New Developments in Allocation, Trigger and Exhaustion: *Long-Tail Disputes*

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Today's Presenters

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What Are the Sources of Disputes?

Allocation/Trigger

Exhaustion (Vertical v. Horizontal)

Stacking of Limits

Re-allocation

Inter-insurer disputes/Equitable Contribution

Background of the Disputes

Steadily Growing Number of Long-Tail Claims

- Asbestos
- Construction Defect
- Lead
- Mold
- Pollution
- Silica

Widespread acceptance of multi-year trigger

- Since 1990s, nearly every state but Rhode Island has abandoned "manifestation" as the sole trigger of coverage for long-tail claims.

What Are We Talking About?

Trigger: *What* must happen during the policy period

Allocation: *How* are the policies to respond

Exhaustion: *Who* has to pay and *When*

Trigger of Coverage

Trigger Theories

Actual Injury

Injury in Fact

Manifestation

Continuous Trigger

Don’t Be Fooled!!

Labels Don’t Solve the Problem

The theories must be ***applied*** to a specific factual context

“. . .we must stress that courts and litigants should be careful when referring to such delineated theories. The nomenclature and reference of specific trigger models can be deceiving because a court must apply policy language to the factual context before it..”
Rossello v. Zurich Am. Ins. Co., 226 A.3d 444 (Md. 020)

Carrier Corp. v. Allstate Ins. Co.,

187 A.D.3d 1616 (4th Dept. 2020)

Illustrates the problem of how to apply trigger

The New York rule is “clear”, ***BUT***

How does it apply to large scale tort claims

Is it a matter of law???

Background of *Carrier Corp.*

Thousands of asbestos personal injury claims

Primary coverage exhausted

Can’t determine amount of injury in any period

How does trigger apply to excess policies

The Ruling Below

Decided on cross-motions for summary judgment

Trial court applied the “injury-in-fact” trigger

DOFE -- DOD or DOS

Not so Fast

On appeal, the Insurer’s position was that ***trigger was an issue of fact***

Dispute as to when injury first occurs

Medical experts opine not instantaneous from time of first exposure

Summary judgment not appropriate

The Fourth Department Agrees

The medical evidence is disputed

There are experts on both sides

Trial court can’t resolve as a matter of law

You need a trial

What are the Implications???

Not a quick and easy resolution

Are you going to try the facts of individual claims

Medical trigger trial to set a benchmark. DOFE plus X number of years

Creates practical problems for claim resolution

Trigger for PFAS Claims

Crum & Forster v. Chemicals, Inc. 2021 U.S. Dist. LEXIS 146702 (S.D. Tex. Aug. 5, 2021)

Firefighting foam cases consolidated in USDC—SC

Does insurer have duty to defend when the complaints largely silent on dates of alleged exposure

Injury must “first occur” during the policy period

PFAS Claims

Policy also stated that if the date of injury "could not be determined"

Then it would be deemed to have occurred before the policy period

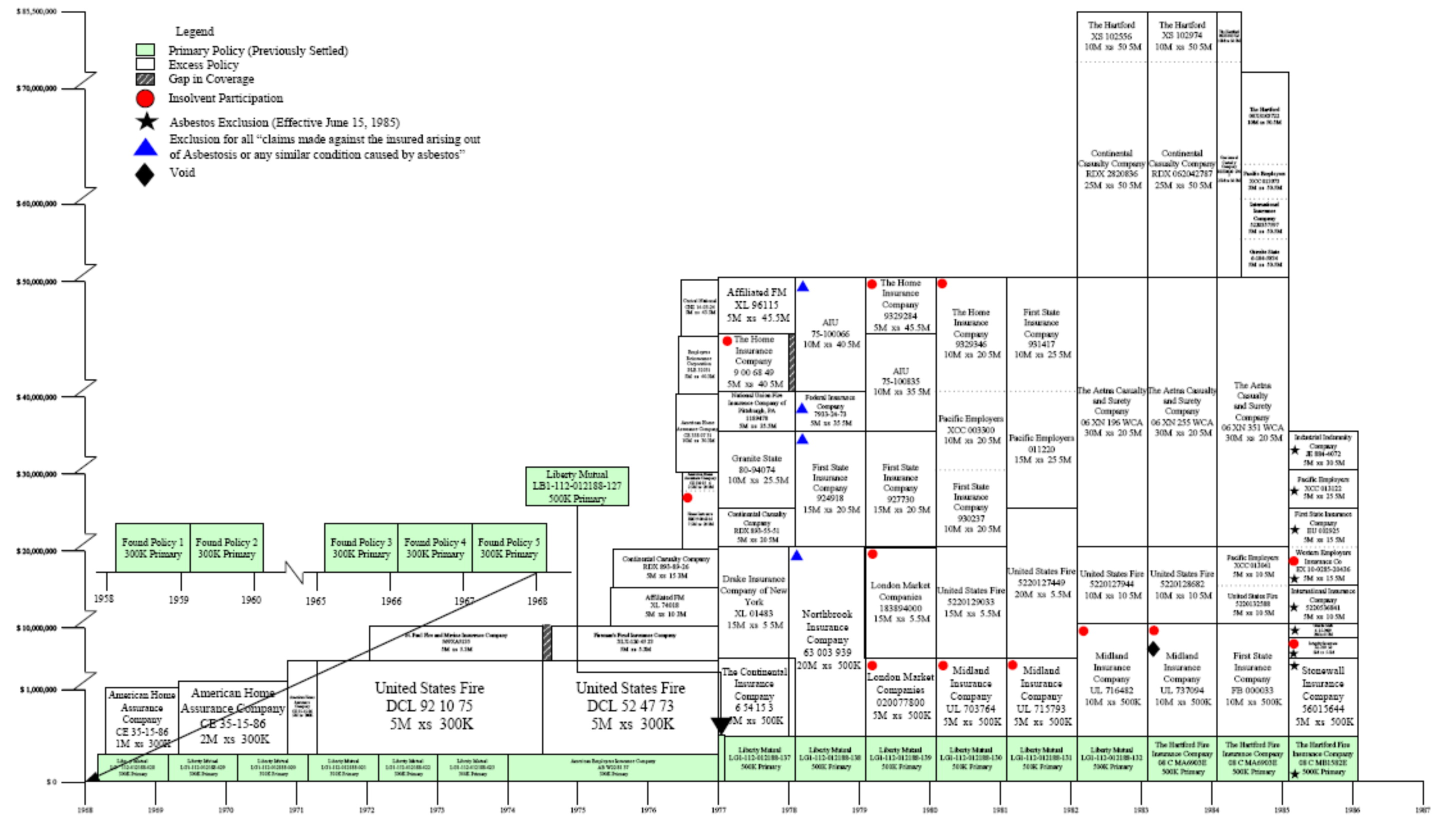
Since can't determine dates from the complaints, no duty to defend

