COMPETING "OTHER INSURANCE" CLAUSES UNDER IOWA LAW: A NEW DIRECTION?

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I. INTRODUCTION

Most insurance policies today contain "other insurance" clauses, which are intended to dictate what is to happen in the event that there is more than one policy covering a single loss.[1] Courts have long struggled with the issues created when an insured is covered by more than one insurance policy for the same loss.[2] The varying and conflicting approaches taken by courts illustrate the complexity of the question.[3]

This Note begins by describing the various types of other insurance clauses and the problems that are created when two different types of other insurance clauses come into conflict. This Note then details the current state of the law of or as it pertains to other insurance clauses in Iowa. In addition,

1. An other insurance clause is an insurance policy provision that an insurer uses to limit liability by proscribing the limits it will pay in the event there is other applicable insurance. Motor Club of Iowa Ins. Co. v. Iowa Mut. Ins. Co., 508 N.W.2d 634, 635 (Iowa 1993).

2. *See infra* notes 26-34 and accompanying text. "The myriad [of] problems attendant upon 'other insurance' clauses is not new, and the conflicting solutions adopted demonstrate a frustrating judicial attempt to resolve [the problem] . . . ." Union Ins. Co. v. Iowa Hardware Mut. Ins. Co., 175 N.W.2d 413, 414 (Iowa 1970).

3. Union Ins. Co. v. Iowa Hardware Mut. Ins. Co., 175 N.W.2d at 414.

this Note discusses and compares the various ways in which other courts have attempted to resolve these situations. Finally, this Note concludes with a suggested method that Iowa courts may use in the future to resolve problems created by competing other insurance clauses.

II. GENERAL DEFINITIONS AND RELEVANT CONCEPTS

A. *"Other Insurance" Clauses and Their Problems*

An other insurance clause is an insurance policy provision that an insurer uses to limit its liability.[4] An insurer includes other insurance clauses in order to limit the amount it would be required to pay if the insured makes a claim against it, as well as other insurers covering the insured for the same loss.[5] The object, however, is not only to limit exposure on the part of insurers, but also to prevent double or multirecovery on the part of the insureds.[6]

Difficult issues arise with respect to other insurance clauses "when there are two or more insurers insuring, the same risk, the same interest, for the benefit of the same person or entity, and during the same period of time."[7] For example, such overlapping coverages can be intended by the insured when they purchase a general umbrella or catastrophic loss policy, as well as a more specific primary policy, such as primary automobile insurance.[8] Multiple coverage can also arise by inadvertently purchasing overlapping coverages.[9] Whether intentional or inadvertent, when two or more insurers find themselves in the position of covering the same loss, they must find a way to resolve the questions of which insurer is to pay and how much each insurer should pay.[10] This problem led to other insurance clauses.

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4. Motor Club of Iowa Ins. Co. v. Iowa Mut. Ins. Co., 508 N.W.2d at 635; *see also* Cozzi v. Government Employees Ins. Co., 381 A.2d 1235, 1240 (N.J. Super. Ct. App. Div. 1977) (defining "other insurance clause" as a device by which insurers "decide among themselves which is to bear the incidence of loss, or whether it is to be shared and in what proportion").

5. Motor Club of Iowa Ins. Co. v. Iowa Mut. Ins. Co., 508 N.W.2d at 635.

6. *Id.* at 637 n.1.

7. Paul R. Koepff, *"Other Insurance" Clauses*, *in* 13TH ANNUAL INSURANCE, EXCESS, AND REINSURANCE COVERAGE DISPUTES, at 249, 251 (PLI Litig. & Admin. Practice Course Handbook Series No. 539, 1995) (noting that these situations become significant issues only when there is more than one insurer for the same accident).

8. BARRY R. OSTRAGER & THOMAS R. NEWMAN, HANDBOOK ON INSURANCE COVERAGE DISPUTES § 9.01, at 254 (1989); *see also* LeMars Mut. Ins. Co. v. Farm & City Ins. Co., 494 N.W.2d 216, 218-19 (Iowa 1992) (defining the scope of umbrella and catastrophic loss policies).

9. OSTRAGER & NEWMAN, *supra* note 8, § 9.01, at 254 (noting that overlapping coverage may occur "when there has been a switch from 'occurrence' coverage to 'claims made' coverage and a claim is made during the 'claims made' policy period on the basis of an act that took place during the occurrence policy period").

10. *Id.* § 9.01, at 253-54.

Insurance companies use three basic types of other insurance clauses: the pro rata clause, the escape clause, and the excess clause.[11] The pro rata clause is a commonly used provision, which provides that when an insured has other available insurance, the insurer will be liable only for the proportion of the loss represented by the ratio between its limit and the total of all limits of all available insurance.[12] If a single insured had two insurance policies that covered the same loss and company A's policy had a $10,000 limit and company B's policy had a $40,000 limit, then company A would be liable for one-fifth of the total loss up to $10,000 and company B would be liable for four-fifths of the total loss up to $40,000.[13]

The escape clause provides that if there are other valid and collectible insurance policies, then the company issuing the policy can avoid liability.[14] If an insurance policy contains an escape clause, the insurance company can completely avoid liability under its policy if that insurance company can show that the insured has some other valid and collectable insurance from which the insured can make a claim.[15]

The excess insurance clause provides that the insurance policy will be available only after all other valid and collectible insurance has been

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11. *See* William C. Brown Co. v. General Am. Life Ins. Co., 450 N.W.2d 867, 870 (Iowa 1990); Grinnell Mut. Reinsurance Co. v. Globe Am. Cas. Co., 426 N.W.2d 635, 637 (Iowa 1988); Union Ins. Co. v. Iowa Hardware Mut. Ins. Co., 175 N.W.2d 413, 415 (Iowa 1970).

12. BLACK'S LAW DICTIONARY 1220 (6th ed. 1990) [hereinafter DICTIONARY]; *see also* Union Ins. Co. v. Iowa Hardware Mut. Ins. Co., 175 N.W.2d at 415; Motor Vehicle Cas. Co. v. LeMars Mut. Ins. Co., 116 N.W.2d 434, 436 (Iowa 1962); 8A JOHN ALAN APPLEMAN & JEAN APPLEMAN, INSURANCE LAW AND PRACTICE § 4909, at 383-84 (1981). A common form of the pro rata clause is:

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

Motor Vehicle Cas. Co. v. LeMars Mut. Ins. Co., 116 N.W.2d at 435.

13. *See supra* notes 10-12 and accompanying text.

14. APPLEMAN & APPLEMAN, *supra* note 12, § 4910, at 457; DICTIONARY, *supra* note 12, at 544; *see also* Aid Ins. Co. v. United Fire & Cas. Co., 445 N.W.2d 767, 769 (Iowa 1989); Union Ins. Co. v. Iowa Hardware Mut. Ins. Co., 175 N.W.2d at 415. A common example of the escape clause is:

> [This policy provides coverage for the] named insured . . . 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 . . . is available to such person . . . .

