
Is “Fair” Fair?: “All Sums” and the Allocation of Deductibles

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Many articles and seminars dissect the issue of allocation, analyzing the allocation of a policyholder’s liability across policy limits under comprehensive and commercial general liability (CGL) insurance policies. Much less has been written about the issue of allocation of a policyholder’s liability to policies containing deductibles or self-insured retentions (SIRs), despite the fact that deductible allocation is also a significant “dollars and cents” issue for both policyholders and insurance companies. Relatively few cases have addressed this issue outright. In those that do, the courts have generally followed the law of the state in question on allocation of policy limits. Thus, if a state follows “all sums” joint and several liability on the allocation of policy limits, it is likely that a court in that state will apply the same rationale to the issue of allocation of deductibles.

“All sums” allocation of deductibles is the result required by “all sums” or similar language in standard-form general liability policies. Some courts, however, have adopted pro-rata approaches, ignoring the public policy upholding the sanctity of contract language and instead imposing erroneous concepts of “equity” and “fairness.” In the most extreme versions of pro-rata allocation, however, courts refuse to apply those same concepts of fairness to deductible allocation. If “fairness” is used to extra-contractually allocate liability on a pro-rata basis across policy limits on behalf of insurance companies, the “fairness”

concept should also be used to *benefit* policyholders in the allocation of liability to deductible periods or SIRs. “Fair” should be fair.

In addressing the allocation of deductibles issue, courts inevitably need to address the related issue of what constitutes “insurance” for purposes of allocation. Cases generally use the term “deductibles” to include fronting policies, SIRs, and deductibles; for that reason, this article generally uses the term “deductibles” in the same fashion.

SUMMARY

Cases addressing the allocation of deductibles can be divided into three general categories:

- First, some courts have correctly interpreted “all sums” or similar policy language to preclude any allocation to insurance policies containing deductibles, even in circumstances in which the courts have found that the policyholder has deductibles or other arrangements under which the policyholder is responsible to reimburse the insurance company for some or all of the insurance company’s policy limits. This line of cases relies solely on the contract language, applying the standard-form language drafted by the insurance industry.
- Second, some courts have prorated a liability to deductibles contained in triggered policy periods in the same manner that coverage is prorated, employing the “fairness” rationale used to support proration in standard allocation cases. Courts prorating liability to deductible periods in this fashion typically have done so in situations in which the policyholder’s liability is triggered by one occurrence. Thus, a complete analysis of this issue also requires an analysis of the “number of occurrences” issue.
- Third, courts in some states that prorate liability across policy periods nevertheless have incorrectly required policyholders to pay a *full* deductible in each triggered policy year *even if* liability is prorated. Thus, these courts have refused to limit the policyholder’s liability to pay deductibles to a proportionate share. The most extreme of these approaches is “horizontal

allocation,” which requires the policyholder to exhaust the fronted policies or deductibles in all triggered years before any “real” insurance applies. These courts have rejected the “sauce for the goose, sauce for the gander” application of the “fairness” argument that is used to justify proration concepts. “Fair” in these cases is really not fair.

A number of cases have stated that rejecting pick and choose or joint and several allocations and imposing liability on the policyholder even for self-insured deductibles is contrary to clear policy language and violates the principle forbidding equitable contribution between a policyholder and its insurer. Although few courts have explicitly addressed this issue, the “all sums” rationale that has persuaded courts to reject proration of policy limits continues to apply in the context of deductible allocation. By contrast, the pure “horizontal allocation” option contravenes the “all sums” contract language and relies instead on misguided extra-contractual notions of fairness and equity that should not govern issues of contract interpretation.

Courts adopting this approach have rejected the argument that SIRs should be considered primary coverage and, instead, have adopted a “vertical exhaustion” approach, treating SIRs like deductibles, with only a policy’s own SIR needing to be exhausted before its coverage becomes available

ANALYSIS

I. Law on Allocation of “Deductibles”

A. Application of “All Sums” or Joint and Several Liability to Deductibles

Many cases provide authority for “all sums” allocation, and policyholders have an unequivocal basis to argue under the law of many states, and under general principles of policy interpretation, that the all-sums language allows the policyholder to select a policy year or years that provide optimum coverage.¹ Courts adopting this approach have rejected the argument that SIRs should be considered primary coverage and, instead, have adopted a “vertical exhaustion” approach, treating SIRs like deductibles, with only a policy’s own SIR needing to be exhausted before its coverage becomes available.²

The case law in Washington and California appears to be the most developed on the issue of non-allocation to CGL insurance policies containing

deductibles. State courts in Washington have specifically held that insurers are jointly and severally liable under CGL insurance policies for the policyholder’s liability in cases in which damage continuing over a period of years constitutes a “single injury” or occurrence and triggers multiple policy years.³ The Washington Supreme Court’s reasoning in holding that CGL insurers are jointly and severally liable for years of continuing damage later provided crucial support for a Washington federal court’s decision not to treat fronting policies and SIRs as primary insurance.⁴ That subsequent federal decision rejected the insurance companies’ argument that the policyholder’s decision to use fronting policies and SIRs required application of pro-rata allocation.⁵ California courts have likewise rejected insurer arguments that fronting policies, SIRs, and deductibles should be treated as “insurance,” and thus do not require the policyholder to shoulder a share of its own liability if it otherwise has sufficient insurance coverage.⁶

These courts construe the “all sums” policy language to require the insurer to pay the limits of its policy or policies, without proration to the policyholder, *even for* deductibles or periods of “self-insurance.” They find no “unfairness” or “inequity” in holding insurers to the terms of the standard-form policy language that the insurers themselves drafted. In refusing to assign liability to policyholders based on the existence of fronting arrangements, these courts rely on principles of policy interpretation and reasoning that mirror those used by the courts adopting “all sums” allocation of policy limits. The Washington and California decisions are thus compelling authority for the argument that the “all sums” language should be applied *as written* to allow the policyholder to pick and choose the year or years that will apply to a claim. This result will allow a policyholder to avoid liability, to the extent possible, under fronting policies and other kinds of “deductibles” found in the standard-form CGL policies.

