

In Like a Lion Out Like a Lamb-Weston: Variations in Judicial Scrutiny of Other Insurance Clauses

Spiro K. Bantis and Daniel W. London

I. Introduction

Liability insurance policies typically contain an “other insurance” clause to describe an insurer’s obligation when more than one insurance policy provides coverage to the same insured for the same loss. “Other insurance” clauses are unique within the liability policy because the clauses apply to the insurer’s interaction with other insurers and not to the insurer’s interaction with the insured.

On this much courts consistently agree: a primary policy with an “other insurance” clause dictates the sharing of liability vis-à-vis an overlapping primary policy with no “other insurance” clause. And each insurer is responsible for their proportional share of liability (usually measured in relation to their respective policy limits) when identical clauses present an intractable conflict. However, when overlapping primary liability policies contain different “other insurance” clauses, approaches vary by jurisdiction and degrees of intellectual rigor.

In this article, we contrast the so-called minority approach to differing “other insurance” clauses with the approach generally described as the majority rule. We discuss a stubborn persistence toward the selective use of the minority rule in jurisdictions that have not adopted the minority approach in its entirety.

II. Other Insurance Clauses

Other Insurance Clauses vary by insurer and policy. The three basic categories of “other insurance” clauses are:

1. The “pro rata” clause, which provides that an insurer will pay its share of the loss based on the ratio of its policy limits to the policy limits of any other “valid and collectible” primary insurance;
2. The “excess” clause, which provides that a primary insurer will pay its share of the loss only after exhaustion of any other “valid and collectible” primary insurance; and
3. The “escape” clause, which provides that an insurer will not pay any amount for loss to which other “valid and collectible” primary insurance is available.¹

Under the majority approach, discussed in section four, below, a court attempts to harmonize the competing clauses in order to avoid the need to disregard them entirely. A policy with a “pro-rata” clause generally pays its entire limit when confronted with an “excess” or “escape” clause.² There is less agreement concerning the priority between an “escape” clause and an “excess” clause. However, as a general rule, a policy with an “escape” clause pays its entire limit first when confronted with an “excess” clause from another insurer.³

III. *Lamb-Weston*: the “Minority Rule”

In *Lamb-Weston, Inc. v. Oregon Automobile Ins. Co.*, the Supreme Court of Oregon considered competing “excess” and “pro-rata” clauses in primary automobile liability policies.⁴

The coverage dispute arose out of an accident in which the brakes failed on a truck being driven to a repair shop. As a result of the brake failure, the truck crashed into a warehouse causing property damage. The lessor of the truck, Lamb-Weston Inc., had dispatched the truck to the repair shop with knowledge of the faulty brakes. Lamb-Weston, Inc. settled its liability to the warehouse with a loan from its liability insurer, St. Paul Fire & Marine Ins. Co. (“St.Paul”), and sued Oregon Automobile Insurance Company (“OAIC”), which insured the owner of the truck, for contribution and a determination that Lamb-Weston, Inc., a lessor, was an additional insured.⁵

The St. Paul policy contained a version of an “excess” clause, which provided:

If the Insured’s liability under this policy is covered by any other valid and collectible insurance, then this policy shall act as excess insurance over and above such other insurance.⁶

The OAIC policy contained a version of a “pro-rata” clause, which read:

...if the insured has other insurance against a loss covered by this policy the Company shall not be liable under this policy for a greater proportion of such loss than the applicable limit of liability stated in the declarations bears to the total applicable limit of all valid and collectible insurance against such loss....⁷

The Oregon Court was troubled by what it saw as arbitrary reasoning in the “other insurance” jurisprudence. The “pro-rata” clause in the OAIC policy required sharing by limits with other “valid and collectible insurance.” However, the “excess clause” in the St. Paul policy prohibited sharing with other “valid and collectible insurance.”

According to the Oregon Court:

[The majority rule’s] reasoning appears to us completely circular, depending, as it were, on which policy one happens to read

first....[T]he problem is little different from that involved in deciding which came first, the hen or the egg.⁸

Rather than modify the two clauses to give effect to the perceived intention of the insurers, the *Lamb-Weston* rule rejects both clauses and treats the overlapping primary policies as though they do not contain “other insurance” clauses at all:

In our opinion, whether one policy uses one clause or another, when any come in conflict with the ‘other insurance’ clause of another insurer, regardless of the nature of the clause, they are in fact repugnant and each should be rejected in toto.⁹

Almost since it was decided in June 1959, commentators have labeled *Lamb-Weston* the “minority rule.” Despite its “minority rule” label, *Lamb-Weston* garners a steady stream of adherents. And, in recent years, courts have rendered decisions whose logic is best described as “*Lamb-Weston*-like.” We discuss some of those *Lamb-Weston*-like decisions in part five, below.