Union Ins. Co. v. Iowa Hardware Mut. Ins. Co., 175 N.W.2d at 414; *see also* Aid Ins. Co. v. United Fire & Cas. Co., 445 N.W.2d at 769.

15. Union Ins. Co. v. Iowa Hardware Mut. Ins. Co., 175 N.W.2d at 415.

exhausted.[16] Therefore, an insurance policy containing such a clause would come into effect only after any and all other valid and collectible insurance is exhausted to its full limits.[17]

Another common clause in insurance policies is a combination pro rata and excess clause.[18] This clause generally provides that the insurance is prorated with any other valid and collectible insurance, unless a certain condition exists at which time the insurance becomes excess.[19] Courts have not created a special category for these hybrid clauses.[20] Therefore, courts treat these types of clauses either as pro rata or excess such that if the condition exists, the policy will be treated as excess; if the condition does not exist the policy will be pro rata.

Problems with these types of clauses arise when two or more policies cover the same loss, but the other insurance clauses are conflicting.[21] For example, suppose an insured has two automobile policies, each with a $10,000 limit, and the insured suffers a loss of $12,000. Policy A has a pro rata clause and policy B has an escape clause.[22] Assuming that a $10,000 limit satisfies the minimum limit in the state in which the accident occurs, company A will pay its full $10,000 limit and company B would be relieved of any responsibility—ultimately leaving the insured with $2000 of unpaid damages despite having purchased $20,000 of insurance. This sort of problem exists when at least one policy involved contains an escape clause and the loss suffered is greater than the other policy's limits.[23]

Another problem arises when both policies contain excess clauses. Consider the aforementioned hypothetical but assume that both policies A and B

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16. APPLEMAN & APPLEMAN, *supra* note 12, § 4909, at 383-84; *see also* DICTIONARY, *supra* note 12, at 561; Motor Club of Iowa Ins. Co. v. Iowa Mut. Ins. Co., 508 N.W.2d 634, 635-36 (Iowa 1993); Union Ins. Co. v. Iowa Hardware Mut. Ins. Co., 175 N.W.2d at 415. A common form of the excess insurance clause states: "This insurance is in excess of any other valid and collectible insurance except insurance that specifies it is in excess of our Limit of Liability." LeMars Mut. Ins. Co. v. Farm & City Ins. Co., 494 N.W.2d 216, 218 (Iowa 1992).

17. LeMars Mut. Ins. Co. v. Farm & City Ins. Co., 494 N.W.2d at 219.

18. Many automobile insurance policies contain the following provision:

> If there is other applicable similar insurance we will pay only our share of the loss. Our share is the proportion that our limit of liability bears to the total of applicable limits. However, any insurance we provide *for a vehicle you do not own* shall be excess over any other collectible insurance.

Motor Club of Iowa Ins. Co. v. Iowa Mut. Ins. Co., 508 N.W.2d at 635; *see also* Grinnell Mut. Reinsurance Co. v. Globe Am. Cas. Co., 426 N.W.2d 635, 636 (Iowa 1988).

19. Aid Ins. Co. v. United Fire & Cas. Co., 445 N.W.2d at 768.

20. *Id.*; *see also* Motor Club of Iowa Ins. Co. v. Iowa Mut. Ins. Co., 508 N.W.2d at 635-36 (holding that the clause would be applied as if it were an excess clause because the injured person was in an automobile he did not own when injured); Grinnell Mut. Reinsurance Co. v. Globe Am. Cas. Co., 426 N.W.2d at 637 (treating the clause as though it were simply a straight-forward excess clause).

21. 46 C.J.S. *Insurance* § 1139 (1993).

22. *See supra* note 16 and accompanying text.

23. *See supra* note 17 and accompanying text.

contain excess other insurance clauses, such that by their terms each policy is to be treated as an excess over any other valid and collectible insurance.[24] In this situation, both companies have attempted to provide coverage only to the extent that the other is unavailable.[25] The obvious problem is that if one policy is excess, then so is the other because they contain identical other insurance clauses.[26] This situation would leave the insured with no coverage despite having purchased two policies covering the loss.[27] This paradoxical result illustrates the problems courts can encounter in attempting to resolve cases involving two competing other insurance clauses.

B. *Basic Principles of Insurance Policy Construction Relevant to "Other Insurance" Clauses*

Courts employ certain basic concepts and doctrines to all insurance coverage disputes. First, in attempting to resolve the problems created when two or more insurance companies provide insurance on the same loss, "the question of their respective insurance obligations is determined by a construction of the language used by the respective insurers and not upon any arbitrary rule or circumstance."[28] Thus, the court would read the language of each competing other insurance clause literally and construe the language as it is "plainly" written, theoretically leading the court to a sensible and just result.[29] This approach does not, however, completely resolve the issue. In the above example of conflicting excess clauses,[30] employing this analysis would result in neither policy being in force because both policies' excess clauses make each policy excess over the other.[31] Thus, simply employing this sort of policy language construction analysis leads to what some courts have termed "a circular riddle."[32] The reason is that "[t]o solve the problem by picking up one policy, and reading it with a result which would be opposite to that reached if the other policy were first in order, is at best a pseudo-solution."[33]

Secondly, courts have held that one basic principle of insurance policy construction is that when there is an ambiguity, the policy should be con-

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24. *See supra* note 18 and accompanying text.

25. *See* Union Ins. Co. v. Iowa Hardware Mut. Ins. Co., 175 N.W.2d 413, 414-16 (Iowa 1970) (stating that both insurers are attempting to limit their liability by providing coverage only to the extent that the other is unavailable).

26. *Id.* at 415.

27. *Id.*

28. Truck Ins. Exch. v. Maryland Cas. Co., 167 N.W.2d 163, 164 (Iowa 1969).

29. *See, e.g., id.* (involving the plain language of an excess insurance contract that the court read to determine if coverage existed).

30. *See supra* notes 21-23 and accompanying text.

31. Union Ins. Co. v. Iowa Hardware Mut. Ins. Co., 175 N.W.2d at 417 (discussing the position taken by Iowa Hardware that because of the other side's coverage, the insurer owed nothing under the excess clause).