1. Washington State Court Cases: *Gruol* and *B&L Trucking*

In *Gruol Construction Co. v. Insurance Co. of North America*, the Washington Court of Appeals found that continuing damage from dry rot triggered all insurance policies covering the risk during the years of damage.⁷ The court held that both Insurance Company of North America and Northwestern Mutual Insurance Company were liable because continuous damage took place during their policy periods.⁸ Moreover, the court specifically rejected the insurers’ effort to place the burden of proof of apportionment on the policyholder.⁹ Instead, the court required the insurers to show that the policy

language supported apportionment to the policyholder, holding that “in a dispute between an insured who has sustained damages of a continuing nature, and the insurance carrier [who is] providing coverage, the *burden of apportionment is on the carriers*.”¹⁰

Subsequently, the Washington Supreme Court sitting en banc in *American National Fire Insurance v. B&L Trucking & Construction Co.*, relied on *Gruol* in rejecting pro-rata allocation in a case involving coverage for environmental cleanup costs.¹¹ After surveying the law on allocation, the Washington Supreme Court cited the Delaware Supreme Court’s decision adopting all-sums allocation in *Monsanto Co. v. C.E. Heath Compensation Liability Insurance Co.*¹² In reviewing the policy language, the court found that:

the language is, at the least, fairly susceptible to different, reasonable interpretations and is, therefore, ambiguous. If the insurer wished to limit its liability through a [program] to allocation of damages once a policy is triggered, the insurer could have included that language in the policy. . . . The average person purchasing insurance would construe the policy language to provide indemnity for any injury once the policy was triggered.¹³

Of particular import in *B&L Trucking* is that the jury found that the policyholder had coverage for only two of the eight years in which environmental damage took place.¹⁴ As a result, the court concluded that the policyholder could not be said to have maintained insurance during the entire period of damage.¹⁵ However, the court further concluded that the fact that the policyholder “did not maintain insurance during the *entire* period of damage is of no moment” and an all sums allocation still applied.¹⁶ The court found no unfairness or violation of public policy in this result, because the insurance policy used standard-form language drafted by the insurance industry and, as considered contracts, the policies’ language, not public policy, governed the parties’ obligations to each other:

Northern contends the Court of Appeals’ opinion violates principles of fairness and public policy because it provides a policyholder who purchases just one year of insurance the same protection as those who purchase insurance annually. This argument is without merit. *Northern drafted the policy language; it cannot now argue its own drafting is unfair.* Further, because insurance policies are considered contracts, the policy language, and not public policy, controls. We will not add language to the policy that the insurer did not include.¹⁷

In reaching its “all sums” decision, the court in *B&L Trucking* cited *Insurance Co. of North America v. Forty-Eight Insulations, Inc.*¹⁸ In *Forty-Eight Insulations*, an early asbestos case, the Sixth Circuit held that indemnity costs could be prorated among insurers if there was a reasonable basis to do so, such as the number of years of exposure to the asbestos.¹⁹ The court also held that “[a]n insurer must bear the entire cost of [a policyholder’s] defense when ‘there is no reasonable means of prorating the costs of defense between the covered and the not-covered items.’ ”²⁰ Policyholders can use this principle in cases in which the insurer cannot show a “reasonable means” for allocating the policyholder’s defense.²¹ That factual issue, at a minimum, should avoid a summary judgment for the insurer on this issue in jurisdictions that do not apply “all sums” as a matter of law.

2. Washington Federal Court Cases: *Weyerhaeuser*

In *Weyerhaeuser Co. v. Fireman’s Fund Insurance Co.*, the United States District Court for the Western District of Washington relied on *B&L Trucking* and *Gruol* in rejecting insurer arguments that the court should assign a share of liability to a policyholder that was “self-insured” for more than 10 years during a 35 year period of continuing damage.²² In that case, Weyerhaeuser had bought fully fronted policies from one insurance company and primary liability insurance policies using a combination of SIRs and fronting arrangements from other insurance companies.²³ All of these fronting arrangements would have resulted in the policyholder bearing 100 percent of the ultimate liability under its primary CGL insurance policies on the risk from 1978 to 1989.²⁴ The alleged environmental damage took place from the early 1950s to 1989.²⁵ But, as the court in *Weyerhaeuser* held, “*B&L Trucking* instructs that Washington courts may not apportion liability between an insured and an uninsured, or between an insurer and an insured who cannot collect for other insured periods.”²⁶

Weyerhaeuser also rejected the insurers’ effort to seek equitable contribution from the insured.²⁷ The court observed that “the fronting policies left Weyerhaeuser effectively uninsured from 1978 to 1989.”²⁸ As a result, the insurers’ efforts to obtain contribution in effect sought equitable “recompense from the insured.”²⁹ Relying on the “all sums” language, the court found that the Washington Supreme Court’s holding in *B&L Trucking* “prohibits that result.”³⁰