IV. Application of the Majority Rule

Courts using a true “majority” approach attempt to harmonize differing “other insurance” clauses in overlapping primary insurance policies rather than disregard the clauses entirely.¹⁰

In *St. Paul Mercury Ins. Co. v. Penn. Cas’y Co.*, the Court applied a true “majority” rule to reconcile competing “other insurance” clauses in professional liability policies issued to a hospital and its directors by St. Paul Mercury Insurance Company (“St. Paul”) and Pennsylvania Casualty Company (“PCC”).¹¹

The PCC policy contained a version of the “excess” clause, which provided:

The insurance afforded under this policy shall be excess over any valid and collectible insurance.¹²

The St. Paul policy contained a version of the “pro rata” clause, which read:

A professional liability loss that’s covered under this agreement may also be covered under other insurance. If this happens, we’ll pay that portion of the loss which the limits of coverage under the agreement are of the total of all limits that apply. But we won’t pay more than the limits of coverage under this agreement.¹³

Noting that “neither party relied upon the existence of insurance coverage on the part of the other” in issuing the policies, the Court reasoned that the competing ‘other insurance’ clauses were best harmonized by permitting the PCC policy, which had an “excess” clause, to apply as excess to the St. Paul policy, which had a “pro rata” clause.¹⁴

The “excess clause” contemplates that the policy will be excess “over any valid and collectible insurance.” An overlapping primary policy is “valid and collectible insurance.” Therefore, the “excess” clause can be enforced. As the *Lamb-Weston* Court noted, the majority rule chooses to begin with the “excess clause” and, by doing so, does not give full effect to the “pro rata” clause, which requires sharing by limits.

Majority courts reason that it is more consistent with the expectation of insurers for a “pro-rata” clause, which contemplates *some* sharing with other insurance, to give way to an “excess clause,” which prohibits sharing. One could argue that the very existence of the majority rule has strengthened the expectation of insurers, who have for years drafted “other insurance” clauses with the majority rule in mind.

V. Application of *Lamb-Weston*-like Rules

Courts that have adopted *Lamb-Weston*’s bright-line rule are indeed in the minority.¹⁵ However, courts continue to apply *Lamb-Weston*-like rules in select circumstances.¹⁶ Accordingly, it may be unhelpful to simply characterize a particular jurisdiction as following the “minority” or “majority” approach. It is increasingly necessary to examine the particular competing “other insurance” clauses in context.

A. Application of *Lamb-Weston* for Select Conflicts

In *Penton v. Hotho*, a Louisiana appellate court applied the *Lamb-Weston* rule selectively to resolve competing “excess” and “pro-rata” clauses in professional liability policies.¹⁷ Dr. Hotho was insured by Louisiana Medical Mutual Ins. Co. (“LMMIC”) under a cancelled claims-made policy with an extended reporting period and by The Medical Protective Company (“MPC”) under an overlapping claims-made policy issued after cancellation of the LMMIC policy.¹⁸

Like the PCC policy at issue in *St. Paul Mercury Ins. Co.*, above, the LMMIC policy contained a version of an “excess” clause. The LMMIC clause provided:

The insurance available under this policy shall be excess over any other valid and collectible insurance.¹⁹

And like the St. Paul policy described above, the MPC policy at issue in *Penton* contained a version of a “pro rata” clause. The MPC clause read:

When both this insurance and other insurance apply to the loss on the same basis...the Company shall not be liable under this policy for a greater proportion of such loss than the applicable limit of liability under this policy for such loss bears to the total applicable limit of all valid and collectible insurance against such loss.²⁰

Rather than modify the two clauses to give effect to the perceived intention of the insurers, the *Penton* Court adopted the *Lamb-Weston* rule in treating the overlapping primary policies as though they do not contain “other insurance.”

However, what is perhaps most interesting about the *Penton* decision is that Louisiana does not regard itself as a typical *Lamb-Weston* jurisdiction. As the *Penton* court notes, Louisiana courts will enforce “pro-rata” and “escape” clauses but not “excess” and “escape” clauses or, following *Penton*, “pro-rata” and “excess” clauses.

B. California’s March Toward Lamb-Weston (and beyond)

In California, a destination has begun to appear in a march away from the majority rule, under which California courts sought to harmonize competing “other insurance” clauses, toward a *Lamb-Weston*-like rule, which disregards “excess” and “escape” other insurance clauses on equitable grounds.²¹

Edmondson Property Management v. Kwock presented the court with a relatively common “other insurance” dispute.²² *Edmondson Property Management* (“Edmondson”) managed a residential building at which a child was injured. The child’s guardians filed a personal injury lawsuit against Edmondson. Edmondson had liability insurance as an additional insured on a policy issued to the building owner by California Capital Insurance Company (“Capital”) and as the named insured on a policy issued by Farmers Insurance Group (“Farmers”).²³

