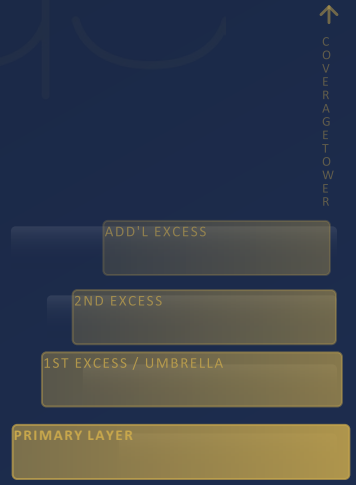
INSURANCE COVERAGE LAW

Suing **Excess Insurers** Before Underlying Exhaustion

The Policyholder's Whole-Tower Action After *Fox Paine*

> *California Supreme Court · Fox Paine & Co. v. Twin City Fire Ins. Co. · July 27, 2026*



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AGENDA

Session Roadmap

Six focused topics on suing excess insurers before exhaustion — from foundational cases to federal court pitfalls.

COVERAGE TOWER

1

Key Cases

Fox Paine, CVC Investments & Recent Federal Decisions

2

The Insurance Coverage Tower

Structure & Baselines

3

Breach of Contract vs. Anticipatory Declaratory Relief

Rights, duties & timing distinctions

4

Ripeness, Actual Controversy & Remote Contingencies

When a dispute is truly justiciable

5

Pleading the Whole-Tower Coverage Case

What must go in the complaint — and why

6

Federal Court Pitfalls

Standing, Injury-in-Fact & Abstention

The Landscape: Four Decisions That Matter

KEY CASES SHAPING PRE-EXHAUSTION DECLARATORY RELIEF

1

CAL. SUPREME COURT

Fox Paine & Co. v. Twin City Fire Ins. Co., *2026 Cal. LEXIS 3942*

✓ Policyholder-Favorable

KEY HOLDING

Pre-exhaustion declaratory relief against excess insurers is viable — insured need not wait for underlying coverage to be exhausted.

Leading state court authority on "reasonable likelihood" standard

2

MINN. SUPREME COURT

CVC Investments LLP v. State Farm, *Minn. Aug, 5, 2026*

✓ Defining Framework

KEY HOLDING

Defines when an "actual controversy" exists — insurer must have had a genuine opportunity to respond and dispute; 2–4 days of silence is insufficient.

Bilateral controversy requirement — not a unilateral prediction

3

6TH CIRCUIT FEDERAL

Fire-Dex v. Admiral Ins. Co.
139 F.4th 519 (6th Cir. 2025)

✓ Clarifies federal-court jurisdiction

KEY HOLDING

Federal court must accept jurisdiction once a breach of contract occurs — courts cannot decline mature damages actions under Wilton/Brillhart discretion.

Limits federal court discretion to decline post-breach claims

4

9TH CIRCUIT FEDERAL

50 Exchange Terrace v. Mount Vernon Specialty Ins.
129 F.4th 1186 (9th Cir. 2025)

✗ Limiting jurisdiction — Appraisal Bar

KEY HOLDING

Injury too speculative during an appraisal proceeding. While parties dispute only the "amount of loss," no actionable injury exists for declaratory relief. After appraisal proceeding, any dispute would be ripe for litigation.

Critical guardrail: appraisal proceedings may bar early suit

Fox Paine & Co., LLC v. Twin City Fire Ins. Co.

CALIFORNIA SUPREME COURT | JULY 27, 2026

> *"An insured may state a viable cause of action for declaratory relief regarding coverage and liability under an excess insurance policy even if all of the underlying insurance coverage has not yet been exhausted."*

1 PLEADING STANDARD

Pre-exhaustion declaratory relief survives demurrer under *C.C.P. § 430.10* — the claim is legally cognizable at the pleading stage.

2 RIPENESS TEST

Action is viable when loss is *"practically or reasonably likely"* to reach the excess layer — not certainty, not mere possibility.

