Insurance - Effect of Other Insurance - In Conflict between Excess Clause of One Policy and Escape Clause of Another, Excess Clause Is Not Mutually Repugnant to Escape Clause

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Insurance—Effect of Other Insurance—in Conflict Between Excess Clause of One Policy and Escape Clause of Another, Excess Clause Is Not Mutually Repugnant to Escape Clause.—In New Amsterdam Cas. Co. v. Certain Underwriters at Lloyds, 34 Ill. 2d 424, 216 N.E.2d 665 (1966), the Illinois Supreme Court was presented with the so-called “other insurance” problem which occurs when a party is apparently entitled to indemnification from two companies. This case involved two auto liability insurance policies. The driver’s policy had an “excess” clause, which meant that when driving an automobile other than his own the policy would not be resorted to until “other applicable insurance” was exhausted.1 The owner’s policy had an “escape” clause, which meant that when the driver had his own insurance, i.e., “other valid and collectible insurance,” the policy would not extend coverage at all.2 The court held that the driver’s insurance was not “other valid and collectible insurance” since the liability was less than the amount of the owner’s policy and therefore the driver’s “excess” insurance never came into being.

Chester A. Fiske was involved in an accident while driving an automobile rented from HAV-A-KAR, an auto rental company whose cars were insured by defendant, Lloyds. Fiske himself had purchased insurance for liability arising out of the use of his own automobile and any other car he might operate.

After the accident, suit was filed against Fiske by the driver of the other car. Fiske forwarded the summons to his insurance company, the New Amsterdam Casualty Co. They requested Lloyds to defend the suit. Lloyds refused, so the New Amsterdam Casualty Co. proceeded with the defense, settled the case, and brought this action against Lloyds for reimbursement of the amount paid in settlement and the expense of the defense.

At the trial in the Municipal Court of Chicago, judgment was rendered for the defendant. On appeal, the First District Appellate Court reversed the judgment and ruled that each insurer was liable in proportion to the amount of insurance provided in its policy.3 A petition for leave to appeal was granted by the Illinois Supreme Court. The judgment of the Appellate Court was reversed and the cause remanded to the Circuit Court of Cook County with directions to enter a judgment in favor of plaintiff for the full amount of damage and expense.

1 “OTHER INSURANCE... The insurance with respect to... other automobiles under Insuring Agreement V shall be excess insurance over any other valid and collectible insurance available to insured, either as an insured under a policy applicable with respect to said automobile or otherwise.”

2 “OTHER INSURANCE... If any person, firm, or corporation other than the Assured named in the Schedule is, under the terms of this policy, entitled to be indemnified hereunder and is also covered by other valid and collectible insurance, such other person, firm, or corporation shall not be indemnified under this policy.”

DISCUSSION OF RECENT DECISIONS

Generally speaking, there are two approaches to the problem of this case. The majority rule attempts to give effect to “other insurance” clauses according to their intent. There is more specific intent in an “excess” clause than an “escape” clause. The former denies coverage only in a certain instance while the denial of coverage in the latter is much more broad. By specifying the special instance of coverage when the other policy is exhausted, the “excess” policy avoids becoming “other valid and collectible” insurance as set forth in an “escape” clause policy because there is no excess coverage until the “escape” clause policy is exhausted. In such a case the “escape” policy must bear full liability to the limit of the policy.4

The minority rule focuses on the effect of “other insurance” clauses. Whatever the language, the effect is a conflicting attempt to limit or avoid liability. As such they are repugnant to one another, and since they are repugnant, the minority rejects them altogether. When both are rejected, coverage is provided by pro-rating the liability according to the value of the conflicting policies. Accordingly, an escape clause becomes identical to an excess clause.5

Before this case was decided by the Illinois Supreme Court, the Illinois Appellate Court decisions were not consistent. Some followed the minority rule6 and some followed the majority rule.7

In the Illinois Supreme Court, New Amsterdam contended that when its insured was driving a car, other than the auto named in the policy, its policy provided coverage only in excess of the coverage provided by “other valid and collectible insurance.” Therefore, the coverage of the Lloyds policy would have to be exhausted before New Amsterdam would become liable for the excess.

But Lloyds contended Fiske was covered by “other valid and collectible insurance.” In fact, Fiske was insured by New Amsterdam and since Lloyds’ policy specifically denied any coverage at all when “other insurance” was available, Lloyds should not bear the cost of the coverage.

Lloyds also argued in the alternative, with the minority rule in mind, that if New Amsterdam was not primarily liable, the correct solution was a pro-rata of the loss. Lloyds’ policy admittedly was written to escape

5 Oregon Auto Ins. Co. v. United States Fid. & Guar. Co., 195 F.2d 958 (9th Cir. 1952).
liability if there was another policy applicable. Lloyds contended that the effect of the New Amsterdam policy was the same. If both policies were given the effect desired (escaping liability), there would be no insurance at all. By thus characterizing both clauses as escape clauses with identical effect, Lloyds said there was no other valid collectible insurance within the meaning of either policy. But since both policies extended coverage they ought to share the loss according to the value of each policy.

The Illinois Supreme Court held that the plaintiff's policy extended coverage to Fiske only to the extent that it might be in excess of valid, collectible insurance available to him under the Lloyds policy. Lloyds' "other insurance" or "escape" clause was found to be without effect because that policy covered the total amount of the damages. Because liability never exceeded the amount of the Lloyds' policy, the plaintiff's insurance was not "other" insurance but "excess" insurance. The court also held that New Amsterdam was entitled to reimbursement for the expense of defending Fiske as well as damages.

With this decision on the point for the first time in the Illinois Supreme Court, Illinois joins the majority of courts which have considered the question. To follow the minority rule would be to characterize every "other insurance" clause as identical with every other regardless of the language used. But the principles involved in interpretation and construction of insurance contracts are the same as those involved in construing other contracts. One of these principles is that the courts do not make contracts for litigants. But the minority rule has something of this effect. While it conveniently solves the dilemma presented by "other insurance" conflicts, it ignores the attempt of insurance companies to write policies for particular situations. It is evident that one reason for an "other insurance" clause is to avoid liability. It is not inconceivable, however, that an insurance buyer might prefer one sort of "other insurance" clause over another. Such a preference is negated by the minority rule.

Disregarding the buyer's viewpoint, but giving attention to the principles of contract interpretation, it remains preferable that the parties to the contract should write the contract, not the courts. This decision gives effect to this preference. In Illinois now, insurance companies will write the policies and the courts will bear with the inconvenience of determining the meaning of one insurance clause as against another. In Illinois, the literal meaning of the words used in an insurance contract, e.g., "excess," will be more important than the fact that two insurance clauses apparently conflict with one another because they both contain "other insurance" clauses.

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8 Supra note 4.