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CONFLICTS BETWEEN "OTHER INSURANCE" CLAUSES IN AUTOMOBILE LIABILITY INSURANCE POLICIES

Double insurance arises when an insured who has sustained a loss finds that his loss is covered by the policies of two or more insurers. In anticipation of this frequently occurring situation, most automobile liability insurance companies insert "other insurance" clauses into their respective policies that purport to limit or avoid their own liability when there is other valid and collectible insurance covering the same loss. Unfortunately, the presence of such clauses in two or more policies covering the same loss precipitates litigation, since each of the clauses attempts to limit one insurer's liability at the expense of the other insurers involved. The resulting conflicts have been resolved by the courts in various ways, and several rules have developed to assist in determining the central issue of whether coverage under one particular policy is valid and collectible insurance that will actuate the "other insurance" clause contained in another policy covering the same loss. This note will explore these clauses, conflicts, rules and solutions.

Origin of the Problem

In the property insurance field, to avoid overinsuring, insurers originally inserted provisions in their policies that prohibited the insured from obtaining additional insurance on the same property. Eventually, these prohibitions were relaxed and "other insurance" clauses were inserted to limit the insurer's liability in the event of double insurance. In this context, "other insurance" clauses were designed to limit the insurer's liability to the extent of the other insurance available to the insured.

1. "A double insurance exists where the same person is insured by several insurers separately in respect to the same subject and interest." Cal. Ins. Code § 590. See also United Pac. Ins. Co. v. Ohio Cas. Ins. Co., 172 F.2d 836, 844 (9th Cir. 1949).

2. There are two related problems peculiar to states with mandatory insurance statutes, e.g., Cal. Vehicle Code §§ 16430, 16451 (Supp. 1969). The first problem is whether "other insurance" clauses reduce the amount of legally required coverage. The other problem is whether it makes any difference that one insurer's policy was issued to satisfy a mandatory insurance statute, while the other insurer's was not. See generally 7 Am. Jur. 2d Automobile Insurance § 200 (1963).

3. The problem does not arise in the life insurance field as a life insurance policy is not a contract of indemnity, but only a contract to pay a certain sum upon death. See Insurance Co. v. Bailey, 80 U.S. 615, 619 (13 Wall. 1871); cf. Central Bank v. Hume, 128 U.S. 195, 205 (1888). For a discussion of other insurance clauses in the health and accident insurance field, see Note, Conflicting Interpretations Of "Other Insurance" Clauses, 28 Ind. L.J. 429, 439-41 (1953).


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clauses were developed to handle double insurance situations.\(^5\) Inevitably, the "other insurance" clauses conflicted with one another, and litigation between insurers resulted. Legislation finally resolved the conflict in fire insurance policies by providing that the loss shall be prorated among all insurers involved.\(^6\) Curiously, nothing similar from a legislative standpoint has been effected with respect to automobile liability policies.

In the automobile liability field, double insurance situations can arise in a great many ways.\(^7\) For example, in states that have a permissive use statute,\(^8\) drivers of automobiles not owned by them are, in effect, given coverage under the policies of both the driver and the owner.\(^9\) Also, double insurance often arises with rental automobiles since a lessee is usually covered by his own policy, by the lessor's policy\(^10\) and, in some cases, by his employer's policy.\(^11\)


\(^7\) See Russ, supra note 5, at 184 (indicating that the extension of rules for determining tort liability has also affected the number of situations); Comment, Concurrent Coverage In Automobile Liability Insurance, 65 Colum. L. Rev. 319 (1965). In one case involving a truck and trailer rig, there was double coverage because the truck was insured by one insurer and the trailer by another. Lamb v. Belt Cas. Co., 3 Cal. App. 2d 624, 40 P.2d 311 (1935).

\(^8\) E.g., Cal. Vehicle Code § 16451 (Supp. 1969). For a case involving a statute that requires the extension of coverage to situations where the insured is driving an unowned vehicle, see Dekat v. American Auto. Fire Ins. Co., 146 Kan. 955, 73 P.2d 1030 (1937).


