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## Filling the Regulatory Void after ERISA: The Third Circuit's Employer First Rule in Coordination of Benefits

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1998]

FILLING THE REGULATORY VOID AFTER ERISA:  
THE THIRD CIRCUIT'S "EMPLOYER FIRST" RULE  
IN COORDINATION OF BENEFITS

I. INTRODUCTION

In many situations, individuals find themselves covered by more than one health benefits plan.<sup>1</sup> For example, in households where both spouses are employed it is common for family members to obtain health care insurance coverage through each spouse's employer.<sup>2</sup> Moreover, some individuals hold two jobs and retain benefits under both, and children covered as dependents under their parents' plans may also hold a job and secure employee benefits.<sup>3</sup> In such cases, many employees believe that this duplicate coverage will result in dual protection or, at the very least, adequate protection.<sup>4</sup> This false sense of security, however, tragically dissipates once they file claims that are systematically rejected by both insurers.<sup>5</sup> Instead of enjoying the abundance of insurance protection they once envisioned, individuals covered by two health care plans fall victim to

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1. See Jack B. Helitzer, *Coordination of Benefits: How and Why it Works*, 4 BENEFITS L.J. 411, 411 (1991) (asserting that prevalence of duplicate insurance coverage in modern society is result of "two-wage-earner families"); Roberta Casper Watson et al., *Coordination of Benefits*, C552 ALI-ABA 319, 321 (1990) (noting several instances in which individuals may obtain overlapping coverage).

2. See NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS, GROUP COORDINATION OF BENEFITS MODEL REGULATION, § IV, 120-19, app. B (1997) [hereinafter NAIC MODEL] ("It is common for family members to be covered by more than one health plan."); see also *McGurl v. Trucking Employees of N. Jersey Welfare Fund, Inc.*, 124 F.3d 471, 474 (3d Cir. 1997) (noting that group health care insurance plans have increasingly included coordination of benefits clauses because enlarged numbers of two-employee families have increased possibility that claimant could be covered under multiple plans).

3. See Watson et al., *supra* note 1, at 321 (asserting examples of duplicated coverage). Other instances where duplicate coverage may inadvertently occur arise when a covered employee also maintains coverage through a union or professional organization. See *id.* In addition, children of divorced parents may be covered not only by both natural parents but also by their step-parents. See *id.* at 322. Also, an employee who is injured may be entitled to coverage by automobile insurance. See *id.* Finally, a covered employee may also be entitled to Medicare benefits. See *id.*

4. See BARRY R. OSTRAGER & THOMAS R. NEWMAN, HANDBOOK ON INSURANCE COVERAGE DISPUTES § 11.01, at 495 (8th ed. 1995) ("The term 'other insurance' in the special sense in which it is used in insurance contracts, describes the situation in which two or more policies of insurance cover the same risk in the name of, or for the benefit of, the same person.").

5. See generally *McGurl*, 124 F.3d at 471 (involving beneficiary who was denied payment of claim by both her insurance company and insurance company that classified her as dependent); *Northeast Dep't ILGWU Health & Welfare Fund v. Teamsters Local Union No. 229 Welfare Fund*, 764 F.2d 147, 149-50 (3d Cir. 1985) (adjudicating denial of claims by insurance companies of beneficiary who is participant in one and dependent of other).

(999)

a legal battle between two insurance companies over which insurer should pay the claims.<sup>6</sup>

On the other hand, some employees manipulate the system to their benefit by collecting reimbursement from both insurers, effectively turning a profit from their illness or injury.<sup>7</sup> In an attempt to remedy this situation, many states have enacted legislation that requires insurers to follow a "coordination of benefits" procedure in determining the proportion each insurer should pay.<sup>8</sup> As insurers began to recognize the potential for

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6. See generally *McGurl*, 124 F.3d at 471 (involving beneficiary caught in legal battle between two insurance companies). But see Lawrence J. O'Connell, *North-east Department ILGWU Welfare Fund v. Teamsters Local No. 229 Welfare Fund: An End to the Escape Clause as a Method of Coordinating Health Benefits Under ERISA?*, 3 J. CONTEMP. HEALTH L. & POL'Y 329, 330 (1987) (stating that sometimes dual coverage works in employee's favor in that one may surreptitiously accept reimbursement for more than 100% of covered expenses).

7. See *Watson et al.*, *supra* note 1, at 321 (positing that duplicate coverage tempts beneficiaries either to gain profits from injuries or even "seek medical treatment indiscriminately").

8. See NAIC MODEL, *supra* note 2, § IV, at 120-19, app. B (noting that many states have adopted NAIC Model Group Coordination of Benefits Regulation or comparable legislation). The following is a list of states that have adopted or enacted such legislation: ALA. INS. DEPT. REG. NO. 56 (1985/1986) (adopting birthday rule as of August 29, 1987 that applies in cases where two spouses each retain separate health benefits and determines which spouse's plan covers couple's children by choosing policy of spouse whose birthday falls first in any calendar year, regardless of age of each spouse); ALASKA BULL. NO. 85-3 (1985) (adopting birthday rule as of July 1, 1985 and urging adherence to NAIC Model); ARIZ. ADMIN. CODE R20-6-217 (1982/1985) (adopting birthday rule as of January 1, 1987); ARK. INS. R. & REG. 21 (1976/1988) (adopting birthday rule as of January 13, 1986); CAL. ADMIN. CODE tit. 10, §§ 2232.52-2232.59 (1986) (adopting birthday rule as of January 1, 1987); COLO. ADMIN. INS. REG. 4-6-2 (1982/1993) (adopting birthday rule effective January 1, 1987 and incorporating NAIC Model by reference); CONN. ADMIN. CODE tit. 38a, §§ 480-1 to 480-7 (1988) (adopting birthday rule effective April 1, 1988); DEL. INS. REG. 61 (1988) (adopting birthday rule effective October 26, 1988); FLA. STAT. ch. 627.4235 (1992) (adopting birthday rule effective October 1, 1985, and using different coordination rule for Medicare beneficiaries); GA. ADMIN. COMP. ch. 120-2-48 (1991) (adopting birthday rule effective January 1, 1991); IDAHO CODE §§ 2216, 2141 (1997) (directing adoption of regulation that substantially follows model, but which also includes individual policies); ILL. ADMIN. CODE tit. 50, §§ 2009.10 to 2009.60 (1991) (adopting birthday rule effective March 22, 1988); IND. ADMIN. CODE tit. 760 R 1-38.1 (1990) (adopting birthday rule as of July 1, 1988); IOWA ADMIN. CODE §§ 191-38.1 to 191-38.11 (1987) (adopting birthday rule effective April 15, 1987); KAN. ADMIN. REGS. § 40-4-34 (1987) (adopting 1985 version by reference with exceptions as well as birthday rule effective July 1, 1985); 806 KY. ADMIN. REGS. 18:030 (1987) (adopting birthday rule effective January 1, 1987); LA. INS. REG. 32 (1998) (adopting birthday rule effective May 5, 1985); ME. REV. STAT. ANN. tit. 24-A, § 2844 (1986) (adopting enabling statute); *id.*, § 2332-A (1991) (allowing for coordination with individual and group policies by nonprofit health services corporations); MD. ANN. CODE art. 48A, §§ 361F, 470S (1991) (allowing coordination with individual and group policies); MASS. REGS. CODE tit. 211 §§ 38.01-38.10 (1989) (adopting birthday rule effective August 18, 1989); MICH. COMP. LAWS §§ 550.251-550.255 (1996) (adopting birthday rule effective April 1, 1985); MINN. INS. REG. §§ 2742.0100 to 2742.0500 (1986) (adopting birthday rule effective July 4, 1987); MISS. INS. REG. LA & H 88-102 (1988) (allowing coordination of benefits); MO. CODE REGS. ANN. tit. 20, § 400-2.030 (1991)

overlapping coverage, they crafted clauses in their policies purporting to limit or completely exonerate themselves of all liability in the event that "other insurance" applied.<sup>9</sup> Appropriately titled "other insurance" clauses, these provisions arose in three forms: (1) pro-rata, which calls for an ap-

(noting birthday rule effective as of January 1, 1986); MONT. ADMIN. R. 6.6.2401-6.6.3405 (1987) (adopting birthday rule effective January 1, 1987); NEB. ADMIN. R. & Regs. tit. 210, ch. 39 (1994) (adopting birthday rule effective January 1, 1987); NEV. REV. STAT. §§ 689B.063-689B.064 (1987) (noting order of benefit determination rule only and making birthday rule effective as of July 1, 1987); N.H. CODE ADMIN. R. ANN. INS. 1904 (1993) (adopting birthday rule effective February 22, 1987); N.J. ADMIN. CODE §§ 11:4-28.1-11:4-28.12 (1988) (adopting birthday rule as of October 17, 1988); N.Y. COMP. CODES R. & REGS. CODE tit. 11, § 52.23 (1987) (adopting birthday rule as of January 15, 1987); N.C. ADMIN. CODE tit. 11, ch. 12, § .0514 (1992) (adopting birthday rule as of July 1, 1986); N.D. ADMIN. CODE §§ 45-08-01.1 to 45-08-01.2 (1994) (adopting birthday rule effective July 1, 1985); OHIO REV. CODE ANN. §§ 3902.11-3902.14 (Banks-Baldwin 1991) (adopting birthday rule as of June 29, 1988), OHIO INS. REGS. § 3901-1-56 (1993) (adopting birthday rule); OKLA. INS. REGS. §§ 365:10-11-1 to 365:10-11-11 (adopting birthday rule effective January 1, 1987); OR. ADMIN. R. §§ 836-20-700 to 836-20-765 (1985) (adopting birthday rule as of January 1, 1987); R.I. INS. REG. XLVIII (1990) (adopting birthday rule as of January 1, 1988); S.C. INS. R. 69-43 (1990) (adopting birthday rule as of May 24, 1990); S.D. CODIFIED LAWS §§ 58-18A-1 to 58-18A-15 (Michie 1987) (adopting birthday rule as of March 1, 1988); TENN. COMP. R. & REGS. tit. 0780, ch. 1-53 (1987) (adopting birthday rule as of March 1, 1988); 28 TEX. ADMIN. CODE §§ 3.3501-3.3511 (1994) (adopting birthday rule as of January 1, 1987); UTAH INS. R590-131 (1994) (adopting birthday rule effective January 1, 1987); VA. CODE ANN. § 38.2-3543.1 (Michie 1994) (noting authority to adopt birthday rule regulation); WASH. ADMIN. CODE R. §§ 284-51-010 to 284-51-185 (1994) (adopting birthday rule effective January 1, 1987); W. VA. CODE STATE R. tit. 114, §§ 114-28-1 to 114-28-8 (1993) (adopting birthday rule effective August 1, 1991); WIS. ADMIN. CODE § 3.40 (1992) (adopting birthday rule as of July 1, 1986); WYO. INS. REGS. ch. 10 (1985) (adopting birthday rule as of July 1, 1985). See NAIC MODEL, *supra* note 2, § IV, at 120-19 to 120-23, app. B. The Commonwealth of Pennsylvania, which had not yet passed a regulation adopting the birthday rule, sent a notice to insurers dated August 19, 1986, stating that the June 1985 Coordination of Benefits guideline adopted by the NAIC would serve as a guide for policy form approval. See *id.*

