Denver Law Review

Volume 40 | Issue 5 Article 3

April 2021

Other Insurance Clauses - Multiple Coverage

Gordon H. Snow

OTHER INSURANCE CLAUSES – MULTIPLE COVERAGE

By Gordon H. Snow*

I. Introduction

When two or more insurance companies become exposed to a single loss or claim as a result of policy language which extends their respective coverage to the loss, it is frequently stated that there exists the problem of "double coverage."

Where inconsistent "other insurance" clauses exist, the problem is a difficult one and usually comes into focus where "A" carries liability coverage on his car with "drive other cars" protection and at the time of the accident he is driving "B's" car, who also carries liability coverage which contains a so-called omnibus clause,[1] which extends protection to anyone driving "B's" car with the permission of the named insured. For immediate inquiry is the problem as to which insurance company will cover the loss or claim, or, in other words, protect the liability of "A" (and incidentally "B" if he becomes involved in the litigation which may result from the accident in which "A" was involved).

A determination of this perplexing program will probably bring into play the following provisions of the policies in force:

1. Other insurance clauses;
2. Proration clauses;
3. Policy limit provisions;
4. Certain exclusions contained within the contracts of insurance which limit or vitiate coverage while the automobile is being used for a non-covered purpose.

A detailed discussion of the problems presented under these provisions will be made subsequently. Meanwhile, suffice it to say that much confusion and uncertainty in the law result from the court's attempt to reconcile the problem. It is proper enough to refer to this situation as a problem of double coverage but it is manifestly enlarged when more than two insurance carriers become exposed, in which event we are no longer thinking in terms of "double coverage." A more appropriate term to apply to this perplexing situation would be "multiple coverage" or "concurrent insurance."

Just how confused and exasperated our courts are becoming when presented with these hypertechnical problems where the issue of multiple coverage exists, is manifestly demonstrated in the court's opinion in the case of *American Auto. Ins. Co. v. Transport Indem. Co.*[2]

> This is another of the plethora of cases coming to the courts in which insurance carriers engage in an internecine struggle to determine which carrier should discharge a loss under primary and "excess" coverage provisions. In en-

* Senior Vice President and General Counsel, Pacific Indemnity Group, Los Angeles; Past-President, International Association of Insurance Counsel.

1 The insurance afforded by this policy applies to any person or organization using or legally responsible for the use of the automobile provided said automobile is used with the consent of the name insured.

2 200 Cal. App. 2d 543, 19 Cal. 558 (1962).

tering the legalistic labyrinth of the provisions of the policies, we are not favored, like Theseus, with any thread of principle; each case apparently presents a particularistic and unique problem. The obscurities of overlapping coverage have, indeed, led some experts to urge legislative clarification. In the absence of such statutory definition, our efforts in interpreting the policies in this case have led us, with one exception as to the apportionment of liability, to the same basic conclusion as the trial judge.

A law review article,[3] referred to by the judge in the above-captioned case, contained the following language:

> Faced with the maze created by the policy provisions, statutes, and varying concepts of the industry, it is not difficult to see why the courts have been unable to evolve a rule which can establish tiers of liability for the insurers and at the same time cover most of the situations in which the problem arises. The clause matching method has proven to be as unsatisfactory a solution as the earlier formulas it replaced. Attempts to find the answer in a presumed intent of the insurers, in the absence of binding contractual relations between them, can only result in a case by case handling of the conflicts.
>
> In the absence of a solution through the policies themselves, legislative action appears to be the best remedy. . . .
>
> Such legislation should be directed toward producing the greatest stability without needless duplication of administrative handling. Statutory control of the "other insurance" clauses appears to be the approach which will produce this result without undue complexity.

Much has been written on this subject and consequently the law has frequently been exhaustively discussed. There would seem to exist no prime need for exhaustive research and, as a result, there can be no fresh and scintillating approach to the subject. It shall, therefore, be the purpose of this material to cover the law rather thoroughly to serve as a review and an exhaustive reference to the authorities and, perhaps even more particularly, to emphasize the nature of the problems, to call attention to the reasons for the situations which lead to the problem and to

3 Russ, *The Double Insurance Problem — A Proposal,* 13 Hastings L.J. 183, 191 (1961).

generally discuss the matter from the viewpoint of the insurance carrier.

