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The 24th Annual Insurance Symposium:

Allocation & Other Insurance

By:

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Allocation & Other Insurance

What are we talking about?

- The "other insurance" provisions found in insurance policies specify how damages and defense costs are to be shared when a loss is covered by two or more concurrent insurance policies

- When there is other valid and collectible insurance, how loss is apportioned between carriers depends upon whether the other insurance is primary or excess

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Allocation & Other Insurance

Other Insurance Clause:

Rationale

- The development of other insurance clauses began in the area of property insurance
- To avoid an insured's temptation or fraud of over-insuring its property or of inflicting self-injury
- In the areas of automobile and liability insurance, the moral hazard of self-injury is absent

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Types of Other Insurance Clauses:

Pro Rata Clause: Restricts liability upon concurring insurers to an apportionment basis

Excess Clause: Restricts liability upon an insurer to excess coverage after another concurrent insurer has paid up to its policy limits

Escape Clause: Avoids all liability in the event of other insurance (most draconian clause)

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TYPICAL LANGUAGE OF THESE CLAUSES

- **Typical Pro Rata Clause**: If there is other valid and collectible insurance, the company shall not be liable for more than its prorate share of the loss in direct proportion that its policy limits bear to the total policy limits available to pay the loss

- **Typical Excess Clause**: This insurance is excess over any other insurance, whether primary, excess, contingent or on any other basis

- **Typical Escape Clause**: If at the time of an occurrence any valid and collectible insurance is available to the insured, except insurance purchased to apply in excess of the limit of liability of this policy, no insurance shall be afforded hereunder as respects such occurrence; except, if the applicable limit of liability of this policy exceeds the applicable limit of liability of such other insurance, this policy shall afford excess insurance over such other insurance sufficient to afford the insured a combined limit of liability equal to the limit of liability of this policy. Insurance under this policy shall not be construed to be concurrent or contributing with any other insurance whatsoever

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Concurrent Policies With Other Insurance Clause: Types of Conflict

Conflicts involving other insurance clauses arise when more than one policy covers the same insured and each policy has an "other insurance" clause which restricts its liability by reason of the existence of other coverage. To illustrate, two policies may contain:

- Excess clause and pro rata clause
- Escape clause and pro rata clause
- Escape clauses
- Excess clause and escape clause
- Specific escape clauses

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TEXAS LAW:
MAIN RULE & VARIATIONS

MAIN RULE:

- *Hardware Dealers Mut. Ins. Co. v. Farmers Ins. Exch.*, 444 S.W.2d 583 (Tex. 1969)
- *Royal Ins. Co. v. Hartford Underwriters Ins. Co.*, 391 F.3d 639 (5th Cir. 2004)
- *Colony Ins. Co. v. Scottsdale Ins. Co.*, 2015 WL 11622494 (W.D. Tex. 2015)

RULE DOES NOT APPLY:

- *Am. States Ins. Co. v. ACE Am. Ins. Co.*, 547 F. App'x. 550 (5th Cir. 2013)
- *Scottsdale Ins. Co. v. Steadfast Ins. Co.*, 2017 WL 661520 (S.D. Tex. 2017)

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Hardware Dealers Mut. Fire Ins. Co. v. Farmers Ins. Exch., 444 S.W.2d 583 (Tex. 1969)

FACTS

- Farmers issued an automobile owners policy to John Hyde, with the "other insurance" clause that converted its coverage into excess insurance if other insurance coverage existed
- Hardware issued a garage automobile liability policy to a car dealer, Frizzell Pontiac, with an escape clause excluding coverage for permissive users of Frizzell Pontiac's cars who were covered by other insurance
- Mr. Hyde's daughter, Anita, who was a permissive user and covered under Farmers policy had an accident while on a test drive of a new car. The driver of the other car sued Anita

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Hardware Dealers Mut. Fire Ins. Co. v. Farmers Ins. Exch.,

444 S.W.2d 583 (Tex. 1969)

ANALYSIS: TWO-STEP INQUIRY

- First: Courts must consider whether from the point of view of the insured, the insured has coverage from either of the two policies but for the other
- Second, Courts must evaluate the impact that the two insurance provisions would have when read together on the coverage of the insured. In other words, whether each policy contains a provision which is reasonably subject to a construction that it conflicts with a provision in the other concurrent insurance
- If the answer is yes to both steps, then the policies conflict, and coverage should be apportioned on a pro rata basis between the insurers

