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Advanced Issues in Insurance Coverage

Where Multiple Policies are Implicated by the Same Claim

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Insurance Coverage Issues: Allocating Loss Among Multiple Implicated Policies

I. General Structure of the Insurance Tower (Vertical Tower)

A. Primary Insurance

Primary insurance typically responds to a covered claim at the onset subject to any applicable deductibles or self-insured retentions.

B. Umbrella Policy

An umbrella policy typically serves two purposes: to extend coverage above the limits of insurance provided in the underlying primary policy and to offer defined coverage that may not be available under the primary. Thus, the umbrella policy exceeds the breath of coverage offered by the primary.

C. Excess Policies

Excess policies differ from umbrella policies in that they are truly vertical in nature, meaning they typically only respond to those claims covered by the underlying policy.

II. Multiple Towers of Insurance

When allocation is applied among multiple towers of insurance spanning different periods of years relative to a continuous claim that triggers the multiple towers of coverage, courts will generally allocate as between policies at the same level, meaning allocation starts at the primary layer horizontally and continues to be applied in a horizontal fashion to the next level of coverage. See, *Jefferson Ins. Co. v. N.Y. Travelers Indem. Co.*, 92 N.Y. 2d 363, 372 (1998).

III. Multiple Policies Potentially Cover Same Non-Continuous Claim (Episodic Event)

A. Stacking of Policies on same Level

1. "The concept of 'stacking' coverages * * * arises where the *same claimant* and the same loss are covered under multiple policies, or under multiple coverages contained in a single policy, and the amount available under one policy is inadequate to satisfy the damages alleged or awarded." (Emphasis added.) 12 Couch, Insurance (3 Ed.1998) 169-14 to 169-15, Section 169:4.

2. "Stacking" is also defined as "the ability of the insured, when covered by more than one insurance policy, to obtain benefits from a second policy on the same claim when recovery from [the] first policy alone would be inadequate." Black's Law Dictionary (6 Ed.19990) 1403.

i. UIM Coverage

UIM coverage is not excess coverage and its limits shall be reduced by those amounts available for payment under all applicable liability policies. R.C. 3937.18(C).

ii. Anti-stacking provisions enforceable. *Merz v. Motorist Mut. Insu.*, 2007-Ohio-2293.

B. Prevention of Stacking/Other Insurance Clauses.

1. Historical Origin

Other insurance clauses find their historical roots in first party property insurance policies. The original purpose appears to have been to cut off duplicative recoveries against different insureds, perhaps each unaware of each other, for the same loss.

Today, other insurance clauses are more often called upon to set forth the priority of coverage when more than one liability policy applies to the same risk at the same level (meaning one policy is not specifically designated to be excess over the other).

"Another insurance clause is one which delineates the application of an insurance policy where there is more than one policy covering the same risk." *Amerisure Ins. Co. v. Mut. Fire, Marine & Inland Ins. Co*., 8th Dist. Cuyahoga No. 58433, 1991 Ohio App. LEXIS 2121, at *7 (May 9, 1991).

When one policy has another insurance clause and the other does not, the other insurance clause is given full force and effect. *Continental Casualty Co.* v. *Buckeye Union Casualty Co.* (1957) 75 Ohio Law Abs. 79.

2. Purpose

Insurers use this type of excess insurance clause to deter over insuring for the purpose of double recovery. The clauses create a situation whereby an insured may pay premiums for two primary coverages but can recover from only one unless the loss exceeds the first policy. The insured holding a policy with such a clause will be deterred from purchasing other insurance because he obtains very little in protections with his second premium payment."

IV. Types of Other Insurance Clauses

A. Pro rata clause

1. Permits the insurer to base its coverage in proportion to other coverage that may be available. For example, if a competing other insurance clause provides for a proration by limits, the applicable policies will generally be liable for the

proportion of the loss that the limits of each policy bears to the total amount of available insurance.

a. If a competing clause provides for contribution by equal shares, the policies share the loss equally.

