Motor Vehicle

tions, only relatively large entities with substantial assets can qualify for state-issued certificates of self-insurance.<sup>173</sup>

The Supreme Court of Vermont's decision in *Champlain Casualty Co. v. Agency Rent-A-Car*<sup>174</sup> illustrates the role of state law in determining whether to treat self-insurance as insurance.<sup>175</sup> In *Champlain Casualty*, the court con-

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Safety-Responsibility Act, agency agreed to pay same judgments and in same amounts that insurer would be obligated to pay under owner's liability policy, if it had issued such policy to self-insured); *Champlain Cas. Co. v. Agency Rent-A-Car, Inc.*, 716 A.2d 810, 812 (Vt. 1998) (stating that Vermont law requires self-insured to insure every person operating one of its motor vehicles).

173. See, e.g., *USX Corp. v. Liberty Mut. Ins. Co.*, 645 N.E.2d 396, 402 (Ill. App. Ct. 1994) (citing state motor vehicle law requiring that certified self-insured have more than twenty-five vehicles registered in its name); *Southern Home Ins. Co. v. Burdette's Leasing Serv., Inc.*, 234 S.E.2d 870, 871 (S.C. 1977) (same); *Home Indem. Co.*, 314 S.W.2d at 864 (same). Some jurisdictions also allow automobile owners to obtain financial responsibility bonds in lieu of traditional insurance. See *Carter v. Bernard*, 269 N.E.2d 139, 141 (Ohio Ct. C.P., Montgomery Co. 1971) (stating that insurance company had issued and filed financial responsibility bond to enable motorist with prior conviction for driving while intoxicated to comply with Motor Vehicle Safety Responsibility Act).

174. 716 A.2d 810 (Vt. 1998).

175. See *Champlain Cas. Co. v. Agency Rent-A-Car, Inc.*, 716 A.2d 810, 814 (Vt. 1998) (concluding that car rental agency's self-insurance obligation under state financial responsibility and compulsory insurance laws and rental contract are "other collectible insurance" as provided in lessor's own automobile insurance policy). The *Champlain Casualty* case involved a dispute over liability for damages that the lessee of one of Agency Rent-A-Car's (Agency) vehicles caused. *Id.* at 811. Champlain Casualty Company (Champlain), the automobile lessee's insurer under a comprehensive automobile liability policy, appealed a lower court ruling that Agency's self-insurance obligations did not constitute "other collectible insurance" and that Champlain was responsible for providing primary coverage. *Id.* The lessee, while driving the rental vehicle, collided with a vehicle driven by a third party. *Id.* The underlying suit involved the third party's claim against the lessee's estate, and both parties looked to both Agency and Champlain to defend and indemnify. *Id.* The policy issued by Champlain covered the operation of a non-owned automobile, but provided that it was excess over any other collectible insurance. *Id.* Agency's responsibility was based on its possession of a certificate of self-insurance under Vermont's financial responsibility law. *Id.* Vermont law required automobile owners to maintain liability insurance and permitted owners to file self-insurance in the amount of \$100,000 in lieu thereof. *Id.* at 812. The stated purpose of the statute was to benefit any person suffering personal injuries or property damage out of the use of the vehicle. *Id.* Agency had attempted to limit its liability through the terms of its rental agreement that required that the lessee have his own liability insurance covering the operation of Agency's vehicles and provided that coverage under the rental agreement would be excess over any insurance policy. *Id.* Agency argued that its self-insurance status was not "other collectible insurance" and that Champlain was therefore responsible for primary coverage under the terms of Agency's rental agreement. *Id.* Champlain argued that self-insurance was "other collectible insurance." *Id.*

The Supreme Court of Vermont framed the issue as "whether the relationship between the self-insurer and the tortfeasor can be described as insurance." *Id.* at 813. The identity of the tortfeasor was central to the liability determination because Vermont law required a self-insurer to insure every permissive user of its vehicles. *Id.* at 814. The court concluded that the relation-

sidered whether a self-insured rental car company's liability coverage constituted "other valid and collectible insurance."<sup>176</sup> The court adopted its approach from *Home Indemnity* and *Hartford Casualty*, which the Vermont court described as based on the relationship between the self-insurer and the tortfeasor.<sup>177</sup> The Supreme Court of Vermont considered the facts of *Champlain Casualty* to be closer to those of *Hartford Casualty* than to the facts of *Home Indemnity*, despite the fact that the rental agency in *Champlain Casualty* did not offer insurance to those who rented cars from it.<sup>178</sup> In *Champlain Casualty*, the court concluded that the self-insured rental agency's responsibility to indemnify the tortfeasor was based on Vermont's financial responsibility law, which provided that a certificate of self-insurance insured every person operating a motor vehicle owned by the self-insurer with its permission against loss from the liability imposed by law upon such person.<sup>179</sup> Because the statute described the relationship between the self-insured and the tortfeasor as insurance and because the car rental contract did not provide that the tortfeasor must indemnify the rental agency, the rental agency's obligation to pay constituted "other collectible insurance" for the purposes of the driver's liability policy.<sup>180</sup>

## 2. Determining the Extent of the Self-Insured's Obligations Under Financial Responsibility Laws

The nature of automobile liability insurance lends itself to frequent "other insurance" disputes because when an individual drives a car owned by another, overlapping coverage often exists between the policy covering the

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ship between Agency and the lessee-tortfeasor was in substance one of insurance and subject to the "other collectible insurance" provision of the Champlain policy. *Id.* The court then turned to the conflicting excess "other insurance" provisions in each of the policies. *Id.* The court determined that the unique characteristics of the situation took the case out of the general rule that conflicting excess clauses are mutually repugnant and therefore void. *Id.* at 814-15. Because Agency required the lessee to obtain or maintain other insurance and the law imposed Agency's responsibility, the court concluded that Champlain had primary liability. *Id.* at 816-17.

176. *Id.* at 813 (concluding that car rental agency's self-insurance obligation and rental contract constitute "other collectible insurance").

177. *See id.* at 813-14 (discussing *Home Indemnity* case, in which Texas Supreme Court determined that relationship between tortfeasor and self-insurer was not one of insurance, and *Hartford Casualty* case, in which Texas Supreme Court determined that rental car contract created insurance relationship).

178. *See id.* at 814 (determining that *Champlain Casualty* facts were closer to facts of *Hartford Casualty* than to *Home Indemnity* because self-insured rental car agency in *Champlain Casualty* was obligated to indemnify tortfeasor).

179. *See id.* at 812 (explaining how state financial responsibility law creates insurance-like relationship).