\(^11\) E.g., American Motorists Ins. Co. v. Underwriters at Lloyd's, 224
Insurers and courts have contributed to the problem by placing broad definitions on terms used in the policies, thereby extending the policy coverage. Consequently, here, as in the property insurance field, insurers have made extensive use of "other insurance" clauses. Although it has been said that the insurance companies use these clauses to protect themselves, to avoid litigation, or to facilitate settlements, the probable reason for their use is to reduce or avoid liability when there is other insurance covering the same loss. To understand the problem fully, the various types of "other insurance" clauses that are employed must be distinguished.

"Other Insurance" Clauses

One of the three basic types of "other insurance" clauses used in the automobile liability insurance field is the escape clause. It is analogous to the prohibition against other insurance, originally used in property insurance policies, and provides:

If other valid insurance exists protecting the Insured from liability... this policy shall be null and void with respect to such specific


15 Note, Conflicting Interpretations of "Other Insurance" Clauses, 28 Ind. L.J. 429, 431 (1953).

16 Russ, supra note 5, at 183; Comment, Concurrent Coverage In Automobile Liability Insurance, 65 Colum. L. Rev. 319, 320-21 (1965).


hazard otherwise covered, whether the Insured is specifically named in such other policy or not.

The purpose of the escape clause is to avoid all liability when a double insurance situation exists. When effective, the clause gives the insurer a windfall in that premiums are collected from the insured, and yet no liability is incurred when other insurance covers the same loss.

A second type of clause frequently used in automobile liability policies is the excess clause. One version of the excess clause attempts to limit the insurer's liability to that amount of the insured's loss which exceeds the policy limits of the other insurer.

If there is other insurance against an occurrence covered by this policy, this insurance shall be deemed excess insurance over and above the applicable limits of such other insurance.

A somewhat different result is brought about by another version, the limited excess clause:

'The insurance hereunder shall apply only as excess insurance over any similar insurance available to the insured, and this insurance shall then apply only in the amount by which the applicable limit of liability of this endorsement exceeds the sum of the applicable limit of liability of all such other insurance.'

With this clause the insurer limits its liability to the difference between its policy limits and the sum of the policy limits of all other insurance covering the loss. To illustrate, suppose the applicable policy limit of the insurer's policy with the limited excess clause was $25,000 and there were two other collectible policies with limits of $10,000 and $12,000. The insurer with the limited excess clause would be liable for only $3,000 even if the insured's loss exceeded $25,000. Extending this reasoning further, the limited excess clause becomes a complete escape clause if the total amount of other insurance equals or exceeds the policy limits of this particular policy. In contrast, it might be noted that the extent to which a regular excess clause acts as an escape clause is measured by the difference between the pro rata share of liability and what the insured actually must pay when the excess clause is given effect.

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23 This type of clause has been referred to as a “modified escape” clause. Russ, supra note 5, at 184. In this discussion, the term “limited excess” clause is used since it describes the provision more accurately in that there may be some instances where an insurer using such a clause will incur liability. E.g., McFarland v. Chicago Exp., Inc., 200 F.2d 5 (7th Cir. 1952); Peerless Cas. Co. v. Continental Cas. Co., 144 Cal. App. 2d 617, 301 P.2d 602 (1956); Air Transp. Mfg. Co. v. Employers' Liab. Assurance Corp., 91 Cal. App. 2d 129, 204 P.2d 647 (1949).
Excess insurance policies are to be distinguished from ordinary policies containing excess clauses. By its terms, no liability is incurred under the excess policy unless the insured's loss exceeds a specified amount, whereas the policy containing the excess clause is not treated as excess insurance, but rather as primary insurance, unless there is other valid and collectible insurance that will effectuate the excess clause. As will be seen, most courts have been willing to find such other insurance.

The third type of “other insurance” clause is the prorate clause. 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 stated in the declaration bears to the total applicable limit of liability of all valid and collectible insurance against such loss. . .

By the terms of this clause, each insurer bears a proportionate amount of the loss. This is essentially the same result as that reached when none of the policies contain “other insurance” clauses.

