

PARTIAL OPINION OF THE COURT BY RECKTENWALD, C.J.

2. Whether Liberty Mutual's "Other Insurance" Clause Was Valid

The "other insurance" clause contained in Liberty Mutual's policy created a priority of coverage among multiple insurers, and did not limit or reduce Liberty Mutual's liability for UM payments to Labrador. Thus, the provision was valid and enforceable under Hawai'i law, and the circuit court did not err in denying Labrador's motion for partial summary judgment.

We begin our analysis by recognizing that "liability insurers have the same rights as individuals to limit their liability, and to impose whatever conditions they please on their obligation, provided they are not in contravention of statutory inhibitions or public policy." First Ins. Co. of Hawai'i v. State, 66 Haw. 413, 423, 665 P.2d 648, 655 (1983) (quoting 6B J. Appleman, Insurance Law and Practice § 4255 at 40 (Buckley 1979)). Thus, the question here is whether the "other insurance" clause contravenes statutory provisions or public policy. We conclude that it does not.

HRS § 431:10C-301 provides, in relevant part:

Required motor vehicle policy coverage. . . .

(b) A motor vehicle insurance policy shall include:

. . . .

(3) With respect to any motor vehicle registered or principally garaged in this State, liability coverage provided therein or supplemental thereto, in limits for bodily injury or death set forth in paragraph (1), under provisions filed with and approved by the commissioner, for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles because of bodily injury, sickness, or disease, including death, resulting therefrom; provided that the coverage required under this paragraph shall not be applicable where any named insured in the policy shall reject the coverage in writing[.]

The statute requires that insurers provide coverage for any bodily injury or death sustained as a result of conduct of the owner or operator of any uninsured motor vehicle, unless that

coverage is expressly rejected by the insured. The purpose of the statute is "to provide a remedy to the innocent victims of irresponsible motorists who may have no resources to satisfy the damages they cause[d] . . . [i]deally, the purpose is to place those insured in the same position they would have occupied had the tortfeasor carried liability insurance." Dawes v. First Ins. Co. of Hawai'i, 77 Hawai'i 117, 123, 883 P.2d 38, 44 (1994) (footnote and citation omitted). As a remedial statute, HRS § 431:10C-301(b)(3) is "to be construed liberally in order to accomplish the purpose for which it was enacted[.]" Dines v. Pacific Ins. Co., 78 Hawai'i 325, 327, 893 P.2d 176, 178 (1995) (citation omitted). However, the statute does not expressly preclude Liberty Mutual from including a provision in its policy which sets forth priorities for payments when multiple UM insurers are involved.¹⁸

The Hawai'i Supreme Court has recognized that UM coverage is personal to the named insured; that is, UM coverage follows the insured's person. Dawes, 77 Hawai'i at 123, 883 P.2d at 44; Palisbo v. Hawaiian Ins. & Guar. Co., 57 Haw. 10, 15, 547 P.2d 1350, 1354 (1976). Accordingly, a named insured is entitled to UM benefits even though he or she is injured while operating a vehicle not insured under the policy, Allstate Ins. Co. v. Morgan, 59 Haw. 44, 47-48; 575 P.2d 477, 479-80 (1978), or while occupying a vehicle not mentioned in the policy, Methven-Abreu v. Hawaiian Ins. & Guar. Co., 73 Haw. 385, 396-98, 834 P.2d 279, 285-86 (1992); Kau v. State Farm Mut. Auto. Ins. Co., 58 Haw. 49, 51, 564 P.2d 443, 444 (1977).

