MEALEY'S INSURANCE 101 CONFERENCE: A PRACTICAL INTRODUCTION

MARY KAY VYSKOCIL
SIMPSON THACHER & BARTLETT LLP

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I. OVERVIEW OF THE ISSUES

The insuring clause of a commercial general liability policy typically provides that the insurer will:

pay all sums which the insured shall become legally obligated to pay as damages [because of bodily injury or property damage to which this insurance applies,] caused by an occurrence . . . .

Barry R. Ostrager and Thomas R. Newman, Handbook on Insurance Coverage Disputes § 8.03[a], at 430-31 (10th ed. 2000).

Further,

in most CGL policies, an 'occurrence' is defined as 'an accident, including a continuous or repeated exposure to conditions, which results, during the policy period, in bodily injury or property damage . . ..'"

Id. at 431; see also Maryland Cas. Co. v. W.R. Grace & Co., 23 F.3d 617, 624- 25 (2d Cir. 1994).

General liability claims involving continuing injuries (such as bodily injuries or property damage from hazardous waste and toxic substances), often implicate many years of coverage because the injury-causing event, and the underlying claimant's exposure to the injury-causing substance, may be far removed in time from the discovery that the underlying claimant has suffered bodily injury or property damage. During those years, and even decades, the defendant often will have obtained varying amounts of liability coverage from one or more insurers. The question of how the loss will be divided — or allocated — among the policies will turn on number of different issues, including but not limited to:

- Number of Occurrences

- Trigger of coverage
- Scope of coverage
- Pro Rata Allocation v. Joint and Several Liability
- Stacking of Limits
- Horizontal v. Vertical Exhaustion

II. NUMBER OF OCCURRENCES

A. CGL policies provide coverage on "per occurrence" basis and may or may not contain aggregate limits. Excess policies generally provide that they are not triggered until underlying coverage is exhausted by payment. Likewise, the insured will generally pay a deductible for each occurrence. The question of the number of occurrences, therefore, can have a significant impact on the amount the amount of insurance benefits the policyholder will receive, and how much of the loss will be absorbed by low layer policies before excess policies must pay.

B. APPROACHES TO DETERMINING THE NUMBER OF OCCURRENCES

1. "CAUSE" ORIENTED TEST

a. Majority approach

b. "The general rule is that an occurrence is determined by the cause or causes of the resulting injury. '[T]he majority of jurisdictions employs the "cause theory". [] Using this analysis, the court asks if "[t]here was but one proximate, uninterrupted, and continuing cause which resulted in all of the injuries and damage."'" Appalachian Ins. Co. v. Liberty Mut. Ins. Co., 676 F.2d 56, 61 (3d Cir. 1982) (citations omitted) (footnote omitted) (holding that company's adoption in 1965 of discriminatory employment policies was the single occurrence that caused multiple injuries (sex discrimination)).

c. Under the cause approach, "a single event, process or condition [that] results in injuries, [] will be deemed a single occurrence even though the injuries may be widespread in both time and place and may affect a multitude of individuals." Transport Ins. Co. v. Lee Way Motor Freight, Inc., 487 F. Supp. 1325, 1330 (N.D. Tex. 1980). Thus, applying the cause test, the Lee Way court held that a company's system-wide discriminatory employment policies was the single occurrence that led to injuries, at different times and places. Id. at 1330-31.

d. Hyer v. Inter-Ins. Exchange of Auto. Club, 77 Cal. App. 343, 350, 246 P. 1055 (Cal. Ct. App. 2 Dist. 1926) (negligent operation of car by insured's chauffeur was the single cause of damage to two automobiles).

e. Union Carbide Corp. v. Travelers Indem. Co., 399 F. Supp. 12, 21 (W.D. Pa. 1975) (insured's manufacturing decision and failure to warn was the single cause of subsequent damages suffered by large number of persons and companies in distribution chain).

f. Truk-Away of Rhode Island, Inc. v. Aetna Cas. & Sur. Co., 723 A.2d 309, 313 (R.I. 1999) ("The dissemination of contaminants, through seepage, for an undetermined number of years constitutes a continuous or repeated exposure to conditions resulting in property damage. . . . However, such continuous activity constitutes only one occurrence for purposes of an insurance policy.") (citation omitted).