Example: "Other Insurance: If the insured has other insurance against a loss covered by Part I of this policy the company shall not be liable under this policy for a greater proportion of such loss than the applicable limit of liability stated in the declarations bears to the total applicable limit of liability of all valid and collectible insurance against such loss;" *Fleming v. Parsons*, 2 Ohio App. 2d 12, 14, 206 N.E.2d 46 (5th Dist. 1965).

B. Escape clauses

1. Clause that states an insurer will provide coverage to a person "but only if no other valid and collectible insurance. 8A John Alan Appleman, Insurance Law and Practice § *4906 at 349-50 (Rev. Ed. 1981).*

2. "Super escape clause" is an escape clause that indicates that the policy coverage does not apply to any loss where there is similar coverage under another policy whether primary, excess, or contingent.

C. Excess clauses

1. Clause within a policy that extends coverage to an insured only to the extent that the coverage is excess over other collectible insurance the insured may have.

2. For example, a clause will state that the policy will respond only after all other policies that apply to the loss have been exhausted.

   a. Typically, an excess clause is identified by language indicating "the policy will provide coverage only for liability that is excess over other collectible insurance. *Muller v. Western Reserve Mutual Casualty Co.*, 8th Dist. No. 50998, 1986 Ohio App. LEXIS 8587.

3. Excess over excess/super excess form of an excess clause which, in addition to containing excess clause language, further provides that it will be deemed excess coverage over any other collectible insurance whether stated to be primary, contributing, excess, or contingent.

V. Allocation issues between other insurance clauses

A. The governing principle before one policy can ride as excess insurance, the other policy must be made to walk as the primary policy. *Buckeye Union Ins. Co. v. State Auto Mut. Ins. Co.,* 44 Ohio St. 2d 213 (1977)

1. If one insurer has a pro rata clause and the other an excess clause, the pro rata insurer is primarily liable.

B. Pro Rata v. Excess

1. If one insurer states that it is pro rata with other "applicable" insurance and the second policy states that it is "excess" over other "collectable insurance," then the pro rata policy is primary because the excess policy is not "applicable" until primary coverage is exhausted. *Trinity Universal Insurance Co. v. General Accident Fire & Life Insurance Co., Ltd*., 138 Ohio St. 488, 489 (1941).

   See also *Nutmeg Ins. Co. v. Emplrs. Ins. Co.,* U.S. Dist. Ct. N.D. Texas, Dallas Division, 2006 U.S. Dist. LEXIS 7246 (Feb. 23, 2006), majority rule is that "equal shares" and "pro rata" policy is primary to a policy which contains an "Excess" other insurance clause.

2. *Tribe v. Malone,* 4th Dist. Athens No. 00CA18, 2000-Ohio-2002

   a. In *Tribe,* a plaintiff filed suit against a defendant-driver for injuries suffered in an auto accident, seeking to recover under two separate automobile policies, each containing other insurance provisions.

   b. The court in *Tribe* was confronted with the following other insurance provisions:

      i. If there is applicable similar insurance, we will pay only our share of the loss. Our share is the proportion that our limit of liability bears to the total of all applicable limits. If this policy and any other policy providing similar insurance apply to the same accident, the maximum limit of liability under all the policies shall be the highest applicable limit of liability under any policy. However, any insurance we provide with respect to a vehicle you do not own shall be excess over any other collectible insurance."

      ii. Compare with: "If there is other applicable similar insurance available under one or more policy or provision of coverage:

iii. Any recovery for damages for bodily injury sustained by an insured may equal but not exceed the higher of the applicable limit for any one vehicle under this insurance or any other insurance.

iv. With respect to a vehicle not owned by you or a family member, we will provide insurance only in the amount by which your limit of liability for this coverage exceeds the limit of liability for any other applicable insurance."

v. The court held that the second other insurance provision clearly provided excess coverage, requiring the insured to exhaust the limit under the first policy.

a. In contrast, the first insurance provision provided that it will only pay its share of the loss, pro rata, when other applicable similar insurance is available.

b. The court reasoned that the second policy did not provide similar coverage for a vehicle it did not own; instead, the policy stated that its coverage would be excess. Based on these designations, the policy providing for the pro rata other insurance provisions was primary over the excess policy.

