ALLOCATION OF DEFENSE AND INDEMNITY OBLIGATIONS AMONG MULTIPLE INSURERS

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I. INTRODUCTION

One of the most challenging aspects of settling or litigating environmental and other "long tail" insurance coverage disputes that involve multiple insurers is evaluating how much to attribute to, demand from, and settle for with each insurer. This evaluation involves consideration of a variety of factors, including:

(1) the number of "occurrences" at issue;
(2) the governing law on "trigger of coverage;"
(3) the scope of each insurer's defense and indemnity obligations under the law of the jurisdiction that is likely to control in litigation (if you are lucky enough to have a state with settled law on these issues);
(4) the effect of "other insurance" clauses;
(5) the insurer's internal "company position" with respect to allocation and "other insurance provisions;" and
(6) whether any of the policies at issue contain "deemer" or "non–cumulation" provisions.

II. DETERMINATION OF THE NUMBER OF OCCURRENCES

A. The "Number of Occurrences" Analysis Can Have a Significant Impact on The Insured's Protection

Liability policies cover "occurrences" that take place during the policy period. "Occurrence" is typically defined as:

> an accident, including *continuous or repeated exposure to conditions* which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured. (emphasis added).

Although the definition of "occurrence" includes ongoing or repeated events, CGL policies do not provide guidance for distinguishing when one occurrence ends and another begins. The number of occurrences at issue can be extremely critical to an insured. If the insured faces numerous claims or claims in which defense costs account for a major portion of the estimated

loss, and has policies without aggregate limits or deductibles, a finding that each claim constitutes a separate occurrence could result in much more protection than a finding that all of the claims flow from a single occurrence. On the other hand, the insured that has policies with large deductibles or retrospective premium agreements may receive much greater protection if its exposure is found to be the result of a single occurrence.

B. Most Courts Apply a "How Many Causes" Approach

Courts have, as an initial matter, attempted to determine the number of occurrences by applying a "cause" or "effect" analysis. Under the "effect" approach, courts consider the number of injuries to determine the number of occurrences. *See e.g.*, Lombard v. Sewerage & Water Board, 284 So. 2d 905, 915–16 (La. 1973). Under the cause approach, courts examine the number of proximate "causes" of an injury or damage to determine the number of occurrences. Most courts have adopted the "cause" approach. *E.g.*, Champion Int'l Corp. v. Continental Casualty Co., 546 F.2d 502 (2d Cir. 1976) cert. denied 434 U.S. 819, 98 S.Ct. 59 (1977) (asbestos); Appalachian Ins. Co. v. Liberty Mutual Ins. Co., 676 F.2d 56, 61 (3rd Cir. 1982); Bartholomew v. Insurance Co. of North America, 502 F. Supp. 246, 251 (D.R.I. 1980), *aff'd mem.* 655 F.2d 27 (1st Cir. 1981).

However, courts adopting a "cause" approach have applied the standard in different ways. What one court views as an on-going phenomenon or single causative event, another court may view as multiple causative events. *Compare e.g.*, Jackson Township Municipal Utilities Authority v. American Home Assoc. Co., reprinted at 1984 Haz. Waste Litig. Rep. 6220 (Aug. 31, 1984) (seepage of toxic waste into wells over 6 year period leading to contamination of drinking water and injuring numerous families constituted separate occurrences) with Morton Thiokol v. Aetna Casualty & Surety Co., No. A–8603799 (Ohio Ct. Common Pleas, Hamilton Cty. March 1, 1990) (all claims relating to disposal at one site arose out of same condition and constituted one occurrence per policy year).[1] A small majority of courts have found that the ongoing involvement of an insured at one waste site is either one occurrence, or one occurrence per year. *See e.g.*, Northern States Power Co. v. Fidelity & Cas. Co., 517 N.W. 2d 918 (Minn. 1994); Spokane City v. American Re-Insurance Co., No. CS–90–256 (E.D. Wash. May 12, 1993); Sunnyside Seed Farms, Inc. v. Refuse Hideaway, Inc., No. 91–CV. 4264) (Dane Cty. Cir. Ct. Wis. April 6, 1993). Multiple occurrences are

