NO, PLEASE, AFTER YOU: PRIORITIES OF LIABILITY COVERAGE AND THE INTERPLAY BETWEEN "OTHER INSURANCE" CLAUSES AND INDEMNIFICATION AGREEMENTS

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Life is full of Catch-22s.[1] For whatever reason, one of life's least discussed Catch-22s is the circular tug-of-war conducted by liability insurers attempting to establish priorities of coverage. Operating under the assumption that the general public would readily ruminate on that paradox if only given the chance, this article provides in two parts an overview of priorities of liability coverage, including the fundamentals of "other insurance" clauses and their interaction with indemnification agreements. Part I provides a survey of the various types of "other insurance" clauses and Virginia's rules regarding the application of competing clauses. Part II of this article discusses the added complication of indemnification agreements, as well as an analysis of the Supreme Court of Virginia's recent ruling[2] on the interplay between "other insurance" clauses and risk-transfer contract provisions.

I. "Other Insurance" Clauses

A. Background

"Other insurance" clauses find their historical roots in first-party property insurance policies. As the Supreme Court of Virginia recently explained, "[t]he original purpose of other-coverage clauses in insurance policies appears to have been to cut off duplicative recoveries against different insurers, perhaps unaware of each other, for exactly the same loss."[3] For example, an unscrupulous homeowner might insure his own property with two different insurers, each ignorant of the other's existence. If his house burnt down, he could attempt to recover from both—resulting in a double-recovery windfall for the insured. Even worse, given the moral hazard of being over-insured, he might be tempted to burn the house down himself.

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1 The term appears to have originated from Joseph Heller's World War II novel, *Catch 22* (1961).

2 Nationwide Mut. Fire Ins. Co. v. Erie Ins. Exch., No. 160805, 2017 WL 1367013 (Va. Apr. 13, 2017).

3 Commonwealth Div. of Risk Mgmt. v. Virginia Ass'n of Ctys. Grp. Self Ins. Risk Pool, 292 Va. 133, 145, 787 S.E.2d 151, 156 (2016).

While still serving their original purpose, today, "other insurance" clauses are more often called upon to set forth the priority of coverage when more than one liability insurance policy applies to the same risk.[4] In the third-party liability context (the focus of this article), priority of coverage issues are common. For example, personal auto policies provide liability coverage to the named insured for the use of *any* vehicle—not just the use of the covered auto. Likewise, personal auto policies provide liability coverage for *any* permissive user of a covered auto—not just the named insured. As a result, when a person borrows a friend's car, very often at least two auto policies would provide liability coverage to the driver.[5] In the event of a claim, the question becomes how those policies interact with one another.[6]

In fact, issues about the priorities of coverage so frequently arise in auto cases that Virginia Code section 38.2-2206(B) essentially provides a statutory "other insurance" clause for underinsured motorist coverage.[7] The statute provides, in part:

> If an injured person is entitled to underinsured motorist coverage under more than one policy, the following order of priority of policies applies and any amount available for payment shall be credited against such policies in the following order of priority:
>
> 1. The policy covering a motor vehicle occupied by the injured person at the time of the accident;
>
> 2. The policy covering a motor vehicle not involved in the accident under which the injured person is a named insured;

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[4] Although "other insurance" clauses are present and sometimes implicated in the first-party context, it is rare that more than one first-party policy would be at issue (other than the fraudulent situation described above). For example, a home typically is insured under only one policy (a homeowners policy), and an automobile under only one auto insurance policy providing collision coverage. Because "other insurance" clauses are implicated only when more than one insurance policy is at issue, priority of coverage disputes infrequently arise in the first-party context.

[5] Liability insurers take on two basic obligations to their insureds: the duty to defend and the duty to indemnify. *See* AES Corp. v. Steadfast Ins. Co., 283 Va. 609, 617, 725 S.E.2d 532, 535 (2012).