180. *See id.* at 814 (concluding that relationship between rental car agency and lessee of vehicle was in substance one of insurance).

automobile and the policy covering the driver.<sup>181</sup> Despite the prevalence of laws that allow entities to apply for certificates of self-insurance in lieu of obtaining traditional insurance policies, many of these statutes do not clearly state whether a self-insurer must assume the same responsibilities that the law requires traditional insurance companies to assume, such as providing uninsured motorist coverage<sup>182</sup> or omnibus coverage.<sup>183</sup> A common statutory provision, as a prerequisite to obtaining state issued certificates of self-insurance in many states, is that an entity must agree to pay the same judgments in the same amounts that an insurer would have been obligated to pay under an owner's motor vehicle liability policy if it had issued such a policy to the

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181. See *supra* notes 112-13 (citing cases, most of which involve automobile liability insurance, involving self-insurance as "other insurance" disputes). At least one commentator has identified a growing trend to treat self-insurance as "other insurance" in the automobile liability context. See Richmond, *supra* note 5, at 1454-55 (discussing lack of uniformity in court's treatment of self-insurance and noting that courts increasingly are treating automobile liability self-insurance like insurance). Only a few jurisdictions have considered whether self-insurance constitutes "other insurance" outside the automobile liability context. See, e.g., Universal Underwriters Ins. Co. v. Marriott Homes, Inc., 238 So. 2d 730, 732 (Ala. 1970) (determining that "other insurance" provision of workmen's compensation policy did not include self-insurance obtained by insured under compensation statute); Idaho v. Continental Cas. Co., 879 P.2d 1111, 1116 (Idaho 1994) (deciding whether state acted as university's insurer in employment discharge, tort, and civil rights claim); United States Gypsum Co. v. Admiral Ins. Co., 643 N.E.2d 1226, 1262 (Ill. App. Ct. 1994) (affirming trial court's ruling that insured must exhaust all available primary coverage, including limits of fronting policy under which insured is, in effect, self-insured, before proceeding against excess carrier when that carrier's policy contains "other insurance" clause); American Nurses Ass'n v. Passaic Gen. Hosp., 484 A.2d 670, 673 (N.J. 1984) (determining whether nurse's professional liability insurance policy was primary over self-insured sum of policy provided by hospital); Physicians Ins. Co. v. Grandview Hosp. & Med. Ctr., 542 N.E.2d 706, 707 (Ohio Ct. App. 1988) (determining that self-insured hospital's contract to provide professional liability coverage for its residents was not "other insurance" within meaning of resident's professional liability policy).

182. See *Twyman v. Robinson*, 342 S.E.2d 313, 315 (Ga. 1986) (determining that certificate of self-insurance is "substantial equivalent" of no-fault policy, and thus uninsured motorist coverage is implied as contained in plan of self-insurance); *Transport of New Jersey v. Watler*, 391 A.2d 1240, 1245 (N.J. Super. Ct. App. Div. 1978) (determining that statute requiring all automobile liability policies to include uninsured motorist coverage applies to self-insured vehicles as well). *But cf. Gary v. Allstate Ins. Co.*, 612 N.E.2d 115, 119 (Ind. 1993) (determining that financial responsibility law does not require self-insured municipality to provide uninsured motorist protection for those who drive their automobiles because law applies only to "insurers" who issue policy of insurance). Uninsured motorist coverage is not liability insurance, but, rather, it is direct compensation to persons that an uninsured motorist injures if the uninsured motorist is at fault. See *RUSS & SEGALLA, supra* note 14, § 122:2, at 122-7 to 122-9 (describing uninsured motorist coverage).

183. See *RUSS & SEGALLA, supra* note 14, § 10:5, at 10-10 to 10-11 (stating that states are in conflict as to whether self-insurers must provide omnibus coverage). Most states require that automobile insurance extend to permissive users of an automobile. *Id.* This extended coverage is referred to as "omnibus" coverage. *Id.*

self-insurer.<sup>184</sup> State courts have disagreed on what statutory obligations their legislatures intended to include in these provisions.<sup>185</sup> In determining the scope of a self-insurer's obligation under a financial responsibility law, courts often consider the purpose of the statutes and whom the drafters intended to protect.<sup>186</sup> Although the *Home Indemnity* court determined that self-insurance was not "other insurance" when state law required a self-insurer to pay "the same judgments and in the same amounts that the insurer would be obligated to pay,"<sup>187</sup> another state court interpreted a similar statute differently.<sup>188</sup>

184. See ALA. CODE § 32-7-19 (1989) (requiring that certificate of self-insurance, in order to be considered proof of financial responsibility, be accompanied by agreement of self-insurer that, with respect to accidents occurring while certificate is in force, self-insurer will pay same judgments in same amounts that insurer would have been obligated to pay under owner's motor vehicle liability policy if it had issued such policy to self-insurer); ALASKA STAT. § 28.20.390 (Michie 1998) (same); CONN. GEN. STAT. ANN. § 38a-371 (West 1992) (requiring self-insurers to file evidence that reliable financial arrangements, deposits, or commitments exist providing assurance for payment of all obligations under statute substantially equivalent to those afforded by policy of insurance); LA. REV. STAT. ANN. § 32:897 (West 1989) (requiring that certificate of self-insurance, in order to be considered proof of financial responsibility, be accompanied by agreement of self-insurer that, with respect to accidents occurring while certificate is in force, self-insurer will pay same judgments in same amounts that insurer would have been obligated to pay under owner's motor vehicle liability policy if insurer had issued such policy to self-insurer); MO. ANN. STAT. § 303.160 (West 1994) (same); MONT. CODE ANN. § 61-6-132 (1999) (same); NEV. REV. STAT. ANN. § 485.307 (Michie 1997) (same); N.C. GEN. STAT. § 20-279.18 (1993) (same); OHIO REV. CODE ANN. § 4509.45 (West 1995) (same); OR. REV. STAT. § 806.130 (1997) (same); R.I. GEN. LAWS § 31-32-20 (1995) (same); S.D. CODIFIED LAWS § 32-35-64 (Michie 1998) (same); TEX. TRANSP. CODE ANN. § 601.124 (West 1999) (same); WASH. REV. CODE ANN. § 46.29.450 (West 1987) (same).

185. See *infra* notes 197-200 and accompanying text (discussing different conclusions reached by state courts regarding obligations of self-insured automobile owners).

186. See, e.g., *Quick v. National Auto Credit*, 65 F.3d 741, 745 (8th Cir. 1995) (determining that legislative purpose of financial responsibility law was to ensure certain minimum payments to injured parties); *Jeffreys v. Snappy Car Rental, Inc.*, 493 S.E.2d 767, 769 (N.C. Ct. App. 1997) ("The primary purpose of compulsory automobile liability insurance . . . is to compensate innocent victims who have been injured by financially irresponsible motorists."); *Home Indem. Co. v. Humble Oil & Ref. Co.*, 314 S.W.2d 861, 866 (Tex. Civ. App. 1958) ("The guarantee by a self-insurer to pay any judgment that an insurance carrier would have to pay can operate only for the benefit of the State . . . and the injured party and cannot . . . be construed to operate for the benefit of the negligent driver . . ."). *But cf. Gary*, 612 N.E.2d at 119 ("Although we recognize the remedial purpose of the uninsured motorist coverage statute and we may even agree that public policy favors a requirement that self-insurers . . . should be required to provide . . . uninsured motorist protection, it is not our role . . . to write such a requirement into the act."). The *Gary* court read the statute literally to apply only to "insurers." *Id.*

187. *Home Indem.*, 314 S.W.2d at 864-65 (determining that certificate of self-insurance that owner of motor vehicle filed did not constitute "other insurance" within excess coverage provisions of driver's liability policy); see *supra* notes 125-36 and accompanying text (discussing *Home Indemnity* decision).

188. Compare *Home Indem.*, 314 S.W.2d at 864-65 (stating that, when Safety-Responsibility Act provided that self-insurer must pay same judgments that insurer would have been

In *Southern Home Insurance Co. v. Burdette's Leasing Service, Inc.*,<sup>189</sup> the Supreme Court of South Carolina interpreted a statute permitting a state agency to issue a motor vehicle certificate of self-insurance to an entity with "the ability to pay judgments obtained against him."<sup>190</sup> The court concluded that the legislature intended to require that a self-insurer provide the same protection to the public that a statutory liability policy provides, including the provision of coverage to permissive users of the self-insurer's motor vehicles.<sup>191</sup> According to the court, it necessarily followed that self-insurance constituted "other valid and collectible insurance" within the meaning of a liability insurance policy provision.<sup>192</sup>

As in *Champlain Casualty*, a state financial responsibility law may create a relationship between the self-insured and the tortfeasor that requires a court to treat the self-insurer as the tortfeasor's insurer.<sup>193</sup> Most states require that

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obligated to pay, legislative intent was to protect public from judgment proof drivers and to confine self-insured's agreement under certificate to such obligation) *with* Southern Home Ins. Co. v. Burdette's Leasing Serv., Inc., 234 S.E.2d 870, 872 (S.C. 1977) (holding that self-insurer that was qualified under statute had to provide same coverage to automobiles that it owned as automobile liability insurance policy would provide and, therefore, self-insurance constituted collectible "other insurance").

