STACKING COMMERCIAL INSURANCE COVERAGE – INSURER & POLICYHOLDER PERSPECTIVES

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This presentation is intended to educate on certain issues; it is not intended to provide legal advice. The information and opinions expressed in this presentation are solely those of the lecturers, and not necessarily those of their law firms or current or former clients.
Stacking permits a policyholder to combine the multiple limits to respond to a single loss.

Simple form:
- Limits A: $1,000,000
- Limits B: $2,000,000

Total Coverage:
$3,000,000 with stacking
maybe $1,000,000/maybe $2,000,000 without
Two types of stacking:

- **Intra-policy**
  - Different limits of the same policy are added or stacked
- **Inter-policy**
  - Limits of different policy are added or stacked
INTRODUCTION

- Intra-policy

    - Automobile accident. Both vehicles underinsured.
    - Injured passenger covered under a policy covering three other vehicles, with UM/UIM coverage limits “for each person” of $250,000, $300,000, $300,000, respectively
    - Available limits: $850,000
Another intra-policy case

  - Sand migrated off site
  - Personal injury and property damage coverages triggered
  - PI limits: $1,000,000; BI/PD limits $1,000,000
  - Total limits available: $2,000,000
INTRODUCTION

- Inter-policy
  - “Stacking is defined as the right to recover on two or more policies in an amount not to exceed the total of the limits of liability of all policies up to the full amount of the damages sustained.”
  - Two automobile policies
  - No stacking due to anti-stacking provision
More generally inter-policy stacking is an issue with respect to long-tail claims:

- A continuous, progressive or repeated injury over a period of time long enough to implicate multiple policy years.

Examples:
- Asbestos
- Environmental damage
- Toxic torts
- Products liability
- Cyber?
Keene Corp v. Ins Co. of N. America, 667 F.2d 1034 (D.C. Cir. 1981)

- Between 1948 and 1972 manufactured thermal insulation products
- Over 6000 lawsuits
- Trigger: each policy on the risk from exposure to manifestation
- But no stacking
“The principle of indemnity implicit in the policies requires that successive policies cover single asbestos-related injuries. That principle, however, does not require that Keene be entitled to “stack” applicable policies’ limits of liability…. [W]e hold that only one policy’s limits can apply to each injury. Keene may select the policy under which it is to be indemnified.”

Keene, 667 F.2d at 1049-50
**Cole v. Celotex Corp., 599 So. 2d 1058 (La. 1992)**

- Asbestos injury from long-term exposure
- Policies purchased over thirty year period
- Exposure trigger
- Stacking permitted:

  “As a general rule the claimant may recover under all available coverages provided that there is no double recovery.” Indeed, it has been suggested that the 1966 revisions to the standard policy language defining an occurrence as “injurious exposure to conditions which results in injury” were intended to mean that “[i]n some exposure types of cases involving cumulative injuries, it is possible that more than one policy will afford coverage. Under these circumstances, each policy will afford coverage to the bodily injury or property damage which occurs during the policy period.”

  599 So. 2d at 1080 [citations omitted]
GENERALIZING THE CONCEPT

- There may be a stacking issue where an injury or loss triggers multiple coverages
  - Coverages may be in the same or different policies
  - Coverages may be provided by the same or different insurers
  - Coverages may be in the same or different policy year
FURTHER COMPLICATIONS

- Claims made vs. occurrence coverage
- Mergers and acquisitions and successor liability
COURTS DIVIDED:
RULINGS IMPACTING ALLOCATION

ALL SUMS
V.
PRO RATA
WHAT IS ALL THE FUSS ABOUT?

• Debate began with the emergence of “long-tail” exposure claims (e.g., environmental pollution; asbestos) where the alleged damage occurs continuously or progressively over many years and triggers multiple insurance policies

• Multiple years and multiple layers of coverage potentially implicated

• Typical policyholder position: “all sums”

• Typical insurer position: “pro rata”

• Courts have taken inconsistent positions on resolution of the allocation issue
WHEN DID THE JUDICIAL CONTROVERSY BEGIN?