Weyerhaeuser also relied upon the California Supreme Court’s decision in *Aerojet-General Corp. v.*

*Transport Indemnity Co.*³¹ There, as in *Weyerhaeuser*, the policyholder had insurance policies that, in effect, left it uninsured for many of the triggered policy years.³² *Aerojet* emphasized that equitable contribution does not apply to parties to a contract.³³ Because an insurance company contracts with its policyholder, the doctrine of equitable contribution does not apply to policyholders under California law and cannot be used to justify application of pro-rata allocation.³⁴ Applying both the legal concept of joint and several liability and the law limiting application of equitable contribution, the court in *Aerojet* rejected the insurers' efforts to characterize *Aerojet's* fronting policies as "insurance."³⁵

One of the insurers in *Weyerhaeuser* specifically argued that the *Aerojet* rules should not apply because, unlike *Weyerhaeuser*, *Aerojet* involved allocation of defense costs only.³⁶ The *Weyerhaeuser* court rejected that distinction.³⁷ Instead, the court found that all-sums allocation applies equally to the duty to pay defense costs and the duty to pay for the policyholder's liabilities.³⁸ In reaching that result, the court specifically rejected the insurers' equity arguments, repeating the Washington Supreme Court's rationale in *B&L Trading*:

[T]here is nothing unfair about requiring an insurer who agreed to pay all sums arising out of an occurrence to pay for effectively uninsured periods.... "Northern drafted the policy language [in which it agreed to pay 'all sums' the insured becomes legally obligated to pay, up to the policy limits]; it cannot argue its own drafting is unfair."³⁹

3. *Aerojet* and Other California Authority

As shown by the analysis in *B&L Trucking*, California law provides key support for an "all sums" result on deductible allocation (and, thus, on allocation more generally). That analysis begins with the California Supreme Court's decision in *Aerojet*. The policyholder there sought coverage for environmental liability in three government actions and more than 35 private actions which alleged that *Aerojet's* operations caused damage from hazardous discharges taking place from the early 1950s into the mid-1980s.⁴⁰ The insurers sought to allocate a portion of the defense costs to *Aerojet* because, from 1976 to 1984, *Aerojet's* primary insurance policies required the policyholder to pay 100 percent of the liability back to the primary insurer INA.⁴¹ The court rejected any application of equitable contribution to *Aerojet*, finding that the doctrine of equitable contribution cited by the insurers applies only

between insurers (or other unrelated parties) that do not have contractual relationships with each other.⁴²

Aerojet also discussed at some length the concept of insurance. More specifically, the court rejected the insurers' efforts to equate "self-insurance" with true insurance, and concluded that, "[i]n a strict sense, 'self-insurance' is a 'misnomer.'"⁴³ Relying on a California statute defining insurance as "'a contract whereby one undertakes to indemnify another against loss, damage, or liability arising from a contingent or unknown event,'" the court specifically found that "self-insurance" does not meet that definition: "If insurance requires an undertaking by one to indemnify *another*, it cannot be satisfied by a self-contradictory undertaking by one to indemnify *oneself*."⁴⁴

The court then turned the insurers' "assumption of the risk" argument against them, stating that it was the insurers, *not* *Aerojet*, that had "'assumed the risk'" of liability for defense costs given the insurance industry-drafted policy language at issue.⁴⁵ The court further concluded that the insured would receive no "windfall," because "*Aerojet* and the insurers were generally free to contract as they pleased."⁴⁶ The court refused the insurer's invitation to "rewrite what [the insurers] themselves wrote."⁴⁷ The court thus found that the insurers had failed to meet their burden of proving that allocation to the fronting policies was justified.⁴⁸

The California Court of Appeal in *Montgomery Ward & Co. v. Imperial Casualty & Indemnity Co.* followed *Aerojet* when it similarly rejected insurer arguments that a portion of defense costs incurred by the insured should be allocated to policies containing SIRs.⁴⁹ There, the policyholder faced environmental liability arising from the operation of its automobile repair business and sought coverage under CGL policies on the risk from 1962 to 1976.⁵⁰ Under the policies in place throughout that period, *Montgomery Ward* was obliged to pay a SIR, ranging from \$50,000-\$250,000, in each triggered year before any insurance policy attached.⁵¹ Given the existence of the SIRs, the insurers referred to their coverage as "excess insurance," and argued that *Montgomery Ward* had to exhaust the SIR in each triggered year before any of their "excess insurance" would apply.⁵² This "horizontal exhaustion" argument would have required *Montgomery Ward* to pay \$2.9 million per occurrence, effectively negating coverage.⁵³ The court, however, held that that "an insurer on the risk when continuous or progressively deteriorating damage or injury first manifests itself remain[s] obligated to indemnify the insured for the entirety of the ensuing damage or injury, up to the policy limits."⁵⁴

The court specifically rejected the argument that insurance policies with SIRs should be treated as primary insurance, finding that it would nullify the insurers' contractual obligations:

[A]ll of the policies make it clear there is a difference between underlying insurance and retained limits, and the Insurers understood this difference when they entered into these contracts. The Insurers now ask us to relieve them of this clear contractual obligation, and instead to deem retained limits in other potentially applicable policies to be primary insurance.... This we will not do. We are offered no public policy or other compelling reason to engraft new meaning onto plain language, and accordingly, "[w]e may not rewrite what they themselves wrote."⁵⁵

