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The Determination of Liability in Automobile Insurance Policies Containing Excess Insurance Clauses

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In recent years automobile liability insurance has become one of the most important fields of insurance law, which today affects nearly every person in the country. The great number of accidents involving motor vehicles continually brings automobile insurance companies forward to defend lawsuits and to pay judgments arising therefrom.[1] With this growth of insurance law and the accompanying increase in the number and types of policies held by the owners and drivers of motor vehicles, insurance companies have felt obliged to insert clauses in their policies to divert liability to other insurers whose policies cover the same wrongful act. A clause frequently used to divert the loss provides that the policy shall constitute only excess insurance over any other valid and collectible insurance available to the insured, and is termed an "excess insurance" clause.

"Excess insurance" clauses have been held valid in a vast majority of jurisdictions, despite arguments that they are against public policy.[2] Usually when the loss is covered by two insurance policies, and one of the policies contains an "excess insurance" clause, the policy without such a clause constitutes primary insurance. The insurer whose policy contains the "excess insurance" clause is liable only to the extent that the primary insurance does not cover the loss.[3]

Common usage of such clauses has given rise to the problem of determining liability when two or more policies covering a loss contain "excess insurance" clauses. It must be decided whether one insurer is the primary carrier, the others constituting excess insurance over and above the primary insurance, or whether all carriers occupy the same legal status. Further, if it is found that all carriers occupy the same legal status, it must then be determined how liability should be apportioned among them.

I.

Numerous paths have been followed by the courts in their attempts to determine the liability of each party where there are two or more "excess insurance" clauses in litigation. Seemingly the only

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[1] 7 APPLEMAN, INSURANCE § 4251 (1942).
[2] American Sur. Co. v. Canal Ins. Co., 258 F.2d 934 (4th Cir. 1958).
[3] Continental Cas. Co. v. Buckeye Union Cas. Co., 143 N.E. 2d 169 (Ohio 1957).

view not taken by the courts is that neither carrier is primarily liable. While such an interpretation would be necessary if a literal effect were given to both clauses, the courts and the insurers themselves agree that to so hold would be completely unwarranted — a loss could be covered by several insurance policies, but the individual who thought he was adequately insured would be forced to pay.[4]

The majority of the courts hold that where there are two or more "excess insurance" clauses in the policies covering the loss, and there is no policy without such a clause, these clauses should be disregarded as being mutually repugnant and the loss should be prorated among or between the insurers.[5] The case law is unanimous in holding the insurers liable and prorating the loss among them when the policies contain no "excess insurance" clauses.[6] The courts following the majority view have thus extended this basic rule of insurance law by ignoring the "excess insurance" clauses in such a situation.

Representative of the majority view is *Oregon Auto. Ins. Co. v. United States Fid. & Guar. Co.*,[7] an action for a declaratory judgment. The policy of one insurance carrier covered *X* who was driving the automobile at the time of the accident, and included his operation of other vehicles except as to losses covered by other insurance. The other policy was issued to the owner of the automobile involved and included liability arising from the operation of the vehicle by another with the owner's consent, except as to losses covered by other insurance. Citing and refusing to accept the numerous holdings of other federal and state courts, the court held the clauses to be "indistinguishable in meaning and intent.

> "One cannot rationally choose between them. We understand the parties to concede that where neither policy has an 'other insurance' provision, the rule is to hold the two insurers liable to prorate in proportion to the amount of insurance provided by their respective policies. Here, where both policies carry like 'other insurance' provisions, we think [they] must be held

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[4] Oregon Auto. Ins. Co. v. United States Fid. & Guar. Co., 195 F.2d 958 (9th Cir. 1952).

[5] *Ibid.*; Continental Cas. Co. v. St. Paul Mercury F. & M. Ins. Co., 163 F. Supp. 325 (S.D. Fla. 1958); Employers Liab. Assur. Corp. v. Pacific Employers Ins. Co., 102 Cal. App. 2d 188, 227 P.2d 53 (1951). See generally, Annot., 69 A.L.R.2d 1122 (1960).

[6] 143 N.E.2d 169.

[7] 195 F.2d 958.

> mutually repugnant and hence be disregarded. Our conclusion is that such view affords the only rational solution of the dispute in this case."[8]

The problem often rises where one who has insurance covering him while driving any automobile with the owner's permission, except as to losses covered by other insurance, rents an automobile from a car rental concern which has a policy covering anyone permissively driving its vehicles, except as to losses covered by other insurance. These were essentially the facts in *Continental Cas. Co. v. Buckeye Union Cas. Co.*,[9] where the court held that both companies afforded joint coverage and each has the obligation to share the amount of damages.

> "If we accept as a truism the fact, and it is a fact, that there can be no 'excess' insurance in the absence of a 'primary' insurance, it follows as night follows day that since neither policy by its terms is a policy of 'primary' insurance, neither policy can *operate* as a policy of 'excess' insurance. The policies are not changed. The 'excess' provisions of the policy merely are inoperative as being impossible of accomplishment in the way that such excess provisions are inoperative if there is no other insurance in effect."[10]

The court further states that the situation which here arises is very different from the "double insurance" problem arising in property law, where two policies are held by the same person. Here two policies are owned by two different people; different insurance companies are involved. Had it not been for policy No. 2, policy No. 1 would have been liable for the entire liability. Thus the existence of a second policy effectuates a saving to the first policy.