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[1] This variation in analysis is also found in other multi–claim cases. For instance, in suits involving sexual assaults, courts in Nevada and Oregon have defined an "occurrence" as the entire pattern of sexual aggression involving multiple victims. Washoe County v. Transcontinental Ins. Co., 878 P.2d 306 (Nev. 1994) (County's negligence in licensing daycare during three year course of conduct is single occurrence); Interstate Fire & Casualty Co., v. Portland Archdiocese, 747 F. Supp. 618 (D.Or. 1990) (archdiocese's negligent retention and supervision of priest that molested multiple children is single occurrence). A Louisiana court faced with a similar circumstance, determined that each victim/claimant was a separate occurrence, and a Massachusetts court held that all of a perpetrator's activities at a single location was a single occurrence. *See* Society of Roman Catholic Diocese of Lafayette v. Interstate Fire & Cas. Co., 26 F.3d 1359 (5th Cir. 199); Worcester Ins. Co. v. Fells Acres Day School, Inc., 408 Mass. 393, 558 N.E.2d 958 (1990).

more likely to be found where an owned or formerly owned sites where discrete events can be identified that are distinguishable from each other by location or chemical composition (rather than solely by date of event).

Where property damage claims are based on the migration of chemicals onto third parties' property, courts have sometimes looked to the policy or policies in effect when the abutting property was damaged, rather than the policies in effect at the time any property damage took place. *E.g.*, United States v. Conservation Chemical Co., 653 F. Supp. 152, 177 (W.D. Mo. 1986).

C. Ambiguities In Policy Interpretation Are Construed In Favor of Coverage

In general, courts have applied their "number of occurrences" analyses so as to maximize coverage. For example, in cases such as Champion International Corp. v. Continental Cas. Co., 400 F. Supp. 978 (S.D.N.Y. 1975) *aff'd* 546 F.2d 502 (2d Cir. 1976) where the insured faces hundreds of small claims that would have been largely be absorbed by deductibles and self–insured retentions, the courts have found a single occurrence. *See also* Champion International Corp. v. Liberty Mutual Ins. Co., 701 F. Supp. 409 (S.D.N.Y.) 1988); Stonewall Ins. Co. v. National Gypsum Co. *et. al.*, 1992 WL 123144 *slip op* (S.D.N.Y., May 26, 1992) (asbestos); Transport Ins. Co. v. Lee Wew Motor Freight Co., 487 F. Supp. 1325 (N.D. Tex. 1980); Cargill Inc. v. Liberty Mutual Ins. Co., 488 F. Supp. 49 (D. Minn. 1979) *aff'd* 621 F.2d 275 (8th Cir. 1980); Washoe County v. Transcontinental Ins. Co., 878 P.2d 306 (Nev. 1994) (child molestation).[2]

On the other hand, when per occurrence limits of liability are low, relative to the insured's total exposure, courts have been more likely to find multiple "occurrences." *See e.g.*, Slater v. United States Fidelity & Guaranty Co., 379 Mass. 801, 400 N.E.2d 1256 (1980).

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[2] When many people are damaged or injured by a single ongoing physical phenomenon, courts tend to view all injuries as arising from one occurrence. *See e.g.*, Kansas Fire & Cas. Co. v. Koelling, 729 S.W.2d 251 (Mo. App. 1987) (insureds attempt to pass car which resulted in collision with two vehicles was single occurrence); Barrett v. Iowa National Mut. Ins. Co., 264 F.2d 224 (9th Cir. 1959) (fire damaged apartments of seven tenants); Saint Paul–Mercury Indem. Co. v. Rutland, 225 F.2d 689. (5th Cir. 1955) (insured's truck collided with freight train causing damage to sixteen cars and property of fourteen owners); Tri–State Roofing Co. v. New Amsterdam Cas. Co., 139 F. Supp. 193 (W.D. Pa. 1955) (insured's employee upset tar pot onto roof, causing fire which spread and burned several buildings). Courts also have found a single occurrence when the problem is a defect in the manufacture or design of the product line on the theory that the product "is an accident waiting to happen." *See e.g.*, Household Manuf. Inc. v. Liberty Mutual, No. 85-C-8519 (N.D. Ill. Feb. 10, 1987) (plumbing products); Shaq Security Inc. v. Liberty Mutual Ins. Co., 488 F. Supp 49 (D. Minn. 1979), *aff'd* 621 F.2d 275 (8th Cir. 1980). However, especially in the toxic tort area, there are some notable exceptions. *See e.g.*, Asbestos Ins. Coverage Cases, Judicial Council Coordination Proceeding No. 10702, Tentative **[Note: Prior draft reflected the same "missing text" as this last draft.]**

