device discloses that the trend has been toward a recognition of the testator's evident purpose and away from arbitrary and technical rules of law.[85] In addition, Congress' new enactment concerning the taxability of limited powers should stimulate the utilization of this type of testamentary transfer by furnishing a convenient hegira from further tax depletions upon the death of the life tenant.

CONFLICTING INTERPRETATIONS OF "OTHER INSURANCE" CLAUSES

An individual who suffers a loss occasioned by harm to his property or person has frequently contracted with more than one insurance company for reimbursement in an amount dependent upon the policy limits and the type and extent of loss. The frequency of such double coverage is attested by the numerous commonplace situations which may occasion it.[1] The existence of concurrent insurance is in most instances either an unavoidable coincidence or a result of an insured's response to a real need for additional protection.

From the insurance companies' viewpoint, double coverage presents a twofold problem. First, there is an increased possiblity of over-insurance; that is, the insured is in a position to recoup more than the actual amount of his injury. This situation—the capability of a claimant to realize a profit upon occurrence of the insured contingency—may intensify the moral hazard to the insurer. Second, the insured, by seeking reimbursement from one company rather than the others, may place the entire burden upon that company. Insurance carriers early realized that

85. An example of an extreme case is Hanks v. McDanell, 307 Ky. 243, 210 S.W.2d 784 (1948), where the testator made a general devise to his widow with an absolute power of disposition added, remainder over to certain named persons. The court, in holding that the widow took only a life estate, asserted the "Pole Star" rule that the intent of the maker of an instrument shall prevail and be enforced "unless it antagonizes a statute or is against public policy." The devise involved was declared not to be against public policy or Kentucky statutes. But see Franklin College v. Wolford, 118 Ind. App. 401, 78 N.E.2d 35 (1948); see note 37 *supra.*

1. Generally, concurrent liability results from overlapping coverage of various companies' policies; the alternative would be negotiations between a single insurer and an applicant to draft one insurance contract for all of the applicant's needs. While this process might solve many problems, it does not appear to be economically or administratively feasible. Concurrent insurance may also result from any of the following situations: rising values may induce a property owner to obtain more fire insurance; acquisition of hazardous instruments or assumption of hazardous activities may entice the insured to buy more liability insurance; use of others' insured cars and trucks by an already insured driver results in concurrent insurance upon the driver.

the common law remedy of contribution afforded them some protection against these dangers by limiting recovery to actual damage and distributing the obligation proportionately among the several companies.[2] As a prerequisite to common law contribution among insurers, their policies must be concurrent—they must insure the same subject matter, interest and risk.[3] Another requirement for contribution is an ascertainable loss, expressed in monetary terms, to use in computing the adjustment.

Before there can be a determination as to whether or not a particular insurer is entitled to contribution, there must be some classification of insurance policies on the basis of type of loss covered. Insurance which assumes the risk of damage to buildings and chattels, and the risk of public liability, can be classified as property insurance;[4] writers of such coverage, which is said to be indemnity insurance because the amount of loss can be established,[5] are entitled to contribution when the other prerequisites are present.[6] In contradistinction are life and accident insurance policies,[7] which, since the pecuniary value of human life or limb cannot be measured, are not contracts of indemnity,[8] and so afford no right to contribution.

2. For a brief, general discussion of common law contribution, see McClintock, Equity § 204 (2d ed. 1948); Restatement, Restitution, Reporter's Notes § 81 (1937).

3. Newark Fire Ins. Co. v. Turk, 6 F.2d 533, 535 (3d Cir. 1925); Nobbe v. Equity Fire Ins. Co., 210 Minn. 93, 297 N.W. 349 (1941); Murdaugh v. Traders & Mechanics Ins. Co., 218 S.C. 299, 62 S.E.2d 723 (1950); Lucas v. Garrett, 209 S.C. 521, 527, 41 S.E.2d 212, 215 (1947); 7 Couch, Cyclopedia of Insurance Law § 1846 (1930).

4. "The different kinds of insurance contracts . . . are almost as numerous and varied as are the human interests that are subject to the risk of uncertain future events, but for convenience in treatment they may . . . be assembled in three great groups: (1) Contracts of property insurance, including the most ancient forms of insurance, marine and fire insurance, as well as a vast number of later forms. (2) Contracts of liability insurance, closely akin to property insurance. . . . (3) Contracts of life insurance, a broad term that may include not only policies payable on the termination of the life insured, but also those promising to make specified payments in case of accidental injury, illness, or disability for other causes." Vance, Insurance 90 (3d ed. 1951).

5. Davis-Wood Lumber Co. v. Insurance Co. of North America, 154 So. 760, 764 (La. App. 1934); State *ex rel.* Duffy v. Western Auto Supply Co., 134 Ohio St. 163, 168-169, 16 N.E.2d 256, 258-259 (1938); 7 Couch, Cyclopedia of Insurance Law § 1838.