3 NO BRIGHT LINE

No precise formula or *line of demarcation* governs the "reasonable likelihood" analysis — courts assess the totality of circumstances.

ACTUAL CONTROVERSY STANDARD

CVC Investments LLP v. State Farm

Minnesota Supreme Court | August 5, 2026

What DOES Create Actual Controversy

- Insurer **expressly denies coverage**
- Insurer **fails to respond** after reasonable opportunity
- **Clear repudiation** of contractual obligation
- Genuine dispute about **scope of appraisal**

vs.

What Does NOT Create Actual Controversy

- Insured's **unilateral prediction** of future dispute
- **2–4 days of insurer silence** with no legal duty to respond yet
- Filing suit as a **placeholder** before limitations period expires
- **One side's demand for appraisal alone** — without scope dispute

Source: *CVC Investments LLP v. State Farm Fire & Cas. Co.*, Minnesota Supreme Court, Aug. 5, 2026

Actual controversy must be bilateral — insurer must have had opportunity to respond and dispute

The Insurance Coverage Tower: Baselines

Three foundational concepts for today's discussion

1

Tower Structure

Primary insurer sits at the **bottom** of the tower; unlimited excess layers may stack above it. There is **no cap on the number of layers** — each successive carrier sits above the prior layer's limits.

2

Vertical Relationship

Each applicable underlying layer must be **exhausted from the bottom up** before the next layer is triggered. An excess insurer's duty to perform **matures only upon exhaustion of applicable underlying coverage** — not before.

3

Policy as Contract

The excess policy is a **contract**; breach-of-contract principles govern throughout. **Exhaustion is a prima facie element** of the insured's case — without it, no breach has matured.

Typical Coverage Tower Structure

Coverage flows from the bottom up — each layer exhausted before the next attaches

COLLECT FROM BOTTOM UP

Assume Primary layer of $1 million; first excess of $4 million; and second excess of $5 million

ADDITIONAL EXCESS
No Limit

No theoretical limit — layers stack sequentially
Each attaches after prior layer fully exhausted
Policyholder collects from the bottom up

UNLIMITED LAYERS

2ND EXCESS LAYER
$5M xs $5M

Attaches only after underlying umbrella/excess layer exhausted

Effective limit: $10,000,000 cumulative

ATTACHES AT $5M

1ST EXCESS / UMBRELLA
$4M xs $1M

Attaches only after primary limits exhausted
Supplements indemnity limits of primary
Effective limit: $5,000,000 cumulative

ATTACHES AT $1M

PRIMARY LAYER

Pays defense costs (supplementary payments) ± policy limits
Pays judgment up to indemnity limit

FIRST RESPONDS

TOWER KEY

- Primary — responds first; widest obligations
- 1st Excess — attaches at primary limit
- 2nd Excess — attaches at cumulative $5M
- Additional layers — no theoretical limit

KEY PRINCIPLE
No excess layer pays a dollar until every layer beneath it is **fully (or deemed) exhausted.**

Exhaustion is a **prima facie element** of the insured's breach-of-contract case.

↑ **Vertical Sequence:** *Each layer is triggered sequentially — primary → 1st excess → 2nd excess → additional layers. The policyholder must prove exhaustion of underlying limits before current recovery from any excess layer.*

Insurance Policies Are Contracts

Elements of a Breach-of-Contract Claim

1. **A valid contract**
   Offer, acceptance, and consideration — the insurance policy itself

2. **Plaintiff's performance or excuse for non-performance**
   Timely notice, premium payment, cooperation with insurer

3. **Defendant's breach of a *matured* contractual duty**
   The obligation to perform must have become due and payable

4. **Damages caused by the breach**
   Compensatory damages — amounts owed but withheld by the insurer
   Pre-Judgment Interest & Consequential Damages

CRITICAL FOR EXCESS POLICIES

The duty to perform (pay $) matures **ONLY upon exhaustion of underlying coverage.** Without exhaustion, there is no breach — there is only a **potential future breach.**

