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All Sums v. Pro Rata: Allocating Damages in Insurance Claims

Indemnification Strategies in Continuing Property Damage and Personal Injury Claims

A Live 90-Minute Teleconference/Webinar with Interactive Q&A

Today's panel features:

Laura A. Foggan, Partner, **Wiley Rein**, Washington, D.C.

Robert M. Horkovich, Shareholder, **Anderson Kill & Olick**, New York

Tuesday, September 29, 2009

The conference begins at:

1 pm Eastern

12 pm Central

11 am Mountain

10 am Pacific

The audio portion of this conference will be accessible by telephone only. Please refer to the dial in instructions emailed to registrants to access the audio portion of the conference.

Strafford Publications Teleconference

ALL SUMS V. PRO RATA ALLOCATING DAMAGES IN INSURANCE CLAIMS

Tuesday, September 29, 2009

1:00 PM – 2:30 PM EDT

10:00 AM – 11:30 AM PDT

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ALLOCATION OF LIABILITY

(Robert Horkovich)

All sums rule

ALLOCATION OF LIABILITY

(Laura Foggan)

Pro rata/Time on the risk allocation

COURT TREATMENT

(Laura Foggan)

Boston Gas Co. v. Century Indemnity Co.,
454 Mass. 337, 910 N.E. 2d 290, (Mass.
2009).

COURT TREATMENT

(Laura Foggan)

Direct liability should be prorated among all insurance companies “on the risk”.

COURT TREATMENT

(Laura Foggan)

Where it is not feasible to make fact-based allocation of losses for each policy period, losses should be allocated using time-on-the-risk method.

COURT TREATMENT

(Laura Foggan)

Policyholders are responsible under time-on-the-risk method for any periods that it went without insurance.

COURT TREATMENT

(Laura Foggan)

Policyholders are liable for only a prorated portion of its per occurrence self-insured retention for each triggered policy period, to be prorated on same basis as the insurance companies' liability, unless policy language unambiguously provides otherwise.

COURT TREATMENT

(Laura Foggan)

“No reasonable policyholder could have projected that a single one-year policy would cover all losses caused by toxic industrial wastes released into the environment over the course of decades. Any reasonable insured purchasing a series of occurrence-based policies would have understood that each policy covered it only for property damage occurring during the policy year.”

Boston Gas, 454 Mass. At 363.

COURT TREATMENT

(Laura Foggan)

“[T]he joint and several allocation method is improvident. It ‘does not solve the Allocation problem; it merely postpones it.’”

Boston Gas, 454 Mass. At 365 (quoting *EnergyNorth*, 156 N.H. 333 at 345).

COURT TREATMENT

(Laura Foggan)

“In sum, the pro rata allocation method promotes judicial efficiency, engenders stability and predictability in the insurance market, provides incentive for responsible corporate behavior, and produces an equitable result.”

Boston Gas, 545 Mass. At 366.

COURT TREATMENT

(Robert Horkovich)

State of California v. Continental Insurance Co. (Cal.), 169 Cal. 4th 1114 (January 5, 2009).

ALL-SUMS RULE

(Robert Horkovich)

In its “all-sums” ruling, the trial court had ruled in favor of the State:

“[O]nce coverage for...continuous...damage...is triggered under a liability policy, the insurer is required to pay for all sums (up to the policy limits) of the insured’s liability – not just liability specifically allocable to damage during the policy period.”

ALL-SUMS RULE

(Robert Horkovich)

Insuring Agreement:

“To pay on behalf of the Insured all sums which the Insured shall become obligated to pay by reason of liability imposed by law...for damages...because of injury to or destruction of property, including loss of use thereof.”

ALL-SUMS RULE

(Robert Horkovich)

“It is a settled rule that an insurer on the risk when continuous or progressively deteriorating damage or injury first manifests itself remains obligated to indemnify the insured for the *entirety* of the ensuing damage or injury.”

