Re-tying the Gordian Knot: *Hindson v. Allstate* and its progeny

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*In **Hindson v. Allstate Insurance Co.**,…the Supreme Court of Rhode Island declared a ceasefire in the battle of the draftsmen… However, since then,…the Court has created a series of rule-swallowing exceptions and effectively negated the force and effect of **Hindson**.*

In **Hindson v. Allstate Insurance Co.**, 694 A.2d 682 (R.I. 1997) (Flanders, J.), the Supreme Court of Rhode Island declared a ceasefire in the battle of the draftsmen often waged by two insurance companies whose policies cover the same loss on a primary basis yet contain other-insurance clauses that purport to disclaim primary coverage because of the existence of the other policy. In the future, the Court eloquently and stridently ruled, such clauses would be deemed mutually-repugnant, and the primary policies in which they were contained would share coverage on a pro-rata basis, according to their respective coverage limits.[1] However, since then, most recently in **Irene Realty Corp. v. Travelers Property Casualty Company of America**, 973 A.2d 1118 (R.I. 2009) (Robinson, J.), the Court has created a series of rule-swallowing exceptions and effectively negated the force and effect of **Hindson**.

Some history is in order. In **Brown v. Travelers Insurance Co.**, 610 A.2d 127 (R.I. 1992) (Kelleher, J.), the Court had to determine the priority, if any, between two uninsured/underinsured automobile-insurance policies that covered the same injured person but contained other-insurance clauses that purported to disclaim primary coverage due to the availability of the other policy.[2] The Court explained that "[p]rimary coverage is provided when an insurer is liable for the risk insured against, regardless of any other available coverage," while "'[o]ther-insurance' clauses purport to limit the coverage of a policy if there is another policy or policies protecting the risk insured against."[3] One of the **Brown** policies contained an excess other-insurance clause, "which provides that the insurer will pay for a loss only after any primary coverage of other available insurance has been exhausted[.]"[4] The other policy contained an escape other-insurance clause, "which provides that the insurer is not liable for any and all liability if other coverage is available[.]"[5] These clauses are in addition to the *pro-rata* clause, "which provides an insurer is required to share the loss in proportion to the aggregate liability coverage available for the same risk," and the hybrid excess-escape clause, "which provides that the insurer is liable for the amount of the loss that exceeds the limits of other available insurance and that the insurer is not liable when other available coverage contains limits equal to or in excess of its own limits."[6]

Brown struggled with the fact that conflicts between and among the various types of other-insurance clauses often are not "readily resolved by 'word logic.'"[7] A majority of jurisdictions created a hierarchy favoring certain clauses over others, but the Court found this akin to "refereeing the 'battle of the draftsmen' waged by insurance companies."[8] "[O]ther jurisdictions[,]" the Court found, "have resolved this conflict in …a more effective manner, that is, by requiring both insurers to share the loss on a pro-rata basis."[9]

While the competing clauses in **Brown** were not "mutually repugnant,"[10] and the clauses could have been – and actually had been – reconciled in other jurisdictions, the Court did "not wish to encourage the complication of insurance legerdemain at the expense of the policyholders' money or the court's time."[11] Rather, the Court decided, the "conflict between an excess clause in one policy and an escape clause in another is more readily and efficiently resolved by requiring both insurers to afford pro-rata coverage."[12]

Later, in **Hindson**, the Court addressed competing pro-rata and excess other-insurance clauses within two automobile-insurance policies that covered the same injured person.[13] Because neither insurer agreed that its policy afforded primary coverage for the loss, the injured person had to commence a declaratory judgment action "seeking to have these insurers pay for his covered losses on a pro-rata basis."[14] In assessing the two policies, the Court found compelling that both insurers would have been "primarily liable to plaintiff if either one was the lone insurer providing coverage[; h]owever, when other insurance is available to compensate for an insured's loss, they both seek to limit their liability."[15]

As in **Brown**, the Court found that a majority of jurisdictions would have ruled in favor of one of the two competing insurers.[16] However,

the Court believed that "the reasoning of the Supreme Court of Oregon in **Lamb-Weston, Inc. v. Oregon Automobile Ins. Co.**, 219 Or. 110, 341 P.2d 110 (Or. 1959), provided "the better solution."[17] That case "rejected the multifarious approaches followed by the majority of jurisdictions to subjugate pro-rata clauses to excess clauses and concluded that any conflicts between such other-insurance clauses should be resolved by construing them as mutually repugnant and therefore unenforceable."[18]