One of the most prevalent difficulties with overlapping coverage in a family arises when claims are submitted for dependents. See *PM Group Life Ins. Co. v. Western Growers Assurance Trust*, 953 F.2d 543, 547-48 (9th Cir. 1992) (involving incompatible "other insurance" provisions in two self-funded ERISA plans that led court to adopt birthday rule in determining which parent's insurance plan would cover their child). For example, if a family consists of two parents who both maintain health insurance coverage through their employee benefits plans, which of the two plans will cover the couple's children? See *id.* This issue led many states, prompted by the NAIC, to adopt the birthday rule whereby the plan of the spouse whose birthday falls first in the calendar year will cover all dependents. See NAIC MODEL, *supra* note 2, § IV, 120-17, app. B; see also *McGurl*, 124 F.3d at 474 (noting that group health care insurance plans have increasingly included coordination of benefits clauses because enlarged number of two-employee families has increased possibility that claimant could be covered under more than one plan).

9. See Marcy Louise Kahn, *The "Other Insurance" Clause*, 19 FORUM 591, 591 (1984) ("The 'other insurance' clause was designed to resolve much of the confusion which results when more than one insurance policy is applicable to the same loss."). In every instance, the purpose of the "other insurance" provision is to limit or even completely eliminate an insurer's liability in the presence of another plan

portionment of the loss between or among the insurers; (2) excess, where insurers will only offer secondary coverage; and (3) escape, where insurers relieve themselves of all liability in the presence of other insurance.<sup>10</sup>

Although state efforts have increased regulation in an effort to cure the discrepancies and litigation amassed by "other insurance" provisions, many insureds remain unaided by state law.<sup>11</sup> For example, individuals who obtain their health insurance from a self-funded employer fall within the auspices of the Employee Retirement Income Security Act (ERISA).<sup>12</sup> Enacted by Congress in 1974, ERISA was intended to ensure that employee benefit plan participants would not be denied their deserved benefits.<sup>13</sup> Originally designed to protect employee recipients from the fraud or insolvency of their employer, ERISA has instead become a shield for employers and insurance companies.<sup>14</sup> Insurance companies consistently

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covering the same loss. *See id.* at 592 (stating that purpose of clause is to limit or eliminate carrier's liability where another policy provides coverage for same loss).

10. *See id.* at 594-95 (noting three basic types of "other insurance" clauses). For a detailed discussion of the three types of "other insurance" provisions, see *infra* notes 25-82 and accompanying text.

11. *See* Mary Anne Bobinski, *Unhealthy Federalism: Barriers to Increasing Health Care Access for the Uninsured*, 24 U.C. DAVIS L. REV. 255, 349 (1990) (concluding that ERISA's preemption of state regulatory laws has impeded attainment of health care coverage); Catherine L. Fisk, *The Last Article About the Language of ERISA Preemption? A Case Study of the Failure of Textualism*, 33 HARV. J. ON LEGIS. 35, 38 (1996) (noting that "[i]t is rich irony that ERISA, which was heralded at its enactment as significant federal protective legislation," has through its preemption provision been basis for invalidating scores of progressive state laws).

12. Pub. L. No. 93-406, 88 Stat. 829 (1974) (codified as amended in 29 U.S.C. §§ 1001-1461 and in scattered sections of 26 U.S.C.); *see* 29 U.S.C. § 1002(1) (1994)

("The terms 'employee welfare benefit plan' and 'welfare plan' mean any plan, fund, or program which was . . . established or maintained by an employer . . . for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or . . . medical [benefits] . . .").

13. *See* 29 U.S.C. § 1001(c). Congress set forth its declaration of policy in ERISA by stating:

It is hereby further declared to be the policy of this chapter to protect . . . the interests of participants in private pension plans and their beneficiaries by improving the equitable character and the soundness of such plans by requiring them to vest the accrued benefits of employees . . . , to meet minimum standards of funding, and by requiring plan termination insurance.

*Id.*

14. *See* O'Connell, *supra* note 6, at 329 (discussing impact of ERISA on employee benefit plans). One of the requirements of ERISA is that a fiduciary be appointed to manage the benefit plans. *See id.* One of the purposes of this fiduciary is to offset some of the administrative costs incurred by the employer. *See id.* at 330. In an attempt to manage and achieve cost containment of the benefit plans, many fiduciaries have subscribed to the coordination of benefits method. *See id.*

According to the Group Coordination of Benefits Model Regulation, such coordination reduces the duplication of benefits paid to beneficiaries by overlapping plans. *See* 1 NAIC MODEL LAWS, REGULATIONS AND GUIDELINES § 1, 120-1 (Jan. 1996).

hide behind ERISA's broad preemption clause that precludes the application of all state laws that "relate to" employee benefit plans.<sup>15</sup>

Although ERISA affords beneficiaries standing in federal court, it effectively abandons them in a regulatory vacuum.<sup>16</sup> For example, ERISA does not account for a coordination of benefits provision, and it does not offer guidance as to the resolution of such disputes.<sup>17</sup> "Left with these sorts of legislative 'gaps' that plague ERISA, it has become incumbent upon the federal courts to develop a 'federal common law of rights and obligations under ERISA-regulated plans.'"<sup>18</sup>

This Casebrief discusses the development of law in the United States Court of Appeals for the Third Circuit concerning the treatment of coor-

15. See 29 U.S.C. § 1144(a). The preemption clause of ERISA reads: "[T]he provisions of this subchapter . . . shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan . . ." *Id.* "State law" was broadly defined to include "all laws, decisions, rules, regulations, or other . . . action having the effect of law . . . [of any] State, any political subdivisions thereof, or any agency or instrumentality of either." *Id.* § 1144(c). Although the definition of state law was sweeping, the preemption clause was clarified so as not to include preemption of state insurance, banking or securities law. See *id.* § 1144(b)(2)(B); see also 120 CONG. REC. 29,933 (1974) (setting forth remarks of Senators Williams and Javits). One of the purposes of ERISA preemption was to eliminate the threat of conflicting state and local regulation of employee benefit plans. See *id.*

Although ERISA affords beneficiaries a cause of action in federal court to redress their claims, it precludes the application of state law. See CHARLES G. BENDA & FAY A. ROISOVSKY, *MANAGED CARE AND THE LAW: LIABILITY AND RISK MANAGEMENT* § 4.3 (1996) (noting that ERISA preemption significantly curtails beneficiary's rights to seek redress from insurance fraud).

16. See *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 41 (1987) (asserting that ERISA preempts state common law contract and tort claims in employee benefits cases alleging denial of claims); see also *De Bruyne v. Equitable Life Assurance Soc'y*, 920 F.2d 457, 468 (7th Cir. 1990) (involving ERISA preemption of state claims to federal court); *Kanne v. Connecticut Gen. Life Ins. Co.*, 867 F.2d 489, 493-94 (9th Cir. 1988) (holding that ERISA preempts state common law claims against group health insurer alleging breach of contract, breach of implied covenant of good faith as well as breach of fiduciary and statutory duties); *In re Life Ins. Co.*, 857 F.2d 1190, 1190 (8th Cir. 1988) (finding that ERISA preempts state claims against insurer).

17. See *PM Group Life Ins. Co. v. Western Growers Assurance Trust*, 953 F.2d 543, 546 (9th Cir. 1992) (noting that ERISA does not include coordination of benefits provision). In *PM Group*, the United States Court of Appeals for the Ninth Circuit recognized that the federal courts are empowered to adopt uniform federal common law rules in such instances where there are gaps in federal statutory law. See *id.* at 546 n.3.

18. *McGurl v. Teamsters Local 560 Trucking Employees of N. Jersey Welfare Fund*, 925 F. Supp. 280, 284 (D.N.J. 1996) (quoting *Dedeaux*, 481 U.S. at 56); see *PM Group*, 953 F.2d at 548 (adopting birthday rule as federal common law rule for resolving coordination of benefits conflicts regarding minor dependents); *North-east Dep't ILGWU Health & Welfare Fund v. Teamsters Local Union No. 229 Welfare Fund*, 764 F.2d 147, 154-58 (3d Cir. 1985) (positing that federal common law must be fashioned to resolve disputes falling within precepts of ERISA where no such federal law exists).

dination of benefits provisions in insurance contracts.<sup>19</sup> Part II unfolds the history of the three types of “other insurance” provisions and highlights their respective roles in insurance law.<sup>20</sup> Part III analyzes the coordination of benefits framework as codified under state law.<sup>21</sup> Part III also discusses coordination of benefits against the backdrop of ERISA preemption and the regulatory void of federal common law.<sup>22</sup> Part IV highlights the Third Circuit’s recent debut of the “employer first” rule in determining benefits coordination under ERISA.<sup>23</sup> Finally, Part V offers speculation as to the potential impact of the “employer first” rule on insurance law.<sup>24</sup>

## II. FRAMEWORK OF THE “OTHER INSURANCE” PROVISION

Issues involving “other insurance” provisions arise when the same individual is insured by two or more insurance companies for the same risk during the same time period.<sup>25</sup> Historically, “other insurance” clauses originated in the property insurance field in an attempt to shield the insurer from the moral hazards of fraudulent over-insurance.<sup>26</sup> Frequently,

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19. For a discussion of Third Circuit case law that comprises coordination of benefits insurance law, see *infra* notes 83-120 and accompanying text.

