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An Introduction to Insurance Allocation Issues in Multiple-Trigger Cases

Thomas M. Jones

Jon D. Hurwitz

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AN INTRODUCTION TO INSURANCE ALLOCATION
ISSUES IN MULTIPLE-TRIGGER CASES

THOMAS M. JONES†
JON D. HURWITZ††

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† Thomas M. Jones is a senior member of the firm and managing partner of
the Northwest Regional Office of Cozen and O'Connor in Seattle. Mr. Jones
heads the insurance coverage practice group in the Seattle office, and is national
chairman of the firm's environmental practice group, coordinating environmental
coverage suits in all Northwest jurisdictions for various insurers. Mr. Jones has
published and lectured extensively on environmental insurance coverage matters.
†† Jon D. Hurwitz is a third year law student at the Villanova University
School of Law and assisted Mr. Jones in the research and writing of this article.
I. INTRODUCTION

With the advent of complex multi-claim litigation, cumulative exposure cases, long-term environmental damage claims and toxic tort litigation, courts have faced the question of how to allocate indemnity payments among multiple insurers and their insureds on an increasingly frequent basis. The stakes of "environmental litigation" are staggering. For example, cleanup costs under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) are projected to reach between eighty billion and one trillion dollars. Although complex environmental coverage


litigation has received a great deal of attention over the last decade, the judiciary has only recently begun to address the problematic allocation and exhaustion issues created largely by multiple-trigger rulings in favor of policyholders. While it is impossible to reconcile substantively the myriad of allocation and exhaustion decisions, one recurring theme is many courts’ desire to maximize the coverage available to policyholders. In light of this, as well as the great financial stakes of environmental litigation, it is imperative that


4. See C. MacNeil Mitchell, Allocating Liability for “Long Tail” Pollution Damages, 12 No. 7 CORP. CONSULT. 11, Dec. 1997, at *11 (noting that “[u]nlike the more settled rules of law governing ‘scope of coverage’ issues, the rules governing ‘allocation of coverage’ have not yet achieved the same degree of appellate clarification”). To the contrary, some higher courts have moved away from earlier bright line rules to permit more flexible allocation at the trial court level. See id.; see also David O. Larson et al., Review of Recent Developments in Excess, Surplus Lines, and Reinsurance Law, 32 TORT & INS. L.J. 359, 360 (1997) (highlighting that California’s appellate courts have granted trial courts discretion to choose most equitable allocation method).

A court’s choice regarding the applicable trigger of coverage bears directly on the issue of allocation. See Northern States Power, 523 N.W.2d at 662 (explaining that “choice of trigger theory is related to the method a court will choose to allocate damages between insurers”). Although the allocation and “trigger of coverage” issues are related, it is important to note their conceptual and analytical differences. While “trigger analysis” determines which policies are potentially liable, “allocation analysis” determines the amount of liability any one policy will bear. Additionally, although allocation is not usually an issue where damages are confined to a single policy period, when it is an issue, trigger analysis is considerably important. One commentator states that “pinning down the trigger period to where it is no longer in real dispute is probably the single most important ingredient in resolving the overall insurance allocation question.” Mitchell, supra note 1, at *5.

5. See, e.g., Lac d’Amiante du Quebec, Ltee. v. American Home Assurance Co., 613 F. Supp. 1549, 1551 (D.N.J. 1985) (observing that “the courts have offered conflicting interpretations of the manner in which virtually identical policies allocate liability”). In Lac d’Amiante, a case in which property damage led to an asbestos coverage dispute, the court attributed the inconsistent judicial outcomes in this type of case to the difficulties inherent in both defining the concept of “injury” as well as determining specific coverage periods in which injury might have occurred. See id. The Lac d’Amiante court also highlighted some courts’ “desire . . . to maximize coverage even when to do so requires judicial sleight of hand.” Id. Similarly, in one of the most well-known decisions in this area, Owens-Illinois, Inc. v. United Insurance Co., the New Jersey Supreme Court acknowledged that “the differing interpretations of which occurrence constitutes the injury contemplated by the language of insurance policies” sometimes result from a “‘leap of logic’ that all the damages can be thought to be imposed in any one of the years of exposure or release.” Owens-Illinois, Inc., v. United Ins. Co., 650 A.2d 974, 989 (N.J. 1994) (quoting Lac D’Amiante, 613 F. Supp. at 1551). Many commentators assert that courts should reject this “coverage maximization” rationale because the long-term results it produces are “both inefficient and unfair.” Doherty, supra note 1, at 266-67.
both carriers and insureds understand the issues involved in multiple-policy coverage litigation.

This Comment provides a broad survey of insurance allocation issues. Part II reviews the insurance concepts that underlie the multiple-policy coverage issues. Part III provides an overview of the judicial application of "horizontal" versus "vertical" policy exhaustion. Part IV outlines the four principal methods by which courts allocate indemnification obligations among multiple carriers. Part V addresses allocation of defense costs. Part VI summarizes allocation of shares to the policyholder, also known as "orphan shares."

II. BACKGROUND OF THE GENERAL STRUCTURE OF INSURANCE POLICIES

A. Underlying Policy Language

From the late 1960s through the mid-1980s, comprehensive general liability (CGL) policies contained insuring agreements under which the insurer would pay "all sums which the insured shall become legally obligated to pay as damages because of property damage or bodily injury to which this insurance applies, caused by an occurrence." The CGL's policy's definitions of "bodily in-
jury” and “property damage” made it clear that the insured would be indemnified only for losses occurring during the policy period.\textsuperscript{12} A preliminary question in any coverage analysis is, therefore, whether damage or injury during the policy period triggered a policy’s coverage. This is known as the “trigger of coverage” issue.

Many CGL policies also contain an “other insurance” clause, which limits the carrier’s obligations when the insured has “other valid and collectible insurance” available.\textsuperscript{13} When other insurance is available, if the CGL policy is primary, the carrier’s obligations are unaffected unless the other collectible insurance is also primary, in which case the insurers will share the loss.\textsuperscript{14} The “other insurance” clause further provides that if the CGL policy is excess insurance, the insurer will pay its share of the loss that exceeds the sum of “(1) [t]he total amount that all [collectible] other insurance would pay for the loss in the absence of [that] insurance; and (2) [t]he total of all deductible and self-insured amounts under all that other insurance.”\textsuperscript{15} Additionally, the excess insurer’s duty to de-

\textsuperscript{12} See id. CGL policies commonly defined “occurrence,” “bodily injury” and “property damage” as follows:

“Occurrence” means 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.

“Bodily injury” means bodily injury, sickness or disease sustained by any person which occurs during the policy period, including death at any time resulting therefrom.

“Property damage” means (1) physical injury to or destruction of tangible property which occurs during the policy period, including the loss of use thereof at any time resulting therefrom, or (2) loss of use of tangible property which has not been physically injured or destroyed, provided such loss of use is caused by an occurrence during the policy period.

\textsuperscript{13} Id. The New Jersey Supreme Court noted in Owens-Illinois v. United Insurance Co. that “[h]istorically, ‘other insurance’ clauses were designed to prevent multiple recoveries when more than one policy provided coverage for a given loss.” Owens-Illinois v. United Ins. Co., 650 A.2d 974, 995 (N.J. 1994).

\textsuperscript{14} See H. James Wulfsberg & Timothy A. Colvig, The 1986 Commercial General Liability Insurance Program, in CONSTRUCTION CONTRACTS AND LITIGATION 1988, at 446 (PLI Real Est. L. & Practice Course Handbook Series No. 508, 1988) (stating that “[i]f this insurance is primary, our obligations are not affected unless any of the other insurance is also primary and ... then, we will share with all that other insurance by the method described ... below”). For an explanation of the method by which insurers share the loss, see infra note 17 and accompanying text.

\textsuperscript{15} Wulfsberg & Colvig, supra note 14, at 446. A typical “other insurance” states: “Excess Insurance. This insurance is excess over any of the other insurance, whether primary, excess, contingent or on any other basis.” Id. The clause contin-
fend under the "other insurance" clause is limited. When multiple insurers are to share a loss, the clause calls for "contribution by equal shares" if permissible and "contribution by limits" in all other cases.