6. Thurston v. Koch, 4 Dall. 348 (C.C.D. Pa. 1800); Artificial Ice Co. v. Reciprocal Exchange, 192 Iowa 1133, 1152, 184 N.W. 756, 764 (1921); Commercial Cas. Ins. Co. v. Knutsen Motor Trucking Co., 36 Ohio App. 241, 173 N.E. 241 (1930); *cf.* Sutton v. Franklin Fire Ins. Co., 209 N.C. 826, 184 S.E. 821 (1936); *see* Traders & General Ins. Co. v. Hicks Rubber Co., 140 Tex. 586, 597, 169 S.W.2d 142, 148 (1943).

7. See note 4 *supra.*

8. Crab Orchard Improvement Co. v. Chesapeake & Ohio Ry., 115 F.2d 277, 281 (4th Cir. 1940) (by comparing workmen's compensation with life and accident insurance, the court decided the former is not indemnity); First-Columbus Nat. Bank v.

To preclude litigation and facilitate settlements, objectives impossible of attainment through resort to common law contribution, insurance companies often include clauses in their policies which limit liability contingent upon the existence of concurrent insurance.[9] But poor and ambiguous drafting of these liability limitation clauses, and the inevitable conflicts of divergent clauses, frequently necessitate litigation to fix the liability—a contradiction of their very purpose. Complicating the situation, courts inconsistently approach the question of insurers' liability under policies with conflicting "other insurance" clauses.

Liability Limitation Clauses—Property Insurance

Three types of limitation clauses are most frequently employed. (1) "Loss prorata": the company shall be liable for its prorata share of the loss in the same proportion as the limit of its policy bears to the aggregate amount of insurance carried.[10] (2) "Excess": after payment by the other insurer, the excess insurer is liable for whatever amount is still necessary to fully indemnify the insured.[11] (3) "Escape": when other insurance exists, this policy is void.[12] Ownership of policies

Pate Lumber Co., 163 Miss. 691, 141 So. 767 (1932); Reed v. Provident Savings Life Assur. Soc'y, 190 N.Y. 111, 82 N.E. 734 (1907); Suttles v. Railway Mail Ass'n, 156 App. Div. 435, 141 N.Y. Supp. 1024 (4th Dep't 1913) (although contract provided benefits for loss of time, the court held such was not an indemnity contract); Gatzweiler v. Milwaukee Electric R. & L. Co., 136 Wis. 34, 116 N.W. 633 (1908) (accident insurance is not indemnity insurance).

Query whether or not accident insurance which provides benefits for loss of time due to temporary disability should be considered as indemnity. ". . . [D]eath benefit is not the dominant feature of an accident insurance policy. The dominant feature of that kind of a policy is indemnity for loss of time resulting from accident." Arneberg v. Continental Cas. Co., 178 Wis. 428, 438, 190 N.W. 97, 100 (1922). ". . . [P]roperty has a market value, and when that market value is paid the assured is indemnified. A bodily injury has no market price. If it results in a mere disability to continue the assured's avocation, the value of the assured's time during such disability furnishes a definite standard for a contract of indemnification. . . ." Employers' Liability Assur. Corp. v. Morrow, 143 Fed. 750, 754 (6th Cir. 1906). See Smith, *The Disability Clause*, 5 J. Am. Soc'y C.L.U. 127 (1951), in which the author suggests that life insurance carriers should include disability coverage for loss of earning power which is a kind of indemnity insurance.

9. Vance, Insurance 878.

10. In illustration, suppose policy A limits coverage to $600 and policy B limits its coverage for the same loss to $1200; the amount of the loss is placed at $900. Under loss prorata clauses, policy A is liable for $300 ($600/$1800 of $900) and policy B for $600 ($1200/$1800 of $900). See Vance, Insurance 878, for a typical loss prorata clause.

11. *E.g.*, ". . . [T]he coverage under this endorsement shall be an excess coverage over and above the valid and collectible insurance under the policy taken out by the owner or operator of the car." New Amsterdam Cas. Co. v. Hartford Acc. & Indemnity Co., 108 F.2d 653, 655 (6th Cir. 1940).

12. *E.g.*, "If any other Assured included in this insurance is covered by valid and collectible insurance against a claim also covered by this Policy, he shall not be

containing these diverse clauses leads to inevitable conflicts. The prime considerations in interpreting the limitation clauses and resolving their conflicts are the effectuation of the terms of the contracts without either indiscriminately placing the entire burden upon one carrier, or denying the insured indemnity for his loss.