3. If one insurer claims no liability if other insurance is available and the other insurer claims to be excess only, the insurer with the excess clause becomes secondary. *State Farm Mut. Auto. Ins. Co. v. Home Indem. Ins. Co*., 23 Ohio St. 2d 45, 47-48 (1970).

i. "Where an insurance policy insures a loss 'only if no other valid collectible automobile liability insurance, either primary or excess *** is available,' and another insurance policy insures the same loss only as to the 'excess over other collectible insurance,' the latter provision will be given effect; thus, the former policy will be held to furnish the insurance for the loss."

In other words, an escape clause is ineffective when the alternate policy contains an excess clause. *Mitchell v. Motorists Mut. Ins. Co.*, 2005-Ohio-3988, at ¶26.

4. If both insurers have excess clauses, then they become liable on a pro rata basis. *Buckeye Union Ins. Co. v. State Auto. Mut. Ins. Co*., 49 Ohio St. 2d 213, syllabus (1977);

5. *See Buckeye Union Ins. Co. v. State Auto Mut. Ins. Co.*, 49 Ohio St.2d 213, 361 N.E.2d 1052 (1977) (where two insurance policies both contain excess insurance clauses, the clauses are repugnant and must be ignored, and the two insurers become liable in proportion to their policy limits).

    i. "[B]efore one policy 'can ride as excess insurance,' the other policy must be made to walk as primary insurance.' Since there can be no primary insurance of the risk where there are conflicting excess clauses, the excess clause a fortiori cannot be a valid means of establishing only 'secondary' liability. For us to look to other provisions within the insurance policies in order to find one insurer primarily liable and give effect to an excess clause which has been neutralized, as a matter of logic, by the conflicting excess clause of the other policy, is to apportion liability on the basis of criteria unrelated to the excess clauses themselves and to run the same hazards of arbitrariness and disregard for the insurer's intent that lead us to reject the primary tortfeasor doctrine."

6. Following the *Buckeye* rationale, the Ninth District Court of Appeals reasoned that when two uninsured motorists' provisions covered the same risk and both were triggered, "the appropriate remedy is that the policies be enforced pro rata." *Pierson v. Wheeland*, 9th Dist. Summit No. 22736, 2006-Ohio-1316, ¶ 24.

VI. Multiple Triggered Policies for "Continuous" Claims

A. Continuous or Multiple Trigger Theory

Under a continuous or multiple trigger theory, the event giving rise to a liability claim is not to be deemed a single episodic event limited to a single policy period, but rather a continuous event which can trigger coverage under insurance policies in effect during consecutive periods of time. Common examples of continuous claims are delayed manifestation events such as asbestos exposure or pollution contamination claims.

The recognition of continuous trigger originated in asbestos cases in which bodily injury was deemed to progress and become more serious over extended periods of time spanning multiple policy periods.

B. Methods for Allocating Coverage

1. Two Methods

    a. Pro Rata Coverage Among All Implicated Policies

i. Divides a loss horizontally among all triggered policy periods, with each insurance company paying only a share of the policyholder's total damages.

1. In other words, each insurer is only responsible for a portion of the total claim based on a ratio between that part of the occurrence which takes place during each insurer's policy period and not the entire duration of the occurrence

2. Divides the loss horizontally among all triggered policies with each insurer paying only its respective share of the total damages

b. All sums

i. Allows an insured to seek full coverage for its claims from any single policy, up to that policy's coverage limits, out of the group of policies that have been triggered.

