

# When more than one insurance policy provides coverage, which policy provides primary coverage?

## Interpreting 'Other Insurance' Clauses

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### Issue:

We currently have a case in which an employee who was driving a vehicle owned and insured by the employee. The employer has a commercial auto policy which states that for any covered auto not owned by the employer, the insurance coverage is excess over any other collectible insurance. The employee's policy states that if there is other applicable similar insurance from any other policy that applies to a loss covered by [its policy], they will pay only their share.

### Circumstances Giving Rise to Coverage of Multiple Policies:

- Employer Vicarious Liability: When an employee is driving his own vehicle on behalf of his employer and the employee has a personal auto policy for his vehicle and the employer has a commercial auto policy for vehicles driven by their employees.
- Car Rental/Lease: When the leasee has a personal auto policy and the leasor (car rental company) also provides coverage for the leased auto. Of note, in 2005 President Bush signed into law the new Federal Transportation Funding Act (hereinafter the Act). Contained in the Act is a statute which pre-empts vicarious liability which arises by reason of being the owner of the rented or leased vehicle.
- Test Drive: When a customer of a car dealership is involved in an accident while test driving a vehicle and the customer has a personal auto policy and the dealership has a commercial auto policy covering their inventory.
- Borrowed Car: When the driver is driving a vehicle owned by another and both the driver and the owner have insurance.

### Types of Other Insurance Clauses:

- The Escape Clause: Escape clauses are those providing that in the event of other insurance, the insurer issuing the policy in question is not liable at all;
- The Excess Clause: Excess clauses are those providing that in the event of other

insurance, the coverage offered by the policy shall be in excess of the limits of the other policy; and

- The Pro Rata Clause: Pro rata clauses are those providing that in the event of other insurance, the insurer issuing the policy in question shall be liable only for the proportion of the loss that represents the ratio between the limit of liability stated therein and the total limit of liability of all valid and collectible insurance covering the loss.

W.R. Habeeb, *Apportionment of Liability Between Automobile Liability Insurers Where One of the Policies Has an "Excess Insurance" Clause and the Other a "Proportionate" or "Prorata" Clause*, 76 A.L.R. 502 (2009).

### **Policy Interpretation:**

- Pro Rata v. Pro Rata Other Insurance Language: When more than one insurance policy covers the same insured and each policy contains a pro rate clause, each policy covers their pro rata share. 21 A.L.R.2d 611 (2009).
- Excess v. Excess Other Insurance Language: If concurrent policies provide coverage only to the extent that other insurance is not available, such excess provisions are ignored, and the loss is prorated between the insurers based on their combined policy limits. *Federated Ins. v. Iowa Mut. Ins. Co.*, 659 N.W.2d 207, 208 (Iowa 2003).

*John Deere Ins. Co. v. De Smet Ins. Co.*, 650 N.W.2d 601 (Iowa 2002). An employee incurred liability while driving a vehicle of a co-employee on behalf of his employer. The policies issued to the employer and co-employee were determined to be co-primary in accordance with their 'other insurance' clauses. The employee's 'other insurance' clause stated that "if there is other applicable liability insurance, we will pay our share of the loss," but "any insurance we provide for a vehicle you do not own shall be excess." The employer's 'other insurance' clause stated the coverage was primary for any auto owned by the employer, but for any auto not owned by the employer, the coverage was excess. Since both policies contained excess language, the damages were divided on a pro rata basis.

*Westfield Ins. Co. v. Economy Fire & Cas. Co.*, 623 N.W.2d 871 (Iowa 2001). An employer rented a vehicle to be driven by its employee. While driving the car, the employee was involved in an accident. The plaintiff brought suit against the employee driver, the employer who rented the car, the rental car company, and the company from whom the rental car company leased the car. The Iowa Supreme Court held that each 'other insurance' clauses were all repugnant to the other in that they only provided excess liability coverage and, thus, pro rata distribution was required since there was no primary insurer. This ruling would be

different if this case were tried today in light of the 2005 pre-emptive federal statute.

*Illinois Nat. Ins. Co. v. Farm Bureau Mut. Ins. Co.*, 578 N.W.2d 670 (Iowa 1998). A man fell from a truck operated by the brother of an insured. The brother also had a liability policy. The policy held by the owner of the truck was considered primary and the carrier paid its limits. The driver of the truck had two policies. The Farm Bureau policy stated that it was excess over any other valid and collectible insurance and the Illinois National policy stated that if there was other applicable liability insurance, it would pay only its share of the loss, unless the vehicle was not owned by the insured, and then coverage was excess. Since both policies were excess, the court applied the pro rata rule.

- Excess v. Escape Other Insurance Language: When one policy contains an excess clause and another policy contains an escape clause, those clauses are mutually repugnant and the loss is pro-rated between the insurers. *Union Ins. Co. v. Iowa Hardware Mut. Ins. Co.*, 175 N.W.2d 413, 418 (Iowa 1970).

*Aid Ins. Co. V. United Fire & Cas. Co.*, 445 N.W.2d 767 (Iowa 1989). While test driving a vehicle owned by a car dealership, a driver struck and injured a child. The child's parents brought suit against the driver and the dealership. The driver carried a personal auto policy which provided that any insurance provided for a vehicle not owned by the insured would be excess coverage. The car dealership's policy provided that a customer driving a vehicle owned by the dealership with its permission was not covered unless that customer had no other available insurance. The clause contained in the dealership's policy was deemed an escape clause. Accordingly, the court deemed the excess clause and the escape clause to be mutually repugnant. Thus, the damages were divided between the insurance carriers pro rata.

- Excess v. Pro Rata Other Insurance Language: This is the situation in our current case.

*Grinnell Mutual Reinsurance Co. v. Globe American Cas. Co.*, 426 N.W.2d 635 (Iowa 1988). A driver was injured while driving a car owned by another when it was struck by an uninsured driver. The excess clause of the owner's insurance policy competed with a pro rata clause of the driver's policy. The Supreme Court of Iowa held that where an excess clause of an owner's insurance policy competed with a pro rata clause of a driver's policy, the excess carrier would pay only to the extent the pro rata insurance policy failed to satisfy the claim. In other words, the pro rata policy was deemed primary.

