

# Insurance - "Other Insurance" Clauses - Conflict Between Escape Clauses and Excess Clauses

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a car is being used in the automobile business are increased, and have permitted the insurer to limit the risk it desires to assume. It should be observed that the exclusion forces the claimant to rely on the service station's policy of insurance.

The construction of the clause "used in the automobile business" by the court in the instant case appears sound. A service station attendant or a mechanic driving a customer's automobile to or from the customer is not using it in the sense in which a demonstrator, tow truck, or parts-delivery vehicle is used. However, since the wording of the clause in question has been changed in an attempt to avoid the result of the instant case, some uncertainty will remain until the Louisiana Supreme Court is presented with the problem of *Dumas*. As the decision in *Dumas* was based on the fact that the work had been completed and the car was being returned, the question whether there will be coverage under the new Family Policy if an accident occurs while the attendant is driving the vehicle to the service station and before work is begun remains unanswered. The court in *Dumas* indicated that the exclusionary clause applies only while the car is actually being serviced.<sup>17</sup> Therefore, since a vehicle being taken to the station is not actually being serviced, the policy will probably afford coverage. The exclusionary clause interpreted in the *Nyman* case has not been changed, and the courts will probably follow *Nyman* when dealing with a Standard Policy. If the Supreme Court adopts the *Dumas* rule, an owned automobile would be covered by a Family Policy but not by a Standard Policy under the facts of the instant case. Such a result would be anomalous, since the intention of the parties under both policies is undoubtedly the same.

*Raleigh Newman*

#### INSURANCE — "OTHER INSURANCE" CLAUSES — CONFLICT BETWEEN ESCAPE CLAUSES AND EXCESS CLAUSES

An automobile liability insurance policy issued by State Farm to Grigsby provided that coverage "with respect to a temporary substitute auto or nonowned auto shall be excess insurance over

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17. 181 So.2d 841, 843 (1965): "We think it is abundantly clear under the facts of the instant case that the exclusionary clause of the policy would have applied to Waldrop service station manager who was driving the automobile at the time of the accident] only while he was actually engaged in servicing the Brady automobile."

any other valid and collectible insurance." The insured automobile was traded on a later model, and while awaiting delivery of the new car Grigsby was given the use of another car by the dealer. The dealer's liability policy, issued by Travelers, covered the substitute automobile, "but only if no other valid and collectible auto liability insurance either primary or excess . . . is available to such person." Each insurer denied liability on a claim arising from an accident caused by Grigsby's negligence and relied on the provisions of its policy and availability of insurance provided by the other. *Held*, the "other insurance" clauses were mutually repugnant, so that each company is liable in proportion to its respective policy limits. *State Farm Mut. Auto. Ins. Co. v. The Travelers Ins. Co.*, 184 So. 2d 750 (La. App. 3d Cir. 1966), *writs refused*, 187 So. 2d 439 (1966).

"Other insurance" clauses are of three principal types: *pro rata clauses* under which if there is other insurance the issuer will be liable only for the proportion of the loss that represents the ratio between his limit of liability and the total limit of liability of all insurance covering the loss; *excess clauses*, under which if there is other insurance the issuer will be liable only for the amount of loss that exceeds the limits of the other policy; and *escape clauses*, under which if there is other insurance the issuer is not liable at all.<sup>1</sup> Depending on the scope of their exclusions, escape clauses may be classified as *limited*, meaning they exclude coverage only when there exists other primary insurance, or *unlimited*, meaning coverage is excluded if there is other insurance, primary or excess.<sup>2</sup>

Most cases involving conflict between excess and escape clauses are concerned with the limited escape clause. This conflict has usually been resolved by application of the principle that the more specific clause should be given effect. Most courts have found a limited escape clause provision for no protection when there is "other valid and collectible insurance" less specific than an excess clause stating "the insurance shall be excess insurance

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1. Annot., 76 A.L.R.2d 502 (1961).

2. A typical limited escape clause reads: "If any person, firm or corporation other than the Named Assured has valid and collectible insurance against any claim or loss, then such person, firm or corporation shall not be covered under this Policy." *Michigan Alkali Co. v. Bankers Indem. Ins. Co.*, 103 F.2d 345, 347 (2d Cir. 1939). A typical "unlimited" escape clause defines an "insured" as any person other than the named insured using the automobile with the named insured's permission "but only if no other valid and collectible automobile liability insurance either primary or excess . . . is available to such person."

over any other valid and collectible insurance" and have held the insurer on the policy containing the escape clause primarily liable while giving full effect to the excess clause.<sup>3</sup>

Both the excess and limited escape clauses state, first, that coverage is affected by "other valid and collectible insurance," and, second, what effect this "other valid and collectible insurance" shall have on the particular policy. In the escape clause it is provided that the effect is to end all coverage. In the excess clause it is stated that the effect is to render the policy only excess insurance. The different effect in each clause is specifically set out. To say that one is more specific than the other is arbitrary.<sup>4</sup> The better method of settling this conflict between an excess and a limited escape clause is to recognize that neither takes precedence because of greater specificity, but that they are mutually repugnant, and to hold each company for its pro rata share.<sup>5</sup>