Court disagreed: Dates "could" potentially be determined in later proceedings so C&F must defend

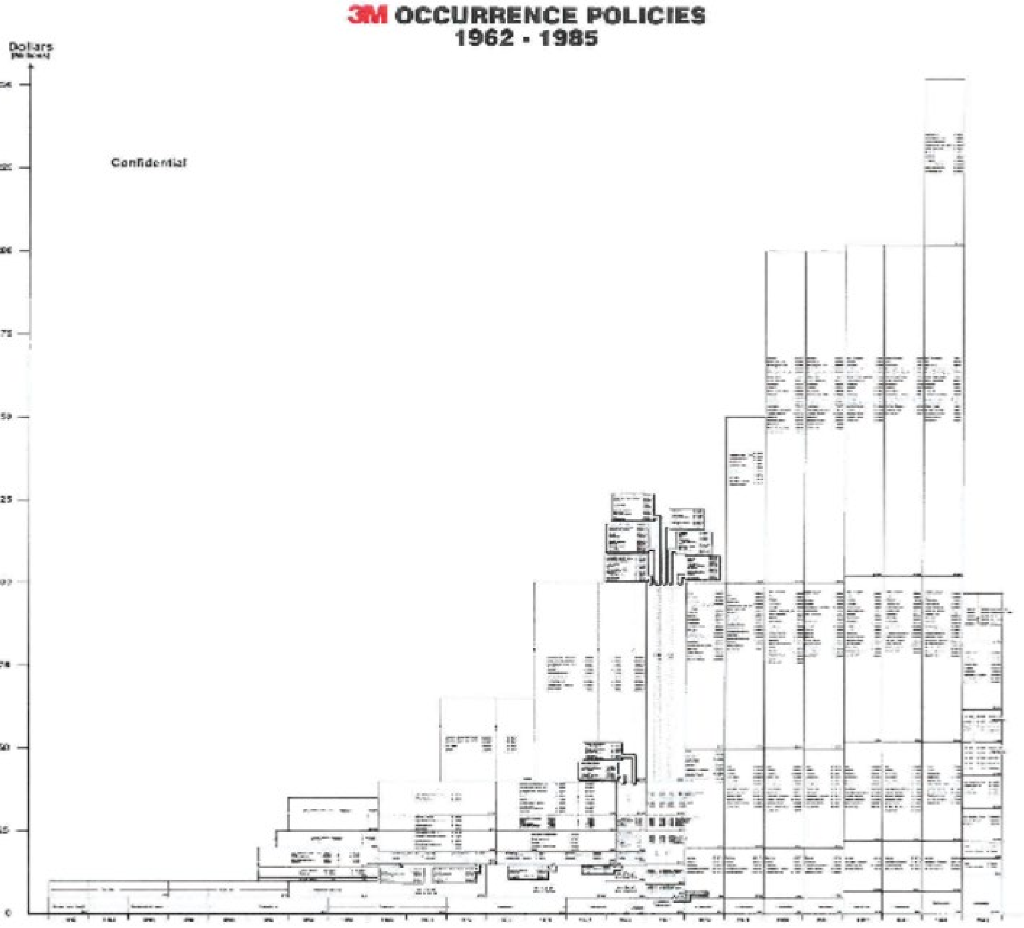
What Happens After Policies are Triggered

ALLOCATION

A Sample Coverage Block



Another Example



Conflicting Approaches / Policy Terms

Insured allowed to assign entire loss to any triggered year of coverage

- “All Sums”
- Joint and Several Liability

Loss pro-rated across period of injury

- Pure “time on the risk”
- Modified “time on the risk”

“All Sums”

Language formerly contained in CGL policies requiring insurer to pay “all sums” that insurer was legally obligated to pay as damages because of BI or PD.

Language is not tied to trigger

Not a self-executing allocation provision

“Spiking”

Insured allowed to assign its entire loss to a single year’s stack of policies, causing the loss to “spike” into higher years.

Not to be confused with the effect that such claims may have on the blood pressure of insurance companies.

Orphan Shares

"Orphan shares" are gaps due to:

- Insurance wasn't purchased
- Missing policies
- Exhausted limits
- Exclusions
- Insolvency
- Self-Insurance

Hop Scotch

Policyholders allowed to pick its way through coverage block without having to bear responsibility for any orphan shares.

Time on The Risk

Insurer's share is calculated by dividing months or years of coverage by months or years when injury occurred.

Insurer's share is not affected by availability of coverage for uninsured periods.

Insured responsible for all orphan shares.

The Key Policy Language

Insurer agreed to pay for "bodily injury" or "property damage"

BUT ONLY **"DURING THE POLICY PERIOD"**

Modified Time on Risk

Loss only allocable to periods when insured could have transferred risk.

No allocation to years where insurance was unavailable for such losses.

Limits purchased included (NJ)

“Availability” Issues

Early Years (pre-CGL)

Claims Made Coverage

Asbestos Exclusions (post-1986)

Pollution Exclusions

- “Sudden and accidental” (1970)
- Absolute/Total Pollution Exclusions (1986…)

Collapsing Bathtub

As certain years become exhausted due to inadequate limits, those years are eliminated from inclusion in either numerator or denominator for calculating pro rata shares.

Not to be confused with defective plumbing claims.