189. 234 S.E.2d 870 (S.C. 1977).

190. *Southern Home Ins. Co. v. Burdette's Leasing Serv., Inc.*, 234 S.E.2d 870, 871 (S.C. 1977) (holding that self-insurer that was qualified under statute had to provide same coverage to automobiles it owned as automobile liability insurance policy would provide, and therefore, self-insurance constituted collectible "other insurance"). In *Southern Home*, the court determined whether a state-certified self-insurer must provide the same coverage to automobiles it owned as the law required insurance policies to provide and whether self-insurance constituted "other valid and collectible insurance" within the meaning of a liability policy. *Id.* at 872. *Southern Home* involved a dispute over responsibility for damages arising from a motor vehicle accident involving a rented vehicle in which the driver was insured under his employer's insurance policy. *Id.* at 870-71. The insurance company paid the claim and sought reimbursement under the "other insurance" provision of its policy from the self-insured rental car agency. *Id.* at 871. The state financial responsibility law in effect at the time allowed owners of 25 or more vehicles to qualify as a registered self-insurer if the entity possessed the ability to pay judgments obtained against it. *Id.* The court concluded that the intention of the legislature was that the self-insurer provide the same protection to the public that a statutory liability policy provided and that the self-insured must self-insure the operation of its motor vehicles by permissive users. *Id.* at 872. The court reasoned that the self-insured's statutory obligations meant that its self-insurance was "other valid and collectible insurance" within the meaning of the insurance policy provision. *Id.*

191. *See id.* (holding that self-insured motor vehicle rental agency's self-insurance extends to cover persons using its vehicles with consent).

192. *See id.* (stating that self-insurance must be considered "other insurance" in order to carry out intent of motor vehicle financial responsibility law).

193. *See id.* (holding that self-insurer had to provide same coverage to automobiles that it owned under statute as automobile liability insurance policy would provide and, therefore,



automobile liability insurance policies include "omnibus coverage" provisions that provide liability insurance coverage for permissive users of the insured vehicle.<sup>194</sup> Courts may have to determine whether the legislature intended to require that self-insured automobile owners indemnify permissive users of the self-insurer's automobiles.<sup>195</sup> Under one theory, if the relevant statute requires that self-insurers indemnify permissive users of their vehicles, the self-insurers are providing insurance for those users.<sup>196</sup> In the absence of an express requirement that self-insureds provide omnibus coverage, some courts have determined that a self-insured does not automatically assume that obligation, even though an insurance policy must provide omnibus coverage.<sup>197</sup> These courts have concluded that the obligation of a self-insured is confined to assuring financial remuneration to injured parties by ensuring that certain min-

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self-insurance constituted collectible "other insurance"); *see also* discussion *supra* Part IV.C.1 (discussing role of state motor vehicle financial responsibility laws).

194. *See* RUSS & SEGALLA, *supra* note 14, § 10:5, at 10-10 to 10-11 (describing omnibus coverage).

195. *Id.*

196. *See id.* (stating that states are in conflict as to whether self-insurers must provide omnibus coverage).

197. *See* Quick v. National Auto Credit, 65 F.3d 741, 745 (8th Cir. 1995) (interpreting Missouri's Motor Vehicle Financial Responsibility Law to confine self-insurance obligations to ensuring certain minimum payments to injured parties); Home Indem. Co. v. Humble Oil & Ref. Co., 314 S.W.2d 861, 866 (Tex. Civ. App. 1958) ("The guarantee by a self-insurer to pay any judgment that an insurance carrier would have to pay can operate only for the benefit of the State . . . and the injured party and cannot . . . be construed to operate for the benefit of the negligent driver."). Even when financial responsibility laws require compulsory automobile liability insurance for automobile owners, state law may permit an insurer or a self-insured to avoid providing primary liability coverage under the terms of its policy. *See* Jeffreys v. Snappy Car Rental, Inc., 493 S.E.2d 767, 769 (N.C. Ct. App. 1997) (ruling that automobile insurer may expressly exclude liability coverage under owner's policy if lessee driver holds liability policy for minimum amount of coverage required under state law); Champlain Cas. Co. v. Agency Rent-A-Car, Inc., 716 A.2d 810, 816 (Vt. 1998) (concluding that, because car rental agency required lessee to obtain or maintain other insurance, lessee's insurer under comprehensive automobile liability policy had primary liability). For example, the owner of a rental vehicle in these jurisdictions may avoid primary liability by requiring its lessees to have valid liability insurance policies with other companies that cover rented vehicles and by expressly providing in its lease agreements that the rental agency is not providing liability coverage. *See* Jeffreys, 493 S.E.2d at 769 (noting that insurer by terms of its policy may exclude liability coverage). A statute may clearly require a self-insured to indemnify permissive users of its automobiles. *See* Champlain Cas. Co., 716 A.2d at 812 (quoting state financial responsibility law, 23 V.S.A. § 800(a), providing that certificate of self-insurance obtained by self-insured shall insure every person operating motor vehicle with permission of self-insured). The *Champlain Casualty* court treated self-insurance as other collectible insurance because Vermont's financial responsibility law mandated that automobile owners who filed a certificate of self-insurance insure every permissive operator of the insured vehicle. *Id.* at 814.

imum payments are available.<sup>198</sup> These courts have emphasized that liability insurance requirements generally operate in favor of the state and of the injured party and do not exist for the benefit of the negligent driver.<sup>199</sup> In other jurisdictions, when state financial responsibility laws require liability insurance policies to include omnibus coverage, courts have determined that the legislature also intended to require self-insureds who are certified under the laws to provide the same coverage to permissive users of their vehicles.<sup>200</sup>

#### D. Public Policy and Fairness Arguments

Courts that find self-insurance to be "other insurance" often make equitable arguments for treating self-insurers like ordinary insurance companies for the purpose of determining liability.<sup>201</sup> These courts note that self-insurers gain the dual benefit of not having to pay insurance premiums and of avoiding primary liability when they can force another insurance company to pay.<sup>202</sup>

198. See *American Family Mut. Ins. Co. v. Missouri Power & Light Co.*, 517 S.W.2d 110, 113-14 (Mo. 1974) (interpreting Missouri's Motor Vehicle Financial Responsibility Law to confine self-insurance obligations to ensuring certain minimum payments to injured parties); *Home Indem. Co. v. Humble Oil & Ref. Co.*, 314 S.W.2d 861, 865-66 (Tex. Civ. App. 1958) (interpreting state motor vehicle financial responsibility law).

199. See *Quick v. National Auto Credit*, 65 F.3d 741, 745 (8th Cir. 1995) (stating that motor vehicle financial responsibility law obliges owners to protect public from judgment-proof drivers by ensuring certain minimum payments); *Home Indem.*, 314 S.W.2d at 866 ("The guarantee by a self-insurer to pay any judgment that an insurance carrier would have to pay can operate only for the benefit of the State . . . and the injured party and cannot . . . be construed to operate for the benefit of the negligent driver.").