B. Excess Liability Insurance Policies

1. Primary Policies Versus Excess Policies

Policyholders exposed to large amounts of liability frequently purchase several layers of insurance coverage. Primary insurance typically comprises the first layer of coverage. Most primary-level policies impose on the insurer a duty to defend, subject to appropriate notice and tender. A carrier's obligations under a primary policy attach immediately upon the happening of a covered event or "occurrence."

The other layers of coverage are excess layers. Liability under an excess policy attaches only upon the exhaustion of the limits of some other policy or policies. The excess insurer is liable, up to its policy limits, for the amount of covered loss exceeding the limits of the underlying policy or policies, including self-insured retentions or deductibles. Also, in contrast to primary policies, excess

ues by explaining how the loss will be shared, as outlined in the text accompanying this note. See id. The clause concludes: "[w]e will share the remaining loss, if any, with any other insurance that is not described in this Excess Insurance provision and was not bought specifically to apply in excess of the Limits of Insurance shown in the Declarations of this Coverage Part." Id. at 447.

16. See id. at 446. Specifically, the CGL policy provides that when the insurance is excess, the insurer will not be obligated to defend any claim that any other insurer must defend. See id. Further, although the excess insurer will defend in cases where no other insurer will defend, in doing so the excess insurer is entitled to the insured's rights against all non-defending insurers. See id.

17. Id. at 447. The pertinent language of the other insurance clause states: 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.

Id.

18. See General Refractories Co. v. Allstate Ins. Co., No. CIV.A. 89-7924, 1994 WL 246375, at *4 (E.D. Pa. June 8, 1994) (explaining that distinction between primary and excess policies "is critical, because unlike primary insurers, excess insurers are not liable merely because of the occurrence of an injury within the scope of the policy"). Exhaustion of the primary insurance is a condition precedent to the triggering of an excess insurer's liability. See id.
liability policies typically do not impose on the insurer a duty to defend.  

2. **Follow-Form Versus Umbrella Excess Policies**

Excess insurance, as explained above, is coverage that attaches only after the exhaustion of a predetermined amount of underlying coverage. A follow-form excess policy provides coverage above the underlying limits according to the same terms and conditions as the primary policy. If the policyholder has only primary and excess policies, the excess layer of coverage sits directly above the primary layer or self-insured retention. Follow-form excess policies also commonly contain unique provisions that the underlying primary policy does not contain, such as an additional exclusion. If the policyholder has umbrella liability coverage as well as primary coverage, the excess layer sits above the umbrella layer. An umbrella excess policy may provide broader coverage than scheduled underlying insurance policies. This coverage may occur due to either an exclusion in the primary policy or the primary insurer's insolvency. An umbrella policy that "drops down" usually does so subject to the policyholder paying some prescribed retention amount.

III. **"Horizontal." Versus "Vertical." Exhaustion of Policies**

A. **Background**

When a claim potentially triggers numerous layers of coverage over multiple policy periods, perhaps the most critical concern from an excess insurer's standpoint is the order in which a court will decide to exhaust the policies at issue. The two basic methods of exhaustion courts apply are "horizontal" exhaustion, or "exhaustion by layers," and "vertical exhaustion," or "exhaustion by...

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19. For additional discussion of the excess insurer's duty to defend, see *supra* note 16 and accompanying text.

20. See, e.g., *Federal Ins. Co. v. Scarsella Bros., Inc.*, 931 F.2d 599, 605 (9th Cir. 1991) (explaining that inclusion of insolvency in policy term "exhausted" obligated excess insurer to drop down and cover policyholder in place of insolvent primary insurer).

21. See H. Wesley Sunu et al., *Recent Developments in Excess, Surplus Lines, and Reinsurance*, 31 Tort & Ins. L.J. 239, 245 (1996) (stating that "[t]he excess carrier's ultimate exposure for contributing ... is completely dependent upon the determination reached by the courts concerning whether a horizontal or vertical allocation formula will be applied at the primary layer").

22. For a comprehensive discussion of horizontal exhaustion, see *infra* notes 26-45 and accompanying text.
years.” Whether a court applies horizontal or vertical exhaustion determines which policies need to be exhausted before the triggering of a particular excess policy.

Briefly stated, those advocating vertical exhaustion argue that “underlying policies” refer only to those policies directly under the excess policy at issue; that is, only the primary or other underlying policies issued during the same policy period as the excess policy at issue must be exhausted before triggering the excess policy. Conversely, those advocating horizontal exhaustion assert that all triggered underlying policies must be exhausted, regardless of the policy period, before the excess insurer becomes liable. Excess liability policies are often silent regarding whether only the immediate underlying policy or all lower level policies must be exhausted before the excess coverage is triggered. This Part examines exhaustion approaches before discussing allocation theories, as an exhaustion ruling favorable to the excess insurer might fully release that carrier from participation in the allocation process.

23. For a comprehensive discussion of vertical exhaustion, see infra notes 46-51 and accompanying text.

Although most courts have adopted either horizontal or vertical exhaustion, one court recently eschewed both approaches. See Carter-Wallace, Inc. v. Admiral Ins. Co., 712 A.2d 1116, 1123 (N.J. 1998). In Carter-Wallace, the New Jersey Supreme Court adopted a hybrid approach, whereby damages were apportioned among the years in which policies were triggered “without reference to the layering of policies in the triggered years.” Id. at 1123-24 (citation omitted). Under the hybrid approach, however, each coverage layer must be depleted within any single year before the next level can be tapped. See id. at 1124.

24. The policyholder is frequently the party arguing in favor of vertical exhaustion because it leaves other primary policies available, or unexhausted. Vertical exhaustion provides the insured with substantially greater coverage than does horizontal exhaustion, as primary policies usually provide defense costs in addition to the limits of liability, while excess policies generally do not provide for defense costs.

25. The application of a particular exhaustion approach, usually horizontal, can absolve the excess carrier, either in whole or in part, of liability to the policyholder. Such results have led counsel for policyholders to lament, “[i]n order to even get in the door with excess insurers — to ‘tap’ those excess policies for coverage — the insured must overcome the many ‘exhaustion’ hurdles upon which excess insurers rely to deny coverage. The insured does not face these issues with its primary insurers.” David W. Steuber & Michael A. Rossi, What Difference Can a ‘Layer’ Make?, COVERAGE, Nov.-Dec. 1994, at 1, 4. For an example of a court’s application of horizontal exhaustion and its subsequent finding that an insured could not recover from its excess insurer without first exhausting all triggered primary policies, see Continental Cas. Co. v. Armstrong World Indus., 776 F. Supp. 1296, 1301 (N.D. Ill. 1991); see also infra notes 26-30 and accompanying text for a complete discussion of Continental Casualty.
B. "Horizontal Exhaustion" or "Exhaustion by Layers"

Horizontal exhaustion requires each layer of coverage to indemnify the policyholder to the full extent of its respective policy limits before requiring contribution by any policies in the layer above. When an occurrence potentially implicates more than policy layer, each triggered primary policy can be called upon to respond to the claim up to the full limits of that policy. Excess carriers often argue for application of this "exhaustion by layers" approach, which triggers their policies only after the limits of all triggered primary policies have been exhausted.

The court in Continental Casualty Co. v. Armstrong World Industries, Inc. adopted horizontal exhaustion. In Continental Casualty, an action involving thousands of asbestos-related personal injury claims spanning twenty-two years of coverage, the district court held that the policyholder was required to exhaust all of its twenty-four triggered primary liability policies before it called upon Continental Casualty Company's (CNA's) two excess umbrella policies for payment. The court found that the CNA policies' "other insurance" clauses stated with reasonable clarity that coverage would only begin after the exhaustion of any applicable primary insurance. Consequently, the CNA policies' plain meaning contradicted the policyholder's claim that only the underlying primary policies issued during the same policy period need be exhausted before CNA's excess liability would begin. By ruling in favor of the insurer, the court directed that policies were to be exhausted by layers.