Combinations of these three clauses are also frequently used: 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 stated in the declaration bears to the total applicable limit of liability of all valid and collectible insurance against such loss; provided, however, the insurance under this policy with respect to loss arising out of the maintenance or use of any hired automobile insured on a cost of hire basis or the use of any non-owned automobile shall be excess insurance over any other valid and collectible insurance.

The combination could also involve an escape clause in place of either the prorate or excess clause in the above example. But regardless of the composition of the combination provision, only one of its component clauses is activated in any given situation.

With the exception of double insurance situations where (1) none of the policies involved have “other insurance” clauses, (2) where all of the policies involved contain prorate clauses, or (3) where only one of the policies involved has an “other insurance” clause, the mere presence of such clauses in two or more policies causes conflict. For example, when one insurer’s clause declares it will prorate the loss with other insurers and the other insurer’s clause declares it will only assume liability for any loss exceeding the limits of the first policy, the clauses, by their very terms, appear to be irreconcilable. As a consequence of such conflicts, the courts have been called upon to determine which of the clauses is to be given effect.

Prior Judicial Solutions

First in Time

Some courts turned to the property insurance field for a guide to determine which of the conflicting clauses was to be given effect. By this guide, the insurer which issued its policy first was declared to be primarily liable since, at the time the policy was written, there was no other insurance to activate its "other insurance" clause. By applying this doctrine to automobile liability insurance cases, the insurer that issued its policy first was deemed to be primarily liable and effect was given to the second insurer's "other insurance" clause.

This approach to resolving the conflict has been rejected or disregarded in most jurisdictions since neither insurer is strictly liable for a loss until the loss occurs. Then, at that time, the insurers become liable simultaneously.

Specific v. General

Still seeking a policy that could be declared primary, some courts adopted the so-called specific v. general test. By this test the policy that covered the particular loss more specifically was declared primarily liable, while the "other insurance" clause of the more general policy was given effect.

A somewhat different application of this test is illustrated by Zurich General Accident and Liability Insurance Company v. Clamor, which rejected the first in time theory but applied the specific v. general approach to the "other insurance" clauses instead of to the entire policy. The more specific "other insurance" clause was given

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29 Russ, supra note 5, at 184; Snow, Other Insurance Clauses-Multiple Coverage, 40 Denver L. Center J. 259, 265 (1963); cf. Watson, The "Other Insurance" Dilemma, 518 Ins. L.J. 151, 153 (1966).
30 Russ, supra note 5, at 184; Snow, Other Insurance Clauses-Multiple Coverage, 40 Denver L. Center J. 259, 265 (1963).
34 Id. Here one insurer was declared primarily liable because its policy covered losses arising from the use of a truck while the other insurer's policy covered any loss arising upon the insured's premises.
35 124 F.2d 717, 720 (7th Cir. 1941).
36 Id. at 719-20.
Either application of this approach involves questionable reasoning, for after determining that both insurers cover the loss, it does not follow that the one which covers it more specifically is more liable than the other. Consequently, this approach has also been generally abandoned.

**Primary Tortfeasor**

Another solution to the conflicting clause problem was to hold as primarily liable the insurer having the primary tortfeasor as its named insured. This seems to have been nothing more than an application of the specific v. general approach, since one insurer was made primarily liable because it named the active tortfeasor in its policy, i.e., its policy was more specific. This solution was quite limited since it did not cover situations in which the primary tortfeasor was not the named insured in any of the policies involved, or conversely, was the named insured in all the policies involved. As in the case of the first in time and the specific v. general tests, the primary tortfeasor solution has, for the most part, been rejected.

The courts that adopted the first in time, specific v. general and primary tortfeasor doctrines must have recognized the impossible task of reconciling conflicting “other insurance” clauses since each test resulted in one insurer being declared primarily liable. As such,

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37 Id. at 720.
38 This argument was recognized and rejected in General Ins. Co. of America v. Truck Ins. Exch., 242 Cal. App. 2d 419, 426, 51 Cal. Rptr. 462, 468 (1966), relying in part on Cal. Civ. Code § 3534, which provides that “[p]articular expressions qualify those which are general.”
42 Russ, supra note 5, at 165.
that insurer's "other insurance" clause was necessarily disregarded, thereby eliminating the conflict. Nevertheless, the majority of jurisdictions do not admit that it is impossible to reconcile conflicting "other insurance" clauses, but claim instead to be able to give effect to the intent of both insurers.43