20. For a discussion of the three types of “other insurance” provisions and their application in employee benefit plans, see *infra* notes 25-45 and accompanying text.

21. For a discussion of state regulation of coordination of benefits disputes, see *infra* notes 46-66 and accompanying text.

22. For a discussion of ERISA and its preemption provision as well as the federal common law that has developed to fill the regulatory gap, see *infra* notes 67-82 and accompanying text.

23. For a discussion of *McGurl v. Teamsters Local 560 Trucking Employees of North Jersey Welfare Fund* and the application of the “employer first” rule, see *infra* notes 83-120 and accompanying text.

24. For a discussion of the impact of the Third Circuit’s establishment of the “employer first” rule, see *infra* notes 121-24 and accompanying text.

25. See Paul R. Koepff, *Other “Insurance” Clauses*, 539 PLI/LIT 249, 252 (1995) (noting that true “other insurance” difficulties arise only when overlapping coverage occurs in presence of two different insurance companies); see also *Pacific Indem. Co. v. Linn*, 766 F.2d 754, 767 (3d Cir. 1985) (setting forth elements of “other insurance” provisions); *Continental Ins. Co. v. McKain*, 820 F. Supp. 890, 903 (E.D. Pa. 1993) (asserting that under Pennsylvania law, problem arises when there are two or more insurance policies simultaneously covering same risk for same person); *Pafco Gen. Ins. Co. v. Providence Wash. Ins. Co.*, 587 N.E.2d 728, 732-33 (Ind. Ct. App. 1992) (involving “other insurance” clauses included in policies to prevent stacking of auto insurance policies).

Overlapping coverage can occur not only when there is concurrent coverage, but, alternatively, when there is consecutive coverage. See OSTRAGER & NEWMAN, *supra* note 4, § 11.01, at 495; see, e.g., *Atlantic Mut. Ins. Co. v. Trucks Ins. Exch.*, 797 F.2d 1288, 1290 (5th Cir. 1986) (involving settlement of claim for property damage covered under two policies where one policy offers only secondary excess coverage).

26. See R.J. Robertson, Jr., *“Other Insurance” Clauses in Illinois*, 20 S. ILL. U. L.J. 403, 405 (1996) (noting that property insurers are often at risk of duplicate insurance as result of moral hazard that insured will purchase several policies insuring

individuals would purchase several policies covering the same piece of property and then intentionally destroy the property and collect the entire loss on each of the policies.<sup>27</sup> As insurers grew wise to the scam, they began to include provisions in their policies that limited their liability in the presence of "other insurance" policies.<sup>28</sup> Generally, these provisions take one of three forms: (1) pro-rata clauses; (2) excess clauses; and (3) escape clauses.<sup>29</sup>

#### A. *Pro-Rata Clauses*

Pro-rata clauses usually invoke a "sharing of the loss" method of apportioning liability among the insurers.<sup>30</sup> The insurer will agree to pay its

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same piece of property and then intentionally destroy property and collect loss from multiple insurers).

27. *See id.* (asserting that property insurance fraud gave rise to incorporation of "other insurance" provisions in policies).

28. *See* Linda Kogel Hasse, comment, *Is There a Solution to the Circular Riddle? The Effect of the "Other Insurance" Clauses on the Public, the Courts, and the Insurance Industry*, 25 S.D. L. REV. 37, 38-39 (1980) (discussing insurance policy limitations due to "other insurance" policies). Due to the modern public demand for expanded liability protection among insureds, many insurance companies have greatly expanded the scope of their coverage. *See id.* at 39. For example, extended coverage is realized in automobile policies that cover the insured when he or she is driving another vehicle (drive-other cars provision). *See id.*; *see also* Douglas R. Richmond, *Issues and Problems in "Other Insurance," Multiple Insurance, and Self-Insurance*, 22 PEPP. L. REV. 1373, 1377 (1995) ("Common examples of designed co-insurance are the purchase of an umbrella liability policy with specifically scheduled underlying policies, and the purchase of multi-layered excess coverage above specifically scheduled primary insurance or self-insurance."). Multiple insurance is an increasingly common situation and can occur by design or by coincidence. *See* OSTRAGER & NEWMAN, *supra* note 4, § 11.01, at 496-97.

Overlapping coverage for the same risk under concurrent policies generally arises in three different contexts: by design, by coincidence or by the inadvertent purchase of overlapping coverage. An example of co-insurance by design is the purchase of a general umbrella/catastrophe policy with specifically scheduled underlying coverages, and the purchase of multi-layered excess coverage over specifically scheduled primary or self-insured coverage. A common example of co-insurance by coincidence occurs when the driver of a non-owned vehicle is covered as a named insured under his own auto policy as well as under the omnibus clause of the owner's policy. An inadvertent overlap may arise where there has been a switch from "occurrence" coverage to "claims made" coverage and a claim is made during the "claims made" policy period on the basis of damage that occurred during the "occurrence" policy period.

*Id.*

29. *See* OSTRAGER & NEWMAN, *supra* note 4, § 11.02, at 497-500 (listing three types of "other insurance" provisions).

30. *See* Robertson, *supra* note 26, at 408 (noting "sharing of the loss" method of apportionment employed by pro-rata clauses); *see also* OSTRAGER & NEWMAN, *supra* note 4, § 11.02[a], at 497-98 (discussing pro-rata clauses). An ordinary pro-rata clause might resemble the following:

If the insured has other insurance against liability or loss covered by this policy, the company shall not be liable for a greater proportion of such liability or loss than the applicable limit of liability bears to the total appli-



prorated share of the loss in relation to its respective liability limit.<sup>31</sup> The theory underlying the pro-rata clause is that the amount of premiums collected by each insurer reflects the amount of risk the insurer assumes.<sup>32</sup>

The required contribution of each insurance carrier is generally determined by one of two methods.<sup>33</sup> Under the "contribution by equal shares" method, each insurer contributes "on an equal basis until the limit of the lower policy is reached [and] additional payments are made by the remaining insurance companies until the loss is satisfied."<sup>34</sup> The more common approach, however, is the "contribution by limits" method in which each insurer's liability is based on the proportion of each insurer's policy limit with respect to the combined available coverage.<sup>35</sup>

### B. *Excess Clauses*

Excess clauses typically provide that an insurer's liability is limited to the amount by which the loss exceeds the coverage provided by other insurers.<sup>36</sup> In other words, as "excess" insurance only, the insurer never intends to be named as the primary insurer unless no other collectible insurance is available.<sup>37</sup> In the presence of other insurance, liability for

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cable limit of liability of all collectible insurance against such liability or loss.

*Id.*

31. See Robertson, *supra* note 26, at 408 (discussing generally pro-rata clauses).

32. See Richmond, *supra* note 28, at 1382 (noting that share of loss is relative to insurer's liability limit).

33. See Kahn, *supra* note 9, at 594 (asserting that two common methods exist for apportioning liability under pro rata scheme).

34. *Id.* Under the "equal shares" method, consider the following hypothetical. An insured assumes a loss of \$50,000. Policy A has a liability limit of \$200,000 and Policy B has a limit of \$50,000. Both policies would pay \$50,000. See Koepff, *supra* note 25, at 257 (using similar example to demonstrate "equal shares" method).

35. See Kahn, *supra* note 9, at 594 (describing "contribution by limits" method of apportionment). Under the "contribution by limits" method, consider the following illustration. An insured assumes a loss of \$100,000. Policy A has a liability limit of \$200,000 and Policy B has a limit of \$100,000. Total coverage amounts to \$300,000. Policy A would pay \$133,333 (2/3 ratio) and Policy B would pay \$66,666 (1/3 ratio). See Koepff, *supra* note 25, at 257 (using hypothetical to demonstrate "contribution by limits" method of pro-rata contribution).

36. See OSTRAGER & NEWMAN, *supra* note 4, § 11.02[b], at 498 (describing excess clauses). A typical excess clause would read:

"Unless otherwise endorsed, this policy shall be excess over any other insurance whether prior or subsequent hereto, and by whomsoever effected, directly or indirectly covering loss or damage insured hereunder, and this Company shall be liable only for the excess of such loss or damage beyond the amount due from such other insurance, whether collectible or not, however, not exceeding the limits as set forth in the Declarations."

*Id.* (quoting Hasse, *supra* note 28, at 39 n.18).

37. See 16 GEORGE J. COUCH ET AL., COUCH CYCLOPEDIA OF INSURANCE LAW § 62:48 (2d ed. 1983) (asserting that excess insurer is liable only for amount of loss

excess insurers does not ensue until the limits of all other policies have been exhausted.<sup>38</sup> Notably, difficulties arise when competing policies contain excess clauses and no policy expressly assumes responsibility as primary insurer.<sup>39</sup>

### C. *Escape Clauses*

Escape clauses purport to avoid liability altogether whenever there is at least one other valid insurance policy.<sup>40</sup> Typically, an escape clause in its truest form asserts that the insurer is relieved of all obligation if other coverage is available, irrespective of whether the other coverage will adequately sustain the claim.<sup>41</sup> Often referred to as “super escape clauses,” these provisions contravene public policy and have been deemed “arbitrary and capricious.”<sup>42</sup> The difficulty with escape clauses lies in the fact

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in excess of coverage provided by other insurers). Difficulties arise when there are multiple insurance policies and each contain “excess clauses.” *See id.* § 62:79 (noting that “if literal effect were given to both excess insurance clauses . . . neither policy would cover the loss and such a result would produce an unintended absurdity”). When all competing policies refuse to assume the role of primary insurer, courts usually interpret the clauses as mutually repugnant and apply a pro-rata theory of apportionment. *See id.* § 62:80 (stating that generally conflicting excess clauses are disregarded). For a detailed discussion of rules governing the apportionment of liability in cases of conflicting “other insurance” clauses, see *infra* notes 46-66 and accompanying text.

