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World Rent-A-Car, Inc. v. Stauffer, 306 So. 2d 131 (Fla. 2d Dist. Ct. App. 1974)

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The *Roman* court determined that the protection of individual rights requires strict compliance with the announcement rule. But requiring literal compliance with the knock and announce statute in the face of substantial evidence of the defendant's guilt may justify the fear expressed by some that the major effect of the exclusionary rule is to let the guilty go unpunished. The exclusionary rule has never been interpreted to extend to all proceedings or persons who have been victims of illegal entries or searches, nor should it be.[56] The announcement requirements developed as a means of effectuating fourth amendment rights. In turn, the exclusionary rule was applied to ensure that law enforcement officers would comply with the announcement requirements. Thus the mandate of the exclusionary rule is twice removed from the constitutional guarantees it seeks to protect. The rule might be worth its cost, *i.e.* letting the guilty go free, if, as its proponents argue, it is the "only effective deterrent to police misconduct."[57] However, in light of increasing evidence that it does not fulfill this purpose, serious doubts arise as to its application.[58] Application of the rule should be limited to situations where it most efficaciously serves to protect individual privacy, preserve property, or prevent violence. When these purposes are not served by application of the exclusionary rule, other remedies for violations of constitutional rights should be sought.[59]

JOSLYN WILSON

Insurance — "OTHER INSURANCE" PROVISIONS — CONFLICTING ESCAPE CLAUSES IN CONCURRENT AUTOMOBILE LIABILITY POLICIES ARE VOID.— *World Rent-A-Car, Inc. v. Stauffer,* 306 So. 2d 131 (Fla. 2d Dist. Ct. App. 1974).

Defendant Clarence Maurer was involved in an automobile accident while driving a rental car owned by codefendant World Rent-A-Car, Inc. He was covered by an omnibus clause in the rental agency's policy

657 (1926). *See also* Ker v. California, 374 U.S. 23, 38-41 (1963); *id.* at 54-60 (Brennan, J., concurring in part); Jones v. United States, 362 U.S. 257, 272 (1960) ("[A] claim under 18 U.S.C. § 3109 depends upon the particular circumstances surrounding the [entry]."); State v. Hetzko, 283 So. 2d 49 (Fla. 4th Dist. Ct. App. 1973).

56. *See* cases cited note 11 *supra.*

57. Terry v. Ohio, 392 U.S. 1, 12 (1968).

58. *See* note 13 *supra.*

59. For discussion of alternative remedies see notes 23, 24 *supra.* The *Roman* court may have been influenced by (1) the widespread opinion that possession of marijuana is not (or should not be) a serious offense, (2) the traditional isolation of a college campus from the surrounding community, and (3) the extravagant manner in which the arrest was accomplished.

and a drive-other-cars clause in his own automobile policy. At trial, however, both the driver's and the owner's insurers disclaimed all liability under similar "non-coverage" provisions.[1] In effect, each policy provided that it would not apply if any other valid and collectible insurance was available to the defendant. The trial court held that the driver's insurer had successfully disclaimed liability and dismissed it from the action. The rental agency and its insurer, Chicago Insurance Company, appealed this ruling.

The Second District Court of Appeal found the issue to be whether both policies' escape clauses should be given effect or neither,[2] rejecting the trial court's decision that only the lessor's insurer should be liable. Relying heavily on a 1971 Mississippi case involving similar facts,[3] the court concluded that the two escape clauses were mutually repugnant and void. The district court then remanded the case for further proceedings consistent with its finding that coverage should be "afforded fully under both policies."[4]

Because insurance companies have expanded their coverage in recent years to include parties other than the named insured, a person is often covered for the same risk by two separate insurance policies. The insurance companies were quick to take advantage of such situations by including in the policies "other insurance" clauses to reduce or avoid liability.[5] These clauses are of three types: excess clauses, pro-

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1. The driver's policy from State Farm Mutual contained the following language:

> [A]ll coverages are subject to the following: . . .
> (b) The insurance with respect to . . . .
> (iii) a non-owned automobile, owned by any person or organization engaged in the automobile business, shall not apply to any liability or loss against which the insured or the owner of such vehicle has other collectible insurance applicable in whole or in part.