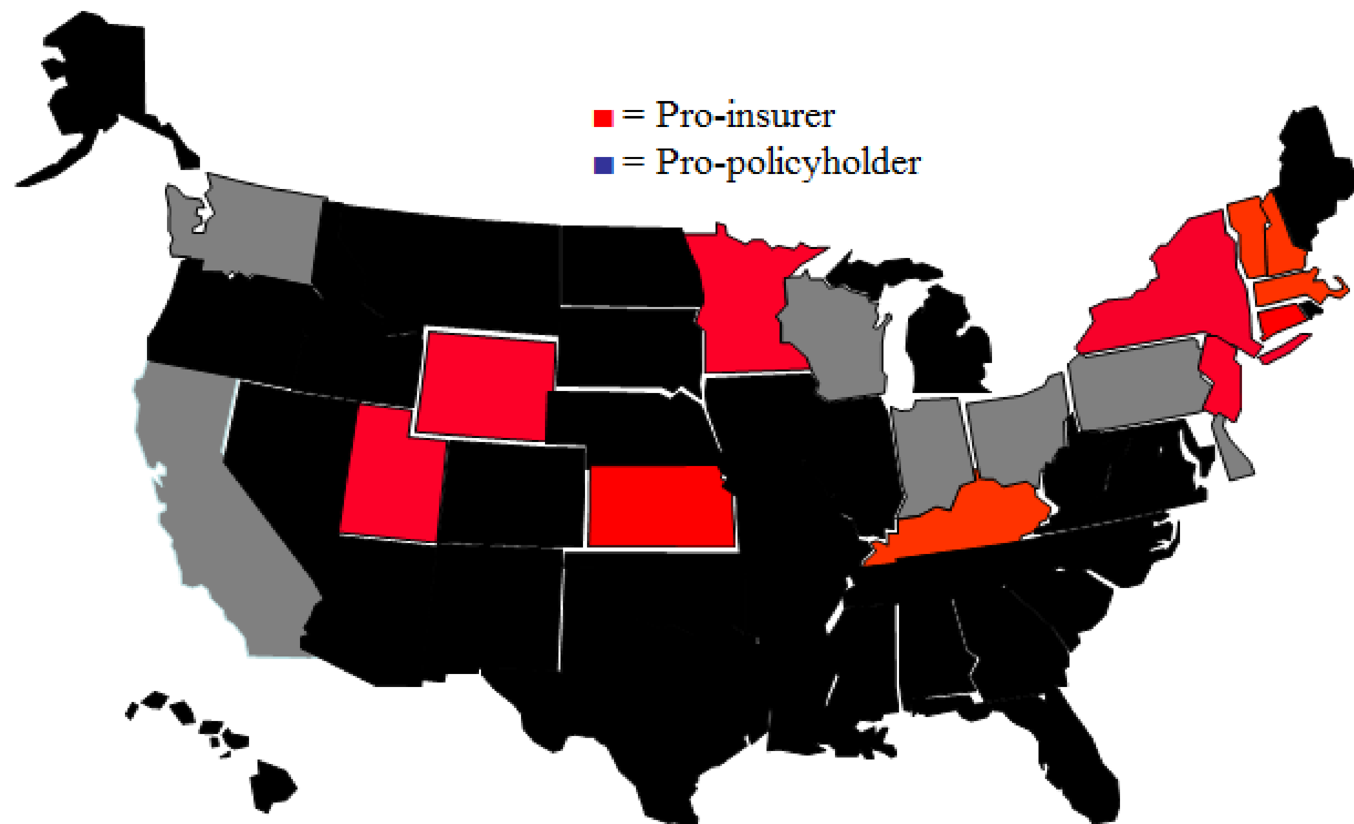
Supreme Courts Are Split

State supreme courts narrowly divided.

- Eleven supreme courts have permitted allocation, albeit on different theories.
- Six state supreme courts have adopted “all sums” or joint and several liability

No law at all in most states.

THE STATE OF THE STATES
Supreme Court Rulings



Pro Rata States

Colorado
Connecticut
Kansas
Kentucky
Louisiana
Massachusetts
Minnesota
Nebraska
New Hampshire
New York (sort of)
South Carolina
Utah
Vermont

ILLINOIS

Zurich v. Raymark Indus. Inc.,

118 Ill. 2d 23, 112 Ill. Dec. 684, 514 N.E.2d 150 (1987)

Dispute over coverage for asbestos-related bodily injury claims

- Coverage triggered by exposure and subsequent manifestation of disease and/or sickness
- When and whether coverage is triggered must be determined based on case-by-case factual inquiry
- Applied joint and several liability to all triggered policies

John Crane Inc. v. Admiral Ins. Co.,
991 N.E.2d 474 (Ill. App. 2013)

Coverage dispute over asbestos-related bodily injury claims

- All primary coverage must be horizontally exhausted prior to triggering coverage under umbrella and/or excess coverage

Outboard Marine Corp. v. Liberty Mut. Ins. Co.,

283 Ill. App. 3d 630 (Ill. App. 1996)

Coverage dispute over costs for clean up of PCB contamination

- Continuous trigger applies, meaning that all policies in effect while property was damaged were triggered
- Costs allocated among time periods where property damage took place on a pro rata basis
- Policyholder is responsible for periods where no insurance is available
- All primary policies must be exhausted prior to calling on umbrella and excess coverage

NEW YORK

Stonewall Ins. Co. v. Asbestos Claims Mgmt. Corp., 73 F.3d 1178 (2d Cir. 1995)

Dispute over coverage for asbestos-related bodily injury claims

- Coverage is triggered during all time periods during which it can be shown that bodily injury took place
- Applied pro rata time on risk allocation
- Policyholder is responsible for uninsured periods, except for after 1985, when coverage for asbestos claims became generally commercially unavailable

Keyspan Gas. E. Corp. v. Munich Reinsurance Am. Inc., 31 N.Y.3d 51, 96 N.E.2d 209 (N.Y. 2018)

Coverage dispute over environmental property damage claims

- Applied pro rata time-on-risk allocation
- Policy language requiring property damage “during the policy period” required that insured was responsible for time periods during which coverage was commercially unavailable

Consol. Edison of N.Y. v. Allstate Ins. Co.,

98 N.Y.2d 208, 774 N.E.2d 687 (N.Y. 2002)

Coverage dispute over environmental property damage claims

- Applied pro rata-time on risk allocation

In re Viking Pump, Inc.,
27 N.Y.3d 224, 33 N.Y.S.3d 188, 52 N.E.3d 1144 (N.Y 2016)

Dispute over coverage for asbestos-related bodily injury claims

- Applied all-sums allocation where policies contained non-cumulation and continuing coverage clauses, holding that pro rata allocation would be inconsistent with this policy language
- Non-cumulation clauses provide that one set of limits is available where a claim triggers multiple policy periods
- Continuing coverage clauses provide coverage where damages continue after the expiration of the policy period

NEW JERSEY

Owens-Illinois, Inc. v. United Ins. Co.,
138 N.J. 437, 650 A.2d 974 (1994)

Dispute over coverage for asbestos-related bodily injury claims

- Coverage is triggered for all insurers on the risk between first exposure and manifestation of disease
- Allocated indemnity on a pro rata basis according to time on risk and the amount of risk assumed
- Insured is responsible for periods of no coverage when coverage was commercially available

Carter-Wallace Inc. v. Admiral Ins. Co.,
154 N.J. 312, 712 A.2d 1116 (1998)

Dispute over coverage for environmental property damage

- Applied continuous trigger
- Allocated defense and indemnity costs proportionally on a pro rata time on risk by limits basis
- Damages are allocated vertically in each policy period, including for periods of self-insurance

CALIFORNIA

Trigger Meets Allocation Meets Exhaustion

Policyholder success in broadening the trigger of coverage created unintended problems for insureds and insurers

Who bears responsibility for triggered years for which insurance is unavailable?

