

Nova Law Review

Volume 24, Issue 1

1999

Article 10

The Scope of Insurance Coverage for Pollution Claims in Florida: Full Indemnification for Indivisible Cleanup Costs Caused by Multiple Release

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The Scope of Insurance Coverage for Pollution Claims in Florida: Full Indemnification for Indivisible Cleanup Costs Caused by Multiple Releases

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I. INTRODUCTION

Generally, "occurrence-based" comprehensive general liability ("CGL") insurance policies promise to indemnify the policyholder for "all sums" resulting from an occurrence during the policy period.¹ In the context of pollution cases, however, such policies typically contain a "pollution

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1. See generally John G. Nevius & Steven J. Dolmanisth, *The Pollution-Exclusion Conspiracy: A Newly Recognized Basis for Recovery*, 13 PACE ENVTL. L. REV. 1103 (1996).

exclusion” clause that either limits or precludes coverage.² Because the standard CGL policy, and the language of the “pollution exclusion” clause, have changed over the years, whether coverage is precluded or merely limited generally depends on the date the policy was issued.³

Many pollution cases are initiated with the discovery of damages (i.e., contamination), rather than the awareness of a specific pollution release.⁴ Often, it is difficult to trace the contamination back to a specific incident. Since the damage from a pollution event may occur over an extended period of time, covered property damage may continue over the course of numerous policy periods during which different insurers were on the risk. Because the terms of the standard “pollution exclusion” have changed over the years, the date of the relevant release or “occurrence” can be the difference between full indemnification and no indemnification.⁵

With the Supreme Court of Florida’s rulings in *Dimmitt Chevrolet, Inc. v. Southeastern Fidelity Insurance Corp.*,⁶ and *Deni Associates of Florida, Inc. v. State Farm Fire & Casualty Insurance Co.*,⁷ Florida’s insureds seemingly have little chance of recovering insurance proceeds for environmental pollution claims. In *Dimmitt Chevrolet*, the court held that the phrase “sudden and accidental,” found in most pollution exclusion clauses in insurance policies issued between 1970 and 1985, was unambiguous.⁸ More specifically, the court stated that “[t]he ordinary and common usage of the term ‘sudden’ includes a temporal aspect with a sense of immediacy or abruptness.”⁹ Five years later, in *Deni Associates*, the court held that the “absolute pollution exclusion,”¹⁰ found in most CGL policies since 1985, was similarly unambiguous, and bars any recovery for damages arising from the release of pollutants or contaminants.¹¹

Although the pollution exclusion clauses have been given a restrictive reading under Florida law, no Florida court has defined the scope of coverage in pollution cases in which some, but not all, of the contamination

2. See *id.* at 1105–10.

3. *Id.*

4. *Chemical Leaman Tank Lines v. Aetna Cas. & Sur. Co.*, 978 F. Supp. 589 (D.N.J. 1997), *rev’d*, 177 F.3d 210 (3d Cir. 1999); *Diamond Shamrock Chem. Co. v. Aetna Cas. & Sur. Co.*, 609 A.2d 440 (N.J. Super. Ct. App. Div. 1992); *Highlands Ins. Co. v. Aerovox*, 676 N.E.2d 801 (Mass. 1997); *Northern States Power Co. v. Fidelity & Cas. Co. of NY*, 523 N.W.2d 657 (Minn. 1994).

5. See *Montrose Chem. Corp. v. Admiral Ins. Co.*, 913 P.2d 878 (Cal. 1995).

6. 636 So. 2d 700 (Fla. 1993).

7. 711 So. 2d 1135 (Fla. 1998).

8. *Dimmitt Chevrolet*, 636 So. 2d at 704.

9. *Id.* The “word sudden means abrupt and unexpected.” *Id.*

10. *Deni Assocs.*, 711 So. 2d at 1137.

11. *Id.* at 1141.

was caused by a covered occurrence. This is a critical issue because when contamination is discovered, it is often possible to identify several "occurrences" that may have caused or contributed to the contamination. Rarely, however, is it easy to distinguish the contamination caused by these various "occurrences." Some of these releases may be covered under the insurance policy in effect at the time of the release, and others might not. This situation may arise in a number of different contexts:

- A covered "sudden and accidental" release that has caused pollution that is indistinguishable from that caused by other nonsudden or nonaccidental releases;
- A covered, pre-1985 "sudden and accidental" release that has caused pollution that is indivisible from that caused by noncovered, post-1985 releases;
- A pre-1985 release that begins suddenly and accidentally but continues for an extended period of time, beyond the policy period;
- Multiple, pre-1985 "sudden and accidental" releases that each occurred during different policy periods with different insurers;
- A covered pre-1985 "sudden and accidental" release that caused pollution that is indivisible from noncovered post-1985 releases subject to an "absolute pollution exclusion;"
- A covered, pre-1970 release not subject to any pollution exclusion clause that caused pollution that is indivisible or indistinguishable from that caused by noncovered post-1970 releases;
- Multiple covered releases, but only one from which recovery is possible (i.e., other insurers have filed for bankruptcy or the policies cannot be located); and
- A covered release attributable to the insured coupled with other releases caused by previous or subsequent operators at the site.

This article will discuss the scope of insurance coverage for pollution claims when more than one release has caused or contributed to the contamination but not all such releases are covered by the policies then in effect. While the factual scenarios listed above are different, the same

general legal principles apply. As discussed below, notwithstanding the Supreme Court of Florida's rulings in *Dimmitt Chevrolet* and *Deni Associates*, there is still hope for insurers to receive full indemnification for pollution cleanup costs.

II. THE EVOLUTION OF THE "POLLUTION EXCLUSION" CLAUSE

Beginning in 1966, the standard CGL policy provided coverage for an "occurrence," which was defined as "an accident, including continuous or repeated exposure to conditions, which results in *bodily injury* or *property damage* neither expected nor intended from the standpoint of the *insured*."¹² This definition expanded the scope of coverage from that of earlier, "accident-based" policies, by including "continuous or repeated exposure to conditions" as a coverage-triggering event.¹³ At a time when pollution issues were receiving increased attention, this change from "accident-based" to "occurrence-based" policies made it clear that insurers intended the standard CGL policy to apply to pollution claims.¹⁴ A few years later, in the early 1970s, insurance companies began including a "pollution exclusion" in their policies because the earlier policies, drafted before public attention focused on large scale pollution events, seemed tailor made to cover most pollution situations. As one commentator noted:

With the increase in litigation concerning environmentally related losses, the liability exposure of insurers, and the uncertainty that courts injected into the policy coverage inquiry, the insurers, in 1970, again changed their policies. The insurers' primary concern was that the occurrence-based policies, drafted before large scale industrial pollution attracted wide public attention, seemed tailor-made to extend coverage to most pollution situations. Consequently, they tacked onto the occurrence-based policies an

12. See *Dimmitt Chevrolet*, 636 So. 2d at 703 (quoting *Broadwell Realty Serv. Inc. v. Fidelity & Cas. Co. of NY*, 528 A.2d 76, 84 (N.J. Super. Ct. App. Div. 1987)) (emphasis added).

13. See *id.*

14. Eugene R. Anderson & Maxa Luppi, *1970 Pollution Exclusion Filings: Do Two Wrongs Make A Right?*, 3 ENVTL. CLAIMS J. 195, 196 (1991) (quoting E. Joshua Rosenkranz, *The Pollution Exclusion Clause Through the Looking Glass*, 74 GEO. L.J. 1237, 1251 (1986)):

With the lesson of accident-based coverage fresh in their minds, the insurers used new language to remove only the suddenness barrier and to cover *pollution liability that arose from gradual losses*. The standard policy made it clear that the loss had to be unexpected and unintended from the insured's standpoint for coverage to apply.

Id. (emphasis in original).

exclusionary clause that applied specifically to pollution related claims.¹⁵

This new “pollution exclusion,” which appeared in virtually all CGL policies from roughly 1971 through 1986,¹⁶ typically stated that:

[I]nsurance would not apply . . . to bodily injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any water course or body of water, *but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental.*¹⁷

This limited pollution exclusion remained in effect until 1985, when a new endorsement was added to the CGL form to amend coverage¹⁸ as follows: It is agreed that the exclusion relating to the “discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants,”¹⁹ is replaced by the following:

- (1) “Bodily injury” or “property damage” arising out of the actual, alleged, or threatened discharge, dispersal, release or escape of pollutants;
 - (a) At or from premises you own, rent or occupy;
 - (b) At or from any site or location used by or for [the named insured] or others for the handling, storage, disposal, processing or treatment of waste;
 - (c) Which are at any time transported, handled, stored, treated, disposed of, or processed as waste by or for the named insured or any person or organization for whom the named insured may be legally responsible; or
 - (d) At or from any site or location in which the named insured or any contractors or subcontractors working directly or

15. E. Joshua Rosenkranz, *The Pollution Exclusion Clause Through the Looking Glass*, 74 GEO. L.J. 1237, 1251 (1986) (citations omitted).

16. See *Virginia Properties, Inc. v. Home Ins. Co.*, 74 F.3d 1131, 1132 (11th Cir. 1996).

17. *Id.* at 1134 (emphasis in original).

18. William P. Shelly & Richard C. Mason, *Application of the Absolute Pollution Exclusion to Toxic Tort Claims: Will Courts Choose Policy Construction or Deconstruction?*, 33 TORT & INS. L.J. 749, 752 (1998).

19. *Id.* at 752.

indirectly on behalf of the named insured are performing operations;

(i) if the pollutants are brought on or to the site or location in connection with such operations; or

(ii) if the operations are to test for, monitor, clean up, remove, contain, treat, detoxify or neutralize the pollutants.