[6] The following is an example of a typical personal auto "other insurance" clause:

> *Other Insurance*
>
> If there is other applicable liability 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 all applicable limits. However, any insurance we provide for a vehicle you do not own, including any vehicle while used as a temporary substitute for "your covered auto," shall be excess over any other collectible insurance.

Insurance Services Office, Inc., 2003, *Personal Auto Policy*, PP 01 01 05, p. 5 of 14.

[7] The statutory priority scheme trumps any inconsistent "other insurance" provisions contained in a policy. *See* Stone v. Liberty Mut. Ins. Co., 253 Va. 12, 478 S.E.2d 883 (1996) (when policy provisions conflict with requirements of § 38.2-2206, the statute controls and policy provisions are invalid and unenforceable).

3. The policy covering a motor vehicle not involved in the accident under which the injured person is an insured other than a named insured.

> Where there is more than one insurer providing coverage under one of the payment priorities set forth, their liability shall be proportioned as to their respective underinsured motorist coverages.[8]

In short, the statute lays out the three ways an underinsured motorist policy might provide coverage and sets forth their order of priority. And unlike professional football, it is relatively clear what happens in the case of a tie.

Priority of coverage issues are prevalent not just in auto cases. In the commercial context, where multiparty relationships are common, named insureds often add other entities as "additional insureds" on their policies. For example, a general contractor, in addition to having its own commercial general liability policy (CGL), will often be named as an "additional insured" under a subcontractor's CGL policy. If the general contractor finds itself as a defendant arising out of the conduct of the subcontractor, it will usually be insured under both liability policies.

When two or more liability policies apply, inevitable questions arise: Which insurer is on the hook? Who defends? Who indemnifies? Both? If both, in what order? In what amounts? This is the stuff of "other insurance" clauses. Sometimes "other insurance" clauses resolve these issues clearly and decisively, like two complementary puzzle pieces—perfectly engineered and seamless. Other times, it is like jamming a square peg into a round hole.[9]

B. THREE BASIC TYPES OF "OTHER INSURANCE" CLAUSES

Not all "other insurance" clauses are created equal. Although most "other insurance" clauses purport to shift at least some of the primary coverage obligation to the other insurer, they can be classified by the manner in which they claim to do so. The three basic types of "other insurance" clauses are (1) pro rata, (2) excess, and (3) escape.[10]

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[8] VA. CODE § 38.2-2206(B).

[9] As discussed below, in the latter cases, one must turn to the common law to reconcile otherwise irreconcilable "other insurance" clauses and end the exercise in futility.

[10] Arguably, there is fourth type of "other insurance" clause known as "super excess," although it is typically found only in higher level true excess policies and is not recognized in all jurisdictions. Super excess clauses purport to provide coverage after every other source of insurance, including other excess policies, has exhausted. Unlike escape clauses, however, they do not purport to eliminate exposure altogether. *See* Maryland Cas. Co. v. Horace Mann Ins. Co., 551 F. Supp. 907 (W.D. Pa. 1982), *aff'd sub nom.* Maryland Cas. Co. & Assurance Co. of Am. v. Horace Mann Ins. Co., 720 F.2d 664 (3d Cir. 1983); *see also* American Cas. Co. of Reading, Pa. v. Health Care Indem., Inc., 613 F. Supp. 2d 1310 (M.D. Fla. 2009).

1. Pro Rata Clauses

Pro rata clauses are the friendliest of "other insurance" clauses—rather than simply shouting "not it," they offer to share. As the Supreme Court of Virginia recently stated in more technical terms, pro rata clauses "permit[ ] concurrent coverage subject to pro-rata-contribution formulas . . . ."[11] In other words, pro rata clauses concede that the policy provides coverage on a primary basis but provide that the obligation is shared with other policies based on a sharing formula. Those sharing formulas, which vary by jurisdiction, can be summarized in one of three ways: pro rata by limits, by equal shares, and pro rata by premiums received.[12]