The court therefore concluded that there was "no basis in the insurance contracts, or in applicable law, from which to conclude Montgomery Ward's SIRs are the equivalent of policies of primary insurance."⁵⁶

If a court refuses to apply to deductible allocation the "all sums" rule enumerated in B&L Trucking, Aerojet, and similar cases, the policyholder's next best alternative is to argue that deductibles should be prorated among different triggered policies just as damage is

B. Proration of Deductibles

If a court refuses to apply to deductible allocation the "all sums" rule enumerated in *B&L Trucking*, *Aerojet*, and similar cases, the policyholder's next best alternative is to argue that deductibles should be prorated among different triggered policies just as damage is. The "fairness" arguments implicit in the proration approach to allocation apply not only to insurers, but to policyholders as well. The United States Court of Appeals for the Third Circuit used this approach in *PECO Energy Co. v. Boden*, where the policyholder had sued to enforce its property theft insurance coverage for a series of thefts from its fuel trucks over multiple policy periods.⁵⁷ There, the court calculated the portion of the deductible that the policyholder had to pay during each triggered policy period by averaging the deductibles in each of the policy years during which PECO suffered loss, and then weighting each year's coverage and deductible based on the percentage of PECO's loss suffered during that year.⁵⁸

In *LaFarge Corp. v. Hartford Casualty Insurance Co.*, the Fifth Circuit applied an approach similar to *PECO Energy's* in a case involving CGL insurance.⁵⁹

All American Pipeline had contracted with American West Pipeline Constructors to construct an underground pipeline from Santa Barbara, California, to McCombs, Texas.⁶⁰ American West subcontracted with a joint venture to provide a special coating that would protect the pipeline from corrosion and exposure to the elements.⁶¹ LaFarge was the corporate parent of one of the joint venturers.⁶² The coating failed at certain joints, damaging the pipeline, and All American sued to recover for damage to its pipeline and other losses.⁶³ LaFarge submitted an insurance claim.⁶⁴ Thereafter, LaFarge's primary insurer, Hartford, sought a declaratory judgment that it had no liability for LaFarge's defense.⁶⁵ Hartford argued, among other things, that it had no duty to defend claims against LaFarge that were clearly not covered (e.g. breach of contract claims); or defendants not covered under Hartford's coverage.⁶⁶

The United States Court of Appeals for the Fifth Circuit affirmed the trial court's "time on the risk" ruling, assigning only 30 percent of LaFarge's defense costs to Hartford because the damage to the pipeline continued over a period of years and Hartford had sold coverage to LaFarge for 30 percent of that time.⁶⁷ The court also affirmed the trial court's decision to prorate the policyholder's deductible in an identical manner.⁶⁸ *LaFarge* cited with approval the Fifth Circuit's earlier holding in *Clemtex, Inc. v. Southeastern Fidelity Insurance Co.* that the policy provisions on deductibles were ambiguous.⁶⁹ The court in *LaFarge*, as in *Clemtex*, required the policyholder to pay only a portion of the deductible, prorating the deductible in the same manner in which the coverage was apportioned, because the policy was silent as to what would happen when the insurer was liable for only part of a continuous occurrence and prorating was a valid interpretation of what was, at worst, an ambiguous contract:

The policy provides that the deductible will apply to each occurrence; it is at best ambiguous as to what happens when the insurer is held liable for only part of a continuous occurrence. The district court therefore did not have to rely on equitable principles in order to reduce the deductible obligation; its decision is supported simply as a valid choice of one of at least two reasonable interpretations of the policy. It did not err in prorating the deductible.⁷⁰

Proration of deductibles, of course, should not be an issue unless the court first decides to apply prorated allocation to the coverage, a threshold issue that is often litigated.⁷¹ For example, at the outset of its discussion on the allocation of deductibles, the court in *LaFarge* endorsed (arguably without specifically holding) the trial court's decision to prorate under the "time on the risk" theory of allocation used in the

Fifth Circuit's 1981 decision *Porter v. American Optical Corp.*⁷² Significantly, the holding in *Porter*, in which Louisiana law applied, was not based on a decision by the Louisiana Supreme Court.⁷³

C. "Horizontal Exhaustion" of Deductibles

Policyholders question those decisions that apply proration to policy limits but forego "equity" or "fairness" rationales when allocating deductibles. These cases require the policyholder to pay the full deductible in each triggered policy year while, at the same time, allowing the insurer to pay only a portion of its "all sums" liability to the policyholder.⁷⁴ These cases seem to apply "fairness" considerations only one way, allowing insurers to prorate the damage for which they are liable, but prohibiting insureds from prorating their liability by prorating across deductibles. If the insurers are allowed to prorate, then the policyholder's liability for deductibles should be prorated as well. Like proration in general, the proration approach to deductible allocation ignores the fact that CGL policies contain no provision requiring (or even addressing) allocation of deductibles.

These cases apply the principle, also used in the general (non-deductible) allocation context, called "horizontal exhaustion." In horizontal exhaustion, courts require the policyholder to exhaust the primary limits in all triggered policy years before any of the excess layers must pay. These cases, in effect, equate captive fronting arrangements, as well as SIRs and deductibles, with "insurance." In adopting the insurers' "heads I win, tails you lose" position, these courts reason that policyholders are obliged to pay deductibles, are not entitled to equitable arguments for prorating deductibles, and are not entitled to the benefit of the insurer's contractual obligations.⁷⁵

Courts applying "horizontal exhaustion" to deductible allocation thus conclude that, although underlying liability should be prorated to determine an insurer's coverage obligation, the policyholder's obligation to pay deductibles remains the same. The United States Court of Appeals for the Second Circuit, for example, held that prorating the deductible would "upset th[e] balance" between the insurance company and the policyholder.⁷⁶ This conclusion, however, ignores that insurers draft policy language without negotiation. Applying fairness arguments in this context to benefit *insurers* ignores the presumptions that are meant to benefit policyholders.