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27. Id. at 1298-99, 1301.
28. See id. at 1301. Although schedules of underlying primary policies were attached to both CNA policies, the CNA policies' "other insurance" clauses did not confine their limitations to the listed policies. See id. In addition, each CNA policy defined "ultimate net loss" as excluding amounts other insurance covered. See id. Specifically, one excess policy excluded payments that were recoverable "through any other valid and collectible insurance." Id. The other policy allowed deductions for "other insurances . . . other than the [listed] underlying insurance and excess insurance purchased specifically to be in excess of this policy . . . ." Id. (alteration in original).
29. See id. The Continental Casualty court reasoned that "[t]he CNA policies are both specifically designated as 'umbrella' excess policies, designed to afford coverage only when all other types of insurance are exhausted." Id. (citing 8A APPLEMAN, INSURANCE LAW AND PRACTICE § 4096, at 348 & § 4909.85, at 453-54 (1981)). In addition, because the CNA policies were unambiguous regarding the exhaustion requirement, the doctrine of contra proferentum (construe against drafter) was inapplicable. See id. at 1301.
30. See id.
When a similar dispute arose in *General Refractories Co. v. Allstate Insurance Co.*, the United States District Court for the Eastern District of Pennsylvania relied on *Continental Casualty* in applying horizontal exhaustion. In *General Refractories*, the policyholder sought a determination of its rights under certain excess policies issued to it by Commercial Union. At issue was whether the policyholder “must exhaust all primary coverage before seeking indemnification from any of its excess insurers, or whether it need only exhaust the limits of the [directly] underlying policies.” Citing *Continental Casualty*, the *General Refractories* court rejected the policyholder’s contention that Commercial Union became liable immediately upon the exhaustion of the policies directly underlying its excess umbrella policies. Instead, the court emphasized that the excess policies at issue specifically provided that Commercial Union “shall not be liable for any ‘ultimate net loss’ so long as ‘other valid and collectible insurance’ exists.”

The *General Refractories* court advanced as an important additional factor in support of its application of horizontal exhaustion the underlying purpose of the excess insurance policies. The court stated that “[u]nlike primary insurance policies, umbrella policies’ raison d’être is to provide affordable protection against excess judgments of third parties . . . [which] is underscored by the difference in premiums . . . insurance companies charge for the two types of policies.” Specifically, the *General Refractories* court highlighted that premiums for umbrella insurance are significantly less than premiums for primary insurance because the related risks for umbrella policies are substantially less than those for primary policies. Further, the court recognized that because to permit the policyholder to seek payment from its excess carrier before exhaust-

32. See id. at *8.
33. See id. at *1. In *General Refractories*, thousands of individuals sued the insured, a manufacturer of products containing asbestos and silica, claiming that they were injured by the use of the products. See id.
34. Id. at *7 (emphasis added). In *General Refractories*, as in *Continental Casualty*, each of Commercial Union’s excess policies contained a declaration sheet naming specific underlying policies. See id.
35. See id. at *8.
36. *General Refractories*, 1994 WL 246375, at *8. As the *General Refractories* court highlighted, Commercial Union’s excess policy provisions “unambiguously provide that even if the stated policy limits are exhausted, [Commercial Union’s] liability will not arise if other insurance is available.” Id.
37. See id.
38. See id. (citation omitted).
39. See id.
ing all of its primary insurance would be to subvert the purpose of excess insurance, horizontal exhaustion was appropriate.40

State courts in several recent decisions have adopted horizontal exhaustion.41 In United States Gypsum Co. v. Admiral Insurance Co.,42 a property damage case, the Illinois Court of Appeals affirmed the trial court's ruling requiring the policyholder to exhaust all triggered primary coverage before it could recover under the excess policies at issue.43 Significantly, the United States Gypsum court noted that adopting vertical exhaustion, as the policyholder advocated, "would allow [the policyholder] to effectively manipulate the source of its recovery, avoiding difficulties encountered as the result of its [decisions regarding insurance]."44 Consequently,

40. See id.
43. Id. at 1262. In United States Gypsum, a manufacturer of asbestos-containing building materials moved for a declaratory judgment, seeking insurance coverage for damage to third-parties' real property and buildings caused by asbestos release. See id. at 1229. The United States Gypsum court based its decision on the plain language of the excess policies' "other insurance" clause, holding that the clause "unequivocally sets forth that the excess insurer will not contribute 'if other valid and collectible insurance with any other insurer is available to the insured.'" Id. at 1261 (quoting language of excess insurance policy). The United States Gypsum court found the language of the other insurance clause indicated that the excess policy was to "serve as an excess policy to all triggered primary policies, regardless of whether they extend over multiple policy periods or [only] one." Id.
44. Id. at 1262. The United States Gypsum court concluded that if it permitted the policyholder to recover from excess insurance policies upon the exhaustion of a single primary policy, the policyholder could seek indemnification from its excess policies rather than from either itself as a primary self-insurer or from insolvent insurers in other triggered policy periods. See id. at 1261. The court further noted that "[s]uch a practice would blur the distinction between primary and excess insurance, and would allow certain primary insurers to escape unscathed when they would otherwise bear the initial burden of providing indemnification." Id. at 1262 (citation omitted).
C. "Vertical Exhaustion" or "Exhaustion by Years"

While horizontal exhaustion appears to be the dominant exhaustion theory courts apply, some courts have adopted a vertical approach, particularly in recent decisions. Vertical exhaustion, or "exhaustion by years," is also known as "spiking" due to its precipitous approach. That is, once a primary policy is exhausted, any remaining obligation shifts upward to the policy at the next level of coverage that was on the risk for the same period. Specifically, vertical exhaustion requires each excess policy in a triggered year to contribute to indemnification as soon as its particular underlying coverage is exhausted, even if other triggered primary policies (covering other periods) remain "untapped."

In *Dayton Independent School District v. National Gypsum Co.*, where asbestos property damage claims were at issue, the District Court for the Eastern District of Texas adopted vertical exhaustion and held that only the policies immediately underlying a given excess policy need be exhausted before the policyholder may call upon that excess policy for indemnification. The *Dayton* court reasoned that because each triggered policy was required to indemnify the policyholder for its entire liability, up to its coverage limits, the policyholder could select which triggered policy it wished to provide coverage. Consequently, vertical exhaustion permitted the policyholder to designate the policy year that would cover the

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46. See, e.g., UNR Indus., Inc. v. Continental Ins. Co., Nos. 85-C-3532, 83-A-2523, 1988 WL 121574, at *12 (N.D. Ill. Nov. 9, 1988) (holding that "when underlying coverage is exhausted for any policy period, liability will exist under the terms of an excess policy . . . . It is not necessary that underlying coverage be exhausted for an entire policy period before any claim can be made against an excess carrier"); Westinghouse Elec. Corp. v. Aetna Cas. and Sur. Co., No. L-069351-97 (N.J. Super. Ct. Aug. 7, 1998) (explaining that excess policy is triggered and liable to its limits as soon as directly underlying policy is exhausted according to court); Illinois Power Co. v. Home Ins. Co., No. 95-L-284 (Ill. Cir. Macon County Aug. 15, 1997) (finding that policy language gives insured right to exhaust vertically and does not require policyholder to pay pro-rata damage for uninsured years).


48. See id. at 1411 n.23.

49. See id. at 1411.
loss and receive indemnification from excess insurers for that period as the underlying policies were exhausted.\textsuperscript{50} Notably, the \textit{Dayton} court concluded that because the “other insurance” clauses the excess policies contained related only to the rights of each carrier against the others, the clauses did not limit the policyholder’s right to exhaust by years.\textsuperscript{51}

IV. \textsc{Allocation of Indemnification Obligations Among Multiple Carriers}

When more than one policy period is triggered by a continuous occurrence, a crucial determination is the manner in which claims for indemnity should be allocated or apportioned among the triggered policies.\textsuperscript{52} When an occurrence implicates multiple policies, courts often use one of the following methods to allocate indemnity obligations among insurers: (1) joint and several liability;\textsuperscript{53} (2) pro-ration by years;\textsuperscript{54} (3) pro-ration by years and limits;\textsuperscript{55} or (4) pro-ration by exposure.\textsuperscript{56}

A. “Joint and Several” Liability

“Joint and several,” or “all sums” liability, which policyholders usually assert, allows recovery \textit{in full} under any triggered policy of the policyholders’ choosing and leaves the selected insurer to pursue cross-claims against other carriers whose policies were also available. Under joint and several liability, any policy on the risk for any

\textsuperscript{50} See id. at 1411 & n.23; see also UNR Indus., Inc. v. Continental Ins. Co., Nos. 85-C-3532, 83-A-2523, 1988 WL 121574, at *20 (N.D. Ill. Nov. 9, 1988) (holding that “[policyholder] is entitled to look to excess and umbrella carriers for coverage and indemnity after an underlying carrier has paid its limits for any annual period and need not await full payment by a primary carrier for the entire policy period”).

