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STATUTORY COMMENTS

"OTHER INSURANCE" CLAUSES IN GARAGE LIABILITY POLICIES

Conflicting "other insurance"¹ clauses in automobile liability insurance policies have been the source of much litigation.² Such clauses usually provide either that the coverage normally extended under the policy will not apply when there is "other valid and collectible insurance" covering the same loss (i.e., the standard "other insurance" clause) or that the policy will provide coverage only in "excess" of the limits of such other insurance (i.e., the "excess insurance" clause).³ The conflict arises when two insurance policies appear to extend coverage to the driver of the vehicle but each insurer denies liability on the basis of the "other insurance" clauses in their respective policies.

The General Assembly of Virginia has recently taken a stand on this issue by amending Virginia's motor vehicle liability insurance statute.⁴ The amendment provides in part:

Such policy or contract of bodily injury liability insurance, or of property damage liability insurance, which provides insurance to a named insured against liability arising from the own-

¹"Other insurance" clauses are "clauses which purport to vary the coverage of the policy if there is another policy or other policies protecting the risk insured against." Annot., 76 A.L.R.2d 502, 503 (1961).

²See Annot., 46 A.L.R.2d 1163 (1956).

³A third type of "other insurance" clause in addition to the standard "other insurance" and the "excess insurance" clauses is the "pro-rata" clause which generally provides that in the event of other insurance, the policy containing the "pro-rata" clause will be liable only for a proportion of the loss that represents a ratio between the limit of liability stated in that policy and the total limits of liability in all other valid and collectible insurance covering the loss. See generally Annot., 76 A.L.R.2d 502, 503 (1961). For cases involving a conflict between two "pro-rata" clauses, see *Liberty Universal Ins. Co. v. National Sur. Corp.*, 338 F.2d 988 (5th Cir. 1964); *Celina Mut. Cas. Co. v. Citizens Cas. Co.*, 194 Md. 236, 71 A.2d 20 (1950). See generally Annot., 21 A.L.R.2d 611 (1952). For cases involving a conflict between a standard "other insurance" clause and a "pro-rata" clause, see *McFarland v. Chicago Express, Inc.*, 200 F.2d 5 (7th Cir. 1952); *Air. Transp. Mfg. Co. v. Employers' Liab. Assur. Corp.*, 91 Cal. App. 2d 129, 204 P.2d 647 (Dist. Ct. App. 1949). See generally Annot., 46 A.L.R.2d 1163, 1167-68 (1956). For cases involving a conflict between an "excess" clause and a "pro-rata" clause, see *Globe Indem. Co. v. Capital Ins. & Sur. Co.*, 352 F.2d 236 (9th Cir. 1965); *Citizens Mut. Auto. Ins. Co. v. Liberty Mut. Ins. Co.*, 273 F.2d 189 (6th Cir. 1959); *Lamb-Weston, Inc. v. Oregon Auto. Ins. Co.*, 219 Ore. 110, 341 P.2d 110 (1959). See generally Annot., 76 A.L.R.2d 502 (1961).

⁴VA. CODE ANN. § 38.1-381 (Supp. 1968).

ership, maintenance or use of any motor vehicle in the business of selling, repairing, servicing, storing or parking motor vehicles may contain a provision that the insurance coverage applicable to such motor vehicles afforded a person other than the named insured and his employees in the course of their employment shall not be applicable if there is any other valid and collectible insurance applicable to the same loss covering such person under a policy with limits at least equal to the financial responsibility requirements specified in § 46.1-504 of the Code of Virginia.⁵

The precise situation which the amendment was intended to clarify was recently presented to the Supreme Court of Appeals of Virginia in the companion cases of *American Motorists Insurance Co. v. Kaplan*⁶ and *Hardware Mutual Casualty Co. v. Celina Mutual Insurance Co.*⁷