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Hardware Dealers Mut. Fire Ins. Co. v. Farmers Ins. Exch., 444 S.W.2d 583 (Tex. 1969)

ANALYSIS: RULE IN ACTION

STEP ONE

- Hardware policy, minus its escape clause, covers the insured
- Farmers policy, minus its excess clause, covers the insured
- **YES TO FIRST INQUIRY**

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Hardware Dealers Mut. Fire Ins. Co. v. Farmers Ins. Exch.,
444 S.W.2d 583 (Tex. 1969)

ANALYSIS: RULE IN ACTION

STEP TWO

- The Hardware policy "other insurance" provision excluded from coverage anyone who was covered by other insurance. Here, the Farmers policy provided coverage so the Hardware clause is triggered
- The Farmers policy converted its coverage into excess if other insurance existed. Here, the Hardware policy existed so the Farmers clause is triggered
- When read together—escape clause versus excess clause—the insured is left with no primary coverage, leading the court to conclude that the two policies conflicted
- **YES TO SECOND INQUIRY**

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Hardware Dealers Mut. Fire Ins. Co. v. Farmers Ins. Exch., 444 S.W.2d 583 (Tex. 1969)

HOLDING

- Farmers and Hardware policies other insurance clauses are mutually repugnant and must be ignored. The liability is to be prorated between the two companies and each has an obligation to defend the insured

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Royal Ins. Co. v. Hartford Underwriters Ins. Co.,

391 F.3d 639 (5th Cir. 2004)

FACTS

- Hartford issued a Commercial General Liability/Health Care Professional Liability policy
- Royal issued a Commercial General Liability/Resident Health Care Facility Professional Liability policy
- In a wrongful death and survival action against the insured, Royal notified Hartford of the lawsuit and, when Hartford declined to join in the defense, Royal defended the insured, settled the case, and brought an insurance subrogation action against Hartford to recover half of the settlement costs

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Royal Ins. Co. v. Hartford Underwriters Ins. Co.,

391 F.3d 639 (5th Cir. 2004)

"Other insurance" clauses

- The Harford policy's "other insurance" provisions contained an excess clause, which stated in relevant part: "This insurance is excess cover an other insurance other than insurance specifically arranged by you on an umbrella or similar basis to apply excess of this coverage part"

- The Royal policy's "other insurance" provisions contained a pro rata clause, which stated in relevant part: "This insurance is primary except as described in Paragraph b. below. Our obligations are not affected unless any of the other insurances is also primary. Then we will share with all that other insurance by the [pro rata] method"

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Royal Ins. Co. v. Hartford Underwriters Ins. Co.,

391 F.3d 639 (5th Cir. 2004)

RULE IN ACTION & HOLDING

- Applying *Hardware* two-part test: Viewed from the insured's perspective, the Fifth Circuit found that Hartford provided coverage for the underlying suit if Royal's policy did not exist and Royal provided coverage for the underlying suit if Hartford's policy did not exist

- For the second step, according to the Fifth Circuit, a reasonable construction of the two policies (excess versus pro-rata) from the insured's perspective yielded a conflict. The court found a conflict even though the plain language of the policies suggested Hartford should have been excess and Royal primary

- Royal and Hartford are liable proportionally and both had a duty to defend the insured

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Royal Ins. Co. v. Hartford Underwriters Ins. Co.,

391 F.3d 639 (5th Cir. 2004)

IMPORTANCE

- Subsequent Fifth Circuit and Texas federal district courts have followed Royal Insurance's broad interpretation of Hardware Dealers
- These courts have noted that if a "reasonable construction" of the two policies from the insured's perspective would result in full primary coverage under each policy but for the existence of the other, the policies conflict and liability should be apportioned pro rata -- even when a plausible interpretation of opposing other insurance clauses would render one policy's coverage primary and the other's excess

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Colony Ins. Co. v. Scottsdale Ins. Co.,

2015 WL 11622494 (W.D. Tex. 2015)

FACTS

- Stanford Construction, Inc. (General Contractor), and Criterion Broadway, L.P. (Owner), entered into a contract to build an apartment complex. The contract required Stanford to list Criterion as an additional insured on its general liability and commercial excess liability policies with Scottsdale, which were to be "primary and not in excess of or contributing to any insurance . . . maintained by the . . . Owner [Criterion]."