Current Judicial Solutions

It should be noted first that when the conflicting clauses are of the same type, most jurisdictions ignore the "other insurance" clauses and prorate the loss among the insurers.44 To give effect to both clauses would leave the insured without protection, and there is no logical basis for declaring one clause to be effective, while ignoring the other clause.45 Thus, when there are two conflicting excess clauses, neither is given effect and the loss is prorated between the insurers.46 Of course, there is no conflict at all when both policies contain a prorate clause because both clauses can be effected according to their terms without depriving the insured of any coverage.47

The Majority Approach

Where the "other insurance" clauses differ, the majority of juris-

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dictions have attempted to adhere to the intents of all the insurers involved as expressed in their "other insurance" clauses. In doing so, they have developed a priority system whereby, in any given conflict, one type of "other insurance" clause is given priority over another type. In order to see the unsuccessful result of this approach, both in reconciling the conflicting clauses and in giving effect to the intent of each insurer, each set of conflicting clauses should be considered separately.

Prorate v. Escape

Some authors speak as if there are several cases involving the prorate v. escape clause conflict, but an examination of these cases shows that they actually involve a conflict between prorate clauses and limited excess clauses. Only one case has been found which actually involved a prorate v. escape conflict in any way, and

48 Note 43 and accompanying text supra.
50 For example, in McFarland v. Chicago Exp. Inc., 200 F.2d 5 (7th Cir. 1952), the clause in question provided:

If other valid insurance exists... this policy shall be null and void with respect to such specific hazard otherwise covered... provided, however, that if the applicable limit of liability of this policy exceeds the applicable limit of liability of such other valid insurance, then this policy shall apply as excess insurance against such hazard in an amount equal to the applicable limit of liability of this policy minus the applicable limit of liability of such other valid insurance.

Id. at 6. In Peerless Cas. Co. v. Continental Cas. Co., 144 Cal. App. 2d 617, 301 P.2d 602 (1956), the clause provided:

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 other insurance.


If other valid insurance exists protecting the insured from liability... this policy shall be null and void with respect to such specific hazard otherwise covered... provided, however, that if the applicable limit of liability of this policy exceeds the applicable limit of liability of such other valid insurance, then this policy shall apply as excess insurance against such hazard in an amount equal to the applicable limit of liability of this policy minus the applicable limit of liability of such other valid insurance.

Id. at 130, 204 P.2d at 648.
51 See notes 23 & 24 and accompanying text supra.
there the Supreme Court of Washington surprisingly\textsuperscript{52} gave effect to the escape clause.\textsuperscript{53} The case is of questionable authority, however, since the action was merely between the insured and the insurer that had used the escape clause in its policy,\textsuperscript{54} that is, the insurer with the prorate clause was not a party to the action. Thus, although the court determined that there was other valid and collectible insurance that triggered the defendant insurer's escape clause, the decision was based on an interpretation of the defendant's contract with the insured,\textsuperscript{55} and even if the other insurance policy had contained a different type of "other insurance" clause, or no clause at all, the result probably would have been the same.

There are at least two undesirable consequences which occur when an escape clause is given effect. First, the amount of insurance available to the insured is reduced. Secondly, the insurer using the escape clause is given a windfall, since it collects the premium from the insured and yet avoids liability when a loss occurs to the insured. Consequently, it would seem preferable to prorate the loss between the insurers.

\textit{Prorate v. Excess}\textsuperscript{56}

In the situation involving a conflict between a prorate and an excess clause, the rule has developed that "when an excess clause in one . . . policy conflicts with another 'other insurance' clause, and more particularly a 'pro-rata' clause, in a second policy, the excess clause controls and is to be given its full effect."\textsuperscript{57} In other words, "'excess insurance' is not considered to be 'other valid and collectible insurance'"\textsuperscript{58} under this rule and thus is not within the purview of the prorate clause of another policy.