In *Kaplan*, defendant was given permission to test drive an automobile owned by the John Copeland Motor Company in Norfolk. The vehicle was insured by American Motorists Insurance Company (hereinafter referred to as American). While driving this vehicle, the defendant collided with a vehicle operated by Kaplan, who subsequently recovered a judgment against the defendant. The defendant was an insured under a family automobile policy issued to his stepfather by the Government Employees Insurance Company (hereinafter referred to as GEICO). The defendant was also covered under American's policy issued to the automobile dealer as one driving with the permission of the named insured.⁸ GEICO contended that Ameri-

⁵VA. CODE ANN. § 38.1-381 (23) (Supp. 1968). The second paragraph of the 1968 amendment reads as follows:

In the event that such other valid and collectible insurance has limits less than the financial responsibility requirements specified in § 46.1-504 of the Code of Virginia, then the coverage afforded a person other than the named insured and his employees in the course of their employment shall be applicable to whatever extent may be necessary to equal the financial responsibility requirements specified in § 46.1-504 of the Code of Virginia.

⁶209 Va. 53, 161 S.E.2d 675 (1968).

⁷209 Va. 60, 161 S.E.2d 680 (1968).

⁸American's policy included an "omnibus clause" as required by VA. CODE ANN. § 38.1-381(a) (Supp. 1968). The pertinent part of this statute reads as follows:

No policy or contract of bodily injury liability insurance, or of property damage liability insurance covering liability arising from the ownership, maintenance or use of any motor vehicle... shall be issued or delivered in this State... unless it contains a provision insuring the named insured and any other person responsible for the use of or using the motor vehicle... with the consent, express or implied, of the named insured.... (emphasis added).

can's policy constituted primary coverage and therefore GEICO was not liable since its policy contained an "excess insurance" clause.⁹ American contended that the "other insurance" clause¹⁰ in the policy issued to the John Copeland Motor Company relieved American from any liability. Affirming the decision of the lower court, the Supreme Court of Appeals held the "other insurance" clause in American's policy invalid as being contrary to the omnibus clause.¹¹ Thus, primary liability was imposed upon American, the insurer of the vehicle.

In *Kaplan and Celina Mutual*¹² the court examined the "other

⁹The policy issued by GEICO contained a clause designated "Other Insurance" which provides:

Other Insurance: If the insured has other insurance against a loss covered by Part I [Bodily injury and property damage liability] of 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 declaration bears to the total applicable limit of liability of all valid and collectible insurance against such loss; *provided, however, the insurance with respect to a temporary substitute automobile or non-owned automobile shall be excess insurance over any other valid and collectible insurance.*

209 Va. at 54-55, 161 S.E.2d at 677.

¹⁰Attached to the garage liability policy issued by American was an endorsement specified as "Auto 89—Limited Coverage for Certain Insureds," which amended paragraph 3 of "Persons Insured" to read:

(3) With respect to an automobile to which the insurance applies under paragraph 1(a) of the Automobile Hazards, any of the following persons while using such automobiles with the permission of the named insured, provided such person's actual operation or (if he is not operating) his other actual use thereof is within the scope of such permission:

(a) Any employee, director or stockholder of the named insured, any partner therein and any resident of the same household of the named insured, such employee, director, stockholder or partner.

(b) *Any other person, but only if no other valid and collectible automobile liability insurance, either primary or excess, with limits of liability at least equal to the minimum limits specified by the financial responsibility law of the State in which the automobile is principally garaged, is available to such person; . . .* (emphasis added) 209 Va. at 55, 161 S.E.2d at 77.

¹¹The court, however, found the "excess insurance" provision relating to the operation of non-owned vehicles contained in the policy issued by GEICO to be a valid limitation of coverage. The court said:

The omnibus statute (§ 38.1-381(a)) does not require that coverage be afforded a permissive user of a non-owned vehicle. It only requires that the owner's policy extend coverage to a permissive user for liability 'resulting in the operation or use of such [owner's] vehicle.' 209 Va. at 58, 161 S.E.2d at 679.

