By: Blair Dancy

WHO'S ON FIRST? PRIORITY OF COVERAGE AND GETTING TO HOME PLATE

You've seen it before. A mess of defendants. A gaggle of insurance adjusters. The mediator borrows office space to have enough room to split up the factions. Or, if mediating remotely, breakout rooms are crammed with so many stakeholders that they cannot fit on the same screen. Plaintiff's counsel pitches a compelling liability theory and a simple damages model and then waits. And waits. And waits.

What went wrong? Where's the settlement offer?

Among the tangle of policies and indemnity agreements, one complicating issue is frequently priority of coverage—the order in which the policies pay out. Knowing the order in which the dominos fall allows counsel to target the right defendant—and the right policy—at the right time.

"Other insurance" provisions found in almost every liability policy are key, such as these taken from a General Commercial Liability form:

4. Other Insurance

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

(1) This insurance is excess over:

(a) Any of the other insurance, whether primary, excess, contingent or on any other basis:

(i) That is Fire, Extended Coverage, Builder's Risk, Installation Risk or similar coverage for "your work";

(ii) That is Fire insurance for premises rented to you or temporarily occupied by you with permission of the owner;

(iii) That is insurance purchased by you to cover your liability as a tenant for "property damage" to premises rented to you or temporarily occupied by you with permission of the owner; or

(iv) If the loss arises out of the maintenance or use of aircraft, "autos" or watercraft to the extent not subject to Exclusion **g.** of Section **I** – Coverage **A** – Bodily Injury And Property Damage Liability.

(b) Any other primary insurance available to you covering liability for damages arising out of the premises or operations, or the products and completed operations, for which you have been added as an additional insured.

(2) When this insurance is excess, we will have no duty under Coverages **A** or **B** to defend the insured against any "suit" if any other insurer has a duty to defend the insured against that "suit". If no other insurer defends, we will undertake to do so, but we will be entitled to the insured's rights against all those other insurers.

(3) When this insurance is excess over other insurance, we will pay only our share of the amount of the loss, if any, that exceeds the sum of:

(a) The total amount that all such other insurance would pay for the loss in the absence of this insurance; and

(b) The total of all deductible and self-insured amounts under all that other insurance.

(4) We will share the remaining loss, if any, with any other insurance that is not described

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in this Excess Insurance provision and was not bought specifically to apply in excess of the Limits of Insurance shown in the Declarations of this Coverage Part.

c. Method Of Sharing

If all of the other insurance permits contribution by equal shares, we will follow this method also. Under this approach each insurer contributes equal amounts until it has paid its applicable limit of insurance or none of the loss remains, whichever comes first.

If any of the other insurance does not permit contribution by equal shares, we will contribute by limits. Under this method, each insurer's share is based on the ratio of its applicable limit of insurance to the total applicable limits of insurance of all insurers.[1]

Typical "other insurance" provisions can make a policy's coverage excess, or share pro rata, or even completely inapplicable when other coverage is available.

Hardware Dealers Mutual Fire Insurance Company v. Farmers Insurance Exchange is the seminal case in Texas on this issue.[2] The *Hardware Dealers* court recognized three kinds of "other insurance" provisions in auto policies at the time: Pro rata clauses, which apportion loss among concurrent policies; excess clauses, which make a policy excess when other insurance applies; and escape clauses, which avoid coverage all together when other insurance applies.[3] After rejecting other jurisdictions' approaches to reconciling conflicting "other insurance" provisions, the court resorted to "settled principles which give dominant consideration to the rights of the insured."[4] The court held, "When, **from the point of view of the insured, she has coverage from either one of two policies but for the other**, and each contains a provision which is reasonably subject to a construction that it conflicts with a provision in the other concurrent insurance, there is a conflict in the provisions."[5] When provisions so conflict, Texas courts will ignore them to find concurrent coverage with liability prorated between policies based on limits.[6]

The *Hardware Dealers* rationale also applies where two excess or umbrella policies have mutually repugnant "other insurance" clauses.[7] However, even in umbrella policies, there can be material differences based on policies to which they are excess. For example, when one umbrella is excess to all primary policies and the other is excess to "any other insurance providing coverage," inclusive of both primary and excess insurance, the former policy will come first.[8]