The decision in this particular situation that a policy with an excess clause is not "valid and collectible insurance" while a policy with a prorate clause is "valid and collectible insurance" appears to have been made rather arbitrarily. There would seem to be no reason why a policy containing a prorate clause is any more "valid and collectible" than a policy containing an excess provision. Accordingly, the majority rule has been properly criticized as depending upon

\begin{itemize}
\item \textsuperscript{52} Comment, "Other Insurance" Clauses Conflict, 5 Stan. L. Rev. 147, 150 (1952).
\item \textsuperscript{53} Miller v. Allstate Ins. Co., 66 Wash. 2d 871, 405 P.2d 712 (1965).
\item \textsuperscript{54} Id. at 874, 876, 405 P.2d at 713-14, 715.
\item \textsuperscript{55} Id. at 874, 405 P.2d at 714.
\item \textsuperscript{56} The majority result can also be obtained by applying the specific v. general test previously considered. For example, an excess provision is more specific than a prorate clause so the excess clause controls. Zurich Gen. Accident & Liab. Ins. Co. v. Clamor, 124 F.2d 717 (7th Cir. 1941). See text accompanying note 35 supra.
\item \textsuperscript{58} Id.
\end{itemize}
which policy was read first.\textsuperscript{60} One author, however, while admitting
the validity of the criticism, nevertheless defends the rule as one
recognizing and giving effect to the intent of the insurers.\textsuperscript{60}

The usual intent of the insurer [using the excess clause] is that
the policy will afford only secondary coverage when the loss is cov-
ered by "other insurance." \ldots A provision that limits a policy to
only pro rata liability in the event of concurrent coverage usually is
intended to become effective only when other valid and collectible
primary insurance is available.\textsuperscript{61}

In other words, he argues that when there is other insurance, the
insurer employing the excess clause intends to be secondarily liable
only, whereas the insurer employing the prorate clause intends to be
primarily liable. This argument seems to overlook the fact that the
insurer using the prorate clause intends to be liable for only part of
the loss. Consequently, the majority rule only gives effect to the
intent of one of the insurers, and the purported justification for the
rule—that of giving effect to the intent of each insurer—has not been
effectuated.\textsuperscript{62}

\textit{Excess v. Escape}

In a conflict between excess and escape clauses, effect is usually
given to the excess clause,\textsuperscript{63} primarily because giving effect to the
escape clause would give the insurer using it a windfall and because
it would reduce the amount of coverage available to the insured.\textsuperscript{64}

\footnotesize
\begin{itemize}
\item \textsuperscript{60} Oregon Auto. Ins. Co. v. United States Fidelity & Guar. Co., 195 F.2d
958, 960 (9th Cir. 1952).
\item \textsuperscript{61} Comment, \textit{Concurrent Coverage In Automobile Liability Insurance}, 65
\item \textsuperscript{62} Contra, American Auto. Ins. Co. v. Republic Indem. Co. of America,
52 Cal. 2d 507, 512-13, 341 F.2d 675, 678-79 (1959), where the court stated that
the only meaningful construction is that the excess clause controls in every
situation falling within its terms and that the prorate clause governs in all
other situations.
\item \textsuperscript{63} E.g., Zurich Gen. Accident & Liab. Ins. Co. v. Clamor, 124 F.2d 717
(7th Cir. 1941); New Amsterdam Cas. Co. v. Certain Underwriters at Lloyds, 34
Wis. 2d 64, 188 N.W.2d 322 (1963) (escape clause given effect). See also Russ,
supra note 5, at 187; Snow, \textit{Other Insurance Clauses—Multiple Coverage}, 40
DENVER L. CENTER J. 259, 263 (1963); Watson, The “Other Insurance” Dilemma,
1966 INS. L.J. 151, 154; Comment, \textit{Concurrent Coverage In Automobile Liability Insurance}, 65
INQ. L.J. 429, 434 (1953); Note, \textit{Automobile Liability Insurance—Effect Of Double Coverage And “Other Insurance”
Clauses}, 38 MAN. L. REV. 838, 854 (1954); Comment, “Other Insurance”
Clauses Conflict, 5 STAN. L. REV. 147, 148 (1952); Note, \textit{Effect of Conflicting
“Other Insurance” Clauses}, 41 WASH. L. REV. 564, 567-68 (1966); 5 U.C.L.A.L.
\item \textsuperscript{64} Oregon Auto. Ins. Co. v. United States Fidelity & Guar. Co., 195 F.2d
958, 959 (9th Cir. 1952); Zurich Gen. Accident & Liab. Co. v. Clamor, 124 F.2d
717, 720 (7th Cir. 1941).
\end{itemize}
Yet the courts adhering to the majority rule, in giving effect to the excess clause, fail to realize that they merely shift the benefit of the windfall to the insurer using that clause.