Declaratory Relief: Two Types in Insurance Context

Negative Declaration — Insurer Sues

Insurer initiates before any payment obligation

- Insurer seeks a court declaration that **no coverage exists** before any obligation to pay arises
- **Classic usage:** Insurer files first to preempt the insured from selecting the forum or framing the legal question (or mitigate claim of bad faith)
- Action is forward-looking — dispute is declared before breach matures, avoiding the need for breach to occur at all

📖 Edwin Borchard, *Declaratory Judgments and Insurance Litigation*, 34 Nw. L. Rev. 245 (1939) — foundational authority on declaratory adjudication

Positive / Anticipatory Declaration — Insured Sues

Insured acts before exhaustion; no breach has yet occurred

- **Insured sues excess carrier** before all underlying policies are exhausted — the breach has not yet ripened
- No breach yet — the dispute is **forward-looking**: insured seeks to clarify obligations now, so breach becomes unnecessary
- Ripeness: must show it is **"practically or reasonably likely"** that losses will reach the excess layer (*Fox Paine*, Cal. 2026)

Cal. Civ. Code § 1060 | Uniform Declaratory Judgment Act

Federal Declaratory Judgment Act, 28 USC § 2201; Fed. R. Civ. P. 57

BORCHARD (1939)

"Resort to declaratory adjudication does not require any purported *breach* of contractual relations — one of its functions is to *clarify disputed relations so as to make breach unnecessary.*"

***E.R. SQUIBB V. LLOYD'S*, 241 F.3D 154, 177 (2D CIR. 2001)**

"Insurance coverage disputes are a *paradigm* for declaratory jurisdiction — even when coverage depends on future contingencies, courts may properly exercise jurisdiction."

DECLARATORY RELIEF

Anticipatory Posture: What It Means for the Case

Four procedural dimensions shaped by the pre-exhaustion, anticipatory posture of a declaratory action

1 Statute of Limitations

The SOL on the **breach-of-contract claim has NOT commenced** — the breach has not yet occurred.

Because no duty to pay has matured and no breach has taken place, the limitations clock has not begun to run. The anticipatory declaratory action is not a SOL-avoidance tactic — it is the **correct vehicle** for the pre-exhaustion claim.

E.g., Vigilant Ins. Co. v. Luppino, 723 A.2d 14 (Md. 1999)

2 Preclusion

Collateral estoppel applies to matters *actually determined* in the declaratory action.

General res judicata — barring claims that *could have been* raised — does **NOT apply**. The anticipatory posture limits the preclusive scope of the judgment to issues actually litigated and decided.

Allan Block v. Country Materials Corp., 512 F.3d 912 (7th Cir. 2008) (Posner, J.); *Boca Park v. Higco*, 407 P.3d 761 (Nev. 2017)

3 Jury Trial Rights

The anticipatory or declaratory **label does not determine** the right to a jury trial on disputed facts.

Courts look to the **nature of the underlying claim** — not the form of relief sought. If the underlying claim would carry a jury right (*e.g.,* breach of contract), that right is preserved in the declaratory action.

Simler v. Conner, 372 U.S. 221 (1963)

4 Court Discretion

Courts have discretion **NOT to proceed** in a purely anticipatory posture — even when **Article III jurisdiction exists**.

Relevant factors: parallel state proceedings, maturity of dispute, availability of adequate alternative relief, and whether the declaratory action would serve a useful purpose.

Wilton v. Seven Falls Co., 515 U.S. 277 (1995); *Brillhart v. Excess Ins. Co.*, 316 U.S. 491 (1942)

Anticipatory Repudiation vs. Anticipatory Declaration

A critical distinction

Anticipatory Repudiation / Renunciation

When a party **expressly renounces** performance before it is due, this may be treated as a **PRESENT breach of contract**. The non-breaching party may sue immediately.

