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award in lieu of homestead to ten thousand dollars.[18] Although the value of the homestead exemption has not, as yet, been changed, and remains six thousand dollars,[19] there is a provision in the new probate code that, if the value of the homestead is less than ten thousand dollars, the court shall award additional property so that the total shall equal ten thousand dollars.[20] Thus, in situations similar to the principal case, the fact that the homestead value is lower than the award *in lieu of* homestead would not be significant because of the award *in addition to* homestead. There is, however, no reason for the variance, and the legislature should act to equalize the values.

EFFECT OF CONFLICTING "OTHER INSURANCE" CLAUSES

Plaintiff was seriously injured when an automobile in which she was a passenger collided with another vehicle driven by an uninsured operator. Plaintiff's automobile insurance policy, issued by defendant, included coverage for bodily injury caused by uninsured motorists. Excluded from this coverage, however, was injury sustained in an automobile not owned by plaintiff, if the owner had "similar insurance" which was available to plaintiff.[1] The owner of the automobile in which plaintiff was injured also carried insurance containing uninsured motorist coverage. His policy, written by another company, contained a pro rata clause restricting coverage to a proportionate share of the loss if the insured had other similar insurance available.[2] Being an "insured" by definition, plaintiff received the maximum payment under the latter policy, but defendant denied liability because of its policy's

[18] WASH. REV. CODE § 11.52.010 (1965).
[19] WASH. REV. CODE § 6.12.050 (1956).
[20] WASH. REV. CODE § 11.52.022 (1965).

[1] The exclusionary, or "escape" clause, read as follows, 66 Wash. Dec. 2d at 858, 405 P.2d at 713:

> This Section of the Policy does not apply: 1. to bodily injury of an insured sustained while in or upon, entering into or alighting from, any automobile, if the owner has insurance similar to that afforded by this Section and such insurance is available to the insured....

[2] This pro rata clause read as follows, 66 Wash. Dec. 2d at 858-59, 405 P.2d at 713:

> Except as provided in the foregoing paragraph, if the insured has other similar insurance available to him and applicable to the accident, the damages shall be deemed not to exceed the higher of the applicable limits of liability of this insurance and such other insurance, and the Company shall not be liable for a greater proportion of any loss to which this Uninsured Motorists Coverage applies than the limit of liability hereunder bears to the sum of the applicable limits of liability of this insurance and such other insurance.

exclusion. Plaintiff sought a judgment declaring that defendant's policy be interpreted to provide primary insurance coverage or, in the alternative, excess coverage over and above any other available insurance.[3] The trial court dismissed the complaint. On appeal, the Washington Supreme Court affirmed. *Held*: Availability of an insurance policy containing a pro rata clause effectuates the escape clause of another policy which denies coverage or liability if other similar insurance is available. *Miller v. Allstate Ins. Co.*, 66 Wash. Dec. 2d 857, 405 P.2d 712 (1965).

In response to the public's growing need for broader protection, automobile liability insurers now offer expanded coverage to prospective purchasers.[4] As a result, a particular loss or injury may be covered by more than one insurance policy.[5] To avoid concurrent or "double" coverage, "other insurance" clauses are often found in insurance policies.[6] These clauses are generally classified as *escape*,[7] *excess*,[8] or *pro rata* clauses.[9] Conflicts arise, however, when each of two applicable insurance policies purports to restrict or terminate

[3] Plaintiff alleged damages not in excess of $32,000, and both policies limited liability to $10,000.

[4] See generally Grad, *Recent Developments in Automobile Accident Compensation*, 50 COLUM. L. REV. 300 (1950).

[5] The scope of coverage has been expanded by "omnibus," "drive-other-car," "hired car," "non-ownership," and "substitute car" clauses, and other common provisions. Furthermore, many persons, organizations, and automobiles not described in an insurance policy may be included as insureds although the named insured alone assumes the premium obligations. See Gorton, *A Further Study of the Effect of the "Other Insurance" Provision Upon Automobile Liability Insurance*, 16 INS. COUNSEL J. 190 (1949); Note, *Automobile Liability Insurance—Effect of Double Coverage and "Other Insurance" Clauses*, 38 MINN. L. REV. 838 (1954).

[6] See generally 8 APPLEMAN, INSURANCE LAW & PRACTICE § 4911 (1962).