However, these cases are not dispositive of the validity of Liberty Mutual's "other insurance" clause. The principle that UM coverage is personal to the insured prohibits

¹⁸ The fact that the legislature has set forth priorities for payments in the no-fault statute, HRS § 431:10C-305(b)(1) and (2) (1993), does not, in our view, establish an intention by the legislature to preclude insurers from including provisions in their policies establishing priorities for payments in the uninsured motorist context. See In re Water Use Permit Applications, 94 Hawai'i 97, 151, 9 P.3d 409, 463 (2000); see also State Farm Mut. Ins. Co. v. Fermahin, 73 Haw. 552, 564, 836 P.2d 1074, 1080-81 (1992) (distinguishing between statutory analysis of an exclusion of coverage in the no-fault context and in the uninsured motorist context).

insurers from restricting UM coverage on the basis of the insured's location when he or she is injured. In contrast, Liberty Mutual's "other insurance" clause does not restrict UM coverage in such a manner, but rather designates its coverage as excess if other coverage is available to the insured. The clause has no effect in the absence of other available UM insurance. Accordingly, Liberty Mutual's "other insurance" clause does not violate the principle that UM coverage is personal to the insured because the insured is still covered regardless of where he or she is injured. Other courts that recognize UM coverage as being personal to the insured have taken a similar position. See, e.g., State Farm Mut. Auto. Ins. Co. v. Powers, 732 A.2d 730, 734 (Vt. 1999) (holding that insurers may designate their UM coverage as excess relative to other insurers and that such a holding did not contravene the proposition that UM coverage is "designed to protect persons, not vehicles"); Aetna Casualty & Surety Co. v. CNA Ins. Co., 606 A.2d 990, 993 (Conn. 1992) (holding that "other insurance" clauses are valid for the purpose of establishing the order of coverage between insurers furnishing UIM coverage where statutes governing UM coverage apply equally to UIM coverage).¹⁹

The Hawai'i Supreme Court has also addressed the validity of an "other insurance" clause in the UM insurance context. In Walton v. State Farm Mutual Automobile Insurance Co., 55 Haw. 326, 518 P.2d 1399 (1974), the insurance company attempted to escape all liability to the plaintiff on grounds that the plaintiff had already collected UM benefits from the host driver's insurer. The plaintiff had been seriously injured while a passenger in a car that was hit by an uninsured motorist. The plaintiff was insured as a passenger under the host driver's policy, as well as under his own personal-insurance policy. Both

¹⁹ When the Hawai'i Supreme Court determined in Dawes that UM coverage was personal to the insured, it cited a Connecticut case for the proposition that "coverage attaches to the insured person, not the insured vehicle" and that "[a]n insured's status at the time of the injury, whether passenger, pedestrian, or driver of an insured or uninsured vehicle, is irrelevant to recovery under the statutorily mandated coverage." 77 Hawai'i at 124, 883 P.2d at 45 (quoting Harvey v. Travelers Indem. Co., 188 Conn. 245, 248, 250, 449 A.2d 157, 159-60 (1982)). The court noted that the Connecticut statute was "similar in all material respects" to Hawai'i's UM statute. Dawes, 77 Hawai'i at 124, 883 P.2d at 45.

policies provided \$10,000 in UM coverage. The plaintiff recovered \$10,000 from the host driver's insurer and subsequently obtained a judgment against the uninsured motorist for a sum of \$25,000. The uninsured motorist then filed for bankruptcy. The plaintiff sought to recover \$10,000 in UM benefits from his own insurer, but the insurer refused, relying on the following "other insurance" clause in the plaintiff's policy:

[W]ith respect to bodily injury to an insured while occupying a motor vehicle not owned by a named insured under this coverage, the insurance hereunder shall apply only as excess insurance over any other similar insurance available to such occupant, and this insurance shall then apply only in the amount by which the applicable limit of liability of this coverage exceeds the sum of the applicable limits of liability of all such other insurance. (Emphasis in the original.)

Id. at 327 n.1, 518 P.2d at 1400 n.1.

By its terms, the plaintiff's insurance policy was only applicable in situations where its limit of liability exceeded the limits of liability of all such other insurance. Since the plaintiff's insurance policy provided maximum UM coverage of \$10,000 and since the plaintiff had already collected \$10,000 from the host driver's insurance policy, the provision excused the plaintiff's insurer from any duty to pay even though the plaintiff's damages amounted to \$25,000. Thus, the "other insurance" clause effectively limited the insured's recovery of UM benefits to less than the actual damages sustained.