Option: The injured party may also elect to wait until performance is actually due before bringing suit — the choice belongs to the non-breaching party.

Statute of Limitations

The SOL is **not accelerated** merely by the defendant's renunciation. The limitations period runs from the time of the **actual breach**, not the anticipatory repudiation

Franconia Assoc. v. United States, 536 U.S. 129 (2002)*; Mammoth Lakes Land Acquisition v. Town of Mammoth Lakes,* 191 Cal. App. 4th 435 (2010)

CVC Investments Definition (Minn. 2026)

> *"Anticipatory breach is a term of art. It occurs when one party . . . before the performance is due, **expressly renounces** the same and gives notice that he will not perform it. . . . Anticipatory breach does **not** arise simply from a plaintiff's doubt about the defendant's ability to perform."*

Suing Excess Carriers Before Exhaustion: The *Fox Paine* Standard

> *A dispute can be ripe, and a court can provide* ***sufficiently clear and directive*** *declarations of rights and responsibilities under* ***multiple excess policies****, even though coverage under these policies is* ***contingent on the exhaustion*** *of all underlying insurance."*
>
> FOX PAINE & CO., LLC V. TWIN CITY FIRE INS. CO. · CAL. SUPREME COURT, JULY 27, 2026

1

CONTINGENT COVERAGE

Actual controversy may exist even when coverage depends on a **future contingency** — exhaustion of underlying layers does not have to occur first.

2

PRACTICAL LIKELIHOOD

Focus on the **practical likelihood** that the contingencies will occur — **not a precise formula** or line of demarcation. Courts assess reasonableness, not certainty.

3

PLEADING STAGE LIMIT

If losses are **fully known** yet fall **short of underlying limits**, declaratory relief is properly **rejected at the pleading stage** — no actual controversy exists.

Fox Paine & Co., LLC v. Twin City Fire Ins. Co. · California Supreme Court · July 27, 2026

Applying the "Reasonable Likelihood" Test

Fox Paine's framework for excess-layer declaratory relief

1 STEP ONE

Map the Coverage Tower

Identify all layers, limits, and attachment points. Calculate **total exposure vs. total available limits** across the entire tower.

FOUNDATION

2 STEP TWO

Assess Known Losses vs. Underlying Limits

Are known/alleged losses **reasonably likely to exhaust underlying coverage?** Compare current loss estimates to primary + umbrella limits.

LOSS ANALYSIS

3 STEP THREE

Evaluate Contingencies

How many contingencies must occur for excess to attach? **Liability finding + quantum of damages + underlying exhaustion.** Each adds remoteness.

RIPENESS

4 STEP FOUR

Apply the Pleading Standard

If it is **"practically or reasonably likely"** that the loss will reach the excess layer, the claim survives demurrer/motion to dismiss. *No precise formula.*

KEY STANDARD

Fox Paine: "No precise formula or line of demarcation" — courts assess the practical likelihood that the loss will reach each excess layer at the pleading stage.

What Is Too Remote?

Duty to Defend vs. Duty to Indemnify — Different Ripeness Bars

RIPENESS THRESHOLD ●●○○○ HIGHER BAR

Duty to Defend

Generally Easier to Show Ripeness

LOWER BAR

CONTINGENCY BURDEN: ●●○○ MODERATE

REQUIRED CONTINGENCY

Third party commences litigation

- ✓ Lower contingency burden — only one predicate event needed to trigger ripeness analysis
- ✓ Practical likelihood that third party commences litigation is sufficient — no finding of liability required

Authorities

Trustgard Ins. Co. v. Collins, 942 F.3d 195, 200 (4th Cir. 2019)
Admiral Ins. v. Niagara Transformer, 57 F.4th 85, 93 (2d Cir. 2023)