Montrose Chem. Co. v. Admiral Ins. Co., 10 Cal.4th 645, 686 (1995) (emphasis added).

ALL-SUMS RULE

(Robert Horkovich)

[E]very insurer that issued a liability policy for any period during which a continuous loss occurred was liable for “the full extent of the loss up to the policy’s limits....”

Armstrong World Industries, Inc. v. Aetna Casualty & Surety Co., 45 Cal.App.4th 1, 49 (1996).

ALL-SUMS RULE

(Robert Horkovich)

“...the duty to indemnify ‘is triggered if specified harm is caused by an included occurrence, so long as at least some such harm results within the policy period.... *It extends to all specified harm caused by an included occurrence, even if some such harm results beyond the policy period....*”

Aerojet-General Corp. v. Transport Indemnity Co., 17 Cal.4th 38, 57-58 (1997) (emphasis added).



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ALL-SUMS RULE

(Robert Horkovich)

“The all-sums approach, however, is not *literally* joint and several liability.... The insurers are not jointly liable on each other’s policies; rather, each insurer is severally liable on its own policy.”

Slip. Op. at 18. (emphasis in original).

ALL-SUMS RULE

(Robert Horkovich)

“To summarize, then, in California, when there is a continuous loss spanning multiple policy periods, *any* insurer that covered *any* policy period is liable for the *entire* loss, up to the limits of its policy.”

Slip. Op. at 19 (emphasis in original).

ALL-SUMS RULE

(Robert Horkovich)

Implications of the ruling

Each insurance company is wholly responsible for the whole loss imposed upon the policyholder up to its policy limits. The exposure of each insurance company is not limited to just the dollar liability presented only by that amount of property damage taking place during the policy period.

ALL-SUMS RULE

(Laura Foggan)

Insurance Industry View:

The California Supreme Court has not decided how indemnity should be allocated in a continuing loss context.

- *Armstrong* and *Aerojet* addressed the duty to defend, and statements in those opinions regarding the duty to indemnify were *dicta*.
- Later California appellate decisions addressing the duty to defend extended “all sums” to indemnity, in reliance on *Montrose* and *Aerojet*, although the indemnity issue was not presented or decided in those cases.

ALL-SUMS RULE

(Laura Foggan)

Insurance Industry View:

“All-sums” in the indemnity context is inconsistent with the policy language.

- Occurrence Definition: “‘Occurrence’ means an accident or a continuous or repeated exposure to conditions which result in injury to persons or damage to property during the policy period....”
- Policy Period Territory: “This policy applies only to occurrences which take place during the policy period commencing _____ and ending _____.”

ALL-SUMS RULE

(Laura Foggan)

Insurance Industry View:

The “all-sums” approach is contrary to the California rules of contract interpretation.

- The “all sums” approach rewrites the insurance contracts – replacing policy terms limiting coverage to property damage “during the policy period” with property damage “during and before and after the policy period.”
- The “all sums” approach deprives policy terms of meaning, contrary to the rule that each term in a contract must be given independent meaning and effect. (Civil Code § 1641.)

ALL-SUMS RULE

(Laura Foggan)

Insurance Industry View:

The “all-sums” approach is objectively unreasonable.

- “All sums” unreasonably requires an insurer to pay all damage occurring over time (subject to other policy terms and Insurance Code § 533), despite policy language limiting coverage to risk of harm during the policy period.
- “All sums” unreasonably requires insurers to pay for damage that took place in periods in which the insured did not buy insurance or its policies exclude coverage.

COURT TREATMENT

(Robert Horkovich/Laura Foggan)

Comparison of these rulings



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COURT TREATMENT

Court treatment in other jurisdictions

ALL-SUMS RULE

(Robert Horkovich)

Other Jurisdictions That Have Adopted “All-Sums”:

- Washington: *American Nat’l Fire Ins. Co. v. B & L Trucking & Constr. Co.*, 951 P.2d 250, 256-257 (1998).
See also *Groul Constr. Co. v. Ins. Co. of N. America*, 11 Wn.App. 632, 524 P.2d 427 (1974).
- Oregon: *Cascade Corp. v. American Home Assur. Co.*, 135 P.3d 450, 455-56 (2006).
- Pennsylvania: *J.H. France Refractories Co. v. Allstate Ins. Co.*, 626 A.2d 502, 507-508 (1993).