¹²*Kaplan and Celina Mutual* were tried together in the lower court where it was stipulated that the two cases involved identical issues and that the decision in one was determinative in the other. On appeal, the Supreme Court of

insurance" clauses in conjunction with each policy's omnibus clause. The omnibus clause provides that the *same* coverage available to the named insured will also be extended to any person operating the insured vehicle with the permission of the named insured. It is required by statute in Virginia that all motor vehicle liability policies issued in the State contain such a clause¹³ and this coverage will be read into the policy regardless of whether or not it is so written in by the insurance company¹⁴ *Kaplan* and *Celina Mutual* held that the omnibus clause precluded any limitations on the insurer's liability inconsistent with the coverage afforded thereunder¹⁵ and thus found the "other insurance" clause invalid. However, by virtue of the 1968 amendment to § 38.1-381 of the Code of Virginia there is a statutory qualification to absolute omnibus clause coverage. The result is that the statute now makes "lawful" essentially¹⁶ the same clause that was held to be invalid in *Kaplan* and *Celina Mutual*. It should be noted, however, that the amendment is limited in its application.

First, the "other insurance" clause now permitted under the statute may be included only in garage liability policies.¹⁷ Such policies are generally issued to automobile dealers, garages, and service stations.

Appeals of Virginia reached the same conclusion in *Celina Mutual* as it did in *Kaplan*. In its opinion in the *Celina Mutual* case, the court said:

[The] assignments of error raise the same issues as those presented in *American Motorists Ins. Co. v. Kaplan, et al., supra*. The decision in that case, which affirmed the holding of the court below, is controlling here and reference to it is hereby made.

209 Va. at 62-63, 161 S.E.2d at 682.

¹³VA. CODE ANN. § 38-381(a) (Supp. 1968). See *Lumbermans Mut. Cas. Co. v. Indemnity Ins. Co.*, 186 Va. 204, 42 S.E.2d 298 (1947); *accord*, *Maryland Cas. Co. v. Burley*, 345 F.2d 138 (4th Cir. 1965).

¹⁴*Newton v. Employers Liab. Assur. Corp.*, 107 F.2d 164 (4th Cir. 1939) (interpreting the Virginia statute); *Maxe v. American Cas. Co.*, 180 Va. 285, 23 S.E.2d 221 (1942).

¹⁵*Accord*, *Maryland Cas. Co. v. Burley*, 345 F.2d 138 (4th Cir. 1965) (interpreting the Virginia statute); *Pulley v. Allstate Ins. Co.*, 242 F. Supp. 330 (E.D. Va. 1965) (interpreting the Virginia statute).

¹⁶The clause which is now permissible under § 38.1-381 (a3) (Supp. 1968) of the Code of Virginia is not worded exactly like the clause which the court held to be invalid in *Kaplan*. The clause considered in that case included the phrase "either primary or excess" following the terms "other valid and collectible insurance." See note 10 *supra*, wherein the entire clause is quoted. However, the wording of the clause approved in § 38.1-381 (a3) (Supp. 1968) does not include the phrase "either primary or excess." The possible importance of this distinction will be discussed later in this comment. See text accompanying note 29 *infra*.

¹⁷Garage liability policies are those "which are specifically designed to protect garagekeepers, operators of service, rental, and repair stations, or dealers, against loss by reason of injury to the person or property of others in certain defined situations." Annot., 93 A.L.R.2d 1047, 1049 (1964).

Thus, the statute does not provide for incorporation of such a limiting clause in the standard family automobile policy.