Some courts have noted that the variations in decisions for different coverage profiles is not surprising since the policies do not provide a definition or other aid to determining when one occurrence ends and another begins, and ambiguities in the policy must be construed against the insurer. Slater v. United States Fidelity & Guaranty Co., 379 Mass. 801, 400 N.E.2d 1256 (1980); Stonewall v. National Gypsum, 1992 WL 123144 *slip op* at 12 (S.D.N.Y. May 27, 1992); Weissblum v. Glen Falls Ins. Co., 31 Misc. 2d 132, 219 N.Y.S. 2d 711 (City Ct. 1961) *rev'd on other grounds* 40 misc. 2d 964, 244 N.Y.S. 2d 689 (Sup. Ct. 1963); Transamerica Ins. Co. v. Keown, 451 F. Supp. 397 (N. 1978).

III. A SINGLE OCCURRENCE CAN "TRIGGER" MULTIPLE PRIMARY POLICIES

Multiple primary policies may be triggered for a single occurrence under "exposure," "injury–in–fact," and "continuous trigger" theories.[3] Under the exposure approach, all policies in effect at the time the claimant or environment was "exposed" to pollution must respond. *See, e.g.*, Insurance Co. of North America v. Forty–Eight Insulations, 633 F.2d 1212 aff'd and clarified on review 657 F.2d 814 (6th Cir. 1981) *cert. denied*, 454 U.S. 1109 (1981) (asbestosis). Under the injury–in–fact approach, the policy or policies in effect when injury or property damage takes place must respond. *See, e.g.*, Industrial Steel Container Corp. v. Fireman's Fund Ins. Co., 399 N.W. 2d 156 (Minn. App. 1987) (property damage adopting actual injury trigger for property damage at landfill).

Under the continuous trigger approach, all policies in effect from time of first exposure until time when pollution becomes a known loss must respond. *See, e.g.*, Montrose Chemical Corp. v. Admiral Ins. Co., 10 Cal. 4th 645, 897 P.2d 1, 42 Cal. Rptr. 2d 324 (1995); Owens–Illinois, Inc. v. United Ins. Co., 138 N.J. 437, 650 A.2d 974 (1994); J.H. France Refractories Co. v. Allstate Ins. Co., 534 Pa. 29, 629 A.2d 502 (1993) (adopting "multiple trigger" in asbestos case); Keene Corp. v. Insurance Co. of North America, 667 F.2d 1034 (D.C. Cir. 1981) *cert. denied*, 455 U.S. 1007 (1982) *rehearing denied* 456 U.S. 951 (1982) (asbestos); Broderick Investment Co. v. The Hartford Accident and Indemnity Co., 742 F. Supp. 571 (D. Colo. 1989) (all policies triggered during years that wood treatment residue was placed on–site or seeped into groundwater).

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[3] The fourth commonly discussed trigger is the "manifestation" trigger. Under a "manifestation" trigger, the policy responds that was in effect when injury was discovered or reasonably could have been discovered by the claimant. Hanover Ins. Co. v. Tinkham, C.A. No. C–86–539–L, Order on Motion for Summary Judgment (D.N.H. Apr. 7, 1988). Multiple policies may be triggered under a manifestation approach if there are new manifestations of injuries in different policy periods. *See, e.g.*, United States Fidelity & Guaranty Co. v. Munroe, C.A. No. 92–3545, Findings and Order (Middlesex Cty., M. Superior Ct., Feb. 8, 1993) (coverage available under each of four consecutive one–year policies as long as insured can prove exposure and manifestation of injury from lead paint to victim during each policy period).

In many progressive property damage cases, the effect of the adoption of an exposure or Owens–Illinois, Inc. v. United Ins. Co., ___ NJ. ___, ___ A.2d ___ (1994) (discussing application of various triggers in asbestos and environmental contexts).[4]

IV. ALLOCATION OF DEFENSE COSTS AMONG MULTIPLE INSURERS

A. The Majority of Courts Have Held that Each Triggered Policy Has a Full and Entire Duty to Defend

Where multiple primary insurance policies are triggered, the majority courts to address the issue have stated that each insurer has a full and independent duty to defend its insured.[5] *See e.g.*, Abex Corp. v. Maryland Casualty Co., 790 F.2d 119, 122 (D.C. Cir. 1986); Buckley Heating Inc. v. Hanover Ins. Co., No. 83-24556 (Mass. Super. Ct. Nov. 14, 1983) (underground storage tank leak); Mendes & Mount v. American Home Assurance Co., 97 A.D.2d 384, 467 N.Y.S.2d 596 (N.Y. App. Div. 1983); United States Fidelity & Guaranty Co. v. Thomas Solvent, 683 F. Supp. 1139 (W.D. Mich. 1988) (company property and Superfund sites).