World Rent-A-Car, Inc. v. Stauffer, 306 So. 2d 131, 131-32 (Fla. 2d Dist. Ct. App. 1974) (emphasis omitted). The language in the rental agency's policy was:

> The term contingent insured shall mean any person or organization while using a rental vehicle with the permission of the owner, provided his actual operation or (if he is not operating) his other actual use thereof is within the scope of such permission, but:
> (a) only if no other valid and collectible insurance, whether primary, excess or contingent, with the limits of liability at least equal to the applicable financial responsibility limit is available to such person . . . .

Id. at 132.

2. 306 So. 2d at 132.

3. Travelers Indem. Co. v. Chappell, 246 So. 2d 498 (Miss. 1971).

4. 306 So. 2d at 133.

5. *See* J. APPLEMAN, AUTOMOBILE LIABILITY INSURANCE 324 (1938); R. KEETON, INSURANCE LAW § 3.11(a) (1971); Russ, *The Double Insurance Problem—A Proposal*, 13 HASTINGS L.J. 183 (1961); Note, *Concurrent Coverage in Automobile Liability Insurance*, 65 COLUM. L. REV. 319 (1965); Comment, *Double Insurance Coverage in Automobile Insurance Policies—The Problem of "Other Insurance" Clauses*, 47 TUL. L. REV. 1039

ration clauses, and escape clauses. An excess clause limits the insurer's liability to any excess after the primary insurer has paid to the limits of its policy.[6] A proration clause distributes liability between the two companies on a stated basis, usually according to policy limits.[7] An escape clause, the type involved in the instant case, attempts to disclaim all liability where the insured is covered by another valid policy.[8]

Due to the popularity of these provisions, especially in automobile liability insurance, concurrent policies often contain one or more conflicting "other insurance" clauses.[9] In approaching such a conflict, the courts generally apply three basic principles. First, the insured must not be deprived of protection because of the fortuity of double protection.[10] Secondly, the insured is not entitled to recover more than his actual damages.[11] Finally, the intent of the insurer, as evidenced by the language of the policy, should be honored if possible.[12]

When faced with conflicting "other insurance" provisions courts have apportioned liability in a variety of ways. Following the rationale of *Hartford Steam Boiler Inspection & Insurance Co. v. Cochran Oil Mill & Ginnery Co.*,[13] an old property case, the early decisions found one of the insurers primarily liable.[14] In determining which party was

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(1973). Property insurance policies were the first to contain "other insurance" clauses. Such clauses quickly became popular in automobile, health, medical and accident insurance. 16 G. COUCH, CYCLOPEDIA OF INSURANCE LAW § 62:36 (2d ed. 1959); R. KEETON, *supra*, § 3.11(a), at 170.

The original purpose of "other insurance" clauses was to reduce the temptation to over-insure property and then destroy it. This rationale does not seem as applicable to automobile liability insurance as to property insurance, although there is some possibility of collusion among insured drivers. It has been suggested that the real reason for the use of these provisions is the desire on the part of insurance companies to limit or eliminate their share of the liability when concurrent coverage exists. Russ, *supra*, at 183-84.

6. *See* R. KEETON, *supra* note 5, § 3.11(a).

7. *Id.*

8. *Id.*

9. There are, of course, six different combinations of the different provisions: excess—excess, excess—prorata, excess—escape, pro-rata—pro-rata, pro-rata—escape and escape—escape. For a discussion of the handling of these situations in other jurisdictions see Note, *Supra* note 5.

10. 8 J. APPLEMAN, INSURANCE LAW AND PRACTICE § 4913 (3d ed. 1962); APPLEMAN, *supra* note 5, at 321.

