



## NORTH CAROLINA LAW REVIEW

Volume 46 | Number 2

Article 13

2-1-1968

# Insurance -- The "Other Insurance" Clause Conflict

Samuel G. Grimes

Follow this and additional works at: <http://scholarship.law.unc.edu/nclr>



Part of the [Law Commons](#)

### Recommended Citation

Samuel G. Grimes, *Insurance -- The "Other Insurance" Clause Conflict*, 46 N.C. L. REV. 433 (1968).

Available at: <http://scholarship.law.unc.edu/nclr/vol46/iss2/13>

This Note is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in North Carolina Law Review by an authorized editor of Carolina Law Scholarship Repository. For more information, please contact [law\\_repository@unc.edu](mailto:law_repository@unc.edu).

volved with either the communicant or the communication in a manner similar to his personal appearance. The logic of the privilege seems to require inclusion of this latter type of observation within privileged information. If it did not, for example, the effect of the privilege as to testimony concerning the penitent's admissions of thefts would certainly be vitiated by subsequent testimony of the priest that he saw the stolen goods. Thus it is clear that formulation of comprehensive rules dealing with varying factual situations must await case by case development of more specific privilege principles.

The new statute embodies the recognition by the General Assembly that the purpose of the former statute could be better served by broadening the terms defining the privilege. The new statute follows a trend among state legislatures to liberalize the priest-penitent privilege<sup>32</sup> and should be well received by the clergy and the Bar. Such a direction clearly conforms to the basic policy underlying the priest-privilege that

. . . Knowledge so acquired in the performance of a spiritual function . . . is not to be transformed into evidence to be given to the whole world. . . . The benefit of preserving these confidences inviolate overbalances the possible benefit of permitting litigation to prosper at the expense of the . . . spiritual rehabilitation of a penitent. The rules of evidence have always been concerned not only with truth but with the manner of its ascertainment.<sup>33</sup>

THOMAS W. TAYLOR

### Insurance—The "Other Insurance" Clause Conflict

The controversy among the courts concerning conflicting "other insurance" clauses<sup>1</sup> in automobile liability policies is no small one. This conflict arises when two policies appear to provide general coverage to a driver, yet each claims exclusion from liability. That claim is generally based on provisions in each stating either that

<sup>32</sup> North Carolina was among the twelve states in which priest-penitent statutes were enacted during the five-year period, 1957-1962. There has been no apparent abuse of the privilege, evidenced by the fact that no state has ever repealed its statute once it was adopted. Reese at 58.

<sup>33</sup> Mullen v. U.S., 263 F.2d 275, 280 (D.C. Cir. 1959).

<sup>1</sup> "Other insurance" clauses are "clauses which purport to vary the coverage of the policy if there is another policy or other policies protecting the risk insured against." Annot., 76 A.L.R.2d 502, 503 (1961).

the policy shall not extend coverage where there is available to the driver other valid and collectible insurance, or that the policy shall provide coverage only for liability in excess of the limits of such other insurance.

In *Allstate Ins. Co. v. Shelby Mut. Ins. Co.*<sup>2</sup> Mrs. Widenhouse, with a view toward purchasing, drove an automobile owned and held for sale by Concord Motors, Inc. She struck and injured David Clontz. Concord Motors held a "Garage Liability Policy" issued by Shelby Mutual Insurance Company under which Mrs. Widenhouse was insured as an operator with the permission of the named insured. Mrs. Widenhouse was also covered by an owner's liability policy with "drive other car"<sup>3</sup> coverage issued to her husband by the Allstate Insurance Company. Both Mrs. Widenhouse and Concord Motors were sued by Clontz's father as next friend. Allstate sued Shelby Mutual for declaratory judgment concerning the liability of the insurers. The Supreme Court held that the garage liability policy did not cover the accident because of the provision therein that a user such as Mrs. Widenhouse would not be covered if other valid and collectible automobile insurance, *either primary or excess*, was available to such user. The provision was held to be controlling even though the Allstate policy contained a provision that insurance with respect to a non-owned automobile would be *excess* insurance over other valid and collectible insurance.<sup>4</sup>

There are three principal types of "other insurance" clauses: (1) the "escape" clause, providing that in the event of other insurance the insurer issuing the policy in question will be released from all liability; (2) the "excess" clause, providing that in the event of

---

<sup>2</sup> 269 N.C. 341, 152 S.E.2d 436 (1967).