Loss prorata v. Loss prorata. When both policies contain a loss prorata clause, the liability of each company is readily determined by giving effect to both clauses and apportioning the loss among the insurers.[13]

Escape v. Escape. Although at the present time no cases have treated this conflict, the courts should prorate liability. Acceptance of both clauses would deny the insured indemnity; placing the burden of the loss entirely upon one company would arbitrarily relieve one insurer at the expense of the other.

Excess v. Excess. Endeavoring to settle contests between companies whose policies contain excess clauses, the courts have utilized incongruous approaches to fix the liability of each company. For example, a court may say that the policy issued first in time is primarily liable, for when that policy was issued there was no other insurance in effect to execute its excess clause.[14] Realistically, priority of issue should be immaterial since both policies become legally liable at the same moment—when the event occasioning the loss occurs.[15]

Another approach determines which policy accords *specific* coverage for the particular risk and which policy provides *general* coverage, the former resulting in primary liability, the latter being secondarily liable.[16] To illustrate, suppose insurance company X issues a liability policy for injuries sustained due to an explosion of an air compressor, and company Y issues a public liability policy covering injuries received while on the insured's premises. If someone were injured on the insured's premises by an explosion of an air compressor, a court using this approach would

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entitled to protection under this Policy." New Amsterdam Cas. Co. v. Hartford Acc. & Indemnity Co., 18 F. Supp. 707, 709 (W.D. Ky. 1937).

13. See note 10 *supra.* Ranallo v. Hinman Bros. Construction Co., 49 F. Supp. 920 (N.D. Ohio 1942); Consolidated Shippers, Inc. v. Pacific Employers Ins. Co., 45 Cal. App. 2d 288, 114 P.2d 34 (1941); Celina Mut. Cas. Co. v. Citizens Cas. Co., 194 Md. 236, 71 A.2d 20 (1950); Central Sur. & Ins. Corp. v. New Amsterdam Cas. Co., 216 S.W.2d 527, 533 (Mo. App. 1948) (assignment to one prorata insurer of insured's claim against two other prorata insurers), *rev'd on other grounds,* 359 Mo. 430, 222 S.W.2d 76 (1949).

14. New Amsterdam Cas. Co. v. Hartford Acc. & Indemnity Co., 108 F.2d 653 (6th Cir. 1940); Gutner v. Switzerland General Ins. Co., 32 F.2d 700 (2d Cir. 1929).

15. Oregon Auto. Ins. Co. v. United States Fidelity & Guar. Co., 195 F.2d 958, 960 (9th Cir. 1952); Zurich General Acc. & Liability Ins. Co. v. Clamor, 124 F.2d 717, 719 (7th Cir. 1941).

16. Hartford Steam Boiler Inspection & Ins. Co. v. Cochran Oil Mill & Ginnery Co., 26 Ga. App. 288, 105 S.E. 856 (1921).

hold company X liable to the limit of its policy because it specifically covered such an explosion, while company Y would be liable only for the excess, even though both policies contained excess clauses. While having the specious advantage of simple application, this method of determining liability ignores the identity of the instant risk—either policy standing alone would be wholly liable. Application of prorata liability would prevent the conferring of an arbitrary advantage upon one of the companies.[17]

Excess v. Loss prorata. The specific-general approach was extended to a conflict between a policy containing an excess clause and one with a loss prorata provision in *Trinity Universal Insurance Co. v. General Accident, Fire & Life Assurance Corp.*[18] Policy X insured against liability due to an accident occurring upon the premises of the insured, but "if such accident . . . is due . . . to an automobile . . . then this policy . . . shall be excess insurance only over . . . other insurance." Policy Y, containing a loss prorata clause, provided liability insurance for injuries arising out of the use of a delivery truck. As a result of an accident on the premises involving the delivery truck, the insured was liable for damages. In a suit by the company issuing policy Y for declaratory determination of the liability of the respective policies, the court held that policy X furnished general coverage while policy Y specifically covered the truck involved in the accident. Following the "general rule," the specific insurer was held primarily liable; the court held the company with a loss prorata policy liable for its contract limit, thus giving effect to the excess clause of policy X.

The dilemma a court faces when confronted with the problem of interpreting and applying conflicting limitation clauses can be illustrated by the facts of this case. A limitation clause becomes applicable when "other valid and collectible insurance" exists concurrently with the policy containing the clause. The court's examination of the policies above could start with policy X; since X contained an excess clause, it would not be "other insurance" with full and valid liability for the loss. Thus, the prorata clause of policy Y would have no effect, and the court would hold policy Y primarily liable with the excess payable by X. On the other hand, the court could first examine policy Y and find that since it contained a prorata clause, it was not "other valid and collectible insurance" which would give effect to the excess clause of policy X. Thus, X would

17. Employers Liability Assur. Corp. v. Pacific Employers Ins. Co., 102 Cal. App. 2d 188, 227 P.2d 53 (1951). *Contra:* Zurich General Acc. & Liability Ins. Co. v. Clamor, 124 F.2d 717, 720 (7th Cir. 1941).