Montrose Chemical Corp. v. Superior Court,
9 Cal. 5th 215, 460 P.3d 1201 (Cal. 2020)

Case started before some of you were born

Many prior decisions

Focus on whether Horizontal vs. Vertical Exhaustion Applies

Background of *Montrose*

Environmental property damage from 1947 to 1982

Entered into Consent Decrees with EPA and State of California

Costs of more than $150 million

Sued 115 insurers in coverage block from 1961-1985

Prior Decisions and Building Blocks

Montrose **(1995):**	Continuous trigger
Aerojet-General **(1997):**	“All Sums” Ruling
State of Cal. V. Continental Ins. Co**. (2012):**	Stacking

Sequencing is the Key Issue

Montrose argued should be able to go straight up a tower

Vertical Exhaustion

As long as immediately underlying policy exhausted can go to the next layer

Lower layer coverage left intact

Montrose's Theory

The rule Montrose proposes in its amended complaint [filed in 2015] is a rule of "vertical exhaustion" or "elective stacking," whereby it may access any excess policy once it has exhausted other policies with lower attachment points in the same policy period. The insurers, in contrast, each of which has issued an excess policy to Montrose in one of the triggered policy years, argue for a rule of "horizontal exhaustion," whereby Montrose may access an excess policy only after it has exhausted other policies with lower attachment points from *every* policy period in which the environmental damage resulting in liability occurred. 9 Cal. 5th at 227.

The Insurers' Position

Exhaustion Should Proceed by Layers

Rising Bathtub Approach

No Vertical Spike

Policy Language and Expectations

Why Is This an Issue?

Policies don’t provide a clear answer

Policies defined “underlying” coverage in many different ways

Schedule of specific underlying policies

Specified dollar amounts/Combined Limits

“Other Insurance” Provisions???

Lack of consistency/uniformity

This is not one UBER Policy

When policies placed no one was thinking about uniformity of “other insurance” clauses

Introducing: The "UBER" Policy

This all-sums-with-stacking indemnity principle properly incorporates the continuous injury trigger of coverage rule and the all sums rule, and effectively stacks the insurance coverage from different policy periods to form one giant "uber-policy" with a coverage limit equal to the sum of all purchased insurance policies. This approach treats all the triggered insurance as though it were purchased in one policy period and recognizes the uniquely progressive nature of long-tail injuries that cause progressive damage throughout multiple policy periods. Importantly, the insured has immediate access to the insurance it purchased. The insurers can then sort out their proportional share through actions for equitable contribution or subrogation. 9 Cal. 5th at 228.

Only Immediately Underlying Policy

Lack of clarity in policies

No provision regarding exhaustion of layers

No uniformity in “other insurance” provisions

“Other insurance” clauses don’t address this situation

Don’t apply to progressive loss scenario

Montrose Rationale

Policies state attachment point

Use of schedules

Horizontal exhaustion is harder

Have to address all issues across the years of coverage

What is the Court Missing?

No discussion of underwriting and pricing

No such creature as an “uber” policy

What about “gaps” in coverage in a single year

Equitable contribution claims prolong the litigation

Montrose Redux

Doesn't Answer Everything

Leaves Open a Series of Issues

Wait Until Montrose 22

Montrose Redux

Doesn't Answer Everything

Leaves Open a Series of Issues

Wait Until Montrose 22

MARYLAND

Rossello v. Zurich Am. Ins. Co.,
468 Md. 92, 226 A.3d 444 (Md. 2020)

Relitigating what were previously thought to be settled issues

Does pro rata allocation apply to long-tail BI claims?

YES

The Facts

Construction worker case/ Worked on a project starting in 1974

Not diagnosed with mesothelioma until 2013

Obtained judgment against installer and brought a garnishment proceeding against Zurich

The Question

Zurich issued policies to the installer

- BUT only for 4 years out of 40 year period
- Does Zurich have to pay the entire judgment or only a pro rata share based on time on the risk
- Impact of years when insurance was not purchased/unavailable

The History

Mayor and City Council of Baltimore v. Utica Mut. Ins. Co.,
145 Md. App. 256, 882 A.2d 1020 (Md. App. 2002)

- Asbestos in building claims
- Property damage
- Zurich urged court to apply
- Injured worker urged court to adopt “all sums”

The History

Bausch & Lomb v. Utica Mut. Ins. Co.,
355 Md.566, 735 A.2d 1081 (1999)

- Rejected claim for "joint and several" or "all sums" for environmental liabilities that spanned thirty years
- Only had coverage for four years
- Argued that as long as any portion of damage occurred during the policy period then the insurer was on the hook for all damages
- Pro rata better matches the policy provisions of "during the policy period"

The Result

Rejected “all sums” and “joint and several” approach

Consistent with policy language

Significant that it was an individual claimant

Rejected claims that pro rata approach was “unfair” or “unworkable”

Are You Exhausted?

Axis Reinsurance Co. v. Northrop Grunman Corp.,

976 F.3d 849 (9th Cir. 2020)

Rejected claim by excess insurer that underlying insurance had been "improperly exhausted" by settlement decisions

- Axis argued that payment of an "uncovered claim" could not be used to exhaust coverage
- Can't "second-guess" decisions of the underlying insurer

Costco Wholesale Corp. v. Arrowood Indem. Co.,

387 F.Supp. 3d 1165 (W.D. Wash. 2019)

Recognized importance of "settled expectations"

- In normal circumstances can't second guess decisions which result in exhaustion
- Have to establish "bad faith" or "fraud" to be able to challenge an exhaustion decision

Scottsdale Ins. Co. v. Certain Underwriters at Lloyd's,
836 Fed. Appx. 105 (9th Cir. 2020)

Professional liability claims brought against Dickstein Shapiro

- Settlement payments exhausted underlying
- *BUT*, the payments also included claims for "bad faith" against Underwriters
- In that situation, could challenge the decision and what was included in the exhaustion calculation

Or am I Just Tired?