The Hawai'i Supreme Court invalidated the clause on the grounds that it was contrary to the protective purpose²⁰ of HRS § 431-448 (1968).²¹ The court stated:

While admittedly not determinative because of its nebulosity, "protection" as a statutory purpose is much more readily construed to invalidate, rather than validate, "other insurance" provisions, such as here relied upon by appellant-insurer, in cases such as this where appellee-insured has been damaged to the extent of \$25,000,

²⁰ The supreme court observed that "[t]he purpose of [the UM statute] is to promote protection, through voluntary insurance, for persons who are injured by uninsured motorists who cannot pay for personal injuries caused by motor vehicle accidents." Walton, 55 Haw. at 331, 518 P.2d at 1402.

²¹ HRS § 431-448 was the predecessor to HRS §431:10C-301(b)(3).

and yet has been compensated therefor only to the extent of \$10,000.

Id. at 331, 518 P.2d at 1402.

The insured was therefore allowed to recover UM benefits from both his own insurer and his host driver's insurer. However, the supreme court specifically noted that the question before the court was a "narrow one," namely "whether the provisions of the insurance policy cited above . . . shall be allowed to stand, in view of HRS § 431-448." Id. at 328, 518 P.2d at 1400 (emphasis added).

There is a crucial difference between the language in Liberty Mutual's "other insurance" clause and the "other insurance" clause that was invalidated in Walton. Liberty Mutual's "other insurance" clause provided that "any insurance we provide with respect to a vehicle you do not own shall be excess over any other collectible insurance." Unlike the "other insurance" clause in Walton, the clause in the instant case does not reduce UM benefits to the insured below his or her actual damages. Rather, it establishes a priority system for determining the distribution of liability among multiple insurance carriers. Other states have upheld clauses like the one in the instant case despite invalidating clauses similar to the one in Walton. See, e.g., State Farm Mut. Auto. Ins. Co. v. United Servs. Auto. Ass'n., 176 S.E.2d 327, 331 (Va. 1970) (upholding a provision similar to the one contained in Liberty Mutual's policy despite having previously invalidated a provision similar to the one contained in Walton, reasoning that "[t]he language before us now does not contain a limitation on the uninsured motorist statute which would permit an insurance company to escape all or a portion of its liability to the insured, thus depriving the insured of coverage to which he was legally entitled"); Aetna, 606 A.2d at 991-93 (distinguishing between an "other insurance" clause which prohibits the insured from stacking coverages where the insured has not been fully indemnified for his damages from one which is used "for the purpose of determining the priority of payment between insurers"); Gaught v. Evans, 361 So. 2d 1027, 1028-29 (Ala. 1978)

(differentiating between excess-escape clauses, similar to the clause in Walton, and excess clauses, like the one in Liberty Mutual's policy).

Liberty Mutual's "other insurance" clause is therefore consistent with the protective purpose of the statute because it "place[s] [Labrador] in the same position [she] would have occupied had the tortfeasor carried liability insurance," Dawes, 77 Hawai'i at 123, 883 P.2d at 44, and does not contravene public policy, see Farmers Ins. Co. v. Prudential Prop. & Cas. Ins. Co., 692 P.2d 393, 396 (Kan. Ct. App. 1984) (noting that "a provision which does not dilute coverage but seeks to establish a priority of payments between insurers is not violative of public policy").

Granger v. Government Employees Insurance Co., 111 Hawai'i 160, 168, 140 P.3d 393, 401 (2006), does not require the invalidation of Liberty Mutual's "other insurance" clause. Granger considered whether an insurer providing UIM coverage could refuse to consent to settlement in order to protect its subrogation rights after conducting a good faith investigation, and if so, whether the insurer should be required to tender payment to the insured equal to the tortfeasor's settlement offer. Id. at 165-66, 140 P.3d at 397-98. The Hawai'i Supreme Court held that an insurer may, after investigation, refuse to consent in order to protect its subrogation rights. Id. at 166, 140 P.3d at 399. However, the supreme court also held that if the insurer refuses to consent to the proposed settlement, then it must tender the insured an amount equivalent to the settlement offer. Id. at 168, 140 P.3d at 401.