1. Under this scheme, an insured can allocate all damages vertically to a single carrier.

ii. The Ohio Supreme Court adopted the "all sums" approach, noting that such a rule "promotes economy for the insured while still permitting insurers to seek contribution from other responsible parties when possible." *Goodyear Tire & Rubber Co. v. Aetna Cas. & Sur. Co*., 95 Ohio St.3d 98, 2010-Ohio-2745, 930 N.E.2d 800, at ¶ 11.

iii. When a policy provides coverage for "all sums" a policyholder becomes legally obligated to pay, the Ohio Supreme Court has held that a policyholder has the right "to seek full coverage for its claims from any single policy, up to that policy's coverage limits, out of the group of policies that has been triggered." *Pennsylvania Gen. Ins. Co. v. Park-Ohio Industries*, 126 Ohio St. 3d 98, 2010-Ohio-2745, 930 N.E.2d 800, at ¶ 11 (quoting *Goodyear*); *Goodyear Tire & Rubber Co. v. Aetna Cas. & Sur. Co.*, 95 Ohio St. 3d 512, 2002-Ohio-2842, 769 N.E.2d 835, at ¶ 6.

iv. Under this approach, when a loss "triggers claims under multiple primary insurance policies, the insured is entitled to secure coverage from a single policy of its choice that covers 'all sums'

incurred as damages 'during the policy period,' subject to that policy's limit of coverage." *Pennsylvania Gen. Ins. Co. v. Park-Ohio Industries*, 126 Ohio St. 3d 98, 2010-Ohio-2745, 930 N.E.2d 800, at ¶ 11 (quoting *Goodyear*); *Goodyear Tire & Rubber Co. v. Aetna Cas. & Sur. Co.*, 95 Ohio St. 3d 512, 2002-Ohio-2842, 769 N.E.2d 835, at ¶ 6. A policyholder is "permitted to choose, from the pool of triggered primary policies, a single primary policy against which it desires to make a claim." *Goodyear*, 2002-Ohio-2842, at ¶ 12.

v. In the event that a selected policy "does not cover an entire claim," then the policyholder "may pursue coverage under other primary or excess insurance policies." *Id.*

vi. However, the Ohio Supreme Court's holding is seemingly limited to those policies providing for coverage for "all sums." *Id.* at ¶ 6.

1. When a loss "triggers claims under multiple primary insurance policies, the insured is entitled to secure coverage from a single policy of its choice that covers 'all sums' incurred as damages 'during the policy period,' subject to that policy's limit of coverage."

2. *See Indiana Insurance Co. v. Farmer's Insurance of Columbus*, 5th Dist. No. 2002 AP 11 0090, 2003-Ohio-4851

    a. Refusing to apply *Goodyear* to a situation not involving a "long-term injury" and where the at-issue policy specifically provided that it was not an "all sums" policy, but rather only applied on a primary or excess basis. *Id*. at ¶¶ 43, 47.
    b. In *Indiana Insurance*, only two insurance policies were implicated in an action arising out underinsured motorist claims. The court, in finding that the excess clause in one policy applied, refused to apply *Goodyear* because "it is relatively easy to determine who must bear the loss" in cases involving motor vehicle policies. *Id*. at ¶ 43.

3. In *Manor Care, Inc. v. First Specialty Ins. Cor.*, 200 U.S. Dist. N.D. Ohio, 2006 U.S. Dist. LEXIS 48244 (July 17,

> 2006), the court noted that *Goodyear* all sums approach was applicable in situations where parsing damages among different policy periods was difficult. Where it is relatively easy to determine who must bear the loss, reliance on G*oodyear* is misplaced.

c. Summary of Case Law applying the All Sums Approach

***Goodyear Tire and Rubber Company v. Aetna Casualty Ins. Co.*, 95 Ohio St.3d 512 (2002)**

In *Goodyear*, multiple carriers sought a determination as to how a claim settled on behalf of the insured should be allocated among various policies. The *Goodyear* court ultimately adopted an allocation position premised on the fact that the policy insuring agreements obligated each carrier to pay "all sums." The court did not specifically identify an appropriate trigger of coverage, finding: "the parties are in agreement as to which primary policies have been called into play, and there is no dispute that there was continuous pollution across multiple policy periods that gave rise to occurrence in the claims to which those policies apply".