200. See *Comorote v. Massey*, 264 A.2d 478, 480-81 (N.J. Super. Ct. Law Div. 1970) (noting that state legislature has treated self-insured synonymously with one possessing automobile liability policy and, therefore, there was no sound basis for excluding self-insurer from providing omnibus coverage); see also *Hillegass v. Landwehr*, 499 N.W.2d 652, 655 (Wis. 1993) (stating that legislative decision to permit companies to select manner in which they are "insured" or financially responsible for liability to others does not mean that legislature intended to permit self-insureds to avoid obligations and duties that arise from operating motor vehicles).

201. See, e.g., *Nabisco, Inc. v. Transport Indem. Co.*, 192 Cal. Rptr. 207, 210 (Ct. App. 1983) (noting that self-insured company had made risk management decision not to pay premiums for liability coverage); *State Farm Mut. Auto. Ins. Co. v. Budget Rent-A-Car Sys., Inc.*, 359 N.W.2d 673, 676 (Minn. Ct. App. 1984) (stating that to treat self-insured as anything other than insurer for amount up to which it was self-insured would create windfall for self-insured); *Hillegass v. Landwehr*, 499 N.W.2d 652, 656 (Wis. 1993) ("It seems inappropriate to permit [the self-insured lessor] to escape liability merely because [the lessee] chose to purchase an individual insurance policy when in fact [the self-insured lessor] would otherwise be responsible." ).

202. See *Hillegass*, 499 N.W.2d at 655 ("[I]t would be fundamentally unfair . . . to permit companies . . . to self-insure and thereby escape both the expense of premium payments and the possibility of being held liable as primary insurer."); *Richmond*, *supra* note 5, at 1455 (asserting

Releasing an entity that chooses to self-insure from primary liability when another insurance company insures the same risk confers a benefit upon the self-insured at the expense of other insurers.<sup>203</sup> These other insurers normally would look to each other under the "other insurance" provisions of their policies, and thus they have set their rates accordingly.<sup>204</sup> When a self-insured contractually undertakes the responsibility for a risk, treating a self-insured as anything other than an insurer would create a windfall for the self-insured.<sup>205</sup> The Wisconsin Supreme Court relied on these and other public policy arguments in *Hillegass v. Landwehr*<sup>206</sup> to hold that a self-insured company had primary liability in an accident involving a car that it owned.<sup>207</sup>

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that pure risk retention and self-insured retentions are "other valid and collectible insurance" within meaning of "other insurance" clause). According to Richmond,

[s]elf-insurance is the functional equivalent of a liability insurance policy. Rather than paying premiums to an insurer to transfer risk, self-insureds retain risk in exchange for lower premiums, or no premiums. In both instances, the transaction is the same: there is an exchange of potential liability for premium payments. Self-insurance is but one side of the same liability insurance coin.

*Id.*

203. See *White v. Howard*, 573 A.2d 513, 516 (N.J. Super. Ct. App. Div. 1990) (stating that company that chooses to save insurance premiums by self-insuring its vehicles may not do so partially at expense of other insurers).

204. *Id.*

205. See *State Farm Mut. Auto. Ins. Co.*, 359 N.W.2d at 676 (discussing car rental contract whereby self-insured rental agency agreed to provide liability coverage for each vehicle rented).

206. 499 N.W.2d 652 (Wis. 1993).

207. See *Hillegass v. Landwehr*, 499 N.W.2d 652, 656 (Wis. 1993) (holding that self-insurer provided "insurance" within meaning of "other insurance" clause of automobile liability policy). The *Hillegass* court decided whether self-insurance constituted other collectible insurance within the meaning of an automobile liability insurance policy. *Id.* at 654. The collision involved a Burlington Air Express-owned automobile that a Burlington employee was driving. *Id.* at 653. Burlington was self-insured for the first one million dollars in damages. *Id.* The employee held a liability insurance policy from an insurance company and was driving the car on personal business at the time of the collision. *Id.* The employee's liability policy contained an "other insurance" clause holding the issuing insurance company liable for "excess over any other collectible insurance." *Id.* The Wisconsin Supreme Court noted that a majority of the twelve jurisdictions that had considered the issue had distinguished between insurance and self-insurance on the basis of the contractual relationship existing between a third-party insurer and its insured. *Id.* at 654. It also noted that four jurisdictions had adopted the "minority rule" that defined self-insurance as "one subset of the familia [sic] insurance." *Id.* Rather than adopting one of these rules, the court based its decision on the underlying public policies on which Wisconsin insurance law is based, namely the fair and efficient allocation of resources and related expressions of legislative purpose. *Id.* Central to the court's opinion was the fact that Burlington made a discretionary, risk management decision to retain its own risk rather than pay premiums to a third party insurer. *Id.* at 655. According to the court, "it would be fundamentally unfair and contrary to the legislative intent to permit companies . . . to self-insure and

The *Hillegass* case involved an appeal from a circuit court decision concluding that "self-insurance" could be "other insurance" within the meaning of the "other insurance" clause of an automobile liability policy.<sup>208</sup> The lower court held that Burlington Air Express (BAE) was the primary insurer of a BAE employee when the employee collided with another motorist while driving a BAE company car.<sup>209</sup> BAE was self-insured for the first one million dollars of loss resulting from the operation of its motor vehicles and held a two million dollar umbrella policy with an insurance company.<sup>210</sup> The employee held a liability insurance policy from an insurance company that covered his negligence as a driver.<sup>211</sup> The employee's liability policy contained an "other insurance" provision stating that the policy "shall be excess over any other collectible insurance."<sup>212</sup> BAE argued that its self-insurance was not "other collectible insurance" because the term insurance referred to a contractual relationship between the insurer and the insured that was absent in its self-insurance mechanism.<sup>213</sup>

The Wisconsin Supreme Court rejected the rule it identified as predominant in other jurisdictions that distinguishes between insurance and self-insurance on the basis of the contractual relationship existing between a third-party insurer and its insured.<sup>214</sup> The court identified four jurisdictions that applied another line of reasoning and defined self-insurance as "one subset of the familia [sic] insurance."<sup>215</sup> Rather than adopting the reasoning of the courts in other states, however, the *Hillegass* court based its decision on the underlying public policies providing the basis for Wisconsin insurance law, namely the fair and efficient allocation of resources, and on related expressions of

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thereby escape both the expense of premium payments and the possibility of being held liable as primary insurer." *Id.* Accordingly, the court affirmed the lower court's determination that the self-insured company that owned the vehicle responsible for the accident had primary liability. *Id.* at 654.

208. *Id.*

209. *Id.*

210. *Id.* at 653.

211. *Id.*

212. *Id.*

213. *Id.* at 655.

214. *See id.* at 654 (concluding that courts that had distinguished between insurance and self-insurance based on contractual relationship had not explained their rationale sufficiently).