- When an employee sued Criterion and Stanford for personal injuries sustained on the construction site, Criterion demanded Stanford's carrier, Scottsdale, to assume Criterion's defense as an AI. When Scottsdale declined to assume the entire defense, Colony defended Criterion. Colony subsequently sued Scottsdale for recoupment of all of Criterion's defense costs.

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Colony Ins. Co. v. Scottsdale Ins. Co.,

2015 WL 11622494 (W.D. Tex. 2015)

FACTS

- **Colony's "other insurance" clause**: "If other valid and collectible insurance is available to the insured for a loss we cover under Coverages A or B of this Coverage Part, our obligations are limited as follows:

  a. Primary Insurance: This insurance is primary except when Paragraph **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 Paragraph **c.** below"

  b. Excess Insurance: "This insurance is excess over . . . [a]ny other primary insurance available to you covering liability for damages arising our of the premises or operations . . . **for which you have been added as an additional insured by attachment of an endorsement**"

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Colony Ins. Co. v. Scottsdale Ins. Co.,

2015 WL 11622494 (W.D. Tex. 2015)

FACTS

- **Scottsdale's "other insurance" clause**: **a. Primary Insurance**: "This insurance is primary except when Paragraph **b.** below applies. **b. Excess Insurance**: This insurance is excess **over any other insurance** whether primary, excess, contingent or on any other basis … that is valid and collectible insurance available to you under any other policy"

- Further, Scottsdale's policy included: "If a loss occurs involving two or more policies, each of which states that its insurance will be excess, then our policy will contribute on a pro rata basis"

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Colony Ins. Co. v. Scottsdale Ins. Co.,

2015 WL 11622494 (W.D. Tex. 2015)

RULE IN ACTION & HOLDING

- Applying *Hardware* two-part test: If either Colony's or Scottsdale's policy existed alone, each would be the primary insurance for Criterion
- Reading both "other insurance" clauses together, the district court found that they are reasonably subject to conflicting constructions
- Criterion is an “additional insured” under Colony policy and as such it triggers excess insurance coverage
- Under Scottsdale policy, “[a] valid and collectible insurance available to you under any other policy” exists — the Colony policy — thus triggering excess insurance coverage under the Scottsdale policy.

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Colony Ins. Co. v. Scottsdale Ins. Co.,

2015 WL 11622494 (W.D. Tex. 2015)

RULE IN ACTION & HOLDING

- The existence of "other insurance" triggers the excess insurance coverage provisions in each policy. Because of this mutual repugnancy, the court apportioned liability between Colony and Scottsdale on a pro rata basis
- The fact that the construction contract required Stanford to obtain additional insured coverage on a primary and non-contributory basis for Criterion did not matter. The terms of the two insurance policies controlled instead

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Am. States Ins. Co. v. ACE Am. Ins. Co.,

547 F. App'x. 550 (5th Cir. 2013)

FACTS

- American States provided a commercial automobile policy to Hook & Anchor
- ACE provided a business automobile policy to Chemical Weed Control, Inc.
- Each policy contained identical "other insurance" clauses that extended primary coverage for "covered autos" owned by the policyholder and excess coverage for "covered autos" not owned by the policyholder
- Hook & Anchor's employee was involved in a car accident while driving Chemical Weed's truck
- The other driver sued Hook & Anchor, and American States (H&E's insurer) tendered the defense to ACE (Chemical Weed's insurer), who rejected it

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Am. States Ins. Co. v. ACE Am. Ins. Co.,

547 F. App'x. 550 (5th Cir. 2013)

ISSUE

- Whether the identical "other insurance" clauses in the American States and ACE policies rendered ACE"s coverage primary and American States" coverage excess due to Chemical Weed's ownership of the truck, or whether the clauses were mutually repugnant and should be knocked out under Royal Insurance/Hardware Dealers

