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Allocation of Loss in Insurance Litigation

Allocation Methodologies

Presented by: Paul A. Dame

"All Sums" Policy Language (1973 ISO)

"The company will pay on behalf of the insured **all sums** which the insured shall become legally obligated to pay as damages because of **bodily injury** … caused by an **occurrence**."

"All Sums" Policy Language (1973 ISO)

"The company will pay on behalf of the insured **all sums** which the insured shall become legally obligated to pay as damages because of bodily injury ['bodily injury, sickness or disease sustained by any person **which occurs during the policy period**'] … caused by an **occurrence** ['an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured']."

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"All Sums" Policy Language (2001 ISO)

"We will pay those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies. . . . **This insurance applies to 'bodily injury' and 'property damage' only if . . .[t]he 'bodily injury' or 'property damage' occurs during the policy period."**

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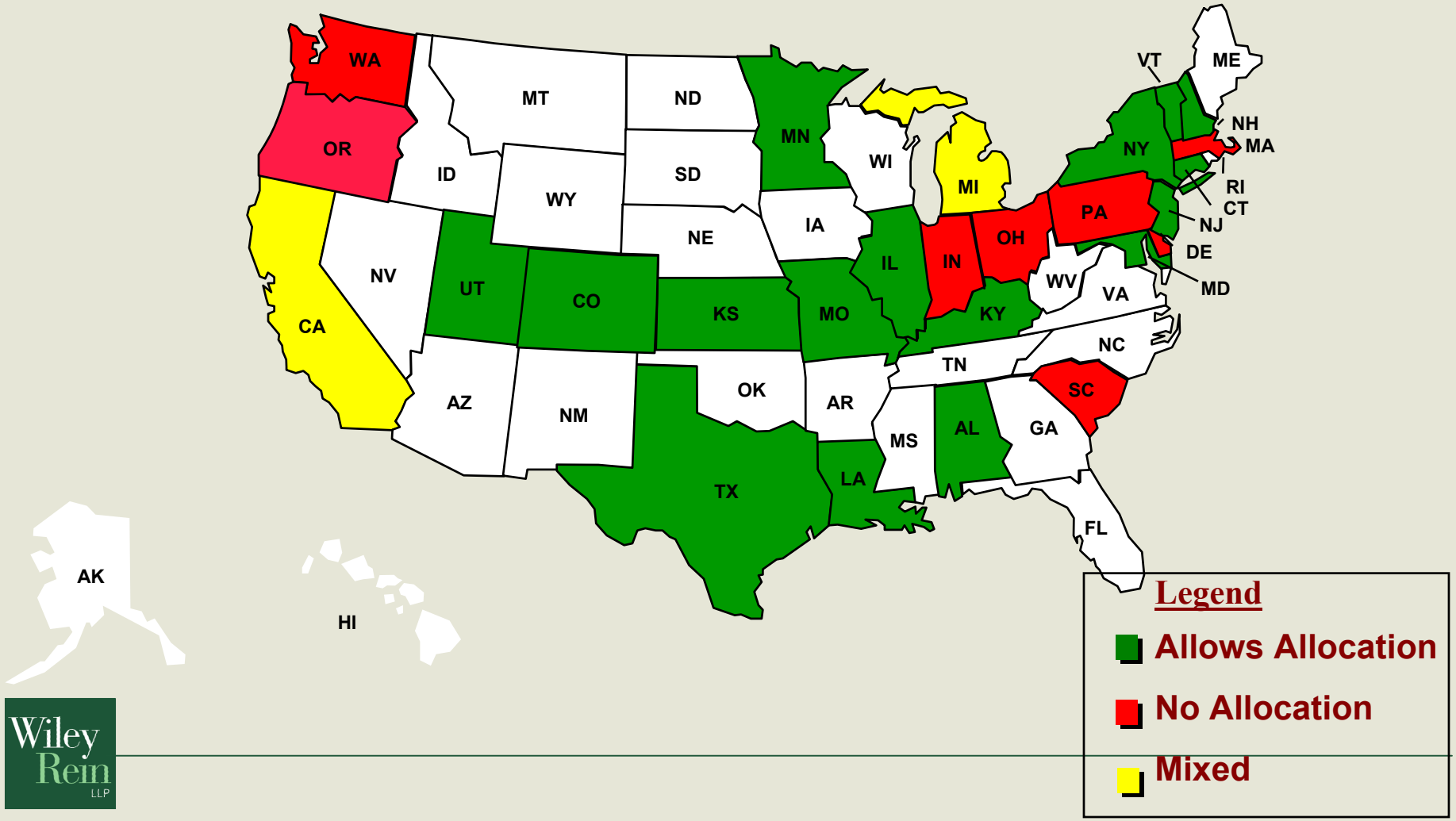
Survey Of
Appellate Court Decisions On Allocation