The policy issued by Farmers contained an “excess” other insurance clause. According to the Court, the policy issued by Capital did not contain any other insurance clause at all.²⁴ Noting that “[t]he modern trend is to require contribution where there is the same level of insurance for the same risk, regardless of ‘other insurance’ language,” the *Edmondson* Court concluded that “[p]ublic policy favors apportionment of loss among those who have contracted to insure against it and, as a result, equity overrides the terms of the insurance contract in these cases.”²⁵ Thus, the “excess” other insurance clause in the Farmers policy would be disregarded even in the absence of any competing “other insurance” clause in the Capital policy. And the two primary policies would be required to contribute “50 percent for each party.”²⁶

Edmondson is a significant landmark in California’s movement toward *Lamb-Weston* because it is the first reported California decision to apply a non-majority rule for primary policies covering the same policy periods. Earlier California cases were distinguishable because they applied a non-majority rule in cases with several policies spread over multiple policy periods.²⁷

Edmondson may prove to represent a significant move beyond *Lamb-Weston* because the “excess” clause in the Farmers policy was disregarded even in the absence of a competing other insurance clause in the Capital policy. In this way, the *Edmondson* court strode past *Lamb-Weston* and earlier California cases that had given lip-service to the older rule “that an insurer’s coverage terms will be honored if possible.”²⁸

The *Edmondson* Court rooted its decision solely in equitable terms:

[“excess” and “escape” clauses] are discouraged and generally not given effect in actions where the insurance company who paid the

liability is seeking equitable contribution from the carrier who is seeking to avoid the risk it was paid to cover.²⁹

Federal District Courts tasked with interpreting California's "other insurance" jurisprudence may be struggling with the entirely equitable nature of the new rules. In *California State Automobile Association Inter-Insurance Bureau v. Progressive Casualty Insurance Company*, a district court was tasked with the interpretation of competing "other insurance" clauses in overlapping primary insurance policies.³⁰

The district court considered a dispute involving coverage for a personal injury arising out of a boating accident.³¹ One primary policy contained a standard "excess" other insurance clause. A second overlapping primary policy contained an "other insurance" clause that was "excess" only for claims arising out of "watercraft."³² Noting that the "modern trend is to require contribution where there is the same level of insurance for the same risk," the Court added "this modern trend...should only apply if there is an actual conflict between the two other insurance clauses."³³

The district court found no conflict between a general "excess" other insurance clause and the more specific "excess" other insurance clause in the second policy. Because there was no conflict between the policies, the district court determined that principles of equity required the policy with the general "excess" clause to contribute its limits before the policy with the more specific "excess" clause was implicated.³⁴

VI. Conclusion

Courts continue to struggle with their approach to disputes over competing other insurance clauses in overlapping primary insurance policies. Courts using a true "majority" approach attempt to harmonize different "other insurance" clauses in overlapping primary insurance policies rather than disregard the clauses entirely. However, courts attempting harmony sometimes strike a discordant note when efforts are made to discern common rules across jurisdictions.

The bright-line rule adopted by the Oregon Supreme Court in *Lamb-Weston* offers the promise for greater consistency but provides that consistency only by ignoring insurers' attempts to define their obligations to one another. California appears to be forging its own path, based on public policy considerations rather than principles of contract interpretation.

In this shifting landscape, it is increasingly important for underwriters, claims professionals and coverage lawyers to consider particular competing "other insurance" clauses in context of the jurisdictions, policies and underlying claims in which a dispute may arise. In relying on majority rules and long-held industry expectations, there is a risk of walking into a claim with the confidence of a lion only to discover a surprising rule that sends one out like a lamb (Weston).

¹ See, e.g., *St. Paul Fire & Marine Ins. Co. v. American Home Assur. Co.*, 444 Mich. 560, 565, 514 N.W.2d 113, 115 (1994)(listing categories of 'other insurance' clauses); *Couch on Insurance 3D*, §219:4 (West 2012).

² See, e.g., *Couch on Insurance 3D*, §§219:51 & 219:56 (West 2012).

³ *Couch on Insurance 3D*, §219:53.

⁴ *Lamb-Weston, Inc. v. Oregon Auto. Ins. Co.*, 219 Or. 110, 341 P.2d 110 (1959)

⁵ *Lamb-Weston, Inc.*, 219 Or. at 113-114, 341 P.2d at 111-112 (1959)

⁶ *Id.* at 119, 114.

⁷ *Id.*

⁸ *Id.* at 122, 116.

⁹ *Id.* at 128, 119.

¹⁰ *Jones v. Medox, Inc.*, 430 A.2d 488, 12 A.L.R. 4th 981 (D.C. Ct. App. 1981)(reconciling ‘pro rata’ and ‘excess’ other insurance clauses in overlapping primary professional liability policies by requiring ‘pro rata’ clause policy to contribute up to its limits before ‘excess’ clause policy is implicated).