[7] An *escape* clause provides that the policy affords no coverage at all when there is other applicable insurance available. See, *e.g.*, the following clause discussed in Continental Cas. Co. v. Curtis Publishing Co., 94 F.2d 710, 711 (3d Cir. 1938): "If any person... is, under the terms of this policy, entitled to be indemnified thereunder and is also covered by other valid and collectable insurance, such other person ... shall not be indemnified under this policy."

[8] The typical *excess* clause provides that the insurer's liability shall be only the amount by which the loss exceeds the coverage of all other available insurance, up to the limits of the excess policy. See, *e.g.*, the following clause discussed in Cimarron Ins. Co. v. Travelers Ins. Co., 224 Ore. 57, 355 P.2d 742, 750 (1960): "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."

[9] A *pro rata* clause provides that the insurer will pay only a prorated share of the loss, usually in the proportion which its policy limit bears to the aggregate limits of all other valid and collectable insurance. See, *e.g.*, the clause discussed in Woodrich Constr. Co. v. Indemnity Ins. Co., 252 Minn. 86, 89 N.W.2d 412, 422 (1959):

> 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 Declarations bears to the total applicable limit of liability of all valid and collectable insurance against such loss.

liability for a particular risk in the event that there is other insurance available.

In most cases, such a conflict causes one insurer to sue the other to obtain contribution or to determine their respective liabilities to a common insured. The principal case is unusual, besides being of first impression, because the contest was between an insured and one of two insurers. As a consequence, the court was able to treat the case as a question of interpretation of the parties' contract. The contract's escape clause absolved defendant from liability if plaintiff could recover under "insurance similar to that afforded"[10] by defendant's policy. The court proceeded to define "similar" as not synonymous with "identical," but meaning "a general resemblance in the essential elements."[11] Because plaintiff was covered by two policies providing "the same amount of insurance to the same beneficiaries for the same injuries caused by the same type of automobiles,"[12] defendant was held exempt from liability pursuant to its insurance contract. The court went on to state that the better rule gives effect to an escape clause at the expense of a pro rata clause when the two conflict. As a result, insurance with a pro rata clause is considered similar to escape clause insurance, but the converse is not true. The court emphasized, however, that this case was a suit between an insured and her insurer, not two insurance companies, and involved uninsured motorist coverage, not ordinary liability policies. What the result would have been without these factors present was left open to conjecture.

As stated by the court, the principal case falls within "an area of law which is nebulous, unsettled, and devoid of uniformity or agreement."[13] Courts have used several methods to resolve conflicts between "other insurance" clauses. They include the "prior in time" theory, giving effect to the clause in the later issued policy;[14] the "specific

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[10] See note 1 *supra.*

[11] 66 Wash. Dec. 2d at 861, 405 P.2d at 714.

[12] *Ibid.*

[13] 66 Wash. Dec. 2d at 859, 405 P.2d at 713. See Oregon Auto. Ins. Co. v. United States Fid. & Guar. Co., 195 F.2d 958, 959-60 (9th Cir. 1952).

[14] The reasoning is that, since no other insurance existed when the first policy was issued, its clause is ineffective and the second policy's clause must control. See, *e.g.,* New Amsterdam Cas. Co. v. Hartford Acc. & Indem. Co., 108 F.2d 653 (6th Cir. 1940). Ignored, however, is the fact that neither clause can take effect until the moment of loss or injury, and at that time both policies are in force. See Russ, *The Double Insurance Problem—A Proposal,* 13 HASTINGS L.J. 183, 184 (1961); Note, *Concurrent Coverage in Automobile Liability Insurance,* 65 COLUM. L. REV. 319, 321 (1965); Note, 38 MINN. L. REV. 838, 845-47 (1954).

versus general" theory, holding primarily liable the insurer whose policy offers the most specific protection against the particular loss;[15] and the "primary tortfeasor" theory, imposing primary liability upon the insurer whose named insured is the primary tortfeasor.[16] These formulas have proved unworkable, however, due to the increased complexity of double coverage situations, and have been rejected by most jurisdictions.[17]

Recently, the courts have developed a system of priorities by which "other insurance" clauses are paired and one type of clause is favored over another depending on the type of clause opposing it in the particular case.[18] The results are fairly uniform among jurisdictions if clauses of the same type are involved. Courts will generally order proration if both policies have pro rata clauses.[19] Proration is usually the result, also, when two excess clauses are opposed, since effect cannot be given to both.[20] The same result should occur when two escape clauses are involved.[21] Less uniformity exists among jurisdictions, however, when clauses of differing types are involved. Washington follows the general rule which gives full effect to an excess clause when paired with a pro rata clause, disregarding the latter.[22] When an escape clause is matched with an excess clause, the escape clause policy