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All Sums

- Also referred to as "Joint and Several Liability" or Policyholder's "pick and choose" approach
- Allows policyholder to pick one policy period to be liable for all losses up to limits of liability for each policy applicable to that year.
- This is the allocation methodology most favored by policyholders.
- Relieves the policyholder of the burden of seeking recovery from insurers in multiple policy years. Instead the burden is on the spiked insurer(s) to seek contribution from other potentially liable insurers.
- *See, e.g., Keene Corp. v. Ins. Co. of N. Am.*, 667 F.2d 1034 (D.C. Cir. 1981); *Goodyear Tire & Rubber Co. v. Aetna Casualty & Surety Co.,* 95 Ohio St. 2d 512, 769 N.E.2d 853 (2002).

The Pro Rata Approach

- Divides the policyholder's loss proportionally among all insurers with triggered policies.
- Insurers are generally not charged with liability outside of their policy periods for uninsured periods, insurer insolvencies, or unavailability of insurance.
- Courts rejecting the joint and several approach have adopted a variety of methods for determining the proper allocation.

Time on the Risk

- Limits insurer's liability for losses to the proportional share of the available insurance sold by that carrier.
- *See, e.g., Public Service Co. v. Wallis & Co.*, 986 P.2d 924 (Colo. 1999) (environmental damage) (indemnity) (any liability must be allocated based both on time-on-the-risk and degree of risk assumed; allocation to policyholder for self-insured retentions and uninsured periods)

Owens-Illinois/Carter-Wallace Proportionality Approach

- Developed by the New Jersey Supreme Court
- *Carter-Wallace, Inc. v. Admiral Insurance Co.*, 154 N.J. 312, 712 A.2d 1116 (1998) (hazardous waste) (indemnity) (adopts formula that considers risk assumed within each year based on policy limits and mathematical progression of limits)
- *Owens-Illinois, Inc. v. United Insurance Co.*, 138 N.J. 437, 650 A.2d 974 (1994) (asbestos) (defense and indemnity) (rejects joint and several liability; adopts pro rata allocation scheme that accounts for time on the risk and the degree of risk assumed; finds that policyholder is liable for periods for which it was self-insured or uninsured, though the opinion suggests that periods where no insurance was available would not be allocated to the policyholder)

Pro Rata By Limits

- Apportions losses to a given insurer based on the limits of the policy(ies) issued by that insurer as a percentage of the total triggered limits.
- *See, e.g., Argonaut Ins. Co. v. Transport Indem. Co.*, 6 Cal. 3d 496, 99 Cal. Rptr. 617, 492 P.2d 673 (1972); *Employers Reinsurance Corp. v. Phoenix Ins. Co.*, 186 Cal. App. 3d 545, 230 Cal. Rptr. 792 (1st Dist. 1986).

Equal Shares

- Apportions loss equally to each insurer regardless of limits or time on the risk
- Used mainly to allocate defense costs
- *See, e.g., Peerless Insurance v. Vermont Mutual Insurance Co.*, 151 N.H. 71, 849 A.2d 100 (2004) (lead) (defense) (primary insurer and another insurer providing additional insured coverage must share equally in defense costs because the policies' competing "other insurance" clauses were mutually repugnant)

Allocation of Defense Costs

- Some courts have found that same principles allowing for allocation of indemnity apply to allocation of defense
- Other courts require each insurer to be responsible for all defense costs, subject to allocation
- Reimbursement of defense costs for noncovered claims is permitted by some courts
- Can be a large exposure for insurers if defense is "outside of limits"

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