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Am. States Ins. Co. v. ACE Am. Ins. Co.,

547 F. App'x. 550 (5th Cir. 2013)

RULE IN ACTION & HOLDING

- Unlike the "other insurance" clauses in *Hardware Dealers* and subsequent decisions applying the *Hardware* two-step analysis, the existence of primary coverage under each of the "other insurance" clauses in the American States and ACE turns not on the availability of other insurance but rather on vehicle ownership

- Because the availability of other insurance is not dispositive of the existence of primary coverage, the issue in *Hardware Dealers* — "other insurance" clauses that restrict liability by reason of the existence of other coverage — is not implicated in this case

- The American States and ACE policies are not mutually repugnant and, under the terms of "other insurance" clauses, ACE was obligated to provide primary coverage to Hook & Anchor and is liable for the entirety of Hook & Anchor's defense. ACE had this obligation because Chemical Weed owned the truck

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Scottsdale Ins. Co. v. Steadfast Ins. Co.,

2017 WL 6611520 (S.D. Tex. 2017)

FACTS

- Two insurance carriers disputed which policy covers an apartment manager's (Kaplan Management's) liability for negligence
- Scottsdale issued a policy that provided primary insurance to CVP Holdings (the property owner) and included as insureds "[a]ny person . . . or organization while acting as [CVP"s] real estate manager. The policy stated, "If this insurance is primary, our obligations are not affected unless any other insurance is also primary. Then we will share with all that other insurance on a pro rata basis" (i.e., Pro rata other insurance clause based upon presence of other insurance)
- Steadfast issued a policy to Kaplan Management. The Steadfast policy contained the following endorsement, "With respects [sic] to your liability arising out of your management of property for which you are acting as real estate manager this insurance is excess over any valid and collectible insurance to you" (i.e., Excess "other insurance" clause based upon insured's status)

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Scottsdale Ins. Co. v. Steadfast Ins. Co.,

2017 WL 6611520 (S.D. Tex. 2017)

RULE IN ACTION & HOLDING

- From Kaplan Management's perspective, it had a primary insurance coverage from Scottsdale, which required Scottsdale to defend Kaplan Management in the underlying lawsuit

- However, because Kaplan Management was a property manager and was sued as such, the Steadfast policy's endorsement rendered Steadfast insurance excess, regardless of Scottsdale policy's existence. The absence of the Scottsdale policy would not convert the Steadfast excess policy to a primary policy—the Steadfast policy would always be an excess policy

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Scottsdale Ins. Co. v. Steadfast Ins. Co.,

2017 WL 6611520 (S.D. Tex. 2017)

RULE IN ACTION & HOLDING

- The availability of primary coverage under the Steadfast policy turned on Kaplan Management's status and not the presence of other insurance
- Kaplan Management had primary coverage from Scottsdale and excess coverage from Steadfast, and only Scottsdale had the right and duty to defend Kaplan Management
- Therefore, Hardware Dealers/Royal Insurance did not apply

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"Other Insurance" Clause:

KEY POINTS

- The Fifth Circuit and Texas federal district courts have broadly construed Hardware Dealers by applying it to insurance policies that would both otherwise be primary but for the other insurance clauses - the two clauses will typically be mutually repugnant even though the plain language could suggest otherwise
- These courts have concluded that the two carriers split the indemnity (and sometimes defense) on a pro-rata basis based upon limits, which could have major consequences if the two carriers have substantially different policy limits
- Hardware Dealers should not apply when an other insurance clause limits liability based upon the insured's status (e.g., property manager, vehicle owner, etc.) instead of on the availability of other insurance

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"Other Insurance" Clause:

Key Points

- Before the "other insurance" clause applies, two or more concurrent policies must have coverage for the claim, meaning that the coverage in the policies must precisely overlap
- The coverages must be at the same level, i.e. a primary insurer cannot ordinarily assert the other insurance clause against an excess or umbrella carrier
- The "other insurance" clause should not be used to limit or deny coverage simply because there may be coverage under another policy
- If the other carrier is unwilling to contribute, a subsequent contribution or subrogation lawsuit may be necessary to recoup defense costs and indemnity

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