18. 138 Ohio St. 488, 35 N.E.2d 836 (1941).

be fully liable, and since the court was accepting Y's prorata clause, the result would be that X and Y would prorate the loss.

The latter result was substantially reached in a California case which gave effect to both the excess and prorata clauses; the excess insurer was liable for the balance over the prorata amount.[19] This solution in fact made the excess insurer a prorata insurer. In a later California case the court arbitrarily examined the policy with the excess clause first, and so held that the prorata insurer of a car involved in an accident was primarily liable and the excess insurer of the driver of the car was secondarily liable.[20] Since the courts can rationalize any of several solutions, the most reasonable approach would be to either deny both clauses, because the other policy is not other valid insurance, or to give effect to both clauses, with the end result that the liability is prorated.

Excess v. Escape. In declaring that an insurance policy with an excess clause is not such other valid and collectible insurance as would void a policy with an escape clause, a court examined the excess insurance first. By so doing, the court did not determine whether or not the policy with an escape clause was such other insurance as would effectuate the excess clause.[21] The court reasoned that, from the language of the clauses, the escape clause was "general" while the excess clause was "more specific"; the specific language controlled, so that the excess policy was not other valid and collectible insurance.

Faced with the conflict of an excess clause and an escape clause, the Court of Appeals for the Ninth Circuit, in its recent opinion in *Oregon Automobile Insurance Co. v. United States Fidelity & Guaranty Co.*, took cognizance of the confusion pervading the cases which have inter-

19. Air Transport Mfg. Co. v. Employers' Liability Assur. Corp., 91 Cal. App. 2d 129, 204 P.2d 647 (1949).

20. Norris v. Pacific Indemnity Co., 237 P.2d 666, 671 (Cal. App. 1951), *rev'd on other grounds*, 39 Cal. 2d 420, 247 P.2d 1 1952). The court examined the excess clause and found that it was not other valid insurance to give effect to the other policy's prorata provision. The result of such reasoning makes excess insurance clauses secondarily liable, and gives them an unwarranted preference over prorata clauses. The respondent urged, more reasonably, that neither clause could be given effect since both policies were "other conditional insurance," not "other valid insurance." The court admits a preference to excess clauses by saying "to adopt respondent's view here would also be . . . to ignore the . . . excess clause and render it meaningless. . . . [N]o excess clause would ever be effective. . . ." *Id.* at 672. But, has not the court actually rendered a loss prorata clause meaningless when in conflict with an excess clause?

21. Zurich General Acc. & Liability Ins. Co. v. Clamor, 124 F.2d 717 (7th Cir. 1941). See note 20 *supra* for a brief discussion of the preference often accorded excess clauses. *But cf.* New Amsterdam Cas. Co. v. Hartford Acc. & Indemnity Co., 18 F. Supp. 707 (W.D. Ky. 1937), in which the court found that the policy with an excess clause was sufficient "other insurance" to effectuate the escape clause of a concurrent policy.

preted conflicting limitation clauses.[22] The court lucidly pointed out the arbitrariness of the various approaches: The "reasoning [of these cases] appears to us completely circular, depending . . . on which policy one happens to read first. Other cases seem to recognize the truth of the matter, namely, that the problem is little different from that involved in deciding which came first, the hen or the egg."[23] Since the "other insurance" provisions were indistinguishable in meaning and intent, the insurers were held liable proratably. When both policies carry like "other insurance" clauses, "[o]ne cannot rationally choose between them"; they "must be held mutually repugnant and hence be disregarded" in favor of proration.[24] This case exemplifies a sound approach to interpretation of conflicting limitation clauses; arbitrarily limiting one policy bestows a windfall upon that policy; giving effect to both clauses would sometimes deny the insured indemnity.

After classifying limitation clauses generally as loss prorata, excess and escape, and examining the possible combinations productive of conflicts,[25] the most reasonable approach by the courts in each situation has resulted in prorata liability among the insurers. Assuming an equal desire on the part of insurance companies and policy holders for quick and easy settlements without litigation, the loss prorata clause, the most equitable device, should be uniformly adopted by property insurance carriers.

Practically all states, led by New York, have taken a commendable step designed to eliminate conflicting limitation clauses in fire insurance policies by adopting a standard fire policy with a loss prorata clause.[26] However, a loophole has been left by including in the standard policy a

22. 195 F.2d 958 (9th Cir. 1952); see Comment, 5 STAN. L. REV. 147 (1952); 52 COL. L. REV. 1063 (1952).

23. Oregon Auto. Ins. Co. v. United States Fidelity & Guar. Co., *supra* note 22, at 960. One "other case" was Zurich General Acc. & Liability Ins. Co. v. Clamor, *supra* note 21; there the court, though recognizing the dilemma, did little to resolve it and relied upon the reasoning of the specific clause controlling over the general escape clause.