38. *See* COUCH ET AL., *supra* note 37, § 62:48 (stating that policy may also typically indicate that excess insurer will not reimburse insured for deductible amount in primary policy); *see also* *McGurl v. Trucking Employees of N. Jersey Welfare Fund, Inc.*, 124 F.3d 471, 474 (3d Cir. 1997) (explaining liability of excess clauses). In *McGurl*, the appellant’s insurance policy contained the following excess insurance provision:

[T]his Plan is *always* a reimbursement plan; if you are covered under another medical plan, this Plan will only take effect when the limits of your other Plan have been exceeded. This means that you can receive benefits from this Plan (in the form of reimbursement payments) only after the other plan pays benefits to the full extent of the terms of that Plan.

*Id.*

39. *See* Koepff, *supra* note 25, at 259 (detailing different questions that may arise and noting that in some cases, courts will not give effect to excess clauses in competing policies). For a detailed discussion of rules governing the apportionment of liability in cases of conflicting “other insurance” clauses, see *infra* notes 46-66 and accompanying text.

40. *See* OSTRAGER & NEWMAN, *supra* note 4, § 11.02[c], at 498-99 (describing escape clauses). A typical escape clause may read: “If any other Assured included in this insurance is covered by valid and collectible insurance against a claim also covered by this Policy, he [or she] shall not be entitled to protection under this Policy.” *Id.*

41. *See id.* (detailing aspects of escape clauses); *see also* *McGurl*, 124 F.3d at 474 (containing escape clause that disclaims all liability for employees who are also covered by other health insurance plans).

42. *See* *Northeast Dep’t ILGWU Health & Welfare Fund v. Teamsters Local Union No. 229 Welfare Fund*, 764 F.2d 147, 164 (3d Cir. 1985) (involving employee benefit plans with competing “other insurance” provisions). The *Northeast* court recognized the judicial disdain for escape clauses as it reasoned:

that beneficiaries are “deprived of [the] compensation that they reasonably anticipate under the plan’s purported coverage.”<sup>43</sup> The inequity is exacerbated in situations where the insured is unsuspectingly covered under two policies.<sup>44</sup> A common example of such overlapping insurance occurs when the driver of a vehicle not owned by him or her is inadvertently covered as a named insured under his or her personal auto insurance as well as the omnibus clause of the owner’s policy.<sup>45</sup>

### III. COORDINATION OF BENEFITS

#### A. Resolving “Other Insurance” Clauses in Competing Policies

In the early 1900s, courts fashioned a number of rules to assign liability to resolve conflicts between “other insurance” clauses from competing policies.<sup>46</sup> Some courts followed the “first in time” rule whereby the policy with the earliest effective date was deemed the primary insurer and subse-

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Underlying the judicial hostility toward escape clauses appears to be the sentiment that insureds who reasonably expect a certain level of insurance coverage should not be unexpectedly deprived of such coverage when one insurer attempts to avoid liability by shifting it to another whose policy terms may be much less favorable to the insured.

*Id.* at 162.

43. *Id.* at 163. In *Northeast*, the Third Circuit decided, in a matter of first impression, that the incorporation of an escape clause in an ERISA-governed health benefits plan is unenforceable because it represented arbitrary and capricious conduct by the plan trustees. *See id.* at 164 (noting that such conduct on part of plan trustees is violation of their fiduciary duties); *see also* *Fryer v. Allstate Ins. Co.*, 573 A.2d 225, 228 (Pa. Super. Ct. 1990) (“Our reading of the law convinces us that the . . . policy provisions must be enforced as if the escape clause did not exist.”).

44. *See* OSTRAGER & NEWMAN, *supra* note 4, § 11.01, at 496 (noting that overlapping coverage for same risk under concurrent policies generally arises in three different contexts: by design, by coincidence or by inadvertent purchase of overlapping coverage).

45. *See id.* (denoting instances in which overlapping insurance may occur by coincidence).

46. *See* Robertson, *supra* note 26, at 410-12 (describing early methods employed by courts to apportion liability in cases where two policies had conflicting clauses). One commentator noted the six common scenarios involving cases litigating policies with “other insurance” clauses: (1) escape/escape; (2) escape/excess; (3) escape/pro-rata; (4) excess/excess; (5) excess/pro-rata; and (6) pro-rata/pro-rata. *See id.* at 410 (listing possible conflicts between competing insurance clauses). The commentator then went on to describe how “all of these older approaches either expressly or implicitly recognized that in virtually all cases involving overlapping coverage, it was not possible to give literal effect to the ‘other insurance’ clauses in each policy.” *Id.* at 412. The commentator also noted that the older approaches were largely unmanageable and failed to give effect to either the plain language of the policies or the intent of the parties. *See id.* (noting that although “few of the criteria [for these methods] made any sense . . . courts utilizing these methods were not so misguided as to suggest that they were merely ‘interpreting’ the policy language or giving effect to the ‘intent of the parties’”).

quent policies were termed secondary or excess.<sup>47</sup> Other courts held that the policy that more specifically or directly covered the incident was the primary insurer, whereas the policy that only extended general coverage was deemed excess.<sup>48</sup> Still other cases exhibited the tendency of courts to apply a "primary tortfeasor" method whereby the insurer of the primary tortfeasor assumed the role of primary insurer and other policies contributed only excess coverage.<sup>49</sup> Nevertheless, these methods have been discredited and replaced with modern rules of apportionment.<sup>50</sup>

Modern courts have abandoned older methods of assigning liability and often revert to discerning the intent of the parties or prorating the liability among the insurers.<sup>51</sup> This is particularly the case when competing policies contain the same type of "other insurance" clause.<sup>52</sup> For instance, it is clear that when both policies contain pro-rata clauses, the courts will subject each insurer to a percentage of the loss based on the proportional coverage each policy provides.<sup>53</sup> If both policies contain ex-

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47. See *id.* at 410-11 (describing "First in Time" rule); see, e.g., *New Amsterdam Cas. Co. v. Hartford Accident & Indem. Co.*, 108 F.2d 653, 656 (6th Cir. 1940) (holding that policy with earlier effective date is deemed primary insurance).

48. See Robertson, *supra* note 26, at 411 (describing "specific" method of apportioning liability as compared to "general" method); see also *Fageol Truck & Coach Co. v. Pacific Indem. Co.*, 117 P.2d 661, 668-69 (Cal. 1941) (applying specific versus general rule in apportioning liability).

49. See Robertson, *supra* note 26, at 411 (describing apportionment method in which primary tortfeasor's insurer becomes primary insurer); see also *American Auto. Ins. Co. v. Penn Mut. Indem. Co.*, 161 F.2d 62, 62-63 (3d Cir. 1947) (holding insurer of primary tortfeasor primarily liable); *Maryland Cas. Co. v. Bankers Indem. Ins. Co.*, 200 N.E. 849, 851 (Ohio Ct. App. 1935) (same); cf. *Oregon Auto. Ins. Co. v. United States Fidelity & Guar. Co.*, 195 F.2d 958, 959-60 (9th Cir. 1952) (comparing methods used by courts to apportion liability).

50. See Robertson, *supra* note 26, at 410, 412 (noting that older apportionment methods are "now almost universally discredited" as they are mostly based on nonsensical criteria). One commentator also pointed out that none of the historical methods of apportioning liability utilized a proration method whereby insurers would share liability. See *id.* at 412 (noting that characteristic of older methods was that one insurer provided primary coverage while other insurer, merely provided excess).

51. See Hasse, *supra* note 28, at 42 (noting that most courts will focus on language of policies and attempt to determine intent of contracting parties to reconcile conflicting clauses).

52. See *id.* (noting that where applicable portions of two conflicting "other insurance" clauses are identical, courts almost always require insurers to apportion liability).

53. See Richmond, *supra* note 28, at 1388 (noting that when both policies contain pro-rata clauses, traditional rule has been to hold insurers liable for proportion of subject loss that face amount of each insurer's policy bears to total amount of valid and collectible insurance); see also *Cargill, Inc. v. Commercial Union Ins. Co.*, 889 F.2d 174, 179-81 (8th Cir. 1989) (apportioning liability in pro-rata fashion); *Compton v. State Farm Mut. Auto. Ins. Co.*, 870 P.2d 545, 547-48 (Colo. Ct. App. 1993) (involving action brought against automobile insurer to recover difference between total damage claim arising out of accident and amount paid by insurer and other carriers for uninsured motorists); *General Accident Ins. Co. v. United States Fidelity & Guar. Ins. Co.*, 602 N.Y.S.2d 948, 951-52 (App. Div. 1993)

cess clauses, however, an interpretation of the clauses is circular and useless because both policies purport to provide only secondary coverage.<sup>54</sup> Therefore, courts will generally dismiss the excess clauses as “mutually repugnant” and against public policy, and will simply prorate the loss between the insurers.<sup>55</sup> Finally, a literal interpretation of two policies containing escape clauses connotes that neither insurer provides any protection at all.<sup>56</sup> As expected, courts will generally preclude insurers from

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(involving claim brought by comprehensive general liability insurer against automobile insurer in which court held that insurers provided primary coverage and liability was determined based on pro-rata provisions of policies); *Tarolli v. Continental Cas. Co.*, 581 N.Y.S.2d 510, 511 (App. Div. 1992) (holding that coverage provided by both insurers was primary and therefore pro-rata apportionment of liability ensued); *Aetna Cas. & Sur. Co. v. Continental Ins. Co.*, 429 S.E.2d 406, 409-10 (N.C. Ct. App. 1993) (holding that “other insurance provisions” in insurance contracts were mutually repugnant and applying pro-rata method of allocation of risk); *Equity Mut. Ins. Co. v. Spring Valley Wholesale Nursery, Inc.*, 747 P.2d 947, 955 (Okla. 1987) (noting that loss shall be shared by insurers where policies contain pro-rata or “other insurance” clauses, although private agreements between parties assigning primary liability may be considered “when concurrent commercial policies all provide primary coverage for the same loss”); *Mission Ins. Co. v. Guarantee Ins. Co.*, 683 P.2d 215, 220 (Wash. Ct. App. 1984) (apportioning liability under pro-rata method in case where policies of both insurers were consistent in authorizing “policy limits method” of apportionment).