"Pollutants" means any solid, liquid, gaseous, or thermal irritant or contaminant, including smoke, vapors, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed.²⁰

In *Deni Associates*, the Supreme Court of Florida held that this "absolute pollution exclusion," as well as the undefined terms "irritant" and "contaminant," were clear and unambiguous.²¹ In so holding, the court rejected the argument that the clause excludes only environmental or industrial pollution.²²

As discussed above, the availability of insurance coverage for pollution events has gone through four distinct phases over the past thirty-five years. Prior to 1966, pollution events were generally covered under the standard CGL policy as long as the release could be categorized as an accident.²³ From roughly 1966 through 1973, most CGL policies covered most pollution claims.²⁴ Between 1973 and 1985, pollution events were covered occurrences only if they were sudden and accidental,²⁵ and since 1985, the standard CGL policy broadly precludes coverage for releases of pollutants or contaminants.²⁶ Accordingly, the discovery of contamination may implicate several insurance policies with very different provisions regarding coverage for pollution claims.²⁷

20. *Id.* at 752-53.

21. *Deni Assocs.*, 711 So. 2d at 1138-39.

22. *See id.* Even before *Deni Associates* it was clear that the "absolute pollution exclusion" barred coverage for claims arising out of environmental or industrial pollution. *See id.* at 1137.

23. *See* Holis M. Greenlaw, *The CGL Policy and the Pollution Exclusion Clause: Using the Drafting History to Raise the Interpretation Out of the Quagmire*, 23 COLUM. J.L. & SOC. PROBS. 233 (1990).

24. *See id.*

25. *See Virginia Properties, Inc.*, 74 F.3d at 1134.

26. *Shelly & Mason*, *supra* note 18, at 752.

27. *See New Castle County v. Continental Cas. Co.*, 725 F. Supp. 800 (D. Del. 1989), *aff'd in part, rev'd in part*, 933 F.2d 1162 (3d Cir. 1991), *rev'd*, 970 F.2d 1267 (3d Cir. 1992).

III. SUDDEN AND ACCIDENTAL RELEASES AFTER DIMMITT CHEVROLET

In *Dimmitt Chevrolet*, the insured car dealership sold used crankcase oil to an oil recycling company known as Peak Oil.²⁸ As part of its daily operations, Peak Oil illegally dumped thousands of gallons of used oil into unlined pits.²⁹ As expected, Peak Oil routinely spilled large quantities of used oil onto the ground outside of the pits, and when it rained, runoff from the pits and spills became contaminated.³⁰ The EPA subsequently named Dimmitt Chevrolet a potentially responsible party ("PRP") liable under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") for the costs of cleaning up the Peak Oil site.³¹

In holding that insurance coverage did not exist, the Supreme Court of Florida construed the meaning of "sudden and accidental" within the pollution exclusion clause at issue in that case.³² As explained in *Dimmitt Chevrolet*, a split in authority existed among the various states as to whether "sudden and accidental" was ambiguous, with many state supreme courts construing that phrase to mean "unexpected and unintended" pollution and others holding that it was limited to "abrupt and unintended" pollution.³³ Siding with the latter interpretation, the court explained that the phrase was not ambiguous and that "[a]s expressed in the pollution exclusion clause, the word sudden means abrupt and unexpected."³⁴ Applying the policy language to the facts in this case, the court held that Dimmitt Chevrolet's claim was barred because "[t]he pollution took place over a period of many years and most of it occurred gradually."³⁵

The nongradual spills of used oil were also excluded from coverage, the court explained, because they occurred on a regular basis, thereby taking

28. *Dimmitt Chevrolet*, 636 So. 2d at 701.

29. *Id.*

30. *Id.*

31. *Id.* See generally Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9607 (1995).

32. *Dimmitt Chevrolet*, 636 So. 2d at 703–05. The exclusion in *Dimmitt Chevrolet* excluded coverage for:

BODILY INJURY or PROPERTY DAMAGE arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids, or gases, waste materials . . . into or upon land, the atmosphere or any water course or body of water; but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental

Id. at 702.

33. *Id.* at 703.

34. *Id.* at 704.

35. *Id.* at 705.

them outside the scope of the “sudden and accidental” exception to the pollution exclusion:

[T]hese spills and leaks appear to be *common place events* which occurred in the course of daily business, and therefore cannot, as a matter of law, be classified as “sudden and accidental.” That is, these “occasional accidental spills” *are recurring events* that took place in the usual course of recycling the oil.³⁶

In *Southern Solvents, Inc. v. New Hampshire Insurance Co.*,³⁷ the Eleventh Circuit considered whether, under Florida law, the phrase “sudden and accidental” in the 1972–85 CGL pollution exclusion applies to the initial discharge of pollutants or to the subsequent environmental damage.³⁸ There, the insured operated a tetrachloroethylene (perchloroethylene) distribution facility at which four perchloroethylene releases had occurred.³⁹ While the district court found that the initial discharges of these four releases were “sudden and accidental,” it also found that the resulting leaching was continuous after the initial discharge.⁴⁰ The district court then held that “[t]o rule that such continuous pollution is ‘sudden and accidental’ thwarts the policy goals behind the exclusion” and granted summary judgment in favor of the insurers.⁴¹ The Eleventh Circuit reversed, holding that:

Our reading of Florida law, specifically *Dimmitt Chevrolet, Inc. v. Southeastern Fidelity Insurance Corp.*, 636 So.2d 700 (Fla. 1993), leads us to conclude that the District Court erred in this respect. Under Florida law, the discharge must be sudden and accidental, not the resulting environmental damage. . . . Based on the holding in *Dimmitt* and the unambiguous terms in the policy issued by Canal it is clear that it is the actual discharge, not the resulting damages or contamination, which must be sudden and accidental in order to fall within the exception to the pollution exclusion clause.⁴²

While Florida courts have not directly addressed the issue, in recent years Massachusetts courts have considered whether “damage due to the release of pollutants on particular occasions would be covered under the

36. *Dimmitt Chevrolet*, 636 So. 2d at 705 (emphasis added).

37. 91 F.3d 102 (11th Cir. 1996).

38. *Id.* at 105.

39. *Id.* at 103–04.

40. *Id.* at 104.

41. *Id.*

42. *Southern Solvents, Inc.*, 91 F.3d at 105.

sudden and accidental exception to the pollution exclusion clause if the insured had also engaged in pollution-generating activities not subject to the exception over a longer period.”⁴³ While these Massachusetts cases obviously are not binding on Florida courts, they are instructive because Massachusetts law is consistent with Florida law in its interpretation of the “sudden and accidental” pollution exclusion.⁴⁴

In *Nashua Corp. v. First State Insurance Co.*,⁴⁵ the court ruled that, notwithstanding a company’s history of routinely delivering hazardous waste to a landfill, evidence of a subsequent unexpected and abrupt release of a significant amount of pollutants into the environment may be sufficient to confer insurance coverage despite the pollution exclusion clause.⁴⁶ The test focuses on whether the triggering event is common or uncommon.⁴⁷ Accordingly, the court found that evidence of a burst tank seal, a fire, and a subsequent explosion created genuine issues of material fact as to whether the releases were “sudden and accidental.”⁴⁸

Subsequently, in *Highlands Insurance Co. v. Aerovox, Inc.*,⁴⁹ the court made it clear that the exception to the pollution exclusion clause may apply to a “pollution-prone industry.”⁵⁰ The court explained that the test is whether the triggering event is “so beyond the pale of reasonable expectability as to be considered ‘accidental.’”⁵¹ In applying this standard to the facts of that case, the court looked to whether a “sudden and accidental” release led to any damages that were more than *de minimis*.⁵² This standard was later applied in *Millipore Corp. v. Travelers Indemnity Co.*,⁵³ in which the court held that to survive a motion for summary judgment, the insured “must present specific evidence creating a genuine issue as to whether the incidents at the sites were sudden and accidental and caused more than a *de minimis* release of pollutants into the environment.”⁵⁴

While these Massachusetts cases are not binding on Florida courts, they provide some insight into how a Florida court might view “sudden and

43. *Millipore Corp. v. Travelers Indem. Co.*, 115 F.3d 21, 32 (1st Cir. 1997).

44. *See Lumbermens Mut. Cas. Co. v. Belleville Indus., Inc.*, 555 N.E.2d 568 (Mass. 1990).

45. 648 N.E.2d 1272 (Mass. 1995).

46. *See id.* at 1276.

47. *See id.*

48. *Id.*

49. 676 N.E.2d 801 (Mass. 1997).

50. *Id.* at 806 n.10 (citing *Lumbermens Mut. Cas. Co. v. Belleville Indus., Inc.*, 938 F.2d 1423, 1427 (5th Cir. 1991)).

51. *Id.*

52. *Id.* at 806.

53. 115 F.3d 21 (1st Cir. 1997).

54. *Id.* at 34 (emphasis added).

accidental” releases by a “pollution-prone industry.”⁵⁵ However, not all courts have acknowledged the potential for “sudden and accidental” releases to co-exist with intentional or nonsudden releases. These courts have typically avoided the issue by refusing to “microanalyze” the alleged releases, instead looking at the insured’s operations as a whole.⁵⁶ This view is contrary to Florida law because it amounts to a determination that insureds in pollution prone industries can never have covered “sudden and accidental” releases.⁵⁷ Some of these courts have gone so far as to suggest that a “foreseeable” release for which the insured has taken precautions to prevent or minimize cannot be “sudden and accidental.”⁵⁸ Such a position is akin to a determination that a car accident cannot be sudden and accidental because of the presence of brakes, seatbelts, and air bags in the cars. Moreover, this view disregards the policy language and would effectively eliminate the exception to the pollution exclusion for companies whose operations might result in pollution. Thus, it seems likely that Florida courts would recognize the possibility of covered “sudden and accidental” releases coexisting with noncovered expected or intended releases. This raises the question of how much coverage is an insured entitled to when the contamination was caused by both covered and uncovered releases.

55. *Highlands Ins. Co.*, 676 N.E.2d at 806 n.10.