The "horizontal exhaustion" argument has gained some traction with a few courts (primarily those in pro-rata states).⁷⁷ In other jurisdictions, such as Illinois, courts have applied horizontal exhaustion, holding

that both SIRs and "fronting policies" rendering a policyholder at least partially "self-insured" constitute primary coverage that must be wholly exhausted before any excess policy can be tapped.⁷⁸ Also, a well-known insurance coverage treatise suggests that this approach is the majority rule on deductible allocation and that only a "few courts" have prorated deductibles or refused to pro-rate deductibles at all.⁷⁹ This characterization, in our view, however, is hyperbole and should be taken with a grain of salt.

Most courts apply the cause test, and all focus on the standard-form definition of "occurrence," which CGL policies define as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions."

II. Brief Discussion of Law on Number of Occurrences

Analysis of both the allocation issue generally and the allocation of deductibles issue specifically inevitably raises the question of whether a policyholder's claim constitutes one or multiple occurrences.⁸⁰ To determine the number of occurrences, courts have formulated the following tests:

- (i) the "cause test," which focuses on the cause or causes of the injuries in question;
- (ii) the "liability-triggering event test," which focuses on the incidents for which the policyholder is allegedly liable; and
- (iii) the "unfortunate events test," applied by some New York courts, which focuses on the unfortunate character of the events leading to injury.

Most courts apply the cause test, and all focus on the standard-form definition of "occurrence," which CGL policies define as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions."⁸¹ The cause test often enables the policyholder to argue persuasively that, at most, one occurrence applies per insured liability. Fewer occurrences can benefit a policyholder because each occurrence can require payment of a new deductible or SIR, increasing the amount that the policyholder must pay. Application of fewer occurrences may therefore allow a policyholder to exhaust the primary layers of coverage and move into the excess layers, which may have more "real insurance." Conversely, a multiple occurrence result favors policyholders when the insurance contains no per occurrence deductibles or retentions.

Courts have applied the cause test to grant coverage to insureds and to prevent the insurer from limiting coverage by applying a deductible to each underlying claim asserted against the insured. For example, in *Owens-Illinois, Inc. v. Aetna Casualty & Surety Co.*, the insured sought to enforce its standard-form CGL insurance policies for thousands of underlying asbestos-related bodily injury claims.⁸² The policies contained per occurrence deductibles, and the insurer argued that each asbestos claim constituted a single occurrence.⁸³ Under that argument, most, if not all, of the insured's coverage would have never been reached because each individual claim typically fell within the amount of the per occurrence deductible.⁸⁴ The insured argued that its process of manufacturing and selling of asbestos-containing products was a single cause of the underlying claims and thus constituted a single occurrence.⁸⁵

Applying the cause test, the *Owens-Illinois* court ruled in favor of the policyholder.⁸⁶ The court held that the policyholder's sale and manufacture of asbestos products constituted one occurrence.⁸⁷ The court also noted that the existence of substantial per occurrence deductibles "supports the conclusion that, when [the policyholder] purchased the policies, the parties reasonably expected that [the policyholder] would be required to pay only one deductible for claims like those resulting from asbestos-related injury."⁸⁸

Many courts facing this issue have relied on *Champion International Corp. v. Continental Casualty Co.*⁸⁹ There, the United States Court of Appeals for the Second Circuit held that 1,400 sales of defective material constituted one occurrence because "the multiple sales were continuous and repeated elements of the same occurrence."⁹⁰ In a widely cited case on the issue, the United States Court of Appeals for the

Third Circuit applied the cause test to find that the company-wide policy of the insured (an insurance company) of discriminating against women employees constituted one occurrence.⁹¹ The court reached this result notwithstanding the multiple employee locations involved.⁹²

Thus, a single accident or occurrence can be seen as just one continuous process that results in injury to multiple persons or property. Courts have applied this principle to a number of types of underlying claims, including asbestos,⁹³ fires,⁹⁴ plumbing malfunctions,⁹⁵ exposure to toxic substances,⁹⁶ and employment discrimination.⁹⁷

Sometimes, of course, it is insurers who seek a one occurrence result so as to limit their exposure if their policies contain per occurrence limits without deductibles or retentions. This is often the case in situations in which the insured wants multiple limits to apply while insurers seek to limit their exposure to one policy year.⁹⁸

Conclusion

Decisions by the Washington Supreme Court and the California Supreme Court provide strong support for policyholder arguments that the "all sums" rationale should apply not only to allocation of policy limits, but to allocation of deductibles as well. At a minimum, if courts disregard the clear policy language and, instead, use purported "fairness" and equitable arguments to consider proration of coverage limits, then the courts should apply the same rationale to the proration of deductibles. Insurance coverage cases are contract cases. If courts are going to let "fairness" arguments trump the policy language, then those arguments should apply equally to insurers and policyholders. "Fair" should be fair.