11. Cone v. Phoenix Assur. Co., 135 So. 142 (Fla. 1931); FLA. STAT. § 631.61(2) (1973); 8 J. APPLEMAN, *supra* note 10, § 4911.

12. J. I. Kelly Co. v. St. Paul Mercury Fire & Marine Ins. Co., 47 So. 742 (Fla. 1908); 16 G. COUCH, *supra* note 5, § 62:44.

13. 105 S.E. 856 (Ga. Ct. App. 1921).

14. *See* Note, *Automobile Liability Insurance—Effect of Double Coverage and "Other Insurance" Clauses*, 38 MINN. L. REV. 838, 841-47 (1954).

primarily liable, the courts followed mechanical tests, such as which policy was issued first,[15] or which was more specific in defining the risk.[16]

In later cases many courts have concluded that no real justification exists for choosing between the policies, and have in certain situations found the clauses to be mutually repugnant and void.[17] There is a split of authority on how to apportion liability after this determination has been made. The minority of jurisdictions, after abrogating the conflicting clauses, returns to the primary liability doctrine.[18] Jurisdictions following the minority approach use two bases for determining which policy is primary: ownership of the automobile[19] and identity of the primary tortfeasor.[20] When the owner's insurance is held to be primary, the driver's insurer is liable only after the owner's coverage has been exhausted. The reasoning underlying this approach is that the primary insurer's "other insurance" provision never comes into play because the secondary policy is not "valid, collectible" insurance.[21] The majority view is that if the "other insurance" clauses are void, then the problem should be treated as if neither clause were present.[22] In such a case liability would be prorated, usually according to the limits on the policies.[23]

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15. *E.g.*, New Amsterdam Cas. Co. v. Hartford Accident & Indem. Co., 108 F.2d 653 (6th Cir. 1940).

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

17. One of the leading cases adopting this viewpoint is Oregon Auto. Ins. Co. v. United States Fidelity & Guar. Co., 195 F.2d 958 (9th Cir. 1952).

18. *See* 8 J. APPLEMAN, *supra* note 10, § 4912; 16 G. COUCH, *supra* note 5, §§ 62:78, :81; Watson, *The "Other Insurance" Dilemma*, 1966 INS. L.J. 151; Comment, *supra* note 5, at 1041. Watson suggests that instead of placing full liability on the primary insurer, courts first decide who should bear the liability and then label that party the primary insurer. Watson, *supra*, at 154.

19. *See, e.g.*, Travelers Indem. Co. v. Chappell, 246 So. 2d 498, 505 (Miss. 1971); 16 G. COUCH, *supra* note 5, § 62:60.

20. *See* cases discussed in 16 G. COUCH, *supra* note 5, § 62:64.

21. *See* 8 J. APPLEMAN, *supra* note 10, § 4914; 16 G. COUCH, *supra* note 5, § 62:60.

22. The majority view is represented by Oregon Auto. Ins. Co. v. United States Fidelity & Guar. Co., 195 F.2d 958 (9th Cir. 1952). *Cf.* Zurich General Accident & Liab. Ins. Co. v. Clamor, 124 F.2d 717, 720 (7th Cir. 1941):

> 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.

23. *See, e.g.*, State Farm Mut. Auto. Ins. Co. v. General Mut. Ins. Co., 210 So. 2d 688 (Ala. 1968); Rocky Mt. Fire & Cas. Co. v. Allstate Ins. Co., 474 P.2d 38 (Ariz. App. 1970); State Farm Mut. Auto. Ins. Co. v. Travelers Ins. Co., 184 So. 2d 750 (La. App. 1966); Arditi v. Massachusetts Bonding & Ins. Co., 315 S.W.2d 736 (Mo. 1958); Continental

Courts often find that the intent of the insurer can be determined if one or both policies contain a proration clause in addition to the conflicting clauses.[24] In most cases, however, no clear intent is discernible and the courts must determine which of the solutions discussed above best serves public policy. Where both parties attempt to disclaim or limit their liability, it has been suggested that proration has the effect of approximating what the parties would have intended had they foreseen the problem.[25] While it is true that each insurer would rather be partially liable than primarily liable, each insurer's real preference is to escape liability entirely. Thus, it is misleading to speak in terms of unexpressed "intent."