A pro-rata-by-limits sharing formula, the most common type (and that which is followed by Virginia courts), provides that the two (or more) insurers on the same risk will provide coverage in proportion to their respective policy limits.[13] For example, if Policy A has liability limits of $100,000, and Policy B has liability limits of $1,000,000, there is a 1:10 ratio between the policy limits. Accordingly, for every dollar of coverage ultimately provided by Policy A, Policy B provides ten dollars. Assuming a $500,000 loss, Policy A would be responsible for $45,454.55 and Policy B would be responsible for $454,545.45

An equal share formula[14] provides that the two (or more) insurers on the same risk will provide coverage in equal amounts until their respective limits are exhausted.[15] Taking the example from the preceding paragraph, Policy A and Policy B would provide dollar-for-dollar coverage until Policy A exhausted, at which point Policy B would be responsible for the remainder (up to its limit). That means the first $200,000 would be split evenly between the two insurers (dollar-for-dollar up to the Policy A limit of $100,000), at which point Policy A would be exhausted and Policy B would provide the final $300,000. Ultimately, based on an equal share formulation, Policy A will have paid $100,000 and Policy B will have paid $400,000.

Finally, a by-premium-received formulation is a ratio, like the pro-rata-by-limits formula, but is based on premiums rather liability limits.[16] Assume that the total *premium* received for Policy A was $2000, and the total *premium* received for Policy B was $10,000. Looking at the premiums received, rather than the liability limits, the ratio between Policy A and Policy B is 1:5, rather than 1:10. Applying that formula to a $500,000 loss, Policy A provides $83,333.33, and Policy B provides $416,666.67.

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[11] *Commonwealth Div. of Risk Mgmt.*, 292 Va. at 145; 787 S.E.2d at 156.

[12] 2 ALLAN D. WINDT, INSURANCE CLAIMS AND DISPUTES § 7:4 (6th ed. 2013).

[13] *Id.*

[14] Such a sharing formula is not actually pro rata, but some policies and jurisdictions apply it on the primary level. The name is somewhat misleading in that the shares are equal only to the extent that the lowest limits of coverage are not exhausted.

[15] WINDT, *supra* note 12.

[16] *Id.*

2. Excess Clauses

The precise language of excess "other insurance" can vary, but the common thread is that the clauses purport to make an otherwise primary policy operate on an excess basis.[17] In other words, an excess "other insurance" clause will provide that if there is other applicable insurance, that other policy is primary and the instant policy is excess. Basically, excess "other insurance" provisions purport to shift the primary coverage obligation to the other insurers, ostensibly requiring the other insurer to provide first-dollar coverage until that policy is exhausted. Then, and only then (according to the language of the excess clause), will the policy containing the excess clause be triggered.

3. Escape Clauses

If pro rata clauses are the friendliest "other insurance" clauses, then escape clauses are surely the least amiable. An escape clause, on its face, purports to provide *no* coverage if there is other insurance available. Rather than prioritizing the order of coverages, policies with escape clauses seek to elude their coverage obligations altogether—or escape them. As the Supreme Court of Virginia has explained, escape clauses "seek[ ] to absolve the insurer of any and all liability—co-primary or excess—in the event that the insured obtains duplicative coverage elsewhere."[18]

As the Court pointed out in *Commonwealth Division of Risk Management*, however, escape clauses are disfavored by courts and are of dubious enforceability. The Court noted that escape clauses "ha[ve] spawned a great deal of litigation and ha[ve] been met with a considerable amount of judicial hostility, particularly when competing coverages attempt to cancel each other out."[19] Notably, the Court declined to rule on that particular issue, stating that the Supreme Court of Virginia "ha[s] never addressed whether such escape clauses can result in a total forfeiture of coverage, and we see no need to do so in this case."[20]

C. DUELING "OTHER INSURANCE" CLAUSES

Given the three basic classifications of "other insurance" clauses, it is easy enough to construe them in isolation. Unfortunately, by their very nature, "other insurance" clauses are never encountered in isolation. Rather, "other insurance" clauses are implicated only when two or more policies provide coverage to the same risk. Consequently, if one "other insurance" clause is implicated, there is *always* at least a second one at play as well. Often, the two (or more) "other insurance" clauses point the proverbial finger at one another, en-

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[17] *Commonwealth Div. of Risk Mgmt.*, 292 Va. at 145, 787 S.E.2d at 156.