• Seminal Pro Rata Case Came First
  – Held that each policy was responsible only for the pro rata share of the total damage that occurred during the policy period
    • claim apportionability because the duty to defend arises out of a contractual relationship: “[A]n insurer contracts to pay the entire cost of defending a claim which has arisen within the policy period. The insurer has not contracted to pay defense costs for occurrences which took place outside the policy period.”

• Seminal All Sums Case Arrived One Year Later
  – Held that each policy was responsible (up to its limits) for the total amount of the damage and the policyholder could choose which policy
WHAT IS THE REAL DIFFERENCE?


- Under the *pro rata* method, the insured is liable for costs attributable to losses occurring during periods when it is uninsured, while under the *all-sums* method, all costs are allocated *solely* among the insurers. *Security Ins. Co. v. Lumbermens Mut. Cas. Co.*, 826 A.2d 107, 117 (Conn. 2003).
TYPICAL FOCUS OF COURTS ADHERING TO ALL SUMS ALLOCATION

- Courts adopting all sums allocation typically focus upon the language in the grant of coverage in a usual comprehensive general liability policy obliging the insurer to “pay ... all sums which the insured shall become legally obligated to pay as damages ...” See, e.g., Plastics Engineering, 315 Wis.2d at 583.

- Find that the policyholder can “pick & choose” and assign entire loss to any particular policy period
  - Find that a selected insurer is fully liable up to policy limits and if the claim exceeds policy limits, the policyholder can access the excess policies in the same year [“vertical spike”] and, if applicable, “stack” policies from other policy years
  - Focus is on making the policyholder whole with subsequent contribution among the triggered insurers permitted
The insurer drafted the policy and included a promise to pay “all sums.”

No single insurer will actually be left with an obligation to cover “all sums” because the selected insurer(s) have contribution rights against other insurers whose policies are triggered by the same occurrence. Ultimately, each insurer will only be liable up to its policy limits.

Policyholders are entitled to the most reasonable construction of the policy in its favor. Giving effect to the plain and ordinary meaning of “all sums” promotes this fundamental principle of insurance contract interpretation.
CALIFORNIA EMBRACES "ALL-SUMS-WITH-STACKING" INDEMNITY PRINCIPLES

- Based upon the policy language in the excess policies at issue, a unanimous California Supreme Court held, the “all sums” approach to indemnity allocation applied to the State od CA’s long-tail environmental claims relating to contamination from the Stringfellow Acid Pits.
- Further ruled that the State of CA could “stack” the limits of policies in consecutive years to maximize recovery.
The court determined that the all sums language in the excess policies’ insuring agreements meant that the insurers had to cover all damage up to their policy limits, even damage that occurred before or after their policy was in effect.

The court further held that the “during the policy period” language that the insurers relied on to limit coverage does not appear in the insuring agreement section of the policies and is neither logically nor grammatically related to the “all sums” language in the insuring agreement.

In reaching its decision, the court reasoned that: “It is often ‘virtually impossible’ for an insured to prove what specific damage occurred during each of the multiple consecutive policy periods in a progressive property damage case. . .If such evidence were required, an insured who had procured insurance coverage for each year during which a long-tail injury occurred likely would be unable to recover.”
The court asserted that extending coverage throughout the entirety of the ensuing property damage best reflects the policyholder’s expectations and the insurers’ indemnity obligations under their respective policies. “Stacking generally refers to the stacking of policy limits across multiple policy periods that were on a particular risk. In other words, [s]tacking policy limits means that when more than one policy is triggered by an occurrence, each policy can be called upon to respond to the claim up to the full limits of the policy.”