2. "EFFECTS" ORIENTED TEST

a. Minority approach

b. Under the "effects" test, the court looks to the number of injuries, not the cause of the injuries, to determine the number of occurrences.

c. "If one cause operates upon several at one time, it cannot be regarded as a single incident, but the injury to each individual is a separate accident." Anchor Cas. Co. v. McCaleb, 178 F.2d 322, 324 (5th Cir. 1949) (where oil well erupted over two day period, causing injury to the properties of various owners, the injury to each individual owner was a separate accident).

d. Elston-Richards Storage Co. v. Indemnity Ins. Co. of N. Am., 194 F. Supp. 673, 682 (W.D. Mich. 1960) (damage over a nine month period to appliances in warehouse by one cause — the manner in which clamp on lift truck was operated — was separate accidents or occurrences, which did not exceed the per occurrence deductible in policy), aff'd, 291 F.2d 627 (6th Cir. 1961).

III. <u>TRIGGER OF COVERAGE</u>

A. What does the term "Trigger of Coverage" Mean?

1. The term is use to describe the factors that must exist, or events that must take place, during a policy period, for the possibility of coverage to exist.

2. "As a general rule, the time of the occurrence of an accident within the meaning of an indemnity policy is not the time the wrongful act is committed but the time when the complaining party is actually damaged." Owens-Illinois, Inc. v. United Ins. Co., 650 A.2d 974, 981-82 (N.J. 1994).

3. The fact that coverage has been "triggered" does not mean that coverage exists; only that the loss could be covered under the policy, i.e., the policy is implicated, subject to its terms and conditions.

4. Trigger of coverage is "used to describe that which, under the specific terms of an insurance policy, must happen in the policy period in order for the potential of coverage to arise. The issue is largely one of timing-what must take place within the policy's effective dates for the potential of coverage to be 'triggered'"? Montrose Chem. Corp. v. Admiral Ins. Co., 10 Cal. 4th 645, 655 n.2, 913 P.2d 878, 880 n.2 (Cal. 1995) (emphasis added).

5. Public Serv. Co. of Colorado v. Wallis & Co., 986 P.2d 924, 938 n.11 (Colo. 1999) ("Triggering occurs when a threshold event implicates an insurance policy's coverage. The fact that a policy has been triggered means that there may be liability coverage under that policy, subject to the policy's terms, the application of any exclusions in the policy, and any other defenses the insurer may raise. Thus, a policy that has not been triggered does not provide any coverage, while a policy that has been triggered may or may not provide coverage, depending on the circumstances of the case.")

6. Courts do not all apply the same approach to the "trigger of coverage" issue.

B. Four Principal "Trigger Theories"

1. Exposure

a. Under the exposure approach, which has largely been limited to progressive bodily injury claims, the only policies that will respond to a claim are the policies in effect on the date (or dates) when the underlying claimant was exposed to the injury-causing substance.

b. Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc., 633 F.2d 1212, 1222 (6th Cir. 1980) (adopting exposure trigger for asbestos claims, based on the language of the policies and uncontroverted evidence that tissue damage takes place shortly after inhalation of asbestos fibers), clarified on reh'g, 657 F.2d 814 (6th Cir. 1981).

c. In re Liquidation of Midland Ins. Co., 709 N.Y.S.2d 24, 33 (N.Y. App. Div. 1st Dep't 2000) ("[G]iven the 'round hole, square peg' category of an asbestos [bodily injury] claim, and the 'occurrence' language of the policy, the IAS court correctly found that coverage is triggered by exposure, whether first or continued, but not by exposure in residence.") (decided under New York law).

2. Manifestation

a. With long tail claims such as claims for property damage from hazardous waste disposal, or progressive bodily injury claims, it is common that a long period of time passes — years or even decades — from the date the underlying claimant is exposed to the injury-causing substance and the date that the claimant knows or should know that claimant has been injured. Under the manifestation approach to the trigger of coverage issue, the only policies that will respond to a loss are the policies that are in effect on the date the injury becomes evident, even if the fact of injury has not yet been confirmed or diagnosed.

b. Eagle Pitcher Indus., Inc. v. Liberty Mut. Ins. Co., 682 F.2d 12, 24-25 (1st Cir. 1982) (for latent disease claims, coverage is triggered when the symptoms of disease are apparent, whether or not the disease has been diagnosed).