In fact, the **Lamb-Weston** decision found that *all* competing other-insurance clauses should be declared mutually-repugnant and require pro-rata sharing. The Court noted that, regardless of the types of other-insurance clauses that may be in dispute, the competing insurers will use circular reasoning to disclaim primary coverage: both will argue that its other-insurance language is triggered by the other insurer's coverage, and that its other-insurance language is more effective than that of the other insurer.[19] Finding none of the cases that attempted to reconcile competing other-insurance clauses to be "logically acceptable,"[20] the **Lamb-Weston** court concluded that, "whether one policy uses one clause or another, when any 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."[21]

Using the **Lamb-Weston** reasoning, **Hindson**, much like **Brown**, concluded that, while "it could well be argued that some effect should be given to the terms of each policy's other-insurance clause[,]"[22] it was more important "to call at least a temporary halt to the incessant 'battle of the draftsmen' waged by, between, and among the various insurance companies in these other-insurance-clause cases."[23] "Inevitably," the Court noted "the front-line casualties of such clashes are the insureds."[24] "Accordingly," the Court held, "when as here an insurance policy would provide primary coverage to an insured if it were the only applicable policy, we are of the opinion that the coverage responsibilities of all such insurers should be shared on a pro-rata basis despite the existence of conflicting other-insurance clauses."[25]

To magnify its holding, the Court cited the hoary fable of the Gordian Knot, which had been "fastened…so ingeniously that no one could untie it," until Alexander the Great was able to reign supreme "over the whole East" after cutting the Knot with his sword. The Court expressed its "fervent hope" that "cutting the Gordian Knot" of competing other-insurance clauses would "free ensnared insureds like this plaintiff from the coils of such disputes. But," the Court continued, "if our wish remains unrequited and our hope is soon dashed (that is, the battling draftsmen rearm anon and retie the Gordian Knot), we will still abide here, with our sword poised and ever at the ready to cut the knot again."[26]

The Superior Court of Rhode Island soon agreed that **Hindson** (like the **Lamb-Weston** decision upon which it relied) was without exception. **In Ferreira v. Godbout**, 2000 WL 1910036 (R.I.Super., Dec. 15, 2000) (Vogel, J.), this court said, "**Hindson** gave this court clear direction when examining [other-insurance clauses]."[27] **Hindson** "adopted a rule requiring pro-rata apportionment of liability among different insurers providing uninsured/underinsured motorist coverage according to the limits of their respective policies."[28] "[U]nder **Hindson**, regardless of the wording of such provisions, the court

construes them as providing that each carrier shall be liable for a pro rata share of the loss."[29]

However, the Superior Court's decision was appealed to the Supreme Court of Rhode Island, which took a very different slant on its own **Hindson** decision. In **Ferreira v. Mello**, 811 A.2d 1175 (R.I. 2002) (per curiam), the Court applied **Hindson** to a situation involving competing other-insurance clauses in the two automobile insurance policies that covered the same defendant in a personal-injury action. The defendant was involved in an accident while driving someone else's automobile. The terms of the policies that covered the defendant, one of which was issued by the defendant-driver's insurer, the other of which was issued by the owner's insurer, both agreed to extend primary coverage when its insured was involved in an accident while driving his own automobile, but merely excess coverage when its insured was involved in an accident while driving someone else's automobile. Otherwise, the policies agreed to share primary coverage with other applicable policies on a pro-rata basis.[30]

Because the insured-defendant was not involved in an accident while driving his own automobile, neither of these other-insurance clauses should have been applied and both insurers should have been required to share primary coverage; and, either policy would have extended primary coverage had it been the only policy. Thus, **Hindson** seemingly required pro-rata sharing. Alas, the Court decided to have the automobile-owner's policy cover the defendant on a primary basis, and have the defendant's own policy cover him on an excess basis. In doing so, the court somehow did "not read **Hindson** to apply to any and all multiple insurance coverage disputes, particularly when, as here, the policy language is identical."[31]

Standing alone, this finding would have been innocuous, for competing policies rarely have exactly the same language. However, the Court went further, declaring that **Brown** and **Hindson** only govern competing other-insurance clauses that are "irreconcilable" and "do not conflict in any material manner."[32] "Where the respective clauses are in agreement[,]" the Court believed, "there is no reason to deviate from the terms of the policies, each carrier receives that which it bargained for in the policy as written."[33]