\textsuperscript{51} See Dayton, 682 F. Supp. at 1411 n.21. The Dayton court explained that “because no Carrier has filed a cross-claim in this action, the task of interpreting the ‘other insurance’ clauses is not before the Court. Moreover, the ‘other insurance’ clauses do not establish a basis for allocation to the insured.” \textit{Id.}

\textsuperscript{52} See Northern States Power Co. v. Fidelity & Cas. Co., 523 N.W.2d 657, 665 (Minn. 1994) (stating, “[w]e do not expect that this case will be the ‘last word’ in this area. Environmental liability insurance law, like any other area of law, will have to develop over time and trial courts must be flexible in responding to new fact situations.”).

\textsuperscript{53} For a discussion of allocation under joint and several liability, see \textit{infra} notes 57-77 and accompanying text.

\textsuperscript{54} For a discussion of allocation under pro-ration by years, see \textit{infra} notes 78-87 and accompanying text.

\textsuperscript{55} For a discussion of allocation under pro-ration by years and limits, see \textit{infra} notes 88-99 and accompanying text.

\textsuperscript{56} For a discussion of allocation under pro-ration by exposure, see \textit{infra} notes 100-05 and accompanying text.
portion of the period in which the insured sustained property damage or bodily injury is jointly and severally obligated to respond in full, up to its policy limits, for the loss. Courts applying joint and several liability usually focus on a policy’s "all sums" language, which commonly states: "[t]he Company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay."57 Once a policy is triggered, an insurer becomes liable for all sums that it is legally obligated to pay, which may include those sums attributable to bodily injury or property damage that did not occur during the insurer’s policy period.58

The leading case adopting joint and several liability is Keene Corp. v. Insurance Co. of North America.59 In Keene, a manufacturer sought a declaratory judgment of its right to indemnification by its CGL insurers for asbestos-related personal injury claims.60 The United States Court of Appeals for the District of Columbia held that once a particular CGL policy is triggered, the insurer is required to fully indemnify the policyholder for the entire loss up to its policy limits, even though part of the injury may have occurred during another policy period or while the policyholder was uninsured.61 Because each policy issued from the date of initial inhalation of asbestos to the date of manifestation of the injury was

57. For the full text of pertinent, typical CGL policy language, see supra notes 11-12 and accompanying text. Alternatively, some policies contain a substantially similar clause that states that the insurer will pay the "entire liability," rather than "all sums." Courts apply the same interpretation to either clause. See, e.g., Gillespie, supra note 2, at 546 (using J.H. France v. Allstate Ins. Co., 626 A.2d 502 (Pa. 1993), as example of manner in which court interprets these clauses).

58. See John H. Mathias, Jr. et al., Winner Take All — Or Nothing: Allocation Issues in Insurance Claim Resolution, 11 No. 12 CORP. COUNS. 1, May 1997, at *2 (contending that policy language "does not limit the insurer’s duty to pay damages to those that result from bodily injury or property damage that takes place during the policy period").


60. See id. at 1038. After being named as a co-defendant in over 6000 lawsuits alleging injuries caused by exposure to its asbestos-containing thermal insulation products, the policyholder sought coverage under CGL policies from four carriers issued to it between 1961 and 1980. See id.

61. See id. at 1047. The Keene court reasoned that in a long-term damage claim such as the one before it, when the policyholder is held liable for the entire loss, only part of the injury will have developed during any single policy period. See id. The court further stated, "[t]he issue that arises is whether an insurer is liable in full, or in part, for [the policyholder’s] liability once coverage is triggered." Id. Relying on the "all sums" language in the policy, the Keene court concluded that the insurer was liable in full, subject to contribution from other insurers as set out in the policy’s "other insurance" clause. See id. In so holding, the court declined to characterize the insured’s ultimate injury as resulting from a series of discrete injuries, each confinable to an individual policy period. See id. Consequently, the Keene court concluded that pro-ration by years allocation would be inappropriate. See id.
triggered, each insurer in *Keene* had a joint obligation to provide the policyholder with full coverage. Further, under *Keene*, the policyholder could seek indemnification from any of the triggered policies it chose, with the stipulation that only one policy's limits could apply to each injury. Several courts, including the Third Circuit, the Pennsylvania Supreme Court, and other federal and state courts, have followed *Keene* in adopting joint and several liability.

The Supreme Court of Washington followed *Keene*, without wholly relying on its rationale, in deciding *American National Fire*...
Insurance Co. v. B & L Trucking and Construction Co.\textsuperscript{67} In B & L Trucking, the court held that insurers' liability for continuous injury losses is joint and several.\textsuperscript{68} Consequently, the court concluded that pollution cleanup costs need not be allocated between an insurer and its insured when the pollution occurred over a number of years and the policyholder was uninsured for a portion of that period.\textsuperscript{69} As in Keene, the B & L Trucking court found that the "all sums" language of the policy warranted this interpretation.\textsuperscript{70}

In her dissenting opinion in B & L Trucking, Justice Madsen highlighted her perceived shortcomings of the majority opinion by succinctly stating, "[t]he majority requires the insurer in this case to provide insurance coverage it neither contracted to provide nor received insurance premiums for."\textsuperscript{71} Furthermore, according to Justice Madsen, the majority's construction of the "all sums" language as suggesting joint and several liability was unreasonable.\textsuperscript{72} Justice Madsen concluded that in cases where environmental damage continues through insured and uninsured periods, it is illogical and inappropriate to analogize insurance allocation to the tort concept of joint and several liability.\textsuperscript{73}

68. See id. at 254-57.
69. See id.
70. See id. at 256-57. The B & L Trucking court rejected the insurer's argument that because the insured "expected" damage after a certain date, policies triggered before that date could not be found liable for continuing damage after that date. See id. at 255-56. Instead, the court found that once an occurrence triggers a policy, the insurer is liable for all continuing damages flowing from the triggering occurrence. See id. Moreover, the B & L Trucking court reasoned that the insurer was a victim of its own policy language in that because the policy failed to specify whether it provided joint and several or pro-rata coverage, it was ambiguous and had to be construed against the drafter. See id. at 256-57. Also, "if Northern intended solely to be liable on a pro rata basis it could have included that language in its policy." Id. at 256. Further, the B & L Trucking court found that neither principles of fairness nor public policy overcome this construction against the insurer, as "because insurance policies are considered contracts, the policy language, not public policy, controls." Id. at 257.
71. Id. Recall that the standard CGL policy requires insurers to pay for only those injuries occurring "during the policy period." For the pertinent text of a standard CGL policy, see supra note 12.
72. See B & L Trucking, 951 P.2d at 258. Justice Madsen found no ambiguity in the policy, explaining:

Because the language of the policy as a whole does not obligate the insurer to pay any and all sums regardless of when the property damage occurred and regardless of the relevant policy period, there is no ambiguity to be construed in favor of the insured and against Northern Insurance.