c. Appalachian Ins. Co. v. Liberty Mut. Ins. Co., 676 F.2d 56, 62-63 (3d Cir. 1982) (policy in effect when injuries from discriminatory policies first manifest themselves must respond to entire loss).

d. CPC Int'l, Inc. v. Northbrook Excess & Surplus Ins. Co., 668 A.2d 647, 650 (R.I. 1995) (holding, in case involving property damage from an alleged spill of hazardous waste, that "coverage under a general liability policy is triggered . . . when property damage, which includes property loss, manifests itself or is discovered or in the exercise of reasonable diligence is discoverable.")

e. James Pest Control, Inc. v. Scottsdale Ins. Co., No. 99-CA- 1316, slip op. (La. App. 5 Cir. June 27, 2000), reprinted in Mealey's Litigation Report: Insurance, Vol. 14, Iss. 35 (7/18/00) at sec. F (holding that there is no damage to property from termite infestation until the homeowner discovers the damage).

3. Injury-in-Fact or Damage-in-Fact

a. Under an "injury-in-fact" or "damage-in-fact" trigger, the policy that is in effect on the date or dates when damage or injury from an accident actually takes place is the policy that is triggered.

b. This trigger often requires detailed factual and expert evidence of when the bodily injury or property damage actually happened as a matter of scientific proof.

c. American Home Products Corp. v. Liberty Mut. Ins. Co., 565 F. Supp. 1485, 1497 (S.D.N.Y. 1983) ("The plain language [of the policy] demands that the insured prove the cause of the occurrence (accident or exposure), the result (injury, sickness, or disease), and that the result occurred during the policy period. An exposure that does not result in injury during coverage would not satisfy the policy's terms. On the other hand, a real but undiscovered injury, proved in retrospect to have existed at the relevant time, would establish

coverage, irrespective of the time the injury became manifest."), aff'd as modified, 748 F.2d 760 (2d Cir. 1984); but see In re Liquidation of Midland Ins. Co., 709 N.Y.S.2d 24, 33 (N.Y. App. Div. 1st Dep't 2000) (holding that under New York law exposure trigger applies to asbestos bodily injury claims).

d. Independent Petrochemical Corp. v. Aetna Cas. & Sur. Co., 654 F. Supp. 1334, 1358 (D.D.C.) (policies in effect on the date exposure to harmful substance results in injury are triggered), reconsideration granted in part and denied in part, 672 F. Supp. 1, 2 (D.D.C. 1986) (modifying to delete requirement that injury be "diagnosable and compensable"), aff'd in part rev'd in part on other grounds, 944 F.2d 940 (D.C. 1991).

4. Continuous or "Triple Trigger"

a. The "triple trigger" approach was first articulated in Keene Corp. v. Insurance Co. of North America by the federal court of appeals for the D.C. Circuit in the context of an asbestos case but has since also been applied to environmental property damage claims. Under the triple trigger approach, all policies on the risk from the time of initial exposure to manifestation of the injury, are triggered. The "triple" triggers are: exposure, exposure in residence (i.e., progression), and manifestation. Keene Corp. v. Insurance Co. of N. Am., 667 F.2d 1034, 1047 (D.C. Cir. 1981).

b. Eli Lilly & Co. v. Home Ins. Co., 482 N.E.2d 467, 471 (Ind. 1985) (maximizing indemnity and giving effect to insureds' "reasonable" expectations regarding coverage for latent manifestation diseases, by holding that "coverage is triggered at any point between ingestion of DES [exposure] and manifestation of a DES-related disease").

c. J.H. France Refractories Co. v. Allstate Ins. Co., 626 A.2d 502, 506 (Pa. 1993) (language of policy, and origin and development of asbestos diseases "compel[]s" conclusion that all policies from exposure to asbestos, through progression, and up to manifestation of disease, are triggered).

d. Montrose Chem. Corp. of California v. Admiral Ins. Co., 10 Cal.4th 645, 685, 913 P.2d 878, 901 (Cal. 1995) (adopting continuous trigger for third party claims of continuing or progressive property damage).