56. *See, e.g.*, *Smith v. Hughes Aircraft Co.*, 22 F.3d 1432, 1438 (9th Cir. 1993) (refusing to “break down [the insured’s] long-term waste practices into temporal components in order to find coverage where the evidence unequivocally demonstrates that the pollution was gradual”); *Ray Indus., Inc. v. Liberty Mut. Ins. Co.*, 974 F.2d 754, 768–69 (6th Cir. 1992) (stating “when viewed in isolation . . . all releases would be sudden Rather than pursuing such meta-physical concepts, we choose to recognize the reality of Sea Ray’s actions in this case.”); *Lumbermens*, 938 F.2d at 1430 (noting “it is . . . the nature of an insured’s enterprise and its historical operations that determine the applicability of the [pollution exclusion].”); *Hyde Athletic Indus. v. Continental Cas. Co.*, 969 F. Supp. 289, 301 (E.D. Pa. 1997) (noting the futility of performing a microanalysis of a continuous pattern of pollution); *Snyder General Corp. v. Great Amer. Ins. Co.*, 928 F. Supp. 674, 680 (N.D. Tex. 1996) (stating “[t]he fact that the insured may have also experienced isolated spills or minor accidents over the same period of time is irrelevant.”); *American States Ins. Co. v. Sacramento Plating, Inc.*, 861 F. Supp. 964, 970–71 (E.D. Cal. 1994) (holding three distinct events that contributed to contamination caused by pollution occurring in the regular course of plating operation not covered).

57. *See, e.g.*, *Smith*, 22 F.3d at 1438; *Ray Indus., Inc.*, 974 F.2d at 768–69; *Lumbermens*, 938 F.2d at 1430; *Hyde Athletic Indus.*, 969 F. Supp. at 301; *Snyder General Corp.*, 928 F. Supp. at 680; *American States Ins. Co.*, 861 F. Supp. at 970–71.

58. *See, e.g.*, *Smith*, 22 F.3d at 1439; *American States, Inc.*, 861 F. Supp. at 970–71.

IV. THE EXTENT OF COVERAGE UNDER FLORIDA LAW ONCE A POLICY HAS BEEN TRIGGERED

Under Florida law, if contract language is plain and unambiguous, it is to be given the meaning that it clearly expresses.⁵⁹ On the other hand, when the language is ambiguous, an insurance contract prepared by an insurance company shall be construed against the insurer and in favor of the insured.⁶⁰ In determining whether policy language is ambiguous, the court must view the terms in the context of the specific policy at issue.⁶¹

In the standard CGL policy, the insurer agrees to pay "all sums which the INSURED shall become legally obligated to pay as DAMAGES because of [personal injury or property damage]" caused by an occurrence during the policy period and within the policy territory.⁶² As discussed above, the word "occurrence" is typically defined as "an accident including continuous or repeated exposure to conditions, which results in BODILY INJURY or PROPERTY DAMAGE neither expected nor intended from the standpoint of the INSURED."⁶³ Because the occurrence must take place during the policy period, and occurrence is defined as an "accident," it would seem that there must be an accident during the policy period in order to trigger coverage. However, this no longer seems to be the case in Florida. In *State Farm Fire & Casualty Insurance Co. v. CTC Development Corp.*,⁶⁴ the Supreme Court of Florida held that when the term "accident" is undefined in an insurance policy, the term includes not only "accidental events," but also damages or injuries that are neither expected nor intended from the standpoint of the insured.⁶⁵ Because the typical definition of "property damage"⁶⁶ requires that it occur during the policy period, *CTC* suggests that

59. *Jefferson Ins. Co. of N.Y. v. Seaworld of Fla., Inc.*, 586 So. 2d 95, 97-98 (Fla. 5th Dist. Ct. App. 1991).

60. *State Farm Mut. Auto. Ins. Co. v. Pridgen*, 498 So. 2d 1245, 1248 (Fla. 1986).

61. *Dimmitt Chevrolet*, 636 So. 2d at 704.

62. *Id.* at 702.

63. *Id.*

64. 720 So. 2d 1072 (Fla. 1998).

65. *Id.* at 1076.

66. Property damage means:

- (1) the physical injury to or destruction of tangible property which occurs during the policy period, including the loss of use thereof at any time resulting therefrom, or (2) loss of use of tangible property which has not been physically injured or destroyed provided such loss of use is caused by an occurrence during the policy period.

BARRY R. OSTRAGER & THOMAS R. NEWMAN, *HANDBOOK ON INSURANCE COVERAGE DISPUTES* § 7.03(b) (9th ed. 1998).

it is not necessary for an “accidental event” to occur during the policy period in order to trigger coverage. Coverage is triggered whenever unexpected or unintentional damage occurs during the policy period, as long as no other policy exclusion applies. This interpretation is consistent with either the injury-in-fact or continuous trigger theories discussed in section II.B. below.

A. *The Nature of Environmental Liability*

Environmental statutes, such as CERCLA, impose strict liability for the mere release of hazardous substances.⁶⁷ Under CERCLA, liability is joint and several unless a PRP can demonstrate that the damages are divisible.⁶⁸ Accordingly, the mere release of a hazardous substance, regardless of the quantity released, can render a PRP liable for all cleanup costs at the site as long as the damages were not divisible. Implicit in the judicial opinions holding CERCLA liability to be joint and several is the recognition that multiple releases frequently combine to cause indivisible damage.⁶⁹ In such cases, Congress placed the burden on PRP’s to show that their conduct caused only a discrete portion of the contamination at the site.⁷⁰

When insurance policies are involved, the corollary question is whether the insured must bear the burden of proving precisely how much of the contaminant is traceable to a covered “occurrence,” or whether the insured must prove that the damage caused by the covered “occurrence” is divisible from the rest of the contamination. This article posits that the language of the standard CGL policy and Florida’s concurrent cause doctrine place the burden of proving divisibility of damages on the insurer.

Under Florida law, CERCLA cleanup costs constitute “damages” as that term is defined in the standard CGL policy.⁷¹ Similarly, a majority of courts consider environmental contamination that has already occurred to be “property damage” within the scope of a CGL policy.⁷² Thus, once coverage

67. See 42 U.S.C. § 9607(a) (1995). The Florida Legislature has also provided for joint and several liability for pollution-related damages. See, e.g., FLA. STAT. §§ 376.313, 403.727(4), 768.81(4)(b) (1999) (making comparative fault inapplicable to actions for recovery of actual economic damages resulting from pollution).

68. United States v. Alcan Aluminum Corp., 990 F.2d 711, 722–23 (2d Cir. 1993). See Bell Petroleum Servs., Inc. v. Sequa Corp., 3 F.3d 889, 899 (5th Cir. 1993).

69. See *Bell Petroleum Servs.*, 3 F.3d at 894–95.

70. *Id.* at 912.

71. United States v. Peppers Steel & Alloys, Inc., 823 F. Supp. 1574, 1582 (S.D. Fla. 1993), *aff’d in part, rev’d in part*, 87 F.3d 1329 (11th Cir. 1996); see also Hudson Ins. Co. v. Double D Management Co., 768 F. Supp. 1542, 1546 (M.D. Fla. 1991); but see Hayes v. Maryland Cas. Co., 688 F. Supp. 1513, 1515 (N.D. Fla. 1988).

72. See, e.g., Aetna Cas. & Sur. Co. v. Pintlar Corp., 948 F.2d 1507, 1515 (9th Cir. 1991).

is triggered, the insurer becomes liable for the full cost of cleanup unless it can show that the damages resulting from the covered occurrence are distinct or divisible from the rest of the contamination at the site.

B. *Trigger of Coverage*

Whether such damage was “caused by an occurrence during the policy period” is often a difficult question because Florida’s courts have not definitively resolved which “trigger of coverage” applies to long tail environmental releases, i.e., releases that may have gone unnoticed for many years only to later be identified as the source of contamination at a site.⁷³ “Trigger of coverage” refers to the circumstances that “trigger” or activate the insurer’s obligation to indemnify the insured.⁷⁴ While this term is not found in CGL policies, it is a term of convenience used to describe what must happen during the policy period in order to create a duty on the part of the insurer to indemnify the insured.⁷⁵ As such, it is largely an issue of timing.⁷⁶

The policy language of the insuring clause and the definition of “occurrence,” and the “owned property” exclusion may be combined as follows:

The company will pay on behalf of the insured all sums which the Insured shall become legally obligated to pay as damages because of . . . property damage . . . caused by . . . an accident, including continuous or repeated exposure to conditions, which results in . . . physical injury to or destruction of tangible property [of an entity other than the insured] which occurs during the policy period.⁷⁷

Because of the insurance industry’s repeated use of the word “which” instead of “that,” this language should be read in less restrictive manner.⁷⁸ Clauses introduced by the word, “that,” on the other hand, are restrictive and essential; removing it materially alters the sentence.⁷⁹ *Id.* Accordingly, the

73. *Montrose Chem. Corp. v. Admiral Ins. Co.*, 913 P.2d 878, 890 n. 12 (Cal. 1995).

74. *Id.* at 880 n.2.

75. *See id.* at 880–81 n.2.

76. *Id.*

77. *Id.* at 881, 889–900 n.21; MORTON S. FREEMAN, *THE GRAMMATICAL LAWYER* 25 (1979) (clauses introduced by “which” are nonrestrictive and provide only incidental or nonessential information about a previous word).

78. FREEMAN, *supra* note 77, at 25; *see also* HENRY WEIHOFEN, *LEGAL WRITING STYLE* 33 (1961).

79. Freeman, *supra* note 77; Weihofen, *supra* note 78.

policy language quoted above can be restated, without changing its meaning, as follows: “[t]he company will pay on behalf of the Insured all sums . . . because of . . . property damage . . . caused by an accident, including continuous or repeated exposure to conditions.⁸⁰ This statement is much more conducive to coverage than insurance companies would like, and while technical distinctions between “which” and “that” may seem “nitpicky,” the policy language was drafted by the insurance industry.⁸¹ Florida law is clear that when policy language is ambiguous, an insurance contract prepared by an insurance company is to be construed against the insurer and in favor of the insured.⁸²

Courts have applied at least four different theories to determine the appropriate trigger of coverage.⁸³ The “exposure theory,” which is often applied in asbestos and other toxic tort cases, holds that the insurance policy is triggered by a third party’s exposure to the chemical during the policy period.⁸⁴ If there are multiple exposures to the contamination, multiple policies may be triggered. However, this theory is rarely applied to environmental cases involving property damage because, in such cases, “exposure” has little meaning beyond actual injury or contamination.