Id.
73. See id. at 259. Justice Madsen stated that "[a]n insured should not be able to shift its responsibility for uninsured years to a carrier which did not contract to
Several commentators have justly criticized joint and several liability because it ignores "two of the most basic components of every insurance policy, the duration of the policy period and limits of liability." Moreover, this method of apportionment purports to extract relevant meaning from the "all sums" policy language, even though "[t]he language was never intended to cover apportionment when continuous injury occurs over multiple years." Joint and several liability also allows a policyholder to shift the risk of its own bad bargain to those solvent excess carriers who happen to have been on the risk during any triggered period. Finally, this

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75. Owens-Illinois, Inc. v. United Ins. Co., 650 A.2d 974, 989 (N.J. 1994). The Owens-Illinois court commented that "to convert the 'all sums' or 'ultimate net loss' language into the answer to apportionment when injury occurs over a period of years is like trying to place one's hat on a rack that was never designed to hold it. The insurer's liability is not 'joint and several,' it is individual and proportionate."); see also Montrose Chem. Co. v. Admiral Ins. Co., 913 P.2d 878, 903 (Cal. 1995) (rejecting joint and several liability, in part because of the "arbitrariness, from the carrier's perspective, of telescoping all damage in a continuing injury case in a single policy period").

76. Such a situation may arise in the case of a policyholder with a self-insured retention, retrospective premium plans, one or more insolvent carriers, no coverage for significant periods or no coverage due to policy exclusions. See, e.g., General Refractories Co. v. Allstate Ins. Co., No. CIV. A.89-7924, 1994 WL 246375, at *7
allocation scheme generates large transaction costs by requiring an increased amount of litigation.77

B. “Pro-Ration by Years”

Under “pro-ration by years,” or “time on the risk,” each triggered policy bears a share of the total damages proportionate to the number of years it was on the risk, relative to the total number of years of triggered coverage. Significantly, pro-ration by years usually assigns loss without regard to the primary policies’ limits of liability. For example, if a single continuing occurrence begins in year one and ends in year ten, and there are ten one-year policies, exactly one-tenth of the loss will be assigned to each policy.

Pro-ration by years rejects the basic premise of joint and several liability; namely, that the “all sums” language makes a carrier liable for the full amount of bodily injury or property damage if any portion of the loss occurred during its policy period. Instead, courts adopting pro-ration by years recognize that the definitions of “occurrence,” “bodily injury” and “property damage,” read in conjunction with the “Insuring Agreement,” mandate that the allocation of loss to a particular policy be proportionate to the damage suffered during that policy’s term. Due to the difficulty of establishing the actual amount of loss sustained during an individual policy period, however, these courts reason that a simple calculation based on

(E.D. Pa. June 8, 1994) (holding that underlying insurer’s insolvency did not require excess insurer’s coverage to “drop down”).

77. See Doherty, supra note 1, at 271 (explaining that because of additional litigation joint and several liability requires, that allocation method “does not solve the allocation problem; it merely postpones it”). Joint and several allocation necessitates the filing of cross-claims or subsequent actions to fairly determine carriers’ contributions. This approach results in the need for a second lawsuit in which the insurer selected by the policyholder sues the other triggered insurers for contribution.

In support of its rejection of joint and several liability, the Sixth Circuit stated in Forty-Eight Insulations that “[t]he only thing on which all parties agree is that there is a need for us to arrive at an administratively manageable interpretation of the insurance policies — one that can be applied with minimal need for litigation.” Forty-Eight Insulations, 635 F.2d at 1218. The court in Owens-Illinois similarly highlighted that “[o]ne thing is certain: The present system is inefficient.” Owens-Illinois, 650 A.2d at 993. Further, the Owens-Illinois court emphasized that although legal costs in environmental coverage litigation can represent as much as 70% of total cleanup costs, “once the rules are settled, litigation costs may decline.” Id. (citation omitted). One commentator, however, asserts that CERCLA itself must change before litigation costs can decrease. See Chris Roush, The Hurricane Called Superfund: Cleanup Claims Could Hit $1 Trillion — and Batter Insurers, Bus. Wk., Aug. 2, 1993, at 74 (noting that “[o]f the $15 billion that has already been spent on Superfund cleanups [through 1993], roughly 75% has gone to legal fees and related costs . . . [a]nd fewer than 200 of the 1,300 sites have been cleaned.”).
time on the risk is the most equitable and efficient means of allocating indemnification obligations.\textsuperscript{78}

The seminal case adopting pro-ration by years is \textit{Insurance Co. of North America v. Forty-Eight Insulations, Inc.},\textsuperscript{79} in which an asbestos-related personal injury claim was at issue.\textsuperscript{80} In \textit{Forty-Eight Insulations}, the Sixth Circuit held that indemnification and defense costs should be "prorated . . . among all of the insurance companies which were on the risk while the injured victim was breathing in asbestos."\textsuperscript{81} Furthermore, the court concluded that the insured itself was to be treated as an insurer for those periods of time during which it had no insurance coverage.\textsuperscript{82} Because the \textit{Forty-Eight Insulations} court found the insurers' liability to be "individual and proportionate," as opposed to "joint and several," it ruled that an insurer would not be liable for years in which there could not have been any exposure to asbestos that its insured manufactured.\textsuperscript{83} The Sixth Circuit explained its holding by stating, "[g]iven the impossibility in most cases of ascertaining which company provided asbes-

\begin{itemize}
\item \textsuperscript{78} Pro-ration by years offers several potential benefits. First, it spreads the risk to the maximum number of carriers and to the policyholder for those periods in which the policyholder was uninsured. Second, once the total amount of loss is established, pro-rations by years requires only a relatively simple calculation for allocating indemnification obligations. In light of the costs of insurance litigation in these matters, this ease in application is a substantial consideration. For an estimate of litigation costs in environmental cases, see \textit{supra} notes 3 & 78 and accompanying text. Third, pro-ration by years alleviates the subsequent contribution actions between the various carriers that joint and several liability among the insurers necessarily requires. For a discussion of additional litigation under joint and several liability, see \textit{supra} note 77 and accompanying text.
\item \textsuperscript{79} 633 F.2d 1212 (6th Cir. 1980).
\item \textsuperscript{80} See \textit{id.} at 1213-14.
\item \textsuperscript{81} \textit{Id.} at 1224, 1226. Addressing the insurance companies' concerns that pro-ration by years would create problems with coverage "stacking," the Sixth Circuit affirmed the district court's holding limiting the total amount a carrier would be required to pay. \textit{See id.} at 1226 n.28. The \textit{Forty-Eight Insulations} court also stated that "[i]n any event, no insurer should be held liable in any one case to indemnify [the policyholder] for judgment liability for more than the highest single yearly limit in a policy that existed during the period of the claimant's exposure for which judgment was obtained." \textit{Id.} (citation omitted).
\item \textsuperscript{82} \textit{See id.} at 1224, 1226 (illustrating by stating that "if insurer A provided 3 years of coverage, insurer B an additional 3 years, and the manufacturer was uninsured for the remaining 3 years, liability would be allocated at 1/3 for each of the three concerns").
\item \textsuperscript{83} \textit{Id.} at 1225. The \textit{Forty-Eight Insulations} court noted that an insurer would similarly not be liable for years in which a worker used an effective respirator. \textit{See id.} In support of its refusal to impose liability on the insurer for those years, the court highlighted that "no bodily injury resulting from [the policyholder's] products took place during the years in question." \textit{Id.}
tos products in different years, we think that this is the fairest way to apportion liability."

Among the courts that have followed the Sixth Circuit's lead in adopting pro-ration by years are the United States Courts of Appeals for the Second and Fifth Circuits, the Supreme Court of Minnesota and several other federal and state courts. The major flaw of pro-ration by years, however, is that it fails to consider the limits of each policy. Therefore, a policy with very low limits of liability may be liable for the same amount as a policy with much greater limits, despite the likely disparity in the premium that the respective carriers collected from the policyholder.