[18] *Id.*

[19] *Id.* at 145, 787 S.E.2d at 157.

[20] *Id.*

gaging in a circular game of "not it." The question then becomes how to interpret and apply multiple "other insurance" clauses with respect to the same risk.

1. A Survey of Virginia Supreme Court Opinions

To distill the Virginia rules pertaining to dueling "other insurance" clauses to a tweet-sized maxim, one could fairly summarize them as follows: *If the clauses can be reconciled, reconcile them and prioritize. If they purport to do the same thing, they cannot be reconciled, so cancel them and share pro rata by limits*.[21] To unpack that bumper-sticker statement of prevailing doctrine, it makes sense to begin with *State Capital Insurance Co. v. Mutual Assurance Society against Fire on Buildings*,[22] the first case in which the Supreme Court of Virginia directly addressed competing "other insurance" clauses.

In *State Capital*, the Supreme Court of Virginia analyzed the "other insurance" clauses contained in two liability policies, both of which provided coverage for the operator of a motorboat that injured a swimmer.[23] Each policy contained what the Court termed an "excess insurance" clause related to watercraft liability, which—while not identical—essentially purported to render that policy excess over any other policy providing coverage.[24]

The Court in *State Capital* stated that because the two excess "other insurance" clauses purported to do the same thing (that is, each claimed to be excess over the other), they were "placed upon equal footing with respect to the loss in question."[25] The Court noted:

> Under their general liability provisions, both policies admittedly are applicable to the loss. But, by use of an excess insurance clause, each policy attempts to limit the protection otherwise afforded with respect to liability for watercraft accidents. The two clauses are of identical effect in providing that the watercraft coverage shall not apply to the extent other valid and collectible insurance is available to the insured. Given full force and effect, the two clauses operate mutually to reduce or eliminate the amount of valid and otherwise collectible insurance available to the insured from both policies.[26]

Ultimately, the Court held that the two clauses were in "irreconcilable conflict with one another," such that they must be "disregarded" and that the policies must share on a pro rata by limits basis, as the trial court had ordered.[27]

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21 This statement comes to more characters than permitted by Twitter. If the reader intends to tweet it, it needs to be further pared. It may be best not to tweet it at all.

22 218 Va. 815, 241 S.E.2d 759 (1978).

23 *Id.* at 817, 241 S.E.2d at 760.

24 *Id.*

25 *Id.* at 819, 241 S.E.2d at 762.

26 *Id.* at 819-20, 241 S.E.2d at 762.

27 *Id.*

The Supreme Court of Virginia next addressed dueling "other insurance" clauses in *Government Employees Insurance Co. v. Universal Underwriters Insurance Co*.[28] There, the Court compared "other insurance" clauses contained in the uninsured motorist (UM) portions of a garage liability policy and a personal auto policy. Although the analysis was complicated by statutory considerations, ultimately the Court analyzed the policies' "other insurance" clauses.[29] In determining how to handle the "other insurance" clauses, the Court noted that in some jurisdictions, the mere existence of "other insurance" clauses, regardless of the level on which they purport to operate, are "mutually repugnant," resulting in a cancellation of the clauses and enforcement of pro rata allocation.[30]

After analyzing several out-of-jurisdictions cases, the Court ultimately rejected a per se rule that any "other insurance" clause is repugnant with another. Instead, the Court held that because the two "other insurance" clauses could be reconciled—meaning that when applied on their faces, one came before the other—they should be given effect and prioritized according to those terms.[31] The result in that case was that the clauses were not found to be mutually repugnant; rather, one policy was deemed primary, and the other deemed excess. In other words, the Court did not simply cancel the clauses and order a pro rata coverage allocation; instead, the clauses were given effect, reconciled, and the resulting priority of obligations was recognized and applied.