32. *Id.*

33. *Id.*

strued in favor of the insured and strictly against the insurer.[34] This rule of policy construction does not, however, permit a court to ignore the plain meaning of the parties.[35]

The third relevant concept used by courts is that a policy will be construed as a whole to determine the objects each party was trying to achieve.[36] In using this basic canon of insurance policy construction, courts have attempted to resolve the competing other insurance clause problem by determining which policy is primary and which policy is secondary.[37] In looking at the policy as a whole the court is allowed "to consider the surrounding circumstances, the situation of the parties, and the objects the parties were striving to attain."[38]

Finally, the Iowa Supreme Court has stated that insurance policies should be construed in light of the parties' reasonable expectations.[39] The reasonable expectations of the parties may be established by evidence of the underlying negotiations of the policy, its terms and declarations, or it may be inferred from the circumstances under which the policy was procured and issued.[40] In order to ignore a policy provision, however, the provision must be bizarre or oppressive, eviscerate the terms explicitly agreed to, or eliminate the dominant purpose of the transaction.[41]

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34. Benzer v. Iowa Mut. Tornado Ins. Ass'n, 216 N.W.2d 385, 388 (Iowa 1974) ("In interpreting Iowa Mutual's 'other issuance' clause we are . . . mindful of . . . our rule that where insurance contracts are ambiguous, require interpretation, or are susceptible to two equally proper constructions, the court will adopt the construction most favorable to the insured."); Union Ins. Co. v. Iowa Hardware Mut. Ins. Co., 175 N.W.2d at 417 (stating that policies should be construed liberally in favor of the insured and strictly against the insurer); *see also* Gateway State Bank v. North River Ins. Co., 387 N.W.2d 344, 346 (Iowa 1986) ("Since an insurance policy is a contract of adhesion, we construe its provisions in a light favorable to the insured.").

35. State Auto. & Cas. Underwriters v. Hartford Accident & Indem. Co., 166 N.W.2d 761, 764 (Iowa 1969) ("[I]f there is no ambiguity in the contract there is no right or duty on the part of the court to write a new contract of insurance between the parties.").

36. *Id.* ("In the construction of written contracts, the cardinal principle is that the intent of the parties must control; and . . . this is determined by what the contract itself says.") (quoting IOWA R. CIV. P. 344(f) (repealed 1977)) (internal quotations omitted).

37. *See, e.g.*, LeMars Mut. Ins. Co. v. Farm & City Ins. Co., 494 N.W.2d 216, 218 (Iowa 1992) ("An insurance policy is construed as a whole, not by its separate provisions.").

38. *Id.* (citing C & J Fertilizer, Inc. v. Allied Mut. Ins. Co., 227 N.W.2d 169, 172 (Iowa 1975); City of Spencer v. Hawkeye Sec. Ins. Co., 216 N.W.2d 406, 408 (Iowa 1974)).

39. Rodman v. State Farm Mut. Auto. Ins. Co., 208 N.W.2d 903, 906 (Iowa 1973).

40. Farm Bureau Mut. Ins. Co. v. Sandbulte, 302 N.W.2d 104, 112 (Iowa 1981).

41. Cairns v. Grinnell Mut. Reinsurance Co., 398 N.W.2d 821, 825 (Iowa 1987).

III. THE IOWA COURTS' POSITION ON COMPETING "OTHER INSURANCE" CLAUSES

The Iowa Supreme Court adopted the proration approach[42] in *Union Insurance Co. v. Iowa Hardware Mutual Insurance Co.*[43] to resolve problems with conflicting other insurance clauses.[44] The Iowa Supreme Court in *Union* reasoned: "When the insured has coverage from either of two policies, but for the other, and each [policy] contains a provision reasonably subject to a construction that it conflicts with a provision in other concurrent insurance, there is a conflict."[45] The court concluded that when such a repugnancy exists, the policies are "more equitably resolved by ignoring the offending clauses."[46] In the *Union* court's opinion, this repugnancy leads to a conclusion that when such a conflict exists, "the only reasonable result to be reached is a proration between the two insurance companies in proportion to the amount of insurance provided by their respective policies."[47] Thus, *Union* established the Iowa rule on competing other insurance clauses—when the other insurance clauses can reasonably be interpreted to conflict with each other, they are to be ignored, and the two policies should be prorated by the proportion of each policy's limit to the total of all applicable limits.[48]

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42. This approach is also known as the "Oregon Rule" or the "*Lamb-Weston* Rule." Koepff, *supra* note 7, at 251; *see* Lamb-Weston, Inc. v. Oregon Auto. Ins. Co., 341 P.2d 110, 119 (Or. 1959) ("In our opinion, whether one policy uses one clause or another, when they come in conflict with the 'other insurance' clause of another insurer, regardless of the nature of the clause, they are in fact repugnant and each should be rejected in toto."). Only one Iowa case cites directly to the *Lamb-Weston* decision. *See* Motor Vehicle Cas. Co. v. LeMars Mut. Ins. Co., 116 N.W.2d 434, 438 (Iowa 1962). The Iowa Supreme Court in that case rejected the *Lamb-Weston* decision by noting that *National Indemnity Co. v. Lead Supplies, Inc.* "points out the *Lamb-Weston* opinion misinterprets a precedent upon which it relies." *Id.* (citing National Indem. Co. v. Lead Supplies, Inc., 195 F. Supp. 249 (D. Minn. 1960)). Despite this statement, the Iowa Supreme Court adopted a proration approach essentially the same as the approach of the Oregon Supreme Court in the *Lamb-Weston* decision and used similar language eight years later in *Union Insurance Co. v. Iowa Hardware Mutual Insurance Co.*, 175 N.W.2d 413, 419 (Iowa 1970). *Compare* Lamb-Weston, Inc. v. Oregon Auto. Ins. Co., 341 P.2d at 119, *with* Union Ins. Co. v. Iowa Hardware Mut. Ins. Co., 175 N.W.2d at 418-19.

43. Union Ins. Co. v. Iowa Hardware Mut. Ins. Co., 175 N.W.2d 413 (Iowa 1970).

44. *Id.* at 418-19.

45. *Id.* at 418 (relying on Truck Ins. Exch. v. Maryland Cas. Co., 167 N.W.2d 163 (Iowa 1969)). In an action for contribution, the court in *Truck Insurance Exchange v. Maryland Casualty Co.* held that, when mutually repugnant insurers both provide excess coverage, both must be liable on a pro rata basis. *See* Truck Ins. Exch. v. Maryland Cas. Co., 167 N.W.2d 163, 164 (Iowa 1969).

46. Union Ins. Co. v. Iowa Hardware Mut. Ins. Co., 175 N.W.2d at 418.

47. *Id.* at 419.