The California Supreme Court found that an all-sums-with-stacking rule has numerous advantages because: “It resolves the question of insurance coverage as equitably as possible, given the immeasurable aspects of a long-tail injury. It also comports with the parties’ reasonable expectations, in that the insurer reasonably expects to pay for property damage occurring during a long-tail loss it covered, but only up to its policy limits, while the insured reasonably expects indemnification for the time periods in which it purchased insurance coverage.”

As a result of “stacking,” the insurers on the risk were ordered to pay all sums for property damage attributable to the Stringfellow Superfund site, up to their policy limits, if applicable, as long as some of the continuous property damage occurred while each policy was on the loss.
Policy language supports pro rata allocation because:

- occurrence-based liability policies only cover damages or injuries that happen during the policy period. See, e.g., In re Wallace & Gale Co., 385 F.3d 820, 832 (4th Cir. 2004) (the “all sums” language in a standard CGL policy “must be read in concert with other language that limits a policy's liability for damage or loss that occurs during the policy period.”), and Owens-Illinois, Inc. v. Liberty Mut. Ins. Co., 138 N.J. 437, 650 A.2d 974 (N.J. 1994)(questioning Keene).

- all sums or joint and several liability theory is based upon an erroneous and selective reading of the all sums language to the exclusion of other relevant contract language.
TYPICAL FOCUS OF COURTS ADHERING TO PRO RATA ALLOCATION

“[T]o 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. It does not work. The language was never intended to cover apportionment when continuous injury occurs over multiple years. In addition, the argument that all sums to be assessed because of long-term exposure to asbestos could have been established in any one of the policy years is intuitively suspect and inconsistent with our developing jurisprudence in the field of toxic torts.”

TYPICAL ARGUMENTS IN FAVOR OF PRO RATA ALLOCATION

- All sums allocation is inconsistent with multiple policy trigger theories
  - Policyholders are required to prove that a policy is triggered and, to do so, they must demonstrate when the BI & PD happened.
  - Injury-in-fact and continuous trigger theories as applied by many courts to long-tail claims often benefit policyholders.
  - Many policyholders claim that the “during the policy” language limitation addresses the issue of trigger and allocation is addressed by the “all sums” language.
  - However, the policy language does not support this compartmentalization because both trigger and allocation are addressed by the requirement that BI & PD happen during the policy period. Trigger concerns the issue of whether there was BI or PD during the policy period(s) & allocation focuses on how much BI or PD happened during the policy period(s).
  - Courts have recognized that the all sums allocation method is inconsistent with the multiple policy trigger theories advocated by policyholders. See, e.g., Owens-Illinois Inc. v. United Ins. Co., 650 A.2d 974 (N.J. 1994) (“courts must adapt common-law doctrines ‘to the peculiar characteristics of toxic-tort litigation.’ Ibid. We advert to those principles because we believe that common-law resolution of the trigger-of-coverage issue requires that we consider, at the same time, the issue of scope of coverage if a policy is triggered.”); Northern States Power Co. v. Fidelity and Casualty Co. of New York, 523 N.W.2d 657 (Minn. 1994) (“[T]he choice of trigger theory is related to the method a court will choose to allocate damages between insurers”).
TYPICAL ARGUMENTS IN FAVOR OF PRO RATA ALLOCATION, CONT.