C. “Pro-Ration by Years and Limits”

As the name suggests, “pro-ration by years and limits” allocates indemnification among policies based on both the number of years a policy is on the risk as well as that policy’s limits of liability. The basis of an individual insurer’s liability is the aggregate coverage it underwrote during the period in which the loss occurred. Basically, a given insurer’s liability is determined by comparing its particular exposure to the total amount of exposure assumed by all

85. See, e.g., Stonewall Ins. Co. v. Asbestos Claims Mgmt. Corp., 73 F.3d 1178, 1191 (2d Cir. 1995) (approving district court's application of pro-ration by years allocation of damages); Porter v. American Optical Corp., 641 F.2d 1128, 1145 (5th Cir. 1981) (citing Insurance Co. of North America v. Forty-Eight Insulations, Inc., 633 F.2d 1212 (6th Cir. 1980), and holding that liability should be pro-rated among all carriers). In Porter, the Fifth Circuit also recognized that no insurer would be liable for periods when there could not have been exposure. See id. at 1145.
86. See, e.g., Northern States Power Co. v. Fidelity and Cas. Co., 523 N.W.2d 657, 662-63 (Minn. 1994) (rejecting joint and several liability in favor of pro-ration by years in soil and groundwater contamination case).
88. For an example of the application of pro-ration by years and limits to the allocation of liability, see infra note 89. For an example of the application of pro-ration by years and limits to the allocation of defense costs, see infra note 112.
carriers of the triggered policies. This comparison yields a percentage that is then applied to the amount of loss the policyholder sustained.89

The seminal case adopting pro-ration by years and limits is Owens-Illinois, Inc. v. United Insurance Co.90 In Owens-Illinois, the policyholder sought indemnification from several primary and umbrella excess carriers for tens of thousands of asbestos-related personal injury and property damage claims.91 Applying a continuous trigger of coverage, the New Jersey Supreme Court ordered an allocation based on each policy's years and limits.92 Finding that the policies failed to consider coverage cases involving long-term, mass-exposure toxic torts,93 the Owens-Illinois court found it neces-

89. The following illustrates application of pro-ration by years and limits:

For each of the years 1993 and 1994, Insurance Company A (Company A) provided XYZ Chemical Company (XYZ) with general liability insurance under a one-year policy with a $1 million limit of liability. For 1995, Insurance Company B (Company B) provided XYZ with general liability insurance under a one-year policy with a $3 million limit of liability. From the beginning of 1993 through the end of 1995, toxic substances leaked from XYZ's factory (assume that none of XYZ's CGL policies contained a pollution exclusion clause). The state in which XYZ was located ordered remediation of the soil surrounding the factory, which cost XYZ $1 million. XYZ requested indemnification from Companies A and B, which subsequently disagreed regarding their respective obligations and sought declaratory relief. The court applies a continuous trigger of coverage, implicating all three of XYZ's general liability policies, and also decides that a pro-rata by years and limits approach is the most equitable means of allocating indemnification obligations among the insurers.

The amount of each insurer's indemnification obligation is calculated as follows. The total indemnity potentially due to XYZ from Company A is $2 million ($1 million limit x 2 years). The total indemnity potentially due to XYZ from Company B is $3 million ($3 million limit x 1 year). Thus, the sum of all indemnity potentially available to XYZ from Companies A and B is $5 million. Under pro-ration by years and limits, Company A would be responsible for two-fifths, or 40%, of the obligation ($2 million aggregate limit + $5 million aggregate potential). Company A's proportion, 40%, is multiplied by the policyholder's total claim of $1 million to yield an allocation to Company A of $400,000. Company B's proportion, 60% ($3 million aggregate limit + $5 million aggregate potential), is multiplied by the total claim, yielding an allocation to Company B of $600,000. Therefore, Companies A and B would assume indemnification obligations of $400,000 and $600,000, respectively, under pro-ration by years and limits.

91. See id. at 978. Prior to filing its briefs with the Owens-Illinois court, the policyholder "had settled 43,000 bodily-injury lawsuits . . . [and] more than 90,000 bodily-injury and 63 property-damage cases were pending." Id. In addition, bodily-injury suits were accumulating with the policyholder at a rate of 1700 per month, and the policyholder's unreimbursed costs of defending and settling the cases had already reached $105 million. See id.
92. See id. at 984-85, 993.
93. See id. at 988. From an insurance litigation standpoint, cases of this type are similar to long-term environmental damage cases.
sary to look to public policy for guidance. The court noted that the principal consideration was to make “the most efficient use of the resources available to cope with environmental disease or damage.” Also, recognizing straight annual progression as an inappropriate approach to allocation, the Owens-Illinois court rejected pro-ration by years. Instead, it concluded that allocation among insurance carriers, and potentially the policyholder, should be “on the basis of the extent of the risk assumed, i.e., proration on the basis of policy limits, multiplied by years of coverage.”

94. See id. at 992. The court in Owens-Illinois stated that it was simply “unable to find the answer to allocation in the language of the policies.” Id. at 990. Furthermore, the court found little guidance in “the other usual principles of interpretation of contracts.” Id. at 991. Although the Owens-Illinois court considered the doctrines of strict construction and contra proferentem, as well as the objectively reasonable expectations of the policyholder and retroactive imposition of absolute liability under CERCLA, it found that the results under those considerations would be inconsistent. See id. The court also noted that “[t]o have shifting rules of interpretation that depend on the configuration of insurance coverage is unacceptable . . . . Therefore, the public interest factors . . . serve to guide us.” Id. at 991-92.

95. Owens-Illinois v. United Ins. Co., 650 A.2d 974, 992 (N.J. 1994). For instance, regarding self-insurance, the Owens-Illinois court observed that because the insurance industry can most efficiently spread the costs of damage, the law should create an incentive for parties to acquire insurance. See id. Consequently, for the periods in which the policyholder opted not to obtain insurance, the Owens-Illinois court held that it chose to become a risk-bearer and should share in the allocation of damages. See id. at 992-93. The court explained: Almost all such insurance controversies are retrospective, and to reflect now on what might have been done if the parties had contemplated today’s problem is almost fatuous. Our job, however, is not just to solve today’s problems but to create incentives that will tend to minimize their recurrence . . . . Future actors would know that if they do not transfer to insurance companies the risk of their activities that cause continuous and progressive injury, they may bear that untransferred risk. Id. at 992.

96. See id. at 993. The Owens-Illinois Court supported its rejection of pro-ration by years and limits by observing the failure of the approach to “relate the theory of a continuous trigger causing indivisible injury to the degree of risk transferred or retained in each of the years of repeated exposure to the injurious conditions.” Id. The court also implicitly advocated pro-ration by exposure in cases where the amount of injury that occurred in each policy period is ascertainable. See id. at 987-88, 993. Noting the difficulty in ascertaining that amount, however, the Owens-Illinois court stated, “any allocation should be in proportion to the degree of the risks transferred or retained during the years of exposure.” Id. at 993.

For a discussion of pro-ration by exposure, see infra notes 100-05 and accompanying text.

97. Id. In allocating the costs of indemnification and defense, the Owens-Illinois court concluded that it naturally follows that policy limits and exclusions must be considered in determining allocation. See id. at 994. Notably, the court did not specify how pro-ration by years and limits was actually to be developed and applied, stating:

We realize that many complexities encumber the solution that we suggest involving, as it does, proration by time and degree of risk assumed — for
Several other courts have adopted pro-ration by years and limits in apportioning liability.98 A major criticism of pro-ration by years and limits is, however, that insurers with higher limits may be liable for a disproportionate share of damages based solely on their limits.99

D. “Pro-Ration by Exposure”

Under “pro-ration by exposure,” courts attempt to apportion liability to each policy period in accordance with the amount of injury or property damage that can be attributed to that specific policy period. The premise of pro-ration by exposure approach is that a CGL policy is required to pay only for bodily injury or property damage taking place during the policy period.

The leading case applying pro-ration by exposure is Uniroyal, Inc. v. Home Insurance Co.100 In Uniroyal, a manufacturer of Agent Orange herbicides sought reimbursement from its insurers for both its share of the settlement of the underlying class action litigation as well as for defense costs.101 The Uniroyal court applied an injury-in-

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99. See, e.g., Northern States Power Co. v. Fidelity & Cas. Co., 525 N.W.2d 657, 662 (Minn. 1994) (stating pro-ration by years and limits “effectively makes those insurers with higher limits liable for damages incurred outside their policy periods and is therefore inconsistent with the actual injury trigger theory [which says that each insurer is only liable for damages that occurred during its policy period].”).