Under this approach, each insurer is liable to its insured in full for defense costs, but may seek contribution from other triggered insurers.

In states where the appellate courts have not expressly addressed this issue in an environmental case, policyholders should look to case law holding that an insurer that is obligated to defend any portion of a claim is obligated to defend the entire claim. *See e.g.*, Vappi Co., v. Aetna Casualty & Surety Co., 348 Mass. 427 (1965); Horace Mann Ins. Co. v. Barbara B., 4 Cal. 4th 1076, 1084, 17 Cal. Rptr. 2d 210 (1993) ("[w]e look not to whether non–covered acts predominate in the third–party's action, but rather to whether there is *any*

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[4] Policies sometimes contain a "deemer" clause which "deems" progressive bodily injury or property damage to "occur" on the last date of exposure, or date of discovery. *See e.g.*, Abex Corp. v. Maryland Casualty Co., 790 F.2d 119 (D.C. Cir. 1986) (discussing deemer clause in Liberty Mutual policy. Allocation issues involving policies with "deemer clauses" have rarely been addressed).

[5] It is black letter law in almost all jurisdictions that the duty to defend is broader than the duty to indemnify, and that the determination of whether an insurer owes a duty to defend is made by comparing the allegations of the complaint with the terms of the policy. *See e.g.*, Montrose Chemical Corp. v. Superior Ct., 6 Cal. 4th 283, 24 Cal. Rptr. 2d 467, 865 P. 2d 1153 (1993); Boston Symphony Orchestra v. Commercial Union Ins. Co., 406 Mass. 7, 545 N.E. 2d 1156 (1989). Under the law of many jurisdictions, facts extrinsic to the complaint may also give rise to a duty to defend when they reveal that there is a possibility a covered claim could be proved. *See e.g.*, Haskel Inc. v. Superior Ct., 33 Cal. App. 4th 963, 39 Cal. Rptr. 2d 520 (1995); Boston Symphony Orchestra v. Commercial Union, 406 Mass. 7, 545 N.E. 2d 1156. The duty to defend may exist even where coverage is in doubt and ultimately does not develop. Montrose Chemical Corp., 6 Cal. 4th at ___, 24 Cal. Rptr. 2d at ___, 865 P. 2d at ___.

potential for coverage under the policy.") Numerous appellate and trial courts have either expressly or de facto ruled that an insurer that is obligated to defend because a claim alleges injury that could fall, as least in part, within the insurer's policy period must defend the entire claim. *See, e.g.*, Puget Sound Power & Light Co. v. Great American Ins. Co., 51 F.3d 282 (9th Cir. 1995) (finding insurer's offer to participate in the defense based on proration between insured and uninsured years not even arguably reasonable, and awarding the insured its full costs of defense plus attorney's fees incurred in suing its insurer; Polaroid Corp. v. Travelers Indemnity Co., C.A. No. 88–5208, Memorandum of Decision and Order on Polaroid Corporation's Supplemental Motion For Summary Judgment on Defense Costs (Middlesex Super. Ct. Jan. 2, 1992) (Gershengorn, J.) ("each carrier's obligation to defend is separate and complete with respect to Polaroid").

B. Some Courts Require An Excess Answer to Defend Once the Underlying Limit In Its Policy Period Is Exhausted

Where the primary or underlying policies have been exhausted, an excess insurer's defense obligation depends upon whether excess policy language includes duty to defend. Where a claim involves insurers in multiple policy periods, a few courts have required an excess insurer to defend or contribute to defense once the underlying primary policy limit in its policy period limit in its policy period has been exhausted. *See, e.g.*, Dayton Indep. School Dist. v. National Gypsum Co., 682 F. Supp. 1403, 1411 n.23 (E.D. Tex. 1988), vacated on jurisdictional grounds sub nom., W.R. Grace & Co. v. Continental Casualty Co., 896 F.2d 865 (5th Cir. 1990), *reh'q denied.*

V. ALLOCATION OF INDEMNITY AMONG MULTIPLE INSURERS

The standard form insuring agreement states that

> The [insurance] company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury or property damage ... to which this insurance applies caused by an occurrence.[6]

Policyholders argue that the "all sums" language means that each policy provides full coverage up to its policy limits for occurrences that take place during its policy period. A number of courts have agreed, and held that the insurer's promise to pay "all sums" rather than "some sums" or "part of the sums" or "a proportional amount of the sums" means that once a policy

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[6] As previously noted, an "occurrence" includes continuous or repeated exposure to conditions which results in bodily injury or property damage during the policy period.

is triggered because there is an occurrence during the policy period, each insurer is fully obligated to the insured up to its policy limits.