What mechanism to determine exhaustion?

Is actual exhaustion required or can it be imputed?

Role of aggregates and multi-year policies

Other Examples

Farmers Mut. Fire Ins. Co. of Salem v. NJ PLIGA,
74 A.3d 860 (N.J. 2013)

John Crane Co. v. Admiral Ins. Co.,
991 N.E.2d 474 (Ill. App. 1st Dist. 2013)

National Union Ins. Co. v. Porter Hayden,
2014 WL 43506 (D. Md. 2014)

More News

Indemnity Ins. Co. v. W&T Offshore, Inc.,
756 F.3d 347 (5th Cir. 2014)

New England Re v. Ferguson Enterprises,
(D. Conn. 2014)(Cal. Law)

Is Horizontal Exhaustion on the Way Out?

Many courts continue to require that ***all policies*** in underlying layer be exhausted before moving to the next layer.

- *e.g.*, California, Illinois, Maryland, Massachusetts, Minnesota, New Jersey

The Bathtub Also Rises

The Rising
Bathtub Approach

Recent Rejections

Legacy Vulcan Corp. v. Superior Court, 185 Cal. App. 4th 677 (2010)

Northwest Pipe Co. v. RLI Ins. Co., 734 F.Supp. 2d 1122(D. Ore. Aug. 11, 2010)

LSG Technologies v. U.S. Fire, 2010 WL 564054 (E.D. Tex. 2010)

Yeah, Well Prove It!

LSG Technologies v. U.S. Fire, 2010 WL 5646054 (E.D. Tex. 2010)

- *Rejected umbrella insurer's claim that insured had not proven exhaustion of underlying insurance.*
- *No express policy definition so proof of payments was enough*
- *No re-examination of whether payments were "proper"*

I Don’t Have To!!!!!

American Ins. Co. v. St. Jude Medical, 2010 WL 3733009 (D. Minn. Sept. 20, 2010)

Court refused to allow excess insurer to demand “claim by claim” accounting

- *Exhaustion doesn’t require proof of defined losses*
- *Underlying insurers paid sums equal to limits*

Stacking

Stacking – Defined

"In its broadest sense, stacking means treating multiple policies that apply to a single loss as cumulative – as a 'stack' of coverage – rather than as mutually exclusive."

- *State v. Continental Ins. Co.*, 88 Cal. Rptr.3d 288, 302 (Cal. Ct. App. 2009), *aff'd,* 145 Cal.Rptr.3d 1 (2012)

Stacking – Consequences

Thus, if stacking is allowed, an insured can obtain indemnity for a loss under more than one policy period if the loss exceeds the limits of liability of all of the policies in a single policy period or coverage tower.

Stacking – Consequences

"Indeed, the choice between stacking and not stacking can have an even more drastic effect than the choice between an all-sums approach and a pro rata approach."

- *State v. Continental Ins. Co.*, 88 Cal. Rptr.3d at 302.

Stacking-When Applicable?

In pro-rata states, stacking is not usually an issue, the loss is pro-rated over several policy periods.

- Horizontal exhaustion in pro-rata jurisdictions requiring that all primary insurance must exhaust prior to impacting excess coverage is a completely different issue than whether, in the first instance, "stacking" of per occurrence limits of liability is permissible in an all sums jurisdiction.

Arguments Against Stacking

Stacking treats a single occurrence as multiple occurrences – if the court holds that a loss constitutes a single occurrence then only one "per occurrence" limit of liability in a single policy should apply.

Arguments Against 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… Therefore, we 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 Corp. v. Insurance Co. of N. Am.*, 667 F.2d 1034, 1049 (D.C. Cir. 1981) (emphasis added).

Arguments Against Stacking

"Simply because a 'Claim Occurrence' extends throughout several policy periods does not raise the per-occurrence indemnity cap established in every policy. Even the jurisdiction embracing the broadest trigger rule has held that multiple coverage does not permit an insured to 'stack' the limits of multiple policies that do not overlap."

- *American Physicians Ins. Exchange v. Garcia*, 876 S.W.2d 842, 853-54 (Tex. 1994) (discussing *Keene*).

Arguments Against Stacking

"[E]very triggered policy has an independent obligation to respond in full to a claim . . . that does not entitle an insured to get more than it bargained for . . . . The policyholder cannot reasonably expect more simply because asbestos related claims trigger more than one policy."

- *In re Asbestos Insurance Coverage Cases*, Judicial Council Coordination Proceeding No. 1072, Statement of Decision Concerning Phase IV Issues (Cal. Super. Ct. San Francisco Jan. 24, 1990)

Arguments Against Stacking

Stacking "makes aggregate limits and the separately negotiated premiums for each policy illusory by expanding coverage to the sum of both policies."

- Uniroyal, Inc. v. Home Ins. Co., 707 F. Supp. 1368 (E.D. N.Y. 1988)

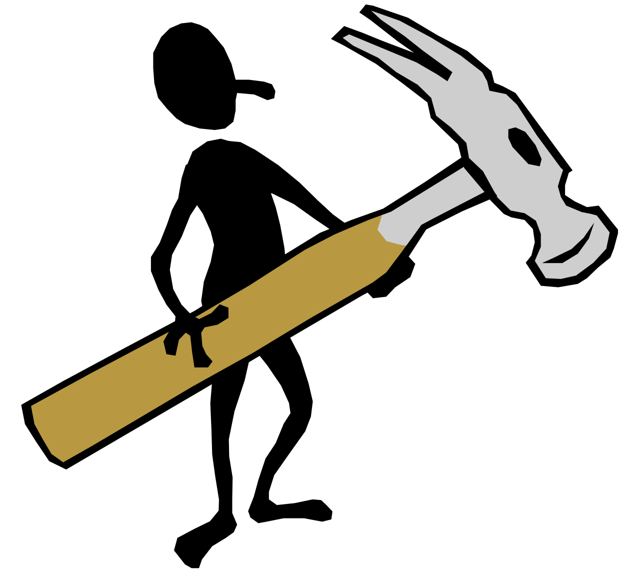
Arguments Against Stacking

The policy language “during the policy period” precludes stacking and is in essence an anti-stacking provision.