e. Public Serv. Co. of Colorado v. Wallis & Co., 986 P.2d 924, 939 (Colo. 1999) ("[T]he continuous trigger theory is a legal fiction permitting the law to posit that many repeated small events occurring over a period of decades are actually only one ongoing occurrence. In cases where property damage is continuous and gradual and results from many events happening over a long period of time, it makes sense to adopt this legal fiction for the purposes of determining what policies have been triggered.")

f. Society Ins. v. Town of Franklin, 233 Wis.2d 207, 214-15, 607 N.W.2d 342, 346 (Wis. Ct. App. 2000) (under Wisconsin law, continuous trigger applies to continuous property damage claims), review granted, __ N.W.2d ___ (Wis. June 13, 2000).

g. Variation on Triple Trigger — So Called "Double Trigger"

(1) In Zurich Insurance Co. v. Raymark Industries, Inc., an asbestos coverage case, the Illinois Supreme Court affirmed lower court holdings that policies in effect during exposure to asbestos and manifestation of an asbestos-related sickness or disease, provide coverage for asbestos bodily injury claims. Zurich, 118 Ill. 2d 23, 45-46, 514 N.E.2d 150, 160 (Ill. 1987). Likewise, the Supreme Court held that the lower courts properly rejected the insured's argument that persons exposed to asbestos sustain continuous injury from the date of exposure to the date plaintiff begins to exhibit symptoms of sickness or disease. Zurich, 118 Ill. 2d at 47, 514 N.E.2d at 161. Thus, under Zurich, the "double triggers" are exposure and manifestation.

C. The Common Threads to the Trigger Methods

1. Regardless of which trigger method is employed by the courts, courts often base their determination of which trigger to apply on a belief that the chosen method will best select those policies that were in effect when the underlying claimant suffered bodily injury or property damage. Compare Insurance Co. of N. Am., supra at 1222 (applying exposure trigger and noting that the evidence shows that injury from asbestos occurs shortly after inhalation), with James Pest Control, Inc. v. Scottsdale Ins. Co., No. 99-CA- 1316, slip op. (La. App. 5 Cir. June 27, 2000), reprinted in Mealey's Litigation Report: Insurance, Vol. 14, Iss. 35 (7/18/00) at sec. F (applying manifestation trigger with respect to property damage claims from termite infestation based and reasoning that there is no "damage" until discovery by the homeowners). Thus, in any particular case, a court could reach the same result by applying either the injury-in-fact trigger or an alternative trigger.

2. Coverage Maximization often drives the decision of which trigger to apply under given circumstances.

a. Keene Corp. v. Insurance Co. of N. Am., 667 F.2d 1034, 1047 (D.C. Cir. 1981) (noting that it would undermine the insurers' obligation to pay all losses if the court did not adopt a triple trigger approach).

b. Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc., 633 F.2d 1212, 1222 (6th Cir. 1980) (in choice between exposure and manifestation trigger, choosing exposure because the exposure trigger would be "likely to leave the manufacturer insured," and the manifestation trigger would "leave[] the manufacturer uninsured for all practical purposes.")

IV. SCOPE OF COVERAGE

A. In cases of continuing or progressive injury, application of the various trigger approaches often results in a finding that more than one policy must respond to a loss. Thus, once it has been determined which policies are triggered, the question arises, how much must each insurer pay? As the United States Court of Appeals for the Second Circuit recently noted: "Where there is on-going and progressive injury that spans many years . . . the question 'is whether each [triggered] policy is liable for the entirety of [the liability for the injury] or whether each policy is responsible for paying only the portion of the [liability] somehow attributable to the amount of injury during the policy period." Olin Corp. v. Insurance Co. of N. Am., Nos. 98-7687(L), 98-7753 (XAP), 2000 WL 1164262, *13 (2d Cir. Aug. 17, 2000).

B. Pro Rata Allocation of Liability

1. Under most CGL policies, there is no coverage under the policy unless the occurrence "results, during the policy period, in bodily injury or property damage." See Barry R. Ostrager and Thomas R. Newman, Handbook on Insurance Coverage Disputes § 8.03[a], at 431 (10th ed. 2000) (emphasis added).

2. Courts have applied a number of different "pro rata" methods of allocating liability when attempting to insure that the amount paid under each triggered policy is proportionate to the injury during the policy period.