<sup>3</sup> A "drive other car" clause is one which provides that if the owner is subjected to liability due to his casual driving of another vehicle, the insurer will assume such liability.

<sup>4</sup> Allstate also contended that the fact that Mrs. Widenhouse was driving a dealer-owned automobile was an event which invoked an exclusionary provision of their policy relating to a non-owned automobile used by insured "in the automobile business." The court denied the contention that this was a use "in the automobile business" on the basis of *Jamestown Mut. Ins. Co. v. Nationwide Mut. Ins. Co.*, 266 N.C. 430, 146 S.E.2d 410 (1966). 269 N.C. at 347, 152 S.E.2d at 441. The *Jamestown* case is North Carolina's only previous encounter with the problem here involved. There the conflict was between a clause excluding coverage where a non-owned car was being used in the "automobile business" and a garage liability policy containing an ordinary "escape" clause. Since the Court ruled that the car was not being used in the "automobile business" and thus not within the exclusion of the former policy, direct confrontation with the conflict was avoided.

other insurance the coverage offered by the policy in question shall be "excess" coverage—*i.e.* the insurer will be liable only if the loss is in excess of the maximum coverage afforded by the other policy or policies; and (3) the "pro rata" clause, providing that in the event of other insurance the insurer issuing the policy in question shall be liable only for the proportion of the loss that represents the ratio between the limit of liability stated therein and the total limit of liability in all other valid and collectible insurance covering the loss.<sup>5</sup> Since automobile liability policies often contain "drive other car" clauses, and since many policies extend their coverage to motor vehicles "used" by or on behalf of the named insured in addition to the vehicle owned by him, it is not infrequent that a loss caused by the operation of a motor vehicle is covered by two or more policies. As each of these policies may also have "other insurance" clauses, the possibility for conflict becomes obvious.<sup>6</sup> This is especially true in North Carolina as every owner of an automobile is required to have liability insurance coverage. Because of the potential frequency of this conflict and North Carolina's recent entry into the controversy, it is necessary to analyze the Supreme Court's holding in light of policyholder interests and the effective administration of justice.<sup>7</sup>

---

<sup>5</sup> Annot., 76 A.L.R.2d 502, 503 (1961).

<sup>6</sup> *Id.* at 504.

<sup>7</sup> Although it is difficult to generalize in this area, a few trends are worth noting. Ordinarily conflicts arise between clauses easily classifiable as one of the three types. In the greatest number of cases the conflict between a "no liability" or "escape" clause and an "excess" clause has been resolved by imposing liability on the insurer issuing the "escape" policy. However, it has been held that the conflict between these clauses is irreconcilable and the insurers should be compelled to prorate the loss. Oregon Auto Ins. Co. v. United States Fidelity & Guar. Co., 195 F.2d 958 (9th Cir. 1952); Zurich Gen. Accident & Liability Ins. Co. v. Clamor, 124 F.2d 717 (7th Cir. 1941); New Amsterdam Cas. Co. v. Certain Underwriters, 34 Ill.2d 424, 216 N.E.2d 665 (1966); New Amsterdam Cas. Co. v. Certain Underwriters, 56 Ill. App.2d 224, 205 N.E.2d 735 (1965); Travelers Indemnity Co. v. State Auto Ins. Co., 67 Ohio App. 457, 37 N.E.2d 198 (1941); *see generally*, Annot., 46 A.L.R.2d 1163, 1164-67 (1956). For treatment of conflicts between two "pro rata" clauses, see Liberty Universal Ins. Co. v. Nat. Surety Corp., 338 F.2d 988 (5th Cir. 1964); Celina Mut. Cas. Co. v. Citizens Cas. Co., 194 Md. 236, 71 A.2d 20 (1950); Maryland Cas. Co. v. Hunter, 341 Mass. 238, 168 N.E.2d 271 (1960); *see generally*, Annot., 21 A.L.R.2d 611 (1952). For treatment of conflicts between a "no liability" clause and a "pro rata" clause, see McFarland v. Chicago Express, Inc., 200 F.2d 5 (7th Cir. 1952); *see generally*, Annot., 46 A.L.R.2d 1163, 1167-68 (1956). For treatment of conflicts between an "excess" clause and a "pro rata" clause, see Globe Indemnity Co. v. Capital Ins. & Surety Co., 352 F.2d 236 (9th Cir. 1965); Citizens Mut. Auto. Ins.

