Catholic University Law Review

Volume 31
Issue 4 *Summer 1982*

Article 15

1982

Insurance

Patrick J. Heneghan

INSURANCE

I. MULTIPLE COVERAGE OF RISK

In an insurance policy, insurers frequently incorporate what are generally referred to as "other insurance" clauses. Although these clauses may be in one of three common forms (the pro rata clause, the excess clause, or the escape clause), each is designed to limit liability when an insured event is covered by two or more insurance policies. A problem which has plagued and confused courts in many jurisdictions has been how to interpret and give effect to two conflicting "other insurance" clauses embodied in two separate insurance policies insuring the same event. As a result of this confusion two distinct lines of authority have evolved. The majority position attempts to give effect to the contractual intent of the parties to reconcile any apparent conflict between two "other insurance" clauses. The minority position, or *Lamb-Weston*[1] rule, provides that when a court is confronted with two or more "other insurance" clauses, they are to be viewed as mutually repugnant and, hence, invalid. Consequently, liability is prorated among all applicable insurers.

In a case of first impression, the District of Columbia Court of Appeals, sitting en banc, addressed the "other insurance" clause dilemma and held, in *Jones v. Medox, Inc.*,[2] that when "other insurance" clauses exist in two policies insuring the same risk the pro rata[3] insurer will bear initial liability and the excess[4] insurer will bear secondary liability.

The dispute in *Jones* resulted from a malpractice action instituted by a plaintiff who suffered injuries resulting from an injection administered by Ms. Jones, a temporary nurse at Doctor's Hospital.[5] The named defendants, Ms. Jones, Doctor's Hospital, and Ms. Jones' employer, Medox, Inc., were insured by Globe Indemnity Co. (Globe), Hartford Insurance Co.

1. Lamb-Weston, Inc. v. Oregon Auto. Ins. Co., 219 Or. 110, 341 P.2d 110 (1959).

2. 430 A.2d 488 (D.C. 1981) (en banc). The court vacated its earlier panel decision which was reported at 413 A.2d 1288 (D.C. 1980).

3. A pro rata clause provides that the insurer will pay its pro rata share of the liability, "usually in proportion that the limit of its policy bears to the aggregate limits of all valid and collectible insurance." *Jones*, 430 A.2d at 489 n.1.

4. An excess clause provides that the insurer's liability is limited to the amount of loss which is not recovered by all other valid and collectible insurance policies. Of course, the excess insurer, like the pro rata insurer, is not liable for loss beyond the policy limits. *Id.*

5. *Id.* at 489-90.

(Hartford), and Insurance Company of North America (I.N.A.), respectively.[6] The central question concerned the interpretation of two apparently conflicting "other insurance" clauses, the "pro rata clause" in the Globe policy and the "excess clause" in the I.N.A. policy.[7] The court defined its task as determining whether

> the pro rata clause in the policy issued by Globe Insurance and the excess clause in the policy issued by the Insurance Company of North America can be reconciled and interpreted to give effect to the intent of the contracting parties, or whether the clauses are irreconcilable and require that this court sweep away the contractual language of the parties and impose a pro rata share of the loss upon each insurance company.[8]

After recognizing widespread confusion surrounding the "other insurance" clause issue,[9] the District of Columbia Court of Appeals aligned itself with the majority of courts which have considered the question.[10] The court reconciled the Globe pro rata clause and the I.N.A. excess clause by interpreting the Globe policy as providing primary coverage and the I.N.A. policy as providing secondary coverage. As a result, I.N.A. did not shoulder any liability because it was liable for the loss only to the extent that Ms. Jones' claim exceeded the Globe policy limits.[11] Since the case was settled for $100,000 and the Globe policy had a $1,000,000 limit of liability, this did not occur.[12]

In concluding that the majority position was the better approach, the court was persuaded by two important goals which, in its view, the majority position advanced and the *Lamb-Weston* rule ignored. First, giving ef-

---

6. *Id.* at 490.

7. In relevant part, the Globe pro rata clause provided:

> If the insured has other insurance against a loss covered by this policy . . . the company shall not be liable under this policy for a greater proportion of such loss than the applicable limit of liability . . . *bears to the total applicable limit of liability* of all valid and collectible insurance against such loss.

Id. (emphasis added). The I.N.A. excess clause provided: "The insurance afforded [by this policy] shall be excess insurance *over any other* valid and collectible insurance." *Id.* (emphasis added).

8. *Id.* at 489.

9. *Id.* at 490.

10. *Id.* at 493. For citations to other decisions adopting the majority position, see *id.* at 491 n.7.

11. *Id.* at 494.