- In other words, if the court is not honoring the “during the policy period” limitation for allocation, it should do so for stacking.

Arguments Against Stacking

Permitting stacking effectively rewards the insured for failing to mitigate or intervene and remedy property damage or bodily injury at an earlier date.



The Enemy Speaks-Arguments For Stacking

The insured should get the "benefit of the coverage." It paid a premium each year for coverage and the insurer calculated the policy premium based upon the risk it understood each policy year. If property damage occurs each policy year, it "must make good on each policy."

- *Society Ins. v. Town of Franklin*, 507 N.W. 2d 342 (Wis. Ct. App. 2000).

The Enemy Speaks-Arguments For Stacking

The purpose of the all sums ruling is to make the insured "whole."

- "If contamination causes a covered occurrence in the 1978 policy period, and continued causing damage in the 1979 policy period, that contamination would trigger both policies. . . . We agree . . . that Dana may elect to seek indemnity from any or all of the policies at risk as to any single occurrence.
  Allstate Ins. Co. v. Dana Corp., 759 N.E.2d 1049, 1060-61 (Ind. 2001)

The Enemy Speaks-Arguments For Stacking

The absence of an “anti-stacking” or non-cumulation clause in a policy means, at a minimum, that no policy term expressly precludes the stacking of “per occurrence” limits of liability.

Arguments for Stacking

The "other insurance" clause permits the insured to obtain coverage under other liability policies.

- When multiple policies apply during a single policy period, the insured is entitled to stack limits.

Scorecard: Stacking in the Context of Long-Tail Claims

Louisiana
Maryland
Wisconsin
California

Kaiser Cement

Kaiser Cement and Gypsum v. Ins. Co. of State of Pa., 155 Cal. Rptr. 3d 283 (2013)

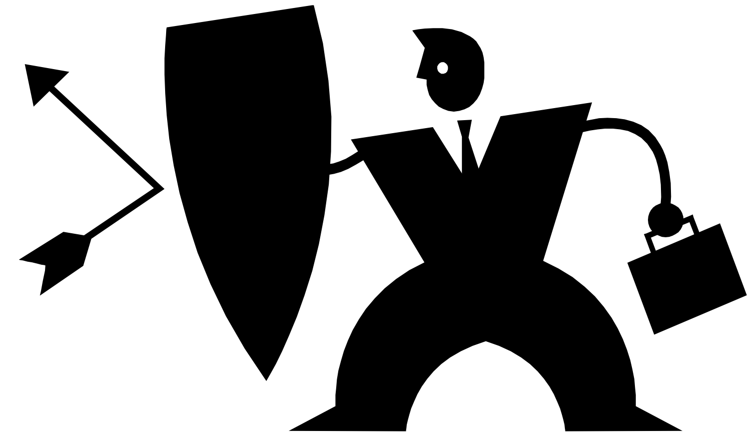
Excess insurer's obligation does not attach until all collectible primary exhausted

Stacking does not apply to primary's obligations

Anti-Stacking Clauses

An insurer may limit stacking with an “anti-stacking” or non-cumulation provision.

- Is the clause unambiguous?
- Does the clause render coverage illusory?
- Does the clause violate public policy?
- Is the clause inconsistent with continuous trigger and pro-rata allocation law?



What Happens After the “Spike”?

“The Biggest Loser”

Biggest loser in all sums world is the excess insurer.

- They receive less premium than primary insurers.
- They are initially stuck with the entire liability and risk of non-recovery due to insolvency, etc.
- They often must pick up the primary exposure and lower-level excess exposures of other insurers.
- They have the burden of fronting the payment and seeking contribution from others.

Options for the “Spiked” Carrier

What can an excess carrier do to reallocate the loss?

- Seek a credit for settlements entered into by settling insurers and reduce its liability in initial coverage case.
- Bring subsequent suit for equitable contribution and/or subrogation against settling carriers.
- Pursue both settlement credits and reallocation.

Cleaver Brooks

Cleaver Brooks, Inc. v. AIU,
839 N.W.2d 882 (Wis. App. 2013)

- *Policyholder has the right to choose more than one insurer at a time to prevent premature exhaustion of defense*

Settlement Credits & Offsets

Avoiding “double recovery” and protracted litigation against settled insurers

Settlement Credits & Offsets

Who bears the risk of the difference between the settlement amount and policy limits?

- Policy limits – credit based on the policy limits of all settled policies.
- Pro-rata – credit based on settled insurer's apportioned share of liability.
- Pro-tanto – dollar for dollar credit based on amount recovered from settled insurers.

Settlement Credits/Offsets – Full Policy Limits

GenCorp Inc. v. AIU Insurance Co., 297 F. Supp. 2d 995 (M.D. Ohio 2003)
An argument for application of horizontal exhaustion even in an all sums jurisdiction.

- EPA had identified GenCorp as a PRP for environmental cleanup.

- GenCorp sought coverage for the cleanup from its primary, umbrella, and excess carriers over different periods.

Gen Corp – Just the Facts

GenCorp then settled with all of its primary carriers, and several excess carriers, across the entire insurance period.

- The remaining excess insurers sought settlement credits.

Gen Corp – The Arguments

GenCorp argued that granting credits would reward the remaining excess carriers for not settling.

- GenCorp asserted that, under the "all sums" approach, it could choose a single policy year and "'rise up' vertically to the coverage provided by the excess insurers" it was targeting.

Horizontal Exhaustion in an “All Sums” World

The court determined that GenCorp decided how to assign its liability when it settled policies in every year of available insurance:

- Having already made its allocation of liability through its settlements in all policy years, “*[i]t is not possible for GenCorp now to decide to allocate its liability to one policy or to one policy year because this would be contrary to the settlements it has reached.*”

  GenCorp, 297 F. Supp. 2d at 1006.

Gen Corp. – Settlement Credit for Full Policy Limits

The insured had effectively eliminated the right of the excess carriers to seek contribution from lower level carriers, which, the court noted, would saddle the excess insurers with more than their share of the insured’s liability.

- *Gen Corp* correctly places the risk of settlement on the party (the insured) who negotiated and controlled it.