The “injury-in-fact theory,” which is more often applied in environmental pollution cases, posits that the duty to indemnify arises when there has been actual injury to the property of a third party during the policy period.⁸⁵ The “exposure theory” and the “injury-in-fact theory” are functionally equivalent when considered in the context of a claim for property damage from environmental contamination because the injury occurs simultaneous with the exposure, i.e., once third party property is exposed to the contamination, property damage has occurred.

The “manifestation theory” considers the duty to indemnify triggered on the date the damage manifests itself.⁸⁶ This theory applies the latest of

80. Freeman, *supra* note 77; Weihofen, *supra* note 78.

81. Clauses introduced by “which” are nonrestrictive and provide only incidental nonessential information about a previous word. Thus, even if the clause is omitted, the meaning of the sentence will remain intact. See FREEMAN, *supra* note 77, at 33.

82. See *Pridgen*, 498 So. 2d at 1248.

83. *Dow Chem. Co. v. Associated Indem. Corp.*, 724 F. Supp. 474, 478 (E.D. Mich. 1989); *Celotex Corp. v. AIU Ins. Co.*, 152 B.R. 647, 650 n.3 (Bankr. M.D. Fla. 1993); *but see* *Huntzinger v. Hastings Mut. Ins. Co.*, 143 F.3d 302, 314–15 (7th Cir. 1998) (identifying seven distinct trigger theories).

84. See, e.g., *Continental Ins. Cos. v. Northeastern Pharm. & Chem. Co.*, 842 F.2d 977, 982 (8th Cir. 1988); *Commercial Union Ins. Co. v. Sepco Corp.*, 765 F.2d 1543, 1544 (11th Cir. 1985).

85. See, e.g., *Bell Lumber & Pole Co. v. United States Fire Ins. Co.*, 60 F.3d 437, 443 (8th Cir. 1995); *W.R. Grace & Co. v. Continental Cas. Co.*, 896 F.2d 865, 876 (5th Cir. 1990).

86. See, e.g., *Mraz v. Canadian Universal Ins. Co.*, 804 F.2d 1325 (4th Cir. 1986); *Eagle-Picher Indus. v. Liberty Mut. Ins. Co.*, 682 F.2d 12, 16 (1st Cir. 1982). Some courts have

the four trigger dates and is generally considered the most proinsurer of the four theories. In practice, the "manifestation theory" often converts an "occurrence-based" policy into a "claims-made" policy because policies that expired before discovery of the contamination would not be triggered.⁸⁷ Because, the insured has a duty to provide prompt notice of the occurrence, coverage will generally only exist under the policy in effect at the time of such notice.

The fourth trigger theory, the "continuous trigger theory," is essentially an amalgamation of the aforementioned theories because coverage is triggered: 1) at the time of the initial exposure; 2) at the time of any actual injury or property damage; and 3) at the time of manifestation.⁸⁸ The continuous trigger theory is generally considered the most proinsured of the theories because it provides coverage for the entire period from the initial exposure or release through the discovery of the contamination.⁸⁹ However, whether this is actually the case depends in large part on the court's approach to the scope of coverage by each insurer on the risk when multiple policies are triggered. If the court applies the Keene "joint and several liability" approach, discussion Section IV.D. below, then all insurers whose policies have been triggered would be held jointly and severally liable, up to their respective policy limits, for "all sums" that the insured becomes legally obligated to pay.⁹⁰ However, if the court applies a "pro-rata" approach to allocation, discussed in Section IV.E.2. below, having more triggered policies can work to the insured's detriment.⁹¹

For example, consider a scenario in which the insured becomes liable for one million dollars in cleanup costs and has ten triggered policies that each contain a self-insured retention or deductible of \$100,000. In such a scenario, a court applying a continuous trigger and a pro-rata allocation theory would allocate \$100,000 to each policy, which would be promptly swallowed by the self-insured retention in each such policy. Accordingly,

elucidated three different formulations of the manifestation theory, depending on whether coverage is triggered when the damage is actually discovered, when it should have been discovered, or when the insured "knew or should have known" of the property damage. *Huntzinger*, 143 F.3d at 314-15; *Mraz*, 804 F.2d at 1328. See *CPC Int'l v. Northbrook Excess & Surplus Ins. Co.*, 46 F.3d 1211, 1219-20 (1st Cir. 1995).

87. See *Huntzinger*, 143 F.3d at 315.

88. See *Keene Corp. v. Insurance Co. of N. Am.*, 667 F.2d 1034, 1044-46 (D.C. Cir. 1981); see generally *Huntzinger*, 143 F.3d at 315; *Celotex Corp.*, 152 B.R. at 651.

89. *Celotex Corp.*, 152 B.R. at 651.

90. *Keene*, 667 F.2d at 1047.

91. *Id.*

the insured would have to pay for the entire one million in cleanup costs, with no assistance from any of its triggered insurance policies.⁹²

While no Florida court has decided the issue in a published decision, the Eleventh Circuit has indicated that the injury-in-fact theory is the approach most likely to be adopted by the Supreme Court of Florida.⁹³ However, based on the supreme court's recent opinion in CTC, it is not clear how the injury-in-fact trigger would differ from a continuous trigger under Florida law. Some courts distinguish the injury-in-fact trigger from the continuous trigger on the rationale that the injury-in-fact trigger does not provide coverage for continuous injury or property damage that began before the policy period.⁹⁴ However, when the release involves active, continuous leaching, as opposed to the passive persistence of the contamination, the policy language does not support a trigger theory that provides coverage only upon the initial discharge of the pollution, because no term in the policy imposes a "discrete temporal limitation on 'injury'" or "property damage."⁹⁵ Because continuous contamination that was both unexpected or unintended would cause injury-in-fact in each subsequent policy period, both the injury-in-fact and continuous trigger theories should provide coverage from the date of the initial discharge until the contamination is cleaned up.

92. The scenario discussed above is just one example of the dramatic impact that given trigger and allocation theories can have on the extent of coverage an insured might receive. Whether a court permits an insured to recover on excess policies before exhausting all primary policies ("horizontal exhaustion"), or whether the insured must recover on all primary and excess policies for a given year before recovering on other years' policies ("vertical exhaustion"), also plays an important role in the coverage equation. Similarly, whether a court permits "stacking" of policies at the same coverage level can be critical to the insured's recovery. A complete discussion of these issues, and the effect of deductibles and self-insured retentions on an insured's entitlement to insurance proceeds is beyond the scope of this article. For a thorough discussion of this subject, see Garrett G. Gillespie, *The Allocation of Coverage Responsibility Among Multiple Triggered Commercial General Liability Policies in Environmental Cases: Life After Owens-Illinois*, 15 VA. ENVTL. L.J. 525 (1996). See also *Chemical Leaman Tank Lines, Inc. v. Aetna Cas. & Sur. Co.*, 978 F. Supp. 589 (D.N.J. 1997), *rev'd*, 177 F.3d 210 (3d Cir. 1999); *Carter-Wallace, Inc. v. Admiral Ins. Co.*, 712 A.2d 1116 (N.J. 1998).

93. See *Trizec Properties, Inc. v. Biltmore Constr. Co.*, 767 F.2d 810, 813 (11th Cir. 1985); see also *CSX Transp., Inc. v. Admiral Ins. Co.*, No. 93-132-CIV-J-10 (M.D. Fla. July 20, 1995); *Mealey's Litigation Report—Insurance* (Dec. 3, 1996) (applying injury-in-fact trigger to claims under the laws of Florida, Michigan, South Carolina, Indiana, Virginia, and Pennsylvania); *but see Celotex Corp. v. AIU Ins. Co.*, 152 B.R. 647, 651 n.4 (Bankr. M.D. Fla. 1993) (stating "Trizec does not speak with sufficient certainty that this Court is willing to hold that injury-in-fact is the trigger in Florida").

94. See *Inland Waters Pollution Control, Inc. v. National Union Fire Ins. Co.*, 997 F.2d 172, 185-86 (6th Cir. 1993).

95. *New Castle County v. Continental Cas. Co.*, 725 F. Supp. 800, 810 (D. Del. 1989), *rev'd*, 970 F.2d 1267 (3d Cir. 1992), *aff'd in part, rev'd in part*, 933 F.2d 1162 (3d Cir. 1991).

C. *The Concurrent Cause Doctrine*

The question presented in each of the scenarios listed at the beginning of this article is, to what extent must the insurer indemnify the insured for damages resulting from a pollution release when some portion of the contamination was caused by noncovered releases? While Florida law has not yet dealt with this issue in the pollution context, case law that has developed in the context of non-environmental claims provides a likely answer to this question.⁹⁶

The doctrine of concurrent causes applies when an "indivisible" loss is caused simultaneously by two separate events.⁹⁷ When only one of the events is covered by an insurance policy, Florida courts hold that the insurer becomes jointly and severally liable for the entire loss.⁹⁸ In *Wallach v. Rosenberg*,⁹⁹ a sea wall between the Wallachs' home and their neighbor's collapsed during a storm, precipitating a domino-like crumbling of a portion of the [neighbor's] sea wall.¹⁰⁰ The neighbor then sued Wallach and his insurance carrier.¹⁰¹ The issue was whether the sea wall collapse was caused by Wallach's negligent maintenance of the wall, an event covered under the insurance policy, or the water pressure caused by the storm, an excluded loss.¹⁰² On appeal, the court held that "the jury may find coverage where an insured risk constitutes a concurrent cause of the loss even where 'the insured risk [is] not . . . the prime or efficient cause of the accident.'"¹⁰³ This policy is consistent with the Florida rule that the duty to defend applies to both covered and uncovered claims,¹⁰⁴ as well as the rule preventing an insurer who pays a judgment on behalf of a joint tortfeasor from maintaining a contribution action against other insurers.¹⁰⁵

96. See *Wallach v. Rosenberg*, 527 So. 2d 1386 (Fla. 3d Dist. Ct. App. 1988).

97. See *id.* at 1387.

98. See *id.*; accord *Transamerica Ins. Co. v. Snell*, 627 So. 2d 1275, 1276 (Fla. 1st Dist. Ct. App. 1993).

99. 527 So. 2d 1386 (Fla. 3d Dist. Ct. App. 1988).