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[15] See, *e.g.*, Hartford Steam Boiler Inspection & Ins. Co. v. Cochran Mill & Ginnery Co., 26 Ga. App. 288, 105 S.E. 856 (1921). This theory fails, however, when, as in most cases, both insurers specifically cover the particular loss in question. See Russ, *supra* note 14, at 185; Note, 65 COLUM. L. REV. 319, 321-22 (1965); Note, 38 MINN. L. REV. 838, 841-43 (1954).

[16] See, *e.g.*, American Auto. Ins. Co. v. Pennsylvania Mut. Indem. Co. 161 F.2d 62 (3d Cir. 1947). This theory, however, fails to provide for a case in which the person causing the loss or suffering the injury is an additional insured not named in either policy. Moreover, it can not be applied to the problem presented by the principal case. See Russ, *supra* note 14, at 184-85; Note, 65 COLUM. L. REV. 319, 322 (1965); Note, 38 MINN. L. REV. 838, 843-45 (1954).

[17] See Oregon Auto. Ins. Co. v. United States Fid. & Guar. Co., 195 F.2d 958, 960 (9th Cir. 1952); Russ, *supra* note 14, at 185.

[18] See Russ, *supra* note 14, at 186; Note, 65 COLUM. L. REV. 319, 321 n.16 (1965). See generally Note, 28 IND. L.J. 429 (1953); Note, 38 MINN. L. REV. 838 (1954); Note, 5 STAN. L. REV. 147 (1952); Note, 1 WILLIAMETTE L.J. 485 (1961); Annot., 46 A.L.R.2d 1163 (1956).

[19] *E.g.*, Case v. Fidelity & Cas. Co. of N.Y., 105 N.H. 422, 201 A.2d 897 (1964); Annot., 21 A.L.R.2d 611 (1952).

[20] *E.g.*, Insurance Co. of Tex. v. Employers Liab. Assur. Corp., 163 F. Supp. 143 (S.D. Cal. 1958); Continental Cas. v. Buckeye Union Cas. Co. 75 Ohio L. Abs., 79, 143 N.E.2d 169 (C.P. 1957).

[21] There seems to be no American case reported, but see the English case of Weddel v. Road Transp. & Gen. Ins. Co., [1932] 2 K.B. 563 (1931).

[22] Safeco Ins. Co. of America, Inc. v. Pacific Indem. Co., 66 Wash. Dec. 2d 33, 401 P.2d 205 (1965). *Accord*, Continental Cas. Co. v. American Fid. Ins. Co., 275 F.2d 381 (7th Cir. 1960); Citizens Mut. Auto. Ins. Co. v. Liberty Mut. Ins. Co., 273 F.2d 189 (6th Cir. 1959); American Sur. Co. v. Canal Ins. Co., 258 F.2d 934 (4th Cir. 1958). *Contra*, Lamb-Weston, Inc. v. Oregon Auto. Ins. Co., 219 Ore. 110, 341 P.2d 110, *modified*, 219 Ore. 129, 346 P.2d 643 (1959) (proration ordered).

is generally construed as primary insurance, holding the latter policy liable only for any excess.[23]

The greatest uncertainty appears in the pro rata-versus-escape clause situation, present in the principal case. Few courts have had to resolve such a conflict. It seems certain that California,[24] and perhaps Oregon[25] would give effect to the pro rata clause and not the escape clause. Most commentators seem to favor proration in such a situation.[26] There are cases, however, in which the clauses were held not mutually repugnant, and proration was rejected.[27] The result in these cases, giving effect to the escape clause, was purported to rest on construction of the language in the policy.[28] The pro rata clause in the other policy was found not applicable because no other insurance was considered available.