¹ See, e.g., *Plastics Eng'g Co. v. Liberty Mut. Ins. Co.*, 759 N.W.2d 613, 625–26 (Wis. 2009); *ACandS, Inc. v. Aetna Cas. & Sur. Co.*, 764 F.2d 968, 974 (3d Cir. 1985); *Keene Corp. v. Insurance Co. of N. Am.*, 667 F.2d 1034, 1048–49 (D.C. Cir. 1981); *Aerojet-General Corp. v. Transport Indem. Co.*, 948 P.2d 909, 920–21 (Cal. 1997); *Monsanto Co. v. C.E. Heath Comp. & Liab. Ins. Co.*, 652 A.2d 30, 34–35 (Del. 1994); *Hercules, Inc. v. AIU Ins. Co.*, 784 A.2d 481, 491 (Del. 2001); *Allstate Ins. Co. v. Dana Corp.*, 759 N.E.2d 1049, 1057–58 (Ind. 2001); *Goodyear Tire & Rubber Co. v. Aetna Cas. & Sur. Co.*, 769 N.E.2d 835, 840 (Ohio 2002); *Weyerhaeuser Co. v. Fireman's Fund Ins. Co.*, No. C06-1189MJP, 2007 U.S. Dist. LEXIS 92521, at *10 (W.D. Wash. Dec. 17, 2007).

² E.g., *Montgomery Ward & Co. v. Imperial Cas. & Indem. Co.*, 81 Cal. App. 4th 356, 364 (2000).

³ *American Nat'l Fire Ins. Co. v. B&L Trucking & Constr. Co.*, 951 P.2d 250, 254 (Wash. 1998); *Gruol Constr. Co. v. Insurance Co. of N. Am.*, 524 P.2d 427, 429–30 (Wash. Ct. App. 1974).

⁴ *Weyerhaeuser Co. v. Fireman's Fund Ins. Co.*, No. C06-1189MJP, 2007 U.S. Dist. LEXIS 92521, at *13 (W.D. Wash. Dec. 17, 2007).

⁵ *Weyerhaeuser Co.*, 2007 U.S. Dist. LEXIS 92521, at *9.

⁶ *Aerojet-General Corp. v. Transport Indem. Co.*, 948 P.2d 909, 929 (Cal. 1997); *Montgomery Ward*, 81 Cal. App. 4th at 369.

⁷ *Gruol Constr. Co. v. Insurance Co. of N. Am.*, 524 P.2d 427, 428, 431 (Wash. Ct. App. 1974).

⁸ *Gruol*, 524 P.2d at 430.

⁹ *Gruol*, 524 P.2d at 431.

¹⁰ *Gruol*, 524 P.2d at 431 (emphasis added).

¹¹ *American Nat'l Fire Ins. Co. v. B&L Trucking & Constr. Co.*, 951 P.2d 250, 253–54 (Wash. 1998).

¹² *Monsanto Co. v. C.E. Heath Comp. & Liab. Ins. Co.*, 652 A.2d 30, 34–35 (Del. 1994).