Insurers, on the other hand, argue that the "all sums" language only applies to the portion of the bodily injury or property damage that took place during their policy period, even where the court has found there to be a single occurrence. The charts attached to this outline demonstrate the effect of various approaches on insureds and insurers.

A. Courts finding (Joint and) Several Liability

Where multiple policies are triggered, a majority of courts to address the issues have permitted the insured to select the triggered policy under which it is to be indemnified or held that each insurer is liable up to its policy limits for occurrences in its policy period(s). Some courts have characterized the insurer's obligation as "joint and several." Others have held that each CGL insurer has a several and indivisible obligation to defend and indemnify its insured irrespective of how many policies may be triggered.[7] *See, e.g.*, Monsanto Co. v. C.E. Health Compensation and Liability Ins. Co., 652 A.2d 30 (Del. 1994) (Missouri would follow majority rule holding insurers jointly and severally liable for pollution losses); Keene Corp. v. Insurance Corp. of North America, 667 F.2d 1034, 1049–1053 (D.C. Cir. 1988); J.H. France Refractories Co. v. Allstate Ins. Co., 534 Pa. 29, 629 A.2d 502 (1993) ( ); Broderick Investment Co. v. The Hartford Accident and Indemnity Co., 742 F. Supp. 581 (D. Colo. 1989) (but holding that allocation under "other insurance" clauses is not appropriate because cleanup will probably consume all primary and excess limits); AC&S, Inc. v. Aetna Cas. & Surety, 576 F.Supp. 936 (E.D. Pa. 1983) (asbestos disease); Central Illinois Pub. Serv. Co. v. Alliance Underwriters Ins. Co., No. 90–L–11094, slip op. (Circuit Ct. Cook Cty; Ill. December 30, 1991) (pollution); Washington Natural Gas Co. v. Aetna Cas. & Sur. Co., C.A. 91–2–13506–1 (Wash. Super. Ct., King Cty., June 9, 1994) (progressive environmental property damage); Federal Insurance Co. v. Susquehanna Broadcasting Co., 727 F.Supp. 169 (M.D. Pa. 1989) (CERCLA property damage); In Re Asbestos Coverage Cases, No. C315367 Proceeding No. 1072, Page III and IV Statement of Reasons for Decision (Calif. Super Ct. Jan. 24, 1990); Zurich v. Raymark Industries, Inc., 118 Ill. 2d 23 (1987) 145 Ill. App. 3d 173 (1st Dist. 1986) (asbestos); Ray Industries v. Liberty Mutual Ins. Co., 974 F.2d 754 (6th Cir. 1992) (environmental damage; Kuhn v. Grant Cty., Kansas, 201 Kan. 163, 439, P.2d 155 (1968) (workers comp insurers each fully liable to injured workman); Keene Corp. v. Insurance Co. of North America, 667 F.2d 1034, 1050–1051 (D.C. Cir. 1981) *cert. denied* 455 U.S. 1007 (1982) (asbestos); AC&S, Inc. v. Aetna Casualty & Surety Co., *et al.*, 764 F.2d 968 (3rd Cir. 1985) (asbestos); Federal Ins. Co. v. Susquehanna Broadcasting, 727 F. Supp. 169 (M.D. Pa. 1989) (CERCLA property damage); In Re Asbestos Insurance Coverage

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[7] The word "several" is defined in Black's Law Dictionary (1968) as "Separate; individual; independent; severable." A "joint" liability on the other hand is "one in which the obligors find themselves jointly but not severally, and which must therefore be prosecuted in a joint action against them all ... ." Id. at 972.

Cases, No. 315367 Proceeding No. 1072 Phase III and IV Statement of Reasons for Decision (Calif. Super. Ct. Jan. 24, 1990) (asbestos); Ray Industries v. Liberty Mut. Ins. Co., 974 F.2d 754 (6th Cir. 1992). *See also*, Crown Center; Redevelopment Corp. v. Accidental Ins. Co., 716 S.W. 2d 348 (Mo. App. 1986) (stating that insurers' obligations are several, and that each insurer has an independent duty to fully indemnify its insured for occurrences covered by its policy). After the insured selects the policy or policies from which to recover its loss, the designated insurer(s) may then seek contribution from other insurance companies whose policies are also triggered.