As a matter of public policy, both solutions—proration and designation of a primary insurer—can be supported. It is basic that the payment of premiums entitles the insured to insurance coverage. An owner with an omnibus clause pays for coverage when another is driving his car. The driver also pays for coverage when he is using another's vehicle. Proration would assure that both insurers meet their contractual obligations and is possibly the best solution for the insured and his insurer.[26]

The policy behind using a primary-excess designation differs depending on which party is ultimately held liable. The unarticulated reason for placing liability on the owner seems to be the belief that he is better able financially to meet the burden and protect the injured party. However, a financial responsibility rationale does not seem to have any application to a conflict between multiple insurers, where the central issue is which insurer will pay and how much.[27]

Cas. Co. v. Buckey Union Cas. Co., 143 N.E.2d 169 (Ohio 1957); Hardware Dealers Mut. Life Ins. Co. v. Farmers Ins. Exch., 444 S.W.2d 583 (Tex. 1969).

Some jurisdictions base the proration on the premium paid, Insurance Co. of Texas v. Employers Liab. Assur. Corp., 163 F. Supp. 143 (S.D. Cal. 1958), while others require the insurers to share equally in payment of the judgment, Ohio Cas. Ins. Co. v. State Farm Mut. Auto. Ins. Co., 511 S.W.2d 671 (Ky. 1974); Ryder Truck Rental, Inc. v. Schapiro & Whitehouse, Inc., 269 A.2d 826 (Md. 1970).

See also R. KEETON, *supra* note 5, § 3.11(b); 69 A.L.R.2d 1122 (1960; Note, *supra* note 5, at 325-26; Comment, *supra* note 5, at 1049-54.

24. *See, e.g.*, Factory Mut. Liab. Ins. Co. of America v. Continental Cas. Co., 267 F.2d 818 (5th Cir. 1959); Continental Cas. Co. v. St. Paul Mercury Fire & Marine Ins. Co., 163 F. Supp. 325 (S.D. Fla. 1958). In *St. Paul Mercury*, the court gave effect to a proration clause in one policy although it was not actually applicable to the factual situation involved. *See* Note, *supra* note 5, at 325 n.40.

25. *See, e.g.*, Continental Cas. Co. v. Buckeye Union Cas. Co., 143 N.E.2d 169, 180 (Ohio 1957), in which the court held that there was no basis for "court created" primary insurance where both policies contained identical "other insurance" clauses. *See also* Note, *supra* note 5, at 325; Note, *supra* note 14, at 850.

26. Note, *supra* note 14, at 850.

27. To insure that an injured party will receive compensation the Florida Legislature

Assuming that primary liability must be imposed on one of the parties, it seems reasonable that it should be imposed on the tortfeasor, without whose negligence the accident would not have occurred.[28] This rule would recognize that fault is the basis of liability. However, the primary tortfeasor rule does not cover a negligent party who is not the named insured in either policy[29] and has been adopted only rarely.[30]

The *Stauffer* court found the problem of apportioning liability between policies containing conflicting escape clauses to be one of first impression in Florida.[31] The Florida Supreme Court has, however, considered a conflict between excess clauses[32] and some authorities have found the two situations sufficiently analogous to justify similar treatment.[33] The supreme court, recognizing the danger of depriving the insured of coverage if both clauses were given effect, held both excess clauses void.[34] The district court in *Stauffer* reached the same result when dealing with escape clauses by relying on *Travelers Indemnity Co. v. Chappell,*[35] a Mississippi Supreme Court case.

