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Insurance - Escape Clause - Excess Clause Controversy - Illinois Joins the Majority

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defending as the heir of the deceased."[29] Yet, this is the very issue at bar. Only by conceding that the purported heir has the very status he is claiming to possess can the admitted heir be disqualified.

As a result of the instant case, whenever heirship is contested there will be a need for the testimony of impartial third parties and other extrinsic evidence. The persons most closely related to and best qualified to shed light on the lineage of the decedent in most cases will not be allowed to testify. In many cases this disqualification will result in extra expense to the estate and lack of convincing evidence. The court in the noted case was very much aware of the fraud that could be perpetrated by allowing the admitted heir to testify to the claim of the purported heir. However, it is equally conceivable that a fraud on the estate could be successfully effected by a false heir because his claim could not be refuted by the testimony of admitted heirs.

John Wols

[29] *Supra* note 1.

INSURANCE–ESCAPE CLAUSE–EXCESS CLAUSE CONTROVERSY–ILLINOIS JOINS THE MAJORITY

Chester A. Fiske was involved in an accident while driving a rented automobile which was insured under an "omnibus" clause by the defendant. Fiske was also insured personally by the plaintiff. The defendant's policy included an "other insurance" clause which provided that if the insured is covered by other valid and collectible insurance he would not be entitled to indemnification under its policy.[1] This is commonly referred to as an escape clause. The plaintiff's policy also contained an other insurance clause which provided that the insured would only recover the excess over any other valid and collectible insurance.[2] This is commonly referred to as an excess clause.

The plaintiff sought reimbursement for the settlement of the claim against Fiske and recovered a judgment on the pleadings. On appeal, the Appellate Court reversed, holding that each insurer should bear a pro rata portion of the liability. The Supreme Court reversed the decision of the

[1] The clause in question stated as follows: "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."

[2] The clause in plaintiff's policy stated: "[T]he 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."

Appellate Court and ordered that judgment be entered for the plaintiff. They reasoned that the conflicting other insurance clauses were distinguishable and that the escape provision in the defendant's policy never came into force. *New Amsterdam Casualty Co. v. Certain Underwriters*, 34 Ill. 2d 424, 216 N.E. 2d 665 (1966).

By holding that the conflicting insurance clauses were distinguishable, the Illinois Supreme Court placed Illinois firmly in the majority of states which have been confronted with the excess v. escape controversy. The purpose of this note is to examine the reasoning of the court with respect to the decisions in other jurisdictions which have recently had an opportunity to choose between the majority and minority views, and attempt to determine whether Illinois represents the present trend indicated by these decisions.

Conflicting other insurance clauses have plagued the courts for many years. In attempting to resolve this conflict, earlier courts have resorted to one or more of four approaches: (1) holding the primary tortfeasor liable;[3] (2) holding the insurer first in time liable;[4] (3) holding the more specific insurer liable;[5] or (4) interpreting the clauses of the various policies in order to determine liability. The first three approaches have been criticized and rejected by most jurisdictions, mainly on the grounds that they were used for mere expediency and that they did not take into account the intention of the insurers at the time they drafted their policies. The last approach, on the other hand, has been adopted by Illinois in the present case and by the majority of jurisdictions.

Proponents of the majority approach have sought to pair the various types of other insurance clauses, such as escape v. excess or pro rata v. excess, in an attempt to formulate a general rule of law applicable to that particular situation.[6] In so doing, these courts have looked to the different clauses and have determined that they were distinguishable in meaning and intent. When the excess v. escape situation has arisen, the majority of courts have held that the policy containing the excess clause was not to be considered as other insurance within the meaning of the escape policy.

[3] This approach holds the insurer, under whose policy the primary tortfeasor is the named insured as being primarily liable. See American Auto Ins. Co. v. Penn Mutual Indem. Co., 161 F.2d 62 (3rd Cir. 1947); Commercial Cas. Co. v. Hartford Acc. & Liability Co., 190 Minn. 528, 252 N.W. 434 (1934).