Duty to Indemnify

More Remote

HIGHER BAR

CONTINGENCY BURDEN: ●●●● HEAVY

DOUBLE CONTINGENCY REQUIRED

① **Third party commences litigation** + ② **Third party prevails**

> *"Suits about the duty to indemnify . . . would ordinarily be advisory when the insured's liability remains undetermined."*
> — *Trustgard Ins. Co. v. Collins*, 942 F.3d 195 (4th Cir. 2019)

Courts may **sever and stay** indemnity disputes pending resolution of underlying facts

Additional Consideration

Stay of indemnity dispute while underlying facts are being litigated.
Montrose Chemical v. LA Superior Court, 6 Cal. 4th 287 (1993)

Limits: When Suing Too Soon or Too High Fails

Guardrails on the whole-tower action

Too High in the Tower

- If known losses fall entirely below the attachment point of an excess layer, no actual controversy exists for that layer

> *"When the insured's allegedly covered losses are fully known yet fall short [of the underlying limits], the excess policy will not attach . . . declaratory relief is properly rejected at the pleading stage."* — *Fox Paine & Co. v. Twin City Fire Ins. Co.* (Cal. 2026)

- Liquidated losses may be far less than estimated total exposure — courts look at both

Solution: Plead the loss estimate, not just the current payment amount

Too Early in the Claim Process

- Insurer must have had a reasonable opportunity to respond to notice before insured files suit

> *Filing suit the day after mailing notice — before the insurer even receives it — is an* ***improper anticipatory maneuver****, not a genuine controversy.* — *Atlanta Gas Light Co. v. Aetna Cas. & Sur. Co.*, 68 F.3d 409 (11th Cir. 1995)

> *2–4 days of insurer silence — with no legal duty to respond in that window — is* ***insufficient*** *to create an actual controversy.* — *CVC Investments LLP v. State Farm* (Minn. 2026)

Solution: Await a genuine bilateral dispute — insurer denial or reservation of rights or unreasonable delay

Too Speculative on Indemnity

- Duty-to-defend ripeness is generally easier to establish — lower contingency burden
- Duty-to-indemnify requires the additional showing that the underlying plaintiff will actually prevail — a double contingency

> *"Suits about the duty to indemnify . . . would ordinarily be advisory when the insured's liability remains undetermined."* — *Trustgard Ins. Co. v. Collins*, 942 F.3d 195 (4th Cir. 2019)

- Courts may sever and stay indemnity claims while underlying facts are litigated

See Montrose Chemical v. LA Superior Court, 6 Cal. 4th 287 (1993)

Each limitation should be considered before filing

Discretion Not to Proceed, Even with Jurisdiction: Anticipatory Actions

Wilton/Brillhart Discretion — Where Courts Draw the Line

TOO HYPOTHETICAL? WHICH INSURER DUTY?

Prudential deference — discretion to decline

TRUSTGARD INS. CO. v. COLLINS — 942 F.3D 195 (4TH CIR. 2019)

- Duty to indemnify **ordinarily advisory** before underlying liability determined
- Even if Article III jurisdiction exists, court **should decline prudentially**
- Constitutional jurisdiction ≠ obligation to exercise it

ADMIRAL INS. CO. v. NIAGARA TRANSFORMER CORP. — 57 F.4TH 85 (2D CIR. 2023)

- "Practical likelihood" test applied to **both** defend and indemnify
- Greater willingness to dismiss **pre-exhaustion claims**
- Duty-to-indemnify claims face double-contingency burden

"Suits about the duty to indemnify . . . would ordinarily be advisory when the insured's liability remains undetermined." — Trustgard, 942 F.3d at 200

WHEN IS LITIGATION MATURE?