Insofar as neither of the two insurers involved in **Ferreira** actually (or even impliedly) bargained for primary coverage under the facts of that case, what the court essentially did was to impose upon the insurers the principle behind both of their policies – that an automobile owner's policy should come before an automobile driver's policy. However, even assuming that the equities required such a result, the Court did not stop at the equities. Instead, it created a new rule to govern all future other-insurance disputes – a rule that invited litigants and the courts to determine on a case-by-case basis whether the competing other-insurance clauses are "identical" and "do not conflict in any material manner," after it was just this kind of quibbling that **Brown** and **Hindson** specifically and painstakingly sought to avoid (for the sake of policyholders and injured parties). Indeed, and again, **Brown** and **Hindson** both involved policies that could have been – and actually had been – reconciled in other jurisdictions, so it cannot be said that **Ferreira** addressed a previously-unseen dilemma.[34]

It was inevitable that **Ferreira** would cause problems. Sure enough, in **Irene Realty Corp. v. Travelers Property Casualty Company of America**, supra,

two insurers used Ferreira to argue that, when read together, their other-insurance clauses, even though not identical, required just one of them to extend primary coverage to the defendant in an underlying premises-liability action. Rather than spurning this battle of the draftsmen, limiting the reach of **Ferreira**, and requiring the insurers to share primary coverage on a pro-rata basis, the Court required just one of them to extend primary coverage – the insurer (American Empire) that agreed to defend the underlying action despite its belief that the other insurer (Travelers) was primarily liable;[35] reinforcing the adage that no good deed goes unpunished.

In **Irene Realty**, the competing other-insurance clauses were contained in two commercial general liability insurance policies that covered a commercial landlord (Irene Realty) that had leased commercial property to a tenant who agreed in writing to "provide to Landlord evidence of coverage with at least $500,000 limits for Commercial General Liability insurance for both property damage and bodily injury [and to] add the Landlord as an Additional Insured on Tenant's insurance policies."[36] The tenant procured from Travelers a commercial general liability policy that covered the tenant on a primary basis and, through an additional-insured endorsement, also covered the landlord on a primary basis: The endorsement extended the definition of insured in the tenant's primary policy to "any person or organization (referred to below as additional insured) with whom you [the tenant] have agreed in a written contract, executed prior to loss, to name as an additional insured[.]"[37] Later, in the same additional-insured endorsement, an other-insurance clause said, "[t]he insurance afforded to the additional insured is excess over any valid and collectible insurance available to such additional insured, unless you have agreed in a written contract for this insurance to apply on a primary or contributory basis."[38]

Meanwhile, Irene Realty had its own commercial general liability insurance policy with American Empire that contained the following other-insurance language, only part of which (subsections 4.a. and 4.b.) was cited by the court:

> 4. Other Insurance….a. **Primary insurance**. This insurance is primary except when b. below applies. If this insurance is primary, our obligations are not affected unless any of the other insurance is also primary. Then, we will share with all that other insurance by the method described in c. below.
> b. **Excess insurance**. This insurance is excess over: * * * (2) Any other primary insurance available to you covering liability for damages arising out of the premises or operations for which you have been added as an additional insured by attachment of an endorsement." c. **Method of sharing**. If all of the other insurance permits contribution by equal shares, we will follow this method also. Under this approach each insurer contributes equal amounts until it has paid its applicable limit of insurance or none of the loss remains, whichever comes first. If any of the other insurance does not permit contribution by equal shares, we will contribute by limits. Under this method, each insurer's share is based on the ratio of its applicable limit of insurance to the total applicable limits of insurance of all insurers.[39]

While these two policies were in effect, an employee of the tenant very seriously was injured at the subject property. The employee sued Irene Realty alleging that

it was responsible for the incident. American Empire agreed to defend the claim on behalf of the Irene Realty, while Travelers refused to participate in the defense or settlement of the claim (as it had done in **Brown**).[40]