The following year, in *Aetna Casualty & Surety Co. v. National Union Fire Insurance Co.*,[32] the Supreme Court of Virginia echoed its prior rulings when it succinctly held:

> We have recently held that when "other insurance" clauses of two policies are of identical effect in that they operate mutually to reduce or eliminate the amount of collectible insurance available, neither provides primary coverage and that "the pro rata distribution ordered by the trial court was appropriate."[33]

Notably, the Court cited both *State Capital* and *GEICO*, the former for the proposition stated, and the latter with the note that the "other insurance" clauses were reconcilable.

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[28] 232 Va. 326, 350 S.E.2d 612 (1986).

[29] Note that terminology used by the Court is not necessarily consistent with the terminology used in this article or other cases.

[30] *GEICO*, 232 Va. at 330, 350 S.E.2d at 614-15.

[31] *Id.* at 331; 350 S.E.2d at 615-16; *see also* Medical Protective Co. v. National Union Fire Ins. Co. of Pittsburgh, Pa., 25 F. App'x 145, 147 (4th Cir. 2002) (concluding that, based on *GEICO*, "the Virginia Supreme Court would adopt the majority rule of reconciling competing 'other insurance' clauses when it is possible to do so").

[32] 233 Va. 49, 353 S.E.2d 894 (1987).

[33] *Id.* at 54, 353 S.E.2d at 897.

Skipping ahead to 2016, the Supreme Court of Virginia again delved into the world of competing "other insurance" clauses when it issued its opinion in *Commonwealth Division of Risk Management v. Virginia Association of Cities Group Self Insurance Risk Pool*.[34] The specific "other insurance" issues involved in *Division of Risk Management* go beyond the scope of this article. Notably, however, the Court again affirmed that reconcilable "other insurance" clauses will be applied so as to create a priority order, whereas "other insurance" clauses that purport to be on the same priority level (like excess-excess) are mutually repugnant and will result in a pro rata allocation of the loss.[35]

Most recently, in April 2017, the Supreme Court of Virginia once again analyzed "other insurance" provisions. In *Nationwide Mutual Fire Insurance Co. v. Erie Insurance Exchange*,[36] the Court analyzed not only "other insurance" clauses but also the effect of indemnification provisions on issues of coverage priority. The latter portion of that analysis is discussed below, but for present purposes it is worth recognizing that, in addition to reaffirming Virginia's "other insurance" rules,[37] the Court closely examined the question what "mutually repugnant" really means. In this case, the two policies at issue (an Erie policy and a Nationwide policy) both contained a form of excess "other insurance" clause but with slightly different wording. The Erie policy's "other insurance" clause provided:

> This insurance is excess over, and shall not contribute with any of the other insurance, whether primary, excess, contingent or on any other basis.[38]

The Nationwide "other insurance" clause, by contrast, contained slightly different language. It provided:

> If "other insurance" applies to claims covered by this policy, the insurance under this policy is excess and we will not make any payments until the "other insurance" has been exhausted by payment of claims.[39]

The question raised by these technically different clauses was whether the language in Erie's clause, which specified "primary, excess, contingent or any other basis," rendered it excess over Nationwide's "other insurance clause," which lacked that language. In other words, did the variation in language make them reconcilable? The Court answered in the negative, adopting the reasoning

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[34] 292 Va. 133, 787 S.E.2d 151 (2016).

[35] *Id.* at 149, 787 S.E.2d at 159.

[36] No. 160805, 2017 WL 1367013 (Va. Apr. 13, 2017).

[37] *Id.* at *4.

[38] *Id.* at *5.

[39] *Id.* at *4.

from other courts that determining which excess clause is more specific is "an exercise in 'meaningless semantics.'"[40] Instead, the Court held that "[t]he phrase 'whether primary, excess or contingent' does not add anything to the all[-]inclusive 'other valid' phrase in the umbrella policies."[41] Ultimately, the Court held that the provisions were "virtually identical" and thus were irreconcilable and mutually repugnant.[42] Based on the Court's *Nationwide* holding, it is evident that, when determining whether "other insurance" clauses are mutually repugnant, the focus is not on hypertechnicalities but instead is an analysis of the overall function of the clause. In *Nationwide*, both clauses were, in effect, excess clauses, resulting in mutual repugnancy.