B. The Proration Fugue

1. Contribution by Equal Shares

After courts have adopted a "pro–rata" approach and required the insurer in each policy period to contribute equally up to the limits of its policy. This analysis is often based on the presence of an "equal shares" other insurance provisions in the primary policies, and does not usually result in attribution of loss back to the policyholders.

2. Pro Ration by Limits

A few courts have pro–rated the insured's liability among the insurers according to their policy limits. As, in the pro–ration by equal limits, the court usually finds the rationale for such apportionment in the insurers' "other insurance" clauses. *See* Avondale v. Travelers, ( ) (2nd Cir. 19). Under this model the insurers bear 100% of the risk, but the distribution of that risk is not selected by the policyholder.

3. Pro Ration by Years on the Risk

Insurers typically argue that they should only be obligated to pay a percentage of loss that is equal to the fraction of the triggered period during which they were on the risk.[8] A few courts have adopted this approach and have allocated to the insured a portion of loss allocated for years in which it was self-insured or cannot identify the insurer. *See* Insurance Co. of North America v. Forty–Eight Insulations, Inc., 633 F.2d 1212 (6th Cir. 1980) modified 657 F.2d 814 (6th Cir.) *cert. denied* 454 U.S. 1109 (1981); Stonewall Ins. Co. v. National Gypsum, 1992 WL 163180 (S.D.N.Y. June 24, 1992).

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[8] The Pro rata by years on the risk approved is inconsistent with the previous position of many insurers that "other insurance" provisions govern insurers' relative obligations in multiple policy periods.

4. Yet Another Iteration: Owens–Illinois

In Owens–Illinois, Inc. v. United Ins. Co., ___ NJ. ___, ___ A.2d ___ (1994), the insured contended that the "all sums" language required each insurer to indemnify the insured (subject to later contribution from other triggered insurers). The insurer took the coverage maximizing time–on–the–risk pro–rata approach. In December 1994, the New Jersey Supreme Court rejected both arguments and came up with still another approach to allocating liability among multiple insurers across time.

The court first concluded that "We are unable to find the answer to allocation in the language of the policies ... ." Id. at 39. Instead of interpreting uncertainties in the policy in favor of the insured, the court rejected both the policyholder and the insurer's analysis and held that losses should be allocated to policies on the basis of the "risks transferred" by the policyholder during the years of the injurious process. The court found that measure of the risk transferred in any one year is the policy limits of the triggered policies and adopted a formula which allocates loss among triggered policies "on the basis of policy limits, multiplied by years of coverage." Id. at [50]. The Court further held that where the policy holder had made a conscious decision not to purchase insurance during a portion of the injurious process, the policyholder should bear some of the loss:

> When periods of no insurance reflect *a decision by an actor to assume or retain a risk, as opposed to periods when coverage for a risk is not available*, to expect the risk–bearer to share in the allocation is not unreasonable.

Id. at [55–56] (emphasis added).[9]

The court's formula requires a finder of fact to come up with a nonexistent "policy limit" for years in which the insured chose not to purchase insurance (a result that is almost certainly well outside the reasonable expectations of the parties to the contract). In defining these hypothetical, self-insured limits, the Supreme Court cautioned that, "straight annual progression is not an appropriate measure of allocation. The degree of risk transferred or retained in the early years ... obviously was not at all comparable to that sought to be insured in later years."

The New Jersey Supreme Court's opinion has spawned to a whole new set of unanswered questions for parties litigating in New Jersey. First, the opinion does not

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[9] How much is allocated to the insured is based on the "risk assumed" during the uninsured period. Id. at [56].

address how to apply the formula to situations in which the insured has multiple layers of insurance which begin and end at different points across time.[10] Second, the Court did not address how to treat deductible of various sizes in different years. Third, the Court did not provide specific guidance on how to apply the formula to years in which the insured believes it purchased policies, but the policies cannot be located or the insurer is now insolvent.[11] Fourth, the Court did not address which of the parties has the burden of proving that the insured consciously chose to transfer or retain the risk and, if retained, what the amount of the risk retained was.