The Allstate case is a good example of the difficulty involved in attempting to reconcile the conflicts that frequently arise. The clause in the Allstate policy was of the ordinary "excess" type:

[T]he insurance with respect to a temporary substitute or non-owned automobile shall be *excess insurance over any other valid and collectible insurance*.<sup>8</sup>

The clause in the Shelby Mutual "Garage Liability Policy" was classifiable as an "escape" or "no liability" clause, but its language varied from that normally used in such clauses:

[O]nly if no other valid and collectible automobile liability insurance, *either primary or excess*, with limits of liability at least equal to the minimum limits specified by the Financial Responsibility Law of the state in which the automobile is principally garaged, is available to such person . . . [shall this policy be valid].<sup>9</sup>

The usual "escape" clause does not contain the language "either primary or excess," but merely states that if there is other valid and collectible insurance available to the driver, the policy affords no coverage. It is this distinction on which the Court based its conclusion that the Shelby Mutual policy did not provide coverage for Mrs. Widenhouse. In considering the policies, the court said:

[H]ere, the Shelby Mutual policy is not ambiguous with reference to the intent of the parties to exclude coverage under it where the other policy contains an "excess" clause. The Shelby Mutual Policy expressly makes the existence of such "excess" policy an event which sets the Shelby Mutual's exclusionary clause into operation . . .<sup>10</sup>

The Court reasoned that since the Allstate "excess" policy invoked the exclusionary clause of the Shelby Mutual policy, the event which would activate the limitation or deferment clause of the Allstate

---

Co. v. Liberty Mut. Ins. Co., 273 F.2d 189 (6th Cir. 1959); Mountain States Mut. Cas. Co. v. American Cas. Co., 135 Mont. 475, 342 P.2d 748 (1959); Lamb-Weston Inc. v. Oregon Auto. Ins. Co., 219 Ore. 110, 341 P.2d 110 (1959); Jensen v. New Amsterdam Ins. Co., 65 Ill. App.2d 407, 213 N.E.2d 141 (1965); *see generally*, Annot., 76 A.L.R.2d 502 (1961).

<sup>8</sup> 269 N.C. at 345, 152 S.E.2d at 439.

<sup>9</sup> 269 N.C. at 344, 152 S.E.2d at 439.

<sup>10</sup> 269 N.C. at 351, 152 S.E.2d at 443. Before making this statement the court distinguished the recent Illinois decision in *New Amsterdam Cas. Co. v. Certain Underwriters*, 34 Ill.2d 424, 216 N.E.2d 665 (1966) holding that an "excess" policy was not such as would set an "escape" policy's exclusionary clause in operation.

policy had not occurred.<sup>11</sup> In other words, the Allstate policy was an event which triggered the Shelby Mutual "escape" limitation. Thus the Shelby Mutual policy was no longer in existence and could not invoke the Allstate "excess" limitation.

It is not clear why the court could not have first considered the effect of Allstate's "excess" policy and then considered whether the Shelby Mutual policy was such as would invoke the Allstate limitation. The court itself recognized that Allstate intended to provide initial coverage only in the event no other valid and collectible insurance was available.<sup>12</sup> Had the court first considered the Allstate policy, it would have recognized that the Shelby Mutual policy would clearly be "valid and collectible insurance". That policy would thus be an event which would trigger the Allstate "excess" limitation. It then follows that the Allstate policy would no longer be in existence and thus could not invoke the Shelby Mutual "escape" limitation. Shelby Mutual would thus be liable up to the limits of its policy.<sup>13</sup> The circuitry of this reasoning is obvious. It is typical of the reasoning used in other jurisdictions to hold that the conflict between the usual type of "escape" and "excess" clauses should be resolved in favor of the "excess" policy.<sup>14</sup>

It is questionable whether the addition of the language "either primary or excess" is a distinction sufficient to justify the effect

---

<sup>11</sup> 269 N.C. at 345, 152 S.E.2d at 439.

<sup>12</sup> 269 N.C. at 349, 152 S.E.2d at 442.

<sup>13</sup> In the event the liability to Clontz exceeds the limits of the Shelby Mutual policy Allstate will be liable for any excess. However, the concern here is over which of the two companies must bear the burden of defending Mrs. Widenhouse and sustain the initial liability, if any. If it could be assumed that there will be such liability and it will be in excess of the Shelby Mutual policy limits then there may be some logic in the court's reasoning. Even so, such "logic" is no more than the result of a battle of semantics, an approach which as will be seen should be rejected.