48. Various Iowa Supreme Court decisions have followed the *Union* rule. *See, e.g.*, Motor Club of Iowa Ins. Co. v. Iowa Mut. Ins. Co., 508 N.W.2d 634, 638 (Iowa 1993) (applying *Union* in a case involving two automobile insurance policies); Aid Ins. Co. v. United Fire & Cas. Co., 445 N.W.2d 767, 770-71 (Iowa 1989) (applying *Union* in a case involving two automobile insurance policies); Westhoff v. American Interinsurance Exch.,

A. *The Benefits of Iowa's Approach*

The proration approach adopted by the Iowa Supreme Court has several benefits. First, it serves the purpose of guaranteeing that an insured will not have less coverage by purchasing two policies than with just one policy because it forces all applicable insurers to pay a share.[49] Furthermore, it closes the gaping loophole opened when courts gave the language of both policy provisions independent meaning[50] in cases of competing excess clauses.[51]

A second benefit of this approach is that it avoids a draftsmanship battle between insurance companies trying to draft the most specific other insurance clause in an effort to limit the company's liability.[52] The rationale is that if the court allows insurers to escape or diminish their liability based on the specificity of their other insurance clause, then insurers would be encouraged to try and draft their other insurance clause more "craftily" than the other companies.[53] This situation leaves the insurers battling over who should pay and how much they should pay, while the insured is "left helpless on the sidelines."[54] The court, therefore, employed the fairest solution it found—to nullify the clauses entirely and simply pro rate according to policy limits.[55]

B. *The Problems with Iowa's Approach*

On its face, Iowa's approach seems to be the fairest in terms of the interests of the insureds; however, there are certain drawbacks to the proration approach. First, the *Union* case, which established the proration rule in Iowa[56] was decided in a case in which both the applicable policies had equal policy limits thereby resulting in equal shares of the loss to each insurer.[57] Although in this context the result seems fair to all concerned, there could be times when the application of the proration rule would lead to inequitable results.

For example, consider the case of *LeMars Mutual Insurance Co. v. Farm & City Insurance Co.*[58] That case involved two policies, both of which

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250 N.W.2d 404, 410-11 (Iowa 1977) (applying *Union* in an uninsured motorist policy case); St. Paul Ins. Co. v. Horace Mann Ins. Co., 231 N.W.2d 619, 622 (Iowa 1975) (applying *Union* in a case involving two liability policies written to cover accidents arising out of a high school chemistry class).

49. Union Ins. Co. v. Iowa Hardware Mut. Ins. Co., 175 N.W.2d at 417.

50. *See supra* notes 20-21 and accompanying text.

51. Union Ins. Co. v. Iowa Hardware Mut. Ins. Co., 175 N.W.2d at 417.

52. Aid Ins. Co. v. United Fire & Cas. Co., 445 N.W.2d at 770 (citing Union Ins. Co. v. Iowa Hardware Mut. Ins. Co., 175 N.W.2d at 417).

53. *Id.*

54. Union Ins. Co. v. Iowa Hardware Mut. Ins. Co., 175 N.W.2d at 418.

55. *Id.*

56. *See supra* note 42 and accompanying text.

57. Union Ins. Co. v. Iowa Hardware Mut. Ins. Co., 175 N.W.2d at 419.

58. LeMars Mut. Ins. Co. v. Farm & City Ins. Co., 494 N.W.2d 216 (Iowa 1992).

were applicable to an automobile accident.[59] The LeMars policy was an umbrella policy that covered $1,000,000 at a premium of $120 per year.[60] The Farm & City policy was an automobile liability policy that covered $20,000 at a premium of $632 per year.[61] Both policies contained excess other insurance clauses.[62]

In that case, Farm & City argued that the court should apply the proration rule,[63] which would result in LeMars being responsible for fifty fifty-firsts (50/51) of the damage while Farm & City would be liable for one fifty-first (1/51) of the total damage.[64] The fact that Farm & City collected almost three times the premium yet would provide only one fifty-first (1/51) of the coverage, allowing it to escape a large bulk of the liability, shows that the proration rule can lead to inequitable results. In addition, this result punishes insurers that write low premium, low exposure policies by forcing them to pay under circumstances that they did not contemplate when issuing the policy.[65] This behavior discourages insurers from writing low premium, low exposure policies, making it more difficult for those who want to procure such coverage to obtain it.[66]

The second major drawback to the proration rule is that it does not necessarily alleviate the evils in the way it was intended. First, although the proration rule has eliminated the chance of an insured having less coverage with two policies than with one, it has done so at the expense of certainty and predictability.[67] Second, although the proration approach eliminates a draftsmanship battle with respect to other insurance clauses, it does so only by shifting the draftsmanship battle from other insurance clauses to other terms in the policy, such as the declarations and exclusions.[68]

Finally, the proration approach is contrary to the public policy of ensuring that insurance is readily available to all that wish to have it. By making insurance companies less certain of their extent of exposure and by imposing penalties on companies that write policies with high limits and low exposure, the courts make insurance companies less likely to issue such policies and make such policies more expensive.[69] Thus, the proration rule may

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59. *Id.* at 218.

60. *Id.* at 219.

61. *Id.* at 218.

62. *Id.*

63. *Id.*

64. *Id.* LeMars was responsible for $1,000,000 and Farm & City was responsible for $20,000, providing a total of $1,020,000 of coverage. $20,000 is 1/51 of $1,020,000 and $1,000,000 is 50/51 of $1,020,000.

65. *See* Illinois Farmers Ins. Co. v. Depositors Ins. Co., 480 N.W.2d 657, 660 (Minn. Ct. App. 1992).

66. *See id.* at 659.

67. *See supra* notes 49-55 and accompanying text.

68. Illinois Farmers Ins. Co. v. Depositors Ins. Co., 480 N.W.2d at 659.

69. *See* Steven W. Pottier & Robert C. Witt, *On the Demand for Liability Insurance: An Insurance Economics Perspective*, 72 TEX. L. REV. 1681, 1685 (1994) (noting that liability

render these types of policies harder to procure, which harms not only the insured but also any third parties injured by the insured.[70]

In sum, the proration rule does serve its primary goal of guaranteeing that the insured has no less coverage under two policies than they would under just one policy. The proration rule also ended in a draftsmanship battle with other insurance clauses, however, it has done so by merely shifting the detriments that the proration rule was attempting to resolve. It accomplishes these goals, however, by creating the possibility for great injustice to the insurers, which discourages companies from issuing such policies.[71]

IV. OTHER SOLUTIONS COURTS HAVE EMPLOYED

The problem of competing other insurance clauses is not unique to Iowa. In fact, other courts have employed various methods for resolving this problem. Included in the different approaches are the "first in time" approach, the specific versus general approach, the primary versus secondary approach, the clause-oriented approach, and the "closest to the risk" approach. Each approach, however, has met with varying degrees of acceptance by courts.

A. *The "First in Time" Approach*

The "first in time" approach imposes liability on the insurer whose policy was issued earlier in time.[72] Under this theory, courts have reasoned that a policy issued first in time cannot truly be considered excess because without an existing policy there can be no excess.[73] This theory, however, has been criticized as being an arbitrary and artificial line.[74] In fact, the Iowa Supreme Court has stated that the "time of coverage is not as significant as the vital fact that coverage existed when the accident occurred."[75] Consequently, any line drawn based on when the policy was purchased or when the contract was entered into is quite arbitrary insofar as it is unrelated to the issues the court deems most important—the existence of valid insurance

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insurance premiums are based on expectations of future claim and expense costs, which include among other things amounts paid to third parties and defense costs).