12. *Id.* at 490. Like the Globe policy, the I.N.A. policy also had a $1,000,000 limit of liability. Nevertheless, the amount of the excess insurer's liability limit is irrelevant to determining the liability of the pro rata insurer. In the words of the court: "[t]he insurance company including a pro rata clause in its policy will be required to shoulder the loss up to its policy limits." *Id.* at 494.

fect to the contractual language of the policies advances a basic rule of contract law, which is that all the language in a policy is to be considered to determine its meaning and intent.[13] Therefore, whenever possible, a court should attempt to reconcile dissimilar "other insurance" clauses by giving effect to the language and intent of the parties.[14] Second, the court was concerned that higher insurance premiums would ultimately result if the *Lamb-Weston* rule was adopted since insurers would have to confront a new element of uncertainty: destruction of the contractual obligations initially agreed upon by the parties.[15]

In dissent, Associate Judge Pryor, joined by Chief Judge Newman and Associate Judge Mack, argued that when a court construes the confusing provisions of an "other insurance" clause in an orderly and predictable fashion, it can hardly be said that this destroys the negotiated intent of the parties.[16] Consequently, they considered the *Lamb-Weston* rule to be a balanced and equitable solution.[17] Judge Pryor found additional support for the *Lamb-Weston* rule because, under this rule unlike the majority rule, there would be no possibility that one of two or more duplicate insurers could refuse to pay until the other insurer(s) paid.[18]

Viewed in the entirety, the majority position is the better view because it accommodates the bargained for contractual intent of the parties while ensuring that the covered party will receive compensation for the casualty loss. Accepting the premise that the insured and the insurer choose the language and terms of their contract to effectuate their intent, it is reasonable to expect the courts to consider seriously the parties' intent when construing these "other insurance" clauses. The majority view accommodates this interest. Under the *Lamb-Weston* rule, however, a court is allowed to obliterate the contractual intent of the parties and, instead, impose its own view regarding the effect of the "other insurance" clause.

The *Lamb-Weston* rule may have merit in situations where the court is confronted with identical "other insurance" clauses (i.e. both pro rata or both excess). In that instance, it is impossible to determine which insurer the parties intended to be primarily liable. As a result, the clauses become mutually repugnant and it is appropriate to apportion pro rata liability.

---

13. *Id.* at 492.

14. *Id.* The court cautioned that ignoring the contractual language of the parties could result in eradicating the contractual intent of the parties.

15. *Id.* at 493. *See also* Liberty Mut. Ins. Co. v. Truck Ins. Exch., 245 Or. 30, 420 P.2d 66 (1966).

16. 430 A.2d at 495 (Pryor, J., dissenting).

17. *Id.* at 496 (Pryor, J., dissenting).

18. *Id.* at 495 (Pryor, J., dissenting).

Nevertheless, even in this situation, the majority position has viability because courts following this position also recognize that it is impossible to designate primary or secondary liability here.[19] The *Jones* court cautioned that its decision had applicability to cases where the court could determine from the language of the conflicting policies which insurer was intended to assume pro rata liability and which insurer was to assume secondary liability.[20] The court recognized that where the language of the policies was essentially the same, it would be necessary to declare the conflicting policies repugnant and accord pro rata liability. This caveat dilutes the danger Judge Pryor addressed in dissent when he spoke of the possibility that one of two or more insurers could refuse to pay until the other insurer paid.[21]

II. PRIMA FACIE CASE

In an automobile collision situation, frequently an injured plaintiff must bring suit in order to receive compensation for injuries suffered. In the event that the plaintiff is successful in securing a judgment against a defendant who refuses to pay the claim, it becomes necessary for the plaintiff to resort either to a writ of attachment or a writ of garnishment in order to compel payment. A writ of attachment entitles the plaintiff to create a lien on property in the defendant's custody, whereas a writ of garnishment authorizes the plaintiff to create a lien on the defendant's property which is in the possession of a third party garnishee. In an insurance context, the insured is the principal debtor and the insurance company is the garnishee. In either event, in order to establish a prima facie case on a garnishment claim involving an insurance policy, the plaintiff must prove with sufficient certainty the terms of the contract essential to the plaintiff's cause of action.[22]

---

19. *Id.* at 492 n.9, 494.

20. *Id.* at 494.

21. For additional sources discussing the problems created by "other insurance" clauses see, Comment, *Is There a Soluton to the Circular Riddle? The Effect of "Other Insurance" Clauses on the Public, the Courts, and the Insurance Industry*, 25 S.D.L. REV. 37 (1980); Comment, *"Other Insurance" Clauses: The Lamb-Weston Doctrine*, 47 OR. L. REV. 430 (1968); Watson, *The "Other Insurance" Dilemma*, 16 FED'N INS. COUNS. Q. 47 (1966); Comment, *Concurrent Coverage in Automobile Liability Insurance*, 65 COLUM. L. REV. 319 (1965); Snow, *Other Insurance Clauses—Multiple Coverage*, 40 Den. L. Center J. 259 (1963); Russ, *The Double Insurance Problem—A Proposal*, 13 HASTINGS L.J. 183 (1961); Note, *Automobile Insurance—Effect of Double Coverage and "Other Insurance" Clauses*, 38 MINN. L. REV. 838 (1954); Comment, *"Other Insurance" Clauses Conflict*, 5 STAN. L. REV. 147 (1952); Gorton, *A Further Study of the Effect of the "Other Insurance" Provision Upon Automobile Liability Insurance*, 16 INS. COUNS. J. 190 (1949).