- All sums allocation creates unfairness and is bad public policy
  - It may result in an insurer being liable for the entire loss even when it was on the risk for one day. *See, e.g., Public Service Co. of Colorado v. Wallis & Cos.*, 986 P.2d 924 (Colo. 1999) (“We do not believe that those policy provisions can reasonably be read to mean that one single-year policy out of dozens of triggered policies must indemnify the insured's liability for the total amount of pollution caused by events over a period of decades, including events that happened both before and after the policy period.”).
  - It is hardly unfair for the policyholder to bear the consequences of its decisions concerning the purchase of insurance and the managing of its liabilities (e.g., decisions relating to self-insurance, the amount of limits purchased, the years it did and did not purchase insurance, its purchase of insurance from insurers that become insolvent or prior exhaustion based on other claims against the policyholder). *See, e.g., EnergyNorth Natural Gas Inc. v. Certain Underwriters at Lloyd’s*, 934 A.2d 517, 522 (N.H. 2007) (finding that joint and several liability method was inferior to pro rata allocation because it “permitted a policyholder who chooses not to be insured for part of the long-tail injury period to recover as if the policyholder has been fully covered for that period.”).
The imposition of joint and several liability produces inequitable results. Policyholders should not be able to transform their failure or inability to prove the extent of injury or damages in various periods into a windfall in the form of joint and several liability. Equity requires that a pro rata allocation be applied as a proxy — rather than the imposition of joint and several liability — under such circumstances. Similarly, it is entirely proper to expect a policyholder to shoulder the burden of losses or portions of losses where it failed to comply with a contract condition (e.g., late notice) or where an exclusion applies to bar or limit coverage. See Public Service Co. of Colorado v. Wallis & Cos., 986 P.2d 924, 940 (Colo. 1999) (“At the time [the policyholder] purchased each individual insurance policy, we doubt that [it] could have had a reasonable expectation that each single policy would indemnify [it] for liability related to property damage occurring due to events taking place years before and years after the term of each policy.”)
Pro rata allocation fairly apportions responsibility for coverage gaps (orphan shares to the insured

- Multiple courts have recognized as a general principal that for uninsured or underinsured periods, principles of equity demand that the insured be responsible for its pro rata share of defense and indemnity costs.

- Courts have also grounded in utilitarian principles their decision to allocate costs to the insured for uninsured or underinsured periods. For example, in regards to the allocation of defense costs to the insured, the *Forty-Eight Insulations* court stated that, “[w]ere we to adopt [insured’s] position on defense costs a manufacturer which had insurance coverage for only one year out of 20 would be entitled to a complete defense of all asbestos actions the same as a manufacturer which had coverage for 20 years out of 20. Neither logic nor precedent support such a result.” *Forty-Eight Insulations*, 633 F.2d at 1225.
TYPICAL ARGUMENTS IN FAVOR OF PRO RATA ALLOCATION, CONT.

- All sums allocation is inefficient and wastes judicial resources
  - Insurers unfairly burdened with a disproportionate share of the loss will be compelled to see contribution from other insurers to reallocate the loss, which will create additional claims and litigation.
  
  - A pro rata approach eliminates the need for reallocation among insurers through cross-claims in the coverage action or in separate litigation. Indeed, one court has labeled the all sums approach as “improvident” since it “does not solve the allocation problem; it merely postpones it.” *EnergyNorth Natural Gas Inc. v. Certain Underwriters at Lloyd’s*, 934 A.2d 517 (N.H. 2007) (citation omitted). See also *Boston Gas Co. v. Century Indem. Co.*, 454 Mass. 337, 364-65, 910 N.E.2d 290, 311 (Mass. 2009).

COURTS ARE TRENDING IN FAVOR OF PRO RATA ALLOCATION

- To date, 23 state supreme courts have ruled on the allocation issue: 15 courts have ruled in favor of pro rata allocation while 8 have decided in favor of all sums.

- Since 2000, the trend overwhelmingly has been in favor of pro-rata allocation.

  - Ten state supreme courts, in seven federal circuits – Connecticut (2nd), Kansas (10th), Kentucky (6th), Louisiana (5th), Massachusetts (1st), Nebraska (8th), New Hampshire (1st), New York (2nd), South Carolina (4th), and Vermont (2nd) – have decided in favor of pro rata allocation, while the highest court of only four states, mostly in the Midwest – Delaware (3rd), Indiana (7th), Ohio (6th), and Wisconsin (7th) – have found for all-sums allocation.
COURTS ARE TRENDING IN FAVOR OF PRO RATA ALLOCATION, CONT.