24. Oregon Auto. Ins. Co. v. United States Fidelity & Guar. Co., *supra* note 22, at 960.

25. See Comment, 5 STAN. L. REV. 147 (1952). One possible combination remains: A loss prorata clause in conflict with an escape clause. Although no cases can be found upon this point, in view of the undesirability of arbitrarily giving one insurer an advantage over the other, the best solution is to prorate the loss.

See a recent case note on the conflict between a loss prorata clause and an unusual type limitation clause resulting in less liability than the orthodox loss prorata clause. Bergstrom Paper Co. v. Continental Ins. Co., 174 F.2d 636 (7th Cir. 1949), 34 MINN. L. REV. 353 (1950).

26. N.Y. INSURANCE LAW § 168; IOWA CODE ANN. c. 515, § 138 (1949); MASS. ANN. LAWS c. 175, § 99 (Supp. 1952); for a survey of the states adopting the New York Standard Fire Policy see PATTERSON, CASES AND MATERIALS ON THE LAW OF INSURANCE 768 (2d ed. 1947).

clause enabling the insurer to prohibit other insurance or limit the amount of insurance by endorsement.[27] This lacuna opens the gates to various methods of limiting liability which give rise to the identical conflicts experienced in the absence of endorsements. For instance, if the insured has received an endorsement voiding his policy in the event of purchase of other insurance, and he nevertheless buys additional insurance from another company, which policy also contains an escape endorsement, the question raised is which policy is such "other insurance" as to effectuate the limitations of the other policy, or which insurer bears the liability? The insured, having paid premiums to both insurers, should be indemnified for his loss proportionately from each company.

Insurer's payment over its limited liability and its right to contribution. Where "other insurers" deny liability and one company with limited liability proceeds to pay the entire loss within its policy limit, the question arises as to the right of the paying company to obtain contribution from the other insurers.[28]

In a recent federal district court case, *Commercial Standard Insurance Co. v. American Employers Insurance Co.*, liability insurance companies P and D had issued policies with loss prorata clauses to Dodd.[29] Dodd was sued in tort by X, injured through Dodd's negligence, and copies of the summons were sent to P and D. Both insurers had covenanted to defend Dodds, but D denied liability and refused to defend him; P defended the action, paid the judgment, and in the instant case sought contribution from D for its proportionate share of the judgment. The court denied P recovery on the ground that as for any excess payment by P over its proportionate share of liability, it was not legally liable but paid the money to Dodd as a volunteer.[30] While the court was not without precedent in denying contribution under such circumstances,[31] the fairness of such results can be questioned.

27. N. Y. INSURANCE LAW § 168. See Patterson, *Insurance Law During the War Years*, 46 COL. L. REV. 345, 367 (1946).

28. Why would an insurance company pay an entire loss for which it was not liable? The cases indicate that usually the other insurers have denied liability; the insurer paying the entire loss may then feel morally obligated, or more realistically, may expect to receive a "good will" advantage by paying the insured for his loss and assuming the obligation of establishing the liability of the other insurers. Perhaps the insurer recognizes an opportunity to make an immediate settlement, in a case of liability insurance coverage, which is to the advantage of all concerned, both insurers and insured.

29. 108 F. Supp. 176 (W.D. Ky. 1952).

30. *Id.* at 183.

31. American Cas. Co. v. Maryland Cas. Co., 20 F. Supp. 561, 564 (E.D. Pa. 1937); Globe Nat. Fire Ins. Co. v. American Bonding & Cas. Co., 205 Iowa 1085, 1092, 217 N.W. 268, 272 (1928); Hanover Fire Ins. Co. v. Brown, 77 Md. 64, 72 (1893); Farm Bureau Mut. Auto. Ins. Co. v. Buckeye Union Cas. Co., 147 Ohio St. 79, 67 N.E.2d 906 (1946); Traders & General Ins. Co. v. Hicks Rubber Co., 140 Tex.

To use the axiom of "volunteer" is to state the antithesis of the requirements for contribution. In order to create a right to contribution, the payor and another must be legally bound to pay, and the payor must have paid the mutual debt to protect his own interest or obligation;[32] the payment confers a benefit upon the other obligor which he is not allowed to retain. Where an insurance policy contains a loss prorata clause the insurer's liability is limited to a specific amount; it is not co-liable with the other insurers. Because of this lack of mutual liability, courts hold that an overpayment by the prorata insurer, even to the full satisfaction of the loss, does not relieve other insurers of their obligations to the insured; the prorata insurer has no action for contribution against the other insurers, but only an action against the insured for payments to which the latter is not entitled.[33] Holding the other insurers liable to the insured after one insurer has fully satisfied the loss runs counter to the accepted principle that an insured shall recover no more than indemnification. Although the insurer which overpaid has a cause of action against the insured, upon what grounds is this circuity of action justified? Denial of contribution from the other insurers in the first instance, and the necessity of a suit by the payor against the insured jeopardizes one of the most valuable assets of an insurance company—good will and public favor.