II. Historical Background

How is it possible for insurance companies to create situations which conclude in such a seemingly hopeless myriad of legal red tape and confusion? Even though it may appear that the carrier by deliberate design has set out to entrap the unsuspecting public and to otherwise jettison our courts by flooding them with insoluble legal problems, far be this from the truth. On the contrary, it is out of spirit and purpose to provide the public with greater protection, true, perhaps, dictated by competitive pressures in the industry that the insurance companies have "opened" their policies to offer greater protection in a wide variety of circumstances heretofore never contemplated. In so doing, it soon became apparent that in extending coverage, there would be situations where such extended coverage would carry over into areas otherwise protected by the policies of other insurance companies; and even though there existed a genuine, sincere desire on the part of the insurer to offer greater protection to the insured in a variety of situations, it was not the purpose of the insurer to create a situation where another insurer would gain incidental benefit from the extended coverage offer to the extent that the carrier would escape its liability altogether.

Hence the adoption of "other insurance" clauses designed to overcome this problem which we today recognize as pro rata, excess and escape clauses, so-called. The introduction of proration provisions and restricted use exclusions became a common practice also in an effort to permit giving the insured greater protection in a variety of situations without picking up a liability which properly another carrier should take on and for which that carrier received an adequate premium.

It has been urged by insurance company executives and in some cases supported by the courts,[4] that where multiple coverages exist, they should be held invalid because of the moral hazard which is manifest. This argument appears on its face a specious one for, while there may exist this problem in direct property insurance cases where an insured could collect two or more times for the same loss, certainly such would not be the case with reference to liability coverages where the issue being litigated is the legal liability of the insured wherein the insured naturally receives no direct benefit other than to be secured or not, as the case may be, against financial loss. The most that could be said in the case of liability coverages is that the limits have been increased as a result of the existence of multiple coverage, because this in itself should present no problem as the insured is entitled to the limits for which premium has been paid.

The earlier cases in some instances permitted a totally inequitable result where an insured was entitled to the protection of two policies but where each policy contained other insurance escape clauses. The court, by literal interpretation, held that the

[4] New Brunswick Fire Ins. Co. v. Morris Plan Bank of Portsmouth, 136 Va. 402, 118 S.E. 236 (1923).

insured was entitled to no protection.[5] The inequity of this situation is immediately apparent, bearing in mind the fact that double premium was paid for which no coverage was received. Present-day courts will in every instance strive to overcome this type of inequity, for it is fully recognized that when an insured is penalized for carrying too much insurance, it frequently results in a penalty being imposed upon the innocent third party victim who is faced with the problem of prosecuting his claim against frequently an otherwise financially irresponsible wrongdoer. In other words, the present-day courts tend more and more to view liability insurance contracts de facto as contracts made for the benefit of third persons.

Even more difficult of solution is the residual inequity that results from two insurers being in conflict, because of conflicting other insurance clauses, as to their status concerning their respective contributions, if any, to a loss. Each admits he owes something or admits that he would owe the entire loss if it were not for the existence of the other carrier's participation.

Frequently, feeling compelled to protect its legal position, neither carrier will consent to a participation in liquidation of this claim other than on its own terms, usually unacceptable to the other carrier. This has the practical effect of creating a temporary status of no insurance until the conflict has been resolved. Meanwhile, the insured and/or the claimant is left to his devices in filing an action for breach of contract or he may unwittingly become a party in an action or actions by the insurers for declaratory relief wherein the insurers seek to resolve their respective differences during or before pendency of the case in chief by the injured claimant. This unwholesome atmosphere gives rise to unwarranted delay in liquidating the injured claimant's case, often working a hardship upon him, and further tends to impose upon the insured and the injured claimant costly and time-consuming litigation. Suggestions concerning a solution to this problem will be made in the concluding paragraphs of this material.