After deciding that the mutual escape provisions were void, the district court failed to specify clearly the method of apportioning liability between the two insurers. The *Stauffer* court simply quoted with approval from the *Travelers* opinion and, in apparent reference to the result reached in *Travelers,* stated, "Coverage was afforded fully under both policies. We concur."[36]

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adopted a financial responsibility act, FLA. STAT. §§ 324.011-.251 (1973), and an automobile reparations reform act, FLA. STAT. §§ 627.730-.741 (1973), which established a system of no-fault automobile insurance.

28. *See* APPLEMAN, *supra* note 5, at 325. Appleman would impose liability on the driver, reasoning that the omnibus clause in the owner's policy is only a courtesy to the owner's permittees and should not be used when the driver has other insurance. It should be noted, however, that this argument was made before any American court had grappled with the issue and Appleman's view does not seem to have been widely adopted. *See also* 16 G. COUCH, *supra* note 5, § 62:64.

29. Russ, *supra* note 5, at 184-85.

30. *See, e.g.,* Allstate Ins. Co. v. Aetna Cas. & Sur. Co., 326 F.2d 871 (2d Cir. 1964).

31. 306 So. 2d at 133.

32. Hartford Accident & Indem. Co. v. Liberty Mut. Ins. Co., 277 So. 2d 775 (Fla. 1973).

33. *See* Ford, *Concurrent Coverage Controversies,* in PRACTICING LAW INSTITUTE, AUTOMOBILE INSURANCE PROBLEMS 59, 67 (1968); Note, *supra* note 5, at 326. There seems to be little reason to treat the situations differently at least insofar as finding the clauses mutually repugnant.

34. 277 So. 2d at 777. *Cf.* Continental Cas. Co. v. Weekes, 74 So. 2d 367 (Fla. 1954), in which the court found an escape clause was not contrary to public policy so long as the defendant was covered by another policy, the implication being that mutual escape clauses leaving the public unprotected would not be given effect.

35. 246 So. 2d 498 (Miss. 1971).

36. 306 So. 2d at 133.

In *Travelers* an auto repair garage loaned a customer an automobile that was later involved in an accident. The customer was covered by her policy and one taken out by the garage. The policies had "other insurance" clauses which were almost identical to those in the instant case. The Mississippi court found the clauses mutually repugnant[37] and held that the insurer of the auto repair garage was primarily liable since the garage owned the car.[38] The driver's insurer was thus liable only for amounts in excess of the garage's policy limits.

The Mississippi approach could be justified under present Florida law. If it is the result intended in *Stauffer,* it is curious that the district court failed to state its position clearly. Since the Florida Supreme Court's 1920 decision in *Southern Cotton Oil Co. v. Anderson,*[39] the automobile has been considered a "dangerous instrumentality" in Florida. This classification imposes liability on the owner of an automobile for injuries caused while another is driving it.[40] Dictum in another supreme court case, *Hartford Accident & Indemnity Co. v. Liberty Mutual Insurance Co.,*[41] indicates that while the dangerous instrumentality doctrine is not dispositive of the issue of liability, it is

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37. 246 So. 2d at 504.

38. *Id.* at 505.

39. 86 So. 629 (Fla. 1920).

40. See Rouse v. Greyhound Rent-A-Car, Inc., 369 F. Supp. 1072 (M.D. Fla. 1973), *rev'd,* 506 F.2d 410 (5th Cir. 1975); Roth v. Old Republic Ins. Co., 269 So. 2d 3 (Fla. 1972); Susco Car Rental Sys. v. Leonard, 112 So. 2d 832 (Fla. 1959); *accord,* Transamerica Ins. Co. v. Norfolk & Dedham Mut. Fire Ins. Co., 279 N.E.2d 686 (Mass. 1972).