215. *See id.* (identifying jurisdictions that treat self-insurance as "one subset of familia [sic] insurance"). The court noted that the following states announced and followed the "minority rule": California (citing *U. S. Steel Corp. v. Transport Indem. Co.*, 50 Cal. Rptr. 576, 585 (Ct. App. 1966)); Minnesota (citing *State Farm Mut. Auto Ins. Co. v. Budget Rent-A-Car Sys. Inc.*, 359 N.W.2d 673 (Minn. Ct. App. 1984)); New Jersey (citing *White v. Howard*, 573 A.2d 513 (N.J. Super. Ct. App. Div. 1990)); and South Carolina (citing *Southern Home Ins. Co. v. Burdette's Leasing Serv., Inc.*, 234 S.E.2d 870, 872 (S.C. 1977)). *Id.*

legislative purpose.<sup>216</sup> Central to the court's opinion was the fact that BAE made a discretionary, risk management decision to retain its own risk rather than pay premiums to a third party insurer.<sup>217</sup> The court concluded that it would be fundamentally unfair and contrary to the legislative intent to permit companies to self-insure and thereby escape both the expense of premium payments and the possibility of being held liable as primary insurer.<sup>218</sup> Accordingly, the court affirmed the lower court's determination that the self-insured company that owned the vehicle responsible for the accident had primary liability.<sup>219</sup>

Although the Wisconsin Supreme Court decided *Hillegass* in a jurisdiction in which the motor vehicle financial responsibility law required certified self-insurers to agree to pay the same amounts that an insurer would have been obligated to pay under a motor vehicle liability policy, this fact was not determinative.<sup>220</sup> BAE was not a certified self-insurer, and Wisconsin law did not require companies to obtain proof of insurance or self-insurance.<sup>221</sup> The court considered the language of the motor vehicle financial responsibility law to be an expression of legislative intent not to permit individuals who self-insured to escape the liabilities that would attach to third-party insurers.<sup>222</sup> Although the court considered the statutory language, no reason exists to conclude that the Wisconsin court intended to confine its opinion on the nature of self-insurance to the automobile liability context.<sup>223</sup> The court emphasized the general public policy reasons behind its decision and broadly stated that "[t]he phrase 'other collectible insurance' necessarily embraces all forms of insurance, including self-insurance."<sup>224</sup>

216. See *Hillegass v. Landwehr*, 499 N.W.2d 652, 654 (Wis. 1993) (concluding that decisions in other jurisdictions were not sufficiently well-reasoned to serve as precedent).

217. See *id.* at 655 (discussing that Wisconsin law allows entities to choose method of covering risk and does not mandate insurance).

218. *Id.*

219. See *id.* at 654 (finding persuasive circuit court's assessment of public policies and common law doctrines that led lower court to conclude that self-insurance constitutes insurance).

220. See *id.* at 656 (discussing Wisconsin motor vehicle financial responsibility law).

221. See *id.* at 655 ("Wisconsin companies may self-retain a limited amount of risk, purchase full third-party coverage or opt to remain entirely uninsured and expose themselves to unlimited liability.").

222. See *id.* at 656 ("[P]ermitting individuals to self-retain risk was not intended by the legislature to be a device by which self-insurers could escape the liabilities that would attach to third-party insurers.").

223. See *Richmond*, *supra* note 5, at 1455 ("[T]here is no reason to believe that *Hillegass* should be limited to automobile liability policies, or that it does not generally state Wisconsin law.").

224. *Hillegass v. Landwehr*, 499 N.W.2d 652, 656 (Wis. 1993).

Other courts have rejected the argument that it is unfair to permit self-insured entities to escape liability under "other insurance" clauses.<sup>225</sup> One court has suggested that an insurance company can protect itself from the self-insurance as "other insurance" dilemma by including language in its policy stating that its coverage is excess over any other valid and collectible insurance or self-insurance.<sup>226</sup> Courts holding that self-insurance is not other insurance have also noted that courts interpret insurance policies most strongly against the insurer who prepared it.<sup>227</sup>

### *E. Special Self-Insurance Issues Affecting Governmental Entities*

The determination of whether self-insurance is a form of insurance has a potentially large impact on municipalities and other governmental entities because many provide some form of self-insurance.<sup>228</sup> Governmental entities that choose to self-insure face many of the same "other insurance" questions that private entities do,<sup>229</sup> and they face additional issues related to sovereign immunity.<sup>230</sup> These entities have traditionally enjoyed the protection of sov-

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225. See *Wake County Hosp. Sys., Inc. v. National Cas. Co.*, 804 F. Supp. 768, 777 (E.D.N.C. 1992) (holding that hospital's self-insured retention did not constitute "other valid and collectible insurance" within meaning of "other insurance" clause of nurse's policy).

226. See *id.* (explaining that insurance company could have created an excess provision that applied to self-insurance).

227. See *United Nat. Ins. Co. v. Philadelphia Gas Works*, 289 A.2d 179, 182 (Pa. Super. Ct. 1972) ("[I]t is well established that an insurance policy will be construed most strongly against the insurer who has prepared it . . .").

228. See *Berkely*, *supra* note 6, at 693 (describing struggle of self-insured governmental entities to maintain sovereign immunity); see also *Aetna Cas. & Sur. Co. v. James J. Benes & Assocs., Inc.*, 593 N.E.2d 1087, 1089 (Ill. App. Ct. 1992) (determining whether contractual agreement between municipality and intergovernmental risk management agency pool of self-insured municipalities, required the agency to share responsibility to defend and indemnify municipality with commercial liability insurer under principle of contribution); *Blackwelder v. Winston-Salem*, 420 S.E.2d 432, 434 (N.C. 1992) (determining whether city waived its governmental immunity by organizing corporation to handle claims against city of \$1,000,000 or less when city controls corporation and city agrees to reimburse corporation for all payments); *infra* note 230 (citing cases deciding whether municipality waived sovereign immunity by self-insuring).

229. See *Gary v. Allstate Ins. Co.*, 612 N.E.2d 115, 119 (Ind. 1993) (determining that financial responsibility law does not require self-insured municipality to provide uninsured motorist protection for those who drive their automobiles because law applies only to "insurers" who issue policy of insurance); *Ellis v. Rhode Island Pub. Transit Auth.*, 586 A.2d 1055, 1159 (R.I. 1991) (stating that transit authority, like any other self-insurer, was exempt from uninsured motorist coverage requirement).

230. See generally *Mims v. Clanton*, 475 S.E.2d 662 (Ga. Ct. App. 1996) (determining that county's risk management fund for investigation and defense of tort claims was self-insurance plan constituting liability insurance that waived sovereign immunity); *Laramie v. Facer*, 814

ereign immunity, and insurance companies cannot enforce "other insurance" clauses against them if the entities are shielded from liability.<sup>231</sup> However, sovereign immunity does not apply to potential claims in a growing number of categories and does not immunize government employees from liability for their own tortious acts committed in connection with their employment.<sup>232</sup> For this reason, municipalities generally carry some form of insurance or self-insurance to cover their liability in connection with non-immune actions and to protect their employees.<sup>233</sup> In those jurisdictions in which a governmental entity waives its sovereign immunity by purchasing insurance,<sup>234</sup> setting up a self-insurance scheme also may waive immunity.<sup>235</sup> Legislation in many states regulates how governmental entities may insure or self-insure risks and often explicitly states that a governmental entity waives sovereign immunity by self-insuring.<sup>236</sup>

P.2d 268 (Wyo. 1991) (holding that creation of governmental fund pooling association did not constitute waiver of municipalities' sovereign immunity). *See also* McKinley et al, *supra* note 20, at 774-75 (discussing contexts in which courts have determined whether self-insurance should be treated like insurance policy). The reverse is also true; determining whether self-insurance is insurance in the sovereign immunity context may determine whether self-insurance is "other insurance." *See James J. Benes*, 593 N.E.2d at 1091-92 (relying on decision holding that municipal risk pooling agreement did not constitute waiver of sovereign immunity to find that intergovernmental risk management agency did not have responsibility to defend and indemnify municipality, although insurer would have been so obligated).

231. *See* Blodgett, *supra* note 33, at 48 (stating that governmental bodies have been immune from most negligence suits in recent past); Coffey, *supra* note 37, at 713 (describing "slow erosion of governmental immunity").

