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DOUBLE INSURANCE exists when two or more insurers cover the same person for a loss resulting from the same risk.[1] The existence of double coverage on the person ultimately liable for the loss[2] immediately creates the problem of adjustment of the liability among the multiple insurers.

The earliest attempts at solution of this problem took place in the property insurance field, where to prevent the temptations which could arise from overinsurance it became common practice to insert in the policy a provision prohibiting the assured from obtaining additional insurance on the property from another company. To cover instances where double insurance was found a variety of additional provisions were developed which sought to provide in the policy the manner in which the loss would be apportioned among the insurers. Litigation over the meaning of these provisions grew and eventually legislation was passed in most states providing for the method of adjusting the obligations of the insurers.[3]

The companies inserted in their liability policies similar provisions limiting their contribution in the event other insurance extended coverage to the loss. The dangers of overinsurance are not present in this type of policy, and these clauses are inserted primarily to reduce, par-

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[1] CAL. INS. CODE § 590.

[2] To be distinguished are cases where only one carrier covers the tortfeasor and two or more cover the person with solely derivative liability. Such cases do not present the double insurance question. Canadian Indem. Co. v. United States Fid. & Guar. Co., 213 F.2d 658 (9th Cir. 1954); Continental Cas. Co. v. Phoenix Constr. Co., 46 Cal. 2d 423, 296 P.2d 801 (1956).

[3] CAL. INS. CODE § 2071 establishes a statutory fire insurance policy which provides for a proration if other insurance exists and also allows prohibition of other coverage. CAL. INS. CODE § 591 establishes a ratable contribution by fire insurers regardless of policy dates, but makes the policy date controlling in total losses under marine insurance.

tially or totally, the insurer's liability if other coverage can be found extending to the loss. The gradual broadening of the risks and definitions of insured in policies has increased the incidence of double coverage. These factors, coupled with the extending rules of tort liability, have induced wider variety in the application and language of other insurance clauses. At present, several different types of clauses are frequently found in the same policy, each referring to a particular risk. The most commonly used types are the pro rata clause,[4] excess clause,[5] escape clause,[6] and modified escape clause.[7]

Determining Liability

As a concomitant of these changes, the problem of determining the liability of the multiple insurers arises with increased complexity. Like the insurers, the courts in earlier cases leaned heavily on the property insurance law to decide the conflicts which arose between "other insurance" clauses. Some decisions relied on the policy dates to determine the question. They held no other insurance existed when the first policy was written to make its clause applicable, hence it was ineffective and the clause in the second policy was controlling.[8] This reasoning ignores the fact that neither clause takes effect until the moment of the loss and at that time both policies are in force. The rule appears to have been developed primarily as one of convenience. Other cases resolved the conflict by holding liable the insurer whose named assured was the tortfeasor.[9] This rule, however, leaves no room

[4] *E.g.*, "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 states in the Declarations bears to the total applicable limit of liability of all valid and collectible insurance against such loss. . . ." See Woodrich Constr. Co. v. Indemnity Ins. Co., 252 Minn. 86, 89 N.W.2d 412 (1958).

[5] *E.g.*, ". . . If the insured has other insurance against a loss covered by this policy the insurance under this policy shall be excess over any other valid and collectible insurance available to the insured." See Cimarron Ins. Co. v. Travelers Ins. Co., 355 P.2d 742 (Ore. 1960).

[6] *E.g.*, "If any person . . . is, under the terms of this policy entitled to be indemnified thereunder and is also covered by other valid and collectible insurance, such other person . . . shall not be indemnified under this policy." See Continental Cas. Co. v. Curtis Publishing Co., 94 F.2d 710 (3d Cir. 1938).

[7] *E.g.*, "If the insured has other valid and collectible insurance against a loss covered by this policy, the insurance under this policy shall be excess insurance with respect to such loss but shall apply only in the amount by which the applicable limit of liability stated in the declarations exceeds the total applicable limits of liability of such insurance." This type of clause reduces the *limits* available under the policy by the limit of the other policy. See Peerless Cas. Co. v. Continental Cas. Co., 144 Cal. App. 2d 617, 301 P.2d 602 (1956).

[8] *E.g.*, New Amsterdam Cas. Co. v. Hartford Acc. & Indem. Co., 108 F.2d 653 (6th Cir. 1940).