III. THE PROBLEM

There are innumerable situations, far too many to permit an exhaustive discussion herein, which lay the foundation for creation of a problem and consequent litigation. However, for purposes of this material, a discussion of a few basic factual situations will highlight the problems presented:

1. "A" insured his automobile with "X" insurance company with limits of $10,000/$20,000 (which policy contains a drive-other-car provision, and a pro rata, excess, or escape clause). He has an accident while driving a truck owned by "B" (assuming permissive use of the truck by "B"), which is insured with "Y" insurance company with limits of $50,000/$100,000 (which policy contains, among other things, a standard omnibus clause and a pro rata, excess, or escape clause).

Query: Which company is liable to "A" and for what limits?

5 Phoenix Ins. Co. v. Copeland, 90 Ala. 386, 80 So. 48 (1890).

2. "A," while operating "B's" vehicle (a truck), calls at the premises of "C," a manufacturer of automobile parts, who carries a general liability policy with "Z" insurance company with limits of $100,000/$300,000 (which covers use of automobiles on the insured premises and also contains a pro rata, excess, or escape clause). While assisting "A" loading auto parts on the truck, one of "C's" employees drops an object on "D," a passing member of the public, who sues "A," "B," "C," and "C's" employee. "C" reports the suit to "X," his insurance company, who in turn tenders the defense of the case to the insurers of "A" and "B" under the famous lima bean case[6] on the theory that the accident arose out of the loading and unloading provisions of their policies, and therefore, "C" is entitled to primary protection from "X" and "Y" insurance companies.

Query: Which carrier is liable to "C" and "C's" employee, and for what limits?

The answer to these questions will firstly depend upon whether the state wherein the action is tried follows the rule of the lima bean case. Thereafter, the liability of "X" and "Y" will depend upon the other insurance clauses which exist in their respective policies. Finally, assuming the policies of "X" and "Y" insurance companies are exhausted, are "C" and "C's" employee entitled to excess coverage in "Z" insurance company?

3. "A" owns a commercial building containing three stores rented to "M," "N," and "O." He carries a general liability policy with "X" insurance company. "M," "N," and "O" each carry general liability policies. "A" desires to sell the building to "B," a banking institution, who purchases same and simultaneously agrees to re-lease the building back to "A" as a managing lessor. "B" carries general liability insurance. In the contract of lease-back, there is a provision for right of re-entry by "B" onto the premises for purposes of inspection of the total premises, including the right to inspect the boiler plant which supplies heat to the building.[7] Further in the contract of lease-back, there is a

6 Pleasant Valley Lima Bean Growers & Warehouse v. Cal-Farm Ins. Co., 142 Cal. App. 2d 126, 298 P.2d 109 (1956).
7 Hayes v. Richfield Oil Corp., 38 Cal. 2d 375, 240 P.2d 580 (1952).

provision whereby "A" agreed to provide acceptable insurance running in favor of "B" with limits of $100,000/$300,000. This he failed to do, carrying insurance only to protect himself. Further in the same contract "B" agreed to supply a boiler to heat the premises which "A" agreed to maintain and operate. In the revised leases from "A" to tenants "M," "N," and "O" there was a provision whereby said tenants agreed to carry liability insurance running in favor of "A," which they did, with limits of $100,000/$300,000; and further there was a provision that said tenants "M," "N," and "O" would share equally with sublessor "A" the wages of an employee to operate and maintain the boiler equipment which supplied heat to the building.

Due to the alleged negligence of the employee, the boiler exploded, causing heavy injury and damage to various members of the public. Suits were filed against all interests wherein "B" tendered defense of the action to "A" and simultaneously filed a cause of action for "A's" failure to secure the agreed insurance as set forth in the contract of sale of the property, and also filed an action for indemnity against "A." Meanwhile, "A" tendered defense of the action to the insurers of "M," "N," and 'O" who in turn filed actions of indemnity over and against "A" and "B" upon the theory that "A" and "B" were responsible for the furnishing and maintenance of the boiler.

Query: What are the respective rights of the parties, and which insurers are involved in the litigation, and to what extent?

The above three examples are actual cases, the latter two of which, up to this point, remain unsolved. This bar-examination type of situation is presented to you herein for the sole purpose of demonstrating how complicated actual situations can become in dealing with this troublesome area of the rights of the respective carriers under the various types of conflicting other insurance and proration clauses.