The Ohio Supreme Court held that under such circumstances, the insured was free to choose among various triggered policies containing similar language and obtained a complete recovery for any and all damages as against a single triggered policy subject only to that policy's applicable limits. The court held that in such instance, "the insurers bear the burden of obtaining contribution from any other applicable primary policies as they deem necessary".

***Pennsylvania General Insurance Co. v. Park-Ohio Industries*, 126 Ohio St.3d 98 (2010)**

In *Park-Ohio*, the carrier had been called upon to pay the settlement of an entire claim on behalf of the insured pursuant to the "all sums" allocation approach previously recognized in *Goodyear*. The carrier subsequently sought to obtain contribution from other carriers not selected by the insured. The carriers subject to the contribution claims sought to deny the contribution on

the basis of late notice. The *Park-Ohio* court held that the *Goodyear* "all sums" allocation approach was an equitable remedy in nature which promoted economy for the insured while still permitting insurers to seek contribution from the responsible parties when possible. The *Park-Ohio* court thereafter clarified the *Goodyear* holding by stating that the insured has a duty to cooperate with a targeted insurer. While *Goodyear* allows the insured to choose a targeted insurer from which it may recover a full amount of indemnification, that does not mean the insured may engage in tactics to delay or obstruct the targeted insurer in the process of obtaining contribution from non-targeted insurers. Thus, when targeted insurer request information from the insured regarding other policies that may also cover the claim, the insured has a duty to cooperate by identifying those policies.

In addition, the *Park-Ohio* court went on to hold that the failure to timely notify non-target insurers will not necessarily foreclose contribution from the non-targeted insurers to the targeted insurer. The court held that if the failure to notify non-targeted insurers resulted in prejudice to the non-targeted insurers, then the non-targeted insurers will not be required to contribute to the targeted insurer. In contrast, in cases in which the non-targeted insurers have not been prejudiced by the late notice, the equitable nature of the all sums approach requires that those non-targeted insurers will still be liable in contribution in a contribution action brought by the targeted insurer.

***Resco Holdings, L.L.C. v. AIU Ins. Co.*, 2018-Ohio-2844, 2018 Ohio App. LEXIS 3066 (8th Dist. Cuyahoga)**

In *Resco*, an insurer, National Union, appealed from a trial court order awarding contribution based on the allocation formula set forth in the settlement agreement between the policyholder and settling primary insurers, addressing past and future costs for coverage of multiple asbestos bodily injury claims. National Union asserted that a pro rata approach should be applied because "its share of liability should be based solely on the total amount of time its policies

provided coverage in relation to the total amount of time provided by all the primary polices." *Id*. at ¶ 20. The Eighth District reasoned that this "time on the risk" approach failed to take into account the "continuous trigger" theory. *Id*. at ¶ 23.

The "continuous trigger" theory provides that "each and every policy in effect "(1) at the time of initial exposure, (2) during any subsequent period of continuing exposure, or (3) at the time of the physical manifestation of the harm or damage would be forced to respond" to the claim for coverage. *Id.* at ¶ 23. Thus, "exposure to asbestos triggers every policy in effect from the date of the first exposure until the end of the 'coverage block.'" *Id*. Because "Ohio applies the 'all sums' approach for allocating insurance coverage, the trial court was not required to apply a strict pro rata, time-on-risk standard for apportioning . . . liability." *Id*. at ¶ 18. "S]uch strict time-on-risk calculations do not take into consideration when the coverage was 'triggered' and thus are not the most equitable method for allocating liability for asbestos-related bodily injury claims in all cases." *Id*. at ¶ 22.

***MW Custom Papers LLC v. Allstate Ins. Co*., 2d Dist. No. 25430, 2014-Ohio-1112**

An insured, MW Custom Papers ("Mead") was subject to several lawsuits involving injuries arising out asbestos exposure. *Id*. at ¶ 4. Mead filed a declaratory judgment action against 41 insurance companies, seeking declarations that the insurers had a duty to defend for the asbestos-related claims allegedly covered by their policies, spanning from 1958 to 1985. *Id*. at ¶ 2.