[4] This approach holds the insurer who most specifically covers a particular risk liable for the loss, relying on the contract principle that the specific controls the general. See Trinity Universal Ins. Co. v. General Acc. Fire and Life Assur. Corp., 138 Ohio St. 488, 35 N.E. 2d 835 (1941).

[5] This approach holds the insurer whose policy was entered into first as being primarily liable because at that time there was no "other insurance." See New Amsterdam Cas. Co. v. Hartford Acc. & Indem. Co., 108 F.2d 653 (6th Cir. 1940).

[6] Note, 13 HASTINGS L.J. 187 (1961).

Conversely, the escape policy has been considered as other valid and collectible insurance within the meaning of the excess policy. As a result, the insurer providing the escape clause has been held primarily liable with the excess carrier secondarily liable.[7]

A leading case in this field is *Zurich General Accident and Liability Ins. Co. v. Clamor*,[8] which involved the excess v. escape conflict. In concluding that the policy with the excess clause did not qualify as other insurance within the meaning of the first policy, the court stated:

> The 'excess insurance' provided by the latter is not 'other insurance' required by Zurich. We think the logic of this reasoning is made apparent by assuming that neither of the policies contained an 'other insurance' provision, or that both policies contained an 'other insurance' provision in exactly the same language. It could not be seriously argued, in our opinion, but that under either of such situations the two insurers would be liable in proportion to the amount of insurance provided by their respective policies. Here, however, as pointed out, the 'other insurance' provisions of the two policies are different. In order to give effect to such difference, it is logical to conclude that Zurich is liable to the extent named in its policy, and that Car & General is liable only for any excess over that provided by Zurich.[9]

This decision distinguished between the different clauses and attempted to give full effect to the intent manifested by the insurers.

In *Travelers Indemnity Co. v. State Auto Ins. Co.*,[10] the driver was covered both under the leasing company's omnibus clause on the car, which included an escape provision, and by a personal liability policy which provided for excess coverage. The court, in holding that the driver's policy was not other valid insurance within the meaning of the leasing company's policy, emphasized that it was quite apparent that Travelers had extended its insurance to protect the insured only for any excess over the leasing company's coverage. A similar situation arose in the California case of *Air Transport Mfg. Co. v. Employers Liability Assur. Co.*,[11] where the court, after having rejected the "prior in time"[12] and "primary tort-feasor"[13] theories, stated that the "[l]iability . . . must be determined from a proper construction of the language of the 'escape' clauses or conditions

[7] Continental Cas. Co. v. American Fidelity & Cas. Co., 275 F.2d 381 (7th Cir. 1960); McFarland v. Chicago Express, Inc., 200 F.2d 5 (7th Cir. 1952); Zurich Gen. Acc. & Liability Ins. Co. v. Clamor, 124 F.2d 717 (7th Cir. 1941); Michigan Alkali Co. v. Bankers Indemnity Ins. Co., 103 F.2d 345 (2d Cir. 1939); Continental Cas. Co. v. Curtis Publishing Co., 94 F.2d 710 (3d Cir. 1938); St. Paul Fire & Marine Ins. Co. v. Garza County Warehouse & Marketing Ass'n, 93 F.2d 590 (5th Cir. 1937); Air Transport Mfg. Co. v. Employers Lia. Assur. Co., 91 Cal. App. 2d 129, 204 P.2d 647 (1949); Travelers Indem. Co. v. State Auto. Ins. Co., 67 Ohio App. 457, 37 N.E.2d 198 (1941).

[8] See Zurich Gen. Acc. & Liabil. Ins. Co. v. Clamor, *supra* note 7.

[9] *Id.* at 720.

[10] 67 Ohio App. 457, 37 N.E.2d 198 (1941).

[11] 91 Cal. App. 2d 129, 204 P.2d 647 (1949).

[12] *Supra* note 4.

[13] *Supra* note 3.

of both policies."[14] The court proceeded to hold the insurer with the escape clause primarily liable, reasoning that the manifest intent of the insurance with the conflicting pro rata provision was not to insure the entire risk. When another policy already provided some protection, the insurer contracted only to share proportionately in the liability.

