

Long-Tail Liability Claims

By James A. Johnson

Long-tail liability claims are claims that involve a continuous, progressive, or repeated injury over multiple policy years. Common examples include environmental claims involving pollution events that occur over many years, occupational disease such as asbestos claims, and construction defect claims. Long-tail liability claims can trigger multiple insurance policies involving latent damage over several years or even decades.

This article provides guidance in handling long-tail liability claims. The 1st, 2nd, 3rd, 5th, and 6th circuits are discussed with a sprinkling of other jurisdictions. These claims are unique with complicated factual and legal issues. For example, which insurance policies are triggered by the claim, how much is owed under each policy, and how much coverage is available?

The standard commercial general liability insurance policy provides coverage for property damage and bodily injury caused by an occurrence. "Occurrence" is commonly defined as an accident including continuous or repeated exposure to

substantially the same general harmful conditions. In determining which commercial general liability policy or policies are triggered in long-tail liability claims, different methods are used to identify, select, provide notice, and allocate losses that take place over multiple policy periods.

Trigger theories

The term "trigger" is generally defined as the operative event that gives rise to the insurer's duty to cover a loss under a specific policy. There are basically four common trigger theories that have been adopted in the United States:

- (1) **Manifestation trigger**—a policy is triggered when the property damage or bodily injury is discovered or becomes identifiable.¹
- (2) **Exposure trigger**—a policy is triggered during the period in which the person or property was exposed to harmful agents or substances.²



- (3) **Continuous trigger**—combines the exposure and manifestation triggers and is the most widely accepted trigger in toxic tort and defective construction. Continuous trigger is an injury that occurs continuously from the time of the first exposure until manifestation.³
- (4) **Injury-in-fact trigger**—a policy is triggered on the date the damage was actually sustained.⁴

Keep in mind that the question of trigger requires a separate analysis depending on whether the claims at issue involve bodily injury or property damage. It is essential to determine correctly which policies are triggered to place on notice to seek coverage or contribution. Resolving the issues as to which policies are triggered in long-tail claims involving latent damage takes on particular significance in environmental actions. What makes environmental claims so difficult is that they involve conflicting court decisions interpreting the same or similar policy language. The insurer will advance trigger theories to limit or avoid coverage, while the insured will seek to trigger policies with maximum coverage limits.

Allocation

Allocation is how a covered loss will be apportioned among multiple policies. Courts generally are divided between the two allocation methodologies: all-sums approach⁵ and pro-rata approach.⁶ The all-sums allocation allows the policyholder to pick and choose the policies that will cover its claims among multiple triggered policies. The implicated insurers have the obligation to defend and indemnify the insured for a covered claim up to the limit of the triggered policies. After the insurer has paid the claim, the insurer has the right to seek contribution from the other liability insurers that have issued policies pursuant to the other-insurance provision in the policy.

The standard commercial general liability policy's coverage provides that the insurer is obligated "to pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury or property damage to which this insurance applies." The seminal case regarding allocation is *Keene Corp v Ins Co of North America*,⁷ involving more than 5,000 lawsuits alleging personal injury as a result of asbestos inhalation. The D.C. Circuit found that each insurer that issued a triggered policy was jointly and severally liable for the indemnity and defense costs in the underlying asbestos lawsuits.⁸

Allocation in Michigan is a mixed bag. In *Arco Indus Corp v American Motorists Ins Co*,⁹ the Michigan Court of Appeals

adopted a "time on the risk" analysis in a long-tail pollution case.¹⁰ However, another appeals panel, in an unpublished opinion, rejected the *Arco* analysis and ruled that the all-sums coverage in the policy imposed an independent obligation to pay in full without regard to time on the risk. The Michigan Supreme Court commented on allocation in *Gelman Sciences, Inc v Fidelity Cas Co*.¹¹

As an interesting aside, a court in the 1st Circuit said that allocating responsibility in environmental damage claims among insurers is a task so complex it has been labeled as both scientifically and administratively impossible.¹² Notwithstanding, the insurer bears the burden of proof of disproving coverage once the insured provides evidence of insurance and facts relating to a claim covered by the insurance. To determine what constitutes "defense costs" in the environmental context, Michigan follows the test set out in *Gelman*.¹³

Notice and tender

Notice is a contractual obligation requiring the policyholder to notify its insurer of events that may potentially give rise to coverage under the policies at issue. Tender is a request for defense, indemnity, or both from a particular carrier. The key to effective practice is to notify all insurance carriers of any incident that may potentially trigger their policies, and to give notice by both regular and certified mail. This precludes a carrier from asserting that the insured breached the notice provisions in the insurance contract.