The supreme court reasoned that "if [an insurer], in good faith, prefers to prolong the lawsuit against [the tortfeasor] for its own benefit, it may do so," but the insurer cannot at the same time "conscript [the insured] as its 'vicarious plaintiff' for the purpose of recovering, at substantial cost, funds that [the insured] already paid [the insurer] to bear the risk of providing in the event of an underinsured injury." Id. Therefore, on remand the insurer was

required to either (1) consent to the proposed settlement or (2) pay the insured the proposed settlement amount. Id.

In short, Granger addressed the question of whether and under what conditions a UIM insurer may refuse to consent to a settlement by its insured. In contrast, the order at issue here did not address whether and under what circumstances Liberty Mutual could, under the terms of its UM policy and applicable law, refuse to consent to a settlement by Labrador with the other UM insurers. Rather, the circuit court's March 17, 2003 order regarding Liberty Mutual's cross-motion for summary judgment concluded only that H/S's policy "was primary in regard to UM benefits to Labrador and Liberty Mutual's policy provides excess coverage." That narrow holding, without more, does not allow Liberty Mutual to use its "other insurance" clause to "conscript [Labrador] as its 'vicarious plaintiff.'" Id. at 168, 140 P.3d at 401.

Moreover, Liberty Mutual did not use its "other insurance" clause to substantially delay payment of UM benefits to Labrador. It was not until April 24, 2001--more than six years after the accident that injured Labrador--that Labrador's counsel wrote a letter to Liberty Mutual requesting that it pay UM benefits on the basis that there had been two tortfeasors, Elisa Tolfree and the unidentified driver of the unidentified truck. Labrador, Liberty Mutual, and H/S subsequently agreed to a private arbitration of Labrador's UM claim to be held on November 28, 2001, although Liberty Mutual repeatedly asserted that its coverage would be excess to other available UM insurance.²²

²² For example, in a letter dated September 26, 2001 to Tolfree's counsel and copied to Labrador's counsel, Liberty Mutual expressly reserved the right to file a declaratory judgment action to determine, inter alia, whether H/S's "UM policy is primary." In a letter dated October 5, 2001, to the arbitration panel and copied to Labrador's counsel, Liberty Mutual indicated that it in fact "intend[ed]" to file a declaratory judgment action that would address that issue. Liberty Mutual filed its complaint on November 21, 2001, seeking, inter alia, declarations that any obligation on the part of Liberty Mutual to pay UM benefits was "excess over and above the primary uninsured motorist . . . policy limits" available under the H/S and PEMCO policies.

In a letter dated October 31, 2001, Labrador offered to settle with Liberty Mutual and H/S for three-fifths of their respective UM policy limits. H/S agreed to the settlement, but Liberty Mutual refused. On November 28, 2001, the scheduled arbitration was held between Labrador and Liberty Mutual. On December 20, 2001, the arbitration panel issued an award for \$250,000 to Labrador and found that the driver of the phantom truck was responsible for forty percent. Thus, the damages attributable to the uninsured motorist (\$100,000) were less than the aggregate limits of the PEMCO and H/S UM policies (\$150,000). Consistent with its interpretation of its own UM policy, Liberty Mutual declined to pay UM benefits to Labrador after the arbitration, and instead continued to seek a determination of its obligations in this litigation.

Thus it took only about eight months from Labrador's assertion of her UM claim in April, 2001 for the arbitration award to issue in December, 2001. At that point, it was clear under the terms of the respective "other insurance" clauses that Liberty Mutual's coverage was excess and that Liberty Mutual was not obligated to pay UM benefits since the damages attributable to the uninsured driver were less than the policy limits of the primary UM policies. The eight-month period between the initial assertion of the claim and the issuance of the arbitration award was not, in our view, an undue delay or one that suggests that "other insurance" clauses such as the Liberty Mutual provision at issue here contain an inherent potential for abuse that requires their invalidation.

