ADJUSTING "OTHER INSURANCE" CLAUSE CLAIMS

By: Craig Reese

March 22, 2012

Contents

OTHER INSURANCE CLAUSES

INTRODUCTION

When more than one liability policy applies to a particular insured, an immediate question often arises as to how those policies relate to each other. The interpretation of "other insurance" clauses is fact and case specific, and depends almost entirely upon the language of the particular clauses involved.

The question of interpretation of these clauses arises only where there are two or more policies insuring the same risk, and the same interest, for the benefit of the same person, during the same period. In other words, the clauses only operate when there is concurrent coverage for an insured.

Although it appeared that many of the issues had been decided years ago, questions regarding application of these clauses continue today. Courts are still faced with deciding how to resolve conflicts between these clauses. Carriers continue to come up with creative ways to try to get around established case law.

For these reasons, an update on other insurance clauses and their application remains in order.

As we begin our review, it is important to keep in mind that the discussion undertaken herein applies only to the duty to indemnify. Other insurance clauses have no application with respect to the duty to defend. Each carrier owing concurrent coverage owes a full and complete duty to defend.

EXAMPLES OF OTHER INSURANCE CLAUSES

A. Commercial General Liability Policy.

The typical CGL policy contains the following language:

> This insurance is primary except when b. below applies. If this insurance is primary, our obligations are not affected unless any of the other insurance is also primary. Then, we will share with all that other insurance by the method described in c. below.

This provision establishes that the CGL policy's coverage is primary in most instances. It also acknowledges that where there is other insurance which is excess, the CGL policy's coverage will not be affected.

The excess clause in the standard CGL policy's "other insurance" condition is more extensive. It provides:

> This insurance is excess over:
>
> (1) Any of the other insurance, whether primary, excess, contingent or on any other basis:
>
> (a) That is Fire, Extended Coverage, Builder's Risk, Installation Risk or similar coverage for "your work";
>
> (b) That is Fire Insurance for premises rented to you or temporarily occupied by you with permission of the owner;
>
> (c) That is insurance purchased by you to cover your liability as a tenant for "property damage" to premises rented to you or temporarily occupied by you with permission of the owner; or
>
> (d) If the loss arises out of the maintenance or use of aircraft, "autos" or watercraft to the extent not subject to Exclusion g. of Section I - Coverage A - Bodily Injury And Property Damage Liability.
>
> (2) Any other primary insurance available to you covering liability for damages arising out of the premises or operations for which you have been added as an additional insured by attachment of an endorsement.[1]
>
> When this insurance is excess, we will have no duty under Coverage A or B to defend the insured against any "suit" if any other insurer has a duty to defend the insured against that "suit". If no other insurer defends, we will undertake to do so, but we will be entitled to the insured's rights against all those other insurers....

[1] Item (2) is an addition to the CGL form designed to solve an "other insurance" issue which arose in almost every additional insured situation. Often, the contract requiring the named insured to have another party added as an additional insured also required that such coverage be primary and non-contributing with the additional insured's own coverage. Without some language in the policies altering the normal operation of the "other insurance" clauses, this requirement was not met. For some time, this issue had to be addressed by way of a special endorsement. Since 1998, however, subsection (2) is now standard and the additional insured's own policy will be excess.

The third section of the standard "other insurance" clause deals with the method of sharing between the concurrent policies.

It states:

> Method of Sharing
> If all of the other insurance permits contribution by equal shares, we will follow this method also. Under this approach each insurer contributes equal amounts until it has paid its applicable limit of insurance or none of the loss remains, whichever comes first.
>
> If any of the other insurance does not permit contribution by equal shares, we will contribute by limits. Under this method, each insurer's share is based on the ratio of its applicable limit of insurance to the total applicable limits of insurance of all insurers.

B. Homeowners Policy.

1. **Example**

If the **insured** has other insurance under Coverage C (Personal Liability), we will not be liable for a greater proportion of a loss than the limit of liability shown on the declarations page bears to the total limit of all valid and collectible insurance against such loss.

However, with respect to loss arising out of the ownership, maintenance, operation, use, loading or unloading of:

a. any motor vehicle or recreational motor vehicle at the **residence premises**; or

b. watercraft,

this policy will not apply to the extent that any valid and collectible insurance is available to the **insured**.

If other insurance is available to **you** for a loss…we will pay the proportionate amount that this insurance bears to the total amount of all applicable insurance….

2. **Example**

If other insurance is available to you for a loss covered under COVERAGE F – PERSONAL LIABILITY of this policy, this insurance is excess over other valid and collectible insurance except insurance written specifically to cover as excess over the limits of liability that apply in this policy.