Tendering to insurance carriers in the long-tail claim context requires considerable deliberation owing to the years of coverage at issue. It may be best to target a later-year carrier with high-primacy limits to preserve its ability to receive a defense without eroding policy limits. Or it may be advantageous to target an early year if a long-tail claim may trigger application of the absolute pollution exclusion.

fast facts

- Long-tail liability claims are claims that involve a continuous, progressive, or repeated injury over long periods that implicate multiple policy years.
- Courts generally are divided between the two allocation methodologies: all-sums approach and pro-rata approach.



Exhaustion

Monitoring the exhaustion of policy limits is the next important consideration. Exhaustion refers to diminishment of the limits of liability of a policy through payments made by the insurer on behalf of the insured. Payment of defense costs in a primary commercial general liability policy does not reduce policy limits. The primary policy obligates the insurer to defend the insured and specifically provides that defense-related payments are in addition to the stated limit of liability. However, in the excess and umbrella policies, it is customary that both defense and indemnity payments operate to reduce the limits of the policy.

Keep in mind that a first-layer excess insurer has no duty to indemnify the insured until the limits of liability of the primary insurance policy have been exhausted. Similarly, a second-layer excess insurer has no duty to indemnify the insured until the limits of liability of the underlying first-layer policy have been exhausted. You should understand the importance of reading closely each policy to ascertain coverages, exclusions, exhaustion, duties, settlement clauses, assignments, and many other considerations. To quote Chief Judge Richard Posner of the 7th Circuit: “[I]t is common for insurance policies to give with the right hand and then take away with the left.”¹⁴

There are two principal exhaustion methodologies: horizontal and vertical. Horizontal exhaustion requires each primary insurance policy to indemnify the insured to the full extent of the policy limits before any excess insurer is required to pay. The same is required for the first-layer excess and umbrella policies. This scheme is commonly called exhaustion by layers.

Under vertical exhaustion, the insured does not have to exhaust the limits of liability of all primary policies before seeking payment from its excess and umbrella carriers. Vertical exhaustion provides that each excess and umbrella policy in a triggered-policy tower is required to pay as soon as the limit of liability of the underlying policy is exhausted.

Stacking

In an environmental contamination claim covering many years that triggers more than one policy, can a policyholder combine or stack policy periods to recover more than one policy's limits? Yes, says the Supreme Court of California.¹⁵ California uses the continuous injury trigger of coverage and the “all-sums with stacking” rule. This rule stacks the insurance coverage from different policy periods to form one giant policy with a coverage limit equal to the sum of all policies.¹⁶ It appears that when a policy does not contain an anti-stacking clause, California, with its continuous injury trigger of coverage, recognizes progressive damage over multiple policy years.

Settlement

When the insured settles with some insurers but litigates against others, it is possible for the policyholder to receive a double recovery. In all-sums jurisdictions, two methods are used to prevent double recovery: pro-rata settlement credit and pro-tanto settlement credit. In the pro-rata settlement credit, the nonsettling insurer is entitled to an apportioned-share offset or a credit equal to the prorated values of the limits of liability of the settled insurance policies.¹⁷ In a pro-tanto settlement credit, the nonsettling insurer may receive a credit equal to the amount received from the settlement carriers for losses for which it is jointly liable.¹⁸

Conclusion

A long-tail liability claim is one that potentially triggers multiple policies over an extended period. Key issues are trigger theories, allocation, notice, tender, exhaustion, and settlement credits. They often include both primary and excess coverage requiring complex factual and legal analysis.

Practitioners should be mindful of the myriad factual scenarios presented in long-tail liability involving occupational disease claims, environmental pollution and seepage, construction defect claims, employment discrimination, and even cyber-liability claims. With numerous and overlapping trigger theories, different layers of coverage, and time periods, it is absolutely necessary for counsel to read and understand the caselaw of the jurisdiction that will be applied by the court in deciding the dispute.

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Because of space constraints, this article does not address legal issues in prosecuting or defending a long-tail liability claim, such as the application of nonaccumulation of liability clauses, choice of law, and anti-assignment clauses in state or federal court. Counsel must read and reread each applicable triggered policy with careful attention to the facts of the case. The national debate between pro-rata and all-sums continues with no end in sight.