There are many situations found in the authorities which bring into play the "other insurance" clauses of two or more policies. Some of these situations are as follows:

1. A garage liability policy and a private automobile liability policy.[8]
2. A private automobile liability policy as relates to another private automobile liability policy where the insured is driving the automobile owned by another, this bringing into play the omnibus provisions and the drive-other-car provisions of the respective policies.[9]
3. The omnibus clause of a private automobile liability policy

8 Kenner v. Century Indem. Co., 320 Mass. 6, 67 N.E.2d 769, 165 A.L.R. 1463 (1946).

9 Oregon Auto Ins. Co. v. United States Fid. & Guar. Co., 195 F.2d 958 (9th Cir. 1952); American Auto. Ins. Co. v. Pennsylavania Mut. Indem. Co., 162 F.2d 62 (3rd Cir. 1947); Zurich Gen. Acc. & Liab. Ins. Co. v. Clamor, 124 F.2d 717 (7th Cir. 1941); Continental Cas. Co. v. Weekes, 74 So. 2d 367 (Fla. 1954); Travelers Indem. Co. v. State Auto Ins. Co., 67 Ohio App. 457, 37 N.E.2d 198 (1941).

and the provisions of a hired car and the hired car or non-ownership provisions of another liability policy.[10]

4. A second automobile policy as relates to a first automobile policy which the owner believed had been cancelled.[11]
5. A conditional vendee's automobile policy.[12]
6. A comprehensive liability policy.[13]

IV. The Cases

The courts sought at the outset to resolve the various problems presented by adopting certain then-existing rules found in other areas of law which they soon realized was not an appropriate and proper solution. Some of the early theories or approaches to solution of the problem were as follows:

A. The Prior in Time View

In seeking to apply existing law to resolve conflicts flowing from the existence of inconsistent other insurance clauses in "liability policies," the courts turn to numerous decisions found in cases involving conflicting other insurance clauses in *property* insurance cases. It was observed that the courts in such cases had followed the rule that the carrier having the earlier effective date had the primary liability.[14] Later courts, however, recognizing the futility of this approach, argued that the occurrence of the negligent act of the assured has the effect of making both policies effective simultaneously and thus has no bearing upon the time in which the policy became effective.[15] Most courts today have either ignored or repudiated this theory of "prior in time."[16]

B. The Primary Wrongdoer Theory

Some of the earlier decisions were based upon the theory that the insurer of the primary tortfeasor should respond to the primary liability and that the insurer of anyone vicariously liable or secondarily liable would be in the position of excess coverage. While this would appear at the outset to possess some merit, the practical application of the doctrine by the courts has resulted in almost an impossible situation.[17]

C. Specific vs. General Coverage Theory

Some of the authorities have advanced in the past the doctrine of imposing liability upon the coverage which is most specific in

---

10 New Amsterdam Cas. Co. v. Hartford Acc. & Indem. Co., 108 F.2d 653 (6th Cir. 1940); Continental Cas. Co. v. Curtis Pub. Co., 94 F.2d 710 (3d Cir. 1938); American Sur. Co. of N.Y. v. American Indem. Co., 8 N.J. Super. 343, 72 A.2d 798 (1950); Commercial Cas. Ins. Co. v. Hartford Acc. & Indem. Co., 190 Minn. 528, 252 N.W. 434 (1934), *rehearing denied* 190 Minn 528, 253 N.W. 888 (1934).

11 Vrabel v. Scholler, 369 Pa. 235, 85 A.2d 858 (1953), *rehearing denied* 372 Pa. 578, 94 A.2d 748 (1953).

12 Traders & Gen. Ins. Co. v. Pacific Empl. Ins. Co., 130 Cal. App. 2d 158 (1955).

13 Maryland Cas. Co. v. Employers Mut. Liab. Ins. Co., 112 F. Supp. 272 (D. Conn. 1953); Employers Liab. Assur. Corp. v. Pacific Empl. Ins. Co., 102 Cal. App. 2d 188 (1951).

14 New Amsterdam Cas. Co. v. Hartford Acc. & Indem. Co., *supra* note 10.

15 Lamb-Weston, Inc. v. Oregon Auto Ins. Co., 219 Ore. 110, 341 P.2d 110 (1951), *rehearing denied* 219 Ore. 110, 346 P.2d 643 (1951).