If the limited excess clause continues to be treated as an escape clause, as it has been by some authors and at least one court, a conflict between a limited excess clause and an escape clause probably will be construed as involving two escape clauses and the loss would be prorated. Technically, however, if the courts interpret the limited excess clause accurately and follow the majority rule of ignoring the escape clause, there would not only be a windfall to the insurer using the limited excess clause, but in addition, the amount of coverage available to the insured would be reduced.

The Minority or Oregon Approach

As a result of the above mentioned inconsistencies and fallacies in the majority rule, a minority position was founded. In 1952, when an Oregon court was confronted with the excess v. escape clause conflict, the court rejected the various solutions reached by other jurisdictions, including the majority approach of giving effect to the excess clause, and instead disregarded both clauses completely by prorating the loss between both insurers. Subsequently, the rule of proration has been applied to conflicts between other sets of clauses.

The rule operates by disregarding the “other insurance” clauses in all policies and by prorating the insured's loss among all insurers involved.

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65 See cases cited note 63 supra.
66 Assume A and B each issue policies with $10,000 limits and a loss of $10,000 occurs. Assume further that both insurers cover the loss and that A has used an escape clause in its policy, whereas B has used an excess clause. If effect is given to the excess clause, B gets the windfall which most courts would deny A by refusing to give effect to his escape clause. B has collected premiums from the insured but has avoided liability when the loss to the insured occurred. If B's excess clause was of the limited type, the amount of coverage available to the insured would be reduced to $10,000 and he would be required to bear any loss exceeding that amount. Thus, not only would B get a windfall but the insured would not have maximum protection.
67 See notes 49 & 50 and accompanying text supra.
69 See note 44 and accompanying text supra.
70 See note 66 supra.
71 Oregon Auto. Ins. Co. v. United States Fidelity & Guar. Co. 195 F.2d 958 (9th Cir. 1952).
72 Id. at 959-60.
74 Oregon Auto. Ins. Co. v. United States Fidelity & Guar. Co., 185 F.2d 958 (9th Cir. 1952), where the court relies upon the rule that “where neither policy has an ‘other insurance’ provision” the loss is prorated. Id. at 960;
Such a rule is highly desirable. It does not arbitrarily pick one of the conflicting clauses and give effect to it; it does not deprive the insured of any coverage; it is not prejudicial in giving a windfall to one insurer at the expense of another; it does not encourage litigation between insurers; it does not delay settlements. On the other hand, it does enable underwriters to predict the losses of the insurers more accurately; it does preclude the use of illogical rules developed by the courts (e.g., first in time, specific v. general and primary tort-feasor doctrines); and it does give a basis for uniformity of result. In addition, prorating the loss among all insurers is a rule that can be applied regardless of the number of insurers involved and regardless of the type of conflicts that are created by the “other insurance” clauses. Finally, the rule is simpler, more convenient and easier to apply than the majority rule.

Although the Oregon Rule has not been popular with the courts, many writers consider it desirable. It has been criticized, however, as being nothing more than “a simple, convenient solution to the problem” which violates “the foremost rule of the law of contracts” in that it fails “to give full effect to the intent of the parties.”

It has been charged as well that, in an excess clause, the word “‘excess’ means exactly what it says . . . .” Left unanswered is the question of why the conflicting “other insurance” clause does not also mean “exactly what it says.” As noted above, it is usually impossible to give effect to the intent of all the parties in this type of litigation. The insurers involved in any given conflict intended to indemnify the insured when a covered loss occurred. At the same time, the very fact that “other insurance” clauses are inserted in cf. Dekat v. American Auto. Fire Ins. Co., 146 Kan. 955, 73 P.2d 1080 (1937); text accompanying note 27 supra.