Second, the clause applies only to a permissive driver other than the named insured and his employees in the course of their employment. Furthermore, this person must be an insured under another policy of automobile liability insurance providing coverage for the same loss and with limits at least equal to the financial responsibility requirements specified in § 46.1-504 of the Code of Virginia.¹⁸ If the permissive driver is covered by another policy of automobile insurance with limits less than the financial responsibility requirements under the Code of Virginia, the second paragraph of the 1968 amendment provides that the coverage under the garage liability policy will be applicable to whatever extent may be necessary to equal the financial responsibility requirements.¹⁹ In addition, where the permissive driver has no other valid and collectible insurance, it is apparent from a reading of the statute that the garage liability policy will afford the driver the same coverage that applies to the named insured by virtue of the policy's omnibus clause. This is consistent with the rationale behind the omnibus clause—namely, to protect persons who have suffered damage by the negligent use of the insured's motor vehicle when operated by another with the permission of the named insured.²⁰

Third, no reference is made in the statute to either collision or comprehensive coverage. Thus, it must be assumed that it is not the purpose of the statute to alter the coverage within these areas.

Within the limitations above it appears that the purpose of the 1968 amendment is to allow insurance companies issuing garage liability policies to limit their liability under the policy's omnibus clause by the inclusion of a provision that will make the driver's insurance (if any) primarily liable for the loss. The effect, of course, is to overrule cases like *Kaplan* and *Celina Mutual*. The question now

¹⁸The financial responsibility requirements specified in VA. CODE ANN. § 46.1-504 (Supp. 1968) are:

... twenty thousand dollars because of bodily injury to or death of one person in any one accident... thirty thousand dollars because of bodily injury to or death of two or more persons in any one accident, and... five thousand dollars because of injury to or destruction of property of others in any one accident.

¹⁹The second paragraph of the amendment is quoted *supra* at note 5.

²⁰*Liberty Mut. Ins. Co. v. Tiller*, 189 Va. 544, 53 S.E.2d 814 (1949); *accord*, *Liberty Mut. Ins. Co. v. Venable*, 194 Va. 357, 73 S.E.2d 366 (1952).

remains as to how well the statute will operate to perform its intended function.

Inherent in the drafting of any piece of legislation is the problem of wording the statute in a way which will completely cover the situation to be remedied and thereby accomplish the intended purpose. Examining the 1968 amendment in light of this problem, one phrase in particular might well leave room for a broader interpretation by the courts than was intended. The statute provides, in part, that the coverage under the garage liability policy "afforded a person other than the named insured . . . shall not be applicable if there is any *other valid and collectible insurance applicable to the same loss covering such person . . .*"²¹ In construing the meaning of a phrase of this type (e.g., the standard "other insurance" escape clause) the courts have necessarily had to determine exactly what constitutes "other valid and collectible insurance" within the meaning of the policy. An obvious problem arises when the other insurance policy also contains an escape or limiting clause similar to the clause in the policy under consideration.²² The case in which the other policy contains an "excess insurance" clause is illustrative of the problem.²³

Traditionally, where there has been a conflict between an insurance policy containing an "other insurance" clause and another policy containing an "excess insurance" clause, a majority of the courts have held that the policy containing the "other insurance" clause affords primary coverage.²⁴ These courts have reasoned that the policy con-

²¹VA. CODE ANN. § 38.1-381(a3) (Supp. 1968) (emphasis added).

²²The three principal types of "other insurance" clauses are (1) the standard "other insurance" or "no-liability escape" clause, (2) the "excess insurance" clause, and (3) the "pro-rata" clause. See note 3, *supra*, and text accompanying note 3. See generally Annot., 46 A.L.R.2d 1163 (1956).

²³The situation under which a conflict will most likely arise when one of the policies is a garage liability policy is where a customer or prospective customer of the insured to whom the policy is issued is driving an automobile insured under the garage policy. If the customer is involved in an accident while driving such vehicle and is himself insured under a standard family automobile policy, the conflict in Virginia will generally be between the "other insurance" clause in the garage policy and an "excess insurance" clause in the driver's policy. This is true because in Virginia, the wording of the standard family policy "escape clause" reads "*... provided, however, the insurance with respect to a temporary substitute automobile or non-owned automobile shall be excess insurance over any other valid and collectible insurance.*" Such a clause is set out in full *supra* at note 9.