16 Oregon Auto Ins. Co. v. United States Fid. & Guar. Co., *supra* note 9.

17 Oregon Auto Ins. Co. v. United States Fid. & Guar. Co., *supra* note 9; American Auto. Ins. Co. v. Penn Mut. Indem. Co., *supra* note 9; Employers Liab. Assur. Corp. v. Pacific Empl. Ins. Co., *supra* note 13; Consolidated Shippers, Inc. v. Pacific Empl. Ins. Co., 45 Cal. App. 2d 288, 114 P.2d 34 (1941); Maryland Consolidated Cas. Co. v. Bankers Indem. Ins. Co., 51 Ohio App. 323 (1935).

its application to a loss as compared to the coverage which is less specific or general in nature. This concept, perhaps borrowed from property coverages and particularly fire insurance, actually possessed little merit or substance when applied to liability coverages and the courts gradually refused to attempt to make the refined distinction necessary to make the doctrine work, and thus the concept has fallen into disuse.[18]

V. OTHER INSURANCE CLAUSES AND THE COURT'S TREATMENT OF THEM

1. Pro Rata Provisions:

   Under this type of provision the insurer obligates itself to ratably share in the loss in the same proportion with another or other carriers its limits bear to the total available coverage of all other valid and collectible insurance.[19]

2. Excess Provisions:

   These clauses are generally in wide use and briefly provide that the insurance otherwise available shall be excess over and above any other valid and collectible insurance available to the insured.[20]

3. Escape or Void Provisions:

   These clauses, also in fairly common usage, provide in substance that the insurance otherwise provided, under the terms of the insurance contract, is null and void in the event there exists other valid and collectible insurance.[21]

The authorities indicate that unless there exists a conflict in the other insurance clauses of two or more policies, such clauses will normally be recognized and held valid. Problems arise, however, when a conflict in the other insurance or proration clauses exists and it is this problem which so frequently is presented to the courts and in consequence precipitates various and inconsistent rulings in a variety of situations. There is, however, an emerging uniformity in many cases where similar situations have been before our courts with some frequency. From the rules handed down

18 Oregon Auto Ins. Co. v. United States Fid. & Guar. Co., *supra* note 9; Employers Liab. Assur. Corp. v. Pacific Empl. Ins. Co., *supra* note 13; Consolidated Shippers, Inc. v. Pacific Empl. Ins. Co., *supra* note 17.

19 Woodrich Constr. Co. v. Indemnity Ins. Co. of N.A., 252 Minn. 86, 89 N.W. 2d 412 (1958).

20 Cimarron Ins. Co. v. Travelers Ins. Co., 224 Ore. 57, 355 P.2d 742 (1960).

21 Continental Cas. Co. v. Curtis Publish. Co., *supra* note 10.

and approved in many of these cases, certain reasonably reliable conclusions can be deduced.

A. Matching or Pairing of "Other Insurance Clauses"[22]

Many courts look with favor upon matching or pairing other insurance clauses as a logical and equitable solution to inconsistent other insurance provisions. Thus, if the policy contracts under consideration both or all contain excess clauses, a proration generally is ordered.[23] The reasoning of the courts suggests that the same holding would obtain where conflicting contracts both or all contain escape clauses. Obviously, where both or all contracts contain proration clauses, the courts will give effect to the language contained in those contracts and will order a proration.

There is a noticeable trend toward retrenchment from the matching or pairing approach to solution of incompatible other insurance clauses, particularly in situations where there are more than two policies of insurance involved and where two of them match but a third mismatches. The courts find it difficult to reconcile which two of the clauses should be matched first and what the ultimate fate therefore is of the insurer with a third inconsistent clause or mismatched clause. It becomes manifest that in situations of this kind there is absent complete equity to all parties concerned, it having been argued in many instances that using the matching or pairing formula results in an inequity to the insurer whose purpose it was to write a limited or contingent form of coverage at a reduced premium, contemplating that its coverage would become effective only after other primary coverage was exhausted. From an underwriting standpoint, this does point up a substantial objection to this method of solving these problems but the courts have taken a somewhat arbitrary and detached view of the insurer's fate in such cases, arguing that if the insurance company who becomes participating at the primary level in disposition of a claim—even though he did not intend this to be the situation—did not charge enough premium, and it is exposed, it simply made a bad bargain and is bound by it.