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- ¹³ *B&L Trucking*, 951 P.2d at 256.
- ¹⁴ The policyholder had purchased CGL insurance from 1978 through 1986, but its liability began in 1980. The jury found that, after July 1982, the policyholder expected or intended damage at issue, thus precluding coverage for damage taking place after that date. *B&L Trucking*, 951 P.2d at 252.
- ¹⁵ *B&L Trucking*, 951 P.2d at 254 n.4.
- ¹⁶ *B&L Trucking*, 951 P.2d at 254 n.4.
- ¹⁷ *B&L Trucking*, 951 P.2d at 257.
- ¹⁸ *B&L Trucking*, 951 P.2d at 253 (citing *Ins. Co. of N. Am. v. Forty-Eight Insulations, Inc.*, 633 F.2d 1212, 1225 (6th Cir.), *clarified on reh'g*, 657 F.2d 814 (6th Cir. 1981)).
- ¹⁹ *Ins. Co. of N. Am. v. Forty-Eight Insulations, Inc.*, 633 F.2d 1212, 1225 (6th Cir. 1981).
- ²⁰ *Forty-Eight Insulations, Inc.*, 633 F.3d at 1224 (quoting *Nat'l Steel Constr. Co. v. Nat'l Union Fire Ins. Co.*, 543 P.2d 642, 644 (Wash. Ct. App. 1975)).
- ²¹ *Forty-Eight Insulations, Inc.*, 633 F.3d at 1224. The Washington Supreme Court remanded the case for further findings that do not appear to be reported.
- ²² *Weyerhaeuser Co. v. Fireman's Fund Ins. Co.*, No. C06-1189MJP, 2007 U.S. Dist. LEXIS 92521, at *4-5 (W.D. Wash. Dec. 16, 2007).
- ²³ *Weyerhaeuser*, 2007 U.S. Dist. Lexis 92521, at *3-4.
- ²⁴ *Weyerhaeuser*, 2007 U.S. Dist. Lexis 92521, at *4.
- ²⁵ *Weyerhaeuser*, 2007 U.S. Dist. Lexis 92521, at *3.
- ²⁶ *Weyerhaeuser*, 2007 U.S. Dist. Lexis 92521, at *10.
- ²⁷ *Weyerhaeuser*, 2007 U.S. Dist. Lexis 92521, at *11-14.
- ²⁸ *Weyerhaeuser*, 2007 U.S. Dist. Lexis 92521, at *11.
- ²⁹ *Weyerhaeuser*, 2007 U.S. Dist. Lexis 92521, at *11.
- ³⁰ *Weyerhaeuser*, 2007 U.S. Dist. Lexis 92521, at *11.
- ³¹ *Weyerhaeuser*, 2007 U.S. Dist. Lexis 92521, at *11 (citing *Aerojet-General Corp. v. Transport Indem. Co.*, 948 P.2d 909 (Cal. 1997)).
- ³² *Aerojet-General Corp. v. Transport Indem. Co.*, 948 P.2d 909, 915-16 (Cal. 1997).
- ³³ *Aerojet*, 948 P.2d at 930.
- ³⁴ *Aerojet*, 948 P.2d at 930.
- ³⁵ *Aerojet*, 948 P.2d at 929-30.
- ³⁶ *Weyerhaeuser*, 2007 U.S. Dist. Lexis 92521, at *12.
- ³⁷ *Weyerhaeuser*, 2007 U.S. Dist. Lexis 92521, at *12.
- ³⁸ *Weyerhaeuser*, 2007 U.S. Dist. Lexis 92521, at *13.
- ³⁹ *Weyerhaeuser*, 2007 U.S. Dist. Lexis 92521, at *13-14 (quoting *B&L Trucking*, 951 P.2d at 257 *Shepardize*) (second bracketed text in original).
- ⁴⁰ *Aerojet*, 948 P.2d at 912-13.
- ⁴¹ *Aerojet*, 948 P.2d at 914.
- ⁴² *Aerojet*, 948 P.2d at 929-30.
- ⁴³ *Aerojet*, 948 P.2d at 930 n.20 (citing *Nabisco, Inc. v. Transport Indem. Co.*, 192 Cal. Rptr. 207, 209 (Cal. Ct. App. 1983)).
- ⁴⁴ *Aerojet*, 948 P.2d at 930 n.20 (quoting *CAL. INS. CODE § 22* (1997)).
- ⁴⁵ *Aerojet*, 948 P.2d at 931-32.
- ⁴⁶ *Aerojet*, 948 P.2d at 932 (citing *Linnastruth v. Mutual Benefit Ass'n*, 137 P.2d 833, 834 (Cal. 1943)).
- ⁴⁷ *Aerojet*, 948 P.2d at 932.
- ⁴⁸ *Aerojet*, 948 P.2d at 932.
- ⁴⁹ *Montgomery Ward & Co. v. Imperial Cas. & Indem. Co.*, 97 Cal. Rptr. 2d 44, 51-52 (Cal. Ct. App. 2000).
- ⁵⁰ *Montgomery Ward*, 97 Cal. Rptr. 2d at 45.
- ⁵¹ *Montgomery Ward*, 97 Cal. Rptr. 2d at 45.
- ⁵² *Montgomery Ward*, 97 Cal. Rptr. 2d at 51.
- ⁵³ *Montgomery Ward*, 97 Cal. Rptr. 2d at 48.
- ⁵⁴ *Montgomery Ward*, 97 Cal. Rptr. 2d at 49.
- ⁵⁵ *Montgomery Ward*, 97 Cal. Rptr. 2d at 50-51 (quoting *Aerojet-General Corp. v. Transport Indem. Co.*, 948 P.2d 909, 932 *Shepardize* (Cal. 1997)) (citations omitted).
- ⁵⁶ *Montgomery Ward*, 97 Cal. Rptr. 2d at 53.
- ⁵⁷ *PECO Energy Co. v. Boden*, 64 F.3d 852, 854 (3d Cir. 1995), *overruled in part on other grounds by* *Federated Mut. Ins. Co. v. Grapevine Excavation, Inc.*, 241 F.3d 396 (5th Cir. 2001).
- ⁵⁸ *PECO Energy*, 64 F.3d at 857.
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⁵⁹ *LaFarge Corp. v. Hartford Cas. Ins. Co.*, 61 F.3d 389 (5th Cir. 1995), *overruled in part on other grounds by Federated Mut. Ins. Co.*, 241 F.3d 396.

⁶⁰ *LaFarge*, 61 F.3d at 391.

⁶¹ *LaFarge*, 61 F.3d at 391–92.

⁶² *LaFarge*, 61 F.3d at 392.

⁶³ *LaFarge*, 61 F.3d at 392.

⁶⁴ *LaFarge*, 61 F.3d at 392.

⁶⁵ *LaFarge*, 61 F.3d at 392.

⁶⁶ *LaFarge*, 61 F.3d at 398.

⁶⁷ *LaFarge*, 61 F.3d at 392, 401.

⁶⁸ The court agreed with Hartford, however, that the insurer should not be liable for defense costs incurred before the policyholder tendered notice of the claim to Hartford. *LaFarge*, 61 F.3d at 399–400.

⁶⁹ *LaFarge*, 61 F.3d at 401 (citing *Clemtex, Inc. v. Se. Fid. Ins. Co.*, 807 F.2d 1271, 1276–77 (5th Cir. 1987)).

⁷⁰ *LaFarge Corp.*, 61 F.3d 389, 401 (5th Cir. 1995). *See also* *Nationwide Mut. Ins. Co. v. LaFarge Corp.*, 910 F. Supp. 1104, 1108 (D. Md. 1996) (adopting the Fifth Circuit’s reasoning in *LaFarge*); *Lincoln Elec. Co. v. St. Paul Fire & Marine Ins. Co.*, 210 F.3d 672, 690–91 (6th Cir. 2000) (endorsing pro-rata calculation of deductible).