3. Under a pro rata approach, the insured will often be responsible for a share of the loss during periods that the insured has not obtained insurance, or has failed to obtain sufficient insurance.

a. Olin Corp. v. Insurance Co. of N. Am., Nos. 98-7687(L), 98- 7753 (XAP), 2000 WL 1164262, *18 (2d Cir. Aug. 17, 2000) ("[F]indings as to the general availability of insurance that would have covered the risk at issue here and [the policyholder's] failure to obtain it were all that was necessary to allocate the uninsured years to [the policyholder]. There was no need to analyze whether [the policyholder] subjectively elected to forego insurance and self-insure.").

b. Stonewall Ins. Co. v. Asbestos Management Corp., 73 F.3d 1178, 1203 (2d Cir. 1995) ("[P]roration-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. . . . [S]uch proration is appropriate as to years in which [the policyholder] elected not to purchase insurance or purchased insufficient insurance, as demonstrated by the exhaustion of its policy limits. However, we do not agree . . . that proration-to-the-insured should be applied to years [when liability insurance for the risk was unavailable].")

c. See also Insurance Co. of North America v. Forty-Eight Insulations, 633 F.2d 1212, 1225 (6th Cir. 1980), clarified and aff'd on reh'g, 657 F.2d 814 (6th Cir. 1981), in which the insured did not dispute that it should bear a portion of the indemnity loss for periods that it was uninsured, but argued that it should not have to contribute to defense costs, because the insurer's duty to defend is broader than the duty to indemnify, and includes the defense of non-covered claims when some claims potentially are covered. The court rejected this argument, and held that using "exposure" as the trigger of coverage, led to a reasonable means to allocate defense costs. The court noted: "It is reasonable to treat [the insured] as an insurer for those periods of time that it had no insurance coverage. Were we to adopt [the 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."

4. Methods of Pro Rata Allocation

a. Time-on-the-Risk

(1) Under this allocation method, the liability is divided equally among insurers in proportion to the number of years they provided coverage during the period when injury occurred.

(2) Northern States Power Co. v. Fidelity & Cas. Co. of New York, 523 N.W.2d 657, 664 (Minn. 1994) ("[T]he contamination . . . should be regarded as a continuous process in which the property damage is evenly distributed over the period of time from first contamination to the end of the last triggered policy . . . . [and] the total amount of the property damage should be allocated to the various policies in proportion to the period of time each was on the risk.")

(3) Domtar, Inc. v. Niagara Fire Ins. Co., 563 N.W.2d 724, 733-34 (Minn. 1997) (allocating to insured for uninsured periods by time-on-risk method).

(4) Public Service Co. of Colorado v. Wallis & Co., 986 P.2d 924, 941 (Colo. 1999) ("[W]here damages are not reasonably divisible and therefore cannot be precisely attributed to successive insurance policies, the total amount of damages should be divided by the total number of years to yield the amount of damage that is fairly attributable to each year.")

(5) Stonewall Ins. Co. v. Asbestos Management Corp., 73 F.3d 1178, 1204 (2d Cir. 1995) ("We . . . implement proration-to-the-insured by obliging [the policyholder] to pay a share of each claim represented by a fraction that has as its denominator the number of years of the injury up to [the point insurance became unavailable], and as its numerator the number of those years in which [the policyholder] was uninsured (either because it purchased no insurance or its policy limits were exhausted).")

(6) Olin Corp. v. Ins. Co. of N. Am., Nos. 98-7687(L), 98- 7753 (XAP), 2000 WL 1164262, *19 (2d Cir. Aug. 17, 2000) ("[T]o determine the amount that an insurer must indemnify, one multiplies the insured's total liability by a fraction. That fraction 'has as its denominator the number of years in which both injury- in-fact was occurring and insurance was available, and as its numerator the number of years within that period when the insurance was in effect.")

b. Time on the Risk times Policy Limits

(1) Under this method, a greater portion of the loss will be allocated to years when the insured had greater amounts of insurance.

(2) Owens-Illinois, Inc. v. United Ins. Co., 650 A.2d 974, 993 (N.J. 1994) ("We believe that a better formula (putting aside for a moment the problem of periods of self-insurance) is . . . [to] allocate[] the losses among the carriers on the basis of the extent of the risk assumed, i.e., proration on the basis of policy limits, multiplied by years of coverage.")

c. Proportional

(1) Apportioning based on imprecise formula often relating to facts of the claim and/or risk assumed by the insurer or retained by the insured.