232. *See* Blodgett, *supra* note 33, at 50 (describing expanding concepts of municipal liability); Coffey, *supra* note 37, at 715 (noting that governmental immunity applies to governmental entity alone and not to individuals serving in governmental capacity).

233. *See* Coffey, *supra* note 37, at 716-17 (listing reasons why local governments may choose to purchase insurance and forego its inherent authority to refuse to pay claims under sovereign immunity doctrine). Municipalities in some jurisdictions experience a dilemma because the municipality waives its sovereign immunity from tort liability by purchasing insurance. *See* McKinley et al., *supra* note 20, at 775 (stating that immunity waiver provision results in litigation over whether self-insurance fund constitutes insurance and, as consequence, constitutes waiver).

234. *See supra* note 18 (citing state statutes that provide for waiver of sovereign immunity by purchasing insurance policy).

235. *See* Berkely, *supra* note 6, at 693 (describing usefulness of self-insurance to governmental entities).

236. *See, e.g.,* DEL. CODE ANN. tit. 2, § 1329 (1993) (stating that doctrine of sovereign immunity applies to any Delaware Transportation Authority service or activity unless insurance policy or self-insurance covers service or activity); MISS. CODE ANN. § 11-46-17 (Supp. 1998) ("If liability coverage, either through insurance policies or self-insurance retention is in effect, immunity from suit shall be waived only to the limit of liability established by such insurance or self-insurance program."); MO. ANN. STAT. § 105.1070 (West 1997) (stating that, in certain

In some cases, governmental risk retention pools so strongly resemble insurance providers that courts treat them as insurers.<sup>237</sup> Making a clear distinction is difficult because self-insured municipalities take on many of the traditional functions of insurance companies, including claim adjustment<sup>238</sup> and litigation defense.<sup>239</sup> Often several municipalities share these responsibilities through risk pooling associations.<sup>240</sup>

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situations of tort liability, entity waives sovereign immunity to maximum amount of existing policy of insurance or self-insurance plan). Laws in other states provide that the purchase of insurance or procurement of self-insurance does not constitute a waiver of sovereign immunity under some or all circumstances. *See, e.g.*, MINN. STAT. ANN. § 466.06 (West 1994) ("Procurement of commercial insurance, participation in a self-insurance pool . . . , or provision for an individual self-insurance plan . . . shall not constitute a waiver of any governmental immunities or exclusions."); N.C. GEN. STAT. § 116-221 (1997) (stating that nothing in article providing for higher education insurance or self-insurance shall be deemed to waive state's sovereign immunity); N.D. CENT. CODE § 26.1-23.1-02 (1995) (stating that participation in governmental self-insurance pool does not constitute waiver of immunities); VA. CODE ANN. § 62.1-132.1 (Michie 1988) (stating that purchase of insurance or creation of self-insurance plan by Port Authority shall not be deemed waiver of sovereign immunity).

237. *See* Richmond, *supra* note 5, at 1444-45 (stating that it is currently impossible to state general rule governing application of "other insurance" clauses to self-insurance). *Compare* Laramie v. Facer, 814 P.2d 268, 270-71 (Wyo. 1991) (holding that creation of governmental fund pooling association, created to defray costs arising from exceptions to municipalities' sovereign immunity from tort liability, was not purchase of insurance and that participation in association did not extend members' liability exposure) *with* Eakin v. Indiana Intergovernmental Risk Management Auth., 557 N.E.2d 1095, 1102 (Ind. Ct. App. 1990) (determining that Indiana Intergovernmental Risk Management Authority was actually offering insurance through members' contractual relationship, rather than, as townships contended, providing mechanism whereby townships could self-insure).

238. *See* Richmond, *supra* note 5, at 1449 (describing self-insured corporation's responsibilities under self-insured retention).

239. *See* WINDT, *supra* note 73, § 11.31, at 348 (describing difference between self-insured retention and deductible).

For example, the Wyoming legislature has provided for a local government self-insurance program managed by a self-insurance program board. *See* WYO. STAT. ANN. § 1-42-203 (Michie 1999). The board's duties include the following: (i) administering the program; (ii) providing legal services for the defense of claims covered by the act; (iii) procuring insurance, including reinsurance, purchase loss prevention, actuarial and other professional services as required by the board; (iv) establishing assessments to provide for expenditures as to create adequate reserves to operate the program on an actuarially sound basis; (v) apportioning and collecting assessments from each participating local government; (vi) establishing deductibles or retentions as deemed necessary; and (vii) adopting rules governing the administration of the program. *Id.*

240. *See* Eakin, 557 N.E.2d at 1102 (describing Indiana Intergovernmental Risk Management Authority as local government shared risk group); Laramie, 814 P.2d at 270-71 (describing Wyoming Association of Risk Management as governmental fund pooling association created to defray costs arising from exceptions to municipalities' sovereign immunity from tort liability).



In *Aetna Casualty & Surety Co. v. James J. Benes & Associates*,<sup>241</sup> the Appellate Court of Illinois considered whether the Intergovernmental Risk Management Agency (IRMA), a municipal joint risk management pool, had the same obligation to contribute to the settlement of a claim as an insurer.<sup>242</sup> The determination of whether IRMA constituted insurance was necessarily the same under the principle of contribution as it would have been under an "other insurance" clause, except that the other insurer's liability was based on equitable principles instead of an "other insurance" contract provision.<sup>243</sup> Relying heavily on a decision which held that self-insured public entities did not waive sovereign immunity,<sup>244</sup> the *James J. Benes* court distinguished the purchase of insurance from licensed insurance companies from self-insurance.<sup>245</sup> The court based its decision partly on a public policy interest of protecting public funds.<sup>246</sup> Although IRMA provided its members with various risk manage-

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241. 593 N.E.2d 1087 (Ill. App. Ct. 1992).

242. See *Aetna Cas. & Sur. Co. v. James J. Benes & Assocs.*, 593 N.E.2d 1087, 1089 (Ill. App. Ct. 1992) (determining whether contractual agreement between municipality and Intergovernmental Risk Management Agency pool of self-insured municipalities (IRMA), required IRMA to share responsibility to defend and indemnify municipality with commercial liability insurer under principle of contribution). In *James J. Benes*, the municipality's insurer filed a claim seeking partial reimbursement for the settlement of a claim against the municipality's from IRMA. *Id.* at 1088. IRMA provided its members with various risk management services, including defense and settlement of claims, and paid their claims out of pooled funds. *Id.* The insurer based his claim on the equitable principle of contribution, which permits an insurer who has paid an entire loss to receive reimbursement from other insurers who cover the same risk on the same basis for the same parties. *Id.* The court concluded that IRMA was not to be treated the same as private insurance carriers. *Id.* at 1092. The court determined that the sharing of risk under IRMA was distinguishable from shifting the same risk to for-profit companies. *Id.* The IRMA contract required supplemental contributions from all members, even those who submitted no claims, if liabilities exceeded annual contributions to the funds. *Id.* The court concluded that the issuer of the municipality's commercial insurance policy was not entitled to contribution from IRMA. *Id.*

243. Compare *id.* at 1090 ("In order for a settling insurer to recover in a contribution action, the policies must cover a risk on the same basis, and there must be identity between the policies as to parties and insurable interests and risks.") with Koepff, *supra* note 111, at 251 (stating that "other insurance" refers to existence of another insurer that insures same risk, for benefit of same entity, during same period of time).

244. See *James J. Benes*, 593 N.E.2d at 1091-92 (discussing generally *Antiporek v. Village of Hillside*, 499 N.E.2d 1307 (Ill. 1986), case holding that membership in IRMA substantially amounts to pooled self-insurance of governmental entities and does not operate as waiver of municipal tort immunities).