76 To avoid delay in making a settlement with an insured, it is not uncommon for insurers to execute an agreement among themselves that they will contribute to the settlement without waiving any rights each insurer may have against another insurer. E.g., American Motorists Ins. Co. v. Underwriters at Lloyd’s, 224 Cal. App. 2d 81, 36 Cal. Rptr. 297 (1964).


80 Id. at 157.
these policies indicates an intent not to be liable for the entire loss when there is double coverage. Prorating the loss among the insurers gives effect to this intent, though it must be admitted that the intent of each insurer as to how the loss should be distributed is disregarded by this solution. The net effect of the Oregon Rule, then, is to give effect to the common intent of all insurers not to be liable for the entire loss, rather than to give complete effect to the intention of one insurer while completely disregarding the intention of another insurer. In short, the Oregon Rule recognizes that conflicting “other insurance” clauses are mutually repugnant and impossible to reconcile.

The California Position

Unfortunately, California must be numbered among those jurisdictions adopting the majority rule when resolving conflicts between “other insurance” clauses. However, California has not always been entrenched so firmly in the majority camp as it now appears to be. In fact, a brief examination of its case history indicates that if certain cases had been analyzed properly, the Oregon Rule might have been adopted in California.

The California pattern was initiated with Air Transportation Manufacturing Company v. Employers’ Liability Assurance Corporation, which was decided in 1949, three years before the Oregon Rule was pronounced. In this case, the appellate court in effect prorated the loss in a prorate v. limited excess clause conflict. The court determined, as far as the limited excess clause was concerned, that there was “other valid and collectible insurance” for only a proportionate amount of the loss and that the insurer using the limited excess clause was required to assume the remaining loss.

Another conflict arose between prorate and limited excess clauses in Peerless Casualty Company v. Continental Casualty Company, which was decided in 1956. The court treated the limited excess clause as an escape clause and again prorated the loss. Although the Oregon Rule was considered, the court would not prorate on the basis of that rule alone, but relied upon the Air Transportation decision and the general disfavor of escape clauses as well.

While no California case involving a conflict between a true escape clause and an excess clause was found, there is little doubt that effect will be given to the excess clause. See text accompanying note 94 infra.

Regarding prorate v. escape conflicts see notes 49-53 and accompanying text supra.


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Regarding prorate v. escape conflicts see notes 49-53 and accompanying text supra.

83 144 Cal. App. 2d 617, 301 P.2d 602 (1956).
84 Id. at 623, 301 P.2d at 607.
A year after Peerless Casualty, in American Automobile Insurance Company v. Seaboard Surety Company, the rulings of Air Transport and Peerless Casualty were relied upon to prorate the loss in a prorate v. excess clause conflict. It seemed as though California was recognizing the more desirable Oregon Rule by permitting proration between the conflicting clauses.

In Fireman’s Insurance Company v. Continental Casualty Company, decided in 1959, a California court was again confronted with a prorate v. excess conflict. The court in this case, however, misinterpreted Air Transport as involving a prorate v. escape conflict. Additionally, it misinterpreted Peerless Casualty as involving a prorate v. excess conflict, but held that it was not controlling authority since it was based upon Air Transport. American Automobile v. Seaboard Surety was distinguished because, of the two policies involved, one was not an automobile policy. The court therefore resolved the conflict by giving effect to the excess clause.

An examination of the limited excess clauses used in Air Transport and Peerless Casualty shows that they produce identical results. It is difficult to see how, after more than a superficial examination of these clauses, one could be called an excess clause and the other an escape clause, especially when the insurers using them each incurred liability for the so-called excess loss. But, having eliminated the leading California precedents, Fireman’s Insurance adopted the majority rule by giving effect to the excess clause.

The majority rule, as applied in Fireman’s Insurance, was followed in two subsequent cases decided by the California Supreme Court. Neither case mentioned any of the decisions discussed above, but one did acknowledge that the result reached involved circular reasoning. In 1963, the rule of Air Transport was temporarily revived in Colby v. Liberty Mutual Insurance Company, without mention of either supreme court case. However, since Colby, it has been settled... that, in determining the respective liabilities of insurers under separate indemnity policies covering the same loss, an applicable “excess insurance” provision in one of the policies, absent an applicable “excess insurance” provision in the other, is given effect.