⁷¹ Proration, thus, far from promoting settlement, often leads to extensive litigation.

⁷² *LaFarge*, 61 F.3d at 401 (discussing the district court’s reliance on *Porter v. Am. Optical Corp.*, 641 F.2d 1128 (5th Cir. 1981) as well as *Clemtex* and *Forty-Eight Insulations*).

⁷³ *See generally Porter*, 641 F.2d 1128.

⁷⁴ For the most recent example, *see Boston Gas Co. v. Century Indem. Co.*, 588 F.3d 20 (1st Cir. 2009).

⁷⁵ At a minimum, courts should apply “equity” arguments equally to benefit both insurers and policyholders. *See, e.g., Stonewall Ins. Co. v. Asbestos Claims Mgmt. Corp.*, 73 F.3d 1178 (2d Cir. 1995), *modified on other grounds*, 85 F.3d 49 (2d Cir. 1996) (applying New York Law).

⁷⁶ *Olin Corp. v. Ins. Co. of N. Am.*, 221 F.3d 327–28 (2d Cir. 2000).

⁷⁷ *See, e.g., Benjamin Moore v. Aetna Cas. & Sur. Co.*, 843 A.2d 1094, 1104–06 (N.J. 2004); *Liberty Mut. Ins. Co. v. Wheelwright Trucking Co.*, 851 So. 2d 466, 488 (Ala. 2002); *N. States Power Co. v. Fid. & Cas. Co. of N.Y.*, 523 N.W.2d 657, 664 (Minn. 1994).

⁷⁸ *Mo. Pac. R.R. v. Int’l Ins. Co.*, 679 N.E.2d 801, 809–10 (Ill. App. Ct. 1997); *accord Liberty Mut. Ins. Co.*, 851 So. 2d at 488.

⁷⁹ BARRY OSTRAGER & THOMAS NEWMAN, *HANDBOOK ON INSURANCE COVERAGE DISPUTES* § 9.04[e][2] (Aspen Publishers 15th ed. 2009). The authors represent insurers.

⁸⁰ Other courts have required policyholders to absorb only one deductible in cases involving long-term damage or injury. *E.g., Household Mfg., Inc. v. Liberty Mut. Ins. Co.*, No. 85 C 8519, 1987 U.S. Dist. Lexis 1008 (N.D. Ill. Feb. 10, 1987), *modified*, 1987 U.S. Dist. Lexis 10837 (N.D. Ill. Nov. 16, 1987); *Witco Corp. v. Am. Guar. & Liab. Co.*, No. 98 Civ. 8521 (LLS), 1999 U.S. Dist. Lexis 17279 (S.D.N.Y. Nov. 4, 1999).

⁸¹ *See, e.g., Owens-Illinois, Inc. v. Aetna Cas. & Sur. Co.*, 597 F. Supp. 1515, 1525 (D.D.C. 1984).

⁸² *Owens-Illinois*, 597 F. Supp. 1515.

⁸³ *Owens-Illinois*, 597 F. Supp. at 1525–26.

⁸⁴ *Owens-Illinois*, 597 F. Supp. at 1525.

⁸⁵ *Owens-Illinois*, 597 F. Supp. at 1526.

⁸⁶ *Owens-Illinois*, 597 F. Supp. at 1528.

⁸⁷ *Owens-Illinois*, 597 F. Supp. at 1527.

⁸⁸ *Owens-Illinois*, 597 F. Supp. at 1527.

⁸⁹ *Champion Int’l Corp. v. Cont’l Cas. Co.*, 546 F.2d 502 (2d Cir. 1976).

⁹⁰ *Champion Int’l Corp.*, 546 F.2d at 505–506; *accord Fireman’s Fund Ins. Co. v. Scottsdale Ins. Co.*, 968 F. Supp. 444, 447 (E.D. Ark. 1997).

⁹¹ *Appalachian Ins. Co. v. Liberty Mut. Ins. Co.*, 676 F.2d 56, 60–61 (3d Cir. 1982).

⁹² *Appalachian Ins. Co.*, 676 F.2d at 58.

⁹³ *E.g., Champion Int’l Corp.*, 546 F.2d 502 (2d Cir. 1976).

⁹⁴ *Denham v. La Salle-Madison Hotel Co.*, 168 F.2d 576 (7th Cir. 1948); *Barrett v. Iowa Nat’l Mut. Ins. Co.*, 264 F.2d 224 (9th Cir. 1959) (applying Montana law); *Travelers Ins. Co. v. New Eng. Box Co.*, 157 A.2d 765 (N.H. 1960).

⁹⁵ *See, e.g., Household Mfg.*, No. 85 C 8519, 1987 U.S. Dist. LEXIS 1008 (N.D. Ill. Feb. 10, 1987), *modified*, No. 85 C 8519, 1987 U.S. Dist. LEXIS 10837 (N.D. Ill. Nov. 16, 1987).

⁹⁶ *E.g., N. Am. Specialty Ins. Co. v. Iberville Coatings, Inc.*, No. 99-859 (M.D. La. Oct. 3, 2001), *reprinted in* 15 Mealey’s Litig. Rep.—Ins., No. 46, at E1 (Oct. 9, 2001).

⁹⁷ *Appalachian Ins. Co.*, 676 F.2d at 60–61.

⁹⁸ For a fuller discussion of this issue and the various tests cited in the text, *see* Lorelie S. Masters et al., *Insurance Coverage Litigation* Ch. 9 (Aspen 2d ed. 2010).