3. **Example**

This insurance is excess over any other valid and collectible insurance except insurance written specifically to cover as excess over the limits of liability that apply in this policy.

C. Texas Personal Automobile Insurance Policy.

1. **Example**

If there is other applicable liability insurance we will pay only our share of the loss. Our share is the proportion that our limit of liability bears to the total of all applicable limits.

However, any liability insurance we provide to a covered person for the maintenance or use of a vehicle you do not own shall be excess over any other applicable liability insurance.

2. **Example**

If there is other applicable liability insurance, we will pay only our share of the loss. Our share is the proportion that our limit of liability bears to the total of all applicable limits. However, any insurance we provide to a covered person with respect to a vehicle you do not own shall be excess over (1) any other applicable liability insurance or (2) any qualified self-insurance or other permissible means of compliance with a state's financial responsibility law, compulsory liability insurance law, or any similar law.[2]

3. **Example**

If there is other applicable liability insurance available any insurance we provide shall be excess over any other applicable liability insurance. If more than one policy applies on an excess basis, we will bear our proportionate share with other collectible liability insurance.

APPORTIONMENT AND COVERAGE ISSUES

Resolving coverage and apportionment issues between multiple policies requires a review of the policies' "other insurance" clauses. *See Texas Property & Cas. Ins. Guar. Ass'n/Southwest Aggregates, Inc. v. Southwest Aggregates, Inc.*, 982 S.W.2d 600, 606 (Tex. App.—Austin 1998, no pet.) (when more than one policy applies to loss, other insurance provisions provide scheme by which liability is apportioned). Other insurance clauses essentially provide that if the insured has other insurance against a

[2] This example is from a USAA policy.

loss covered by the subject policy, then the subject policy will either: (1) be liable for a proportion of the loss no greater than the ratio of the subject policy limit to the total limit of all applicable policies ("pro rata" clauses); (2) be excess insurance over and above such other insurance ("excess" clauses); or (3) not apply at all ("escape" clauses).

The typical liability policy contains a pro rata "other insurance" clause. *See State Farm Fire & Cas. Co. v. Griffin*, 888 S.W.2d 150, 155 (Tex. App.—Houston [1st Dist.] 1994, no writ); *see also* Mark C. Guthrie, Comment, *"Other Insurance Conflicts: A Common-Sense Proposal*," 36 BAYLOR L. REV. 689, 690 n.8 (1984). The legal effect of such a clause is to provide that the insurer will not be liable for any greater proportion of a loss than the amount named in the policy bears to the entire amount of insurance coverage available. *Griffin*, 888 S.W.2d at 155. When there are two insurers who have contracted to pay a loss and each policy contains such a clause, each insurer is liable only for its proportion of the loss. *Id.* For other insurance to trigger the operation of the clause and relieve the insurer of its primary liability beyond that specified in the pro rata clause, the other insurance must cover the same property and interest against the same risk in favor of the same insured. *Id.*

Where both policies contain similar language making them primary, the two insurers will typically apportion costs between themselves in equal shares, up to their respective policy limits. *See Foremost County Mut. Ins. Co. v. Home Indem. Co.*, 897 F.2d 754, 762 (5th Cir. 1990). This mechanism of apportionment does not, however, affect the contractual relationship between the insurer and insured that requires the insurer to provide full indemnification. *Southwest Aggregates, Inc.*, 982 S.W.2d at 606.

CONFLICTING CLAUSES

When the policies contain conflicting clauses, Texas courts will treat them as mutually repugnant, ignore the provisions, and make the insurers prorate coverage. *See Hardware Dealers Mut. Fire Ins. Co. v. Farmers Ins. Exchange*, 444 S.W.2d 583 (Tex. 1969).

It is important to remember, however, that these clauses only affect insurers' rights amongst themselves; they do not affect the insured's right to recovery under each concurrent policy.

In a "pro rata" vs. "excess" conflict, the majority rule is that the excess clause is given preference, with the result that the insurer whose policy contains the primary "pro rata" clause is liable to the extent of its policy limits, and the excess policy does not come into play, if at all, until such time as the primary policy limits have been exhausted. Mark C. Guthrie, Comment, "*Other Insurance Conflicts: A Common-Sense Proposal*," 36 BAYLOR L. REV. at 694.