The contribution by limits method of apportionment used in the above cases has been the target of criticism by those who suggest that the premium paid for an insurance policy does not always reflect the amount of coverage the policy provides. See *Richmond*, *supra* note 28, at 1388-89 (noting that one criticism of contribution by limits method is that “it ignores the economic reality that the cost of insurance does not increase proportionately with policy limits”). Moreover, many courts have instead relied on a contribution by shares method in appropriating liability. See *id.* at 1389 (noting judicial preference for contribution by shares method); see, e.g., *Reliance Ins. Co. v. Saint Paul Surplus Lines Ins. Co.*, 753 F.2d 1288, 1292 (4th Cir. 1985) (applying District of Columbia law providing for contribution by shares).

54. See *COUCH, ET AL. supra* note 37, § 62:48 (asserting that excess insurer is only liable for amount of loss in excess of coverage provided by other insurers).

55. See *Richmond*, *supra* note 28, at 1389 (noting general trend of courts to dismiss two excess clauses as “mutually repugnant” and to prorate loss); see also *Indiana Ins. Co. v. Mission Nat’l Ins. Co.*, 874 F.2d 631, 634 (9th Cir. 1989) (noting that where two excess policies are “mutually repugnant,” both insurers will be held proportionately liable for loss); *Hennes Erecting Co. v. National Union Fire Ins. Co.*, 813 F.2d 1074, 1077 (10th Cir. 1987) (asserting that Kansas has traditionally followed majority rule in discarding mutually repugnant excess clauses); *Liberty Mut. Ins. Co. v. Pacific Indem. Co.*, 579 F. Supp. 140, 143 (W.D. Pa. 1984) (involving conflicting excess clauses where court gave effect to neither clause and apportioned liability based on limits of each policy).

56. See *Hasse*, *supra* note 28, at 42 (stating that “a literal interpretation of the policies containing . . . identical escape clauses would leave the insured without any coverage where it first appeared that he [or she] had double protection”). See generally *Northeast Dep’t ILGWU Health & Welfare Fund v. Teamsters Local Union No. 229 Welfare Fund*, 764 F.2d 147 (3d Cir. 1985) (involving employee benefit plans with competing “other insurance” provisions). For a discussion of the *Northeast* court’s disdain for escape clauses, see *supra* note 42 and accompanying text.

asserting complete exculpation and, instead, strike the clauses and prorate the loss.<sup>57</sup>

In the event that competing plans contain different clauses, most courts will attempt to reconcile the plans by trying to discern the intent of the parties.<sup>58</sup> Because policies with pro-rata clauses indicate that insurers

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In *Northeast*, the Third Circuit declared that the incorporation of an escape clause in an ERISA-governed health benefits plan is unenforceable because it represents arbitrary and capricious conduct by the plan trustees. See *Northeast*, 764 F.2d at 164 (noting that escape clauses in health plans represent violation of fiduciary duty on part of plan trustees); see also *Fryer v. Allstate Ins. Co.*, 573 A.2d 225, 227-28 (Pa. Super. Ct. 1990) (holding that policy provisions amounted to “an unenforceable escape clause”).

57. See *OSTRAGER & NEWMAN*, *supra* note 4, § 11.03[c][3], at 504-05 (noting that when conflicting policies both contain escape clauses, majority rule holds that insurers are co-insurers); see also *Underwriters at Lloyd's, London v. Pike*, 977 F.2d 1278, 1280 (8th Cir. 1992) (prorating loss between two insurers that issued fire insurance policies that both contained escape clauses); *Guidry v. CSI Blasters/Painters, Inc.*, 921 F.2d 275, 275 (5th Cir. 1990) (affirming district court's decision to prorate loss equally); *Richmond*, *supra* note 28, at 1391 (noting that when two policies contain conflicting escape clauses courts generally deem clauses mutually repugnant and prorate loss between insurers).

58. See *Richmond*, *supra* note 28, at 1392 (“When faced with dissimilar ‘other insurance’ clauses, most courts attempt to reconcile the clauses in a manner that will give effect to the intent of the parties.”). A minority of jurisdictions subscribe to the approach that all “other insurance” provisions, both similar and dissimilar, are “mutually repugnant” and unenforceable. See *OSTRAGER & NEWMAN*, *supra* note 4, § 11.03[d][2], at 510-13 (noting minority jurisdictions that refuse to reconcile conflicting “other insurance” clauses). This view originated in *Lamb-Weston, Inc. v. Oregon Automobile Insurance Co.*, 341 P.2d 110 (Or. 1959), in which the Oregon Supreme Court considered a conflict between a pro-rata clause and an excess clause. See *id.* at 119 (apportioning liability equally in light of competing pro-rata and excess clauses). The court reasoned that the loss should be apportioned equally because each policy would have had to foot the entire bill in the absence of other insurance carriers. See *id.* at 113 (noting that both parties conceded “that if the other was not an insurer against this occurrence [sic] then it would be liable for the full amount”). Although the *Lamb-Weston* doctrine seems to impugn practicality in the resolution of “other insurance” disputes, the approach has garnered much criticism from courts that favor strict interpretation of contractual language. See *Hasse*, *supra* note 28, at 46 (stating that this rule ignores “a basic rule of contracts requiring consideration of all the language in a policy to determine its meaning and intent”). Notably, the Oregon Supreme Court in *Lamb-Weston* merely reiterated what the Ninth Circuit had articulated seven years earlier in *Oregon Auto Insurance Co. v. United States Fidelity & Guaranty Co.*, 195 F.2d 958 (9th Cir. 1952). See *Hasse*, *supra* note 28, at 45-46 (noting that Oregon Supreme Court followed precedent set by Ninth Circuit).

Some courts apply the Minnesota Rule, which applies a three-prong test to determine which insurer is “closest to the risk.” See *Koepff*, *supra* note 25, at 271-72 (describing aspects of test, such as consideration of “total insuring intent” and which insurer is “closest to the risk”). The courts consider: (1) which policy more specifically insures against the cause of the accident; (2) which policy equitably assumes greater exposure or risk based on premium paid; and (3) which policy maintains the risk as the primary focus. See *id.* at 272 (noting three elements of Minnesota test); see, e.g., *American Family Ins. v. National Cas. Co.*, 515 N.W.2d 741, 745-46 (Minn. Ct. App. 1994) (noting that pro-rata and excess clauses in applicable insurance policies conflicted and choosing to allocate liability to policy

anticipated paying a fair share of the loss, courts will usually enforce excess and escape clauses in the presence of a pro-rata clause.<sup>59</sup> This means that the pro-rata clause will trigger full payment up to the policy limit and either an excess clause will cover the remainder or an escape clause will exculpate an insurer from all liability.<sup>60</sup>

Adjudication becomes more difficult when a court addresses competing excess and escape clauses because both policies deny primary liability.<sup>61</sup> The majority approach is to grant full effect to the excess clause and thereby impose primary liability on the policy containing the escape clause.<sup>62</sup> The Third Circuit's holding in *Insurance Co. v. Continental Casu-*

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that was closer to risk because it demonstrated "total policy insuring intent" to provide primary coverage).

59. *See, e.g.*, *American Interinsurance Exch. v. Commercial Union Assurance Co.*, 605 F.2d 731, 736 (4th Cir. 1979) (showing deference to excess clause policy, thus requiring pro-rata policy to assume primary liability); *P.L. Kanter Agency, Inc. v. Continental Cas. Co.*, 541 F.2d 519, 522-23 (6th Cir. 1976) (requiring pro-rata policy to make payment as primary insurer in presence of excess insurer). *See generally* *Alta Cal. Reg'l Ctr. v. Fremont Indem. Co.*, 30 Cal. Rptr. 2d 841, 847 (Ct. App. 1994) (holding that insurer that initially contends policy does not cover particular situation does not waive defense that coverage is only excess if coverage is later found to exist), *overruled by* *Waller v. Truck Ins. Exch., Inc.*, 900 P.2d 619 (Cal. 1995) (overruling *Alta* only to extent that it relied on *McLaughlin v. Connecticut General Life*, 565 F. Supp. 434 (N.D. Cal. 1983), and its rule of automatic waiver); *Harleysville Ins. Co. v. Crum & Forster Personal Ins.*, 588 A.2d 385, 388-89 (N.J. Super. Ct. App. Div. 1990) (obligating pro-rata policy to pay up to policy limits before invoking payment by insurer with excess policy).

60. *See, e.g.*, *McFarland v. Chicago Express, Inc.*, 200 F.2d 5, 7-8 (7th Cir. 1952) (giving effect to escape clause in one policy over pro-rata clause of other policy); *Efferson v. Kaiser Aluminum & Chem. Corp.*, 816 F. Supp. 1103, 1119-20 (E.D. La. 1993) (giving effect to escape clause and hence holding insurer with pro-rata clause primarily liable); *cf.* *Air Transp. Mfg. Co. v. Employers' Liab. Assurance Corp.*, 204 P.2d 647, 650 (Cal. Ct. App. 1949) (opining that escape clause should not be given effect because it was only intended to operate if other insurance is unconditional).

61. *See* *Hardware Dealers Mut. Fire Ins. Co. v. Farmers' Ins. Exch.*, 444 S.W.2d 583, 588-89 (Tex. 1969) (recognizing confusion imposed by conflicting policy clauses). In *Hardware Dealers*, the court recognized the difficulty imposed by "other insurance" clauses by stating:

The many methods employed for the solution of the problem of double coverage by conflicting clauses have produced much confusion . . . . To solve the problem by picking up one policy, and reading it with a result which would be opposite to that reached if the other policy were first picked up, is a solution which does not satisfactorily solve the circular riddle.