²⁴Zurich Gen. Accident & Liab. Ins. Co. v. Clamor, 124 F.2d 717 (7th Cir. 1941); Michigan Alkali Co. v. Bankers Indem. Ins. Co., 103 F.2d 345 (2d Cir. 1939); Continental Cas. Co. v. Curtis Publishing Co., 94 F.2d 710 (3d Cir. 1938); Travelers Indem. Co. v. State Auto. Ins. Co., 67 Ohio App. 457, 37 N.E.2d 198 (1941). See generally Annot., 46 A.L.R.2d 1163, 1164-65 (1956).

taining the "excess insurance" clause does not provide other insurance coverage within the meaning of the "other insurance" clause and, thus, the policy containing the "other insurance" clause is liable for the entire loss up to the limits of that policy. As stated by the court in *Zurich General Accident & Liability Insurance Co. v. Clamor*:²⁵

A decision must rest upon a construction of the language employed by the respective insurers. Zurich affords no protection where there is 'other valid and collectible insurance.' Car and General provides 'the insurance shall be excess insurance over any other valid and collectible insurance.' It will be noted that the language employed by Zurich in this respect is general in its nature, while that employed by Car and General is specific, or, at any rate, more specific than Zurich.

There is no case, so far as we are aware, where the precise question has been decided. There are cases which have held or indicated, under somewhat similar circumstances, that the specific language is controlling over the general. We think that construction should be applied in the instant situation. Any other construction would ignore the specific language employed by Car and General. *The 'excess insurance' provided by the latter is not 'other insurance' required by Zurich.*²⁶

The Virginia courts and the federal courts interpreting Virginia law heretofore have not used the rationale of *Zurich* in denying effect to the "other insurance" clause.²⁷ Rather, as indicated above,²⁸ they have held such provisions to be in conflict with the omnibus clause and therefore invalid. However, the 1968 amendment now makes, in limited situations, the use of such clauses permissible. Nevertheless, by virtue of the 1968 amendment the Virginia courts will now have to determine what constitutes "other valid and collectible insurance"; and it is conceivable that they might adhere to the rationale of *Zurich*.

In an effort to avoid such decisions as that in *Zurich*, certain insurance companies modified the wording of their "other insurance" clauses to read, "if there is other valid and collectible insurance, *either primary or excess.*"²⁹ At least one court has seized upon this change

²⁵124 F.2d 717 (7th Cir. 1941).

²⁶*Id.* at 720 (emphasis added).

²⁷See *Maryland Cas. Co. v. Burley*, 345 F.2d 138 (4th Cir. 1965); *Pulley v. Allstate Ins. Co.*, 242 F. Supp. 330 (E.D. Va. 1965); *American Motorists Ins. Co. v. Kaplan*, 209 Va. 53, 161 S.E.2d 675 (1968); *Hardware Mut. Cas. Co. v. Celina Mut. Ins. Co.*, 209 Va. 60, 161 S.E.2d 680 (1968).

²⁸See text accompanying note 15, *supra*.

²⁹209 Va. at 55, 161 S.E.2d at 677.

of wording in the policy to give effect to the "other insurance" clause and thereby hold the policy containing an "excess insurance" clause primarily liable.

In *Allstate Insurance Co. v. Shelby Mutual Insurance Co.*,³⁰ on facts similar to those in *Kaplan*, the Supreme Court of North Carolina distinguished the wording of the modified "other insurance" clause, which included the terms "either primary or excess" from the previous wording of the clause. The court said:

Here, the Shelby Mutual policy is not ambiguous with reference to the intent of the parties to exclude coverage under it where the other policy contains an 'excess' clause. The Shelby Mutual policy expressly makes the existence of such 'excess' policy an event which sets the Shelby Mutual's exclusionary clause into operation.

The clear meaning of this provision is that the existence of an 'excess' policy (the Allstate policy) is an event which prevents the Shelby Mutual policy from operating at all with reference to [the permissive driver].³¹

The North Carolina decision is supported by an earlier decision of the Supreme Court of Florida in *Continental Casualty Co. v. Weekes*,³² construing a similarly worded exclusionary clause.³³ However, two recent decisions by the Louisiana Court of Appeals in cases involving policies with provisions identical to those in the North Carolina case (and the recent Virginia cases of *Kaplan and Celina Mutual*),³⁴ took a different approach.