This system of matching or pairing "other insurance" clauses, however, appears as unsatisfactory as the earlier formulas. The courts have not been able to offer any real justification for preferring one type of clause over another. Furthermore, the system provides no solution when more than two insurance policies are involved and each has a different clause. A court in such a situation would have to pick arbitrarily two clauses to compare first, thereafter proceeding in a "round-robin" fashion. And, as admitted by the court in the principal case, results under the priority system are usually based on circular reasoning.[29]

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[23] *E.g.*, Continental Cas. Co. v. Suttenfield, 236 F.2d 433 (5th Cir. 1956); Zurich Gen. Acc. & Liab. Ins. Co. v. Clamor, 124 F.2d 717 (7th Cir. 1941); Michigan Alkali Co. v. Bankers Indem. Ins. Co., 103 F.2d 345 (2d Cir. 1939). *Contra*, Oregon Auto. Ins. Co., v. United States Fid. & Guar. Co., 195 F.2d 958 (9th Cir. 1952) (proration ordered); Employers' Liab. Assur. Corp. v. Pacific Employers' Ins. Co., 102 Cal. App. 2d 188, 227 P.2d 53 (1951) (proration ordered).

[24] 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 (Dist. Ct. App. 1949).

[25] Oregon would probably be in accord. See Lamb-Weston, Inc. v. Oregon Auto. Ins. Co., 219 Ore. 110, 129, 341 P.2d 110, 119 (1959):

> 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.

[26] See Russ, *supra* note 14, at 191; Note, 65 COLUM. L. REV. 319, 332 (1965); Note, 38 MINN. L. REV. 838, 854 (1954); Note, 5 STAN. L. REV. 147, 150 (1952); Note, 1 WILLAMETTE L.J. 485, 487 n.22 (1961).

[27] McFarland v. Chicago Express, Inc., 200 F.2d 5 (7th Cir. 1952); Burcham v. Farmers Ins. Exch., 255 Iowa 69, 121 N.W.2d 500 (1963). *Cf.* Motor Vehicle Cas. Co. v. Le Mars Mut. Ins. Co., 254 Iowa 68, 116 N.W.2d 434 (1962).

[28] "It is clear the companies intended to sell less coverage and the insureds to buy less coverage, 'while occupying an automobile not owned by a named insured.'" Burcham v. Farmers Ins. Exch., *supra* note 27, at 503.

[29] 66 Wash. Dec. 2d at 862, 405 P.2d at 715, quoting Burcham v. Farmers Ins. Exch., 255 Iowa 69, 121 N.W.2d 500, 503 (1963):

A few suggestions have been made as possible solutions to conflicts between "other insurance" clauses. One is to extend the trend developing in California and Oregon, and to have courts ignore the clauses and order proration in all cases.[30] Another suggestion is to have insurers draft standard forms that clearly state how they intend liability to be apportioned when "other insurance" clauses conflict. One commentator places a large part of the blame for the increasing litigation in this area on the insurance industry for their inaction.[31] A legislative solution has been proposed which would generally outlaw escape and modified escape clauses, limit the use of excess clauses, and favor the pro rata clause.[32]

In any case, it should be made certain that the insured will not receive less coverage than if he were protected by only one policy. The coincidence of having two policies covering the same loss should not cause a "forfeiture" but simply present the issue of apportionment.[33] The principal case indicates that the Washington court does not favor wholesale proration, but will continue fixing responsibility on one insurer or the other in appropriate cases.

QUASI-CONTRACTUAL RECOVERY WHEN MUNICIPAL CONTRACT ULTRA VIRES

While plaintiff's shopping center was under construction, defendant second-class municipality prepared for installation of a stop light to aid traffic going to and from the center. A contractor was hired and the design was approved, but funds were not budgeted for the project. With the shopping center nearing completion, it was agreed that plaintiff would pay the cost of installation and defendant city would reimburse him out of the following year's budget. The city, without calling for bids on the contract, hired a contractor and plaintiff paid the cost of the traffic signal and its installation. In plaintiff's suit on

Though the reasoning may be criticized as circular and arbitrary, we believe the better rule is that where the insurance companies would be both liable except for the other, the excess-escape clause policy should be held to be not other similar insurance to the policy containing the pro rata clause, conversely, the policy with only its pro rata clause applicable is regarded as other similar insurance as used in the excess-escape policy.

[30] See Note, 38 MINN. L. REV. 838 (1954); Note, 1 WILLAMETTE L.J. 485 (1961).
[31] Note, 65 COLUM. L. REV. 319, 331-32 (1965).
[32] Russ, *The Double Insurance Problem—A Proposal*, 13 HASTINGS L.J. 183, 191-93 (1961).
[33] Note, 65 COLUM. L. REV. 319, 321 (1965).