Four insurers moved to dismiss, alleging that no justiciable issues existed because their policies could not be triggered because they were "high level excess insurers who issued insurance policies which cannot be triggered until at least $270 million of underlying liability is exhausted through payment of claims. There is no damage threat that is remotely near that level of liability."

Id. at ¶ 9. Further, Mead had not presented a claim to these insurers that they had denied. *Id*. The trial court granted the motions to dismiss, noting that "low-level primary and umbrella carriers had defended and indemnified Mead in the past:"

> MW Custom Papers already has allocated its asbestos claims "horizontally" and across all triggered underlying coverage by entering cost share agreements with the underlying carriers. In this regard, the 6th Circuit's decision in *GenCorp, Inc. v. AIU Ins. Co*., 138 Fed. Appx. 732, 138 Fed. Appx. 732, 2005 U.S. App. LEXIS 13669 (6th Cir.). is on point. In *GenCorp,* excess carriers were granted a credit for the full limits of all underlying coverage when a policyholder chose to enter settlements with underlying carriers in multiple years of horizontal layers of coverage. As the *GenCorp* court noted:
>
> > [B]y settling with its primary and umbrella insurers, GenCorp had made the choice to allocate its liability as broadly as possible, which meant that it has to demonstrate that its liabilities would exceed the cumulative limits of all the primary and umbrella policies before it could trigger the excess policies.

Ultimately, the trial court held that Mead had "allocated its asbestos liability horizontally across primary policies issued from 1958 to 1986 before that coverage was exhausted in 2006. Since 2006, [Mead] has allocated its asbestos liability horizontally across first layer umbrella policies by entering "cost sharing" settlement agreements with those carriers," warranting dismissal of its claim for declaratory judgment for lack of justiciability. *Id*. at ¶ 12.

The appellate court rejected this conclusion. It held that because "Mead's complaint appears to ask the court to declare that an 'all sums' approach be used to allocate liability among Mead's insurers" pursuant to *Goodyear*, 95 Ohio St.3d 512, "Mead has a real and substantial present interest in determining how the various policies are triggered, how costs are allocated among triggered policies, how many occurrences are involved under the terms of the policies, and how and when lower-layer policies exhaust and higher-layer policies attach, among other issues." *Id*. at ¶¶ 31, 43.

***Polk v. Landings of Walden Condo. Ass'n*., 11th Dist. Portage No. 2004-P-0075, 2005-Ohio-4042**

Relying on *Goodyear*, the Eleventh District Court of Appeals held that "[a] continued occurrence of damage or injury from environmentally hazardous substances, such as mold triggers coverage under all insurance policies in effect during the occurrence of the hazard." *Id*. at ¶ 87. The court found that because the mold existed in the insured's dwelling during one policy period, and that the insureds became aware of the mold condition when another, separate policy was in effect, both policies were implicated. *Id*. at ¶ 88. "Coverage is triggered so long as property damage occurs during the policy period." *Id*. at ¶ 90. Thus, the court found that both policies were implicated based upon the fact that both water intrusions occurred and mold was detected during both policy periods. *Id.*

***Goodrich Corp. v. Commercial Union Ins.*, 2008-Ohio-3200**

In a case involving an environmental cleanup of contaminated groundwater, the Ninth District Court of Appeals held that an insured had "the right to select the policy or policies under which it wishes to pursue coverage, but its right to such coverage is necessarily limited by the liability limits of the selected policies, pursuant to the explicit language of *Goodyear*. *Id*. at ¶131. Applying *Goodyear*, the trial court's single award of $22 million in compensatory damages against two separate insurers "jointly and severally" meant that the claimant had the right to select the policy or policies under which to pursue coverage." *Id*. at ¶ 131. When the insured chose coverage, the "given insurer is obligated to pay up to the applicable limits of a selected policy, with interest to be calculated thereon." *Id*. The court held that there is no obligation that a policyholder exhaust all other primary policies before pursuing an excess insurer on an all sums basis. *Id*.