C. The Effect of Various Allocation Models, SIRs and Deductibles

A number of courts have held that where a single occurrence extends over multiple policy periods, the insured is only obligated to pay a single deductible or self insured retention. *See e.g.*, Air Products and Chemicals Inc. v. Hartford Acc. and Indem. Co., 1989 WL 73656 (E.D. Pa.) (only one retrospective premium may be collected for occurrences spanning multiple policy periods).

D. "Stacking" or "Pyramiding" Limits in the Same Layer

In Keene, the Court allowed the insured to pick the insurer from whom it would recover, but did not permit the policyholder to "stack" or "pyramid" the limits of multiple policies on the same layer. *See also* [ ]. A number of other courts addressing allocation in the medical malpractice context have also held that policyholders cannot "stack" limits of each year in which malpractice occurred. *See* Aetna Life & Casualty Co. v. McCabe, 556 F. Supp. 1342 (E.D. Pa. 1983); Hartford Casualty Ins. Co. v. Medical Protective Co., 1994 WL 202585 (Ill. App., May 23, 1994); Physician Insurance Exchange v. Garcia, 876 S.W.2d 842 (Tx. 1994); Zipkin v. Freeman, 436 S.W.2d 753 (Mo. 1969). However, other courts have allowed insureds to stack under a joint and several or several approach. *See e.g.*, J.H. France Refractories, **[cite and parenthetical]**. A proration almost always results in the "stacking" or "pyramiding" of limits if the liability exceeds a single limit. See Owens Illinois, **[cite, parenthetical]**; [ ],[12] In Re Asbestos Coverage Cases Decision on Phase IV Issues (San Francisco Cty. Superior Ct. Cal., August 29, 1988) *aff'd* on *other grounds*, 20 Cal. App. 4th

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[10] Owens–Illinois involved a relatively uncomplicated scheme with one insurer. Also, due to the overwhelming number of asbestos claims the company faced, it was relatively clear that all of its policy limits would be fully exhausted no matter what allocation scheme was adopted. **[check]**

[11] The Court did indicate that it was not concerned with the fact that its appointment scheme might cause an insurer to pay for losses that arose, at least in part, outside its policy period. Specifically, the Court noted: "That later insurers might need to respond to pre-policy occurrences is not unfair." Id. at ___.

[12] An examination of the drafting history of the standard form policy makes clear that the insurance industry knew that the limits of multiple occurrence policies could be stacked. Most insurers have turned their attention from anti–stacking arguments to proration by years on the risk to attempt to minimize their liabilities.

296 (1st Dist. 1993); Ducre v. Mine Safety Appliances Co., 645 F. Supp. 708 (E.D. La. 1986) *aff'd* 833 F.2d 588 (5th Cir. 1987) (silicosis claim). Many "other insurance" provisions also clearly contemplate that multiple limits in the same layer can be "stacked."

F. Exhaustion by Limits or Exhaustion by Layers

A court that adopts a "pro rata" approach that involves the "stacking" of limits may divide loss equally among the triggered periods without regard to the limit of the relevant primary policies (the "bathtub" approach) or can pro–rata liability according to the total limits issued by each of the relevant insurers (*see* Avondale v. Travelers, 774 F. Supp. 1416 (S.D.N.Y. 1991). The latter approach normally means that each of the primary policies must be exhausted before any of the first layer umbrella or excess policies is liable. (exhaustion by layer).

However, some courts have required an excess insurer to drop into the exhausted policies' spot and share with other unexhausted primary policies. *See* Associated International Insurance Co. v. St. Paul Fire & Marine Ins. Co. 220 Cal., App. 3d 692, 269 Cal. Rptr. 485 (Cal. App. 1990).

If an insured settles with its primary insurer for less than its policy limits and releases its primary insurer from further coverage obligations, courts have generally required the excess insurer to pay amounts in excess of the primary limit. *See, e.g.*, Star Gap v. Fidelity Casualty Co. of New York, 67 F.R.D. 689, 691 (1975), *aff'd*, 578 F.2d 1375 (3rd Cir. 1978); Allstate v. Riverside Insurance Co. of America, 509 F. Supp. 43, 47 (E.D. Mich. 1981).