While a majority of courts have accepted this seemingly better view, others have set forth a number of divergent views on this subject. There is no one minority view; rather courts that do not follow the position of the majority have developed their own peculiar holdings.

The Third Circuit Court of Appeals held that a policy stating that coverage ". . .shall be an *excess* cover over and above the valid

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[8] *Id.* at 960.
[9] 143 N.E.2d 169.
[10] *Id.* at 180.

and collectible insurance . . ." is secondary to a policy stating that if the insured covered by the policy " . . . is also covered by *other* valid and collectible insurance . . . " the insured shall not be indemnified under the policy.[11] In so holding, the court apparently means that the use of the word "excess" is sufficient to make an insurer secondarily liable—the insurer who chose the word "other" is primarily liable. While such a rule will temporarily alleviate the problem, it does not afford a permanent solution. The insurance companies will be more careful in the drafting of their policies, and be certain to include the word "excess" therein. Finally the court will be faced with the problem again when two policies are in conflict, both of which contain the magic word "excess".

Another minority position is that the policy which is first in time constitutes primary insurance. Any insurance which is later in time and also covers the loss is secondary.[12] In rejecting this view on the ground that liability on both policies actually came into existence on the happening of the same event, i.e. injury to a third party resulting from the negligent driving of a motor vehicle by one falling within the scope of both policies, *Zurich Gen. Acc. & Liab. Ins. Co. v. Clamor*[13] presents still another minority holding. One policy contained an omnibus clause extending coverage to any person using the insured automobile with the permission of the named assured. It was stated that this clause did not apply to any person ". . . with respect to any loss against which he has other valid and collectible insurance."[14] The other policy stated that "the insurance shall be excess insurance over any other valid and collectible insurance available to the insured."[15] The accident occurred while the assured under the second policy was driving the first assured's automobile with his permission. In holding the first insurer liable to the extent provided in the policy, and the second insurer liable only for the excess, the court stated that the more specific language of the second policy controlled.

This line of reasoning was attacked as arbitrary in *Continental Cas. Co. v. Buckeye Union Cas. Co.*[16] In stating that the truck

[11] Continental Cas. Co. v. Curtis Publishing Co., 94 F.2d 710, 711 (3d Cir. 1938) (Emphasis added).
[12] New Amsterdam Cas. Co. v. Hartford Acc. & Indem. Co., 108 F.2d 653 (6th Cir. 1940).
[13] 124 F.2d 717 (7th Cir. 1941).
[14] *Id.* at 718.
[15] *Ibid.*
[16] 143 N.E.2d 169.

insured was a specific automobile, and the person insured by the other policy was a specific person, the court inquired:

> "Which is more 'specific'? What are the comparative yardsticks one would employ in such a determination? We know of none. In our opinion any attempt to weigh the specifics of the two on the balance scale of the law would be at best an arbitrary conclusion not based on any logical premise."[17]

This is not to preclude the possibility of policies so different to warrant a decision that one clause is more specific than the other. In such a case, the more specific policy should be considered as the primary one.[18] However, in most cases involving this problem, the difference in the "excess insurance" clauses is simply a difference in form rather than substance.

The rule expounded by *Maryland Cas. Co. v. Bankers Indem. Ins. Co.*[19] seems to be the best of the minority views. There it was held that the insurer of the person primarily liable for the damage is the primary carrier. All other insurance policies constitute secondary or "excess insurance." The logic is simple. If *A* negligently drives *B's* automobile, thereby injuring *C*, *A* is primarily liable for the accident. Thus *A's* insurer should likewise be primarily liable.

II.

While the problem of multiple "excess insurance" clauses is becoming more prevalent, the West Virginia Supreme Court has not yet been called upon to express its view on the subject. However, the neighboring state of Virginia has set forth an interesting rule relating to this situation. In *Maryland Cas. Co. v. Aetna Cas. & Sur. Co.*[20] *P* and *D* through the same agent issued insurance policies to *X*. *X's* employee, under an agreement with *X*, drove his own automobile, thereby injuring *T*. *T* recovered a judgment against *X* in an action defended and paid for by *P*. The court held, that where one insurer, *P*, assumed liability on its policy for the loss and paid a judgment for which the motorist was primarily liable, the insurer was not entitled to reimbursement from another insurer, *D*, even though *D's* policy was one of general liability and *P's* contained an

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[17] *Id.* at 179.
[18] Hartford Steam Boiler Inspection & Ins. Co. v. Cochran Oil Mill & Ginnery Co., 26 Ga. App. 288, 105 S.E. 856 (1921).
[19] 51 Ohio App. 323, 200 N.E. 849 (1935).
[20] 191 Va. 225, 60 S.E.2d 876 (1950).