But the *Hardware Dealers* rule is not a blunt instrument. The Fifth Circuit recognized the limited policy behind the *Hardware Dealers* rule in *American States Insurance Company v. ACE American Insurance Company*.[9] In *American States*, the two policies had identical "other insurance" provisions, which provided primary coverage for vehicles owned by the policyholder and excess for non-owned vehicles.[10] As the provisions did not depend on the existence of the other policy, but rather on vehicle ownership, the rationale of *Hardware Dealers* did not apply.[11]

This same rationale has been extended to other contexts. In *Scottsdale Insurance Company v. Steadfast Insurance Company*,[12] the Southern District of Texas similarly distinguished *Hardware Dealers* based on "other insurance" language in an endorsement in relation to an apartment manager's liability for negligence. One policy had a pro rata clause and the other had an endorsement that read:

> 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.[13]

The court found that because the insured "was a property manager, the endorsement in the Steadfast policy made [the] Steadfast insurance excess, whether the Scottsdale policy existed or not."[14] Because the availability of primary coverage did not depend on the availability of other insurance (as it did in *Hardware Dealers*), but depended on the insured's status, the court found the provisions did not conflict and *Hardware Dealers* did not apply.[15]

The Fifth Circuit has repeatedly held that where one policy has an excess clause and one has a pro rata clause, *Hardware Dealers* applies and the policies share pro rata.[16] The author is unaware of a Texas state court that has held similarly.

Hardware Dealers can apply to defense costs.[17] Whether an "other insurance" provision extends to defense costs depends, of course, on the specific language of the policy. In *Trinity Universal Insurance Company v. Employers Mutual Casualty Company*, the Fifth Circuit found that an "other insurance" provision that spoke only of an insured's "loss" was limited to indemnity and did not extend to defense costs.[18]

Even when "other insurance" provisions do conflict, the very nature of the policies may dictate against a *Hardware Dealers* result. "Where there is apparent conflict between clauses of applicable insurance policies, courts should look to the overall pattern of insurance coverage to resolve disputes among the carriers."[19] Specifically, when comparing a primary policy with an excess clause to a true excess policy, the primary coverage will typically come first.[20]

Whether a party is being defended as an insured, or as the indemnitee of an insured, may also implicate the "other insurance" analysis. In *American Indemnity v. Travelers*, the Fifth Circuit made an *Erie* guess on Texas law with respect to overlapping additional-insured and contractual-indemnity obligations and priority of coverage.[21] The Court noted the general rule that when "other insurance" provisions make policies share coverage, when one insurer pays more than its share, "the insurer paying more than its share . . . of the claim is ordinarily entitled to recover from the other insurer for the excess so paid."[22] In the context of a valid indemnity provision, the Fifth Circuit has recognized that "other insurance" provisions should not apply:

> [A]n indemnity agreement between the insureds or a contract with an indemnification clause, such as is commonly found in the construction industry, may shift an entire loss to a particular insurer notwithstanding the existence of an 'other insurance' clause in its policy.[23]

This different treatment may be material when weighing whether to pursue additional insured coverage (which is potentially subject to horizontal exhaustion, as noted above) or contractual indemnity (vertical exhaustion). The different treatment can impact deductibles, self-insured retentions, loss histories, exhaustion of available insurance for other claims, and of course future premiums.

There is another significant aspect of *American Indemnity v. Travelers*. The court discussed several non-Texas cases following this approach, including *Wal–Mart Stores Inc. v. RLI Ins. Co.*, 292 F.3d 583, 588–94 (8th Cir.2002), which noted that the insureds do not have to be part of the suit for recovery of paid amounts, to avoid "circuity of action" and "wasteful litigation."[24] In essence, one insurer may sue another insurer directly for its insured's contractual indemnity claims, without having to litigate separately the subrogated contractual indemnity claim. This approach may allow insurers to skip a step in litigation when it comes to subrogated claims for contractual indemnity. However, note that *American Indemnity v. Travelers* involved coverage under a single policy for a single defendant against a single claimant. Cookie-cutter avoidance of "circuity of action" may be inappropriate in cases involving multiple claimants, multiple insureds/indemnitees, eroding limits, or other myriad issues in complex litigation.