2. "True" Excess Policies

In the context of true excess policies—meaning policies specifically issued to provide coverage on an excess level, such as umbrella policies—courts recognize an exception to the general rule that two excess clauses are mutually repugnant and cancel out each other. As the Fourth Circuit Court of Appeals has stated, "the general rule is that as between a true excess policy and a primary liability policy with an other-insurance clause, the limits of the policy that provides primary insurance must *always* be exhausted before coverage under the excess policy is triggered."[43] Noting that the rule is "practically universal," the Fourth Circuit continued: "Otherwise stated, the prevailing rule is that umbrella insurance coverage is 'true excess over and above any type of primary coverage, excess provisions arising in regular policies in any manner, or escape clauses.'"[44]

The result is that in cases of a true excess policy versus a primary policy with an excess "other insurance" clause, the "other insurance" clauses do not directly clash. Instead, "in a priority dispute between a true excess insurer and a primary or coincidental excess insurer, the policies' other-insurance clauses simply are not relevant, and there is no reason to consider whether the other-insurance clauses may be reconciled or must be set aside as mutually repugnant."[45] With that said, when comparing one true excess policy to another, the "other insurance" rules are back in play.[46]

D. ENTER INDEMNIFICATION AGREEMENTS

The foregoing may have seemed like a trudge, but at least it provides answers to the full gamut of priority-of-coverage questions. But there is one last wrench to throw in the gears: indemnification agreements. "Other insurance" clauses,

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[40] *Id.* at *5 (citing State Farm Fire & Cas. Co. v. LiMauro, 65 N.Y.2d 369, 372, 482 N.E.2d 13, 16 (1985)).

[41] *Id.* at *5 (citing AIG Premier Ins. Co. v. RLI Ins. Co., 812 F. Supp. 2d 1315, 1324 (M.D. Fla. 2011)).

[42] *Id.*

[43] Horace Mann Ins. Co. v. General Star Nat'l Ins. Co., 514 F.3d 327, 334 (4th Cir. 2008).

[44] *Id.* at 334-35 (citations omitted).

[45] *Id.*

[46] *See* Nationwide Mut. Fire Ins. Co. v. Erie Ins. Exch., No. 160805, 2017 WL 1367013 (Va. Apr. 13, 2017).

at bottom, set the order of priorities as between insurers. But what if the insureds themselves have agreed to a different priority scheme as between them? In these situations, "other insurance" provisions and indemnity agreements square-off. The result of these interactions is discussed in the next part of this article.

II. Indemnification Agreements and Priorities of Coverage

A. indemnification agreements

Just as insurers seek to shift liability by use of "other insurance" clauses, so too do their insureds seek to transfer risk by means of indemnification agreements. In fact, indemnification agreements are nearly ubiquitous in owner/general contract/subcontractor relationships. For example, the indemnification provision at issue in *Nationwide v. Erie* provided the following:

> *Indemnification*. To the fullest extent permitted by law, Subcontractor hereby agrees to indemnify, hold harmless, and defend (at Subcontractor's sole expense) Contractor, the Owner, affiliated companies of Contractor, their partners, joint ventures, representatives, etc. . . . ("Indemnified parties"), from and against any and all claims for bodily injury, death, damage to property, losses, theft, damages, actions, causes of action, suits, losses, judgments, obligations and any liabilities, costs and expenses . . . ("Claims") which arise or are in any way connected with the Work performed, materials furnished, or services provided under this Agreement by Subcontractor, and/or its employees, agents, sub-subcontractors and/or suppliers.[47]

The intent is clear enough: to transfer a portion of a risk from one party to another. Assume, however, that both parties to the indemnification agreement are insured and each party qualifies as an additional insured under the other's CGL policy. In the event that a third party presents a claim, the facts of the claim are plugged into the indemnification language to determine which party bears the loss and must indemnify and hold harmless the other. Likewise, the parties' insurers will compare "other insurance" clauses to determine which *insurer* bears primary coverage obligations. The apparent quandary arises when, pursuant to the indemnification agreement, Party A must defend and hold harmless Party B, but according to the "other insurance" clauses of their respective insurers, Party B's insurer provides primary coverage to Party A.