Texas courts have generally given full effect to the excess clause over a pro rata clause. *See, e.g., Snyder v. Allstate Ins. Co.*, 485 S.W.2d 769 (Tex. 1972) (both policies contained excess only clauses with respect to non-owned autos; court found that if car was an owned auto within the meaning of one of the policies, then that policy would be primary and "non-owned" coverage would be excess according to the clauses); *Canal Ins. Co. v. Gensco, Inc.*, 404 S.W.2d 908 (Tex. Civ. App.—San Antonio 1966, no writ) (courts uniformly give full effect to excess clause and require primary policy to be exhausted before excess policy becomes effective); *see also Union Indem. Ins. Co. of New York v. Certain Underwriters at Lloyd's*, 614 F. Supp. 1015 (S.D. Tex. 1985) (general rule where two policies afford coverage to a particular loss and one contains a pro rata clause while other contains excess clause is that policy containing excess clause does not provide any coverage until other policy is exhausted).

The Texas Supreme Court directly addressed the conflict between escape and excess clauses in *Hardware Dealers Mut. Fire Ins. Co. v. Farmers Ins. Exchange, supra*. In that case, the daughter of a Farmers' insured was test driving a new car. She was involved in an accident during the test drive. She was covered under the Farmers' policy and also had coverage under the garage policy issued by Hardware Dealers Mutual Fire Insurance Company ("Hardware"). The Farmers' policy provided that while driving a nonowned auto, the coverage afforded under its policy was excess if the insured had other valid coverage. The Hardware policy contained an escape clause which excluded coverage under the policy if

the insured had other collectible insurance. Both carriers argued that the other had the duty to defend and indemnify the insured.

The court undertook a lengthy analysis of other insurance clauses and the various methods used by courts throughout the country to resolve conflicts between the clauses. In undertaking this analysis, the court noted that both carriers rightfully conceded that the daughter would be covered by either policy but for the existence of the other. 444 S.W.2d at 586. The two carriers also conceded that whatever construction the court gave the two provisions, the insured should not have less coverage than if she had been protected by only one of the policies. *Id.* The court ultimately rejected the various approached utilized by other courts and noted:

> We, therefore, shall follow this rule: When, from the point of view of the insured, she has coverage from either one of the two policies but for the other, and each contains a provision which is reasonably subject to a construction that it conflicts with a provision in the other concurrent insurance, there is a conflict in the provisions…A repugnancy between the policy provisions of two policies has usually been solved by ignoring the two offending provisions. The result is that Hardware's policy, minus its escape clause, covers the insured; Farmers' policy, minus its excess clause, covers the insured. The insured is thus insured by both insurers which is a reasonable result since both insurers wrote expanded coverage policies which they must have intended should reach her, and this problem of double insurance was "involuntarily thrust upon the insured through the operation of another's insurance contract."

Id. at 589-90.

The Texas Supreme Court ultimately concluded that the daughter had coverage under both policies and the carriers' liability was equally prorated between them (same limits of coverage under both policies). *Id.* at 590.

This case remains good law and continues to be cited by the courts for dealing with conflicting other insurance clauses, even in situations involving conflicts other than escape vs. excess. *See, e.g., St. Paul Mercury Ins. Co. v. Lexington Ins. Co.*, 78 F.3d 202 210 (5th Cir. 1996) (citing the Texas Supreme Court case, court found that escape clause and prorata clause were mutually repugnant and held both carriers had duty to defend and indemnify).

In fact, the Fifth Circuit seemingly applies a very liberal reading of *Hardware Dealers* when dealing with other insurance clause conflicts. In *Royal Ins. Co. v. Hartford Underwriters Ins. Co.*, 391 F.3d 639 (5th Cir. 2004), the court once again cautioned against overly narrow constructions of the *Hardware Dealers* rule. Taking this caution to heart, the court found that the fact that one policy contained an excess clause and the other a pro rata clause, did not distinguish the case from the rule set out by the Texas Supreme Court.

> Viewed from the perspective of [the insured], one finds that Hartford provides coverage for the underlying suit if Royal's policy did not exist. Similarly, one sees that Royal provides full coverage for the underlying suit if Hartford's policy did not exist. A "reasonable construction" of the two policies from this perspective yields a conflict. Therefore, the substantive step of *Hardware Dealers* applies: both Royal and Hartford are liable proportionally, and both had a duty to defend [the insured].

Id. at 644.