100. *Id.* at 1386.

101. *Id.*

102. *Id.* at 1387.

103. *Id.* (quoting 11 GEORGE J. COUCH, *COUCH ON INSURANCE* 2D § 44:268 (rev. ed. 1982)). See also *West American Ins. Co. v. Chateau La Mer II Homeowner's Ass'n, Inc.*, 622 So. 2d 1105, 1108 (Fla. 1st Dist. Ct. App. 1993).

104. See *Grissom v. Commercial Union Ins. Co.*, 610 So. 2d 1299, 1307 (Fla. 1st Dist. Ct. App. 1992).

105. *Government Employees Ins. Co. v. State Farm Mut. Auto. Ins. Co.*, 242 So. 2d 162, 163 (Fla. 1st Dist. Ct. App. 1970). "Since tortfeasors are jointly and severally liable, and an injured party after obtaining judgment against multiple defendants may select the one he desires

The concurrent cause doctrine applies “only when the multiple causes are not related and dependent, and involve a separate and distinct risk.”¹⁰⁶ In a pollution case involving separate releases, some of which are covered “sudden and accidental” releases and others that are not, this rule is consistent with the rule applied in Massachusetts in *Nashua*, *Aerovox*, and *Millipore*. Thus, under Florida insurance law, if two independent events cause property damage, one of which is covered under an insurance policy and the other is not, coverage exists.¹⁰⁷ As explained in *Wallach* and *West American*, this doctrine is based on common sense:¹⁰⁸ if the insured bought insurance coverage for property damage caused by a sudden discharge of pollutant or contaminants, it is entitled to get that coverage.¹⁰⁹

While separate and independent pollution events rarely occur “concurrently” in the true sense of the word, different releases do often cause indivisible damage. In this regard, the concurrent cause doctrine simply reflects the traditional tort method for dealing with indivisible harm—joint and several liability.¹¹⁰ The modern trend in CERCLA cases to apportion liability when a site’s contamination is divisible reflects the reverse application of the same tort principle.¹¹¹ When the harm is not divisible, both the common law and CERCLA impose joint and several liability. In practice, the same is true under Florida law because comparative fault under section 768.81, of the *Florida Statutes*, does not apply to actions for the recovery of actual economic damages resulting from pollution.¹¹² Accordingly, under the rationale of the concurrent cause cases, the insurer should be

to subject to execution, the carrier must bear the same inequitable burden as is borne by its insured.” *Id.*

106. *Transamerica Ins. Co.*, 627 So. 2d at 1276.

107. *West American Ins. Co.*, 622 So. 2d at 1108; *Wallach*, 527 So. 2d at 1387–88.

108. *West American Ins. Co.*, 622 So. 2d at 1105; *Wallach*, 527 So. 2d at 1388.

109. *West American Ins. Co.*, 622 So. 2d at 1105; *Wallach*, 527 So. 2d at 1388.

110. *See* *Walt Disney World Co. v. Wood*, 515 So. 2d 198, 201 (Fla. 1987), *superceded by statute* by *Fabre v. Marin*, 623 So. 2d 1182 (Fla. 1993) (providing “[t]he feasibility of apportioning fault on a comparative basis does not render an indivisible injury ‘divisible’ for purposes of the joint and several liability rule. A concurrent tortfeasor is liable for the whole of an indivisible injury when his negligence is a proximate cause of that damage.”); *Hernandez v. Pensacola Coach Corp.*, 193 So. 555, 558 (Fla. 1940) (stating “[it] is a general principle of negligence, where an injury results from two separate and distinct acts of negligence committed by different persons operating concurrently, that both are regarded as the proximate cause and that recovery can be had against either or both”); *see also* W. PAGE KEETON, ET AL., *PROSSER AND KEETON ON THE LAW OF TORTS* 41 at 266–67 (5th ed. 1984).

111. *See, e.g., In re Bell Petroleum Servs. Co.*, 3 F.3d 889 (5th Cir. 1993); *United States v. Alcan Aluminum Corp.*, 990 F.2d 711 (2nd Cir. 1993); *O’Neil v. Picillo*, 883 F.2d 176, 178–79 (1st Cir. 1989).

112. FLA. STAT. § 768.81(4)(b) (1999).

liable for the full extent of the damages paid by the insured, absent policy provisions further limiting the insurer's liability.

D. Allocation Cases—Asbestos

The issue of allocating insurance policy liability for occurrences that span several policy periods has been addressed in a line of cases dealing with asbestos liability. As in the environmental context, asbestos occurrences sometimes span decades and call into question dozens of policies. However, insurers argue that each policy typically limits coverage to losses occurring within the policy period. Courts are split as to which of two general theories should be applied to these allocation decisions.¹¹³

The joint and several liability theory was most prominently pronounced in *Keene Corp. v. Insurance Co. of North America*.¹¹⁴ In *Keene*, the court noted that "when Keene is held liable for an asbestos related disease, only part of the disease will have developed during any single policy period."¹¹⁵ Based upon the phrase "all sums" in the policy, the District of Columbia Circuit Court of Appeals concluded that the insurer is liable in full for all damages notwithstanding the fact that some of the disease developed during other policy periods.¹¹⁶ The *Keene* court stated:

As we interpret the policies, they cover Keene's entire liability once they are triggered. That interpretation is based on the terms of the policies themselves. We have no authority upon which to pretend that Keene also has a "self-insurance" policy that is triggered for periods in which no other policy was purchased. Even if we had the authority, what would we pretend that the policy provides? What would its limits be? There are no self-insurance policies, and we respectfully submit that the contracts before us do not support judicial creation of such additional insurance policies.¹¹⁷

The court noted that the policies did not "distinguish between injury that is caused by occurrences that continue to transpire over a long period of time and more common types of injury."¹¹⁸ Accordingly, the insured may collect the full amount of indemnity that is due from any insurer whose coverage is triggered, subject only to the provisions in the policies that govern the

113. *Id.*; see also *O'Neil v. Picillo*, 883 F.2d 176 (1st Cir. 1989).

114. 667 F.2d 1034 (D.C. Cir. 1981).

115. *Id.* at 1047.

116. *Id.*

117. *Id.* at 1048-49.

118. *Id.* at 1049.

allocation of liability when more than one policy covers an injury. Other courts dealing with asbestos trigger issues have followed the approach enunciated in *Keene*.¹¹⁹ For example, in *ACandS Inc. v. Aetna Casualty & Surety Co.*,¹²⁰ the Third Circuit followed the *Keene* approach for asbestos claims. The court stated:

The policies require the insurers to pay all sums which ACandS becomes "legally obligated to pay" because of bodily injury during the policy period. It is uncontested that under principles of tort law ACandS may be held fully liable for a personal injury plaintiff's damages caused in part by ACandS' asbestos during a particular period, even though plaintiff's damages may also have been caused, in part, at other times. It follows that if a plaintiff's damages are caused in part during an insured period, it is irrelevant to ACandS' legal obligations and, therefore, to the insurer's liability that they were also caused, in part, during another period.¹²¹

In contrast to the *Keene* joint and several liability approach stands "the pro-rata time on the risk" theory ("pro-rata theory") of insurer liability. The pro-rata theory was most prominently applied in *Insurance Co. of North America v. Forty-Eight Insulations, Inc.*,¹²² and *Owens-Illinois, Inc. v. United Insurance Co.*¹²³ In *Forty-Eight Insulations*, the Sixth Circuit, applying Illinois law, held that defense costs should be prorated over the course of the occurrence.¹²⁴ Like the court in *Keene*, the *Forty-Eight Insulations* court looked to the terms of the contract to define the scope of coverage.¹²⁵ However, in *Forty-Eight Insulations*, the court concluded that the insurer had not contracted to pay defense costs for occurrences that take place outside the policy period.¹²⁶ Accordingly, the different insurance companies that run the risk over the course of the occurrence were required

119. See *J.H. France Refractories Co. v. Allstate Ins. Co.*, 626 A.2d 502 (Pa. 1993); *Lac D'Amiante du Quebec v. American Home Assurance Co.*, 613 F. Supp. 1549 (D.N.J. 1985); *ACandS, Inc. v. Aetna Cas. & Sur. Co.*, 764 F.2d 968 (3d Cir. 1985).

120. 764 F.2d 968 (3d Cir. 1985).

121. *Id.* at 974 (internal citation omitted).

122. 633 F.2d 1212 (6th Cir. 1980).

123. 650 A.2d 974 (N.J. 1994).

124. *Forty-Eight Insulations*, 633 F.2d at 1226.

125. *Id.* at 1215-16.