Notwithstanding that pro-rata is the majority rule that relies on reasonable policy language, one cannot disregard Judge Posner's admonition. And take the advice of one of my professors when I was a student in the Cradle of Intellectual America: "A word to the wise is sufficient." ■

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ENDNOTES

1. *Eagle-Picher Indus, Inc v Liberty Mut Ins Co*, 682 F2d 12, 25 (CA 1, 1982); *Guardian Nat'l Ins Co v Azrock Indus Inc*, 211 F3d 239, 245 (CA 5, 2000) (describing manifestation as the time when the condition becomes clinically evident or diagnosable).
2. *Ins Co of North America v Forty-Eight Insulations, Inc*, 633 F2d 1212 (CA 6, 1980); *Gelman Sciences, Inc v Fidelity & Cas Co*, 456 Mich 305; 572 NW2d 617 (1998); *Koppers Co Inc v Aetna Cas & Sur Co*, 98 F3d 1440 (CA 3, 1996); *A.W. Chesterton Co v Mass Insurers Insolv Fund*, 838 NE2d 1237 (Mass, 2005).
3. *Koppers*, 98 F3d 1440.
4. *Don's Bldg Supply*, 267 SW3d 20, 25 (Tex, 2008); *Continental Cas Co v Gilbane Bldg Co*, 391 Mass 143, 152 (1984); *Trustees of Tufts Univ v Comm Union Co*, 415 Mass 844 (1993) (teaching counsel that a commercial general liability policy is triggered by establishing that property damage actually occurred during the policy period and not by advancing any particular label of manifestation or injury in fact); *Continental Cas Co v Rapid-American Corp*, 80 NY2d 640 (NY App, 1993).
5. See *Goodyear Tire & Rubber Co v Aetna Cas & Sur Co*, 95 Ohio St 3d 512 (2002); *Pa Gen Ins Co v Park-Ohio Indus*, 126 Ohio St 3d 98 (2010); *J. H. France Refractories Co v Allstate Ins Co*, 534 Pa 29 (1993); *American Physicians Ins Exch v Garcia*, 876 SW2d 842 (Tex, 1994); *Lennar Corp v Markel American Ins Co*, 413 SW3d 750, 759 (Tex, 2013); *Aerojet-General Corp v Transport Indem Co*, 948 P2d 909 (Cal, 1997); *Allstate Ins Co v Dana Corp*, 759 NE2d 1049 (Ind, 2001).
6. See *Ins Co of North America v Forty-Eight Insulations, Inc*, 657 F2d 1212 (CA 6, 1980); *Aetna Cas & Sur Co v Comm*, 179 SW3d 830 (Ky, 2005); *Consolidated Edison Co of NY v Allstate Ins Co*, 98 NY2d 208 (NY App, 2002); *Boston Gas Co v Century Indem Co*, 454 Mass 337 (2009); *EnergyNorth Natural Gas, Inc v Certain Underwriters at Lloyd's*, 156 NH 333, 338 (2007) (adopted by Mass in rejecting all-sums for pro-rata by years and limits allocation in environmental claims).
7. *Keene Corp v Ins Co of North America*, 215 US App DC 156; 667 F2d 1034 (1981).
8. *Id.* at 167-169 (the seminal all-sums case held that each policy was responsible up to its limits for the total amount of damage and the insured could decide which policy to tap); *Owens-Illinois, Inc v United Ins Co*, 138 NJ 437; 650 A2d 974, 993-994 (1994).
9. *Arco Indus Corp v American Motorists Ins Co*, 232 Mich App 146; 594 NW2d 61 (1998).
10. *Id.*
11. *Gelman Sciences, Inc v Fidelity & Cas Co*, 456 Mich 305; 572 NW2d 617 (1998).
12. *Boston Gas Co*, 454 Mass 337; see also *Boston Gas Co v Century Indem*, 708 F3d 254 (2013) (comparing the approach of the New Hampshire Supreme Court and the Mass Supreme Judicial Court in addressing the complexities of long-tail environmental claims).
13. *Arco Industries Corp*, 232 Mich App 146.
14. *Curtis-Universal, Inc v Sheboygan Emergency Med Servs, Inc*, 43 F3d 1119, 1123 (CA 7, 1994).
15. *California v Continental Ins Co*, 281 P3d 1000, 1003-1008 (Cal, 2012).
16. *Id.* at 1008.
17. *Koppers*, 98 F3d at 1453.
18. *GenCorp, Inc v AIU Ins Co*, 297 F Supp 2d 995, 1007-1008 (ND Ohio, 2003); see *RSR Corp v Int'l Ins Co*, 612 F3d 851 (CA 5, 2010) (applying a policy "other insurance" clause in the long-tail context of a settlement credit or a set off where an insured has already settled with one or more of its other insurers).