*Id.* (citation omitted).

62. *See* *Grasberger v. Liebert & Obert, Inc.*, 6 A.2d 925, 926 (Pa. 1939) (involving conflicting excess and escape clauses). In *Grasberger*, the Pennsylvania Supreme Court refused to enforce an escape clause in the presence of an excess clause. *See id.* (holding that "the [escape] clause . . . is not applicable, because, up to the amount of the coverage of the policy, defendant is not covered by other insurance"). The result was to enforce liability against the policy that attempted to escape responsibility altogether. *See id.* (giving effect to excess clause in one policy, thus making policy with escape clause primarily liable). The holding in *Grasberger* has come to be known as the majority view. *See* COUCH ET AL., *supra* note 37,

*alty Co.*<sup>63</sup> comports with this majority approach.<sup>64</sup> The *Insurance Co.* court determined that the entire loss in a wrongful death action should be borne by the insurer that sought to avoid any liability by invoking its escape clause.<sup>65</sup> The decision reiterated the popular belief that escape clauses contravene public policy by attempting to deny all responsibility and, therefore, should be read out of an insurance policy.<sup>66</sup>

### B. *The Role of ERISA*

A fundamental tenet of ERISA is its preemption of all state law "relating to" employee benefits insurance plans.<sup>67</sup> As a result, the established doctrine of insurance law regarding "other insurance" provisions is effectively rendered moot, and courts are free to fashion federal common law

§ 62.76 (stating that "as a general trend" courts are holding that "the insurer who has the no-liability clause will be primary to the excess clause insurer"); *see also* *Insurance Co. v. Continental Cas. Co.*, 575 F.2d 1070, 1073 (3d Cir. 1978) (following *Grasberger* holding and assigning primary liability to escape policy rather than excess policy).

63. 575 F.2d 1070 (3d Cir. 1978).

64. *See id.* at 1074 (holding that escape clause will not be given effect but excess clause will be given effect). *Insurance Co.* involved two insurance companies engaged in the settlement of a wrongful death action. *See id.* at 1071. One policy contained an excess clause and the other policy contained an escape clause. *See id.* at 1072. The district court declared that the two "other insurance" provisions were mutually repugnant, struck both clauses from the respective policies and pro-rated the loss between the two insurers. *See id.* at 1071 (characterizing both provisions as "excess" clauses). The Third Circuit determined, however, that in the wake of *Grasberger*, an escape clause should not be enforced in the presence of an excess clause and that the escape clause should be stricken from the policy. *See id.* at 1073-74 (refusing to distinguish *Grasberger* on basis that provision in question might constitute "super-escape" clause as opposed to mere "escape" clause). Consequently, the court assigned full liability for the entire loss to the insurer that tried to invoke its escape clause and upheld the excess clause. *See id.* at 1074 (giving escape clause no effect).

65. *See id.* (noting that holding protects interests of insureds and defers to holding in *Grasberger*).

66. *See* *Richmond*, *supra* note 28, at 1394 (noting that court may follow traditional rule and deem policy with escape clause to be primary and require its exhaustion before applying policy with excess clause due to fundamental judicial dislike for escape clauses regardless of circumstance).

67. *See* 29 U.S.C. § 1144 (1994). ERISA preemption focuses on three clauses within the statute. *See id.* § 1144(a)-(c) (discussing preemption, savings and deemer clauses). The preemption clause identifies those state laws that will be preempted by ERISA. *See id.* § 1144(a) (discussing preemption clause). The savings clause saves from preemption all those laws that purport to regulate insurance, banking or securities. *See id.* § 1144(b)(2)(A) (discussing savings clause). Finally, the deemer clause limits the application of the savings clause by providing that no employee benefit plan will be considered an insurance company for the purpose of being regulated by the respective state laws. *See id.* § 1144(b)(2)(B) (discussing deemer clause). Moreover, ERISA defines state law to include "all laws, decisions, rules, regulations or other State action having the effect of any law, of any State." *Id.* § 1144(c)(1).



to replace existing state law.<sup>68</sup> One commentator stated, "The issue becomes blurred because, although ERISA is a comprehensive and reticulated statute, no systematic manner of dealing with the coordination of health benefits—either between competing non-insured ERISA plans, or between an insured and a non-insured plan—is provided by the statute."<sup>69</sup> One important concept to consider is that ERISA does not prescribe which benefits an employer must offer, but rather controls the administration of an established plan.<sup>70</sup> Therefore, a coordination of benefits scheme is essential to a court's reconciliation of such disputes under ERISA.<sup>71</sup>

The Third Circuit has decided two seminal cases concerning coordination of benefits and ERISA.<sup>72</sup> In *Northeast Department ILGWU Health & Welfare Fund v. Teamsters Local Union No. 229 Welfare Fund*,<sup>73</sup> the court considered whether an escape clause inserted in a multi-employer benefit plan by trustees of that plan violated ERISA.<sup>74</sup> A unanimous court struck

68. See *McGurl v. Trucking Employees of N. Jersey Welfare Fund, Inc.*, 124 F.3d 471, 481 (3d Cir. 1997) ("Thus, by preempting any law that even relates to ERISA plans Congress anticipated the development of a 'federal common law of rights and obligations under ERISA-regulated plans.'" (quoting *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 56 (1987))); see also *Wayne Chem., Inc. v. Columbus Agency Serv. Corp.*, 426 F. Supp. 316, 322 (N.D. Ind.) ("Where state law is preempted and no specific federal provision governs, a 'court is forced to make law or leave a void where neither state nor federal law applies.'" (quoting Note, *The Federal Common Law*, 82 HARV. L. REV. 1512, 1522 (1969))), *aff'd*, 567 F.2d 692 (7th Cir. 1977).

69. *Watson et al.*, *supra* note 1, at 363 (footnote omitted).

70. See *Hlinka v. Bethlehem Steel Corp.*, 863 F.2d 279, 283 (3d Cir. 1988) (declaring that ERISA is not concerned with design of benefit plan, but rather administration of plan) (citing *Viggiano v. Shanango China Div. of Anchor Hocking*, 750 F.2d 276, 279 (3d Cir. 1984)). In *Hlinka*, the court determined that a fiduciary could determine whether it would allow an employee to take advantage of an early retirement package without violating the precepts of ERISA. See *id.* at 279 (holding that pension provision allowing for early retirement that was deemed to be in employer's interest did not violate ERISA).

71. See *id.* (describing problems courts must resolve in order to reconcile competing insurance clauses).

72. See *McGurl*, 124 F.3d at 471 (adjudicating dispute between two ERISA-governed employee benefits plans containing respective escape and excess clauses); see also *Northeast Dep't ILGWU Health & Welfare Fund v. Teamsters Local Union No. 229 Welfare Fund*, 764 F.2d 147, 164 (3d Cir. 1985) (dismissing escape clauses as unenforceable in light of ERISA).

73. 764 F.2d 147 (3d Cir. 1985).

74. See *id.* at 149-50 ("Finally, we conclude that the decision . . . to incorporate an escape clause in a benefit plan . . . constitutes arbitrary and capricious conduct."). *Northeast* involved an employee in the garment industry who was a participant in her own employer-provided plan as well as a beneficiary of her husband's employee benefit plan. See *id.* at 150. Both plans fell within the purview of ERISA. See *id.* In March of 1981, Mrs. Fazio, the garment industry employee, underwent surgery and subsequently submitted her claims to her own employee benefit plan. See *id.* Her plan, however, informed her that she was not eligible for benefits because her husband's plan also covered her and, therefore, according to the escape clause in her own plan, her insurer would not be liable in the presence of other

down the escape clause as unenforceable because it represented arbitrary and capricious conduct on the part of the plan fiduciaries.<sup>75</sup> Escape clauses clearly subvert the hallmark purpose of ERISA—namely, to protect employees from the fraud of their employers.<sup>76</sup>

Recently, the Third Circuit again addressed a coordination of benefits dispute in *McGurl v. Trucking Employees of North Jersey Welfare Fund, Inc.*<sup>77</sup> At issue was an apparent conflict between “other insurance” provisions in two ERISA-governed plans, each of which purported to provide at most secondary coverage to the claimants.<sup>78</sup> To resolve the conflict, the United States District Court for the District of New Jersey crafted a federal common law order-of-benefits determination rule.<sup>79</sup> The rule imposes primary liability on the plan under which the claimants are covered as employees.<sup>80</sup> Secondary coverage is imposed on plans that cover claim-

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valid insurers. *See id.* at 150-51. When Mrs. Fazio submitted her claims to her husband’s plan, the plan informed her that according to the excess clause in the benefits contract, they reserved the right to defer primary liability to any other valid insurer and would only assume secondary responsibility. *See id.*

75. *See id.* at 163 (“An ‘other insurance’ clause in a [sic] ERISA-covered benefit plan is therefore enforceable unless it reflects an arbitrary and capricious judgment by the plan’s trustees. We believe that the incorporation of escape clauses in benefit plans reflects such impermissible conduct.”).

76. *See id.* (noting that major impetus for Congress’ enactment of ERISA was alarming frequency with which employees who had been promised welfare or retirement benefits by employers were deprived of anticipated benefits due to inequitable character or financial instability of their benefit plans).

77. 124 F.3d 471 (3d Cir. 1997). *McGurl* involved a group of claimants who were covered under a benefit plan (Local 1262 Funds) as employees of a supermarket as well as under another plan (TENJ Plan) as dependents of other employees of various supermarkets. *See id.* at 473. The dispute concerned the responsibilities of the plans with respect to obligations to part-time employees who were covered by both plans. *See id.* at 474.

78. *See id.* The Local 1262 Funds plan contained an excess clause while the TENJ Plan contained an escape clause. *See id.* The district court stated that the “other insurance” provisions in the two plans were “mutually repugnant” as both attempted to deny primary coverage. *See McGurl v. Teamsters Local 560 Trucking Employees of N. Jersey Welfare Fund*, 925 F. Supp. 280, 287 (D.N.J. 1996).