245. See *id.* at 1092 (stating that public policy interest in protecting taxpayer revenues provides basis for distinction between self-insured municipalities and municipalities that hold private insurance policy).

246. See *id.* (noting that, when municipality self-insures, it bears all risk itself and pays settlements or awards directly from government coffers).

ment services and paid claims out of pooled funds, the court determined that this sharing of risk was distinguishable from shifting the same risk to for-profit companies.<sup>247</sup> The court distinguished the IRMA contract from a commercial policy because the IRMA contract required supplemental contributions from all members, even those who submitted no claims, if liabilities exceeded annual contributions to the funds.<sup>248</sup> In addition, all the costs were completely internalized, and no private enterprises or non-governmental entities profited from IRMA.<sup>249</sup> State law permits municipalities to self-insure, and the court stated that it would be unfair to penalize municipalities that were too small to carry their own risk for sharing their risk with other municipalities.<sup>250</sup> The court concluded that the issuer of the municipality's commercial insurance policy was not entitled to contribution from IRMA.<sup>251</sup> The *James J. Benes* decision suggests that governmental entities who self-insure may receive more favorable treatment than private self-insurers.<sup>252</sup> Statutes in other jurisdictions clearly state that governmental self-insurance mechanisms are not insurance and that municipalities are not subject to the same treatment as insurers.<sup>253</sup>

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247. *See id.* at 1091 (explaining that risk is not shifted to insurance company under IRMA, but rather is shared by self-insured entities).

248. *See id.* (describing system of self-insurance that municipalities used). Although the *James J. Benes* court distinguished IRMA from a traditional insurance policy based in part on the fact that all participants in the risk pool were responsible for increasing their contributions if the pool's payments exceeded income, this was a feature of early insurance policies. *See* Scott A. Taylor, *Taxing Captive Insurance: A New Solution for an Old Problem*, 42 TAX LAW. 859, 865-66 (1989) (describing invention of modern fire insurance in seventeenth century with creation of Friendly Society that wrote fire insurance on mutual assessment basis and other mutual associations that increased members' premiums based on group's claim experience).

249. *See James J. Benes*, 593 N.E.2d at 1091 (stating that, because only governmental entities participated in IRMA, there was no danger that private persons would receive unconscionable profits by asserting immunities).

250. *See id.* (describing self-insurance pool as protecting small governmental entities from potential fiscal disasters).

251. *See id.* at 1093 (determining whether contractual agreement between municipality and IRMA required IRMA to defend and indemnify municipality).

252. *See supra* notes 244-51 and accompanying text (describing court's consideration of facts that municipality was attempting to preserve public funds and that private insurer did not profit).

253. *See* N.D. CENT. CODE § 26.1-23.1-02 (1995) (stating that participation in governmental self-insurance pool does not constitute waiver of immunities); *Orange County Water Dist. v. Assoc. of Cal. Water Agencies Joint Powers Ins. Author.*, 63 Cal. Rptr. 2d 182, 185 (Ct. App. 1997) (stating that California law expressly provides that joint powers agreement that created Association of California Water Agencies Joint Powers Insurance Authority to self-insure risk is not insurance).

V. *A Suggested Approach to "Other Insurance" Clauses and Self-Insured Entities*

The term "self-insurance" encompasses a broad range of risk retention plans and includes both modest deductibles<sup>254</sup> and complex insurance schemes in which a company or a group creates a foreign insurance company to underwrite its risks.<sup>255</sup> Therefore, determining whether a particular form of self-insurance is "other insurance" necessarily entails a fact-specific inquiry.<sup>256</sup> Courts should uniformly structure this inquiry to provide the highest degree of predictability possible. First, courts should identify the relationship between the tortfeasor and the self-insured.<sup>257</sup> Specifically, courts should treat self-insurance the same as insurance for the purpose of an "other insurance" clause if the self-insurer is acting as an insurer for another party.<sup>258</sup> Courts should treat the self-insured like an insurer if it has (1) agreed to indemnify the tortfeasor (2) for a specific loss (3) for consideration.<sup>259</sup> The self-insured also should be liable under the "other insurance" clause if state law requires that the self-insured party indemnify the tortfeasor, such as through a motor vehicle rental statute.<sup>260</sup> On the other hand, if the self-insured is itself the tortfeasor, then the "other insurance" clause should not apply to the amount of risk that is self-insured unless the state law requires the self-insured to provide proof of financial responsibility.<sup>261</sup> When state law requires proof of ability to pay a particular type of judgment and permits an entity to satisfy the

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254. See *supra* Part II.C.1 (describing deductibles as form of self-insurance).

255. See Tripoli, *supra* note 1250, at 10-11 (discussing captive insurance companies, which other companies set up to underwrite risks, usually for well-defined group of insureds). Insurance companies that are owned by their members are known as "captives." *Id.* at 10. A single company or group often sets up captives offshore because other countries' laws are more permissive than those of the United States regarding the formation of captives. *Id.* at 10-11. For example, capital requirements are lower and captives are less heavily regulated in some countries. *Id.* at 11.

256. See Richmond, *supra* note 5, at 1454-55 (stating that it is currently impossible to state general rule governing application of "other insurance" clauses to self-insurance).

257. See *supra* notes 125-43 and accompanying text (describing approach used by Texas courts).

258. See *supra* notes 174-80 and accompanying text (describing approach used by court in *Champlain Cas. Co. v. Agency Rent-A-Car, Inc.*, 716 A.2d 810 (Vt. 1998)).

259. See *Champlain Cas. Co. v. Agency Rent-A-Car, Inc.*, 716 A.2d 810, 814 (Vt. 1998) (defining insurance) (citing BLACK'S LAW DICTIONARY 721 (5th ed. 1979)).

260. See *supra* notes 174-80 and accompanying text (describing approach that court used in *Champlain Cas. Co.*, 716 A.2d at 810).

261. See *supra* notes 189-92 and accompanying text (describing court's interpretation of financial responsibility law in *Southern Home Ins. Co. v. Burdette's Leasing Service, Inc.*, 234 S.E.2d 870 (S.C. 1977)).

requirement with self-insurance, the court should treat self-insurance as "other insurance" up to the limit of the financial responsibility requirement unless state law clearly states otherwise.<sup>262</sup>

*A. Identifying the Relationship Between the Self-Insured  
and the Tortfeasor*

The approach suggested above would have lead to a different analysis in *Passaic General*.<sup>263</sup> Before concluding that a partially self-insured hospital did not provide its employees with insurance, the *Passaic General* court considered whether the contract between the hospital and its excess insurer required the hospital to indemnify its employees.<sup>264</sup> Under the suggested approach, the court instead would have considered the relationship between the nurse, as the tortfeasor, and the partially self-insured hospital.<sup>265</sup> If the hospital had agreed to indemnify its employees against liability for their own negligence as part of the employment contract, the court should have treated the agreement as insurance. In *Passaic General*, the court did not decide whether the hospital had a binding agreement with the nurse to indemnify her because the court concluded that such an agreement would not have changed its analysis because the nurse who obtained the insurance policy would not have considered it to be "other insurance."<sup>266</sup>

Courts should treat an employer like the one in *Passaic General*<sup>267</sup> and a rental agency like the one in *Champlain Casualty*<sup>268</sup> similarly for the purposes of state financial responsibility laws. Under certain circumstances, an indemnity agreement between self-insured employers and their employees may constitute insurance.<sup>269</sup> For example, if the law required health care providers to have malpractice insurance or equivalent proof of their ability to

262. See *supra* notes 200-05 and accompanying text (discussing cases holding that self-insurers under state laws must provide coverage as insurer would provide).