B. the interplay between indemnification agreements and "other insurance" clauses

Before the Supreme Court of Virginia's recent ruling in *Nationwide v. Erie*, the Fourth Circuit Court of Appeals addressed the issue in two cases. In the

[47] *Id.* at *3.

first case, *St. Paul Fire & Marine Insurance Co. v. American International Specialty Lines Insurance Co.*,[48] the Fourth Circuit set forth a general rule. In the second case, *Travelers Property Casualty Co. of America v. Liberty Mutual Insurance Co.*,[49] the Fourth Circuit recognized a limitation to the general rule.

In *St. Paul*,[50] several entities were sued for injuries sustained by the plaintiff arising from alleged food poisoning at a resort.[51] The various liability insurers for the defendants settled with the claimant and proceeded to litigate among themselves in a separate action to determine the allocation of coverage between the numerous applicable policies.[52] The Fourth Circuit held that, before insurance coverage could be determined and allocated, the liability of the insureds must be determined, *including establishment of liability between the insureds based upon an indemnification agreement between the insureds*.[53]

The Fourth Circuit determined that, applying the indemnification agreements between the insured parties, responsibility for the claim ultimately rested with one of the insured parties.[54] That determination, however, did not resolve the issue of priorities of insurance coverage. Significantly, applying the various policies' "other insurance" clauses, the insurer of the ultimately responsible party was *not* the sole primary insurer.[55] In finding that the indemnification provisions superseded the "other insurance" clauses, the court stated: "[A]n indemnity agreement between the insureds of a contract with an indemnification clause . . . may shift an entire loss to a particular insurer *notwithstanding the existence of an 'other insurance' clause in its policy.*"[56] Thus, the Fourth Circuit held, the insurer of the indemnifying party provided primary coverage for the claim, notwithstanding the other insurance provisions in the applicable policies.[57]

As in *St. Paul*, the Fourth Circuit in *Travelers* analyzed a priority-of-coverage issue when the two insured parties had entered into an indemnification agreement.[58] Unlike *St. Paul*, however, the underlying claim did not trigger the indemnification provision. In *Travelers*,[59] although one insured had agreed to indemnify the other, the party to be indemnified was not sued.[60] In other words, although there was an indemnification agreement between the insureds, the

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[48] 365 F.3d 263 (4th Cir. 2004).

[49] 444 F.3d 217 (4th Cir. 2006).

[50] *St. Paul* was decided under Virginia law.

[51] *St. Paul*, 365 F.3d at 265-66.

[52] *Id.* at 266-67.

[53] *Id.* at 273.

[54] *Id.* at 275-76.

[55] *Id.* at 269-70.

[56] *Id.* at 270-71 (emphasis added).

[57] *Id.*

[58] Travelers Prop. Cas. Co. of Am. v. Liberty Mut. Ins. Co., 444 F.3d 217, 219 (4th Cir. 2006).

[59] *Travelers* was decided under Maryland law.

[60] *Travelers*, 444 F.3d at 224.

court in *Travelers* distinguished *St. Paul* on the basis that, unlike in *St. Paul*, the indemnification provision was "irrelevant."[61] Ultimately, because the indemnification agreement was not triggered, its existence could be altogether ignored—leaving only analysis of the "other insurance" clauses themselves in determining the priority of coverages.