Westport Ins. Co. v. Appleton Papers,
787 N.W.2d 894 (Wis. App. 2010)

- Settlements of primary coverage in every year of triggered policies.
- Settlements of excess policies at different levels in every year of triggered policies.
- Vertical allocation is consistent with how policies were marketed and sold.

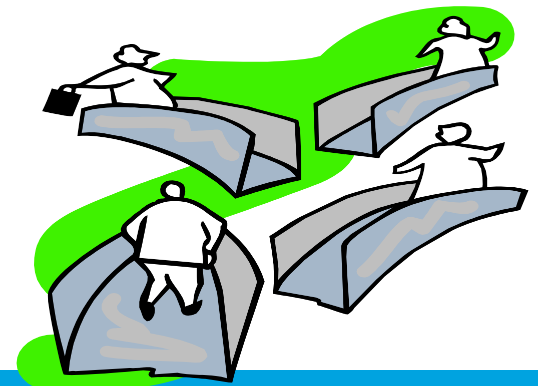
Pro-Rata Settlement Credits

- Purpose is to avoid “double recovery” by insured in light of prior settlements.
- Non-settling insurers are barred from seeking contribution from settled insurers.
- Reduce judgment by settling insurer’s pro-rata apportioned share. *Koppers Co. v. Aetna Cas. & Sur. Co.*, 98 F.3d 1440 (3rd Cir. 1996) (credit for apportioned share of each settled excess policy in comparison to total limits of all triggered policies).

Settlement Credits/Set Offs

Pro-rata settlement credit issues:

- Insurer has a difficult burden of proof.
  - Terms of settlement-problem with “unquantifiable basket of risks.” *Weyerhauser Co. v. Commercial Union Ins. Co.*, 15 P. 3d 115 (Wash 2000).
    - Other sites.
    - Other types of claims (e.g., asbestos, global warming, bad faith claims, etc.).
    - Apportionment of defense costs v. indemnity.
    - Policy buy-backs.



Pro-Tanto Settlement Credits

Insured's argue that pro-tanto settlement credit locks in the all sums principle that the insured will be made "whole."

- Consistent with tort law in some jurisdictions that reduce judgment by joint tortfeasor's payment rather than their share of liability.
- When settlement credit is less than the policy limits may increase exposure to non-settling insurers.

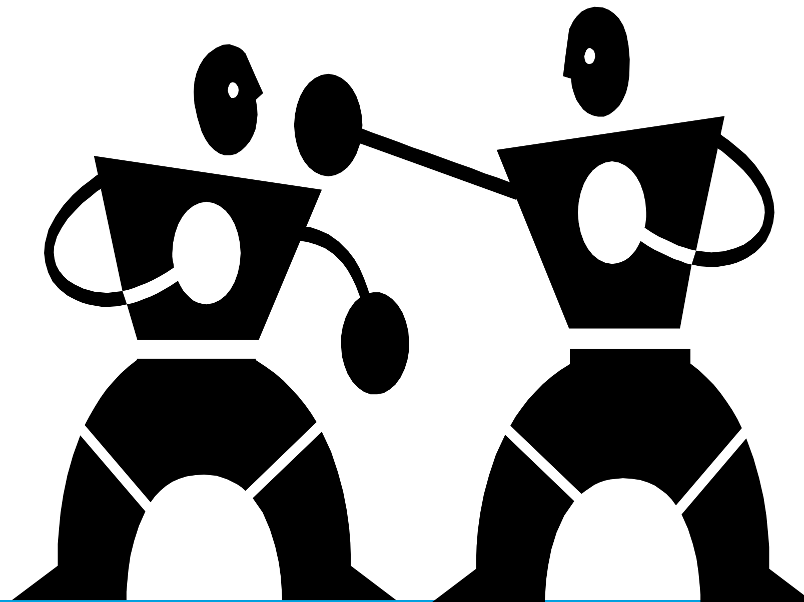
Duty to Settle

Do duties run among the layers in an insurance program?

- *Central Illinois Public Service Co. v. Agricultural Ins. Co.,* 880 N.E.2d 1172 (Ill. App. 5th Dist. 2008)

Contribution Actions

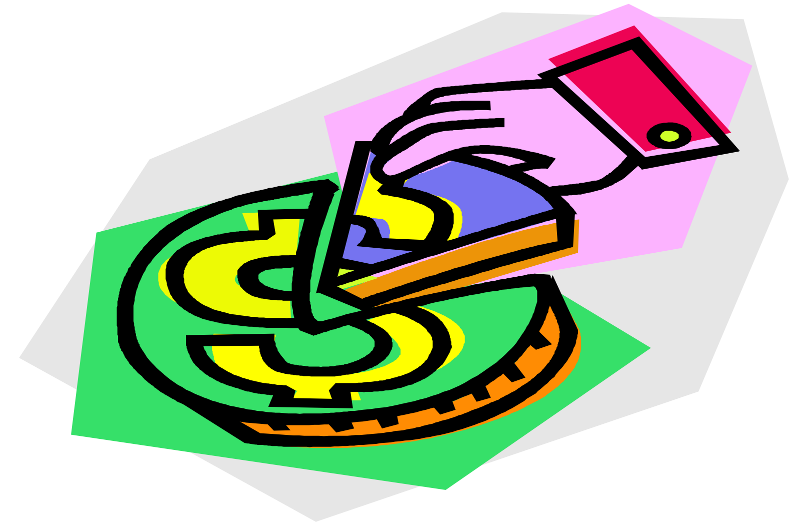
Reallocation to other insurers - The gloves are off.



Reallocation-Inter-Insurer Claims

Theories of Inter-Insurer Reallocation Claims

- Equitable subrogation.
- Equitable contribution/equitable indemnity.
- Unified Restitution.
  - Draft Restatement (Third) of Restitution and Unjust Enrichment.