In *Lincombe v. State Farm Mutual Automobile Insurance Co.*³⁵ and *State Farm Mutual Automobile Insurance Co. v. Travelers Insurance Co.*³⁶ the Louisiana court held the "other insurance" clauses in the two policies mutually repugnant and required the insurance companies to prorate the loss. In *Lincombe* the court reasoned that

³⁰269 N.C. 341, 152 S.E.2d 436 (1967).

³¹152 S.E.2d at 443.

³²74 So. 2d 367 (Fla. 1954).

³³In *Weekes* the Florida Court was presented with an owner-lessor liability provision stating that the insurance does not apply "to any liability for such loss as is covered on a primary, contributory, excess, or any other basis by insurance in another insurance company" and a driver-lessee liability clause providing only for "excess" coverage over and above any other valid and collectible insurance. The court concluded that since the former policy did not provide any contingent liability for excess insurance, it should prevail over the latter.

³⁴The policy provisions involved in *Kaplan* are set out in full *supra* at notes 9 and 10.

³⁵166 So. 2d 920 (La. App.), *cert. denied*, 246 La. 907, 168 So. 2d 820 (1964).

³⁶184 So.2d 750 (La. App.) *cert. denied*, 249 La. 454-55, 187 So.2d 439 (1966).

there was no real difference between the escape clauses in the two policies as in each the purpose was "to relieve the insurer from all or a portion of the liability which it otherwise would have if there is other valid and collectible insurance of the same type available to the insured."³⁷ A concurring opinion by Judge Tate in *State Farm* defended the conclusion of the court in *Lincombe*, stating:

In *Lincombe*, we correctly held it was impossible to reconcile the respective 'excess' and 'escape' clauses in the two policies. Indeed, there is actually no way by logic or word-sense to reconcile two such clauses, where each policy by itself can apply as a primary insurer, but where the clause in each policy nevertheless attempts to make its own liability secondary to that of any other policy issued by a similar primary insurer: For then the primary and (attempted) secondary liability of each policy chase the other through infinity, something like trying to answer the question: which came first, the chicken or the egg.³⁸

The Louisiana court's assessment of the conflict between these two clauses also finds support in an earlier decision.³⁹ Furthermore, the Louisiana court has made it clear that the inclusion of the terms "either primary or excess" in the "other insurance" clause will not change the rule in that state. As stated by the Court in *Graves v. Traders & General Insurance Co.*:⁴⁰

In our judgment a clause using the phrase 'other valid and collectible insurance' (without further qualification by way of either extension or limitation) is equally inclusive (or exclusive) as one which reads 'other valid and collectible insurance either primary or excess.'⁴¹

It might well be argued that prorating the loss between the insurers is the most equitable way to resolve the controversy between these conflicting escape clauses. However, without making an attempt to decide which interpretation is the best, it suffices to say that the Virginia courts will have at least three alternatives in construing the new Virginia statute and the policy provision approved therein when such a provision comes in conflict with an "excess insurance" clause in another policy: (1) follow the interpretation of the federal court in *Zurich* and conclude that the policy containing the

³⁷166 So. 2d at 925.

³⁸184 So. 2d at 753-54.

³⁹*Oregon Auto. Ins. Co. v. United States Fidelity & Guar. Co.*, 195 F.2d 958 (9th Cir. 1952).

⁴⁰200 So. 2d 67 (La. App. 1967).

⁴¹*Id.* at 78.