79. *See McGurl*, 925 F. Supp. at 290-91 (recognizing that any rule that court adopted must be one that ensures predictability and uniformity in application so as to protect benefits plans from forced liability of unanticipated claims).

80. *See id.* at 291 (“[T]he benefits of the plan which covers the person as an employee . . . are determined before those of the plan which covers the person as a dependent . . .”) (quoting NAIC MODEL, *supra* note 2, § 5B[1]); *see also Starks v. Hospital Serv. Plan*, 440 A.2d 1353, 1355 (N.J. Super. Ct. App. Div. 1981) (determining that where claimant is covered by one plan as direct beneficiary and other plan as mere dependent, former plan assumes primary liability), *aff’d*, 453 A.2d 159 (N.J. 1982). In *Starks*, the court addressed the coordination of benefits plan set forth in Blue Cross and Blue Shield (BCBS) group contracts. *See id.* Under the BCBS plan, in the presence of a competing “other insurance” provision rendering the other insurer as secondary or excess, BCBS will assert primary responsibility according to the following three guidelines. *See id.* First, where a claimant is covered as a direct beneficiary by one plan and as a dependent beneficiary by another plan, the former will assume primary liability. *See id.* Second, regarding children, the insurance carrier covering the father will assume primary responsibility before

ants as merely dependents of other covered employees.<sup>81</sup> In establishing the “employer first” rule, the Third Circuit followed the lead of the National Association of Insurance Commissioners (NAIC) Model Regulation for the coordination of benefits.<sup>82</sup>

#### IV. THIRD CIRCUIT JURISPRUDENCE

The Third Circuit’s decision in *Northeast* reflects adherence to state common law coordination of benefits.<sup>83</sup> In accord with the approach taken in *Starks v. Hospital Service Plan*,<sup>84</sup> the Third Circuit formulated a two-step process in resolving “other insurance” disputes.<sup>85</sup> The court first focused on the intent of the contracting parties and discerned that the excess and escape clauses in the respective plans were clearly incompatible.<sup>86</sup> In light of this incompatibility, the court attempted to reconcile the clauses with the precepts and policies of ERISA.<sup>87</sup> Generally, the court posited that “other insurance” clauses in ERISA-covered plans are enforceable unless they reflect an arbitrary and capricious judgment by the plan’s trustees.<sup>88</sup> It is precisely the inequitable character reflected in plans with escape clauses, which try to defer all liability, that constitutes this arbitrary and capricious conduct.<sup>89</sup> After careful consideration of ERISA’s purpose

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the mother’s carrier. *See id.* Third and finally, in the event that the two previous rules do not apply, the plan that has covered the claimant for the longest period of time will pay first. *See id.*

81. *See McGurl*, 925 F. Supp. at 291 (citing Helitzer, *supra* note 1, at 414 (“[T]he plan covering the person as an employee pays benefits first. The plan covering the same person as a dependent pays benefits second.”)).

82. *See* NAIC MODEL, *supra* note 2, § 5(B). The Model Regulation sets forth a comprehensive scheme that eliminates the confusion and hassle of benefits determination and payment delays in the presence of “other insurance” clauses by suggesting that all coordination of benefits comport with this regulation. *See id.* § 2.

83. *See Starks*, 440 A.2d at 1358 (providing that parties’ intentions should be discerned before applying coordination of benefits rules).

84. 440 A.2d 1353 (N.J. Super. Ct. App. Div. 1981).

85. *See id.* at 1358. The *Starks* court stated, “[T]he judicial task is first to determine from the contracts themselves what obligations the respective obligors intended to assume and then to determine whether these intentions are compatible . . . with the insured’s rights and expectations and with the controlling demands of public policy.” *Id.*

86. *See Northeast Dep’t ILGWU Health & Welfare Fund v. Teamsters Local Union No. 229 Welfare Fund*, 764 F.2d 147, 161 (3d Cir. 1985). The two “other insurance” provisions were incompatible based on the fact that the excess clause in one plan defers primary liability to a second plan that has an escape clause which denies all liability in the presence of any other plan. *See id.*

87. *See id.* (construing “other insurance” provisions and determining their compatibility is only first step of two-step analysis and noting that “other insurance” clauses are enforceable only if they are consonant with provisions and policies of ERISA).

88. *See id.* at 163 (asserting that “other insurance” clauses in ERISA-covered benefit plans are enforceable unless deemed arbitrary and capricious).

89. *See id.* (believing incorporation of escape clauses to be arbitrary and capricious conduct).

of protecting employees' entitlements, the court chose to adopt the state common law majority rule and dismiss the escape clause as unenforceable.<sup>90</sup>

The *Starks* court noted that many state courts, when faced with a conflict between an escape clause and an excess clause, have chosen to invoke the former as the primary insurer.<sup>91</sup> Once the escape clause was struck from the defendant's plan, the court found that the policy could be interpreted as assuming primary responsibility.<sup>92</sup> In dismissing the escape clause as arbitrary and capricious, the Third Circuit acknowledged the possibility of adopting a less drastic remedy.<sup>93</sup> The court, however, declined to do so, warning that such a holding might be interpreted as a qualified endorsement of escape clauses.<sup>94</sup>

The court's adamant rejection of escape clauses is seemingly at odds, however, with a minority of jurisdictions that prorate the loss after dismissing both the escape and excess clauses as repugnant.<sup>95</sup> Nevertheless, the holding emphasizes the weighty obligation placed on employee health plan fiduciaries in delivering anticipated benefits.<sup>96</sup>

90. See *id.* at 164 (holding that escape clauses in ERISA-governed plans are unenforceable as matter of law); see also OSTRAGER & NEWMAN, *supra* note 4, § 11.03[d][1][c], at 508 (stating that majority of courts hold that policy containing escape clause is primarily liable for loss, while policy containing excess clause will be held to provide only excess insurance); see, e.g., *Michigan Alkali Co. v. Banker's Indem. Ins. Co.*, 103 F.2d 345, 348 (2d Cir. 1939) (holding that policy issuing escape clause was primarily liable); see also *Insurance Co. v. Continental Cas. Co.*, 575 F.2d 1070, 1072 (3d Cir. 1978) (following reasoning in *Michigan Alkali*).

91. See *Northeast*, 764 F.2d at 162 (relying on policy considerations in declaring escape clauses unenforceable) (citing *Insurance Co.*, 575 F.2d at 1070; *Grasberger v. Liebert & Obert, Inc.*, 6 A.2d 925 (Pa. 1939) (holding excess clause prevailed over escape clause because excess clause did not cover insured's primary loss)).

92. See *Northeast*, 764 F.2d at 164 (holding ILGWU Fund primarily liable because escape clauses are unenforceable as matter of law).

93. See *id.* at 164 n.17 (positing other available remedies).

94. See *id.* ("[W]e are concerned that even a qualified endorsement of escape clauses might encourage benefit plans with excess or coordination of benefits clauses to replace such clauses with those of the escape variety in order to 'fight fire with fire.'").

95. See 8A J. APPLEMAN, *INSURANCE LAW AND PRACTICE* § 49.10, at 458 n.1 (1981) (noting minority rule of proration).

96. See 29 U.S.C. § 1001(c) (1994). Congress set forth its declaration of policy in ERISA by stating:

It is hereby further declared to be the policy of this chapter to protect . . . the interests of participants in private pension plans and their beneficiaries by improving the equitable character and the soundness of such plans by requiring them to vest the accrued benefits of employees . . . to meet minimum standards of funding, and by requiring plan termination insurance.

*Id.*

The *Northeast* court affirmatively placed the onus of honest dealing on the plan trustee as the court recognized the complexity of "other insurance" law and the tendency for the average beneficiary not to make informed choices. See *Northeast*, 764 F.2d at 163-64 n.16.

A decade later, the Third Circuit abandoned its earlier devotion to state common law.<sup>97</sup> In *McGurl*, the court lent credence to the proposition that a federal statute charging the development of federal common law implicitly envisions some degree of national uniformity.<sup>98</sup> As the court stated, “[I]t would make little sense to adopt a state law rule, which Congress has chosen to preempt, as a matter of federal common law.”<sup>99</sup> In discarding state law, the court noted that the need to fashion federal common law stems from the inability to pose before Congress every possible scenario that arises under ERISA.

With a license to craft new law, the court embarked upon a task of first impression in the federal courts.<sup>100</sup> Following the two-step analysis set forth in *Starks* and adopted in *Northeast*, the district court in *McGurl* commenced with an analysis of the parties’ intentions.<sup>101</sup> The court determined that the defendant’s policy contained an escape clause and, in accordance with *Northeast*, declared the clause unenforceable.<sup>102</sup> It is at this point that the fact patterns of *Northeast* and *McGurl* diverge.<sup>103</sup> Once the *Northeast* court struck the escape clause from the defendant’s policy, the remaining language clearly assigned primary liability to the defendant.<sup>104</sup> In *McGurl*, however, the policy still assumed only secondary liability after

97. See *McGurl v. Trucking Employees of N. Jersey Welfare Fund, Inc.*, 124 F.3d 471, 480-86 (3d Cir. 1997) (embracing uniform federal rule instead of state law).

98. See *id.* at 480 (“‘[T]he desirability of a uniform rule is plain’ where ‘identical transactions subject to the vagaries of the laws of the several states’ would lead to great diversity in results.” (quoting *Clearfield Trust Co. v. United States*, 318 U.S. 363, 367 (1943))). The Third Circuit realized that this is the case when a federal statute is at issue militating uniformity. See *id.*

99. *McGurl v. Teamsters Local 560 Trucking Employees of N. Jersey Welfare Fund*, 925 F. Supp. 280, 288 (D.N.J. 1996) (citing *PM Group Life Ins. Co. v. Western Growers Assurance Trust*, 953 F.2d 543, 546 (9th Cir. 1992)).

100. See *McGurl*, 124 F.3d at 473 (noting that case at bar posed question of first impression in federal courts).

101. See *McGurl*, 925 F. Supp. at 285 (noting that court must first discern intent of parties and then determine whether such intent comports with underpinnings of ERISA).