Must accept jurisdiction once breach occurs

FOX PAINE & CO. v. TWIN CITY FIRE INS. CO. — CAL. SUP. CT., JULY 2026

- Trial court has **some latitude** not to proceed in purely anticipatory posture
- BUT: declaratory relief **must be granted** when facts sufficiently alleged
- Discretion is not a license to deny well-pleaded anticipatory claims

FIRE-DEX v. ADMIRAL INS. CO. — 139 F.4TH 519 (6TH CIR. 2025)

- Once breach of contract occurs, federal court **MUST accept jurisdiction**
- Wilton/Brillhart does not apply to **mature damages actions**

GEICO v. DIZOL — 133 F.3D 1220, 1226 n.6 (9TH CIR. 1998) (en banc)

- Courts **cannot decline** mature damages actions — discretion limited to anticipatory posture

Key rule: *Once a breach-of-contract claim matures, Wilton/Brillhart discretion evaporates — federal court (generally) must hear the case.*

Wilton v. Seven Falls Co., 515 U.S. 277 (1995) • *Brillhart v. Excess Ins. Co.*, 316 U.S. 491 (1942) • Federal Declaratory Judgment Act, 28 U.S.C. § 2201

Appraisal Proceedings: A Special Barrier to Declaratory Relief

Three jurisdictions — one convergent lesson: appraisal changes the ripeness calculus

SPECIAL ISSUE

1

9TH CIR. 2025

50 Exchange Terrace v. Mount Vernon Specialty Ins.

129 F.4th 1186 (9th Cir. 2025)

> "Any alleged injury before appraisal is too speculative to create an actionable claim."

- If parties are in appraisal, the sole dispute is "amount of loss"
- No present injury sufficient for declaratory relief while appraisal is pending
- Coverage dispute is premature — quantum must be resolved first

2

TEX. SUP. CT. 2026

In re Ace American Ins. Co.

734 S.W.3d 887 (Tex. 2026)

> "Appraisal is intended to take place **before** suit is filed."
> *(original emphasis)*

- Mandatory pre-litigation exhaustion of appraisal remedy?
- Watch for statute of limitations and one- or two-year suit provision.

3

MINN. SUP. CT. 2026

CVC Investments (Minn. 2026)

Minnesota Supreme Court, August 5, 2026

- One side's appraisal demand alone does not create actual controversy
- Unilateral invocation of appraisal ≠ justiciable dispute

EXCEPTION — SCOPE DISPUTE MAY SUFFICE

Disagreement about the **SCOPE** of an appraisal proceeding — not merely who invoked it — may be sufficient to establish an actual controversy.

Wailua Assoc. v. Aetna, 904 F. Supp. 1142, 1149 (D. Haw. 1995)

Appraisal proceedings may create a temporary ripeness barrier — but scope disputes may reopen the courthouse door.

BREACH CLAIMS

Pleading the Coverage Case: Mature Breach-of-Contract Claims

When exhaustion has occurred — the direct damages pathway

Past Unreimbursed Costs

Allege incurred costs not yet reimbursed. Seek damages plus pre-judgment interest. This is a **mature breach-of-contract claim** requiring no declaratory predicate.

Note: Costs likely to be incurred in **future** are part of claim for **declaratory relief**.

See generally New York Life v. Viglas, 297 US 672 (1936) (Cardozo, J.)

Theory of Allocation

Policyholder must plead (implicitly) a theory of how loss flows through the tower: **horizontal exhaustion, vertical exhaustion, non-cumulation provisions.** Each choice has strategic consequences.

Note: There may be more than one pleadable model of allocation.

Proving Exhaustion

Must allege and be prepared to prove underlying exhaustion as a **prima facie** element.

On proving exhaustion: U-Haul v. Lumbermen's Mut. Cas., 576 F.3d 1040 (9th Cir. 2009); *St. Paul Fire & Marine v. Am. Int'l Spec. Lines*, 365 F.3d 263 (4th Cir. 2004); *Keystone Shipping Co. v. Home Ins. Co.*, 840 F.2d 181 (3d Cir. 1988); *Drake v. Ryan*, 514 N.W.2d 785 (Minn. 1994).