126. *Id.* The proration approach applied in *Forty-Eight Insulations* is inconsistent with the Florida rule that once the duty to defend is triggered, the insured must provide a defense to the entire action. See, e.g., *Grissom v. Commercial Union Ins. Co.*, 610 So. 2d 1299, 1307 (Fla. 1st Dist. Ct. App. 1992).

to prorate defense costs among themselves. The court treated the insured as an insurer for those periods of time that it had no insurance coverage.¹²⁷ Although often cited as authority for the pro-rata approach, *Forty-Eight Insulations* has limited precedential value because the Supreme Court of Illinois rejected this approach in favor of joint and several liability in *Zurich Insurance Co. v. Raymark Industry, Inc.*¹²⁸

In *Owens-Illinois, Inc. v. United Insurance Co.*,¹²⁹ the Supreme Court of New Jersey applied an allocation method that was related to both the time of the risk and the degree of risk assumed.¹³⁰ The court allocated a portion of damages to the insured for uncovered years but *only when no insurance was available.*¹³¹ Unlike the *Keene* and *Forty-Eight Insulations* courts, the court in *Owens-Illinois* was unable to find the answer to allocation in the policy language.¹³² Instead, the court looked to policy considerations and concluded that the *Keene* joint and several liability rule reduces the property owner's incentive to insure against future risks.¹³³ As such, the court was unwilling to allocate costs to the insured for periods in which coverage was not available.¹³⁴

E. Allocation in the Environmental Context

While many of the cases dealing with these scope of coverage issues have arisen in the context of asbestos claims, several courts have considered these issues in the context of environmental pollution claims. Results in these cases have been mixed, with some courts applying a proration formula as in *Forty-Eight Insulations* and *Owens-Illinois*, while other courts have imposed joint and several liability.¹³⁵

Whether the asbestos cases are truly analogous to hazardous waste cases is questionable. While all asbestos bodily injury cases have essentially the same etiology—ingestion of an asbestos fiber, exposure in residence, and manifestation—environmental pollution cases can differ dramatically. In dealing with groundwater contamination issues, factual considerations such as whether rain flushed the same quantity of contaminants into the ground each year or whether the plume of contaminants advanced in an equal rate

127. *Forty-Eight Insulations*, 633 F.2d at 1224–25.

128. 514 N.E.2d 150 (Ill. 1987).

129. 650 A.2d 974 (N.J. 1994).

130. *Id.* at 995.

131. *Id.*

132. *Id.* at 990.

133. *Id.* at 992.

134. *Owens-Illinois, Inc.*, 650 A.2d at 995.

135. *Id.*

over successive policies can have a significant impact on whether it is appropriate to apply pro-rata allocation principles.¹³⁶

1. Early Cases—Joint and Several Liability

The first cases dealing with the allocation issue in the environmental context followed the joint and several liability approach enunciated in *Keene and ACandS*. In *New Castle County v. Continental Casualty Co.*,¹³⁷ the court faced the allocation issue in the context of landfill leachate that caused groundwater contamination.¹³⁸ Citing *ACandS*, the court held that “there is no proration of losses under a policy once coverage is triggered.”¹³⁹ The court continued by stating “[t]he terms of the contract are not affected by prior or subsequent coverage.”¹⁴⁰ Further, the court noted that although the insurer makes reference to other policies that may be implicated, it cites no evidence of the terms of those policies.¹⁴¹ Thus, there was not enough evidence with which to prorate damages even if the law authorized proration.¹⁴²

That same year, in *Federal Insurance Co. v. Susquehanna Broadcasting Co.*,¹⁴³ the court addressed the allocation issue with regard to CERCLA liability under some policies that had pollution exclusion clauses and others that did not.¹⁴⁴ The case involved waste generated by Susquehanna Broadcasting Company (“SBC”) from 1975 through 1983 that contaminated soil and well water in adjoining residential areas.¹⁴⁵ The policies in effect before 1976 or 1977 did not contain a pollution exclusion clause, but subsequent policies did.¹⁴⁶ The court concluded that coverage under the earlier policies was triggered and that damages could not be apportioned.¹⁴⁷ Accordingly, the court followed the joint and several approach applied in

136. *Id.*

137. 725 F. Supp. 800 (D. Del. 1989), *aff'd in part, rev'd in part*, 933 F.2d 1162 (3d Cir. 1991), *rev'd*, 970 F.2d 1267 (3d Cir. 1992).

138. *Id.* at 806.

139. *Id.* at 817 (quoting *ACandS, Inc. v. Aetna Cas. & Sur. Co.*, 764 F.2d 968, 968 (3d Cir. 1985)).

140. *Id.* (citing *Sandoz, Inc. v. Employer's Liab. Assurance Corp.*, 554 F. Supp. 257, 266 (D.N.J. 1983)).

141. *Id.*

142. *New Castle County v. Continental Cas. Co.*, 725 F. Supp. 800, 817 (D. Del. 1989).

143. 727 F. Supp. 169 (M.D. Pa. 1989), *amended on reconsideration in part*, 238 F. Supp. 169 (M.D. Pa. 1990).

144. *Id.* at 169.

145. *Id.*

146. *Id.*

147. *Id.* at 175.

Keene and ACandS, and held the insurers liable for the full extent of the cleanup costs.¹⁴⁸ In so holding, the court noted that “generators of environmental waste can be held jointly liable for all response costs even though others may have contributed to the pollution.”¹⁴⁹ Accordingly, the court concluded that the earlier policies covered all of SBC’s response cost liability, “regardless of the presence of the pollution exclusion clause in later policies.”¹⁵⁰

Similarly, in *Detrex Chemical Industries v. Employers Insurance*,¹⁵¹ the court found that for each policy that is triggered, the policy must cover all damages directly and proximately resulting from the occurrence that caused the injury-in-fact during that policy period.¹⁵² Thus, the court held that without a more complete factual record of the occurrences, the question of allocation was not appropriate for summary judgment because it necessarily requires a determination as to which policies have been triggered.¹⁵³ The court recognized that damages can only be allocated to policies that have been triggered.¹⁵⁴ Thus, if the contamination was caused by a single event, or if there is only one policy that has been triggered, that policy assumes liability for all damages directly and proximately resulting from the occurrence.¹⁵⁵

In *Hatco Corp. v. W.R. Grace & Co.-Conn.*,¹⁵⁶ the court held that although an insured must prove that actual injury occurred during the policy period, coverage is not limited to the injury that occurred during the policy period if the injury is part of a continuous, indivisible process.¹⁵⁷ In *Hatco*, Grace operated an industrial chemical manufacturing facility in Fords, New Jersey between 1959 and 1978.¹⁵⁸ Effluent containing various organic chemical compound was pumped directly into ditches and streams that drained into the Passaic River.¹⁵⁹ In the mid 1960s, Grace constructed unlined ponds that were supposed to hold the effluent so that the useful product could be recovered.¹⁶⁰ The ponds were also used to dump other chemicals that had been used in the manufacturing process, including heat

148. *Susquehanna Broadcasting Co.*, 727 F. Supp. at 175.

149. *Id.*

150. *Id.*

151. 746 F. Supp. 1310 (N.D. Ohio 1990).

152. *Id.* at 1325.

153. *Id.*

154. *Id.*

155. *Id.*

156. 801 F. Supp. 1334 (D.N.J. 1992).

157. *Id.* at 1345.

158. *Id.* at 1343.

159. *Id.*

160. *Id.*

transfer fluids containing Polychlorinated Bipheynls ("PCB") that were dumped by employees from fifty-five-gallon drums directly into the ponds.¹⁶¹ Grace eventually sold the facility to the Hatco Corporation.¹⁶² In 1989, Hatco filed an action against Grace to recover all sums expended to remove hazardous substances disposed of on site.¹⁶³ In turn, Grace sued its primary and excess insurers for indemnification because it claimed that all the damages alleged fall within the definition of "occurrence" in the policies.¹⁶⁴

Applying a continuous trigger theory, the court looked to the language of the insurance contract to determine the scope of coverage.¹⁶⁵ The court noted that the policy language did not expressly restrict coverage to the injury that resulted during the policy period, even though such a provision could have been expressly included in the policies.¹⁶⁶ The court found that "because the Insurers agreed to pay *all sums* which the insured shall become legally obligated to pay as damages," they essentially stepped "into the shoes of the insured."¹⁶⁷ Under CERCLA, Grace became jointly and severally liable for the full extent of damage sustained by Hatco if the harm sustained was indivisible.¹⁶⁸ Thus, the court would apportion liability only to the extent that the insurers can rebut a showing that the injury was indivisible.¹⁶⁹

In *Ray Industry, Inc. v. Liberty Mutual Insurance Co.*,¹⁷⁰ the Sixth Circuit addressed the allocation issue with regard to CERCLA liability arising from Sea Ray Boats, Inc.'s disposal of wastes from 1966 to 1979.¹⁷¹ The district court had held that because the pollution exclusion clause appeared in policies issued on or after July 1, 1971, the policies only covered contamination caused before that date.¹⁷² The Sixth Circuit agreed that the insurer's duty to defend did not extend to matters that would have no relation to the 1966 to 1970 policies, but the court recognized that, considering the nature of CERCLA liability, it was not clear that such matters existed.¹⁷³ The court recognized that the insured was subject to *full liability* for events that occurred during each policy period, and held that the

161. *Hatco Corp.*, 801 F. Supp. at 1343.

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.* at 1345.

166. *Hatco Corp.*, 801 F. Supp. at 1345.

167. *Id.* at 1346 (emphasis added).

168. *Id.*

169. *Id.*

170. 974 F.2d 754 (6th Cir. 1992).

171. *Id.* at 754.

172. *Id.* at 757.

173. *Id.* at 771.

insured had coverage up to the full policy limits for each year from 1966 to 1970.¹⁷⁴ The court specifically refused to further apportion damages via proration to the insured.¹⁷⁵

In *Chemical Leaman Tank Lines, Inc. v. Aetna Casualty & Surety Co.*,¹⁷⁶ Chemical Leaman operated a tank truck operation specializing in the transport of various chemicals and other liquids.¹⁷⁷ From 1960 to 1969, Chemical Leaman placed contaminated rinse water into a wastewater treatment system consisting of unlined ponds and lagoons.¹⁷⁸ This lasted until 1975 when they installed a wastewater treatment system.¹⁷⁹ "By 1977, Chemical Leaman had drained the ponds and lagoons of liquid, dredged the accumulated sludge out of the lagoons, and filled all the ponds and lagoons with brickbat, sand, and concrete."¹⁸⁰ In 1984 the Environmental Protection Agency ("EPA") placed the site on the National Priorities List ("NPL") under CERCLA and alleged that Chemical Leaman was strictly liable for the damages and cleanup costs resulting from the contamination.¹⁸¹ Consequently,¹⁸² Chemical Leaman notified its insurer and requested indemnification.