In sum, neither the express terms of the statute nor any public policy prohibits insurers from including "other insurance" clauses such as the one used by Liberty Mutual in their UM policies. Moreover, such clauses serve valid purposes, such as helping to keep costs of premiums down. By allowing insurance companies to set the priority of payment through excess provisions, they are better able to assess the risk of providing the coverage and to charge the insured accordingly. Rates may increase, however, if insurers are required to serve as the

primary insurer in every instance. See Mustain v. United States Fid. & Guar., 925 P.2d 533, 539 (Okla. 1996) (5-4 decision) (Summers, J., dissenting) ("[Excess clauses] serve valid functions. They establish which insurer has the duty to investigate and defend. The primary insurer has the first duty to defend. The excess insurer does not expect to be called on for these costs, and charges the insured accordingly. Second, the clause guards against the duplication of benefits. Third, these clauses help keep the costs of premiums down.") (internal citations omitted).

Finally, we note that this case does not involve a situation in which multiple insurers claim that their respective policies provide only excess coverage. To the contrary, the policies here were consistent with regard to which policies were primary and which were excess. If and when a situation arises in which multiple insurers each try to characterize their respective policies as excess, there are means available to ensure that the legitimate interests of insureds are not compromised by such a dispute.²³

For the foregoing reasons, Liberty Mutual's "other insurance" clause is consistent with Hawai'i case law and statutes, and the circuit court did not err in denying Labrador's motion for partial summary judgment.

III. CONCLUSION

In light of the foregoing discussion, we:

(1) Affirm the December 4, 2002 "Findings of Fact, Conclusions of Law, and Order Granting [Labrador's] Motion for Partial Summary Judgment Against [Liberty Mutual] Filed on

²³ For example, some courts that have considered multiple excess "other insurance" clauses have resolved conflicts between those clauses by treating both coverages as primary. See Universal Underwriters Ins. Co. v. Allstate Ins. Co., 638 A.2d 1220, 1224 (Md. Ct. App. 1994) (noting that when two excess clauses are applicable and "directly conflict" the majority rule is that they "are to be disregarded (as mutually repugnant) and each of the coverages is treated as primary insurance (and the liability is prorated)"); Westfield Ins. Co. v. Nationwide Mut. Ins. Co., 650 N.E.2d 112, 117 (Ohio App. 1993) (holding that where conflicting "excess" coverage clauses appeared to cancel each other out with respect to non-owned vehicles each insurer owed a pro rata share of total loss).

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October 3, 2002, and Denying [Liberty Mutual's] Motion for Summary Judgment Against [Labrador] Filed on October 3, 2002";

(2) Affirm the February 6, 2003 "Order Denying [Liberty Mutual's] Motion for Reconsideration of the Findings of Fact, Conclusions of Law, and Order Granting [Labrador's] Motion for Partial Summary Judgment Against [Liberty Mutual] Filed on October 3, 2002, and Denying [Liberty Mutual's] Motion for Summary Judgment, Filed on December 17, 2002";

(3) Affirm the March 17, 2003 "Order Granting in Part and Denying in Part [Labrador's] Motion for Attorneys Fees and Prejudgment Interest Incurred in Obtaining UIM Benefits, Filed on October 30, 2002";

(4) Affirm that part of the March 17, 2003 "Order Denying [Labrador's] Motion for Reconsideration; Motion re: Equitable Estoppel; Motion to Set Case for Trial, Filed June 27, 2002," which denied Labrador's motion for reconsideration of the circuit court's ruling that the "other insurance" provision in Liberty Mutual's policy "was not unenforceable as a matter of public policy";

(5) Affirm that part of the March 17, 2003 "Order Denying [Labrador's] Motion for Partial Summary Judgment Against [Liberty Mutual], Filed 02/27/02, and Granting in Part and Denying in Part [Liberty Mutual's] Cross-Motion for Summary Judgment, Filed 03/08/02," which determined that Liberty Mutual's policy was "excess" to the H/S policy; and

(6) Affirm the July 21, 2005 Final Judgment, which entered judgment in favor of Labrador and against Liberty Mutual in accordance with the foregoing orders and held that Liberty Mutual was obligated to pay \$50,000 in UIM benefits and \$6,705 in attorney's fees to Labrador.

Thomas Tsuchiyama
(Sumida & Tsuchiyama)
for Plaintiff-Appellant/
Cross-Appellee.

Phillip L. Carey
for Defendant-Counterclaimant/
Appellee/Cross-Appellant.

Mun G. Redtenwald
Daniel P. Foley