However, there have recently been several departures from the majority approach. A small number of jurisdictions have given effect to the escape clause while holding the excess insurer primarily liable.[15] Such was the case in *Continental Cas. Co. v. Weekes*,[16] where the court held that the escape clause in the Continental policy was not violative of any statute and, therefore, came into force. This decision has been criticized because it was decided before the trial of the personal injury suit. If the damages would have exceeded the limits of the Continental policy, then the excess liability would not have been covered.[17]

By far, the most important departure from the majority approach to date has originated in the Oregon case of *Oregon Auto Ins. Co. v. United States Fidelity and Guarantee Co.*,[18] which involved the same excess v. escape situation as in the noted case. The court reviewed the various approaches which had been used in other jurisdictions and then rejected them as having used "circular"[19] reasoning which depended merely on which policy had been read first. Finding all other decisions irreconcilable it concluded:

> In our opinion, the "other insurance" provisions of the two policies are indistinguishable in meaning and intent. One cannot rationally choose between them. We understand the parties to concede that where neither policy has an 'other insurance' provision, the rule is to hold the two insurers liable to prorate in proportion to the amount of the insurance provided by their respective policies. Here, where both policies carry like 'other insurance' provisions, we think [they] must be held mutually repugnant and hence be disregarded. Our conclusion is that such view affords the only rational solution of the dispute in this case. The proration is to be applied in respect both of damages and of the expense of defending the suits.[20]

The decision reached in this case eventually became the law in Oregon by virtue of *Lamb-Weston, Inc. v. Oregon Auto Ins. Co.*,[21] and more

[14] *Supra* note 11, at 132, 204 P.2d at 649.

[15] Continental Cas. Co. v. Weekes, 74 So.2d 367 (Fla. 1954); American Auto Ins. Co. v. Penn. Mutual Indem., 161 F.2d 62 (3rd Cir. 1947), noted. 32 MINN. L. REV. 510 (1948); Kearns Coal Corp. v. United States Fidelity & Guaranty Co., 118 F.2d 33 (2d Cir. 1941), *cert. denied* 313 U.S. 579 (1941); Maryland Cas. Co. v. Bankers Indem. Ins. Co., 51 Ohio App. 323, 200 N.E. 849 (1935).

[16] *Supra* note 15.

[17] *Supra* note 6, at 187-8.

[18] 195 F.2d 958 (9th Cir. 1952).

[19] *Id.* at 960.

[20] *Ibid.*

[21] 219 Ore. 110, 341 P.2d 110, *modified*, 219 Ore. 129, 346 P.2d 643 (1959).

recently, in *Gilkey v. Andrew Weir Ins. Co.*[22] In both instances, the court concluded that the only acceptable solution was a proration between the insurers involved.

The Oregon cases have caused a great deal of controversy in the state and federal courts throughout the country.[23] In 1959, the Wisconsin Supreme Court in *Reetz v. Werch*,[24] settled the law in Wisconsin by refusing to place primary liability on either of the conflicting policies. The court adopted the reasoning of the Oregon cases and held for proration, stating that they also felt that the criteria for placing responsibility on any one insurer was an "arbitrary circumstance."[25] A California court,[26] although reaching an opposite result, stated that "on the basis of the Oregon case prorating with other insurance companies exceeding the stated amount of primary insurance might well be defensible."[27] Several other jurisdictions have adopted the Oregon view in recent cases. Proponents of the Oregon view offer three arguments for its adoption. It is claimed that not only will the application of the Oregon view avoid the "circular" reasoning employed by the majority, but that it is simple and convenient to use. Finally, it is contended that as an adjunct to the adoption of the minority view, litigation by insurance companies would be reduced. The contesting insurers would anticipate proration and would not attempt to avoid liability through court actions.

In rejecting the Oregon view, the proponents of the majority view feel that providing the insured with the greatest amount of protection is more important than the mere expediency of prorating liability. Such proration denies the insured of any excess coverage. On the other hand, distinguishing between the other insurance clauses provides such necessary coverage. By specifically including escape or excess clauses in their policies, the insurers sought to allocate liability where the risk involved was insured by more than one company. Therefore, as the majority points out, the followers of the Oregon view fail to take into account the fact that by completely disregarding the other insurance clauses, they are not effecting the intent of the insurance companies in such circumstances.