- Of the eight state supreme court allocation decisions during the last 10-years, seven have been for *pro-rata* allocation, while only one – Wisconsin – has found for *all-sums* allocation.

- These *pro-rata* allocation decisions have encompassed allocation for both long-tailed property damage situations (usually pollution) and bodily injury occurrences (generally asbestos).
COURTS ARE TRENDING IN FAVOR OF PRO RATA ALLOCATION, CONT.


THREE PREVAILING PRO RATA APPROACHES

- **Pro rata, time-on-the-risk**: loss is assigned in proportion to the amount of time that a carrier’s policies were in effect (the numerator) as a percentage of the total period of time in which the injury occurred (the denominator).

- **Pro rata, available coverage block**: leads to questions of who has the burden of proving availability or unavailability of coverage.

- **Pro rata, by limits and years**: intent is to reflect the “risk transfer” assumed by the policyholder and its insurers in each insurable year of the loss.
Excess coverage only applies after the limits of all underlying policies are exhausted.

But what is an “underlying policy”?  

- Vertical: 
  - The “underlying” are those in the same policy year as the excess.
- Horizontal exhaustion: 
  - The “underlying” are all those triggered.
HORIZONTAL EXHAUSTION (CONT’D)

- An example of vertical exhaustion

- Question from Insurer:
  - If limits are stacked, why does insured get benefit of excess?

- Question from Insured:
  - If excess is paid premium each year, why does it get benefit of other years?
An example of horizontal exhaustion


One of the most hotly contested issues in continuous loss cases... is whether an insured is obligated to exhaust its liability coverage “vertically” or “horizontally.” This issue arises when several primary policies or lower level excess policies are triggered.... “[H]orizontal exhaustion” is the best fit for the realities of cases of this nature.
Question:

- If there is stacking, how does horizontal exhaustion function?
  - What happens to policies with different limits or which are exhausted at different rates?
  - What happens with self-insured retentions and deductibles?
Policy language may drive a court’s determination

*State v. Continental Ins. Co.,* 55 Cal.4th 186 (2012), allowing all-sums-with-stacking, observed:

“There is nothing unfair or unexpected in allowing stacking in a continuous long-tail loss. The most significant caveat to all-sums-with-stacking indemnity allocation is that it contemplates that an insurer may avoid stacking by specifically including an “antistacking” provision in its policy. Of course, in the future, contracting parties can write into their policies whatever language they agree upon, including limitations on indemnity, equitable pro rata coverage allocation rules, and prohibitions on stacking.”
“ANTI-STAKING” OR “NON-CUMULATION” PROVISIONS

- Provisions may attempt to limit coverage:
  - Regardless of the number of insured persons, injured persons, claims, claimants or policies involved, our total liability for damages resulting from one loss will not exceed the limit of liability for coverage shown on the declarations page. All bodily injury, personal injury and property damage resulting from one accident or from continuous or repeated exposure to the same general conditions is considered the result of one loss.
  - Regardless of the number of (1) insureds under this policy, (2) persons or organizations who sustain personal injury or property damage, (3) claims made or suits brought on account of personal injury or property damage to which this policy applies, the Company’s liability is limited as follows: . . . If the same occurrence gives rise to personal injury or property damage which occurs partly before and partly within the policy period, the each occurrence limit and the applicable aggregate limit of this policy shall be reduced by the amount of each payment made by the company with respect to such occurrence under a previous policy or policies of which this policy is a replacement.
“ANTI-STAKING” OR “NON-CUMULATION” PROVISIONS

Some courts have found the provisions void for public policy reasons:


“ANTI-STAKING” OR “NON-CUMULATION” PROVISIONS

Some courts have found the provision ambiguous and therefore construed it against the insurer.


“ANTI-STAKING” OR “NON-CUMULATION” PROVISIONS

Some courts have analogized the clause to an “escape” clause and have refused to enforce it.