[9] *E.g.*, American Auto. Ins. Co. v. Pennsylvania Mut. Indem. Co., 161 F.2d 62 (3d Cir. 1947).

for the case where the person causing the loss is an additional assured not named in either policy. A third line of authority follows the so-called general-specific approach. One policy is declared to cover the risk more specifically than the other. The "other insurance" clause in the policy of the "specific" insurer is then inapplicable, and that in the more generalized policy is given full effect.[10] This reasoning fails to take cognizance of the fact that each carrier specifically covers the particular loss in question. This dilemma has prevented the development of any test to determine which policy is, in fact, more specific.

Undoubtedly all of the courts attempting to apply these formulas recognized the basic impossibility of making the divergent clauses compatible. They really avoided this problem by ignoring the "other insurance" provisions, and devising extrinsic tests which had to be applied in accordance with the overriding principle that the insured was not to be deprived of his coverage by virtue of the "other insurance" clauses. The fortuitous circumstances that another policy, of which the assured was generally unaware, extended to the loss could not be allowed to jeopardize his protection.

Though these formulas appeared simple on the surface, their application often led to inconsistent results and confusion. Courts experienced difficulty applying them and accepting the non-legalistic reasoning given for their justification. The continued increase in the complexity of the situations in which double insurance arose soon made it obvious that they were no longer workable and a growing number of jurisdictions have rejected the formulas.

The courts in later cases recognize that the date of the policy and the person to whom it was issued as the named assured are immaterial. Equally unimportant is the manner in which the insurance extended to the loss. Each carrier covers the particular risk at the time in question and each took a premium for such protection. In view of these facts these jurisdictions have determined that the conflict should be resolved by a straight interpretation of the policies as they exist at the time of the loss. This invariably leads to a comparison of the "other insurance" clauses.[11]

Straight Interpretation

The benefits which arose from this change in approach soon proved to be more apparent than real, for reliance on the policy language

[10] Hartford Steam Boiler Inspection & Ins. Co. v. Cochran Mill & Ginnery Co., 26 Ga. App. 288, 105 S.E. 856 (1921).

[11] Zurich Gen. Acc. & Liab. Ins. Co. v. Clamor, 124 F.2d 717 (7th Cir. 1941); Air Transp. Mfg. Co. v. Employers' Liab. Ins. Corp., 91 Cal. App. 2d 129, 204 P.2d 647 (1949); American Sur. Co. v. American Indem. Co., 8 N.J. Super. 343, 72 A.2d 798 (1950).

brought to the fore the dilemma avoided by the formulas. In *Zurich Gen. Acc. & Liab. Ins. Co. v. Clamor*,[12] a loss resulted from operation of a borrowed car. The Zurich policy issued to the owner extended coverage to permissive users but provided that the insurance did not extend to any person covered for the loss by other insurance. The driver's policy insured him while operating borrowed vehicles with the proviso that it was excess over other valid and collectible insurance covering the loss. The court reviewed the various formulas that had been used and rejected them in favor of a straight interpretation of the policy. It recognized that the clauses could not be reconciled by interpretation and characterized the problem as being similar to the "chicken or the egg"[13] riddle. Faced with this, the court employed a variation of the general-specific formula it previously rejected. It applied the test to the "other insurance" clauses and held that the clause with the more specific language was controlling over the one with the more general language.[14]

Other courts have shown a similar tendency to revert to this variation of the general-specific test at the point in the decision where the conflict is squarely presented.[15] Like its predecessor, however, the newer test appears to be simply a justification for a circular approach to the problem. One clause is held more specific and given full effect. The clause in the other policy is, therefore, ineffective because the first policy is not "other insurance" within the meaning of its clause.[16] In an effort to avoid this circle some courts attempt to give effect to both clauses holding that the policy with the pro rata clause is liable for a pro rata share while the other is liable for the excess.[17]

Pairing the "Other Insurance" Clauses

The rapid increase in the number of decisions matching "other insurance" clauses has led to the development of a system of pairing the clauses. Under the pairing technique, each clause is given a priority which varies in accordance with the clause opposed to it.[18] In the sim-

[12] Zurich Gen. Acc. & Liab. Ins. Co. v. Clamor, *supra* note 11.