¹¹ *St. Paul Mercury Ins. Co. v. Penn. Cas’y Co.*, 642 F. Supp. 180 (D. Wy 1986).

¹² *Id.* at 182-183.

¹³ *Id.* at 182.

¹⁴ *Id.* at 185 (“this Court will give effect to the intent of the insuring parties, who have contracted with the insured hospital as expressed by the language contained in the insurance policies”)

¹⁵ See, *Werley v. United Svcs. Auto. Ass’n*, 498 P.2d 112, 119 (AK 1972)(“...Lamb-Weston is the better rule of law and should be applied in all cases where conflicting ‘other insurance’ clauses of the excess, pro-rata or escape types are found.

¹⁶ See, e.g., *Hoffmaster v. Hareysville Ins. Co.*, 441 Pa. Super 490, 657 A.2d 1274 (Pa. Sup. 1995)(professing to apply the “majority” rule but refusing to interpret the word “you” in a manner that would reconcile competing other insurance clauses because “[i]t merely encourages the continuing draftsmanship battle by which insurers seek still more specific policy and terms”); *Penton v. Hotho*, 601 So.2d 762, 766-769 (LA Ct. App. 1992)(finding “excess” and “pro-rata” clauses repugnant, but noting that “pro-rata” and “escape” clauses are not repugnant although “excess” and “escape” clauses are). These courts often perceive a policyholder protection rationale in the simplicity of the *Lamb-Weston* rule. see, *Hindson v. Allstate Ins. Co.*, 694 A.2d 682, 685-686 (R.I. 1997)(“Our sincere wish is that this denouement brings a belated but welcome armistice to those combat weary draftsmen still fighting the good fight over which policy’s other-insurance clause boasts the better boilerplate. And our fervent hope is that our cutting of the Gordian Knot will free ensnared insureds...from the coils of such disputes”).

¹⁷ *Penton*, 601 So.2d at 766-769.

¹⁸ *Id.* at 763.

¹⁹ *Id.* at 764

²⁰ *Id.*

²¹ See, e.g., *Owens Pacific Marine, Inc. v. Insurance Co. of North America*, 12 Cal. App.3d 661, 90 Cal. Rptr.826 (2d Dist. 1970)(following majority rule that, where overlapping primary policies contain competing “excess” and “pro-rata” other insurance clauses, the policy with the “pro-rata” clause must pay its limit before the policy with the “excess” clause is triggered); compare, *Fireman’s Fund Ins. Co. v. Maryland Cas’y Co.*, 65 Cal.App.4th 1279, 77 Cal.Rptr.2d 296 (1998)(“excess” other insurance clauses disregarded where multiple primary insurance policies provided coverage to same insured for same loss but during multiple policy periods), *Century Surety Co. v. United Pacific Ins. Co.*, 109 Cal.App.4th 1246, 135 Cal. Rptr.2d 879 (2d Dist. 2003)(requiring pro-rata contribution among primary insurance policies issued to same insured for concurrent policy periods with regard to other insurance clauses), *Travelers Cas’y and Surety Co. v. Century Surety Co.*, 118 Cal.App.4th 1156, 13 Cal.Rptr.3d 526 (4th Dist.2004) review denied (2004)(same).

²² *Edmondson Prop. Mgmt. v. Kwock*, 156 Cal.App.4th 197, 67 Cal.Rptr.3d 243 (5th Dist. 2007) review denied (2008).

²³ *Edmondson Prop. Mgmt.*, 156 Cal.App.4th at 200, 67 Cal.Rptr.3d at 245.

²⁴ *Id.* at 203, 247.

²⁵ *Id.* at 203, 247-248

²⁶ *Id.* at 209, 253. It is not clear whether the fifty-percent apportionment approved by the court was a pro-rata apportionment by limits based on two policies with identical policy limits or an equitable apportionment based on some other consideration.

²⁷ See, e.g., *Fireman’s Fund Ins. Co. v. Maryland Cas’y Co.*; *Century Surety Co. v. United Pacific Ins. Co.*, *Travelers Cas’y and Surety Co. v. Century Surety Co.*, supra n.21.

²⁸ *Travelers Cas’y and Surety Co.*, 118 Cal.App.4th at 159, 13 Cal.Rptr.3d at 528.

²⁹ *Edmondson Prop. Mgmt.*, 156 Cal.App.4th at 203-204, 67 Cal.Rptr.3d at 248.

³⁰ *California State Auto. Ass'n Inter-Ins. Bureau v. Progressive Cas'y Ins. Co.*, 2012 WL 1438835 (N.D.C.A. April 25, 2012).

³¹ *California State Auto. Ass'n Inter-Ins. Bureau*, 2012 WL 1438835 at *1.

³² *Id* at *2.

³³ *Id* at *3.

³⁴ *Id* at **3-4.