101. See id. at 1369-70. In the action underlying Uniroyal, a class of 2.5 million Vietnam War veterans and their family members sued the United States and the manufacturers of Agent Orange. See id. at 1369. Between 1961 and 1971, the United States military sprayed 17-19 million gallons of Agent Orange over approxi-
fact trigger and the parties stipulated that any injury resulting from exposure to Agent Orange took place at, or shortly after, a service-
man’s exposure to Agent Orange. Based on the case’s enormous record, the Uniroyal court determined that the damages should be allocated between the policies in proportion to the respective volume of Agent Orange that the policyholder delivered to the military during each policy year. The Uniroyal court found that the pro-ration by exposure allocation scheme was “the only one that comport[ed] with the language of the policies.”

Several other courts have used pro-ration by exposure to apportion damages among multiple policies. It may, however, be

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102. See id. at 1389. The Uniroyal court distinguished the “occurrence,” which created liability on the part of the policyholder, from the “injury,” which triggered the policy. See id. at 1387. Uniroyal’s deliveries of Agent Orange to the military were held to constitute a single, continuous “occurrence,” even though the deliveries were made over the course of 16 months. See id. at 1383, 1385, 1389. Regarding the injury, the Uniroyal court stated, “[i]n this case there can be no doubt when [it] must be deemed to have taken place . . . . [F]or the purposes of this insurance litigation . . . injury in fact took place within a week or so of spraying.” Id. at 1389. Further, based on “the information gleaned from years of Agent Orange proceedings in this court,” the Uniroyal court deduced that the injury in fact occurred approximately four months after Uniroyal delivered Agent Orange to the United States military. Id. Consequently, because one continuous occurrence, covering two policy periods, caused the injury in fact, both policies were triggered and the net losses therefore needed to be apportioned among the insurers. See id. at 1391.

103. See id. at 1392. To calculate the proportional loss under each policy from the records of delivery dates and quantities, the Uniroyal court held that “[g]allons may be used as a proxy for exposure . . . and exposure may be used as a proxy for injury.” Id. at 1393.

104. Id. at 1392. Although the Uniroyal court described the policies as “nearly silent on the allocation issue and [providing] only scant assistance in determining the allocation of numerous injuries from a continuous occurrence,” it found “indicia” in them suggesting that a proportional allocation based on exposure was appropriate. Id. For example, the court noted that each policy was worded to provide coverage only for injuries that actually triggered that policy. See id. In addition, the “other insurance” clauses of the policies suggested a proportional allocation. See id. at 1393.

difficult for courts to apply this approach because it requires a factual basis for quantifying the damages.

V. ALLOCATION OF DEFENSE COSTS

A. Background

If a court determines that more than one policy is triggered by a single, continuous occurrence, a related and potentially costly issue is apportionment of defense costs among the parties involved. Often, carriers involved in these types of cases informally agree to share the underlying defense costs, pending a determination of defense responsibility in the coverage action. Thus, the allocation of defense costs is commonly based on the same theory as the allocation of indemnity obligations.

B. Methods of Allocation of Defense Costs

Where allocation of defense costs is permitted, courts usually use one of the following methods in a concurrent coverage situation: (1) pro-ration by years; (2) pro-ration by years and limits; or (3) equal shares. Under pro-ration by years, defense costs are allocated to all triggered policies in proportion to each policy’s time on the risk for the single, continuing occurrence.

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106. Contrary to the practice of some insurance companies, in situations where the insurers are unable to agree on an allocation scheme, it is dangerous for a carrier to take the position that, although it has a duty to defend the insured, it will only pay a per year pro-rata share of the defense costs.

107. See, e.g., Keene Corp. v. Insurance Co. of N. Am., 667 F.2d 1034, 1050 (D.C. Cir. 1981) (explaining that because each insurer is fully liable to its insured, each is similarly fully liable for defense costs); Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc., 633 F.2d 1212, 1225 (6th Cir. 1980) (holding that “indemnity costs can be allocated by the number of years [of exposure, and] . . . [t]here is no reason why this same theory should not apply to defense costs”).

108. For a discussion of allocation of defense costs under pro-ration by years, see infra note 111 and accompanying text.

109. For a discussion of allocation of defense costs under pro-ration by years and limits, see infra note 112 and accompanying text.

110. For a discussion of allocation of defense costs under equal shares, see infra notes 113-14 and accompanying text.

111. See, e.g., Gulf Chem. & Metallurgical Corp. v. Associated Metals & Minerals Corp., 1 F.3d 365, 372 (5th Cir. 1993) (noting that “insurers need not provide separate defenses, but may be compelled by the insured to share in the cost of providing a complete defense”); Forty-Eight Insulations, 633 F.2d at 1226 (finding pro-ration by years to be appropriate allocation method because although insurer
ently, under pro-ration by years and limits, an individual insurer’s liability for defense costs is determined by dividing its aggregate policy limits (for all the years it was on the risk for the single, continuing occurrence) by the aggregate policy limits of all the available policies and then multiplying that percentage by the amount of total defense costs. Last, some courts have followed an equal shares or per capita approach, regardless of each triggered policy’s limits or amount of time on the risk. Courts applying this approach reason that because each carrier has a duty to defend, they should share that obligation equally.

For example, assume a single, continuous occurrence triggers three primary policies: (1) policy A has limits of $1 million for one year; (2) policy B has limits of $2 million a year for two years; and (3) policy C has limits of $5 million for one year. The total amount of defense costs for a single occurrence taking place from the beginning of year one through the end of year four is $2 million. Under pro-ration by years and limits, the defense costs would be allocated as follows:

Policy A: $200,000 ($1 mil. + $10 mil. × $2 mil.);
Policy B: $800,000 ($4 mil. + $10 mil. × $2 mil.);
Policy C: $1,000,000 ($5 mil. + $10 mil. × $2 mil.).
VI. ORPHAN SHARES

A. Background

One of the most hotly litigated allocation issues is whether the policyholder must assume responsibility for gaps in coverage that can arise in various circumstances. Although the previous discussions of allocation of indemnity payments and defense costs address, to some extent, the allocation of these "orphan shares," the issue is worrisome enough to both the insurer and the insured to merit a brief, independent analysis.

B. Indemnification Obligations of Orphan Shares

1. Courts Requiring Apportionment to the Insured

Courts imposing liability for orphan shares on the policyholder have often done so with the logic that the policyholder willingly, or through misfortune, "self-insured," and therefore must be held responsible for all risk in that period. For example, in *Uniroyal, Inc. v. Home Insurance Co.*, the District Court for the Eastern District of New York allocated liability for uninsured periods to the insured, observing that "[a] firm that fails to purchase insurance for a period . . . is self-insuring for all the risk incurred in that period; costs should be apportioned equally between them"); *Cablevision*, 836 F.2d at 57 (stating, "each insurer had an equal and unlimited duty to defend").

There are five scenarios that often lead to gaps in insurance coverage. First, after assessing potential risk, the policyholder may make a conscious business decision to not purchase insurance for a certain time period. Second, an uninsured period may occur where the policyholder selected a carrier that subsequently became insolvent. Third, there may be periods for which the policyholder is unable to prove the existence, terms and conditions of its policies. Fourth, an exclusion or limitation may preclude coverage for a specific risk. Fifth, insurance may be unavailable because of market conditions or statutory mandates.