22. *See* Franklin Inv. Co. v. American Mut. Ins. Co., 256 A.2d 620, 621 (D.C. 1969).

In *Peterson v. Government Employees Insurance Co.*,[23] the District of Columbia Court of Appeals reversed the trial court's grant of a directed verdict on a garnishment claim for the defendant, Government Employees Insurance Co. (GEICO).[24] Relying on *Franklin Investment Co. v. American Mutual Insurance Co.*,[25] the trial court denied recovery on the ground that the plaintiffs failed to prove a prima facie case because they had not introduced into evidence the insurance policy which was the subject of the garnishment claim.[26]

In *Franklin Investment* the evidence was held to be insufficient to establish a prima facie case because the validity of the plaintiff's contract depended on terms and conditions embodied in another instrument.[27] Because the plaintiff failed to introduce the other instrument into evidence, the court was unable to determine whether the parties had complied with the terms and conditions of the contract.[28] Accordingly, the District of Columbia Court of Appeals affirmed the lower court's finding that the plaintiff had not proved the existence of the insurance policy contract.[29]

In *Peterson*, however, the District of Columbia Court of Appeals distinguished *Franklin Investment* and held that the latter did not stand for the proposition that a plaintiff suing on an insurance contract need introduce into evidence the insurance contract in order to establish a prima facie case.[30] Instead, *Franklin Investment* is to be read more narrowly: in a contract suit, it is only necessary for the plaintiff to prove that part of the contract necessary to his cause of action.[31] Since plaintiff had established that GEICO had issued a valid insurance policy which was in effect at the time of the accident,[32] that it had assigned a claim number to the incident and had undertaken a defense,[33] and that the judgment against the insured was within the policy liability limits,[34] the court of appeals concluded that

23. *Peterson*, 434 A.2d 1389 (D.C. 1981).

24. *Id.* at 1391.

25. 256 A.2d 620 (D.C. 1969).

26. *Peterson*, 434 A.2d at 1390.

27. *Franklin Inv. Co.*, 256 A.2d at 621.

28. *Id.* at 622.

29. *Id.*

30. *Peterson*, 434 A.2d at 1390.

31. *Id. See also* Blue Bonnet Life Ins. Co. v. Reynolds, 15 S.W.2d 372 (Tex. Civ. App. 1941), *cited with approval in, Franklin*, 256 A.2d at 621.

32. *Peterson*, 434 A.2d at 1390.

33. *Id.* at 1390-91.

34. *Id.* at 1391. The Court was persuaded by the similar case of Oklahoma Farm Bureau Mut. Ins. Co. v. Tyra, 207 Okl. 116, 247 P.2d 969 (1962). There, the court held that the plaintiff demonstrated the insurer's liability solely on the basis of the insurer's admissions in interrogatories without actual presentation of the insurance contract.

despite his failure to introduce the contract itself, the plaintiff had proven the minimum contractual elements necessary to establish a prima facie case.[35] In addition, the court of appeals recognized that although in this case the specific terms of the insurance contract were never at issue, when terms of the contract are at issue, it is the insurer's burden to set forth any particular terms which would void its liability.[36]

In *Peterson*, the court of appeals looked beyond the traditional criteria used to establish a prima facie case on an insurance contract. By recognizing other critical facts which established the existence of a contract, the court was able to look to the substance of the defendant's relationship with the insured rather than looking only at whether the plaintiff could produce the written document. Rather than strapping the plaintiff with the rigid burden of always introducing the actual insurance contract, *Peterson* affords the court the opportunity to look at all the relevant evidence in order to determine the existence of a valid contract.

However, the flexibility afforded by *Peterson* also has an inherent danger. It permits a court to have more latitude in weighing the equities of the case instead of mandating that the court look exclusively at the actual factual question raised: did the plaintiff prove the elements of a prima facie case? This danger is inherent whenever a court looks to the "totality of circumstances" in the determination of a factual issue. As a result, courts must be careful to avoid becoming sympathetic to the plaintiff's claim solely for equitable reasons and must concentrate on drawing only the reasonable inferences from all of the evidence presented. If, however, *Franklin Investment* is viewed as creating the maximum permissible boundaries which a court may use in assessing a factual issue by employing the totality of circumstances test, then the danger implicit in *Peterson* is diminished.

Of course, as the *Peterson* court itself recognized, as a matter of procedure it is still a much better practice to prove the existence of the contract simply by introducing the written document into evidence. This obviates the need for the court to look beyond the face of the contract to determine if the plaintiff has established a prima facie case.

Patrick J. Heneghan

35. *Peterson*, 434 A.2d at 1391.
36. *Id.*