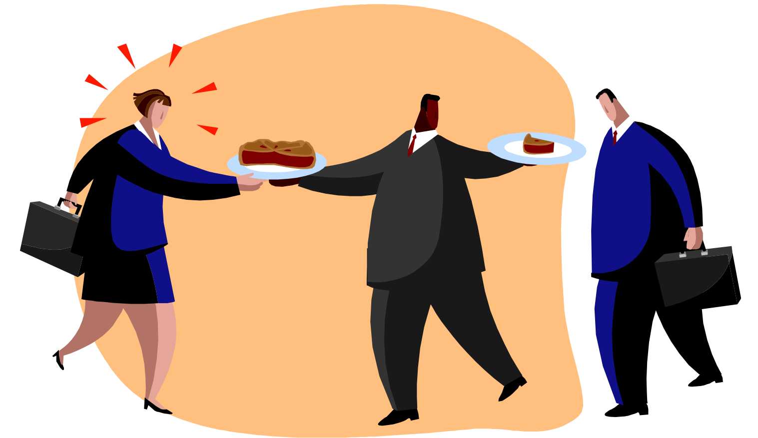


Equitable Subrogation

Paying insurer is automatically subrogated to the insured's rights against third parties.

Subrogation rights arise by operation of law and need not be expressly allowed in policy or settlement agreement/judgment.

Major limitation: Subrogated insurer has no greater rights than its insured.



Equitable Contribution/Indemnity

- Most courts in all sums states recognize spiked carrier's right of contribution.
- Most states have well-developed law or statutes on contribution between joint tortfeasors.
- Main difference between indemnity and contribution is whether pursuing insurer gets some or all of its money back.
- May be issues regarding insurers at different layers.

Equitable Contribution Issues

Bad actors may be denied equity.

- No clean hands, no contribution.
- Insurers conduct in failing to settle may be an issue. *See, e.g., INA v. Kayser-Roth Corp*., 770 A.2d 403 (R.I. 1991).

Insurer bears the risk of uncollectibility.

- Insolvency.
- SIRs and deductibles.
- Fronted or reinsured policies.

Equitable Contribution Issues

Carrier may arguably stand in the shoes of insured.

- Failure to tender.
- Late notice.
- Substantive exclusions and defenses.

Making bad law for insurers

- Attack on validity of post-*Kiger* pollution exclusion. *See*, e.g., *West Bend Mut. Ins. Co. v. USF&G, 598 F.3d 918* (7th Cir. 2010)

Inter-Insurer Contribution Issues

Other insurance clauses.

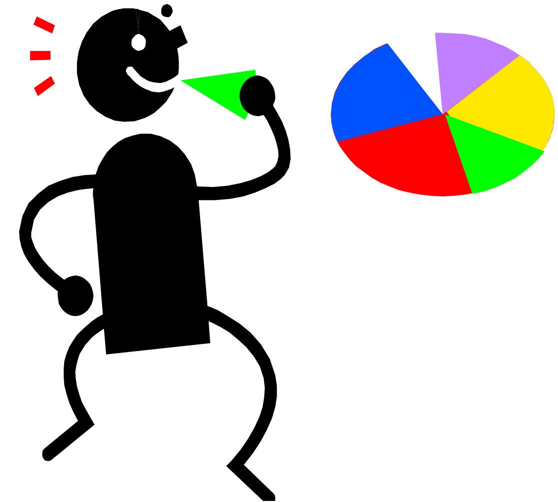
- Pro-rata
- Excess
- Escape

Absence of other insurance clauses.

Similar v. dissimilar clauses.

Applicability to successively issued policies.

Primary v. Excess-exhaustion principles.



Inter-Insurer Contribution Issues

Pursuit of settled insurers.

- Public policy.
  - Discouraging settlement by insured.
  - Discouraging insurer from settling.
- Effect of release by insured.
  - Release claims by non-settling insurers?
  - *Pierringer* release- policyholder "stands in the shoes" of the settled insurer.
  - Policy buy-back.

Inter-Insurer Reallocation Claims Against Settled Carriers

The risk of future claims reinforces insurer desire for protection indemnification terms, judgment reduction clauses, etc.

Indemnity clauses.

- Limited to amount of settlement payment.
- Full indemnity.

Remember *Gen Corp*?

- Doctrine of equitable contribution should be liberally applied.

- Non-settling excess insurers cannot seek equitable contribution from settled primary insurers; the settled primary insurers have no remaining obligation.

- Undermine the finality of settlements.

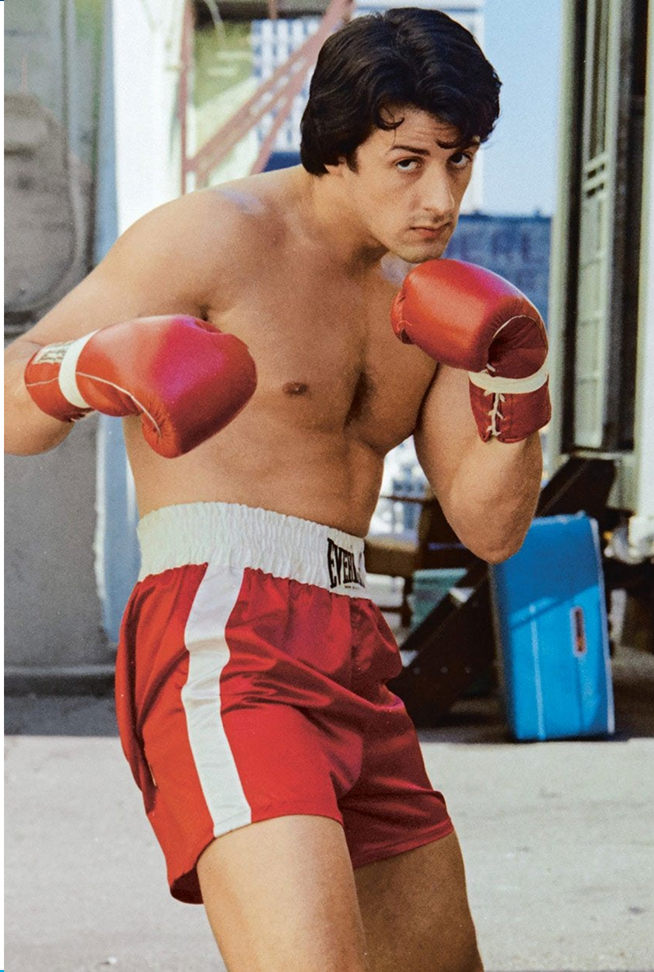
- Settlement credits but no action.

Lots of Inter-Carrier Fighting

Steadfast Ins. Co. v. Agricultural Ins. Co.,
548 Fed.Appx. 544 (10th Cir. 2013)

Potomac Ins. Co. v. OneBeacon Ins. Co.,
73 A.3d 465 (N.J. 2013)

The Fight Never Ends



THANK YOU!!!

QUESTIONS??????