American Empire and Irene Realty commenced a Superior Court declaratory-judgment action seeking a declaration that Travelers was the co-primary (or even the sole-primary) insurer of Irene Realty. These plaintiffs argued that, if **Ferreira** applied, it applied in favor of American Empire, because its policy relegated itself to excess status in cases where the insured was covered by an additional-insured endorsement (like the Travelers endorsement), and because the tenant contractually was required to obtain primary insurance for Irene Realty, the latter of which triggered the last segment of the Travelers endorsement, which required Travelers to cover Irene Realty on a sole-primary basis. If **Ferreira** did not apply to the dispute, the plaintiffs argued, **Hindson** required the primary coverage to be shared on a pro-rata basis because, if either policy had been alone, it would have extended primary coverage to Irene Realty.[41]

The Superior Court accepted neither view, believing that the Travelers policy was – and could only be – an excess policy as it related to additional insureds such as Irene Realty, and thus permitting Travelers to remain the excess insurer.[42] American Empire and Irene Realty appealed to the Supreme Court of Rhode Island, which found that the two policies were in "complete harmony" and not "actually in conflict"; and, that **Ferreira** applied in favor of Travelers.[43] The Court found that "the American Empire policy provides that its insurance for Irene Realty is primary unless any other applicable insurance is primary"; that "[t]he Travelers policy provides that its coverage of Irene Realty as an additional insured is excess unless the parties have agreed in writing for the insurance to be primary"; and, that "[t]he plain and simple fact is that no such writing exists."[44] Travelers thus remained the excess insurer and, in the end, it was able to avoid paying any defense or settlement costs on behalf of Irene Realty.

The Court's "plain and simple" finding that the tenant had not agreed to obtain primary coverage for Irene Realty was too facile. This was a legal issue of first impression, and the Court previously had given assurances that, "[i]n cases of first impression, we often look to leading authorities and the law of other jurisdictions for guidance in making our determination." **Liberty Mutual Insurance Company v. Herben Insurance Company**, 603 A.2d 300, 302 (R.I. 1992).

The plaintiffs introduced such materials, including the on-point **Pecker Iron Works v. Travelers Ins. Co.**, 786 N.E.2d 863, 864 (N.Y. 2003). That case involved the very same Travelers other-insurance clause and a similar underlying contract that required Travelers's insured to name the plaintiff as an additional insured. The Court of Appeals of New York decided that Travelers was required to extend primary coverage to the additional insured because the term additional insured is a "recognized term in insurance contracts," the "well-understood meaning" of which is "an entity enjoying the same protection as the named insured."[45]

Despite its stated policy of surveying the law of other jurisdictions on issues of first impression, and despite the similarity of **Pecker Iron Works**, in which a highly-

continued on page 33

Re-tying the Gordian Knot

continued from page 9

regarded court in a business-sophisticated jurisdiction ruled against Travelers itself, the Supreme Court of Rhode Island did not even mention that case in its **Irene Realty** decision. By failing to address this issue, the Court threw into doubt the many contracts, such as landlord-tenant and contractor-subcontractor agreements, that require indemnitors to name their indemnities as additional insureds on their insurance policies. Read strictly, **Irene Realty** means that the typical, standard-form, business-contract language does not require indemnitors to obtain primary insurance for their indemnitees.

However, what was more remarkable than the Court's ignorance of **Pecker Iron Works** was the Court's finding that, without an agreement by the tenant to obtain primary coverage for Irene Realty, Travelers did not even have to share primary coverage with American Empire. There are two possible, yet equally-troubling, avenues for interpreting this aspect of the Court's decision. Either the Court found the competing other-insurance definitions primary insurance (American Empire) and other applicable similar insurance (Travelers) so vastly different from each other that they did not materially conflict, as in **Ferreira**; or, without saying as much, the Court found that the case fell within **Liberty Mutual**, supra, in which it was determined that true excess or umbrella policies (i.e., policies that are and can only be excess policies in any circumstances) should not have to share primary coverage with a primary policy containing an other-insurance clause.[46]

If, on the one hand, the Court made a value judgment between the competing definitions of other-insurance, then it both misread the American Empire policy and circumvented **Brown** and **Hindson**. The difference between the other-insurance definitions involved in **Irene Realty** – primary insurance (American Empire) and valid and collectible insurance (Travelers) – was similar to the differences between the competing definitions in **Brown** and **Hindson** – other applicable liability insurance, other collectable insurance; other applicable similar insurance. In each instance, the insurer simply was trying to elevate itself above other available insurers. But, even if it could be said that American Empire's use of the term pri-

mary in section b. of its other-insurance clause somehow excluded the Travelers policy, this merely negated section b. ("Excess insurance") of the clause and left the court with section c. of the clause ("Method of Sharing"), which the Court did not cite, but which, nevertheless, called for any other insurance to share primary coverage with American Empire on a pro-rata basis. The latter provision clearly brought the case within **Hindson**, in which competing excess and pro-rata clauses were deemed mutually repugnant.