[13] *Id.* at 719.

[14] The court concluded that the excess clause was more specific than the escape clause.

[15] American Sur. Co. v. American Indem. Co., 8 N.J. Super. 343, 72 A.2d 798 (1950); Speier v. Ayling, 158 Pa. Super. 404, 45 A.2d 385 (1946); Grasberger v. Liebert & Obert, 335 Pa. 491, 6 A.2d 925 (1939).

[16] See generally, 28 IND. L.J. 429 (1952).

[17] American Auto. Ins. Co. v. Seaboard Sur. Co., 155 Cal. App. 2d 192, 318 P.2d 84 (1957); Air Transp. Mfg. Co. v. Employers' Liab. Assur. Corp., 91 Cal. App. 2d 129, 204 P.2d 647 (1949), (the language used by the court indicates that it actually gave effect to the *pro rata* clause over a modified escape provision).

[18] See generally Note, 38 MINN. L. REV. 838 (1953); Comment, 5 STAN. L. REV. 147 (1952).

plest pairings, clauses of the same type are matched. If both policies have pro rata clauses a proration is the result.[19] If two excess clauses are opposed, a proration is generally ordered since obviously both cannot be given effect.[20] The same result will undoubtedly follow when escape clauses are matched.[21]

When clauses of different types are opposed the priority given may fluctuate with the jurisdiction. The reasons given to support a particular result in these situations are more varied and there is also a greater use of cases involving different types of clauses as authority for the position taken. When a pro rata clause is paired with an excess clause the majority of the courts ignore the pro rata clause and give full effect to the excess clause.[22] In the pro rata versus escape matching some give effect to the pro rata[23] and others to the escape clause.[24] The courts giving effect to the pro rata clause in this situation are undoubtedly influenced by their dislike of escape clauses which cut down on the amount of coverage afforded the assured.[25] Similar considerations control the excess versus escape cases and the excess clause is generally given validity.[26]

Laws Requiring Liability Insurance— Effect Upon the Validity of "Other Insurance" Clauses

When a law requiring liability insurance is applicable to the situation in which the loss occurred consideration must be given to its effect upon the validity of "other insurance" clauses. In *Savory v. Kist*[27] the

[19] Traders & Gen. Ins. Co. v. Pacific Employers' Ins. Co., 130 Cal. App. 2d 158, 278 P.2d 493 (1955).

[20] Oil Base, Inc. v. Transport Indem. Co., 143 Cal. App. 2d 453, 299 P.2d 952 (1956).

[21] No cases were found with this conflict but the result appears certain unless a formula test is used.

[22] Speier v. Ayling, 158 Pa. Super. 404, 45 A.2d 385 (1946); Annot., 76 A.L.R. 2d 502. *Cf.*, American Auto. Ins. Co. v. Seaboard Sur. Co., 155 Cal. App. 2d 192, 318 P.2d 84 (1957), where the court ordered a proration giving effect to both clauses.

[23] 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). This matching includes modified escape clauses.

[24] *E.g.*, McFarland v. Chicago Express, Inc., 200 F.2d 5 (7th Cir. 1952).

[25] *E.g.*, Peerless Cas. Co. v. Continental Cas. Co., 144 Cal. App. 2d 617, 301 P.2d 602 (1956).

[26] Zurich Gen. Acc. & Liab. Ins. Co. v. Clamor, 124 F.2d 717 (7th Cir. 1941); Continental Cas. Co. v. Curtis Publishing Co., 94 F.2d 710 (3d Cir. 1938); Grasberger v. Liebert & Obert, Inc., 335 Pa. 491, 6 A.2d 925 (1939). *Contra*, Continental Cas. Co. v. Suttenfield, 236 F.2d 433 (5th Cir. 1956); Employers' Liab. Assur. Corp. v. Pacific Employers' Ins. Co., 102 Cal. App. 2d 188, 227 P.2d 53, (1951), where the court ordered a proration.