To say that a loss prorata insurer has a limited liability and that therefore any payment over that amount characterizes the payor as a volunteer fails to note the true facts of the case. When other insurers deny liability, the insurer who accepts liability and proceeds to pay the entire loss does so because it has become fully liable.[34] It is to the payor's advantage to make a reasonable settlement which will be financially

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586, 597, 169 S.W.2d 142, 148 (1943); Fitzsimmons v. City Fire Ins. Co., 18 Wis. 246 (1864).

32. Southern Sur. Co. v. Commercial Cas. Ins. Co., 31 F.2d 817, 819 n.1 (3d Cir. 1929); American Cas. Co. v. Maryland Cas. Co., *supra* note 31; RESTATEMENT, RESTITUTION § 81 (1937).

33. Fitzsimmons v. City Fire Ins. Co., *supra* note 31.

34. Aetna Cas. & Sur. Co. v. Buckeye Union Cas. Co., 157 Ohio St. 385, 105 N.E.2d 568 (1952). Two companies issued liability insurance, company P to a driver, with excess coverage over other insurance, and company D to the owner of a car, providing loss prorata coverage when one other than the owner drove the car. Both companies were notified of a tort suit against *the driver* of *the car* for negligence. D denied all liability; P settled the claim and now sues D for reimbursement on theories of indemnity and subrogation. Although the court held P was secondarily liable (a finding open to question) and entitled to relief on an equitable theory of indemnity and subrogation, it went on to discuss the question of volunteer and found P was not a mere volunteer. D had denied liability aud at that time P was liable for the entire loss if there was no other valid and collectible insurance to invoke P's limitation clause.

favorable to it and will avoid litigation.[35] The Supreme Court of Wisconsin has held that a refusal of D liability insurer to defend a suit against the insured, as it contracted to do, was such a breach of contract that a full settlement by P, loss prorata insurer, did not make P a "volunteer or interloper"; P was entitled to contribution from D.[36]

In accordance with the principle that an insured is limited to indemnity, full payment of the loss should relieve other insurers of liability to the insured; but, they should not be relieved of liability to the payor. To hold otherwise gives rise to undesirable circuity of action. The effect of saying that the payor is not discharging a joint debt can be minimized by showing that where other insurers have denied any obligation there is no "other insurance" to limit the payor's liability. The payor may be more than a volunteer,[37] for it is protecting its own interest by making reasonable settlements and avoiding litigation. It has rendered a service to the insured by quickly reimbursing him for the loss and assuming the burden of litigation against the other insurers. No practical ground can

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35. Farm Bureau Mut. Auto. Ins. Co. v. Buckeye Union Cas. Co., 147 Ohio St. 79, 67 N.E.2d 906 (1946). Liability insurer P reasonably settled insured's liability but was denied contribution from D insurer on the ground that P was a volunteer. When D refused to settle, P surely had a legal obligation to the insured and justifiable grounds for making reasonable settlement and avoiding litigation. Denial of contribution may jeopardize the making of reasonable settlements. The only defense available to D under such circumstances should be the unreasonableness of the settlement.

36. United States Guarantee Co. v. Liberty Mut. Ins. Co., 244 Wis. 317, 12 N.W.2d 59 (1943). Some cases indicate different methods utilized by the payor to avoid being characterized as a volunteer.

Central Sur. & Ins. Corp. v. New Amsterdam Cas. Co., 216 S.W.2d 527 (Mo. App. 1948). The action between the payor and other insurer was not predicated upon any theory of equitable contribution, but upon an assignment of the judgment from the injured to the payor, which the court said evidenced a clear intent that the judgment was not to be deemed satisfied. This intent made the payor more than a mere volunteer. Perhaps a written assignment taken by the payor is a way of avoiding the oppressive volunteer rule. The ease was reversed upon the ground that the defendant companies were not liable for the loss in the first instance. 359 Mo. 430, 222 S.W.2d 76 (1949).

Fidelity & Cas. Co. v. Fireman's Fund Indemnity Co., 38 Cal. App. 2d 1, 100 P.2d 364 (1940). P liability insurer negotiated a settlement with an injured party to whom the insured was liable. P paid its proportionate liability and "loaned" the remainder of the settlement to the insured until D liability insurer would pay its proportionate share to the insured. P sued D for contribution, but lost because of his volunteer actions. Query whether P should have recovered on an analogy to a typical garnishment situation. The court should have accorded more weight to the intent of the payor.