(2) Under this method, which was applied in Uniroyal, Inc. v. Home Insurance Co., 707 F. Supp. 1368 (E.D.N.Y. 1988) to bodily injury claims based on exposure to Agent Orange, the loss is allocated to each policy period in proportion to the injury that has occurred in that period. See, Uniroyal, 707 F. Supp. at 1393. As the Uniroyal court noted, "[i]n the absence of information defining the loss attributable to each specific [] injury, the proportional allocation scheme produces a calculation based on proxy estimates." Id.

(3) A similar method was applied to the allocation of defense costs in Gulf Chemical & Metallurgical Corp. v. Associated Metals & Minerals Corp., 1 F.3d 365, 373 (5th Cir. 1993), where the court held that in allocating the costs of defending bodily injury claims from exposure to toxic chemicals, the district court should consider: who was suing the insured; the period of the underlying claimant's alleged exposure; and the effort to defend the claims.

(4) Carter -Wallace, Inc. v. Admiral Insurance Co., 154 N.J. 312, 712 A.2d 1116, 1122 (N.J. 1997) (allocation methodology should be "proportionate to the degree of risks transferred or retained during the years of exposure.")

C. All Triggered Policies are Jointly and Severally Liable

1. Under the "joint and several" approach, sometimes called "pick and choose," each policy is liable for the full amount of the loss, up to policy limits, (and subject to a right of contribution in a policy's "other insurance" clause) and the policyholder may choose which policy will respond to the loss.

2. Courts adopting this approach often place great weight on language in the policy's insuring agreement, which provides that the insurer will pay "all sums" the insured shall be come liable to pay, reasoning that this promise is unqualified. Under such an approach, courts have downplayed the significance of policy language limiting coverage under the policy to damages that take place in the policy period.

3. A consequence of adopting the joint and several approach is that the amounts allocated to the triggered policies are not reduced by any period when the policyholder was not insured.

4. Keene Corp. v. Insurance Co. of N. Am., 667 F.2d 1034, 1049 (D.C. Cir. 1981) ("For an insurer to be only partially liable for an injury that occurred, in part, during its policy period would deprive [the insured] of insurance coverage for which it paid. With each policy, [the insured] paid for insurance against all liability for bodily injury.")

5. J.H. France Refractories Co. v. Allstate Ins. Co., 626 A.2d 502, 507 (Pa. 1993) ("Under any given policy, the insurer contracted to pay all sums which the insured becomes legally obligated to pay, not merely some pro rata portion thereof.")

6. Koppers Co. v. Aetna Cas. & Sur. Co., 98 F.3d 1440, 1453 (3d Cir. 1996) ("[W]e accordingly predict that, if presented with our case, the Pennsylvania Supreme Court would hold that each non-settling insurer whose policy was triggered to cover an indivisible loss is jointly and severally liable, up to the limits of its policy, for the full amount of the judgment, less the settling insurers' apportioned shares.")

7. Zurich Ins. Co. v. Raymark Indus., Inc., 118 Ill. 2d 23, 56-57, 514 N.E.2d 150, 165 (Ill. 1987) (affirming lower court's holding that nothing in policy language permitted pro ration of defense and indemnity).

8. Cf. Aluminum Co. of Am. v. Aetna Cas. & Sur. Co., 140 Wash.2d 517, 998 P.2d 856, 883-84 (Wash. 2000) (holding that insurers that issued Differences in Conditions Policies to the insured would be liable for all of the insured's remediation costs (which we in excess of $20 million) even though much of the property damage took place before the policies incepted; under the pro rata approach, which the court rejected, the insurers' liability would have been $200,000).

D. Stacking

1. The stacking issue relates to whether an insured is entitled to "stack," or add, the limits of triggered policies at the same layer of coverage, making the sum of the limits of all triggered policies available to respond to a loss. A related issue is whether an insured is entitled to multiple limits under a single policy that provides coverage for a period greater than one year.

2. Society Ins. v. Town of Franklin, 233 Wis.2d 207, 607 N.W.2d 342, 346-47 (Wis. Ct. App.) (holding that although continuing damage to property was one occurrence, insured could stack the limits of all policies in effect from exposure to manifestation), review granted, ___ N.W.2d ___ (Wis. June 13, 2000).