In *Rouse,* Greyhound Rent-a-Car delivered one of its used rental cars to Lakeland Automobile Auction to be sold at wholesale. Lakeland Automobile Auction allowed defendant Cobb, with whom it maintained a business association, to make use of the car. While Cobb was using the car on a pleasure trip he was involved in an accident causing death and injuries. The court found all three parties to be liable: Cobb as driver of the car, Lakeland Automobile Auction as bailee of the auto, and Greyhound as legal owner. The issue was then how to apportion liability among the respective insurers:

> Florida case law has established the principle that the carrier for the owner is primarily liable and has no right of indemnification from the driver of the vehicle or its carrier. . . . As this Court understands the *Roth* opinion, it is based on the policy of Florida law as developed in the dangerous instrumentality doctrine to require an owner to provide financial responsibility for his motor vehicles . . . .

369 F. Supp. at 1076 (citations omitted). The court then found that both Greyhound and Lakeland Automobile Auction were "owners" for the purpose of apportioning liability and were primarily and jointly liable in proportion to their respective policy limits. The driver's insurer was liable only as an excess insurer. *Id.* at 1076-77.

On appeal, the Fifth Circuit reversed on the ground that the auction company was not an "owner." Thus Greyhound alone was primarily liable and the other two defendants were excess insurers. 506 F.2d at 415.

41. 277 So. 2d 775 (Fla. 1973).

certainly a factor to be considered.[42] While some Florida cases have prorated liability, it seems clear that those results were reached because of an additional proration clause in one of the policies[43] or because both insured parties were considered owners.[44]

It is not clear that the Mississippi approach is the result desired by the *Stauffer* court. Clearly that solution would not result in "full coverage" under both policies. This language would reasonably indicate some type of proration, and would be in accord with the majority view in the United States.[45] In addition, the attorneys for petitioner's insurer believe that proration is the correct interpretation of the court's opinion.[46]

The ambiguity of the decision results in confusion and uncertainty in this area of the law. To a certain extent, any precedent in this field is of limited value because of the importance of the precise language of the policies and the facts involved in each case. But the failure of the *Stauffer* court to state its position clearly cannot be excused by the lack of precedent or confusing facts. A clear guide to the road Florida will follow in resolving "other insurance" problems must await future decisions.

MARY F. CLARK

Process—PERSONAL SERVICE OF LEGISLATIVE WITNESS SUBPOENA DOES NOT CONFER IN PERSONAM JURISDICTION ON CIRCUIT COURT IN PROCEEDINGS TO ENFORCE THAT SUBPOENA.—*Bussey v. Legislative Auditing Committee,* 298 So. 2d 219 (Fla. 1st Dist. Ct. App.), *cert. denied,* 304 So. 2d 451 (Fla. 1974).

On August 27, 1973, in a sixth floor hallway of a Tampa office building, Robert N. Bussey was offered a witness subpoena by an agent of the Florida Legislative Auditing Committee. Bussey was accompanied by his attorney, who, at his request, accepted the sub-

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42. *Id.* at 777.

43. Motor Vehicle Cas. Co. v. Atlantic Nat'l Ins. Co., 374 F.2d 601 (5th Cir. 1967); Factory Mut. Liab. Ins. Co. of America v. Continental Cas. Co., 267 F.2d 818 (5th Cir. 1959); Continental Cas. Co. v. St. Paul Mercury Fire & Marine Ins. Co., 163 F. Supp. 325 (S.D. Fla. 1958).

44. Hartford Accident & Indem. Co. v. Liberty Mut. Ins. Co., 277 So. 2d 775 (Fla. 1973).

45. *See* notes 22, 23 and accompanying text *supra.*

46. Petitioner's Brief for Certiorari at 8, World Rent-A-Car, Inc. v. Stauffer, No. 46,908 (Fla. filed Feb. 13, 1975): "The result of [the Second District's] ruling, if given effect, would mean that each insurance company would respond to the Plaintiff's damages pro tanto."