Current Coverage Issues and Disputes in Long-Tail Claims

BY RICHARD REZIE

Long-tail claims arise when losses caused by the same general conduct of an insured are incurred over a long period of time. The most common examples are asbestos liability claims against manufacturers, distributors, or users of asbestos containing products, and environmental contamination claims where the original release of the claimed pollutant may have been many decades ago and may have continued over a period of many years. A practitioner faced with such claims either on the insurer or the policyholder side must grapple with many issues; among them are the unresolved issues presented below.

Generally, a large corporate insured will have many decades of insurance policies with layered coverages of primary, umbrella, and then excess policies issued by many different insurers. The overall coverage provided will often be at a lower level in earlier years and slowly increase into, potentially, hundreds of millions of dollars in later years. Thus, the first issue presented is to determine which policies may provide coverage. Ohio law is not settled on that point. There are various competing theories, and combinations of theories, as to which policies are "triggered" to provide coverage for a continuing loss: (1) under "continuous trigger," all policies from first exposure to the end of the loss provide coverage; (2) under "exposure trigger," only the policies in effect at the time of the original exposure or release must provide coverage; (3) under the "manifestation trigger," only the policies in effect on the date that the loss is discovered provide coverage; and (4) under the "injury-in-fact trigger," only the policies in effect on the date that the original exposure or release causes damage, regardless of whether that damage is noted, provide coverage. *Gencorp, Inc. v. AIU Ins. Co.*, 104 F. Supp. 2d 740, 745 (N.D. Ohio 2000). Continuous trigger is generally considered most beneficial to insureds because it provides the potential for coverage under the greatest number of years and insurance policies.

No Ohio appellate court has expressly determined Ohio law on trigger in the context of long-tail claims. *Gencorp, Inc.*, 104 F. Supp. 2d at 745. Rather, the decision most commonly relied upon by the policyholder's bar to argue in favor of continuous trigger is the Lucas County trial court opinion applying continuous trigger to asbestos bodily injury claims in *Owens-Corning Corp. v. American Centennial Ins. Co.*, 74 Ohio Misc.2d 183, 214 (Lucas C.P. 1995); see, also, *Gencorp, Inc.*, 104 F. Supp. 2d at 746 (applying "continuous trigger rule that employs injury-in-fact as the initial triggering event"). To date, insurers have generally avoided litigating the issue. For instance, in *Goodyear Tire & Rubber Co. v. Aetna Cas. & Sur. Co.*, 95 Ohio St.3d 512, 2002-Ohio-2842, the court assumed a continuous trigger because "there is no dispute that there was continuous pollution across multiple periods that gave rise to occurrences and claims to which these policies apply." 2002-Ohio-2848, ¶ 6. The issue of trigger, however, was not actually analyzed or decided. *Id.*

1 The first issue presented is to determine which policies may provide coverage.

2 The next step is generally to determine which insurance policies (and insurers) have a current obligation to cover the loss.

3 Even after determining coverage, settling such long-tail exposures is a potential minefield revolving around the effect of a settlement on insurers who do not join in that settlement.

Moving on from the issue of which policies are triggered, the next step is generally to determine which insurance policies (and insurers) have a current obligation to cover the loss. This is often a key complicating issue because, with long-tail claims, an insured may have many policies over a multi-year period with layers of primary, then umbrella, and then excess coverage provided by various insurers. Where the insurance policy promises to provide coverage for "all sums" the insured becomes liable to pay during the coverage period, Ohio has adopted the "all sums" pick-and-choose method of allocation. *Goodyear*, 95 Ohio St. 3d 512; *Pa. Gen. Ins. Co. v. Park-Ohio Indus.*, 126 Ohio St. 3d 98 (2010). Thus, if the policies promise to cover "all sums," as they often do, the insured can allocate the entire loss to any one primary policy. If that primary policy is exhausted, then the coverage flows vertically upwards through the umbrella policy above the primary policy, and any excess coverages above that. In that way, an insured may allocate the loss to one coverage tower (one primary policy with the umbrella and excess coverages above it). That is termed "vertical" allocation. "Horizontal" allocation is when the loss is allocated across all triggered primary policies equally until they are exhausted, and then all the umbrella policies above them, etc.