In any event, the courts apparently will refuse to adopt any formula for the reconciliation of conflicting other insurance and proration clauses which precipitates a forfeiture in whole or in part of any coverage which otherwise would be available. The courts now uniformly appear to accept the premise that where premium has been paid for coverage that coverage will be made available to the assured without embarrassment to him in interpreting the hypertechnical provisions of the policies of two or more insurers which may be involved in the loss.

B. Mismatching of Other Insurance Clauses

It is in this area of the problem where we find the greatest fluctuation of authority, demonstrated by the court's struggle to produce a result that is consistent with the contract language and still is equitable and compatible with the holdings of other juris-

22 38 Minn. L. Rev. 838 (1954); 5 Stan. L. Rev. 147 (1952).

23 Oil Base, Inc. v. Transport Indem. Co., 143 Cal. App. 2d 453, 299 P.2d 953 (1956).

dictions. Consequently, many fluctuations are found, depending largely upon the area wherein the litigation is brought.

1. *Pro Rata vs. Excess Clause.*—The majority opinions indicate that they will ignore the pro rata clause, ordering it to be primary coverage and giving effect to the excess clause.[24]

2. *Pro Rata vs. Escape Clause.*—There appears to be no uniformity in the decisions treating with this problem. Some courts give effect to the pro rata provision,[25] and other courts to the escape clause.[26] The California courts, particularly, who give effect to the pro rata clause in preference to the escape clause reach this conclusion upon the theory that lending validity to the escape clause would cut down the available insurance in force for which premium had been paid.[27]

3. *Excess vs. Escape Clause.*—The courts tend in this situation to lend validity to the excess provisions rather than the escape provisions for the reason indicated above; namely, that to do otherwise results in a reduction of the available insurance to the policyholder. Thus the clauses are matched as though they were Excess vs. Excess, and they, therefore, become pro rata.[28]

However, there are courts who have held the escape clause valid as against the excess clause, ignoring the fact that it precipitates a reduction in available insurance to the insured.[29]

C. *New Developments*

1. *Increased Usage of "Excess" Clauses.*—We are currently seeing an increase in the number of reported decisions wherein the policies involved both contain excess clauses, thus requiring proration between the carriers.[30]

Those reported decisions generally involve policies written for automobile leasing companies, but in the day-to-day handling of claims, insurance companies are also being more frequently confronted with coverage problems wherein an insurer has substituted a strictly "excess" clause for the "standard" clause used by most companies on their automobile liability policies.

The effect of substituting the "excess" clause for the "standard" clause is to distort the traditional coverage picture. Whereas normally the insurer of the automobile owner would be primarily liable, the substitution of clauses permits such an insurer to obtain

---

24 Citizens Mut. Auto. Ins. Co. v. Liberty Mut. Ins. Co., 273 F.2d 189 (6th Cir. 1959); Employers Liab. Assur. Corp. v. Firemen's Fund Ins. Co., 262 F.2d 239 (D.C. Cir. 1958); McFarland v. Chicago Exp., Inc., 200 F.2d 5 (7th Cir. 1952); American Auto. Ins. Co. v. Republic Indem. Co. of America, 52 Cal. 2d 467, 341 P.2d 675 (1959); American Auto. Ins. Co. v. Seaboard Surety Co., 155 Cal. App. 2d 192, 318 P.2d 84 (1957), 76 A.L.R.2d 502; Speier v. Ayling, 158 Pa. Super. 404, 45 A.2d 385 (1946).

25 Peerless Cas. Co. v. Continental Cas. Co., 144 Cal. App. 2d 617, 301 P.2d 602 (1956); Air Transp. Mfg. Co. v. Employers' Liab. Assur. Corp., 91 Cal. App. 2d 129, 204 P.2d 647 (1949).