[27] 234 Iowa 98, 11 N.W.2d 23 (1943).

policy was filed with the State Commerce Commission as required by law. The court held that a pro rata clause in the policy was invalid as between the insurer and the public since it amounted to an unlawful limitation on the coverage required by the statute. The court indicated, however, that such a provision would not be void in an action between the insurers to determine their liabilities *inter se*. Such a situation was presented in *Cosmopolitan Ins. Co. v. Continental Cas. Co.*[28] The Continental policy covered vehicles of the rental agency and was issued to comply with a compulsory insurance statute. In an action between the insurers to determine their liability for a settlement the court held that an excess clause in the policy was not voided by the statute. It concluded that the statute was concerned with public protection and not the manner in which the insurers shared the loss.[29]

In *Continental Cas. Co. v. Weekes*,[30] the Continental policy issued to the rental agency in compliance with a city ordinance contained an escape clause.[31] The declaratory relief action to determine the coverage was decided prior to disposition of the personal injury action. The court held that the escape clause was not violative of the statute and was entitled to full effect. It reasoned that since the policy would have covered if the renter's policy had not been applicable, the purpose of the statute was satisfied. This result is difficult to justify since the action determined the coverage available to the assured before trial of the injury suit. If the damages were determined to be in excess of the limits of the renter's policy, the overage would not be insured under this decision.

Compulsory insurance laws are designed for the protection of the public. They make certain that a minimum amount of insurance exists and can be collected from an identified insurer. If a coverage action is brought before the damage claim is satisfied, this intent can be fulfilled only if the judgment clearly points out that the complying carrier is fully liable to the extent of its limits regardless of the existence of other insurance.

Dissatisfaction With "Pairing" the Clauses

The continued increase in the number of double insurance cases has caused some disenchantment with this matching technique. Absence of a recognizable justification for a given priority has prevented uniformity in the results. Further the approach offers no solution where

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

[29] The court ordered a proration.

[30] 74 So. 2d 367 (Fla. 1954).

[31] Although the ordinance was ambiguous, the court treated it as applicable. The renter's policy contained an excess clause.

more than two carriers are involved and each has a different clause. In such a case the court has no basis for determining which two of the several clauses should be matched first. These problems, plus dissatisfaction with the circular reasoning which is the basis for the results have led courts in the most recent cases to reject this approach as well as the formulas it replaced.

In *Oregon Auto Ins. Co. v. United States Fid. & Guar. Co.*,[32] one policy had an excess clause and the other an applicable escape clause. After noting the arbitrariness of other approaches the court determined that there was no legal basis for choosing between the provisions. It concluded that where the "other insurance" clauses in the policies contained conflicting provisions they should both be disregarded and the policies treated as if neither had such a clause. The court applied the rule and ordered a proration. This view of the Ninth Circuit has subsequently been accepted in several states which previously had vacillated between several different theories.[33] It reached its ultimate in *Lamb-Weston Inc. v. Oregon Auto Ins. Co.*[34]

In the *Lamb* case a loss occurred during operation of a hired vehicle. The operator's policy had an excess clause applicable to losses arising out of the operation of non-owned vehicles. The owner's policy had a pro rata clause. The Oregon Supreme Court reviewed the lines of authority throughout the country and concluded that a proration was the only acceptable solution in all double insurance cases where each policy contained an "other insurance" clause. It summed up its reasoning as follows:[35]

> The "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 "pro rata 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.

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[32] 195 F.2d 958 (9th Cir. 1952).

[33] Continental Cas. Co. v. St. Paul Mercury F. & M. Ins. Co., 163 F. Supp. 325 (S.D. Fla. 1958); Woodrich Constr. Co. v. Indemnity Ins. Co. of No. America, 252 Minn. 86, 89 N.W.2d 412 (1958); Arditi v. Massachusetts Bonding & Ins. Co., 315 S.W.2d 736 (Mo. 1958); Cosmopolitan Ins. Co. v. Continental Cas. Co., 28 N.J. 554, 147 A.2d 529 (1959); Continental Cas. Co. v. Buckeye Cas. Co., 143 N.E.2d 169 (Ohio 1957); Reetz v. Werch, 8 Wis. 2d 388, 98 N.W.2d 924 (1959).

[34] 341 P.2d 110 (Ore. 1959), *modified on method of proration* 346 P.2d 643 (1959). *Accord*, Travelers Ins. Co. v. Peerless Ins. Co., 287 F.2d 742 (9th Cir. 1961); Cimarron Ins. Co. v. Travelers Ins. Co., 355 P.2d 742 (Ore. 1960).

