While most liability policies contain a duty to defend which is subject to a limit of liability clause, they also feature a duty to defend which is virtually unlimited. Insurers have developed a policy in which the "limit of liability" available to indemnify the insured against verdicts or settlements is reduced by the costs of defense. Such a policy is called a "defense within limits" (DWL) policy, also known as "wasting," "cannibalizing," "self-consuming," or "self liquidating" because its available indemnity limit may be eaten or "wasted" by the costs of defense. The industry adopted DWL policy provisions for medical malpractice policies in the 1970s in response to patient claims that were increasing in number and size. Insurers incorporated DWL provisions for directors' and officers' policies for corporate boards during the 1980s in response to heavy defense costs incurred in the savings and loan cases and toxic tort litigation. In the 1980s, insurers placed DWL into legal malpractice insurance. At that time, lawyers were concerned that the industry was forcing them to change from "occurrence" to "claims-made" policies, and the fact that the insurers had inserted DWL provisions into those same policies went virtually unnoticed. I have surveyed lawyers at CLEs in Montana and learned that even today, most do not know they have DWL policies, and do not appreciate the importance of those provisions.

Reasons for development of the DWL policy provisions

Insurers developed DWL policies because costs of defense in the high-risk cases involved in professional liability insurance and directors' and officers' insurance commonly equal costs of indemnity and often exceed limits of liability. While this has prompted insurers to limit their duty to defend, it is hard to see how DWL benefits insurance consumers. When the professional liability insurers inserted the DWL provisions, they abandoned their nominally unlimited duty to defend and promised only defense insular as its costs fit in the limit of money available for indemnity. Insurers contend that they had to adopt DWL because expenses in defending claims were eating up losses paid. This has probably always been true, and the real problem here is that claim complexity, policy limits, and costs of defense are proportional. By the 1980s, the policy limits bought for predicted high-risk liability protection had simply grown to a size where the insurers were unwilling to make an equal commitment for risk of defense expenditures.

The emergence of DWL provisions meant that consumers of Directors' & Officers', Errors & Omissions, and some Commercial General coverages now have to calculate their potential loss exposure as well as the potential costs of defense in buying their insurance. Whether they gain any tangible benefit is questionable. Industry assets that the insured can obtain significant savings by purchasing DWL policies. However, such assertions must be tested against the fact that the risk-aware insured must now double limits to cover the amount deducted for costs of defense. At least one actuary asserts that there is no need for DWL provisions in liability policies because actuarial rate making...
procedures allow pricing of such poli-
cies at a profitable level without de-
ducing defense costs from the limit.3

DWL policy provisions

The DWL policy form from the
Insurance Services Office, Inc., the
trade organization for the industry,
generally features three modifications
from the standardized form resulting
from causality policy. First, the basic insuring agree-
ment traditionally provides that the
company's obligation to pay or defend
terminates when the limit of the com-
pany's liability has been exhausted by
payment of judgment or settlement.
For DWL, that provision is modified
so that the limit can be exhausted not
only by payment of judgments or set-
tlements but also by "claims ex-
penses." Second, the limit of liability
clause is altered to that the
"aggregate" limit of the company's
liability includes not only damages but
also "claims expenses." The limit
of liability clause may also provide that
"claims expenses" are subtracted
from the limit of liability before in-
demnity and that the company has the
right to withdraw when the limits are
exhausted. The limit of liability
clause may then provide for a "deductible"
and "reimbursement" in the event the
insurer has indemnified or paid de-
fense expenses that exceeded the limit
of liability. Third, the policy will carry
in additional definition for "claims ex-
penses" so that the term will cover all
legal defense costs.

In the area of legal malpractice in
1999, the ABA reports that 42 of the
47 insurers providing coverage include
defense costs within their limits of
liability.4 About 12 of the companies
allow exceptions by endorsement5
which likely involves increased premi-
urns. Some include defense costs in
limits after an annual, i.e., $50,000,
defense allowance or a $25,000 per
lawyer annual defense allowance.
Some make supplemental defense
coverage available either as a percent-
age of the per claim limit, i.e., 25%, or
a set amount, i.e., $500,000 or a com-
bination, i.e., the lesser of $100,000 or
50% of the per claim limit.6

Mistakes in marketing the
DWL policy

Because of the marked change in
coverage between a policy that pro-
vides an unrestricted duty to defend
and a policy providing DWL, counsel
should watch for intentional or negli-
gent misrepresentation of the insur-
ance accommodations doing the market-
ing are not careful in representing lim-
its of liability. Sales materials or policy
language indicating that a policy has
"indemnity limits" of a certain
amount, when in fact the limit is sub-
ject to deduction for expenses of de-
fense would raise risk of mismisrep-
tation. Even stating limits of liability
may involve the same risk absent
some language of notice is the policy
that defense expenses are deducted from the available limit.