26 McFarland v. Chicago Express, Inc., *supra* note 24.

27 Peerless Cas. Co. v. Continental Cas. Co., *supra* note 25.

28 Zurich Gen. Acc. & Liab. Ins. Co. v. Clamor, *supra* note 9; Continental Cas. Co. v. Curtis Publish. Co., *supra* note 10; Grassberger v. Liebert & Obert, Inc., 335 Pa. 491, 6 A.2d 925 (1939).

29 Continental Cas. Co. v. Suttenfield, 236 F.2d 433 (5th Cir. 1956); Employers Liab. Assur. Corp. v. Pacific Empl. Ins. Co., *supra* note 13 — (The court in this instance, however, matched the two escape clauses and ended up with a proration).

30 Allstate Ins. Co. v. Atlantic Nat. Ins. Co., 202 F. Supp. 85 (S.D. W. Va. 1962); Athey v. Netherlands Ins. Co., 200 Cal. App. 2d 10, 19 Cal. Rptr. 89 (1962); Truck Ins. Exch. v. Torres, 193 Cal. App. 2d 483, 14 Cal. Rptr. 408 (1961); Continental Cas. Co. v. Hartford Acc. & Ind. Co., 28 Cal. Rptr. 606 (Calif. 1963); Farmers Ins. Exch. v. Continental Nat'l Gr., 28 Cal. Rptr. 613 (Calif. 1963).

contribution from the insurer of a permissive user whose policy would normally be excess.

As the companies continue to maneuver into a more favorable position and to refine their efforts to shift their burden to other carriers, we may see more and more companies resort to the use of a strictly "excess" clause.

2. *Apportionment of the Cost of Defense Between Insurers.*— While it may not be immediately apparent from a reading of the decisions, those persons intimately familiar with the problem of deciding whether to assume the defense of a lawsuit on behalf of their insured or to refuse to enter such a defense with the hope that the other carrier involved would step forward, will acknowledge that they may have been influenced by the knowledge that in many jurisdictions the carrier which once assumed the defense of the insured could not recover any of the expenses incurred by reason of such defense.

Such was the law in California until a recent case in which the supreme court specifically disapproved prior decisions which had stated that the duty to defend was personal to both insurers and thus, neither was entitled to divide that duty with the other.[31] The court noted that the services contemplated by the agreement to defend are not personal but rather are for the benefit of the insurance company and for the benefit of other obligated insurers, as well as for the benefit of the insured, and ruled that under general principles of equitable subrogation, all obligated carriers who have refused to defend should be required to share in costs of the insured's defense. The court also noted: "A contrary result would simply provide a premium or offer a possible windfall for the insurer who refuses to defend, and thus, by leaving the insured to his own resources, enjoys a chance that the costs of defense will be provided by some other insurer at no expense to the company which declines to carry out its contractual commitments."[32]

Since the supreme court has resolved the issue in California, some companies appear to be somewhat more realistic in resolving the conflicts of coverage. While this current development applies only in California and a few other jurisdictions,[33] it may indicate

31 Continental Cas. Co. v. Zurich Ins., 17 Cal. Rptr. 12, 366 P.2d 455 (1961).
32 *Id.* at 18, 366 P.2d 461.
33 General Acc. F. & L. Assur. Corp., Ltd. v. Smith & Oby Co., 272 F.2d 581 (6th Cir. 1959); Liberty Mut. Ins. Co. v. Standard Acc. Ins. Co., 164 F. Supp. 261 (S.D. N.Y. 1958); Bituminous Cas. Corp. v. Travelers Ins. Co., 122 F. Supp. 197 (D. Minn. 1954).

a trend which may ultimately contribute generally to earlier and more amicable settlement of coverage disputes.

Time and space will not permit inclusion of a digest of all the cases reported in the United States on this perplexing problem. Attention is called to the excellent work of Risjord and Austin under the title "Automobile Liability Insurance Cases," in three volumes, published by E. L. Mendenhall, Inc., Kansas City, Missouri. The unusual, excellent index contained in the Table of Chapters, Outline of Cases, and Supplementary Table of Cases, dated March, 1961, contains headings under which are listed all of the cases interpreting each heading.[34]

VI. CONCLUSIONS

While it is not possible to extract "cookbook" rules which will apply to every case to bring about a consistent end result, it is nevertheless possible to form certain conclusions which appear to be relatively dependable.