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87 Id. at 701, 339 P.2d at 604.
88 Id. at 702, 339 P.2d at 604.
90 The clauses are set forth in note 50 supra.
even though inequities . . . result.\textsuperscript{94}

\section*{Recommendations}

As is apparent from the foregoing discussion, whenever a double insurance situation occurs in the automobile liability field, a potential conflict arises between the involved insurance companies because of the mutually exclusive nature of the "other insurance" clauses that may be contained in each of their policies. Although courts have settled the conflicts as the opportunity was offered to them, their solutions have not been so acceptable as to negate the need for further litigation as subsequent double insurance situations occur. Consequently, courts\textsuperscript{95} and authors\textsuperscript{96} alike have called for legislation.

When similar confusion and conflict existed in the property insurance field, legislation proved effective in resolving the problem.\textsuperscript{97} For example, in California the standard form fire insurance policy has a provision for prorating the loss in double insurance situations.\textsuperscript{98} Such a provision would be equally appropriate in the automobile liability field and would, in effect, be a statutory recognition of the Oregon Rule.

Another legislative proposal worth considering would prohibit escape and limited excess clauses, thereby codifying the general judicial disapproval of such clauses.\textsuperscript{99} Under this proposal, the regular excess clause would be permitted only in specified situations and the prorate clause would be generally allowed.\textsuperscript{100} This proposal, if adopted, essentially would be a statutory recognition of the Oregon Rule since only the prorate clause would be generally allowed.

Unquestionably, a conflict exists when two or more insurers

\textsuperscript{94} Ohio Farmers Indem. Co. v. Interinsurance Exch., 266 A.C.A. 849, 854, 72 Cal. Rptr. 269, 272 (1968).

\textsuperscript{95} "Unfortunately there is no statute . . . ." Oregon Auto. Ins. Co. v. United States Fidelity & Guar. Co., 195 F.2d 958, 959 (9th Cir. 1952). See also American Auto. Ins. Co. v. Transport Indem. Co., 200 Cal. App. 2d 543, 19 Cal. Rptr. 558 (1962), where Justice Tobriner commented: "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 entering 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." Id. at 544, 19 Cal. Rptr. at 559.

\textsuperscript{96} E.g., Russ, supra note 5, at 191; Comment, Concurrent Coverage In Automobile Liability Insurance, 65 Colum. L. Rev. 319, 331 (1965). Contra, Snow, Other Insurance Clauses-Multiple Coverage, 40 Denver L. Center J. 259, 271 (1963).

\textsuperscript{97} See note 6 and accompanying text supra.

\textsuperscript{98} Cal. Ins. Code § 2071.

\textsuperscript{99} Russ, supra note 5, at 191. Since courts treat limited excess clauses as escape clauses, it can be said that limited excess clauses also find disfavor with the courts. E.g., Peerless Cas. Co. v. Continental Cas. Co., 144 Cal. App. 2d 617, 301 P.2d 602 (1956).

\textsuperscript{100} Russ, supra note 5, at 191.
with differing "other insurance" clauses cover the same loss. There has been little agreement as to the proper resolution of this conflict as evidenced by the multitude of tests and rules advanced by the courts. It is here suggested that the most rational and equitable solution is to disregard all "other insurance" clauses and simply pro-rate the loss between all obligated insurers, i.e., apply the Oregon Rule.\(^\text{101}\) Considering, however, the reluctance of most courts, including those of California, to adopt this rule, it is further suggested that legislation is needed before this resolution will be effectively accomplished.

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\(^{101}\) If the majority rule is adhered to by most jurisdictions as it presently is, it would seem that many insurers will begin using excess clauses exclusively, primarily because of the favored treatment that provision is given by the courts. See Snow, Other Insurance Clauses-Multiple Coverage, 40 Denver L. Center J. 259, 268-69 (1963). If, however, excess clauses do become prevalent, most losses will be prorated because most conflicts will involve two or more excess clauses.

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