Self-insured retentions themselves can also pose priority problems. Unless expressly addressed in the policy, self-insurance is typically not considered other insurance for purposes of an "other insurance" clause.[25] Further, a self-insured retention can be satisfied by payments made on the insured's behalf by another carrier.[26] The key is, as might be expected, policy language which may dictate different results.[27]

The discussion above primarily addresses third-party coverages, but the same concepts apply to first-party coverages. For example, in *Zurich American Insurance Company v. Certain Underwriters*, the court addressed claims arising out of a well-pad fire that caused a crane to collapse and an out of control well that resulted in over $27 million in claims.[28] The insurers settled the claim collectively for $24 million, allocated to any specific costs and with a reservation of rights to litigate apportionment and allocation.[29] Three primary policies were implicated, two of which involved both first-party and third-party coverages (the third primary policy was third-party only). Key to the dispute, however, was that the policies overlapped on some of the losses but not all of them. The parties failed to allocate the losses to determine which were covered by all three policies, or just two, or just a single policy. Without allocation, the court could not apply *Hardware Dealers* and remanded the case for further proceedings.[30]

The concept that "other insurance" provisions apply only to overlapping coverages has also been recognized in Texas state court: "The provisions of an 'other insurance' clause apply only when the 'other' insurance covers the same property and interest therein against the same risk in favor of the same party."[31]

In sum, priority of coverage involves a detailed analysis of the underlying claims and the specific language of the policies and contractual indemnity obligations. Knowing how those provisions will work may make the difference between getting to first and getting all the way home.

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[1] Commercial General Liability Coverage Form, CG 00 01 04 13, Insurance Services Office, Inc. (2012), at SECTION IV—COMMERCIAL GENERAL LIABILITY CONDITIONS, 4. Other Insurance.

[2] 444 S.W.2d 583, 590 (Tex. 1969).

[3] *Id.* at 586.

[4] *Id.* at 589.

[5] *Id.* (emphasis added).

[6] *See id.* at 590.

[7] *See, e.g.*, *St. Paul Mercury Ins. Co. v. Lexington Ins. Co.*, 888 F. Supp. 1372, 1385–87 (S.D. Tex. 1995), *aff'd,* 78 F.3d 202 (5th Cir. 1996); *Safeco Lloyds Ins. Co. v. Allstate Ins. Co.*, 308 S.W.3d 49, 60 (Tex. App.—San Antonio 2009, no pet.) ("[W]e hold Safeco and Allstate share liability on a pro rata basis in proportion to the amount of insurance provided by their respective policies");

Nat'l Union Fire Ins. Co. of Pittsburgh, PA v. United L.P. Gas Corp., No. 01-00-00222-CV, 2002 WL 396533, at *11 (Tex. App.—Houston [1st Dist.] Mar. 14, 2002) (sharing pro rata), *judgment withdrawn and reissued* (Oct. 9, 2003), *opinion withdrawn and superseded in part,* 01-00-00222-CV, 2003 WL 22310045 (Tex. App.—Houston [1st Dist.] Oct. 9, 2003, no pet.).

[8] *See Great Am. Ins. Co. v. Employers Mut. Cas. Co.*, 18 F.4th 486, 491 (5th Cir. 2021).

[9] 547 F. Appx. 550, 553 (5th Cir. 2013) (following *Snyder v. Allstate Ins. Co.*, 485 S.W.2d 769 (Tex. 1972)).

[10] *Id.* at 552.

[11] *See id.* at 553–54.

[12] CIVIL ACTION NO. H-16-0273, 2017 WL 661520, at *1 (S.D. Tex. Feb. 17, 2017).

[13] *Id.* at *5.

[14] *Id.* at **12-13.

[15] *Id.*

[16] *See, e.g.*, *Royal Ins. Co. of Am. v. Hartford Underwriters Ins. Co.*, 391 F.3d 639, 643–44 (5th Cir. 2004) (following *Hardware Dealers* and *St. Paul Mercury Ins. Co. v. Lexington Ins. Co.*, 78 F.3d 202, 210 (5th Cir. 1996)); *Willbros RPI, Inc. v. Cont'l Cas. Co.*, 601 F.3d 306, 312–13 (5th Cir. 2010) (following *Royal Insurance*); *see also Crum & Forster Specialty Ins. Co. v. Great W. Cas. Co.*, No. EP-15-CV-00325-DCG, 2017 WL 4002713, at *8 (W.D. Tex. Sept. 11, 2017) (following *Royal Insurance* and *Willbros*).