ALL-SUMS RULE

(Robert Horkovich)

Other Jurisdictions That Have Adopted “All-Sums”:

- Delaware: *Monsanto Co. v. C.E. Heath*, 652 A.2d 30, 35 (1994).
- Ohio: *Goodyear Tire & Rubber Co. v. Aetna Cas. & Sur. Co.*, 769 N.E.2d 835, 841 (2002).
- Illinois: *Zurich Ins. Co. v. Raymark Indus., Inc.*, 514 N.E.2d 150, 165 (1987).
- Massachusetts: *Rubenstein v. Royal Ins. Co. of Am.*, 694 N.E.2d 381 (1998), *aff’d*, 708 N.E.2d 639 (1999).



ALL-SUMS RULE

(Robert Horkovich)

Other Jurisdictions That Have Adopted “All-Sums”:

- Texas: *Union Pac. Res. Co. v. Continental Ins. Co.* (Tex. Dist. Ct. Dec. 17, 1998), No. 249-23-98, reprinted in 13 Mealey’s Ins. Litig. Rep. No. 11, Section A (Jan. 19, 1999).
- Arkansas: *Murphy Oil USA, Inc. v. United States Fid. & Guar. Co.* (Ark. Cir. Ct. Feb. 21, 1995) No. 91-439-2, reprinted in 9 Mealey’s Ins. Litig. Rep. No. 19, Section I (Mar. 21, 1995).

ALL-SUMS RULE

(Robert Horkovich)

Memorandum of Meeting of Discussion Group
Asbestosis – April 21, 1977

“The majority also contended that each carrier on risk during any part of that period could be fully responsible for the cost of defense and loss.”

ALLOCATION RULE

(Laura Foggan)

Insurance Industry View:

Numerous courts across the country have endorsed allocation of loss “during the policy period.”

- “We do not believe that these 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....” (*Public Service Company of Colorado v. Wallis & Companies*, 986 P.2d 924, 939 (Colo. 1999).)

ALLOCATION RULE

(Laura Foggan)

Other Jurisdictions Adopting Allocation:

- Vermont: *Towns v. Northern Security Insurance Co.*, 964 A. 2d 1150 (Vt. Aug. 1, 2008).
- Colorado: *Public Service Co. of Colorado v. Wallis and Companies*, 986 P.2d 924 (1999).
- New York: *Consolidated Edison Co. of New York v. Allstate Ins. Co.*, 774 N.E.2d 687 (2002).
- Connecticut: *Security Ins. Co. of Hartford v. Lumberman's Mutual Cas. Co.*, 826 A.2d 107 (2003).
- New Jersey: *Carter-Wallace v. Admiral Ins. Co.*, 712 A.2d 1116 (1998).

ALLOCATION RULE

(Laura Foggan)

Other Jurisdictions Adopting Allocation:

- Minnesota: *Domtar, Inc. v. Niagra Fire Ins. Co.*, 563 N.W.2d 724 (1997).
- Utah: *Sharon Steel Corp. v. Aetna Cas. & Sur. Co.*, 931 P.2d 127 (1997).
- Idaho: *Empire Fire & Marine Ins. Co. v. N. Pacific Ins. Co.*, 905 P.2d 1025 (1995).
- Louisiana: *Southern Silica of Louisiana, Inc. v. Louisiana Insurance Guaranty Association*, 979 So. 2d 469 (La. April 8, 2008).
- New Hampshire: *Energy N. Natural Gas, Inc. v. Certain Underwriters at Lloyds*, 934 A.2d 517 (2007).

QUESTIONS & ANSWERS