263. See *supra* notes 150-64 and accompanying text (discussing generally *American Nurses Ass'n v. Passaic Gen. Hosp.*, 484 A.2d 670 (N.J. 1984)).

264. See *supra* notes 150-59 and accompanying text (discussing facts of *Passaic General*).

265. See *supra* notes 254-62 (suggesting approach to self-insurance as "other insurance" issue); *supra* notes 150-64 and accompanying text (discussing *Passaic General* and converse case authority).

266. See *American Nurses Ass'n v. Passaic Gen. Hosp.*, 484 A.2d 670, 674 (N.J. 1984) (stating that private indemnity agreements are not included in "other insurance" provision).

267. See *supra* notes 150-59 and accompanying text (discussing facts of *Passaic General*).

268. See *supra* notes 174-180 and accompanying text (discussing facts of *Champlain Casualty*).

269. See *Chicago Ins. Co. v. Travelers Ins. Co.*, 967 S.W.2d 35, 35 (Ky. Ct. App. 1997) (stating that employee is "insured" under self-insured employer's fronting policy).

pay judgments, and the self-insured hospital agreed to provide coverage for its employees, an insurance relationship would exist.<sup>270</sup>

*B. A Broader Definition of Insurance Under State  
Financial Responsibility Laws*

A better approach than those that courts currently use to resolve the question of whether self-insurance is "other insurance" for purposes of "other insurance" clauses exists. In *Champlain Casualty*, the court defined insurance as a "contract whereby, for a stipulated consideration, one party undertakes to compensate the other for loss on a specified subject by specified perils."<sup>271</sup> The court considered whether the parties' contractual relationship, along with the obligations that the state financial responsibility laws imposed, constituted insurance under this definition.<sup>272</sup> Although the *Champlain Casualty* court narrowly interpreted the relevant statute,<sup>273</sup> the *Southern Home* court broadly interpreted ambiguous financial responsibility laws to require self-insurers to pay the same claims that insurers subject to "other insurance" clauses would have to pay.<sup>274</sup> When state law allows an entity to satisfy financial responsibility requirements by obtaining either a liability insurance policy or a state-issued certificate of self-insurance, courts should interpret the statute to require that self-insurers be responsible whenever an insurer would be, absent clear legislative intent to the contrary.<sup>275</sup> Combining the *Champlain Casualty* approach<sup>276</sup> with the *Southern Home* court's broad interpretation of state financial responsibility laws<sup>277</sup> provides a method of analysis superior to that of courts that rely on a narrow definition of insurance. This approach adopts

270. See *supra* Part V (suggesting approach to self-insurance as "other insurance" issue).

271. *Champlain Cas. Co. v. Agency Rent-A-Car, Inc.*, 716 A.2d 810, 814 (Vt. 1998).

272. See *id.* (concluding that rental car contract, along with state's financial responsibility law, created relationship of insurance).

273. See *id.* at 812-14 (discussing treatment of "other insurance" in other jurisdictions under state financial responsibility laws). In *Champlain Casualty*, the state financial responsibility law expressly required self-insured automobile owners to provide insurance for permissive users of their vehicles. *Id.* at 814. The *Champlain Casualty* court suggested that, in the absence of the clear expression of legislative intent, it would not have found that the self-insurer was not obligated to indemnify the tortfeasor and, therefore, did not provide "other insurance." See *id.* at 813 (citing with approval *Home Indem. Co. v. Humble Oil & Ref. Co.*, 314 S.W.2d 861 (Tex. Civ. App. 1958)).

274. See *Southern Home Ins. Co. v. Burdette's Leasing Serv., Inc.*, 234 S.E.2d 870, 873 (S.C. 1977) (interpreting financial responsibility statute); *supra* notes 189-92 and accompanying text (discussing *Southern Home Ins. Co.*).

275. See *Southern Home*, 234 S.E.2d at 873 (interpreting financial responsibility statute).

276. See *supra* notes 174-78 and accompanying text (discussing *Champlain Casualty*).

277. See *supra* notes 189-92 and accompanying text (discussing *Southern Home*).

the *Hillegass* court's policy argument that, although the legislature permits companies to formulate the most efficient insurance coverage, including self-insurance, the legislature did not intend to create a device to avoid liability by the self-retention of risk.<sup>278</sup> It permits insurers to look to self-insurers under the "other insurance" provisions of their policies when they have a reason to expect "other insurance" to be available because of state financial responsibility laws.<sup>279</sup> When the law does not require an entity to have insurance, this approach would leave the responsibility to the insurance company to include provisions in its policy stating that the policy was excess to self-insurance.<sup>280</sup>

## VI. Conclusion

Determining whether self-insurance is "other insurance" by attempting to fit the abstract concept of self-insurance into a narrow definition of insurance and applying this conclusion to every form of self-insurance is an unsatisfactory approach for two reasons. First, different courts may not reach the same conclusions, depending on how broadly they define insurance.<sup>281</sup> Although a court could adopt a "lay person" standard like that in *Passaic General*,<sup>282</sup> this approach may not be appropriate when highly sophisticated self-insureds intentionally combine self-insurance with some features of traditional insurance policies<sup>283</sup> or when state financial responsibility statutes are in effect.<sup>284</sup> Second, state-issued certificates of self-insurance are often

278. *Hillegass v. Landwehr*, 499 N.W.2d 652, 656 (Wis. 1993).

279. *See supra* notes 254-262 (proposing approach to self-insurance as "other insurance" conflicts).

280. *Id.*

281. *See supra* note 160 and accompanying text (comparing different courts' application of definition of insurance to self-insurance).

282. *See supra* notes 155, 156 and accompanying text (describing *Passaic General* court's use of lay person standard to conclude that self-insurance was not "other insurance").

283. *See* Michael G. Patrizio, *Fables of Construction: The Sophisticated Policyholder Defense*, 79 ILL. B.J. 234 (1991) (discussing how large commercial businesses differ from individuals in degree of sophistication in approach to purchasing insurance policy and how this difference should affect widely applied doctrine of construing ambiguous contract provisions against insurer). Patrizio notes that large corporations often hire independent brokers to create a large insurance program to cover many types of risks. *Id.* Often, corporations have their own insurance department and evaluate and handle their own claims. *Id.* Large corporations also may eschew primary coverage for a self-insurance program or use a fronting policy in order to save on premiums. *Id.* In reference to the doctrine of strictly construing ambiguous contract provisions against the insurer, Patrizio argues that "common sense mandates a different approach to the ordinary rules governing construction of an insurance policy when a large policyholder is involved." *Id.*

284. *See Champlain Cas. Co. v. Agency Rent-A-Car, Inc.*, 716 A.2d 810, 813 (Vt. 1998) (stating that deciding whether self-insurance is "other collectible insurance" based on simple

available only to large companies with considerable assets.<sup>285</sup> If self-insurers are not liable under the same circumstances that an insurance company would be, insurance companies will bear the sole responsibility of paying more claims, and these costs will be passed along to entities that are unable to self-insure.<sup>286</sup>

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definition of insurance is unhelpful when self-insurer has some obligation to pay for consequences of another's negligence under financial responsibility law).

285. See *supra* note 173 and accompanying text (providing examples of jurisdictions that require certified self-insurers to have twenty-five or more motor vehicles registered in their names).

286. See *Hillegass v. Landwehr*, 499 N.W.2d 652, 655-56 (Wis. 1993) (discussing public policy considerations regarding self-insureds' responsibility for claims).