"excess insurance" clause does not provide other valid and collectible insurance within the definition of the garage liability policy; (2) follow the reasoning of the Louisiana court in *Lincombe* and *State Farm* and hold the two clauses mutually repugnant, thereby requiring the insurance companies to prorate the loss; or (3) read into the statute the terms "either primary or excess" (or give effect to these terms if the policy is so worded) in the "other insurance" clause and conclude that the policy containing the "excess insurance" clause does constitute other valid and collectible insurance within the terms of the garage policy. Under the latter interpretation the policy containing the "excess" provision would be primarily liable, a result in accord with the North Carolina court in *Allstate*. While it is impossible to say which of these alternatives the Virginia court will choose to follow when it is again presented with this issue, one conclusion can be drawn—namely, that the 1968 amendment to the motor vehicle insurance statute does not provide the court with a clear-cut method for applying the "other insurance" policy provision in a garage liability policy.

California has enacted a statute similar to the one recently adopted by the Virginia legislature.⁴² While no cases have been found in which the courts of that state have construed this particular statute,⁴³ certain features of it should be noted.

⁴²CAL. INS. CODE § 11580.1 (f) (West Supp. 1967). The California statute provides:

(f) Where two or more policies are applicable to the same loss and one of such policies affords coverage to a named insured engaged in selling, repairing, servicing, delivering, testing, road testing, parking, or storing automobiles, such policies may contain a provision that the insurance coverage applicable to such motor vehicles afforded a person other than the named insured or his agent or employee shall not be applicable if there is any other valid and collectible insurance applicable to the same loss covering such person as a named insured or as an agent or employee of a named insured under a policy with limits at least equal to the financial responsibility requirements specified in Section 16059 of the Vehicle Code; and in such event, the two or more policies shall not be construed as providing cumulative or concurrent coverage and only that policy which covers the liability of such person as a named insured, or as an agent or employee of a named insured, shall apply. In the event there is no such other valid and collectible insurance, the coverage afforded a person other than the named insured, his agent or employee, may be limited to the financial responsibility requirements specified in Section 16059 of the Vehicle Code.

⁴³The fact that no case law has been found in which the California courts have interpreted this statute may indicate that the California legislature has successfully resolved the conflict between the "other insurance" clauses when one of the policies involved in a garage liability policy. See text accompanying note 44 *infra*.

Under the California statute, a garage policy may contain a provision under which the coverage normally afforded a person other than the named insured, his agent or employee (e.g., a permissive driver) will not be extended when such person is covered by other valid and collectible insurance applicable to the same loss. However, the California statute adds the following phrase not included in the Virginia statute:

... and in such event [where there are two or more policies applicable to the same loss], the two or more policies shall not be construed as providing cumulative or concurrent coverage *and only that policy which covers the liability of such person as a named insured, or as an agent or employee of the named insured, shall apply.*⁴⁴

The presence of this phrase would seem to relieve the courts of the task of determining what constitutes other valid and collectible insurance within the meaning of the "other insurance" clauses in the garage policy. The statute apparently resolves this question by stating that the entire burden of liability is placed on the permissive driver of the vehicle who is a named insured or an agent or employee of a named insured under another policy of liability insurance. The garage policy would, therefore, provide coverage only when such person is not covered by other insurance (or insurance with limits less than the financial responsibility requirements of that State).

While the wording of the Virginia and California statutes is similar in many respects, the California statute unequivocally states that in the event there are two or more policies covering the same loss, only that policy covering the driver as a named insured (or an agent or employee of a named insured) will apply. The Virginia statute, on the other hand, provides only that where there is other valid and collectible insurance covering such permissive driver, the garage policy will not apply. Since the Virginia statute does not expressly state what shall constitute other valid and collectible insurance within the meaning of that clause, the Virginia courts will be called upon to make this determination. The courts might find that the permissive driver's policy which contains a similar "escape" clause does not provide such other valid and collectible insurance, following the reasoning of cases such as *Zurich*; or conclude that two such clauses are irreconcilable and thereby require the insurance companies to prorate the loss, as the Louisiana courts have ruled. Of course, either of these

⁴⁴CAL. INS. CODE § 11580.1(f) (West Supp. 1967) (emphasis added).