102. See *McGurl*, 124 F.3d at 477 (“According to the analysis in *Northeast*, therefore, this provision in the TENJ Fund [defendant] plan is an unenforceable escape clause.”).

103. See *id.* Note that here, once the unenforceable escape clause is stricken from defendant’s plan, the court is still left with a dilemma in assigning liability. See *id.* The court noted that the two plans were nonetheless mutually repugnant. See *id.* Conversely, in *Northeast*, once the court declared the escape clause unenforceable and struck it from the party’s plan, that plan naturally assumed liability due to no further conflicting language. See *Northeast Dep’t ILGWU Health & Welfare Fund v. Teamsters Local Union No. 229 Welfare Fund*, 764 F.2d 147, 164 (3d Cir. 1985).

104. See *Northeast*, 764 F.2d at 164 (“In the absence of its escape clause, the ILGWU plan is the primary insurer of Mrs. Fazio’s medical expenses under its own terms and the terms of the Teamsters plan.”).

the escape clause was struck from the defendant's policy.<sup>105</sup> This was due to the fact that the relevant portion of the policy was reduced to the following phrase: "The Plan covering the patient as an employee or in which the employee is a participant . . . will be the primary plan."<sup>106</sup> Because the claimants were not employee beneficiaries of the defendant's plan, the defendant successfully shielded itself from primary liability.<sup>107</sup>

After the court determined the defendant was not primarily liable, the court examined different approaches in assigning liability.<sup>108</sup> The court rejected the pro-rata approach because it imparts undue recognition and approval of excess clauses.<sup>109</sup> Moreover, the court reasoned that the pro-rata approach sacrifices all certainty because insurers will not be able to compute their relative risk in the absence of notice of other plans.<sup>110</sup> The United States Court of Appeals for the Sixth Circuit recognized this proposition in *Auto Owners Insurance Co. v. Thorn Apple Valley*<sup>111</sup> where the court stated that the pro-rata rule does not comport with "a primary goal of ERISA, which is to safeguard the financial integrity of qualified plans by shielding them from unanticipated claims."<sup>112</sup>

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105. See *McGurl*, 124 F.3d at 477 (positing that both plans are mutually repugnant and noting lack of acceptable method of adjudicating parties' intent).

106. *McGurl*, 925 F. Supp. at 287.

107. See *id.* at 283. The claimants were dependents of the primary employee beneficiaries of the defendant's plan. See *id.* Therefore, because defendant did not cover claimants as employees, the defendant could escape primary liability despite the excision of the escape clause in the policy. See *id.*

108. See *McGurl*, 124 F.3d at 484. The court noted that the two courts of appeals that have addressed the possibility of applying the pro-rata rule have been divided on its merits. See *id.* Compare *Auto Owners Ins. Co. v. Thorn Apple Valley, Inc.*, 31 F.3d 371, 375 (6th Cir. 1994) (considering ERISA-governed plan with no-fault automobile insurance policy and determining that application of pro-rata method of apportionment would subvert policies of ERISA), with *Winstead v. Indiana Ins. Co.*, 855 F.2d 430, 431-32 (7th Cir. 1988) (considering conflict between clauses in ERISA-governed plan and no-fault automobile insurance plan under auspices of Michigan state law and applying pro-rata method of apportionment).

109. See *McGurl*, 124 F.3d at 485 ("[E]ven a qualified endorsement of escape clauses might encourage benefit plans with excess or coordination of benefits clauses to replace such clauses with those of the escape variety in order to 'fight fire with fire.'" (quoting *Northeast*, 764 F.2d at 164 n.17)).

110. See *id.* (opining that pro-rata rule presents many difficulties in apportionment of liability and noting that pro-rata rule exists comfortably in casualty insurance law, but not health insurance law).

111. 31 F.3d 371 (6th Cir. 1994).

112. *Id.* at 375. But see *Winstead*, 855 F.2d at 431-32 (applying pro-rata method of apportionment). In *Winstead*, the court addressed a conflict between the coordination of benefits in an ERISA-regulated plan and an applicable no-fault automobile insurance plan. See *id.* The court apportioned liability based on the pro-rata rule and cited Third Circuit dictum found in a *Northeast* footnote. See *id.* at 434. In *Northeast*, the court recognized that other courts faced with the same scenario have declared the escape and excess clauses mutually repugnant and have held both insurers primarily liable for the entire loss on a pro-rata basis. See *Northeast*, 764 F.2d at 161-62 n.13.

The Third Circuit chose to adopt the coordination of benefits approach set forth by the NAIC in its Model Regulation.<sup>113</sup> The NAIC's rule is seemingly a panacea amid the chaos of "other insurance" law.<sup>114</sup> The Model Regulation establishes a comprehensive scheme for the orderly coordination of employee benefits.<sup>115</sup> Under the Model Regulation, the plan covering the claimant as an employee beneficiary assumes primary responsibility.<sup>116</sup> The plan covering the claimant as a dependent beneficiary assumes secondary responsibility.<sup>117</sup>

Adopted in twenty-four states, the NAIC approach has gained widespread acceptance.<sup>118</sup> Moreover, it more effectively advances the purpose of ERISA than its alternative, the pro-rata rule, which leaves employers unable to predict the extent of their own liability.<sup>119</sup> The "employer first"

113. See *McGurl*, 124 F.3d at 484 (noting that district court employed its law-making power to select NAIC's "employer first" rule); see also *PM Group Life Ins. Co. v. Western Growers Assurance Trust*, 953 F.2d 543, 547 (9th Cir. 1992) (noting that adoption of uniform federal rule best effectuates purpose of ERISA by avoiding confusion and expense). In *PM Group*, the court considered two self-funded ERISA plans with incompatible "other insurance" provisions. See *id.* at 545. The claimants, husband and wife, were each covered by their respective employee benefit plans. See *id.* When the couple gave birth to their three month premature baby girl, it took over four years to collect through their insurance companies for the expenses incurred. See *id.* In adjudicating the coordination of benefits dispute between the insurers of the parents over which insurer should assume primary liability, the Ninth Circuit relied in part on NAIC regulations to create a uniform federal common law solution. See *id.* Under the "birthday rule," the insurer of the parent whose birthday falls first in the calendar year will assume primary liability. See *id.* In establishing a federal common law rule, the court pointed out that the converse would lead to great confusion among insurance carriers that provide coverage to claimants in several states and are therefore subject to several different laws. See *id.* at 547. Another popular competing rule is the "gender rule" which provides that in all cases, the father's plan will be the primary insurer. See *id.* at 548.

114. See *McGurl*, 124 F.3d at 486. From a practical standpoint, the "employer first" rule encourages employees to look uniformly to their employers for reimbursement before seeking recompense from other plans. See *id.* More importantly, however, the employer first rule imparts a good deal of stability on plan trustees in assessing their overall potential liability instead of leaving the determination to an ad hoc judicial decision regarding liability. See *id.*

115. See NAIC MODEL, *supra* note 2, § 2. According to the NAIC, the purpose of the Model Regulation is to "establish a uniform order of benefit determination under which plans pay claims." *Id.* § 2(B). Additionally, the Model Regulation serves to reduce delays made by insurance carriers in paying claims due to the disputes among competing plans. See *id.* § 2(E).

116. See *id.* § 5(D)(1) ("The plan that covers the person other than as a dependent, for example as an employee, member, subscriber or retiree, is primary and the plan that covers the person as a dependent is secondary.").

117. See *id.*

118. See *McGurl*, 124 F.3d at 483 (citing Jack B. Helitzer, *State Developments in Employee Benefits: State Adoption of Coordination of Benefits Rules*, 4 BENEFITS L.J. 435, 442-43 (1991)).

119. See *id.* at 492-93 (positing that pro-rata rule fosters unpredictability and uncertainty among insurance carriers and their respective beneficiaries).

rule is consistent with industry practice and it soundly effectuates the policies of ERISA.<sup>120</sup>

#### V. CONCLUSION

The culture that has evolved in the Third Circuit's jurisprudence of "other insurance" clauses is one that impugns the requisite logic and forethought necessary to adjudicate such intricate disputes. The Third Circuit has ruled aggressively, while duly noting the importance of formulating common law both incrementally and empirically.<sup>121</sup> Regarding ERISA, the Third Circuit has helped to secure adequate certainty for employers that are continually faced with paying disavowed claims. On the other hand, the holdings also advance the interests of the employees in collecting anticipated coverage.

As one commentator noted, adoption of the "employer first" rule in coordination of benefits determinations formalizes the only practical solution to the conundrum of "other insurance" provisions.<sup>122</sup> Virtually all insurance practitioners employ the rule regardless of its legal status.<sup>123</sup> The Third Circuit's holding in *McGurl* merely recognizes industry practice and ensures its uniform application in the resolution of disputes under ERISA-governed plans.

In 1992, Judge Kosinski of the United States Court of Appeals for the Ninth Circuit mused, "The next worst thing to having no insurance at all is having two insurance companies cover the same claim."<sup>124</sup> The federal common law developed by the Third Circuit will certainly help to cure this evil and slowly close the legislative gaps that plague ERISA.

*Aileen A. Dowd*

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120. *See McGurl v. Teamsters Local 560 Trucking Employees of N. Jersey Welfare Fund*, 925 F. Supp. 280, 293 (D.N.J. 1996) (noting that "employer first" rule comports with state practice and goals of ERISA).

121. *See id.* at 289 ("[T]he common law decision making process is inherently incremental by nature . . . ." (quoting *PM Group Life Ins. Co. v. Western Growers Assurance Trust*, 953 F.2d 543, 547 (9th Cir. 1992))).

122. *See Helitzer, supra* note 118, at 436 (noting practicality of "employer first" rule in resolution of employee benefit disputes).

123. *See id.* ("Virtually all insurers and plan administrators follow the practical resolution, and even if they are not sophisticated enough to figure out the solution, they will reach the proper conclusion sooner or later.").

124. *PM Group*, 953 F.2d at 544.