However, the Fifth Circuit is not always consistent in its reading or application of *Hardware* Dealers. In *Kirk v. Universal Underwriters of Tex. Ins. Co.*, 2010 U.S. App. LEXIS 324 (5th Cir. 2010), Coronado was driving a truck for his employer Gulf Coast when he was involved in an accident. Olympic owned the tractor-trailer he was driving and leased it to his employer. The lease agreement required Gulf Coast to maintain a certain level of liability insurance on the truck.. Gulf State obtained the insurance from Home State County Mutual. There is no discussion in the case of the other insurance clause in that policy. At the time of the accident, UUT had issued Olympic a liability insurance policy for Olympic's garage operations, which covered the truck being operated by Coronado. The policy provided that it only covered Olympic's lessees if, at the time of the accident, insurance required by the lease agreement was not collectable.

On appeal, the court was faced with construing the effect of the escape clause in the UUT policy. The court upheld application of the escape clause, finding that since there was no dispute that the Home policy was capable of being collected, there was no reason to graft a requirement that the other insurance fully compensate the plaintiff onto the UUT policy.

The court went on to reject application of the *Hardware Dealers* case to the analysis because the UUT policy did not contain an excess clause and there was nothing to suggest that the policy was intended to provide excess insurance. The court ultimately affirmed summary judgment for UUT because it did not agree to provide excess insurance and the policy's escape clause was unambiguous.

The San Antonio Court of Appeals recently dealt with an other insurance conundrum involving excess vs. excess clauses in *Safeco Lloyds Ins. Co. v. Allstate Ins. Co.*, 2009 Tex. App. LEXIS 9691 (Tex. App.—San Antonio 2009, no pet.). In this case, Ramos was driving a pickup owned by her brother when she was involved in an accident. The pickup was insured under a policy issued by Safeco to the father of Ramos. Ramos had her own Allstate policy for her personal vehicle. The Safeco policy contained the following other insurance clause:

> If there is other applicable liability insurance available any insurance we provide shall be excess over any other applicable liability insurance. If more than one policy applies on an excess basis, we will bear our proportionate share with other collectible liability insurance.

The Allstate policy provided:

> If there is other applicable liability insurance we will pay only our share of the loss. Our share is the portion that our limit of liability bears to the total of all applicable limits.
>
> However, any liability insurance we provide to a covered person for the maintenance or use of the vehicle you do not own shall be excess over any other applicable liability insurance.

Id. at *3.

Allstate refused to contribute on a pro rata basis with Safeco arguing that the insurance followed the vehicle not the driver and its policy only provided excess coverage for a non-owned auto. The court rejected the "insurance follows the car" rule noting that if such a rule existed in Texas, the Texas Supreme Court would have had no reason to address the conflicting insurance clause in *Hardware Dealers*. *Id.* at *225.

Allstate also argued that Safeco violated public policy by changing the wording in its policy in an attempt to turn every other insurer's excess coverage into primary coverage. The court likewise rejected this argument, noting that the "other insurance" provision in Safeco's policy had been approved by the insurance commissioner as required by law. *Id.* at 27.

Instead, the court held that the test announced by the Texas Supreme Court in *Hardware Dealers* applied. Applying this test, the court first noted that it must determine if the insured had coverage from either one of the two policies, but for the other. The court first noted that the Safeco policy covered the Mazda that was involved in the accident and the policy provided that Safeco would pay any damages for which any insured becomes legally responsible. The court found that Ramos was an insured under the Safeco policy because she was using the pickup with the permission of the named insured. *Id.* at *16. The court noted that Ramos was also covered under the Allstate policy issued to her because she was a covered person and was using a vehicle that qualified for coverage. The court concluded that the first part of the test was satisfied. *Id.* at *17.

The court then turned to the second part of the test that requires the court to determine if each policy contains a provision which is reasonably subject to a construction that it conflicts with a provision in the other concurrent insurance. The court held this test too was satisfied. The court concluded that a reasonable interpretation of the two other insurance clauses at issue was that each purported to be excess to other liability insurance, thus creating the type of conflict described in *Hardware Dealers*. *Id.* at *18.

Accordingly, the court ruled that the "offending" provisions must be ignored and each carrier shared liability on a pro rata basis in proportion to the amount of insurance provided by their respective policies. *Id.* at *28.

OTHER INSURANCE CLAUSES AND UM/UIM COVERAGE

Different rules apply to the world of uninsured/underinsured motorists claims, especially as they apply to coverage for non-owned autos.

> If there is other applicable similar insurance we will pay only our share of the loss. Our share is the proportion that our limit of liability bears to the total of all applicable limits. However, any insurance we provide with respect to a vehicle you do not own shall be excess over any other applicable collectible insurance.