70. This Note contends that injured third parties would be harmed by the fact that insureds would have less coverage in terms of policy limits caused by the deterring effect of the proration rule on writing high limit policies. These lower limit policies would in turn provide less recovery in terms of a dollar amount per case.

71. *See supra* notes 65-66 and accompanying text.

72. New Amsterdam Cas. Co. v. Hartford Accident & Ins. Co., 108 F.2d 653, 656 (6th Cir. 1940) (holding that in a case involving two competing insurance policies, each with an excess insurance clause, the policy issued first shall be held liable).

73. *Id.*

74. Union Ins. Co. v. Iowa Hardware Mut. Ins. Co., 175 N.W.2d 413, 416 (Iowa 1970).

75. *Id.*

at the time of the accident.[76] Therefore, most courts have rejected this approach, including Iowa.[77]

B. *The Specific Versus General Approach*

Another approach initially used by many courts to reconcile competing other insurance clauses was to determine which other insurance clause was more specific in its restriction and to give that clause effect over the general clause.[78] Therefore, the insurer that wrote the most specific other insurance clause would be required to provide coverage.[79] A related method of dealing with competing other insurance clauses was to hold that the more specific other insurance clauses trumps the more general other insurance clause.[80] These approaches seem to be directly related to the principle of insurance policy construction, whereby questions of respective insurers' obligations are determined by construction of the language of the policies themselves rather than an arbitrary rule.[81] However, this objective was not met in most cases,[82] and in fact these specific versus general language approaches have been rejected for the most part as arbitrary[83] and "hairsplitting."[84]

C. *The Primary Versus Secondary Approach*

Another early approach used by courts was to hold the insurer of the "primary tortfeasor" responsible; any other insurers were considered only excess insurance.[85] A problem with this method is that the primary tortfeasor could be a named insured in all or none of the policies involved.[86] In

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76. *Id.*

77. *Id.*

78. *See, e.g.*, Trinity Universal Ins. Co. v. General Accident, Fire & Life Assurance Corp., 35 N.E.2d 836, 838 (Ohio 1941) (holding that when the coverage provided by one policy is general while the other competing policy is specific, under the general rule the specific insurer is primarily liable); *see also* R.J. Robertson, Jr., *"Other Insurance" Clauses in Illinois*, 20 S. ILL. U. L.J. 403, 411 (1996).

79. Robertson, *supra* note 78, at 411.

80. Trinity Universal Ins. Co. v. General Accident, Fire & Life Assurance Corp., 35 N.E.2d at 838 (holding the more specific restriction should be given effect over the more general).

81. *See supra* notes 28-32 and accompanying text.

82. *See* Note, *Concurrent Coverage in Automobile Liability Insurance*, 65 COLUM. L. REV. 319, 322 (1965); *see also* Union Ins. Co. v. Iowa Hardware Mut. Ins. Co., 175 N.W.2d at 416.

83. Union Ins. Co. v. Iowa Hardware Mut. Ins. Co., 175 N.W.2d at 416 (stating that the court disclaims the rationale of specific versus general as "unrealistic, artificial, or producing arbitrary results").

84. *See* Robertson, *supra* note 78, at 411.

85. *Id.*

86. Mark C. Guthrie, Comment, *"Other Insurance" Conflicts: A Common-Sense Proposal*, 36 BAYLOR L. REV. 689, 692 (1984).

addition, because most automobile insurance policies contain an omnibus clause, this theory would arguably disregard the intent of the insurer to provide coverage for the insured.[87] Although many courts still use this sort of reasoning when one or more of the policies involved is an umbrella policy,[88] most states, including Iowa, have rejected it as arbitrary and too difficult to apply as a method for resolving competing other insurance clause disputes in cases not involving umbrella policies.[89]

D. *The Clause-Oriented Approach*

Many courts have adopted an approach based on the type of clauses involved.[90] Essentially, separate rules were established depending on the types of other insurance clauses involved in a particular case.

For example, courts have held that when both policies contain excess clauses, the liability generally was prorated among the insurers.[91] Other courts have held that when both policies contain escape clauses, courts generally prorate.[92] When both policies contain pro rata clauses, courts will prorate.[93] When one policy contains an excess clause and the other contains an escape clause, some courts simply give effect to the escape clause, thereby

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87. *Id.*

88. *See* Koepff, *supra* note 7, at 272 ("Where an umbrella or excess policy covers loss with a primary policy having an excess other insurance clause, the primary policy will usually remain primary to the secondary policy and must be exhausted before the excess policy will contribute."); *see also* LeMars Mut. Ins. Co. v. Farm & City Ins. Co., 494 N.W.2d 216, 219 (Iowa 1992) ("We are further persuaded to find the umbrella policy the true excess insurer in this case . . . .").

89. *See, e.g.*, Union Ins. Co. v. Iowa Hardware Mut. Ins. Co., 175 N.W.2d 413, 416 (Iowa 1970) (noting that to use such logic "would deny coverage to any unnamed or additional insured even though the insurer intended to protect him as an insured").

90. *See* Koepff, *supra* note 7, at 261-73; Robertson, *supra* note 78, at 412-20.

91. *See, e.g.*, State Farm Mut. Auto. Ins. Co. v. Union Ins. Co., 147 N.W.2d 760, 763 (Neb. 1967) (holding that if two companies have mutually repugnant excess clauses, each company is obligated to share in the loss on a pro rata basis). *But see* Ohio Cas. Ins. Co. v. Guaranty Nat'l Ins. Co., 592 P.2d 397, 399 (Colo. 1979) (differentiating between the competing excess clauses by examining other provisions of the policy).

92. *See, e.g.*, Allstate Ins. Co. v. Chicago Ins. Co., 676 So. 2d 271, 275 (Miss. 1996).

> The view most often accepted is to the effect that when there is a conflict in the policies, escape v. escape, escape v. excess or excess v. excess, "the two policies are indistinguishable in meaning and intent, (and therefore) one cannot rationally choose between them" and must, therefore, be held to be mutually repugnant and must be disregarded.

Id. (citing Travelers Indem. Co. v. Chappell, 246 So. 2d 498, 504 (Miss. 1971)) (citations omitted).