"ANTI-STAKING" OR "NON-CUMULATION" PROVISIONS

Statutes may affect the application of these limitations

E.g., COLO. REV. STAT. § 10-4-110.4(1) provides:
“A provision in a liability insurance policy issued to a construction professional excluding or limiting coverage for one or more claims arising from bodily injury, property damage, advertising injury, or personal injury that occurs before the policy's inception date and that continues, worsens, or progresses when the policy is in effect is void and unenforceable if the exclusion or limitation applies to an injury or damage that was unknown to the insured at the policy's inception date.”
“ANTI-STAKING” OR “NON-CUMULATION” PROVISIONS

Some courts have enforced the provision

- *Liberty Mut. Ins. Co. v. Treesdale, Inc.*, 418 F.3d 330 (3d Cir. 2005) (non-cumulation clause held to be an anti-stacking clause, not an escape clause. The clause provides that if a single occurrence gives rise to an injury during more than one policy period, only one occurrence limit will apply.)

- *Plantation Pipeline Co. v. Continental Cas. Co.*, 2008 U.S. Dist. LEXIS 80680 (N.D. Ga. July 8, 2008) (The court rejected the policyholder’s arguments that the continuous trigger/pro-rata allocation doctrines must be applied, especially when no Georgia court has adopted them, and enforced the non-cumulation clause.)

- *Kaiser Cement and Gypsum Corp. v. Ins. Co. of the State of Pa.*, 215 Cal.App.4th 210 (Ct. App. 2013) (The policy contained language that stated “the limit of the Company’s liability as respects any occurrence involving one or any combination of the hazards or perils insured against shall not exceed the per occurrence limit designated in the Declarations.”)
DEEMER CLAUSES

“Deems” a particular date in the progression of injury or damage as the relevant triggering date.

- “With respect to injury or destruction of property . . . Caused by exposure to injurious conditions over a period of time involving two or more liability policies . . . all such injury, destruction . . . caused by the same injurious conditions shall be deemed to occur only on the last day of the last exposure and the applicable limit of liability contained in the policy in effect on the last day of such exposure shall be the applicable limit of liability.”
Some courts have refused to apply this provision

- *Endicott Johnson Corp. v. Liberty Mut. Ins. Co.*, 928 F. Supp. 176, 182 (N.D.N.Y. 1996) (finding deemer clause is ambiguous in environmental contamination cases because the last day of “exposure” could either be the last day of the dumping of waste or the last day the waste was finally cleaned and remediated).

- *United Techs. Corp. v. Liberty Mut. Ins. Co.*, 1 Mass. L. Rptr. 91, 1993 WL 818913 (Sup. Ct. Aug. 3, 1993) (holding deemer clause is unenforceable in environmental context where it would be difficult, if not impossible, to apply the clause consistently to gradual pollution claims, particularly where the damage may never be cleaned up and there may never be a last day of exposure).
Some courts have found that self-insured retentions constitute primary insurance and therefore are subject to stacking

- *Atchinson, Topeka & Santa Fe Railway Co. v. Stonwall Ins. Co.*, 71 P3d 1097 (Kan 2003) (SIRs are “other insurance” and must be exhausted before excess insurance policies must assume any obligation).

SELF-INSURED RETENTIONS (SIRs)

Other courts have found that self-insured retentions are not insurance and not subject to stacking

- *Montgomery Ward & Co. v. Imperial Cas. and Indemn. Co.*, 81 Cal. App. 4th 356, (Cal. Ct. App. 2000) (“Insurance is a contract whereby one undertakes to indemnify another against loss, damage, or liability arising from a contingent or unknown event…self-insurance is equivalent to no insurance…As such, it is repugnant to the very concept of insurance…If insurance requires an undertaking by one to indemnify another, it cannot be satisfied by a self-contradictory undertaking by one to indemnify oneself.”)