<sup>14</sup> See, e.g., Zurich Gen. Accident & Liab. Ins. Co. v. Clamor, 124 F.2d 717 (7th Cir. 1942); but see Oregon Auto Ins. Co. v. United States Fidelity & Guar. Co., 195 F.2d 958 (9th Cir. 1952). There is another argument which is interesting to note. It is questionable whether the court was correct in assuming that Allstate's "excess" clause was within the meaning and intent of Shelby Mutual's exclusion. It is the practice of some vehicle owners, such as large trucking concerns, to be self-insurers up to a certain amount and to cover any liability above such amount through the purchase of *excess liability insurance*. In view of Shelby Mutual's reference to "[O]ther . . . liability insurance, either primary or excess. . .," 269 N.C. at 344, 152 S.E. 2d at 439, it is possible that it had in mind only that type of "excess" liability insurance. In any event the rule that an insurance policy is to be strictly construed against the insurance company could be read to require the above interpretation of the Shelby Mutual clause.

given it in the Allstate case.<sup>15</sup> Only two other courts have considered this precise conflict.<sup>16</sup> Our court rejected the Louisiana conclusion that the policies are mutually repugnant and liability should therefore be prorated, because it was based on the "unsound" premise that the "escape" clause in one policy and the "excess" clause in the other policy were "like" provisions.<sup>17</sup> However, the distinction offered by the North Carolina Supreme Court is not as persuasive as the finding that the policies contained "like" provisions.<sup>18</sup> In defense of its conclusion the Louisiana Court stated that:

---

<sup>15</sup> It has been the majority position in the past to hold that the ordinary "excess" clause will prevail over the ordinary "escape" clause. See note 7 *supra*. The North Carolina Court has taken the opposite view in the *Allstate* case on the basis of additional language placed in the "escape" clause. It will be shown that when these clauses were added the meaning and intent of each company was indistinguishable and therefore the clauses should have been held irreconcilable and the companies required to pro rate any loss.

<sup>16</sup> The Florida Court in *Continental Cas. Co. v. Weekes*, 74 So.2d 367 (Fla. 1954) supported the North Carolina position. There the Court was faced with an owner-lessor liability provision stating that the insurance does not apply "to any liability for such loss as is covered on a primary, contributory, excess or any other basis by insurance in another company", and a driver-lessee liability provision providing for "excess" coverage over any other valid and collectible insurance. Though the Court purported to rely strongly on the case of *McFarland v. Chicago Express, Inc.*, 200 F.2d 5, 6 (7th Cir. 1952), it appears that they concluded that the former policy should prevail without giving any conceptual justification. The Louisiana Court of Appeals twice took the opposite view. In *Lincombe v. State Farm Mut. Auto Ins. Co.*, 166 So.2d 920 (La. App. 1964), *cert. denied*, 246 La. 905, 168 So.2d 820 (1964) the court was faced with a driver policy identical to the Allstate policy in the present case and an owner policy identical to that of Shelby Mutual. The two policies were held mutually repugnant and the companies required to prorate. The other case, *State Farm Mut. Auto. Ins. Co. v. Travelers Ins. Co.*, 184 So.2d 750 (La. App. 1966), *cert. denied*, 249 La. 454, 187 So.2d 439 (1966), arose out of the same fact situation as *Lincombe* and involved the identical provisions. These two Louisiana cases would seem to be the better authority for our court since they are more recent and most clearly present the conflict.

<sup>17</sup> 269 N.C. at 351, 152 S.E.2d at 444.

<sup>18</sup> In our opinion there is no real difference between the quoted provisions of these policies. In each the purpose is to relieve the insurer from all or a portion of the liability which it otherwise would have if there is other valid and collectible insurance of the same type available to the insured. Actually the insurance afforded by one of these policies is not any more "available" to the insured than is the insurance provided by the other. We think, therefore, that the "excess insurance" clause in the State Farm policy and the "other insurance" or escape clause in the Travelers policy are mutually repugnant to each other, and that insofar as the claim in this case is concerned those provisions of the policies are ineffective. *Lincombe v. State Farm Mut. Auto. Ins. Co.*, 166 So.2d 920, 925 (La. App. 1964).