3. But see Keene Corp. v. Insurance Co. of N. Am., 667 F.2d 1034, 1049 (D.D. Cir. 1981) (the principle of joint & several liability "does not require that [an insured] be entitled to ‘stack' applicable policies' limits of liability"); Uniroyal, Inc. v. Home Ins. Co., 707 F. Supp. 1368, 1391-92 (E.D.N.Y. 1988) (stacking: "improperly divorces the coverage from the injuries triggering the coverage" and makes each policy's aggregate limits and separately negotiated premiums illusory).

V. HORIZONTAL V. VERTICAL EXHAUSTION

A. When multiple policies are triggered over multiple years, and attach at different layers, an issue arises as to whether coverage should be exhausted "horizontally" or "vertically." The resolution of this question can have a large effect on whether, and when, excess policies will be required to share in a loss.

B. Horizontal Exhaustion

1. With horizontal exhaustion, coverage under any and all excess policies is not available until all of the policies in the underlying layer, including policies issued in different years, have been exhausted by payment.

2. Community Redevelopment Agency v. Aetna Cas. & Sur. Co., 50 Cal.App.4th 329, 340 (1996) ("Absent a provision in the excess policy specifically describing and limiting the underlying insurance, a horizontal exhaustion rule should be applied in continuous loss cases . . . . In other words, all of the primary policies in force during the period of continuous loss will be deemed primary policies to each of the excess policies covering that same period. Under the principle of horizontal exhaustion, all of the primary policies must exhaust before any excess will have coverage exposure."); but see Montgomery Ward & Co. v. Imperial Cas. & Indem. Co., 81 Cal.App.4th 356, 364 (2000) (principles of horizontal exhaustion do not apply to self-insured retentions (SIRs), because SIRs are not primary insurance.)

3. Thus, if the insured had primary coverage of: $50,000 for 3 years; $100,000 for the next 2 years, and $500,000 of primary coverage for the next 5, with excess insurance attaching above the primary policies for the entire 10 years, there would be no allocation to the excess policies, including the policies that are excess to $50,000, until after the entire $2,850,000 in primary coverage is exhausted.

4. In re Liquidation of Midland Ins. Co., 709 N.Y.S.2d 24 (N.Y. App. Div. 1st Dep't 2000) (holding that the language of the "other insurance clause in the excess policy was "broad enough to cover all primary policies, prior and subsequent, which must be exhausted before [the] excess policy can be called to indemnify").

C. Vertical Exhaustion

1. With vertical exhaustion, each year is treated separately and excess policies are triggered upon the exhaustion of underlying coverage in the same policy year.

2. Public Service Co. of Colorado v. Wallis & Co., 986 P.2d 924, 941 (Colo. 1999) ("Within each policy-year, the allocation of that [damage attributed to the policy year] depends on the structure of the insurance. Primary insurance, or alternatively, any SIRs, must first be exhausted. If liability remains after that, then policies in the first layer of excess for that year are required to respond, then policies in the second layer of excess, and so on.")

3. Koppers Co. v. Aetna Cas. & Sur. Co., 98 F.3d 1440, 1454 (3d Cir. 1996) (holding that excess policies are triggered upon exhaustion of directly underlying policies).

4. Dayton Indep. School Dist. v. National Gypsum Co., 682 F. Supp. 1403, 1411 n.23 ("once the limits immediately underlying a given excess policy are exhausted, [the insured] may call upon that excess policy to provide coverage. [The insured], however, is not obligated to first exhaust all underlying insurance in every policy period before it can proceed to obtain indemnification from its excess carriers. The requirement of exhaustion applies only to those policies which share the same policy period."), rev'd on other grounds sub nom W.R. Grace & Co. v. Continental Cas. Co., 896 F.2d 865 (5th Cir. 1990).

D. In Carter -Wallace, Inc. v. Admiral Insurance Co., 154 N.J. 312, 712 A.2d 1116, 1123-24 (N.J. 1997), the court took a mixed approach, holding that the loss must first be allocated horizontally across policy years without reference to layers, but that within any given coverage year each layer of coverage would have to be exhausted before the next level was pierced.

SIMPSON THACHER & BARTLETT LLP