Illinois, prior to the case at bar, has vacillated as to which view it would adopt. In *Economy Fire and Casualty Co. v. Western States Mutual Ins.*

[22] 291 F.2d 132 (9th Cir. 1961). The federal court applied Oregon Law.

[23] See Watson, *The Other Insurance Dilemma*, 54 ILL. B. J. 486 (1966); Comment, 65 COLUM. L. REV. 319 (1965); Note, 38 MINN. L. REV. 838 (1954).

[24] 8 Wis. 2d 388, 98 N.W.2d 924 (1959).

[25] *Id.* at 393, 98 N.W.2d at 926.

[26] Peerless Casualty Co. v. Continental Casualty Co., 144 Cal. App. 2d 617, 301 P.2d 602 (1956).

[27] *Id.* at 625, 301 P.2d at 608.

Co.,[28] decided in 1964, the Illinois Appellate Court held for proration in adopting the Oregon view. Earlier, the Illinois Appellate Court had adopted the same view in *Laurie v. Holland America Ins. Co.*[29] and *Continental Casualty Co. v. New Amsterdam Casualty Co.*[30] However, Illinois through the present decision has placed itself firmly within the majority. Even though the minority has been adopted in several states,[31] it does not represent the current trend. It appears from a survey of the recent cases involving the excess v. escape controversy that the majority position as evidenced by the case at bar, has continued to influence courts throughout the country.[32]

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[28] 49 Ill. App. 2d 59, 198 N.E.2d 723 (1964), *subsequently overruled* in Jensen v. New Amsterdam Ins. Co., 65 Ill. App. 2d 407, 213 N.E.2d 141 (1965).

[29] 31 Ill. App. 2d 437, 176 N.E.2d 678 (1961).

[30] 28 Ill. App. 2d 489, 171 N.E.2d 406 (1960).

[31] Continental Cas. Co. v. St. Paul Mercury Fire & Marine Ins. Co., 163 F.Supp. 325 (D.C. Fla. 1958); Arditi v. Mass. Bonding & Ins. Co., 315 S.W.2d 736 (Mo. 1958); Cosmopolitan Mut. Ins. Co. v. Continental Cas. Co., 28 N.J. 554, 147 A.2d 529 (1959); Reetz v. Werch, *supra* note 24; Farmers Insur. Exch. v. Fidelity & Cas. Co. of New York, 374 P.2d 754 (Wyo. 1962).

[32] Continental Cas. Co. v. American Fid. & Cas. Co., 275 F.2d 381 (7th Cir. 1960); Fund Insurance Group, 262 F.2d 239 (D.C. Cir. 1958); American Surety Co. of New York v. Canal Ins. Co., 258 F.2d 934 (4th Cir. 1958); United Services Automobile Assoc. v. Russom, 241 F.2d 296 (5th Cir. 1957); Citizens Cas. Co. of New York v. Allied Mutual Ins. Co., 217 Md. 494, 144 A.2d 73 (1958); General Acc. Fire & Life Assur. Corp. v. Piazza, 4 N.Y.2d 659, 176 N.Y.S.2d 976, 152 N.E.2d 236 (1958).

SALES–UNIFORM COMMERCIAL CODE–IMPLIED WARRANTY AGAINST OBSCENITY

Plaintiff, a liquor store owner, brought an action for breach of implied warranty against a magazine distributor who had sold him certain magazines. After reselling some of the magazines to the public, it was determined by the Liquor Control Commission that they contained obscene material. As a result, plaintiff could not resell any more of these magazines and also had his liquor license revoked. In his complaint, the plaintiff asserted that the defendant had breached his implied warranty that the magazines were merchantable[1] and fit for the purpose of resale.[2] The Cir-

[1] UNIFORM COMMERCIAL CODE § 2-314. The Uniform Commercial Code became effective in Illinois on July 1, 1962. To date the Code has been adopted or is in effect in every state except Arizona, Idaho, and Louisiana. 3 UNIFORM COMMERCIAL CODE REPORTING SERVICE Release 5 (July 6, 1966).

[2] UNIFORM COMMERCIAL CODE § 2-315.