"excess insurance" clause. However, since this case was decided on the "voluntary payment" theory, i.e. one who voluntarily pays a debt of another is estopped from compelling repayment in the absence of an agreement to the contrary, a timely presentation of the issue in Virginia under different circumstances would probably present an open question to the court.

A final minority rule was proposed by the Federal District Court for the Western District of Virginia and the Fourth Circuit Court of Appeals. *Farm Bureau Mut. Auto. Ins. Co. v. Preferred Acc. Ins. Co.*[21] involved a dispute between the insurer of the owner of the automobile involved and the insurer of the driver who was held to be a permissive user of the vehicle. Both policies contained "excess insurance" clauses. It was held that the insurer of the owner is primarily liable to discharge any liability established against the driver of the automobile by reason of an accident within the limits of the policy; the insurer of the driver is liable only for any excess. *American Sur. Co. v. Canal Ins. Co.*[22] followed this rule in holding the insurer of the lessor of a motor vehicle primarily liable and the insurer of the lessee secondarily liable. Such a theory appears to be unreasonable since the owner was not even in possession of the vehicle at the time of the accident. The reason for the rule rests on the idea that the owner should be careful not to entrust his vehicle with a negligent person.

Although numerous views have been expressed by the courts in this area, the better view and the one supported by a majority of the courts is, that where two or more insurance policies covering a loss contain "excess insurance" clauses, these clauses should be disregarded as being mutually repugnant.

III.

If two or more of the insurers are found to occupy the same legal status, the problem then arises as to how the liability should be apportioned among or between them. The views of the courts in this area are almost as varied as those determining the legal status of the insurers.

This problem is best illustrated by posing a hypothetical situation: assume two insurers have been held to afford coverage of a

[21] 78 F. Supp. 561 (W.D. Va. 1948).
[22] 258 F.2d 934 (4th Cir. 1958).

loss of 5,000 dollars. The policy limits are 10,000 dollars and 90,000 dollars. How much should each insurer be required to pay?

A majority of the cases provide for proration in accord with the proportionate policy limits applicable. Following this rule, the 10,000 dollar insurer would be liable for one-tenth of the loss. The 90,000 dollar insurer would pay the other nine-tenths. This method of proration seems to be the most equitable and is supported by text writers as well as by the courts.[23]

However, this basis of proration has been rejected by some courts. *Cosmopolitan Mut. Ins. Co. v. Continental Cas. Co.*[24] discarded the theory because the cost of liability insurance does not increase proportionately with the limits of an insurance policy. "The cost of increased limits is relatively small when compared to the cost of minimum coverage."[25] The court proceeded to hold that since both companies stood on a relatively equal footing, equity would require an equal apportionment of the amount of settlement and expenses. Thus it may be inferred from the language used by the court that the basis of proration should be that which appears most equitable in a particular case. For this reason, it is doubtful that in the hypothetical problem here posed, this court would require each insurance company to pay one-half, i.e. 2,500 dollars. Such a holding would not be equitable, for although one company's limit is nine times that of the other, they would be held equally liable for the loss.

Another rule as to proration is stated in *Ins. Co. of Texas v. Employers Liab. Assur. Corp.*[26], where it was held that liability should be prorated according to the premiums paid the insurers by their policy holders. While such a view may appear to be equitable on the surface, it is generally known that many variables affect the payment of premiums, e.g. regular automobile insurance as compared to fleet coverage.

Various theories of proration have been proposed and accepted where the insurers are placed on the same legal footing. The best rule as supported by the majority of the cases and by some text writers requires proration in accord with the proportionate policy

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[23] 195 F.2d 958; 8 APPLEMAN, INSURANCE § 4913 (1942). See generally, Annot., 69 A.L.R.2d 1122 (1960).

[24] 28 N.J. 554, 147 A.2d 529 (1959).

[25] *Id.* at 564, 147 A.2d at 534.

[26] 163 F. Supp. 143 (S.D. Cal. 1958).

limits applicable to the loss. However, equity may dictate the use of another theory if such is required to do justice in a particular case.[27]

Conclusion

The use of "excess insurance" clauses in automobile liability insurance policies has grown with the number of such policies issued in recent years. When two such clauses come into conflit, the courts are faced with an important problem which has been settled in a variety of ways. In such a case it has been held that the word "excess" in a policy makes that policy secondary to one using the term "other"; that the policy which is first in time is primary; that the policy which is seemingly more specific is secondary, the more general one primary; that the insurance of the driver of the vehicle is primary; that the insurance of the owner of the vehicle is primary. Out of this myriad of theories emerges one view that is looked upon with favor by a majority of courts, and appears to be supported by the best reasoning. Where two or more "excess insurance" clauses are present, they are mutually repugnant and inoperative as being impossible of accomplishment, and should thus be disregarded.

Once it has been determined that the insurers are on the same legal footing, the problem of proration of the liability among them arises. Although the best rule followed by a majority of the cases suggests proration in accordance with the proportionate policy limits, equity should determine the rule which is just as applied to the facts of each case.

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[27] One final point should be observed concerning the problem of proration. Whatever theory is used by a court in a particular case, the proration should be applied both as to damages and as to the expense of defending the suit. 195 F.2d 958.