1. The courts will no longer accept such a literal interpretation of contracts of insurance which produces the end result of voiding or limiting the insurance coverage to the insured upon the broad premise that the premium was paid for the total insurance and it should therefore be made available to the insured.

2. Where inconsistent other insurance clauses are matched or paired, they will in most cases be held to be pro rata.

3. Where inconsistent other insurance clauses are mismatched, the courts will usually order a solution which will have for its purpose providing the full amount of insurance available to the insured as indicated in the situation set forth hereinabove.

The court's attitude with reference to the problem of other insurance is well expressed in the *Lamb-Weston, Inc.* case,[35] wherein appears the following language:

> "Other insurance" clauses of all policies are but methods used by insurers to limit their liability, whether using language that relieves them from all liability (usually referred to as an "escape clause") . . . or that used by Oregon (usually referred to as a "prorata clause"). In our opinion, whether one policy used one clause or another, when any come in conflict with the "other insurance" clauses of another insurer, regardless of the nature of the clause, they are in fact repugnant and each should be rejected in toto.[36]

VII. THE SOLUTION

It has been expressed by a number of authorities that the hopeless confusion precipitated by the use of other insurance clauses

34 (1) Prorated according to policy limits; (2) Prorated according to premiums paid; (3) Prorated equally without regard to policy limits; (4) Prorated equitably where all policies purport to be excess; (5) All policies purport to be excess; (6) Three policies excess of a fourth; (7) Two policies are excess of a third; (8) One policy is excess; (9) One policy is purchased by named insured; (10) Policyholders agree (That driver's policy will cover driver's liability while operating owner's automobile.); (11) Two insurers cover person secondarily liable; (12) One insurer as volunteer by paying more than its share; (13) Insured as real party in interest where he settles judgment with funds borrowed under a loan agreement with one insurer; (14) Effect on claim expenses; (15) Effect on costs; (16) Effect on interest.

35 Lamb-Weston, Inc. v. Oregon Auto. Ins. Co., *supra* note 15.

36 *Id.* at 119.

by insurance companies to prevent another insurer from incidentally benefiting from the broad coverage interwoven into these various policies, can only be avoided by the adoption of legislation.[37]

Sober consideration of this suggested method of overcoming the problems under consideration points to serious doubt as to whether legislation is in fact a logical and proper solution:

1. There exists a myriad of situations in the underwriting of risks that require the writing of highly specialized forms of coverage which could not conceivably be contemplated by a statutory approach to the unsatisfactory consequences resulting from these various forms of coverages.

2. The insurance industry as a private industry has an obligation to serve the insurance requirements of the public and as such should be prepared to write virtually any form of coverage which is designed to meet a particular situation at a premium which is considered to be reasonable and proper under the circumstances. Any attempt to place into government hands the responsibility which presently rests with the insurance business as a private industry will tend ultimately to destroy the competitive advantages which naturally flow from private enterprise.

3. The existence of statutory uniform contracts will tend to bring the insurance business closer to government control and the ultimate capture of the industry by governmental agencies. This socialization of America's greatest industry would change the form and substance of private industry and would put America well on the road to the ultimate social state.

The solution, therefore, must result from a program of self-discipline and self-correction which it is within the power of the various segments of industry to accomplish in lieu of abandonment of the problem to governmental control.

It is submitted that through the various insurance bureaus and associations which today exist in the United States, wherein the entire insurance industry is represented in one way or another, there exists the capacity and the know-how to undertake an exhaustive study of the problem with the ultimate objective of adopting statements of guiding principles. This would be adhered to by all of the industry covering all of the conceivable situations which could result from the existence of multiple coverage and conflicting proration clauses, and would still preserve the ability of the industry to provide special forms of coverages at appropriate premium rates.

Coupled with this formula approach to a solution of the problem should be a program for liquidation of any disputes outside the statements of guiding principles not anticipated by the draftsmen of those principles, through the medium of arbitration, thus removing the costly and unsatisfactory method of litigating such issues.

---

[37] 26 Ins. Counsel J. 93, 411 (1959); Russ, *The Double Insurance Problem — A Proposal*, 13 Hastings L.J. 183 (1961); Truck Ins. Exch. v. Torres, *supra* note 30.