In *Chemical Leaman*, the court found that New Jersey law applies the continuous trigger theory.¹⁸³ Basing its decision on the *Hatco* case, the court held that the insurer was jointly and severally liable up to the policy limits for all damages resulting from the occurrence, including damage that occurred before and after the policy period.¹⁸⁴ As in *Hatco*, because Chemical Leaman was subject to strict liability under CERCLA, the court held that all policies triggered by a continuous occurrence must bear joint and several liability.¹⁸⁵ The court noted that under New Jersey law, the insured must make two factual showings before imposing joint and several liability under the continuous trigger theory.¹⁸⁶ First, the insured must show that some kind of property damage occurred during each policy period at

174. *Id.* at 770.

175. *Ray Indus., Inc.*, 974 F.2d at 770.

176. 817 F. Supp. 1136 (D.N.J. 1993), *rev'd*, 117 F.3d 210 (1999).

177. *Id.* at 1140.

178. *Id.*

179. *Id.*

180. *Id.*

181. *Chemical Leaman*, 817 F. Supp. at 1140.

182. *Id.*

183. *Id.* at 1153.

184. *Id.*

185. *Id.*

186. *See Diamond Shamrock Chem. v. Aetna Cas. & Sur. Co.*, 609 A.2d 440, 466 (N.J. Super. Ct. App. Div. 1992).

issue.¹⁸⁷ Second, the insured must show that the property damage was part of a continuous and indivisible process of injury.¹⁸⁸ If the insured could make these showings, then it could recover up to the policy limits of each policy in effect from 1960 until the manifestation of the soil and groundwater damage.¹⁸⁹

The continued validity of the *Hatco* and *Chemical Leaman* decisions is questionable in light of the Supreme Court of New Jersey's decision in *Owens-Illinois*.¹⁹⁰ On appeal in *Chemical Leaman*, the Third Circuit held that because the Supreme Court of New Jersey rejected joint and several liability in favor of a risk-based allocation of liability among applicable insurance policies in *Owens-Illinois*, the case should be remanded to the district court for a reallocation of liability between the insurer and the insured.¹⁹¹ Because the district courts in *Chemical Leaman* guessed incorrectly as to the Supreme Court of New Jersey's interpretation of these insurance policies, the district court's opinion has no direct precedential value.

2. Recent Cases—Pro-Rata Allocation

The *Owens-Illinois* case has proven quite influential even outside of New Jersey. Recent cases have departed from the joint and several liability approach in favor of apportionment in certain circumstances. In *Northern States Power Co. v. Fidelity & Casualty Co. of New York*,¹⁹² the Supreme Court of Minnesota held that contamination of groundwater should be analyzed as a continuous process in which the property damage is evenly proportioned throughout the period of time from the first contamination to the end of the last triggered policy.¹⁹³ From 1973 until 1978, power plants were operated on the insured's facility.¹⁹⁴ The insured, Northern States Power ("NSP"), had an insurance program that included standard comprehensive general liability policies with self-insured retentions of \$25,000 per occurrence from 1958 to 1970 and \$100,000 per occurrence from 1970 to 1973.¹⁹⁵ These policies were labeled as excess liability policies, and the record indicated that no other insurer issued any primary liability policies

187. *Chemical Leaman*, 817 F. Supp. at 1153.

188. *Id.*

189. *Id.* at 1154.

190. *Owens-Illinois, Inc. v. United Ins. Co.*, 650 A.2d 974 (N.J. 1984).

191. *Id.*

192. 523 N.W.2d 657 (Minn. 1994).

193. *Id.* at 664.

194. *Id.* at 659.

195. *Id.*

between 1958 and 1973.¹⁹⁶ In 1981, the Minnesota Pollution Control Agency discovered that the groundwater at the site was contaminated with coal tars and spent oxide waste and ordered NSP to clean up the contaminated property.¹⁹⁷ NSP settled with some of its carriers, but did not settle with others.¹⁹⁸ Applying an injury-in-fact trigger theory, the court held that the insured bears the burden of proving that the policy was triggered and therefore that coverage is available.¹⁹⁹ The court held that the environmental damage occurred over successive policy periods and concluded that the damages should be presumed to have been continuous from the point of the first damage to the point of discovery or cleanup.²⁰⁰ Accordingly, the court applied a pro-rata by time on the risk allocation theory similar to that used in *Owens-Illinois*.²⁰¹ Thus, NSP was required to pay one deductible per policy period while being liable for its pro-rata share of any uninsured or self-insured periods.²⁰²

More recently, the NSP approach was applied by a Minnesota court in *Domtar, Inc. v. Niagara Fire Insurance Co.*²⁰³ In *Domtar*, the insured coal-tar processor sued several of its liability insurers for the costs incurred in cleaning up coal-tar contamination that occurred between 1933 and 1991.²⁰⁴ In the absence of any identifiable release during a specific policy period, the court presumed that the damage was continuous and allocated liability among the insurers on a pro-rata "time-on-the-risk" basis.²⁰⁵ The court upheld the trial court's allocation of liability to the insured for uninsured periods and cited *Forty-Eight Insulations*.²⁰⁶

Similarly, in *Montrose Chemical Corp. v. Admiral Insurance Co.*,²⁰⁷ the court determined that all insurers on the risk should contribute in proportion to their respective policies' liability limits or the time periods covered under each such policy.²⁰⁸ "From 1947 to 1982, Montrose manufactured the pesticide, dichloro-diphenyl-trichloro-ethane ("DDT"), at its plant in

196. *Id.*

197. *Northern States Power Co.*, 523 N.W.2d at 659.

198. *Id.*

199. *Id.* at 662.

200. *Id.* at 664.

201. *See id.*

202. *Northern States Power Co.*, 523 N.W.2d at 664.

203. 552 N.W.2d 738 (Minn. Ct. App. 1996), *aff'd in part, rev'd in part*, 563 N.W.2d 724 (Minn. 1997).

204. *Id.* at 743.

205. *Id.* at 743-44.

206. *Id.* at 744 (citing *Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc.*, 633 F.2d 1212 (6th Cir. 1980)).

207. 913 P.2d 878 (Cal. 1995).

208. *Id.* at 878.

Torrance, California.²⁰⁹ Admiral Insurance Company had issued four CGL policies to Montrose covering the period from 1982 to 1986.²¹⁰ The court held that, where successive CGL policy periods are implicated, damages that are continuous over several policy periods are potentially covered by all policies in effect during those periods.²¹¹ The court suggested that courts whose analyses failed to draw these distinctions are actually clouding the issue for the allocation of triggered policies.²¹²

In *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*,²¹³ an appellate court in Illinois applied an allocation formula similar to that employed in *Forty-Eight* and *Owens-Illinois*.²¹⁴ There, the insured, Outboard Marine Corp., was a large manufacturer of outboard motors that operated a dye casting facility in Waukegan, Illinois.²¹⁵ In its dye casting process, Outboard Marine Corp. used a hydraulic fluid, pydraul, that contained Polychlorinated Biphenyl's from 1953 through 1970.²¹⁶ Polychlorinated Biphenyl's laden effluent was routed to a ditch on Outboard Marine Corp. property and eventually found its way into Waukegan Harbor and Lake Michigan.²¹⁷ Residual amounts of PCB laden Pydraul remained in Outboard Marine Corp.'s dye casting machines until approximately 1976.²¹⁸ In March of 1978, the federal government sued OMC to compel it to remediate the contaminated areas, and in 1986, Outboard Marine Corp. sued its primary insurance companies alleging a duty to defend and indemnify them in connection with the federal environmental litigation.²¹⁹

In applying the pro-rata theory, the court noted that while the insurers agreed to indemnify Outboard Marine Corp. for "all sums," it had to be for sums incurred as a result of property damage during the policy period.²²⁰ In finding that allocation was appropriate, the court stated that:

[t]he contamination of the groundwater should be regarded as a continuous process in which the property damage is evenly distributed over the period of time from the first contamination to the end of the last triggered policy (or self-insured) period, and we

209. *Id.* at 881.

210. *Id.*

211. *Id.* at 904.

212. *Montrose Chem. Corp.*, 913 P.2d at 904.

213. 670 N.E.2d 740 (Ill. App. 2d 1996).

214. *Id.* at 746.

215. *Id.* at 744.

216. *Id.*

217. *Id.*

218. *Outboard Marine*, 670 N.E.2d at 745.

219. *Id.*

220. *Id.* at 748.

have also held that the total amount of property damage should be allocated to the various policies in proportion to the period of time each was on the risk.²²¹

Following the language in *Forty-Eight Insulations*, the court treated the insured as an insurance company for the years in which it had no insurance coverage, and allocated a portion of liability to the insured.²²² Further, the court summarily dismissed Outboard Marine Corp.'s joint and several liability argument:

OMC cites no authority for its novel proposition that, because its liability under CERCLA is joint and several, the liability of the excess insurers cannot be apportioned on a pro-rata basis. OMC ignores the principal that insurance coverage disputes are governed by contract law. We can find no rationale to support the imposition of joint and several liability upon the insurers simply because OMC's liability arose under CERCLA.²²³

Recently, in *Missouri Pacific Railroad. v. International Insurance Co.*,²²⁴ the court followed its previous holding in *Outboard Marine Corp.* and applied the pro-rata theory.²²⁵ There, the insured railroad company sought indemnification from insurers for noise-induced hearing loss and asbestos exposure claims based on exposures over a seventy-three-year span.²²⁶ The insured alleged that the claims each arose from "one proximate, uninterrupted, and continuing cause" during each of approximately thirty insurance policies.²²⁷ The trial court certified two questions to the court of appeals regarding whether the "all sums" rule of *Zurich Insurance Co.*²²⁸ or the pro-rata, "time-on-the-risk" approach of *Outboard Marine Corp.* governs allocation of coverage.²²⁹ The court looked to the policy definition of "occurrence," which by definition must occur during the policy period, to hold that the insurer is only liable for damages that occurred during the policy period.²³⁰ Accordingly, the court followed *Outboard Marine Corp.*

221. *Id.* at 749 (quoting *Northern States Power Co. v. Fidelity & Cas. Co. of N.Y.*, 523 N.W.2d 657, 664 (Minn. 1994)).

222. *Id.*

223. *Outboard Marine*, 670 N.E.2d at 750.