93. *See, e.g.*, Continental Cas. Co. v. Buckeye Union Cas. Co., 143 N.E.2d 169, 175 (Ohio 1957) ("Of course, no real problem would arise in pro-rata v. pro-rata.").

relieving that insurer of any responsibility.[94] Other courts, however, have taken a different approach to cases involving excess versus escape clauses.[95] When one policy contains a pro rata clause and the other contains an escape clause, some courts have attempted to discern the original intent of the insurers.[96] Other courts have resolved this situation by simply finding the provision mutually repugnant, thus prorating by combined policy limits.[97] When one policy contains a pro rata clause and the other contains an excess clause, courts generally give the excess clause full effect.[98]

Although this approach has been acknowledged by Iowa courts, it has not been fully adopted.[99] Instead, Iowa courts have merely recognized the approach by reference and have essentially adopted only the specific portions of the doctrine that lead to proration.[100] This approach has also been criticized as somewhat arbitrary and circular.[101]

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94. *See, e.g.*, Padilla v. Norwegian-American Hosp., Inc., 641 N.E.2d 572, 578 (Ill. Ct. App. 1994) ("We note that our supreme court has also held that a policy conditioned by an excess clause is not 'other insurance' that will trigger another primary policy's escape clause.") (citing New Amsterdam Cas. Co. v. Certain Underwriters at Lloyds, London, 216 N.E.2d 665, 668 (Ill. 1966)).

95. *See* Perez Trucking, Inc. v. Ryder Truck Rental, Inc., 886 P.2d 196, 201 (Wash. Ct. App. 1994) (holding that the court was "not adopting an inflexible rule to be applied in all circumstances where an excess clause and an escape clause are at issue"); Blue Cross & Blue Shield v. Larson, 485 So. 2d 1071, 1073 (Miss. 1986) ("[W]here an excess clause is in conflict with . . . an escape clause . . . in the other policy, the excess clause ordinarily would be given full effect. The courts are thus attempting to give full effect to the intent of the two policies to offer two different levels of coverage.") (citing Travelers Indem. Co. v. Chappell, 246 So. 2d 498, 503 (Miss. 1971)).

96. *See, e.g.*, Jones v. Medox, 430 A.2d 488, 493-94 (D.C. 1981) ("[W]here there are two applicable insurance policies, one policy containing a pro rata clause and the other an excess clause, the provisions of each will be interpreted to give effect to the intent of the contracting parties.").

97. *See, e.g.*, Mary Free Bed Hosp. & Rehabilitation Ctr. v. Insurance Co. of N. Am., 345 N.W.2d 658, 658-59 (Mich. Ct. App. 1983) (holding that the amount of a deductible does not affect proration).

98. *See, e.g.*, Blue Cross & Blue Shield v. Larson, 485 So. 2d at 1073 ("[W]here an excess clause is in conflict with . . . a prorata clause in the other policy, the excess clause ordinarily would be given full effect.") (citing Travelers Indem. Co. v. Chappell, 246 So. 2d 498, 503 (Miss. 1971)).

99. Union Ins. Co. v. Iowa Hardware Mut. Ins. Co., 175 N.W.2d 413, 416 (Iowa 1970) (noting that certain Annotated Law Reports articles treat the subject in that way); *see also* McClure v. Employers Mut. Cas. Co., 238 N.W.2d 321, 327-28 (Iowa 1976) (stating that the excess stipulation prevails because the excess is not other similar insurance as to a pro rata clause).

100. Union Ins. Co. v. Iowa Hardware Mut. Ins. Co., 175 N.W.2d at 416.

101. *Id.* at 417.

E. *The "Closest to the Risk" Approach*

Some states have adopted a "closest to the risk" approach.[102] Under this approach, if two competing policies cover the same incident[103] and are deemed to be in conflict,[104] the insurer whose policy is closest to the risk is given effect.[105] Thus, the insurer that is closest to the risk must exhaust its limits before the other insurer is required to contribute.[106]

Once competing policies that cover the same incident are deemed to be in conflict, the court then applies the closest to the risk analysis.[107] The Minnesota Supreme Court has developed three factors to consider in determining which policy is closest to the risk.[108] First, courts must determine which policy specifically describes the accident-causing instrumentality.[109] In other words, courts look at whether one policy was issued specifically to cover a particular instrumentality, and if so, that policy is closer to the risk.[110] Second, courts must determine which premium is reflective of a greater contemplated exposure.[111] This factor is presumably an attempt by the court to protect and enforce the parties' expectations upon entering into the insur-

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102. *See, e.g.*, General Accident Ins. Co. v. Automobile Ins. Co., No. 290726, 1990 WL 283891, at *2 (Conn. Super. Ct. July 11, 1990); Interstate Fire & Cas. Co. v. Auto-Owners Ins. Co., 433 N.W.2d 82, 86 (Minn. 1988); Eckblad v. Farm Bureau Mut. Ins. Co., 371 N.W.2d 78, 81 (Minn. Ct. App. 1985); Branchal v. Safeco Ins. Co. of Am., 738 P.2d 1315, 1316 (N.M. 1987).

103. Interstate Fire & Cas. Co. v. Auto-Owners Ins. Co., 433 N.W.2d at 86; Illinois Farmers Ins. Co. v. Depositors Ins. Co., 480 N.W.2d 657, 660-61 (Minn. Ct. App. 1992); Eckblad v. Farm Bureau Mut. Ins. Co., 371 N.W.2d at 81.

104. Minnesota courts have held that policies conflict when two or more insurers claim to be excess of the other—that is, both competing policies contain excess clauses, or by some other means each insurer is able to claim they are excess over the other. Federated Mut. Ins. Co. v. American Family Mut. Ins. Co., 350 N.W.2d 425, 426-27 (Minn. Ct. App. 1984). Iowa, although not in the context of a "closest to the risk" analysis, has defined conflicting policies in more general terms by stating that "when the insured has coverage from either of two policies, but for the other, each contains a provision reasonably subject to a construction that it conflicts with a provision in other concurrent insurance, there is a conflict." Union Ins. Co. v. Iowa Hardware Mut. Ins. Co., 175 N.W.2d at 418.

105. Illinois Farmers Ins. Co. v. Depositors Ins. Co., 480 N.W.2d at 660-61.

106. *Id.*

107. *Id.* at 660.

108. *See* Interstate Fire & Cas. Co. v. Auto-Owners Ins. Co., 433 N.W.2d at 86 (citing Auto Owners Ins. Co. v. Northstar Mut. Ins. Co., 281 N.W.2d 700, 704 (Minn. 1979)).

109. *Id.*

110. For example, consider a situation in which one policy covered the insured for loss arising out of the use of the insured's automobile and the competing policy covered the insured merely for loss occurring on the insured's property. In an accident involving the automobile, but occurring on the insured's property, the automobile insurance specifically describes the accident-causing instrumentality.