Oregon requires that the DWL
policy form give notice that defense
costs are deducted from the limits
available for liability. Montana has
no such provision. A policy containing
representations about liability limits
and also containing DWL provisions
might be found to be ambiguous by
reason of conflicting provisions, or
because the policy layout and design
mislreads or allows the insured to have
a reasonable expectation that it con-
tains a limit of liability unfettered by
defense expenses.7

Rights and duties of the parties
under the DWL policy

Under the DWL policy, there is
an inherent conflict between the in-
sured and the insurer in every case
where payment of the potential loss
plus payment of predicted defense
 costs could exceed the limits of liabil-
ity since every dollar spent on defense
of the claim is a dollar that will not be
available for settlement or satisfaction
of judgement. The problem is that the
insured has a direct interest in assuming
that the limit of liability is available for
settlement or payment of judgment
while the insurer may be interested in

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defending on the merits. It may be in the financial interest of a risk-averse insurer to offer the entire limits even in a case of poor liability rather than run risk that hard fought defense will deplete the limits and block settlement later or leave an unsatisfied judgment. It may be in the insurer's interest, on the other hand, to establish through hard fought defense that "nuisance" claims will not invoke any settlement offers from this insurance company. Because the insured under a DWL policy must evaluate both risk of loss and risk of defense costs, it may now be necessary that defense counsel provide the insured full information on the costs of defense. Furthermore, the insured, in attempting to control the costs, may seek to exercise more direction and control over the defense. The lower the limits of insurance available in relation to the potential loss and costs of defense, the more risk the insured will take if it does not accept to the insured's demands for direction and control. This is an area in which the insurer may be exposed to risk of claims for bad faith or excess exposure. Indeed, one author believes that the conflicts raised and the rights of the insured in the face of the conflicts increase the chances that the insurer will have no limit on its liability for losses or for expenses of defense and the chance that the insurance defense counsel will be liable to the insured for malpractice. 1

**Reservation of rights**

There is no conflict if the insurer elects to defend unconditionally, since estoppel will later prevent the insurer from withdrawing defense. 22 However, if the insurer defends under reservation of rights, there is potential conflict, since the carrier may only be concerned about the ultimate cost of defending while the insured must worry about the ultimate cost and payment of loss. Where the insurance policy contains DWL provisions, the insurer may find itself giving notice of reservation of right that it will ultimately withdraw when defense expenditures exceed the limits of liability. If the insurer defends under reservation of right to withdraw when the policy limit is exceeded, it is defending under a conflict insular as it may provide a token defense, or provide a "win at any cost" defense while failing to work for the lowest possible settlement.

**Control of the defense**

Where counsel is defending under a DWL policy and where cost of defense coupled with the potential loss payment likely will exceed policy limits, a conflict may arise with regard to the conduct of the insured's defense. A vigorous defense by counsel may quickly deplete the policy limit and allow the insurer to withdraw leaving the indemnity limit exhausted and the insured exposed. When defense costs are subtracted from the indemnity limit, defense counsel has substantial power to affect the insured's ability to respond to settlement offers or verdicts. Consequently, under conflict logic, the insurer should cede the right to select counsel to the insured unless the limit is so substantial that there is no potential to exhaust it. The risk to the carrier "who acts wrongfully in

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The conflict for the plaintiff's attorney

If available insurance contains DWL provisos, aggressive tactics by plaintiff's counsel may not be in the best interest of the claimant because every dollar plaintiff's counsel forces the defense to spend is a dollar not available for settlement or payment of the verdict. Plaintiff's counsel will have much more incentive to make early attempts to negotiate settlement and to negotiate agreement on limitation discovery, pretrial motions, and other matters that can waste the asset represented by the indemnity limit. This may prove to be an incentive for cooperation since the defense attorney also must be atten-
tive to limiting costs for defense for the protection of the insured.

If settlement attempts by plaintiff's counsel meet with rejection or an aggressive stance by the defense, plaintiff faces the prospect of fighting a battle that will reduce the money below that necessary for settlement or satisfaction of verdict. In such a situation, plaintiff has every incentive to attempt to manipulate the insurer into a position of having made a bad faith decision by refusing to settle and engaging in expensive defense. Plaintiff may have an ally in the insured who hopefully will have independent counsel to monitor the decisions of the insurer.

Withdrawal of defense on exhaustion of limits

Normally, if an insurer has undertaken defense of a claim without a reservation of rights, withdrawal is out of the question. In Transamerica Ins. Group v. Chubb and Son, Inc., the court held that the insured was estopped to deny coverage where it had defended for ten months, citing the facts that the insurer chose counsel, conducted the defense, did the initial investigation, and controlled negotiations. The basic insurance agreement in a DWL policy will generally

cour there said that "in determining whether to settle, the insurer must give the interests of the insured at least as much consideration as it gives to its own interests; and that when there is great risk of a recovery beyond the policy limits so that the most reasonable manner of disposing of the claim is a settlement which can be made within those limits, a consid-

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contain a provision allowing the insur-er to withdraw when the limit has been exhausted by claims expenses or payment. However, even under a DWL policy, withdrawal may sometimes be thwarted. Courts generally estop insurers from withdrawing even when they have policy rights to do so 1) if the case is too near trial, 2) if the insurer has done something to prejudice the insured, or 3) if the insurer has defended for a long period of time. 2 If the policy contains clear DWL provisions and a clear right of the insurer to withdraw upon exhaustion of the limits by expenses, categories (1) and (3) should not present problems of prejudice since counsel can continue defending and the only change will be in who pays. However, if the insurer and the insured have disagreed on defense versus settlement, the insured will, under (2), contend that the insurer has in the course of defending prejudiced the case by exhausting the pool of money left for settlement or verdict. While the insurer could seek a remedy for such a wrong after it had defended itself by filing an action for breach of contract for failure to settle, there is a risk that a court would simply disallow the withdrawal.