The reasons for which a policyholder does not have responsive insurance for certain time periods can be significant in litigation. See, e.g., E.I. DuPont de Nemours & Co. v. Admiral Ins. Co., Civ. A. No. 89C-AU-99, 1995 WL 654020, at *16 (Del. Super. Ct. Oct. 27, 1995) (highlighting absence of coverage as relevant to determination of policyholder's liability for uninsured period). Alternatively, it is arguably illogical to consider such factors, because whatever the reason for the gap, making insurers pay for uninsured periods through allocation makes them liable for damages incurred outside their policy periods.

otherwise, it would be receiving coverage for a period for which it paid no premium. Self-insurance is called 'going bare' for a reason."118

Similarly, in Stonewall Insurance Co. v. Asbestos Claims Management Corp.,119 the Second Circuit allocated orphan shares to the policyholder.120 The Stonewall court stated that "proration-to-the-insured is a sensible way to adjust the competing contentions of the parties in the context of continuous triggering of multiple policies over an extended span of years."121 The court thus held that allocation to the insured is appropriate for periods in which the insured either chose not to purchase coverage or obtained insufficient coverage.122 Where the period of self-insurance resulted from circumstances entirely beyond the policyholder's control, however, the Stonewall court found it inappropriate to apportion liability to the insured.123 Consequently, the court refused to apply "proration-to-the-insured" to policy years when asbestos liability insurance was unavailable to insureds because of uniform application of asbestos exclusions.124 In recent years, the courts in several federal and state cases have apportioned liability for orphan shares to policyholders, generally applying the same rationale as the Uniroyal and Stonewall courts.125

118. Id. at 1392 (emphasis added) (citing Developments in the Law - Toxic Waste Litigation VIII: Bankruptcy and Insurance Issues, 99 HARV. L. REV. 1458, 1584 (1986)).
119. 73 F.3d 1178 (2d Cir. 1995), modified, 85 F.3d 49 (2d Cir. 1996).
120. See id. at 1203.
121. Id.
122. See id. As the district court explained in Stonewall:
It was [the insured] that chose to place its insurance with those companies which are now insolvent, and [the insured] that bargained away coverage by accepting asbestos exclusion clauses. There is no possible justification for shifting the economic consequences of [the insured's] decision to the remaining insurers. Relying on social policy to justify imputing an expectation of complete coverage to the insured is legally . . . insupportable.
123. See Stonewall, 73 F.3d at 1203.
124. See id. (reasoning that, unlike situations where insured voluntarily declined to purchase insurance or purchased insufficient amounts, insureds were not afforded choice of acquiring asbestos coverage after 1985).
125. See, e.g., Outboard Marine Corp. v. Liberty Mut. Ins. Co., 670 N.E.2d 740, 748-49 (Ill. App. Ct. 1996) (allocating liability pro-ration by years and holding that policyholder was responsible for pro-rata share for periods of no insurance or self-insurance). The Outboard Marine court noted that if liability were not allocated to the policyholder, the policyholder could "avoid absorbing the cost resulting from its position as a self-insurer in the other triggered policy periods . . . ." Id. at 748 (quoting United States Gypsum Co. v. Admiral Ins. Co., 643 N.E.2d 1226, 1261 (Ill. App. Ct. 1994)); see also Domtar, Inc. v. Niagara Fire Ins. Co., 552 N.W.2d 738, 745 (Minn. Ct. App. 1996), rev'd in part on other grounds, 563 N.W.2d 724 (Minn. 1997) (affirming trial court's pro-rata allocation to policyholder for periods during
2. Courts Rejecting Apportionment to the Insured

Some courts have refused to assign orphan shares to the policyholder. These courts reason that a gap in coverage is not equivalent to self-insurance. Consequent, they hold that such a concept should not be grafted onto the policies.

The most significant case to reject apportionment to the policyholder is also the seminal case adopting a joint-and-several allocation of indemnification obligations: Keene Corp. v. Insurance Co. of North America. In declining to apportion orphan shares to the insured, the Keene court explained:

We have no authority upon which to pretend that [the insured] also has a “self-insurance” policy that is triggered for periods in which no other policy was purchased. Even if we had the authority, what would we pretend that the policy provides? What would its limits be? There are no self-insurance policies, and we respectfully submit that the contracts before us do not support the judicial creation of such additional insurance policies.
Although several state courts have followed *Keene* in refusing to assign liability for coverage gaps to the policyholder, such holdings yield not only unfair results for insurers, but also adverse public policy consequences.

C. Assignment of Defense Costs

Even when a court requires an insured to pay a portion of the damages, the question of whether the insured must also pay a portion of defense costs sometimes remains. The leading pre-*Owens-Illinois* case assigning orphan shares of defense costs to a policyholder is *Insurance Co. of North America v. Forty-Eight Insulations, Inc.* In *Forty-Eight Insulations*, the Sixth Circuit reasoned that because the insurer contracted to pay the cost of defending only those claims that arose within the policy period, the policyholder was required to pay for the defense of the non-covered risk. Although several other federal and state courts have similarly apportioned de-

130. See *J.H. France Refractories*, 626 A.2d at 508 (relying heavily on *Keene* in concluding that uninsured and self-insured periods are not equivalent); Armstrong World Indus., Inc. v. Aetna Cas. & Sur. Co., 52 Cal. Rptr. 2d 690 (Cal. Ct. App. 1996) (holding that policyholders did not have an obligation to pay pro-rata share for any uninsured or self-insured periods of time).

131. See *Owens-Illinois v. United Ins. Co.*, 650 A.2d 974, 991-992 (N.J. 1994) (explaining that "[b]ecause insurance companies can spread costs throughout an industry and thus achieve cost efficiency, the law should, at a minimum, not provide disincentives to parties to acquire insurance."). One commentator asserts that allowing policyholders to avoid responsibility for uninsured periods fails to advance the important public policy consideration of encouraging parties to purchase insurance. See *Doherty*, supra note 1, at 265-66. That commentator also notes that although some long-term environmental damages will occur whether parties are insured or not, insurance helps reduce their cost to society in three ways. See id. First, it spreads the risk to those who are "more efficient risk bearers." *Id.* Second, "[b]y tailoring premiums to the level of risk incurred, insurance forces insured companies to... assess and manage the risks involved in their activities." *Id.* at 266. Third, insurance "reduces the costs of progressive injuries by decreasing the risk of bankruptcy... due to the threat of tremendous liability." *Id.* By affording the same degree of coverage to policyholders who allow gaps to form in their insurance plans and policyholders who consistently maintain adequate insurance programs, courts provide companies with a disincentive to obtain insurance. See *Owens-Illinois*, 650 A.2d at 992 (explaining theory of transfer of risks as it relates to insurance).

132. 633 F.2d 1212 (6th Cir. 1980). For a discussion of the facts of *Forty-Eight Insulations*, see supra notes 80-84 and accompanying text.

133. See *id.* at 1224-25. The *Forty-Eight Insulations* court highlighted that failing to apportion costs to the policyholder for uninsured periods conveys an unfair benefit to the policyholder at the expense of its insurers. See *id.* The court also explained that refusing to allocate these costs to the policyholder would mean that "a manufacturer which had insurance coverage for only one year out of 20 would be entitled to a complete defense... the same as a manufacturer which had coverage for 20 years out of 20. Neither logic nor precedent support [sic] such a result." *Id.* at 1225.
defense costs for uninsured periods to the policyholder, some courts have held that the policyholder is not responsible for paying a portion of the costs of the defense. That court reasoned that "although such defense costs may be allocated among insurers, such 'duty to apportion' does not apply to deny a policyholder its contractual right to a complete defense where the policyholder was not insured at all times."135

VII. CONCLUSION

Although it seems that the media and commentators have been forever chronicling the continuing legal battles of long-tail, multiple-trigger environmental claims, courts have had a relatively brief period in which to determine liability in the coverage context. Clearly, when drafted, the standard form CGL policy was not intended to cover these environmental liabilities. As courts continue to establish their positions regarding allocation issues, parties have at least some basis for predicting how a jurisdiction will apportion liability.

134. See, e.g., Gulf Chem. & Metallurgical Corp. v. Associated Metals & Minerals Corp., 1 F.3d 365 (5th Cir. 1993) (holding that "the insured must bear its share of those [defense] costs determined by the fraction of the time of injurious exposure in which it lacked coverage"); Budd Co. v. Travelers Indem. Co., 820 F.2d 787, 791 (6th Cir. 1987) (ruling that policyholder was obligated to reimburse its insurer for defense costs of claims found to have occurred outside of insurer's policy period). But see, e.g., Scottsdale Ins. Co. v. Homestead Land Dev. Corp., 1992 U.S. Dist. LEXIS 19525, at *21 (N.D. Cal. Dec. 3, 1992) (stating that "it would be patently unreasonable to expect an insurer to protect its insured against liabilities for which the insured did not bargain . . . [a]ny conclusion to the contrary would lead to a windfall to the insured").

135. County of San Bernadino v. Pacific Indem. Co., 56 Cal. App. 4th 666, 669 (1997). Significantly, because only the issue of the "duty to defend" was present, neither the appellate nor the trial courts reached the issue of whether the policyholder was responsible for paying the damages that occurred during the period of self-insurance. See id. at 671-72, 675-77.