Conflict between an excess and an unlimited escape clause, as in the instant case, requires a different analysis, however. The unlimited escape clause specifically designates the other types of insurance with which it might conflict and clearly states that it shall not constitute other valid and collectible insurance when one of the designated types of insurance is available. In a conflict with an excess clause, which simply provides that coverage shall be only for the excess if there is other valid and collectible insurance, the more specific, unlimited escape provision should be given effect. This reasoning was applied in the only previously reported case of conflict between an unlimited escape clause and an excess clause. The unlimited escape clause provided: "the insurance does not apply . . . to any liability for such loss as is covered on a primary, contributory, excess, or any other basis by insurance in another insurance company." The Florida court gave effect to the unlimited escape clause, saying it prevented the policy that contained it from constituting other valid and collectible insurance under the less specific excess

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3. 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); Continental Cas. Co. v. Curtis Pub. Co., 94 F.2d 710 (3d Cir. 1938); Travelers Indem. Co. v. State Auto. Ins. Co., 67 Ohio App. 457, 21 Ohio Op. 427, 37 N.E.2d 198 (1941); Grasberger v. Liebert & Obert, 335 Pa. 491, 6 A.2d 925 (1939). See generally 7 AM. JUR. 2d *Auto Ins.* § 202, at 545 (1963).

4. Oregon Auto. Ins. Co. v. United States Fid. & Guar. Co., 195 F.2d 958, 960 (9th Cir. 1952).

5. Gilkey v. Andrew Weir Ins. Co., 291 F.2d 132 (9th Cir. 1961); Oregon Auto. Ins. Co. v. United States Fid. & Guar. Co., 195 F.2d 958 (9th Cir. 1952).

clause and held the excess clause insurer primarily liable.<sup>6</sup> This case also specifically upheld the validity of an unlimited escape clause despite a contention that it was against public policy. The Louisiana courts have held that no standard form is required by statute for automobile liability insurance as such, and that limited coverage in an automobile liability policy is not prohibited.<sup>7</sup>

Although the instant case involved a conflict between an excess clause and an unlimited escape clause, the court decided the case as if dealing with a limited escape clause. The court resolved the conflict between the two clauses by saying:

"[T]here is no real difference between the quoted provisions of the policies. Actually, the insurance afforded by one of these policies is not any more available to the insured than is the insurance provided by the other. . . . The excess insurance clause in the State Farm policy and the other insurance or escape clause in the Travelers policy are mutually repugnant . . . and . . . insofar as the claim in this case is concerned those provisions of the policies are ineffective."<sup>8</sup>

The court cited three cases to support its decision, but none involved the type of conflict the court had before it.<sup>9</sup>

6. *Continental Cas. Co. v. Weekes*, 74 So.2d 367 (Fla. 1954); and see Annot., 46 A.L.R.2d 1168 (1956).

7. *Kennedy v. Audubon Ins. Co.*, 82 So.2d 91 (La. App. 1st Cir. 1955). This case interpreted LA. R.S. 22:623 (1950), which sets out general rules pertaining to standard provisions of insurance contracts.

8. *State Farm Mut. Auto. Ins. Co. v. Travelers Ins. Co.*, 184 So.2d 750, 751 (La. App. 3d Cir. 1966).

9. Two of the cases cited, *Bradshaw v. St. Paul & Marine Ins. Co.*, 226 F. Supp. 569 (N.D. Ga. 1964), and *Nationwide Mut. Ins. Co. v. State Farm Mut. Auto. Ins. Co.*, 209 F. Supp. 83 (N.D. W. Va. 1962), involved a conflict between identical excess clauses. Both courts held them to be repugnant and held each company liable on a pro rata basis. It is clear that these two clauses were repugnant, but the cases are not authority in the instant case which involved a conflict between an excess clause and an unlimited escape clause. For cases of conflict between two excess clauses, see *Continental Cas. Co. v. Buckeye Union Cas. Co.*, 143 N.E.2d 169 (Ohio 1957); Annot., 7 AM. JUR. 2d *Automobile Insurance* § 202, at 544 (1963).

The third case, *Oregon Auto. Ins. Co. v. United States Fid. & Guar. Co.*, 195 F.2d 958 (9th Cir. 1952), involved a conflict between an excess clause and a limited escape clause, so it should not govern the instant case. The difference in wording of the limited escape clause in *Oregon* and the unlimited escape clause in the instant case would call for a different decision.