Separate Cases — Joinder of Claims

Insurance coverage claims are **separate breach-of-contract actions.** Joinder of claims and parties. Fed. R. Civ. P. 20(a)(2); Cal. Civ. Pro. § 379(a)

Key Principle: Unlike declaratory-relief claims, mature breach claims have a running statute of limitations — underlying exhaustion triggers the SOL clock for overlying. Plead damages precisely; do not rely on declaratory framing for claims where breach has already occurred.

Pleading the Anticipatory Declaratory Relief Claim

For pre-exhaustion cases: What must the complaint allege?

1

Identify All Policies

Plead all primary and excess policies — their *limits*, *attachment points*, and conditions. Name all carriers as defendants.

Fed. R. Civ. P. 20; Cal. Civ. Proc. § 379(a)

2

Allege an Actual, Non-Hypothetical Controversy

Insurer has *denied coverage*, reserved rights, or is in genuine dispute. Not mere silence of 2–4 days. Not a placeholder filing.

CVC Investments LLP v. State Farm (Minn. 2026)

3

Allege Practical Likelihood of Loss Reaching the Layer

Plead it is *"practically or reasonably likely"* that the insured's potential liability will reach into each excess layer claimed. Attach supporting loss estimates, claims history.

Fox Paine & Co. v. Twin City Fire Ins. Co. (Cal. 2026)

4

Allege Future Obligation & Threatened Breach

Allege that upon exhaustion of underlying coverage, the excess insurer will be *obligated to pay* and threatens to refuse performance when that duty matures.

5

Seek Concrete Relief

The declaration must resolve a *concrete dispute* — not issue an advisory opinion. Identify the specific legal rights and duties to be declared for each excess layer.

Fed. R. Civ. P. 57, Advisory Committee Note ("The demand for relief shall state with precision the declaratory judgment desired.").

Practitioner Checklist: **Suing the Whole Tower**

Before filing that complaint — have you addressed each item?

12-POINT CHECKLIST

COVERAGE & CLAIMS FOUNDATION

- ☑ **Map the entire coverage tower** — all policies, limits, attachment points
- ☑ **Identify mature vs. anticipatory claims** — breach or declaratory relief?
- ☑ **Gather evidence of actual controversy** — insurer denial, reservation of rights, refusal to respond
- ☑ **Quantify loss exposure** vs. each layer's attachment point
- ☑ Plead **"practically or reasonably likely"** language from (*Fox Paine*)
- ☑ Consider **horizontal vs. vertical exhaustion** theory

PROCEDURE, FORUM & JOINDER

- ☑ **Address appraisal proceedings** — are they ongoing? (*50 Exchange Terrace; In re Ace American*)
- ☑ If in **federal court**: analyze standing, injury-in-fact, ripeness (Art. III)
- ☑ Research court-specific **discretion rules** in purely anticipatory posture (*Wilton/Brillhart; GEICO v. Dizol*)
- ☑ Consider **severing/staying indemnity claims** while underlying case is pending (*Montrose Chemical*)
- ☑ **Joinder of all carriers** in a single action — Fed. R. Civ. P. 20 / Cal. C.C.P. § 379(a)
- ☑ **Allege exhaustion** with supporting evidence or sufficient specificity

Key Takeaways

1. **Fox Paine confirms** pre-exhaustion declaratory relief against excess insurers is *viable*.

2. The governing standard is **"practically or reasonably likely"** — *not* certainty and *not* mere theoretical possibility. A calibrated, fact-specific showing.

3. An **actual controversy must be bilateral** — the insurer must have had a genuine opportunity to respond and dispute coverage before suit is filed.

4. **Anticipatory posture carries procedural consequences:** the statute of limitations is *not* triggered, and only collateral estoppel — *not* full res judicata — applies to the declaration.

5. **Federal courts** might be more ready to decline a purely anticipatory insurance-coverage suit — but once a *breach occurs*, they generally must accept jurisdiction.

6. **Pleading matters:** align each claim to the correct cause of action — *breach* or *declaratory relief* — and allege the exhaustion theory from the outset.

Questions?

THANK YOU FOR ATTENDING

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