[35] 341 P.2d at 119.

Some courts, however, have shown a reluctance to follow the *Oregon Auto* approach in all cases, preferring instead, to continue fixing responsibility on one insurer or the other. This hesitancy is greatest in cases where the loss results from operation of a borrowed vehicle and the owner's automobile policy has a pro rata clause while the operator's automobile policy has an excess clause applicable to non-owned vehicles. These courts either reject the idea that a conflict exists in the particular situation,[36] or rely on a presumed intent of the insurers.

In such a situation the California Supreme Court refused to order a proration and gave effect to the excess clause.[37] The court noted that each of the insurers used substantially the standard automobile policy form recommended by the insurers' associations and employed by a majority of the automobile insurers. It held that the carriers intended this result by using the recommended form of "other insurance" clause.

This reasoning can be applied only to the simple case of "standard" automobile policies and a loss resulting from driving a non-owned automobile. In other situations the evidence indicates that no such intent can be found. A carrier that does not use the recommended form cannot be said to intend distribution of the loss according to its terms.[38] Some insurers use excess clauses directed to use of hired vehicles but really intend them to apply to losses which occur away from premises controlled by the assured.[39] Carriers underwriting vehicles of rental agencies frequently provide that the coverage extending to the renter is always excess, expressing thereby an intent that they should never be primarily liable for losses resulting from operation of the vehicle.[40] When activities other than mere operation of a vehicle become involved there is even less agreement in the industry on the significance of the "other insurance" clauses. Inability of the underwriters to resolve the problem has led to the formation of claims department committees which have attempted to find a solution by inter-company agreements.[41] Interestingly, these groups have sought to formulate a plan of dis-

[36] Citizens Mut. Auto. Ins. Co. v. Liberty Mut. Ins. Co., 273 F.2d 189 (6th Cir. 1959); Fireman's Ins. Co. of Newark, N.J. v. Continental Cas. Co., 170 Cal. App. 2d 698, 339 P.2d 602 (1959).

[37] American Auto Ins. Co. v. Republic Indem. Co. of America, 52 Cal. 2d 507, 341 P.2d 675 (1959).

[38] See Oil Base, Inc. v. Transport Indem. Co., 143 Cal. App. 2d 453, 299 P.2d 952 (1956); Continental Cas. Co. v. Buckeye Cas. Co., 143 N.E.2d 169 (Ohio 1957). The Transport and Continental policies respectively contained excess clauses applicable in all cases and the companies so argued.

[39] 26 INS. COUNSEL J. 93, 95-96 (1959).

[40] Cosmopolitan Ins. Co. v. Continental Cas. Co., 28 N.J. 554, 147 A.2d 529 (1959).

[41] For a discussion of some of these efforts, see 26 INS. COUNSEL J. 93, 411 (1959); The Adjusters Bulletin, September 1960. These agreements apparently are not intended to have binding legal effect.

tribution based upon a description of the accident without regard to the "other insurance" clauses. Unfortunately, the classifications are necessarily general and themselves productive of dispute.

A Proposal for Legislation

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.

Due to the practice of insurers to attempt to tailor their risks through the medium of "other insurance" clauses it is doubtful that any legislative solution will be totally satisfactory to all concerned. 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.

To accomplish this goal it will undoubtedly be necessary to reduce the types of permissible clauses and the scope of their application. The escape and modified escape clause should not be included as a permissible provision. Few courts give them effect at present and there appears to be little justification for their use as "other insurance" clauses. The excess and pro rata clauses should be allowed, but the legislature should determine their effect. The easiest method would be to make the pro rata provision primary when the other policy has an applicable excess clause.[42] Use of excess provisions, however, should be limited to specifically defined situations, and in all other cases only the pro rata clause should be allowed.

Probably most insurers would find acceptable a requirement that no excess clause should be permitted for losses arising out of the operation, maintenance or use of owned vehicles. The clause should be limited in its application to non-owned vehicles.[43] This requirement conforms to the most common usage today and disposes of most double

[42] Should the case arise where two excess clauses were applicable a proration would result. This is the majority rule at present.