Public policy in Texas strongly favors providing UM/UIM coverage. In fact, unless an insured has specifically rejected such coverage in writing, that coverage will be imposed by statute. *See Howard v. INA County Mut. Ins. Co.*, 933 S.W.2d 212 (Tex. App.—Dallas 1996, writ denied); TEX. INS. CODE ANN. § 1952.101 (Vernon 2009).

In *American Liberty Ins. Co. v. Ranzau*, 481 S.W.2d 793 (Tex. 1972), the Texas Supreme Court held that the "other insurance" clause could not be construed to limit the recovery of actual damages caused by an uninsured motorist. The court noted that the statutory scheme does not limit the recovery of actual damages to the statutory limits of a single policy. This case involved two minimum limits policies, and the carrier that had the non-owned coverage sought to limit the coverage available to the insured to a single, minimum limit – effectively eliminating its own liability based on the fact that its coverage was excess.

The court noted that the insured paid a premium for UM/UIM coverage and was entitled to the contractual benefit paid for. To eliminate coverage under the policy by virtue of the other insurance clause would "frustrate the insurance benefits which the statute sought to guarantee and which were purchased by the respective insureds." *Id.* at 797. Interestingly, the court did not permit the insured to stack the two policies so as to double the amount of coverage available – it merely found that the non-owned auto carrier with the excess clause could not escape coverage.

Two years later, the Texas Supreme Court once again addressed other insurance clauses and UM/UIM coverage in *American Motorists Ins. Co. v. Briggs*, 514 S.W.2d 233 (Tex. 1974). This case likewise dealt with to minimum limits policies. The court held:

> Following [*Ranzau*], we now hold that the [UM/UIM] statute requires that whenever coverage exists under the uninsured motorist endorsement, the person covered has a cause of action on the policy for his actual damages to the extent of the policy limits without regard to the existence of other insurance. If coverage exists under two or more policies, liability on the policies is joint and several to the extent of plaintiff's actual damages, subject to the qualification that no insurer may be required to pay in excess of its policy limits.

Id. at 236.

While explicitly noting that the court was following its earlier decision, there is a glaring inconsistency between the two opinions – the total amount of potentially covered liability. In *Ranzau*, the Texas Supreme Court held that the insured only had the statutory minimum for coverage, although her damages far exceeded the combined policy amounts ($10,000 per policy). In other words, she could only recover $10,000 between the two carriers. In *Briggs* on the other hand, the court permitted a recovery up to policy limits from each carrier to the extent actual damages were that high. In other words, under the later opinion, each carrier is jointly and severally liability to the injured claimant up to its policy limits.[3]

In a more recent case, the Texas Supreme Court sought to explain the reasoning in *Briggs.* The court held that its prior cases "stand for the proposition that offsets in the UM/UIM section of the policy are ineffective to the extent that they prevent recovery of actual damages or reduce UM protection below the minimum limits required by the UM statute." *Mid-Century Ins. Co. v. Kidd*, 997 S.W.2d 265, 270 (Tex. 1999).

The court did not even address the fact that the policies in *Briggs* were minimum limits policies.

Therefore, under current Texas law, multiple UM/UIM carriers are jointly and severally liable for the claimant's actual damages, subject only to their policy limits, and the other insurance provision does not apply. The non-owned auto carrier cannot rely on the clause to limit its obligations to the insured.

[3] The policies in *Briggs* both provided the statutory minimum in coverage limits. Given the language in *Ranzau*, it is not clear whether the court was actually talking about policy limits (whatever those might be) or was talking about the limits set by statute. Given the public policy regarding UM/UIM coverage, it is likely that the court would provide the same result whether the policy limits were at statutory minimums or were for a greater sum.

One question that was not addressed by any of the opinions above is how the other insurance clause applies as between the carriers. In fact, the court in *Briggs* specifically noted that "[w]e are not confronted here with any claims of rights of the insurers *inter se*." 514 S.W.2d at 236. There is no public policy issue at play that would reduce or eliminate the effectiveness of the other insurance provision as between carriers. The outcome of this issue must await another day.

CONCLUSION

As previously noted, it appeared that many of the issues regarding other insurance clauses had already been conclusively decided years ago. However, questions regarding application of these clauses continue today. Courts continue to be faced with deciding how to resolve conflicts between these clauses. Carriers will continue to attempt to come up with creative ways to try to get around established case law.

About the Author:

Craig L. Reese – Partner of the firm, Craig leads the appellate and coverage practice group. He has over 23 years practice experience including appeals at the federal and state level, insurance coverage/defense, and commercial litigation. His appellate experience includes cases before every level of the state courts of appeals and appeals to the Fifth Circuit Court of Appeals.