224. 679 N.E.2d 801 (Ill. App. 2d Dist. 1997).

225. *Id.* at 804.

226. *Id.*

227. *Id.*

228. *See id.*

229. *Missouri Pac. R.R.*, 679 N.E.2d at 803.

230. *Id.* at 804.

and applied the pro-rata, time-on-the-risk approach because the damage cannot be measured and allocated to particular policy periods.²³¹

3. Limits on the Pro-rata Approach—Single Event Causing Indivisible

As the above-discussed cases indicate, the recent trend is toward pro-rata allocation among insurers that were on the risk during the period of continuous damage. However, the pro-rata allocation cases discussed above involved continuous injury in which there was no single event that was the primary cause of the groundwater contamination. Importantly, although *Forty-Eight Insulations* is one of the principal allocation cases, the court noted that where there is no reasonable means of prorating the cost of defense between the covered and noncovered items, the insurer must bear the entire cost of defense.²³² In the typical situation, the court noted, suit will be brought as the result of a single accident, but only some of the damages sought will be covered under the insurance policy.²³³ In these cases, the court recognized that prorating costs between the insured claim and the uninsured claim is very difficult, and as a result, courts should impose the full cost of the defense on the insurer.²³⁴

Similarly, in *Owens-Illinois*, the court recognized the difference between cases involving the gradual release of contaminants and cases in which the occurrence and the attendant injuries are easily identified as falling within a particular policy period.²³⁵ Using an explosion as an example, the court noted that “[e]ven though ‘all sums’ due from the accident might not be known with certainty at the time of the explosion, by the time of trial a claimant would be able to establish, within a reasonable degree of medical probability, what damages would flow from the injury.”²³⁶

In *SCSC Corp. v. Allied Mutual Insurance Co.*,²³⁷ the Supreme Court of Minnesota declined to apply the *Northern States* pro-rata by time on the risk approach that it had adopted only one year earlier.²³⁸ From 1976 to the end of 1988, SCSC operated a dry cleaning and laundry supply distribution facility in St. Louis Park, Minnesota, where it stored perchloroethylene in two above-ground storage tanks.²³⁹ In 1988, perchloroethylene was detected

231. *Id.* at 807.

232. *Forty-Eight Insulations*, 633 F.2d at 1224.

233. *Id.*

234. *Id.*

235. *Owens-Illinois*, 650 A.2d at 989.

236. *Id.*

237. 536 N.W.2d 305 (Minn. 1995).

238. *Id.* at 318.

239. *Id.* at 308.

in the groundwater downgradient of the SCSC facility.²⁴⁰ At trial, the jury found that the contamination was caused by a single event in 1977.²⁴¹ The trial court gave the jury the opportunity to divide the damages among the various insurance policies in effect from 1976 through 1988, but the jury found that the damages were not divisible.²⁴² There was no evidence in the record to indicate that any post-1977 additions of perchloroethylene to the groundwater increased clean up costs.²⁴³ In refusing to apportion liability over the policy periods, the court noted that its decision in *Northern States* was an equitable decision based upon the complexity of proving in which policy periods covered property damage arose.²⁴⁴ Because in *SCSC* the damage was not divisible and arose from a single sudden and accidental occurrence, the court held that only the 1977 policy applied.²⁴⁵ Accordingly, damages in excess of the \$1,100,000 aggregate limit were not covered, consistent with the actual injury theory.²⁴⁶

The only court known to have considered the allocation issue under Florida law held that the *Keene* "joint and several liability" theory would be adopted in Florida.²⁴⁷ Thus, when covered events combine with noncovered events, such as events outside the policy period, causing damage that is not divisible, the insurer is liable for the full extent of damages. This approach is consistent with Florida's concurrent cause doctrine.

Based upon the "all sums" language in the standard CGL policy and the doctrine of concurrent causes, if the contamination at the insured's facility was caused by multiple events, one of which is a covered loss, then coverage exists. The insurer cannot avoid its contractual duty to pay "all damages which the insured is legally obligated to pay" because of the fortuitous occurrence of a concurrent cause outside of the scope of its policy.²⁴⁸

240. *Id.* at 309.

241. *Id.* at 317.

242. *SCSC Corp.*, 536 N.W.2d at 317.

243. *Id.*

244. *Id.* at 318.

245. *Id.*

246. *Id.*

247. *CSX Transp., Inc. v. Admiral Ins. Co.*, No. 93-132 CIV-J-10, Slip. Op. at 9-10 (M.D. Fla. Nov. 6, 1996) at 13-15; *see also Carey Canada, Inc. v. Aetna Cas. & Sur., Co.*, No. Civ. A. No. 84-3113 JHP, 1988 WL 169287, at *8 (D.D.C. Mar. 31, 1988) (noting that "[Florida] law does not appear to deviate in any significant respect from general insurance principles recognized in *Keene* . . .").

248. *See Dimmitt Chevrolet*, 636 So. 2d at 700. Interestingly, the concurrent cause argument was briefed before the Supreme Court of Florida in *Dimmitt Chevrolet, Inc.*, but the court did not reach the issue because it held that there were no covered "sudden and accidental" releases to trigger coverage. *Id.*

V. AN INSURER'S LIABILITY IS NOT LIMITED TO DAMAGES CAUSED DURING THE POLICY PERIOD

The cases rejecting the joint and several liability approach on the grounds that the insurer is liable only for damage that occurs during the policy period are missing the point. While the standard CGL policy provides coverage only when there is an occurrence during the policy period, such policies contain no language limiting coverage to damages that occur during the policy period. As the *Hatco* court recognized, such a provision could easily have been included in the policies, but it was not.²⁴⁹

It is true that the definition of "property damage" indicates that there must be some injury during the policy period. However, the standard CGL policy requires the insurer to pay "all sums" the insured becomes legally obligated to pay as damages because of such property damage. When an insured becomes jointly and severally liable for all clean up costs at a site even though not all such costs were caused by its release, the insurer steps into the shoes of the insured and may also be held jointly and severally liable. Thus, while some personal injury or property damage must occur during the policy period, a rule by which the insured would have to prove precisely how much damage occurred during the policy period would place the insured in an impossible situation.²⁵⁰

VI. CONCLUSION

The limited authority available on the issue indicates that Florida courts would likely adopt the injury-in-fact trigger theory, which is fundamentally equivalent to the continuing trigger theory under Florida law. Based on the policies enunciated in *Wallach v. Rosenberg*,²⁵¹ it appears equally likely that a Florida court would apply the joint and several approach to the allocation issue as long as the insured can show that some covered property damage occurred during the policy period. Since most courts consider environmental contamination to be "property damage" as soon as it occurs, it generally should not be difficult to establish that the policy was triggered. Accordingly, Florida's insured's may be able to obtain full indemnification

249. *Hatco Corp.*, 801 F. Supp. at 1347.

250. See *New Castle County v. Continental Cas. Co.*, 725 F. Supp. 800, 812 (D. Del. 1989) (insured not required to "prove the impossible" in order to establish coverage); see also *Northern States Power Co.*, 523 N.W.2d at 663 (noting "[a]s a public policy matter, this court cannot ignore the difficulty insureds would face if, as is generally the case, they had the burden of proving the amount of damages for each policy at issue").

251. 527 So. 2d 1386 (Fla. 3d Dist. Ct. App. 1988).

when covered occurrences combine with noncovered occurrences to cause indivisible pollution damage.

Nevertheless, courts in other jurisdictions have become increasingly willing to prorate defense and indemnity costs when it appears that environmental damage was continuous or when the date of the occurrence is uncertain. None of the cases discussed above dealt with the situation in which the insured had coverage from different carriers throughout the course of the contamination but elected to proceed against only one of the insurers.²⁵² However, adopting the joint and several liability approach would suggest that the insured bears the burden of showing that other insurance policies are implicated if the insurer can show that the damage was divisible and that only a small portion was attributable to the covered release. In such a case, the court may hold the insurer liable for a fraction of the clean up costs while the insured would have to bear the remaining burden. Nonetheless, this scenario seems unlikely in most cases.

First, it will typically be difficult for the insurer to show divisible damages in most cases. Second, the rationale for prorating costs to the insured—that the insured elected to go uncovered and become a self-insurer—is not present in the case where the insured obtained insurance during all relevant time periods, but could only sustain a claim against a single insurer because of more restrictive pollution exclusions in later policies. Considering the “all sums” language in the standard CGL policy, it is unlikely that a Florida court would prorate costs to the insured for damages outside the policy period.

Despite its growing popularity, the pro-rata, “time-on-the-risk” approach seems to be at odds with an “injury in fact” trigger theory. The standard CGL policy only requires an occurrence, i.e., some unexpected, unintended property damage taking place during the policy period, not that all of the damages occur during the policy period. Thus, once an accident has caused damage during the policy period, the insurer should be liable for “all sums” attributable to that occurrence. Allocation among insurers should be governed by the “other insurance” clauses in the triggered policies.

Finally, the “drafting history” of the standard form CGL policies of 1966 and 1973 indicates that the drafters knew that the occurrence-based language would result in coverage under successive policies for long tail claims, that the language would result in the “pyramiding” of successive policy limits, and that the language contained no allocation method for multiple policies, thus leaving the insurers to apportion claims among

252. An insured may elect not to proceed against an insurer that was on the risk during the time the contamination was present for a number of reasons, including inability to locate policies, difficulty in establishing an “occurrence” during risk policy period, and insurer insolvency. See *New Casile County*, 933 F.2d at 1162; *Wallach*, 527 So. 2d at 1386; *Northern States Power* 523 N.W. 2d at 657.

themselves.²⁵³ Nevertheless, the insurers assumed the obligation to indemnify for “all sums” up to the policy limits, regardless of whether periods of non-coverage were also “triggered.” Under such circumstances, the insurer should bear joint and several liability just as its insureds do under most modern environmental statutes.

253. See John E. Heintz et al., *Allocation of Indemnity Among Multiple Insurance Policies*, 9 ENVTL. CLAIMS J. 5, 11–12 (1996).