23 "OTHER INSURANCE" CLAUSES

Most insuring agreements contain an "other insurance" clause designed to resolve the confusion generated whenever two or more insurance policies apply to a single claim. They most frequently are seen in connection with automobile liability claims, such as where another (insured) person is driving the insured's vehicle, or where the insured is driving someone else's vehicle.

Generally, where two similarly worded (but mutually incompatible) clauses are involved, the loss will be prorated between or among the primary insurers.[277] In *Werley*, the Alaska Supreme Court noted that most automobile liability policies contain "other insurance" clauses declaring any other applicable insurance to be primary. "Attempting to distinguish between such conflicting clauses is much like determining the priority of the chicken versus the egg."[278] Since the two (or more) provisions are indistinguishable in meaning and intent, courts face a Herculean task in choosing which should be given effect. To resolve the circular argument, the Alaska Supreme Court has held most "other insurance" clauses to be repugnant to one another, and instead required that the loss be prorated among all insurers.[279] Contrary to the approach of many other states, Alaska courts have focused upon whether there is a true conflict between the clauses, as opposed to whether the two clauses are identical pro rata-type clauses, excess-type clauses, or escape-type clauses.

Where no true conflict exists between the clauses at issue, Alaska will enforce the "other insurance" provision which applies to the facts. The Alaska Supreme Court has enforced an excess insurance clause in an employer's automobile policy (finding that it clearly applied to the facts) and refused to enforce a similar clause in the owner's automobile policy (finding that it did not apply to the facts).[280] The critical issue seems to be whether there is a potential for unfair or illogical results (such as a result that provides the insured with **less** insurance coverage rather than more, even though two policies covered the same loss). Where such a potential exists, the policies will be prorated according to the insured's interests.

The pro rata liability is determined by the respective policy limits, rather than by the mere number of primary insurers.[281] Each insurer's share of liability and defense costs are to be calculated according to its actual exposure, not overall policy limits.[282]

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[277] *Werley v. United Servs. Auto. Ass'n*, 498 P.2d 112, 119 (Alaska 1972).

[278] *Id.* at 117.

[279] Id. at 119; see *also Horace Mann Ins. Co. v. Colonial Penn Ins. Co.*, 777 P.2d 1162 (Alaska 1989).

[280] *Providence Washington Insurance Co. v. Alaska Pacific Assurance Co.*, 603 P.2d 899 (Alaska 1979).

[281] *Continental Ins. Co. v. United States Fid. & Guar. Co.*, 528 P.2d 430, 436 (Alaska 1974).

For example, a permissive user injured two people while driving his friend's car. The vehicle owner was insured by Insurer A, and had liability limits of $100,000 per person, $300,000 per accident for bodily injury. The permissive user was insured by Insurer B, which provided minimum limits coverage of $50,000 per person, $100,000 per accident. In calculating contribution shares, Insurer A should contribute 2/3 of defense and indemnification costs, since its total exposure is $200,000 ($100,000 per each injured person, rather than $300,000 "per accident" limit), while Insurer B's potential exposure is $100,000 ($50,000 per person, up to a maximum of $100,000).

Generally, in the absence of "other insurance" clauses, multiple coverage situations are resolved by apportioning the loss among the insurers in the proportion that the limit of each policy bears to the aggregate limits of all available insurance.

Most rental car contracts incorporate provisions making the lessee's purchased coverage secondary and excess to all other available insurance. When the operator of a rental vehicle is involved in an accident, the rental agency and the driver's liability insurer frequently disagree regarding primary responsibility for damages and defense costs. Not surprisingly, this issue has arisen in numerous jurisdictions, with mixed results.

Although the Alaska Supreme Court has never had occasion to address the question of auto rental insurance, the Alaska Legislature took the lead in resolving this unsettled area of law. AS 21.89.020(f) provides that in claims involving rental vehicles, any liability payments shall be made in the following order: (1) from a policy or coverage purchased from the rental car agencies; (2) from a policy or coverage covering the operator of a rental vehicle but not purchased from the rental agency (i.e., from the operator's comprehensive auto liability policy); and (3) from the policy or coverage of the rental agency. The statute became effective July 1, 1997.

Appendices:

AS 21.89.020

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[282] *Columbia Mut. Ins. Co. v. State Farm Mut. Auto. Ins. Co.*, 905 P.2d 474 (Alaska 1995).

Sec. 21.89.020. Required motor vehicle coverage. (a) An automobile liability policy that insures an owner or operator of a motor vehicle against loss resulting from liability for bodily injury or death, or for property injury or destruction, or both, that is sold in the state, must contain limits in at least the amount prescribed for a motor vehicle liability policy in AS 28.20.440 or AS 28.22.101.

(b) This section may not be construed to apply only to automobile liability policies obtained to satisfy a requirement of AS 28.20.