[17] *See, e.g.*, *Willbros RPI*, 601 F.3d at 312–13; *Crum & Forster Specialty* , No. EP-15-CV-00325-DCG, 2017 WL 4002713, at *8.

[18] 592 F.3d 687, 694–95 (5th Cir. 2010).

[19] *Liberty Mut. Ins Co. v. United States Fire Ins. Co.*, 590 S.W.2d 783, 785 (Tex. App.—Houston [14th Dist.] 1979, writ ref'd n.r.e.).

[20] *See, e.g.*, *Carraba et al. v. Emp'rs Cas. Co.*, 742 S.W.2d 709, 714–15 (Tex. App.—Houston [14th Dist.] 1987, no writ) ("The policies are not of the same character; they do not supply coverage at the same level. The 'other insurance' clauses of a primary policy with an excess clause and an umbrella policy are not equivalent and are not mutually repugnant so that they cancel one another."); *see also St. Paul Mercury* , 78 F.3d at 209 (establishing that primary carriers exhausted first, followed by concurring excess policies); *Starnet Ins. Co. v. Fed. Ins. Co.*, Case No. A-16-CA-664-SS, 2017 WL 1293578, at *1 (W.D. Tex. Apr. 6, 2017) (rejecting an attempt to get an excess policy to participate with concurrent primary policies where (1) there was common ownership of one of the primary carriers and the excess carrier and (2) the excess policy scheduled only one of the two primary policies); *N. Am. Capacity Ins. Co. v. Colony Specialty Ins. Co.*, 273 F. Supp. 3d 711, 716–17 (S.D. Tex. 2017) (following *Starnet* and rejecting attempt to compel umbrella policy to participate with primary policy which included "other insurance" provision identical to that in *Starnet*).

[21] *Am. Indemn. Lloyds v. Travelers Prop. & Cas. Ins. Co.*, 335 F.3d 429 (5th Cir. 2003).

[22] *Id.* at 435.

[23] *Id.* at 436 (quoting 15 *Couch on Insurance* § 219:1 (3rd ed.1999).

[24] *Id.* at 436-37.

[25] *See Lexington Ins. Co. v. National Oilwell Nov, Inv.*, 355 S.W.3d 205, 215 (Tex. App.—Houston [1st Dist.] 2011, no pet.) (self-insured retention not "other insurance"); *Travelers Lloyds Ins. Co. v. Pacific Emp'rs Ins. Co.,* 602 F.3d 677, 684 (5th Cir. 2010) (self-insurance not "other insurance").

[26] *See Cont'l Cas. Co. v. N. Am. Capacity Ins. Co.*, 683 F.3d 79, 90 (5th Cir. 2012) (finding that because the policy did not explicitly require the insured to pay the amount of the self-insured retention itself, payments made for the insured's defense by other carriers satisfied the self-insured retention).

[27] *See, e.g.*, *id.* at 90 (noting that "the policy does not explicitly require the insured to pay the amount itself"); *Pak-Mor Mfg. Co. v. Royal Surplus Lines Ins. Co.*, SA-05-CA-135-RF, 2005 WL 3487723, at *2 (W.D. Tex. Nov. 3, 2005) ("The unambiguous text of the insurance policy compels the conclusion that Pak-Mor must pay the self insured part of the policy before Royal has any obligation to pay any excess."); *see also Citigroup, Inc. v. Federal Ins. Co.*, 649 F.3d 367, 372 (5th Cir. 2011) (considering whether coverage is triggered under an excess policy where the insured settles with the primary carrier for less than policy limits and assessing whether the plain language of the policies required actual payment by the primary insurer of the full amount of the limits before excess coverage was available).

[28] *Zurich Am. Ins. Co. v. Certain Underwriters Subscribing to OEE Policy NRG 475535-9-02*, 634 S.W.3d 131, 135 (Tex. App.—Houston [1st Dist.] 2020, pet. denied).

[29] *Id.*

[30] *Id.* at 153–54.

[31] *Hartford Cas. Ins. Co. v. Exec. Risk Specialty Ins. Co.*, No. 05-03-00546-CV, 2004 WL 2404382, at *2 (Tex. App.—Dallas Oct. 28, 2004, pet. denied) (holding "other insurance" provision inapplicable as between commercial general liability and errors and omissions policies as the policies "cover completely different risks").