If an insured chooses to allocate vertically to one primary policy period, those insurers "targeted" to provide coverage may seek contribution from the other "non-targeted" insurers in other policy periods which were triggered but who have not been requested to respond to the loss by the insured. See *Pa. Gen.*, 126 Ohio St. 3d 98, paragraph one of the syllabus. Thus, in theory, the end result should be the same as if the insured had allocated the loss horizontally. However, if the insured through agreement or otherwise allocates the losses horizontally, the insured may have waived the right to later allocate the entire loss to one targeted tower of coverage. See, e.g.,

GenCorp, Inc v. AIU Ins. Co., 138 Fed. Appx. 732, 2005 U.S. App. LEXIS 13669 (6th Cir.). This can make a significant difference in the amount of available coverage where some insurers are insolvent or the amount of coverage varies significantly over time.

An issue which remains largely unaddressed under Ohio law is the potential effect of a "Prior Insurance and Non-Cumulation of Liability" clause and whether such a clause may, in effect, prevent "all sums" allocation by an insured to one primary policy and the tower of umbrella and excess policies above it. The intended purpose of a Non-Cumulation clause is to allocate the entire loss to the first policy period providing coverage at each coverage level and to eliminate coverage in later years. The language used is relatively standard: "if any loss covered hereunder is also covered in whole or in part under any other excess policy issued to the insured prior to the inception date hereof, the limit of liability ... shall be reduced by any amounts due the insured on account of any such loss under such prior insurance." However, there are a number of unresolved issues as to how this language would be interpreted under Ohio law. The current majority view outside Ohio appears to hold that Non-Cumulation clauses are not "other insurance" clauses because they apply to successive policies rather than concurrent policies. See, e.g., *Plastics Eng'g Co. v. Liberty Mut. Ins. Co.*, 466 F. Supp. 2d 1071, 1082 (E.D. Wis. 2006); *Spaulding Composites Co. v. Aetna Cas. & Sur. Co.*, 176 N.J. 25, 42-44 (2003). Otherwise, Ohio law would generally find two conflicting "other insurance" provisions to nullify one another resulting in pro rata allocation.

If a Non-Cumulation clause were applied as written, then its application would be inconsistent with pro rata allocation because the entire loss would be covered only by the chronologically first policy providing coverage at each layer/limit of coverage. This, however, would not necessarily be inconsistent with "all sums" allocation as it might be interpreted as limiting the coverage available in any "targeted" period to that which was not provided in any prior coverage period, i.e., only the amount of any increase in coverage limits during that coverage period would be available. See, e.g., *Stonewall Ins. Co. v. E.I. du Pont de Nemours & Co.*, 996 A.2d 1254, 1259-1261 (Del. 2010). While the application of the Non-Cumulation clause may appear superficially beneficial to insurers in that it may reduce the total amount of coverage available, it also focuses the loss on a limited number of policies without any right of contribution against the entire coverage block pro rata. This may be a significant disadvantage to the insurers required to provide coverage. Further, the insured may have no real preference or may even benefit from this approach if the coverage limits available in the highest coverage year are sufficient to cover the loss.

Even after determining coverage, settling such long-tail exposures is a potential minefield revolving around the effect of a settlement on insurers who do not join in that settlement. By allocating a loss horizontally across the entire coverage block in settlement, an insured may be deemed to have later waived the right to allocate the loss to any primary policy containing "all sums" language even if that insurer is not a party to the settlement. See, e.g., *GenCorp*, 2005 U.S. App. LEXIS 13669. On the insurer side, in order to obtain set off for a prior settlement, the insurer will likely have to establish that the prior settlement "was for the 'same damages' that" the insured seeks to recover for a second time which can be difficult in long-tail claims. *Goodrich Corp. v. Commercial Union Ins. Co.*, 9th Dist. Summit Nos. 23585 & 23586, 2008-Ohio-3200, ¶¶ 40- 46. Further, insurers face the risk that non-settling insurers may be precluded from seeking contribution from settling insurers. See *OneBeacon Am. Ins. Co. v. Am. Motorists Ins. Co.*, No. 5:09CV2979, 2010 U.S. Dist. LEXIS 116414 (N.D. Ohio Nov. 2, 2010). This may substantially reduce the amount of recovery potentially available should the insured later seek to allocate ongoing losses to a non-settling insurer. Taken together, a non-settling insurer has to consider the possibility that it may not be able to establish a set off based on the prior settlement and may not be able to seek contribution from the settling insurers. As with the preceding issues, both insurers and policyholders face competing theories and risks which often makes settlement on agreed upon terms the most palatable resolution of a dispute.

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