37. Hope, *Officiousness*, 15 CORNELL L.Q. 25, 205 (1929-30). A distinction is drawn between one who is officious and one who is a volunteer. "From this study of officiousness it will be seen that A's intervention in B's affairs will meet with constant favor at the hands of . . . American courts only when there is some special public interest at stake, or when because of B's default A must act to protect himself." *Id.* at 242.

be asserted for denying the payor contribution from the other insurers which have sold the insured protection for the loss incurred.

Liability Limitation Clauses—Accident Insurance

Accident insurance companies do not use the loss prorata or excess type of limitation clause,[38] for the loss covered in their policies is considered unascertainable. In order to protect themselves against over-insurance,[39] their policies frequently include a "notice prorata" clause which requires the insured to notify the company of any other insurance upon the same loss, a failure to do so subjecting him to a reduction of benefits—the insurer is liable for a proportion of its policy equal to that which the limit of its liability bears to the aggregate of all liability for the loss.[40] This clause thus operates as a penalty against an insured who carries additional insurance without notifying the insurer.

Notification that the insured has other insurance enables the insurer to determine the feasibility of continuing to carry the policy. The minimal effect of the clause as a protection to the insurer is exemplified by a case in which the insured mailed notice of other insurance; before receipt of this information by the insurer, the insured was accidentally injured.[41] The initial insurer was held liable for the entire amount of the policy

38. MOWBRAY, INSURANCE 52 (3d ed. 1946).

39. Dustin v. Interstate Business Men's Acc. Ass'n, 37 S.D. 635, 642, 159 N.W. 395, 397 (1916). "While it is true that the element of moral hazard is not involved in accident insurance to the same extent as in fire insurance, it cannot be denied that there is some additional risk on account of self-inflicted injuries in case of accident insurance, and that the element of moral hazard does exist." See Smith, *The Proratio Clause*, 1949 INS. L.J. 83, 84. "The [notice] proratio clause is a legitimate part of the contract to protect the companies against over-insurance."

40. "If the insured shall carry . . . other insurance covering the same loss without giving written notice to the Company, then in that case the Company shall be liable only for such portion of the indemnity promised as the said indemnity bears to the total amount of like indemnity in all policies covering such loss, and for the return of such part of the premium paid as shall exceed the pro rata for the indemnity thus determined." Smith, *supra* note 39, at 83; Graham v. Business Men's Assur. Co., 43 F.2d 673, 674 (10th Cir. 1930); see 7 COUCH, CYCLOPEDIA OF INSURANCE LAW § 1879. State statutes may specify optional or required provisions similar to that quoted above. *E.g.*, MICH. COMP. LAWS § 522.15 (1948); N.Y. INSURANCE LAW § 164 (optional standard provisions); PA. STAT. ANN. tit. 40, § 753 (Supp. 1951) (required provision for certain types of accident and health insurance policies; statute defines to some extent "other valid coverage").

As an example of the operation of this clause: Accident insurer A with "notice prorata" clause provided $6,000 in death benefits. The deceased was also covered by accident insurer B with "notice prorata" clause for $12,000. Deceased failed to notify either insurer of the existence of the other policy. Invoking the clauses, insurer A is liable for $2,000 ($6,000/$18,000 of $6,000) and insurer B is liable for $8,000 ($12,000/$18,000 of $12,000).

41. Satterfield v. Inter-Ocean Cas. Co., 159 Tenn. 531, 19 S.W.2d 229 (1929).

since an insured must be given a reasonable time within which to give notice of his other insurance.[42] Even if the company had received the notice, the only inference to be drawn from the notice prorata clause is that coverage by any other insurance will not of itself reduce the liability of the insurer; the notice merely operates as knowledge to the insurer which may then cancel its policy after the last paid premium period has expired.

Litigation often arises over the meaning of "other insurance" as used in the notice clause. An insured held both life insurance and accident policies, each with a different company. When the accident insurer denied full liability because it was not notified of the existence of the life insurance, which also provided disability benefits, the insured contended that the notice prorata clause of the accident policy was void with respect to life insurance. The insured maintained that the dominant feature of the two policies was different, and since they did not cover the same loss, the life insurance contract was not "other insurance" of which she had to notify the accident insurer. The court rejected the dominant-feature argument and held that the effects of a policy, rather than the name attached to it, are controlling.[43]

The notice prorata clause partially protects the insurer, but, in some instances, the penalty to the insured or his beneficiary is inordinately burdensome. In order to escape the penalty of the clause, the insured must be aware of the provision and must adequately understand what constitutes "other insurance covering the same loss." The insured should be protected against "hidden penalties" and misleading ambiguities in the notice clause.[44] For example, must the insured give an accident insurance

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42. *Id.* at 535, 19 S.W.2d at 230; *accord,* Aaberg v. Minneapolis Commercial Men's Ass'n, 161 Minn. 384, 389, 201 N.W. 626, 628 (1925).