d. Allocation Methodology When All Sums Approach Not Applied

What remains uncertain after the *Goodyear* case is the allocation method to be applied in situations where the implicated insurance policies do not contain language permitting an "all sums" allocation. The situation was addressed in *Indiana Insurance Co. v. Farmer's Insurance of Columbus* 2003-Ohio-4851, wherein the Fifth District Court of Appeals noted that the Ohio Supreme Court's adoption of the all-sums allocation approach in *Goodyear* was premised upon the language of the policies in issue. In refusing to apply this holding to a policy containing different language in the insuring agreement, the *Indiana Insurance* court reasoned:

> {¶47} … unlike the policy in *Goodyear* that indicated it would cover all sums incurred as damages for injury during the policy period, Cincinnati's business auto policy specifically provides that, [o]ur share is the proportion that our limit of liability bears to the total of all applicable limits of liability coverage on "either a primary or excess basis

As a consequence of this noted factual distinction, in conjunction with other factors, the *Indiana Insurance* court declined to adopt the "all sums" approach, finding that it did not represent the type of case in which the Ohio Supreme Court contemplated the use of the "all sums" approach for purposes of allocation. Also left unresolved in the *Goodyear* case is the allocation method to be applied when an insurer who was required to respond to the insured's "all sums" claim seeks contribution from other implicated carriers who were not asked to respond. On this point, the *Goodyear* court simply indicated that "the [responding] insurer bears the burden of obtaining contribution from other applicable primary insurance policies as they deem necessary." *Id.* at 517.

While the Ohio Supreme Court has yet to identify the appropriate method of allocation in such situations, a decision from the Sixth Circuit Court of Appeals in *Lincoln Electric Company v. St. Paul Fire & Marine Insurance Company* (2000), 210 F. 3d 172, may provide some insight. In *Lincoln Electric*, the federal court, applying Ohio law, sought to predict how the Ohio Supreme

Court would allocate damages arising from delayed manifestation claims arising from prolonged exposure to welding rod fumes among multiple policies implicated during the continuous exposure period. Although the *Lincoln Electric* court failed to anticipate the Goodyear court's subsequent adaptation of the "all sums" approach, the allocation method adopted in *Lincoln Electric* may well have application in policies which do not have the *Goodyear* "all sums" language in the policy insuring agreement and in contribution actions brought by insurers who were compelled to respond to the *Goodyear* "all sums" approach.

In determining the appropriate allocation method, the *Lincoln Electric* court established a four-part test. The first step is to identify the appropriate trigger of coverage. After noting that this analysis may be driven by policy language, the *Lincoln Electric* court concluded that in the absence of clear guidance from the terms of the policy, a rebuttable presumption arises that all exposure prior to diagnosis contributes equally to an injury in-fact. Thus, all policies in effect at the time of exposure to the material causing the bodily injury through the eventual manifestation of the disease will be construed to have been triggered. The court reasoned that this presumption allows the insured to avoid the onerous task of proving a discreet temporal moment of injurious transformation in order to prove a recoverable injury. The court further noted that the insured could choose to avoid the legal presumption of equal distribution of damages and offer direct proof that all, or a disproportionate portion of damage occurred in one particular policy period. Likewise, the insurer is permitted to rebut the "default" presumption by offering specific proof that the risk of loss should be allocated away from a particular policy period. In sum, the *Lincoln Electric* court concluded that theories of coverage and allocation should parallel the theory of liability in order to assure that neither the insurer nor the insured "may have their proverbial cake and eat it too."

The next step in the *Lincoln Electric* court analysis involves the identification of the years of exposure alleged to have occurred and the corresponding periods of coverage (including any periods where the insured decided to become self-insured). The court concluded that in the absence of special weighing considerations justifying a disproportionate allocation[1], the court would assign an equal fractional percentage exposure value to each policy period which correspondence to the years of exposure. As an example, if the exposure period spanned 20 years of insurance provided by separate one year policies, the court would assign a 1/20 value of the claim to each of the implicated policies.