111. *Id.* (citing Auto Owners Ins. Co. v. Northstar Mut. Ins. Co., 281 N.W.2d 700, 704 (Minn. 1979)).

ance contract.[112] Third, courts must determine if one policy contemplates the risk and the use of the accident-causing instrumentality with greater specificity than the other policy.[113] Although somewhat related to the first factor, this factor essentially is aimed at determining if either of the policies is primary or merely incidental to the other.[114] The rationale is that if one policy is primary and the other policy is merely incidental, then the primary policy should have to exhaust its limits before the incidental policy would be required to contribute.[115] This approach to the competing other insurance clause issue attempts to avoid rigid categories or other ironclad rules. Although it may be easy to apply, it often either leads to unjust results or the judicial bending of legal doctrines in order to achieve what the courts believe is a just result that fairly reflects the realities of the modern insurance industry.

V. IOWA COURTS SHOULD ADOPT A MORE EQUITABLE APPROACH

Iowa should adopt a more equitable, case-by-case approach, similar to the closest to the risk approach taken by Minnesota.[116] There are several reasons why Iowa should adopt a new approach. First, the proration approach to the other insurance clause dilemma can lead to either unjust results[117] or reluctance on the part of courts to enforce the rule when it would lead to harsh results.[118] Second, the proration approach is too mechanical and rigid

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112. The court appears to be operating under the assumption that if an insurer charges greater premiums while providing less coverage in fewer situations, then that insurer must have expected greater exposure in those situations that are covered when the insurance contract was executed. Therefore, an insurer should not be allowed to receive those higher premiums yet pay less on accidents involving the very instrumentality they undertook to insure.

113. *Id.* (citing Auto Owners Ins. Co. v. Northstar Mut. Ins. Co., 281 N.W.2d 700, 704 (Minn. 1979)).

114. Illinois Farmers Ins. Co. v. Depositors Ins. Co., 480 N.W.2d 657, 661 (Minn. Ct. App. 1992).

115. *Id.*

116. For an opposing viewpoint, see Robertson, *supra* note 78, at 451-53 (advocating that Illinois adopt the same proration approach that Iowa is currently using, also known as the *Lamb-Weston* approach). In very general terms, Robertson cites the simplicity, flexibility, clarity, eradication of escape clauses, and the encouragement of the industry to develop more comprehensive regulations concerning overlapping insurance policies, as support for his idea that Illinois should adopt a proration approach. *Id.*; *see also* Guthrie, *supra* note 86, at 691.

117. *See supra* Part II.B.

118. *See* LeMars Mut. Ins. Co. v. Farm & City Ins. Co., 494 N.W.2d 216, 217-20 (Iowa 1992). Farm & City issued a $20,000 automobile policy and LeMars Mutual issued a $1,000,000 umbrella policy. *Id.* at 217. Despite both policies containing excess "other insurance" clauses, the court held that the Farm & City policy would have to be exhausted before any contribution from LeMars. *Id.* at 218-19. The court based its decision on the fact that Farm & City charged much higher premiums yet provided only a fraction of the coverage. *Id.* This case is a departure from the *Union* rule of prorating when two competing policies both contain excess "other insurance" clauses. *Cf.* Union Ins. Co. v. Iowa Hardware Mut. Ins. Co., 175 N.W.2d 413 (Iowa 1970). This case illustrates the inequitable outcomes that can result

to deal adequately with the realities of today's insurance industry.[119] Third, although the proration approach provides a clearer, simpler, and more certain result in disputes involving other insurance clauses, it does so at the cost of disrupting the insurer's expectations when entering into insurance contracts.[120]

Fourth, the proration approach frustrates the intent of the parties as expressed in their contracts.[121] Proponents of the proration approach would argue that while this is true, the proration approach gives effect to the common intent of all insurers not to be liable for the entire loss.[122] The ultimate effect is to discourage certain types of insurance contracts or to raise the cost of such policies, making them virtually inaccessible to the majority of people seeking insurance.[123] Therefore, Iowa should adopt the more equitable approach that takes the circumstances of each case into account, such as the closest to the risk approach taken by Minnesota.[124]

A. *Suggested Method for Handling "Other Insurance" Clause Disputes*

The suggested method for handling other insurance clause disputes is to take an approach similar to the closest to the risk approach presently employed by Minnesota courts. Minnesota has focused on determining the fairest way to resolve such disputes and thus, has a more equitable way to approach these cases.[125] In addition, by setting forth factors for the court to

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from following the *Union* rule. *See* LeMars Mut. Ins. Co. v. Farm & City Ins. Co., 494 N.W.2d at 217-20.

119. This Note asserts that the proration approach resembles a "per se" approach. Regardless of the nature of the policies or the insurers, the result is always proration. Therefore, companies have nothing to gain in attempting to limit their liability in cases where it would be beneficial to the insured to have limited coverage in exchange for lower premiums. A common example would be a policy insuring for catastrophic loss, but only to the extent that the loss is excess over and above all other collectible insurance. Such policies often have very high dollar amounts of coverage and are offered at lower premiums due to less exposure. If another insurer also has an excess insurance clause in its policies, however, they prorate despite the latter insurer having contemplated greater exposure which was reflected in higher premiums. The proration approach, if applied strictly, does not account for this situation. If applied less strictly, it leads to a patchwork of situations where the court prorates and situations where it does not.

120. Premiums are based on the insurer's expectations of future claim and expense costs. Pottier & Witt, *supra* note 69, at 1685. In addition, insurers react to unpredictability in awards, which are considered an increase in the cost of the risk, by increasing the premiums, while decreasing the amount and availability of coverages. *Id.* at 1691.

121. James L. Welch, Note, *Conflicts Between "Other Insurance" Clauses in Automobile Liability Insurance Policies*, 20 HASTINGS L.J. 1292, 1304 (1969).

122. *Id.* at 1305.

123. *Id.*

124. *See supra* Part IV.E.

125. *See generally* Illinois Farmers Ins. Co. v. Depositors Ins. Co., 480 N.W.2d 657 (Minn. Ct. App. 1992).

consider, rather than a rigid, steadfast rule, the Minnesota courts allowed an avenue whereby the commercial expectations of the insurers and the insured are preserved. Significantly, these factors also guarantee that no insured will have less coverage by having two policies than if they had only one.

The proposed method does not allow either insurer to completely escape liability. Instead, it is simply a method by which the priority of insurers can be determined in a rational way, rather than upon an arbitrary rule that bears little resemblance to the reality of the insurance industry. Also, the closest to the risk approach allows some flexibility into the system to account for the changing needs of the insured, as well as the insurer. The reason is that the proposed method does not predetermine the result of a coverage dispute over other insurance clauses. Rather, it attempts to use a set of factors that can be used to determine the fairest result in any particular case.[126] Finally, the factor approach allows courts to resolve competing and conflicting insurance policy disputes in a manner that is fair and equitable in every case, without having to cut major holes in the established doctrine or being forced to live with harsh and unjust results.[127]

Under the proposed model, Iowa courts should first make a determination of whether two or more policies are available[128] to the insured and whether the other insurance clauses are in conflict.[129] Thus, when the insured has coverage from either of two policies, but for the other, and each contains a provision reasonably subject to a construction that is repugnant to a provision in other concurrent insurance, there is conflict.[130] If the competing policies are available to the insured and are determined to be in conflict, the court should then apply the following factors to determine the priority of the policies: (1) Which policy specifically describes the accident causing instrumentality? (2) Which premium is reflective of greater contemplated risk? and (3) does one policy contemplate the risk and use of the accident causing instrumentality with greater specificity?[131] For example, is coverage of the risk primary in one policy and incidental to the other?[132] By using this approach, Iowa courts would guarantee that insureds never have less coverage

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126. *See* Interstate Fire & Cas. Co. v. Auto-Owners Ins. Co., 433 N.W.2d 82, 86 (Minn. 1988).