Furthermore, if the insurer is held to have wrongfully withdrawn, the majority rule is that the insured does not have to defend itself and may settle the case without consent. 23 At that point, the insured only has a duty to cooperate but not minimize the insurer's exposure. 24

Does the policy really provide defense within limits?

While professional liability policies and directors and officers liability policies have long contained express DWL provisions, the courts have recently hosted disputes about whether certain Commercial General Liability “CGL” policies provide defense within limits. Faced with enormous potential liability from the savings and loan collapse and toxic tort cases and the concomitant magnitude of the costs of defense involved in such cases, some carriers attempted to read DWL provisions into standard CGL policies. In Bankers Trust Co. v. Impenitual Casualty and Indemnity Company, 25 Imperial, which had spent $2 million defending and only had limits of $2 million, took the position that those defense costs counted toward the $2 million limit of liability and sought a court declaration that its coverage was exhausted. In fact, Imperial's policy appeared to be a standard CGL policy with a standard basic insuring agreement and “limits of liability” provision. In holding that Imperial’s policy was not DWL, the 7th Circuit said:

"Imperial believes that its policy is among the minority that counts defense expenditures toward the limit of liability. It did not tell LACA or its other insured so in 1985, when it issued the policy; indeed, Imperial's interpretation of its policy appears to be a recent discovery." 26

Noting that federal courts had, in unpublished decisions, ruled twice previously that Imperial’s CGL policies were not DWL, 27 Judge Easterbrook wrote, "we publish this decision and trust that Imperial will desist." 28 The Bankers Trust and unpublished decisions against Imperial Casualty and Indemnity make clear the two propensions that DWL cannot be read into the standard CGL policy and that the insurer, being the drafter of the policy, is not in a position to argue that a policy provides DWL by virtue of ambiguity.

Insurers have unsuccessfully attempted to convince courts that their promise to indemnify against judgments that contain attorney fees or costs means that the policy is a DWL policy. See, for example, Planet Ins. Co. v. Mead Reinsurance Corp. 29

And in Groenwald & Adams v. Lloyd's of London, 30 the insurer tried to persuade the court that the fact that the insured’s deductible applied to costs and expenses made the policy a DWL policy. 31 The appellate court ruled that costs of defense were included only in the deductible and not in the definition of aggregate liability. 32 Ambiguity may prevent the court from enforcing a DWL provision. In Beauchee v. CNA, 33 the court found that the juxtaposition of three different clauses on three different pages along with the use of the separate terms “loss” and “claims” would allow

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Only one state, Oregon, requires that the policy contain any particular notice provisions. Montana prohibits any provision in a casualty insurance form "permitting defense costs within limits, except as permitted by the commissioner in his discretion." The statute gives no guidance to aid the commissioner's exercise of discretion, and DWL provisions see common in Montana for E&O and D&O policies.

Conclusion
If DWL was adopted to contain the unpredictability of defense costs in the face of increasing complexity of litigation, one cannot help but think that it was unnecessary. Simple adoption of a "limits of defense" provision similar to a limit of liability with disclosure on the declarations page would have promoted certainty.

The problem with adoption of the DWL provisions is that they encourage conflicts that did not exist in the standard fault policies. DWL provisions produce conflicts between the insured and insurer that heighten the risk of bad faith or excess coverage claims against the insurer. They also increase the number of situations in which courts may rule that the insurer has a policy that is limitless for defense and for indemnity. It may be a fact, however, that the financial benefit of DWL provisions to the insurers will outweigh the detriment of any potential bad faith or excess claims suits. Counsel must understand the potential conflict inherent in DWL policy provisions.

NOTES
2. Helfand, above, at 13 Cal. Rptr. 2d 298.
6. SELECTING LEGAL MALPRACTICE INSURANCE, American Bar Association, Standing Committee on Lawyer's Professional Liability, 1999 Ed.
7. Id.
8. Id.
11. ROESENBURG, supra note 5, at 490.
13. Id., at §4.22, pg. 230 citing, Shelby Steel Fabricators, Inc. v. United States Fidelity & Guaranty Ins. Co., 569 So. 2d 309, 312-13 (Ala. 1990) for the "implication" that the insurer will be automatically estopped from denying coverage.
16. 50 Cal. 2d 654, 658-69, 528

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