[43] The excess clause may also be allowed for use of hired vehicles when no specific premium charge has been made for them. If a premium is charged they should be treated as owned vehicles.

insurance situations without requiring all covering insurers to maintain active files.

Since the use which constitutes loading and unloading produces the greatest disagreement as to how the loss should be treated, it should be handled as a separate category. Inasmuch as these losses almost invariably involve premises activities and equipment, as well as the vehicle, probably the most equitable and stable solution would be to require the pro rata clause for all such risks.

An attempt to fix the loss according to the type of premises activity which caused the accident or the part the vehicle played would only lead to continued litigation.

Such legislation should not, of course, effect in any way the use of true excess policies. This type of insurance should be permitted in any situation where it is allowed at present. Typically these policies provide that in exchange for a reduced premium their coverage does not become applicable until the limits of a specified primary policy are exhausted.[44] The assured specifically bargains for coverage with this condition precedent to fulfill a particular need and it should be treated accordingly.

In the absence of legislative action the decisions indicate a definite trend toward ordering a proration in all cases as the judicial solution. Once it is established, such a rule should be a great improvement over the present situation. The insurers will know their position and can devote their full efforts toward disposition of the claim. At present, a good part of the investigation is designed to establish reasons why the primary burden should be shifted to another carrier. A particular carrier under such a rule will presumably be on one side of the loss as often as the other and should suffer no particular financial detriment. With cooperation, settlements can be more easily accomplished since each insurer will be contributing only a portion of the loss.

Some of the jurisdictions which have recently decided to give effect to an excess clause when two "standard" automobile policies are involved will probably be reluctant to change that rule. If stability is to be attained through judicial action, however, this rule should be sharply confined to cases where both automobile policies use the recommended policy form and the loss results from driving a non-owned vehicle.[45] Attempts to formulate a rule in other areas based upon

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[44] See generally, R[illegible]d v. Pacific Indem. Co. [illegible] Cal. App. 2d [illegible] (1950); Lamb v. Belt Cas. Co., 3 Cal. App. 2d [illegible] 40 P.2d 311 (1935).

[45] Such a limitation would make the supreme court decision in American Auto. Ins. Co. v. Republic Indem. Co., *supra* note 37, consistent with the results of the prior California cases.

"other insurance" clauses and the happenstance of other coverage can only continue the confusion and litigation. If either policy varies from the recommended automobile form, or the loss results from operation or use of a hired vehicle, loading and unloading, premises operations, products liability, or combinations of these, the better rule would be a proration regardless of the types of "other insurance" clauses used. Perhaps there is an element of arbitrariness in this approach, but it cannot be denied that such an element exists in every double insurance decision. It is forced into the case by the policies themselves, and should at least be used to provide a rule of widest applicability.

To implement this rule there should be a clarification by the courts of the distinction between the insurer's liability to the assured and public on one hand and the liability of the insurers *inter se*. It should be clearly established that each carrier on the loss is liable to the assured and public to the full extent of its limits regardless of the existence of double insurance. Adjustments resulting from additional applicable coverage should be left to settlement between the carriers. Such a rule would eliminate the volunteer problem which arises when one carrier refuses to participate and reduce the reluctance to settle which it has created. It would also avoid the problems created by an applicable compulsory insurance law. The problem of handling the investigation and defense should be left to the insurers to resolve. Under the majority rule the defense provision creates an independent and personal duty on the insurer regardless of other insurance or the extent of liability.[46] Establishment of a proration rule would not alter this duty and the carriers would still be free to agree among themselves which should take the lead in investigation and defense.

Conclusion

A solution to this problem which will provide stability and reduce litigation is necessary. The courts are limited to a narrow choice since they must deal with the policies as written by the carriers. Since the underwriters appear to be unable to establish uniformity, it appears the industry's best course is to develop a program for submission to the legislature. Such action should be taken with the cooperation of the companies and a willingness to compromise if any success is to be obtained.

[46] See generally, Fidelity & Cas. Co. of N.Y. v. Fireman's Fund Indem. Co., 38 Cal. App. 2d 1, 100 P.2d 364 (1940).

[47] American Fid. & Cas. Co. v. Pennsylvania Thresherman & Farmers Mut. Ins. Co., 280 F.2d 453 (5th Cir. 1960).