127. *See supra* Part V.B.

128. "Available" in the context of other insurance clauses has been defined by the Iowa Supreme Court as "capable of being used for the accomplishment of a purpose," or that it is accessible or may be obtained. Benzer v. Iowa Mut. Tornado Ins. Ass'n, 216 N.W.2d 385, 389 (Iowa 1974). In *Benzer*, the court also found that the term "available" as used in an other insurance clause was ambiguous, and therefore, subject to the interpretation of an ordinary layman. *Id.* Therefore, "available" means actually available, not merely theoretically available. *Id.* at 390.

129. *See supra* note 104 and accompanying text.

130. Union Ins. Co. v. Iowa Hardware Mut. Ins. Co., 175 N.W.2d 413, 418 (Iowa 1970).

131. Illinois Farmers Ins. Co. v. Depositors Ins. Co., 480 N.W.2d 657, 660-61 (Minn. Ct. App. 1992).

132. *Id.* at 661.

having two policies, yet would provide for a mechanism that prevents unfair or harsh results as to the insurers.

B. *Iowa Courts Have Already Leaned in That Direction*

Despite having a proration rule already in place, Iowa courts already decide cases based on a more equitable and flexible method. First, the Iowa Supreme Court held in *LeMars Mutual Insurance Co. v. Farm & City Insurance Co.*,[133] that when determining priority of competing policies, courts should look at the policy as a whole to determine the scope of coverage.[134] In addition, the court stated that in determining the scope of coverage, a court is permitted to look to the surrounding circumstances to determine the "objects the parties were striving to attain."[135] The court further stated that one such surrounding circumstance that indicates the parties' objectives is the premium paid relative to the amount of coverage provided.[136] The reasoning is that the ratio of premium to coverage provided is indicative of the level of exposure contemplated by the insurer when entering into the policy.[137] Therefore, the insurer that contemplated the greatest exposure should have a higher priority in the ranking of competing insurers.[138]

Significantly, the reasoning employed by the Iowa Supreme Court in *LeMars* is very similar to the reasoning used by Minnesota courts in employing the closest to the risk approach.[139] One factor included in the closest to the risk approach is whether the premium of one policy is reflective of the greater contemplated exposure.[140] Thus, Iowa courts have already employed part of the closest to the risk analysis. In addition, the reasoning in *LeMars* seems to be a recognition by Iowa courts of the need to enforce and preserve the parties' expectations that were the basis for entering into the insurance contract in the first place. Thus, the court clearly acknowledges that these are "objects the parties were striving to attain," and that such objects are valuable in resolving coverage disputes.[141]

The reasons why the court decided not to prorate in a case where the Iowa rule concerning other insurance clauses would seem to have mandated a proration between the two competing policies are purely speculative.[142] It seems clear, however, that the court was motivated in large part by fairness. Under the proration rule, the parties would have prorated by a combined

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133. LeMars Mut. Ins. Co. v. Farm & City Ins. Co., 494 N.W.2d 216 (Iowa 1992).

134. *Id.* at 218.

135. *Id.*

136. *Id.*; *see also supra* note 118 and accompanying text.

137. LeMars Mut. Ins. Co. v. Farm & City Ins. Co., 494 N.W.2d at 218.

138. *Id.*

139. *See* Illinois Farmers Ins. Co. v. Depositors Ins. Co., 480 N.W.2d 657, 659 (Minn. Ct. App. 1992).

140. *Id.* at 660-61.

141. LeMars Mut. Ins. Co. v. Farm & City Ins. Co., 454 N.W.2d at 218.

142. *See id.* (noting that both policies contained excess "other insurance" clauses).

policy limit, which in the *LeMars* case was $1,020,000.[143] Thus, LeMars Mutual would have been required to pay 50/51 of the total damage and Farm & City would have been required to only pay 1/51 of the total loss under the proration approach.[144] The court no doubt saw this as clearly unjust, given the fact that Farm & City collected almost six times as much in premiums.[145]

Second, in *Gabe's Construction Co. v. United Capitol Insurance Co.*,[146] the Iowa Supreme Court looked to the type of accident to determine which insurer should pay.[147] The case involved two general liability policies issued by separate companies, one of which the general contractor had on himself and one of which the subcontractor possessed on behalf of the general contractor for any damage arising out of the subcontractor's work.[148] Despite the fact that both policies contained identical excess other insurance clauses, the court looked at the circumstances under which the accident occurred and apportioned liability accordingly.[149] The court found that, although both policies would cover the accident if the other policy did not exist,[150] the accident arose under the subcontractor's policy, and thus, that policy should pay first.[151] In so holding, the court failed to follow Iowa's proration rule. Significantly, the court was looking at the accident causing instrumentality in much the same way Minnesota courts would under the closest to the risk approach.[152]

VI. CONCLUSION

If the decisions in *LeMars* and *Gabe's Construction* are taken together, they show that, although Iowa courts have a proration rule in effect to deal with conflicting other insurance clauses, the courts sometimes have to bend that rule to achieve what the courts deem to be the correct result. Such judicial bending or ignoring of what seems to be a clearly established doctrine indicates that the doctrine is not workable. In addition, these cases illustrate that Iowa courts have already embraced the basic principles behind the closest to the risk approach. It would only be a short step to get from *LeMars* and *Gabe's Construction* to a full blown closest to the risk approach to resolving

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143. The LeMars policy limit was $1,000,000 and the Farm & City policy limit was $20,000. *Id.* at 218-19.

144. *Id.* at 218.

145. *Id.*

146. Gabe's Constr. Co. v. United Capitol Ins. Co., 539 N.W.2d 144 (Iowa 1995).

147. *Id.* at 147.

148. *Id.*

149. *Id.*

150. The accident occurred when a vehicle, operated by a third party, collided with a truck, owned by the subcontractor, that one of the subcontractor's employees, parked on the roadway. *Id.*

151. *Id.*

152. *Cf.* Illinois Farmers Ins. Co. v. Depositors Ins. Co., 480 N.W.2d 657, 659 (Minn. Ct. App. 1992).

conflicting other insurance clauses. For the reasons stated herein, Iowa courts should take this final step.

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