While *St. Paul* and *Travelers*, both Fourth Circuit opinions, offered some guidance on the interplay of "other insurance" clauses and indemnification agreements, the Supreme Court of Virginia had never addressed the issue. That changed in April 2017, when the Court issued its opinion in *Nationwide*.[62] Like any case involving indemnification agreements and "other insurance" clauses, *Nationwide* involved multiple insured parties. In short, East Coast Insulators, Inc., and Rodriguez Construction entered into a construction subcontract, in which Rodriguez agreed to indemnify East Coast against any injuries arising out of the work.[63] Rodriguez was the named insured under three liability policies issued by Nationwide: a commercial general liability policy, a business auto policy, and an umbrella policy.[64] East Coast was the named insured under two policies issued by Erie: a business auto policy and an umbrella policy.[65]

The case arose from an accident in which a vehicle owned by East Coast and operated by a Rodriguez employee, struck and killed another driver.[66] The decedent driver's estate's personal representative subsequently sued the Rodriguez employee and East Coast but, significantly, nonsuited East Coast before trial.[67] Concurrent with the underlying wrongful death suit, Erie, the Rodriguez employee, and Nationwide participated in a separate declaratory judgment action to determine the priority of coverages.[68]

Relying on *St. Paul*, Erie argued, and the trial court agreed, that the indemnification clause in the subcontract superseded the policies' "other insurance" clauses and "'establishe[d] East Coast Insulators' right to indemnification from Rodriguez Construction through its insurer Nationwide.'"[69] Relying on *Travelers*, Nationwide argued that the indemnification clause was irrelevant because East Coast was not a defendant in the wrongful death action, such that the "other insurance" provisions controlled.[70] The Supreme Court of Virginia, for the first time recognizing the *St. Paul* holding, agreed that "an indemnification

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61 *Id.* at 225.

62 Nationwide Mut. Fire Ins. Co. v. Erie Ins. Exch., No. 160805, 2017 WL 1367013 (Va. Apr. 13, 2017).

63 *Id.* at *1.

64 *Id.*

65 *Id.*

66 *Id.*

67 *Id.*

68 *Id.*

69 *Id.* at *3.

70 *Id.*

agreement may shift the loss from one insurer to another."[71] At the same time, however, the Court recognized the *Travelers* distinction, stating:

> If the facts presented here raised an issue as to providing coverage for East Coast, the trial court might be correct. However, coverage for East Coast is not and never has been at issue in this declaratory judgment action. East Coast was nonsuited as a party in the underlying Tort Action. Rather, the issue is who is obligated to cover . . . [the Rodriguez employee] . . . for his actions during the course of his employment with Rodriguez. [The Rodriguez employee] . . . not East Coast, was a party to the Tort Action and is a party to the declaratory judgment action now before us. Thus, the indemnification provision between East Coast and Rodriguez is irrelevant to this case.[72]

Ultimately, the Court adopting the rationales of both *St. Paul* and *Travelers*, for the first time recognized that under Virginia law an indemnification agreement *can* override "other insurance" clauses but *only if* the indemnification agreement ultimately resolves the underlying liability issue.

III. Conclusion

The priorities of coverage in any given case depend on the facts of the underlying case, the types of "other insurance" clauses contained in the competing policies, and the existence and implication of indemnification agreements between the insureds. Despite the many moving parts, however, two straightforward—if not eloquent—rules emerge. First, when analyzing competing "other insurance" clauses, it is necessary to determine whether the clauses can be reconciled. If the clauses can be reconciled, the prioritization they provide will be applied. If they purport to do the same thing, they cancel each other and coverage obligations are shared on a pro rata basis based upon policy limits. Second, in cases where an indemnification agreement exists between insureds, determine whether the indemnification agreement is triggered by the underlying claim. If so, the indemnification may override the priority of coverage established by "other insurance" clauses. If not, it should be ignored in favor of the "other insurance" analysis.

Armed with these simple rules, the eternally perplexing Catch-22 presented by competing excess coverage provisions in determining the priorities-of-liability coverage can finally and forever be demystified. Thank Goodness.

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[71] *Id.*

[72] *Id.*