43. Gilbert v. Inter-Ocean Cas. Co., 41 N.M. 463, 71 P.2d 56 (1937). Could not the court have dealt more fairly with the insured and recognized that her failure to give notice was a reasonable result of the ambiguity inherent in the notice clause? The opinion of the court appears to be in accord with the majority view. Smith, *supra* note 39, at 85.

The clause has also been attacked on the ground that "same loss" meant benefits for loss of time only, not for loss of life. The allegation was that the purpose of the provision was to protect the insurer from one attempting to profit from an injury by feigning disability; in death there could be no determinable amount of loss and, therefore, no danger of profit or hazard of feigned injury. The court said that the provision applied also to death benefits, for, regardless of the reasons to the contrary, the words of the clause are specific and unambiguous. Graham v. Business Men's Assur. Co., 43 F.2d 673, 674 (10th Cir. 1930); *accord,* Floeck v. United Benefit Life Ins. Co., 52 N.M. 324, 197 P.2d 897 (1948).

44. Floeck v. United Benefit Life Ins. Co., *supra* note 43. Brice, Chief Justice, specially concurring, expresses fear of the notice prorata clause as "a trap to catch the unwary." Since the clause had legislative sanction, the Chief Justice urged the legislature "to correct this blunder." *Id.* at 331, 197 P.2d at 902.

company notice, not only of life insurance, but also of workmen's compensation coverage?[45]

The standard notice prorata provision now in use is obviously inadequate and an invitation to litigation. To prevent unjust penalties, the standard notice clause, now prescribed by statute in many states, should be redrafted to avoid the inherent ambiguities in the phrase "other insurance for the same loss." In addition, due to the human weakness to fail to read insurance contracts attentively or completely, the notice prorata clause should be so placed in the policy that it could not fail to attract attention.

Hospitalization Insurance. Despite the increasing prominence of hospitalization insurance,[46] there is a noticeable absence of liability limitation clauses in such contracts. The necessity for other insurance clauses is almost non-existent, for the moral hazard of an insured feigning illness to profit from hospitalization benefits is negligible. The major hazard is concealed physical defects at the time the policy is issued. Insurers' requirements of authoritative verifications of the alleged malady, and personal examination before the insured receives benefits, should prevent all but a minute number of false claims and render unnecessary the limitation clause.[47] Having effective protection against fraudulent claims, hospitalization companies, for purposes of maintaining "business good will," avoid use of the notice clause.[48] The carriers prefer to discover the existence of any "other insurance" through interrogation and investigation when the application for insurance is made. The ambiguities of the notice clause, and the possible conflicts arising from use of the various types of limitation clauses are commendably avoided when no practical reason for their use can be advanced.

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45. Inter-Ocean Cas. Co. v. Lenear, 95 S.W.2d 1355, 1358 (Tex. Civ. App. 1936). The court held that workmen's compensation was not "other insurance" within the meaning of a notice prorata clause of an accident and health policy. The result is justified since the term "other insurance" is ambiguous and does not give the insured sufficient warning that he must notify the insurer of his workmen's compensation coverage; the average employee would hardly think of workmen's compensation as "other insurance."

46. Dowlen, *Writing Hospital Expense Insurance,* 1951 INS. L.J. 981; Follmann, *The Social Importance of Accident and Health Insurance,* 1949 INS. L.J. 609.

47. Loss prorata clauses could be validly used in certain types of hospitalization policies. PA. STAT. ANN. tit. 40, § 753 (Supp. 1952).

48. Communications to the INDIANA LAW JOURNAL from the Aetna Insurance Co., North American Accident Insurance Co., and Prudential Insurance Co. of America; see Follmann, *1952 Accident and Health Volume Increased,* THE WEEKLY UNDERWRITER, Jan. 3, 1953, pp. 71, 72; 1951 INS. L.J. 981, 983.

Conclusion

The most realistic approach to conflicts between liability limitation clauses in property insurance policies is application of prorata liability. Courts should be more sensitive to the practical equities of the problem of determining liability, instead of vainly seeking a strict interpretation of the contract clauses which often results in arbitrary fixing of liability. The ingenuous approach utilized in *Oregon Automobile Insurance Co. v. United States Fidelity & Guaranty Co.*[49] may well serve as a guide for judicial disposition of the discordant clauses.

Insurance companies' desire to gain public favor, to guard against over-insurance, and to provide for facile settlement of claims, should encourage cooperative action to adopt a standard loss prorata clause for property insurance contracts. And, if, even in the face of such a clause, one company pays the entire loss, the facts occasioning the payment should be the basis for determining the payor's right to contribution from concurrent insurers, rather than an automatic application of the volunteer maxim.

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49. See note 22 *supra* and accompanying text.