In four Louisiana cases effect was given to excess clauses, but it appears from the facts that the other policies in those cases contained no "other insurance" clauses of any kind. *Benroth v. Continental Cas. Co.*, 132 F. Supp. 270 (W.D. La. 1955); *Peterson v. Armstrong*, 176 So.2d 453 (La. App. 3d Cir. 1965); *O'Brien v. Traders Gen. Ins. Co.*, 136 So.2d 852 (La. App. 1st Cir. 1961); *Hurdle v. State Farm Mut. Auto. Ins. Co.*, 135 So.2d 63 (La. App. 2d Cir. 1961). One Louisiana case involved two pro rata clauses, and the court held the two companies liable pro rata. *Hospital Service Dist. No. 1 of Plaquemine Parish v. Delta Gas*, 171 So.2d 293 (La. App. 4th Cir. 1965).

The court failed to give effect to the clear statement in Travelers' escape clause that the policy would not constitute "other valid and collectible insurance" when it conflicted with insurance of either excess or primary type. No language in State Farm's excess policy was specific enough to counteract this provision. In failing to apply the more specific "unlimited" escape clause the court failed to follow the Civil Code provision that every part of the agreement must be given effect.<sup>10</sup>

When the economic intent of the unlimited escape clause is considered, it becomes obvious that the clauses used in the two policies were not considered repugnant by the framers. Not only were the clauses different, but two completely different kinds of policy were involved. The policy issued by State Farm was a family coverage policy. Travelers' policy was a garage liability policy<sup>11</sup> designed to afford garage owners, car dealers, car lessors, and other mass lenders of automobiles cheaper insurance coverage. The unlimited escape clause was to exclude liability on any basis for personal injury or property damage when there exists any other insurance, either primary or excess.<sup>12</sup> Because of this clause, a 5 per cent reduction in personal injury and property damage rates was allowed by the Casualty and Surety Division of the Louisiana Insurance Rating Commission.<sup>13</sup> The rating commission evidently considered that in case of conflict between the unlimited escape clause and any clause in other insurance the unlimited escape clause would be given effect.

The decision in the instant case seems attributable to the court's failure to distinguish between the unlimited escape clause with which it was dealing and the limited escape clause considered in most prior decisions. Since this unlimited escape clause was more specific than those others, it was not repugnant to the excess clause. The excess clause insurer should have been held

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10. LA. CIVIL CODE art. 1945 (1870): "Legal agreements having the effects of law upon the parties, none but the parties can abrogate or modify them. Upon this principle are established the following rules:

"*Second* — That courts are bound to give legal effect to all such contracts according to the true intent of all the parties;

"*Third* — That the intent is to be determined by the words of the contract, when these are clear and explicit and lead to no absurd consequences . . . ."

*Id.* art. 1955: "All clauses of agreements are interpreted the one by the other, giving to each the sense that results from the entire act."

11. 7 CAS. & SUR. REV. 3 (Sept. 30, 1963).

12. The unlimited escape clause is put in a policy by Endorsement A782.

13. LOUISIANA AUTO. CAS. MANUAL Rule 521, at 113; 9 CAS. & SUR. REV. 5 (Sept. 30, 1965).

primarily liable because by the very terms of the unlimited escape clause the policy containing it could not constitute other valid and collectible insurance. Such a holding would have been consistent with the understanding and clear intent of the Louisiana Insurance Rating Commission.

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### JUDICIAL SALES — THE PUBLIC RECORDS DOCTRINE'S EFFECT ON RADICAL NULLITIES

Plaintiff, a posthumous child born in 1941, brought a petitory action in 1963 to recover his forced portion of his father's succession. He sought to set aside the 1940 succession sale of the immovable property of the estate, alleging that his co-heirs fraudulently had the property appraised at less than one-half its value and purchased it for less than two-thirds the appraised value. The co-heirs and bona fide third-party purchasers of some of the property were joined as defendants. The trial court sustained defendants' exception of five-year curative prescription applied to judicial sales by Civil Code article 3543.<sup>1</sup> On appeal, *held*, reversed. Since the property was sold not only for less than two-thirds its appraised value, but also for less than its actual value, the succession sale was an absolute nullity. Prescription under article 3543 was not available even to subsequent purchasers for it was apparent in the public records that a just price had not been obtained. *Bordelon v. Bordelon*, 180 So. 2d 855 (La. App. 3d Cir. 1965).

Louisiana has effected a blend of Anglo-American and civil law in dealing with errors in judicial sales. The doctrine of informality, as opposed to radical error, is a common-law concept used to protect the stranger who purchases at a judicial

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1. LA. CIVIL CODE art. 3543 (1870), as amended by La. Acts 1932, No. 231; La. Acts 1960, No. 407, § 1. All informalities of legal procedure connected with or growing out of any sale at public auction or at private sale of real or personal property made by any sheriff of the parishes of this state, licensed auctioneer, or other persons authorized by an order of the courts of this state, to sell at public auction or at private sale, shall be prescribed against those claiming under such sale that the lapse of two years from the time of making said sale, except where minors or interdicted persons were owners or part ownership by said minor or interdicted persons, the prescription thereon shall accrue after five years from the date of public adjudication or private sale thereof.