The third step in the *Lincoln Electric* court analysis concerns the allocation of deductibles, legal costs, and defense obligations among these legal entities obligated to pay for the claims and the corresponding policies providing coverage to the legal entities. The court held that unless any of the implicated policies explicitly cover costs arising from an exposure period more extensive than the policy period, the court would attribute a pro-rata percentage of exposure value to each legal entity based upon the number of corresponding policy periods of insurance provided to the legal entity. The court would then subject that pro-rata percentage to the terms of each entity's respective policy provisions governing deductibles and insurance defense costs. This aspect of the *Lincoln Electric* court allocation formula seeks to spread the covered damages as between the respective insurance policies for multiple entities who may be liable for a covered claim and subject these allocated shares to the unique terms of each implicated policy. The *Lincoln Electric* court noted that its allocation formula would not preclude any joint and several liability doctrine which may be relevant under Ohio law. The *Lincoln Electric* allocation formula precedes

[1] Some identified examples of additional proof of special weighing circumstances are: (1) identification of a specific "critical transformation" point and (2) non-uniform levels of exposure alleged.

application of joint and several liability doctrine. Thus, if two legal entities were found to have valid policies for the same year and joint and several liability applied, the insurers of both entities would be responsible for the portion of the long-term exposure and delayed manifestation injury claim which was allocated to the jointly covered policy period.

The final aspect of the *Lincoln Electric* allocation analysis addresses a situation when a portion of a claim falls within a time span that may be deemed "double-protected" by overlapping occurrence based and claims based policies. In this situation, may arise when an occurrence based policy was replaced with claims-made coverage and a long term injury claim can be allocated so as to implicate both the occurrence based policy (because the exposure occurred during this policy period) and the claims-made policy (because the claim was filed during the claims made policy period.) Under such a situation, the *Lincoln Electric* court held that the insured can pick and choose between the policies as to that portion of the liability which falls within the time span with the double-protection and overlapping policies.

There is one caveat to the *Lincoln Electric* allocation scheme which involves prior settlements between the policyholder and one of several implicated insurers which merits discussion. In *GenCorp, Inc. v. AIU Insurance Company* (U.S. Dist. Ohio 2003), 247 F. Supp. 2d 995, the court reviewed a situation where, prior to the Ohio Supreme Court's decision in *Goodyear*, *GenCorp* had settled out with three primary carriers for environmental claims involving multiple policy periods. *GenCorp's* remaining claims against a number of excess carriers were thereafter dismissed when the court found applying a horizontal method of allocation, there was no practical likelihood that *GenCorp* would incur enough liability in any specific year to trigger excess coverage. *GenCorp* reinstituted its action against the dismissed excess carrier after the *Goodyear*

case, arguing that under the subsequently recognized *Goodyear* all sums approach, *GenCorp* could now arguably incur sufficient liability in a selected policy year to trigger excess coverage.

In rejecting this position, the court held that *GenCorp's* prior settlement with its primary carriers precluded it from now attempting to allocate the liability in any single policy year after the prior settlement which adopted a pro rata horizontal forum of allocation. By settling with the primary carriers and giving them a release from any further liability, *GenCorp* exhausted the coverage as to all primary insurers, primary policies, and primary policy years. Having done so, it is no longer possible for *GenCorp* to later seek to allocate its liability to one policy or to one policy year because this would be contrary to the allocation methodology established in the prior settlements.

While the *Goodyear* case resolved the issue of allocation as between a policyholder and insurers whose policies contain "all sums" language in the policy insuring agreement, the Ohio courts have yet to definitively resolve the allocation issue in policies without "all sums" language or in the context of litigation between carriers. The allocation framework outlined in *Lincoln Electric* may well provide a rational basis for the future resolution of this issue.