. . . we correctly held it was impossible to reconcile the respective "excess" and "escape" clauses in the two policies. Indeed, there is actually no way by logic or word-sense to reconcile two such clauses, where each policy by itself can apply as a primary insurer, but where the clause in each policy nevertheless attempts to make its own liability secondary to that of any other policy issued by a similar primary insurer. For then the primary and (attempted) secondary liability of each policy chase the other through infinity, something like trying to answer the question: which came first, the chicken or the egg?<sup>19</sup>

It is evident that the resolution of this conflict depends largely on the determination of whether such clauses are "like" or distinguishable so as to justify applying one before the other. With so few guides such a determination should not be made without considering the intent of the contracting parties.<sup>20</sup>

The most obvious intent of each insurer was "to make its own liability secondary to that of any other policy issued by a similar primary insurer."<sup>21</sup> The only real difference for present purposes is that each insurance company chose a different type of "other insurance" clause to accomplish the same result.<sup>22</sup> By including the extra language in its "escape" clause Shelby Mutual may well have intended to show a specific intent to prevail over the "excess" or any other type clause. But the purpose was still to make their insurance coverage secondary to any other insurance which might potentially cover the loss. By engaging in a senseless battle of semantics, the court has fostered an endless battle of terms with each company changing its policy provisions in order to prevail over another company doing the same. On the other hand, a rec-

---

<sup>19</sup> State Farm Mut. Auto Ins. Co. v. Travelers Ins. Co., 184 So.2d 750, 753-54 (La. App. 1966). The quote is from Judge Tate's concurring opinion; see that opinion at pages 754 and 755 for a very lucid and persuasive argument that the owner's insurer in this type of case should be held primarily liable.

<sup>20</sup> An insurance policy is a contract between the parties, and the intention of the parties is the controlling guide in its interpretation. It is to be construed and enforced in accordance with its terms insofar as they are not in conflict with pertinent statutes and court decisions.

Hawley v. Indemnity Ins. Co., 257 N.C. 381, 387, 126 S.E.2d 161, 167 (1962).

<sup>21</sup> State Farm Mut. Auto Ins. Co. v. Travelers Ins. Co., 184 So.2d 750, 754 (La. App. 1966).

<sup>22</sup> There is the minor difference that Allstate intended coverage if other policy limits were not sufficient to cover the liability while Shelby Mutual did not.



ognition that these are "like" provisions calling for a sharing of the loss will put an end to such a useless contest.

There are two alternatives to the court's repeated participation in this battle of semantics. First, proration could be required whenever a conflict arises. The policyholder would know what to expect and would receive all benefits of timely investigation, settlement effort or defense and he would not have to await litigation between the insurance companies. The insurance companies themselves would no longer need to engage in a "battle of forms." Furthermore, the court's time and the taxpayers' money would not be wasted on futile endeavors to reconcile the irreconcilable. It may be that in isolated cases the outcome will be unfair to a particular insurer, but on balance the greatest justice will be accomplished. The second alternative is the development of principles indicating which insurer will be held primarily liable in conflict situations. In the *Allstate* case it may be that the driver's insurer should be primarily liable since his insured was the party at fault. On the other hand, it may be that the car owner's insurer should be primarily liable since his insured was responsible for the use of the car. It may even be that the insurers should share the loss since each insured was partly responsible. Such a set of guiding principles was suggested by the Pacific Claims Executives Association.<sup>23</sup> The formulation of such principles would enable insurance companies to determine accurately when they will be liable in conflict situations. The resulting advantages would be the same as those applying in the case of proration.<sup>24</sup>

Either of these alternatives is more desirable than the course taken by the court in *Allstate* which in effect requires that the parties await a semantic battle in the courts to resolve each new change as it arises. Reconsideration of this conflict in light of the above analysis and available alternatives would be to the benefit of policyholders, insurance companies and the court itself.

SAMUEL G. GRIMES

---

<sup>23</sup> Those principles were outlined in an article by Kenneth S. Hawkes in the *Insurance Law Journal*. Hawkes, *Liability Guiding Principles*, 1960 *INS. LAW J.* 481.

<sup>24</sup> Either of these alternatives would likely have some affect on the rates charged by the companies for these types of coverage. However, in view of the many variables involved a discussion of such is not within the scope of this note. But it should be recognized that the savings to insurance companies in terms of litigation and related expenses would almost certainly be reflected in the rates charged.