If, on the other hand, the Court decided that Travelers prevailed because its policy was, and could only be, an excess insurer of Irene Realty in all cases, as in the **Liberty Mutual** case, then the Court simply misread the Travelers policy. As noted above, the Travelers policy offered primary coverage to additional insureds, such as Irene Realty, if and when they had no other available coverage. In fact, the Court seemingly acknowledged this, because it did not rely upon Liberty Mutual, and because it conducted a full **Ferreira**-type analysis and agreed with Travelers that "both policies contain 'other insurance' clauses which purport to limit coverage to excess coverage when the insured is covered by another policy providing primary coverage[.]"[47]

Thus, it appears that the better of these two available interpretations is that the Court did not find that the Travelers policy was and could only be an excess policy with respect to additional insureds but, instead, found that Travelers had the stronger other-insurance-clause draftsman. If this is indeed how the case was decided, then **Hindson**, while still admirable for its eloquence, has little, if any, remaining precedential value. Initially, the **Ferreira** exception to **Hindson** was created for other-insurance clauses that were in agreement and not actually in conflict, and was intended to give insurers what they specifically bargained for."

Now, we have **Irene Realty**, which purported to reconcile competing policy language that was not in agreement and which ruled against an insurer that specifically agreed not to extend primary coverage under the facts at hand. (If, as it turns out, **Irene Realty** was decided on the basis that Travelers merely extended excess coverage to additional insureds in every case, then the best that can be said for **Irene Realty** is that it wrongly was decided.)

Unless it is content to have this area of the law continue to befuddle practitioners, the Supreme Court of Rhode Island must abandon one or more of its earlier decisions. The best approach would be to uphold **Hindson** and **Ferreira** by strictly limiting **Ferreira** to cases involving truly identical policy language. However, in order to do this, the Court would have to abandon **Irene Realty**, which it presumably would be unwilling to do. (Better yet, the Court could abandon both **Ferreira** and **Irene Realty**, as they were not decided on their facts and the former's inability to curtail the battle of the draftsmen is manifested by the latter.) The only other alternative, short of formally abandoning **Hindson**, would be to reconcile **Hindson** with **Irene Realty**, but this seems impossible to do, at least in a manner consistent with the actual facts of those cases. In any event, until there is some clear and consistent reconciliation of the case law, the battle of the draftsmen shall wage on.

Editor's Note: The author was counsel for the appellants in **Irene Realty Corp. et al. v. Travelers Property Casualty Company of America**.

ENDNOTES

1 ***Hindson v. Allstate Insurance Co.**, 694 A.2d 682, 685 (R.I. 1997).*
2 ***Brown v. Travelers Insurance Co.**, 610 A.2d 127, 128 (R.I. 1992). Earlier, in **Pickering v. American Employers Ins. Co.**, 109 R.I. 143, 282 A.2d 584 (1971), and **Employers' Fire Insurance Co. v. Baker**, 119 R.I. 734, 383 A.2d 1005 (1978), the court invalidated excess-escape-type other-insurance clauses because they ran afoul of Rhode Island's compulsory-insurance legislation.*
3 *Id. at 128.*
4 *Id.*
5 *Id.*
6 *Id.*
7 *Id. at 129.*
8 *Id. at 130.*
9 *Id.*
10 *Id.*
11 *Id.*
12 *Id.*
13 ***Hindson**, supra, 694 A.2d at 683-684.*
14 *Id. at 684.*
15 *Id.*
16 *Id.*
17 *Id.*
18 *Id.*
19 ***Lamb-Weston, Inc. v. Oregon Automobile Ins. Co.**, 219 Or. 110, 119, 341 P.2d 110, 128 (Or. 1959).*
20 *Id. at 115-116.*
21 *Id. at 119.*
22 *Id. at 685.*
23 *Id. at 685 (citing **Brown**).*
24 *Id.*
25 *Id.*