VII. THE EFFECT OF "OTHER INSURANCE" PROVISIONS

Most general liability policies contain "other insurance" provisions. "Other insurance" clauses have been used to determine which insurer pays first or how liability should be divided among multiple insurers. *See, e.g.*, Mission Ins. Co. v. United States Fire Ins. Co., 401 Mass. 492 (1988). A typical "other insurance" provision in primary policy states:

> "When both this insurance and other insurance apply to the loss on the same basis, whether primary, excess or contingent, the company shall not be liable under this policy for a greater proportion of the loss than that stated in the applicable contribution provision below.
>
> (a) Contribution by Equal Shares. If all of such other valid and collectible insurance provides for contribution by equal shares, the company shall not be liable for a greater proportion of such loss than would be payable if each insurer contributes an equal share until the share of each insurer equals the lowest applicable

limit of liability under any one policy or the full amount of the loss is paid, and with respect to any amount of loss not so paid the remaining insurers then continue to contribute equal shares of the remaining amount of the loss until each such insurer has paid its limit in full or the full amount of the loss is paid.

(b) Contribution by Limits. If any of such other insurance does not provide for contribution by equal shares, the company shall not be liable for a greater proportion of such loss than the applicable limit of liability under this policy for such loss bears to the total applicable limit of liability of all valid and collectible insurance against such loss."

Excess policies frequently contain "other insurance" provisions which state that they are excess to another available ("excess clauses") insurance, or relieved of their obligations if other insurance is available (escape clauses). The application of "other insurance" provisions usually result in the exhaustion of all primary insurance before excess policies are required to respond. *See* United States Gypsum Co. v. Admiral Ins. Co., 268 Ill. App. 3d __, 205 Ill. *See* 619, 643, N.E. 2d 1226(1965); Continental Casualty Co. v. Armstrong World Industries, 776 F.Supp. 1296 (N.D. Ill. 1991). Policyholders often stand to benefit from an application of "other insurance" clauses to occurrences in multiple policy periods because other insurance clauses usually distribute loss only among "valid and collectible" other insurance, thereby defeating insureds' arguments that the policyholder should bear a portion of the risk for years in which the policies cannot be located, or insurers are insolvent, pollution exclusions bar coverage, or the insured self–insured. Moreover, at least one court has held that when an insured has settled with some of its insurers, the amount actually paid by that insurer becomes the total amount of insurance "available" under the settled policy for purposes of the "other insurance clause". Coordinated Asbestos Insurance Coverage Cases, 1072, Phase IV Statement of Reasons for Decision (Cal. Super. Ct., Jan. 24, 1990).

Although a number of courts have stated that they will look to "other insurance" provisions to allocate liability for multiple claims among multiple insurers, but few have actually done so. A few courts have stated that "other insurance" provisions are useful only in allocating obligations among insurers on the same risk at the same time. *See, e.g.*, Northern States Power Co. v. Fidelity Casualty Co. of N.Y., 517 N.W. 2d 918 (Minn. 1994) (progressive property damage case) (court holds that "other insurance" clauses in policies are irrelevant where policy periods are consecutive, not concurrent).

VIII. NON–CUMULATION PROVISIONS

Many umbrella and excess policies issued in the late 60s and 70s contain a "non–cumulation" provision which provides that the insurer's obligation is reduced by the

amount paid by insurers earlier in time and that the insurer will continue to cover bodily injury or property damage that takes place after its policy period without payment of further premium.[13] Several courts have held that the non–cumulation provision is valid, but there is little or no case law on the effect of non-cumulation provisions in jurisdictions that adopt a pro–rata approach. *See e.g.*, Flintkote Co. v. American Mutual Liability Ins., No. 808-594, Proposed Statement of Decision Phase 1–7 (Calif. Super. Ct. Oct 14, 1992) (non–cumulation clause is enforceable but may be impossible to apply); Air Products and Chemicals Inc. v. Hartford Ac. and Indem. Co., 1989 WL 73656 (E.D. Pa.) (non–cumulation clauses are valid and enforceable, but are not "escape clauses" that relieve insurer of obligations if loss is not fully paid by other insurers earlier in time). Non–cumulation provisions are particularly important for evaluating the claim value of an insurer on the risk just prior to the adoption of the pollution exclusion or an absolute pollution exclusion.

[13] A common form of non-cumulation provision states: PRIOR EXCESS INSURANCE AND NON-CUMULATION OF LIABILITY. It is agreed that if any loss covered hereunder is also covered in whole or in part under any other excess policy issued to the insured prior to the inception date hereof the limit of liability hereon as stated in the Declarations shall be reduced by any amounts due to the insured on account of such loss under such prior excess insurance.

Subject to the foregoing paragraph and to all the other terms and conditions of this policy in the event that personal injury or property damage arising out of an occurrence covered hereunder is continuing at the time of termination of this policy the company will continue to protect the insured for liability in respect of such personal injury or property damage without payment of additional premium.