(c) An insurance company offering automobile liability insurance in this state for bodily injury or death shall, initially and at each renewal, offer coverage prescribed in AS 28.20.440 and 28.20.445 or AS 28.22 for the protection of the persons insured under the policy who are legally entitled to recover damages for bodily injury or death from owners or operators of uninsured or underinsured motor vehicles. The limit written may not be less than the limit in AS 28.20.440 or AS 28.22.101. Coverage required to be offered under this section must include the following options:

(1) policy limits equal to the limits voluntarily purchased to cover the liability of the person insured for bodily injury or death;

(2) except when the coverage consists of motorcycle liability insurance, and except for a named insured required to file proof of financial responsibility under AS 28.20 or an applicant required to file proof of financial responsibility under AS 28.20, policy limits in the following amounts when these limits are greater than those offered under (1) of this subsection:

(A) $100,000 because of bodily injury to or death of one person in one accident, and, subject to the same limit for one person, $300,000 because of bodily injury to or death of two or more persons in one accident;

(B) $300,000 because of bodily injury to or death of one person in one accident, and, subject to the same limit for one person, $500,000 because of bodily injury to or death of two or more persons in one accident;

(C) $500,000 because of bodily injury to or death of one person in one accident, and, subject to the same limit for one person, $500,000 because of bodily injury to or death of two or more persons in one accident;

(D) $500,000 because of bodily injury to or death of one person in one accident, and, subject to the same limit for one person, $1,000,000 because of bodily injury to or death of two or more persons in one accident;

(E) $1,000,000 because of bodily injury to or death of one person in one accident, and, subject to the same limit for one person, $2,000,000 because of bodily injury to or death of two or more persons in one accident;

(3) other policy limits at the option of the insurer.

(d) An insurance company offering automobile liability insurance in this state for injury to or destruction of property shall offer coverage prescribed in AS 28.20.440 and 28.20.445, or AS 28.22, with limits not less than those prescribed in AS 28.20.440 or AS 28.22.101, to cover the insured person's liability for injury to or destruction of property, for the protection of the persons insured under the policy who are legally entitled to recover damages for injury to or destruction of the covered motor vehicle from owners or operators of uninsured or underinsured motor vehicles.

(e) The coverage required under (c) and (d) of this section may be waived in writing by the insured in whole or in part. After selection of the limits by the insured or the exercise of the option to waive the coverage in whole or in part, the insurer is not required to notify any policy holder in any renewal, supplemental, or replacement policy, as to the availability of the coverage or optional limits, and the waived coverage may not be included in any renewal, supplemental, or replacement policy. The insured may, at any time, make a written request for additional coverage or coverage more extensive than that provided on a prior policy.

(f) An automobile liability insurance policy must provide

(1) that all expenses and fees, not including counsel fees or adjuster fees, incurred because of arbitration or mediation shall be paid as determined by the arbitrator;

(2) liability coverage in the amount set out in AS 28.22.101(d) for motor vehicles rented in the United States or Canada by a person insured under the policy;

(3) physical damage coverage for motor vehicles rented in the United States or Canada, if the policy provides physical damage coverage; if the insured declines physical damage coverage, the insurer shall offer physical damage coverage for rented vehicles;

(4) that payments from applicable coverage provided under (2) and (3) of this subsection will be made in the following order of priority:

(A) from a policy or coverage purchased by the operator from the person who has the vehicle available for rent;

(B) from a policy or coverage covering the operator of a rented vehicle but not purchased from the person who has the vehicle available for rent; and

(C) from a policy or coverage of the person who has the vehicle available for rent.

(g) An insurance company offering automobile liability insurance in this state shall offer a short term policy valid for no more than seven days. The coverage available for the short term policy must be comparable to coverage available for longer term policies. The provisions of AS 21.36.210 — 21.36.310 do not apply to short term policies issued under this subsection.

(h) The selection, rejection, or exercise of the option not to purchase, by a named insured or an applicant, shall be valid for all insureds under the policy. (§ 1 ch 105 SLA 1968; am §§ 2, 3, 18 — 20 ch 70 SLA 1984; am §§ 3, 5, 7, 9, 10 ch 108 SLA 1989; am §§ 1, 2 ch 78 SLA 1990; am § 1 ch 26 SLA 1992; am § 216 ch 67 SLA 1992; am § 1 ch 84 SLA 1992; am §§ 109, 110 ch 81 SLA 1997)

Revisor's notes. — In 1992, in (c)(2) of this section, "proof of" was inserted after the first occurrence of "file" to correct a manifest error in § 1, ch. 26, SLA 1992. Also in 1992, a minor word change was made to give effect to the amendments made by chs. 26, 67, and 84, SLA 1992.

Effect of amendments. — The 1997 amendment, effective July 1, 1997, in subsection (f), added paragraph (4) and made related stylistic changes; and, in subsection (g), added the last sentence.

Editor's notes. — Section 29, ch. 108, SLA 1989 provides that (f) and (g) of this section "apply to automobile liability insurance policies entered into or renewed on or after January 1, 1990."

Section 7, ch. 78, SLA 1990 provides that the 1990 amendments to this section by ch. 78, SLA 1990 apply to "contracts of insurance entered into on or after January 1, 1991."

Section 3, ch. 26, SLA 1992 provides that the amendment made to (c)(2) of this section by § 1, ch. 26, SLA 1992 applies to a policy of insurance entered into or renewed on or after August 13, 1992.

Section 2, ch. 84, SLA 1992 provides that the amendment made to (c)(2) of this section by § 1, ch. 84, SLA 1992 applies to a policy of insurance entered into or renewed on or after September 16, 1992.