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Occurrence Limits Under Multi-Year Policies

NJ Courts Are Changing Their Approach

By Beth A. Koehler

In complex coverage cases involving "long-tail" claims (such as asbestos bodily injury claims or property damage claims related to environmental pollution), decades of insurance policies can be put at issue. In many states, the policyholder's losses will be spread across the years in which the injury or property damage occurred on a proportionate basis, typically referred to as "time on the risk" or pro rata allocation. *E.g., Security Ins. Co. of Hartford v. Lumbermens Mut. Cas. Co.*, 826 A.2d 107, 116 (Conn. 2003); *Sharon Steel Corp. v. Aetna Cas. & Sur. Co.*, 931 P.2d 127, 141 (Utah 1997); *Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc.*, 633 F.2d 1212, 1224-25 (6th Cir. 1980).

In New Jersey, a continuous trigger and a modified pro rata allocation apply to cases involving progressive injury or damage over multiple years. *E.g., Carter-Wallace, Inc. v. Admiral Ins. Co.*, 712 A.2d 1116, 1123-24 (N.J. 1998); *Owens-Illinois, Inc. v. United Insurance Co.*, 650 A.2d 974, 995 (N.J. 1994). In *Carter-Wallace*, the New Jersey Supreme Court explained that the policyholder's total loss would be apportioned across years based on the "degree of the risks transferred or retained" during each year in which injury or damage took

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Courts Favor Insurers in Airport Cases Seeking Civil Authority Coverage After 9/11

By Lynn K. Neuner and David M. Cooke

On the morning of 9/11, the Federal Aviation Administration reacted to the unfolding national disaster by issuing a "ground stop order" of all aircraft departures regardless of destination. This ground stop order was lifted on Sept. 14, 2001. Due to the events of 9/11, numerous policyholders sought coverage under first-party property policies for coverage of their business interruption losses related to operations at the country's airports. The policyholders claimed that the ground stop order or other governmental orders closed the airports and gave rise to coverage under their policies' Civil Authority provision. Based on varying policy language, insurers resisted these claims on several grounds, including that 1) the ground stop order did not bar access to the airports, 2) the ground stop order was not issued due to property damage, and 3) the ground stop order was not issued due to damage to the insured's property or to adjacent property.

To date, the majority of courts deciding these claims have ruled in favor of the insurers. The most recent decision upholding summary judgment for an insurer is *United Air Lines, Inc., v. Insurance Company of the State of Pennsylvania*, 439 F.3d 128 (2d Cir. 2006), decided by the Second Circuit on Feb. 22, 2006. The Second Circuit rejected United Air Lines' claim for civil authority coverage on the basis that the ground stop order and another order closing Reagan Washington National Airport were issued "based on fears of future attacks," not as a result of property damage at the Pentagon. 439 F.3d at 134. In doing so, the Second Circuit joined a circle of courts deciding similar claims related to airports in Chicago, Philadelphia, and, in one case, across the nation. *See City of Chicago v. Factory Mutual Ins. Co.*, Civil Action No. 02-C-7023, 2004 WL 549447 (N.D. Ill. Mar. 18, 2004); *The Philadelphia Parking Authority v. Federal Ins. Co.*, Civ. Action No. 03-Civ-6748 (DAB), slip op. (S.D.N.Y. Jan. 14, 2005); *The Paradies Shops, Inc. v. Hartford Fire Ins. Co*, Civil Action No. 1:03-CV-3154 (JEC), slip op. (N.D. Ga. Dec. 15, 2004).

In the minority is a decision rendered after a bench trial in *US Airways, Inc. v. Commonwealth Insurance Co.*, Civil Action No. 03-587, 2004 WL 1637139 (Virginia

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Cir. Ct. July 23, 2004). The Virginia state court agreed that Reagan Airport was closed "out of fear of being a target for further terrorist attacks," but concluded that the policy covered civil authority closure orders issued due to the "risk of damage" to an insured's property. 2004 WL 1637139 at *5. The cases cited above reject the position that orders issued to prevent future damage are a sufficient trigger for civil authority coverage. The *US Airways* decision was reversed on appeal, but the Virginia Supreme Court ruled for the insurer on other grounds and did not reach the civil authority issue.

In another case involving the Los Angeles area airports, the court denied summary judgment for the insurer holding that the policy language was ambiguous. *See City of Los Angeles v. Industrial Risk Insurers*, Civil Action No. 03-5416 (RSWL), slip op. (C.D. Calif., Nov. 16, 2004). The case was consensually resolved and dismissed prior to trial. Two other cases, involving airports in Massachusetts and Tennessee, were both settled before significant motion practice. *See Massachusetts Port Authority v. Industrial Risk Insurers*, Civil Action No. 1:03-CV-10533-RCL (D. Mass. Complaint filed Mar. 24, 2003); *Tri-Cities Airport Comm'n v. Chubb Group of Ins. Cos.*, Civil Action No. 2:03-CV-00066 (E.D. Tenn. Complaint removed Feb. 25, 2003).

This article explores the details of the civil authority arguments by focusing on the recent *United Airlines* decision and then provides a brief overview of the other cases in the field.

BACKGROUND OF *UNITED AIR LINES*

United Air Lines ("United") sued the Insurance Company of the State of Pennsylvania ("ISOP") for coverage under its "Property Terrorism & Sabotage Insurance" policy for 9/11-related losses. United claimed that it suffered approximately $1.2 billion in losses and sought coverage for the policy limit of $25 million. The parties filed cross-motions for summary judgment. One of the key issues was whether the Civil Authority provision provided coverage due to the ground stop order and the closure of Reagan Airport.

The Business Interruption portion of the policy stated that "[t]his policy insures against loss resulting directly from the necessary interruption of business caused by damage to or destruction of the Insured Locations, resulting from Terrorism." *United Air Lines, Inc. v. Insurance Co. of the State of Penn.*, 385 F. Supp. 2d 343, 345 (S.D.N.Y. 2005). The Civil Authority provision stated that "[t]his section is specifically extended to cover a situation when access to the Insured Locations is prohibited by order of civil authority as a direct result of damage to adjacent premises, not exceeding, however, two (2) consecutive weeks." *Id.*

On the morning of 9/11, after two planes struck the north and south towers of the World Trade Center, the Federal Aviation Administration issued an order at 9:26 a.m. EST declaring a "ground stop" of all departures of all aircraft. The order stated: "[d]ue to national emergency, ground stop all departures regardless of destination ... repeat ground stop all departures." At 9:40 a.m., a third plane crashed into the Pentagon. At 9:45 a.m., the FAA issued a second order that ceased authorization for all air traffic:

> Due to extraordinary circumstances and for reasons of safety. Attention all aircraft operators, by order of the Federal Aviation Command Center, all airports/airdromes are not authorized for landing and takeoff. All traffic including airborne aircraft are encouraged to land shortly.

At 10:07 a.m., a fourth plane crashed into a field in Stony Creek Township, PA. At 10:15 a.m., the Metropolitan Washington Airports Authority ("MWAA") closed Reagan Airport. At 10:39 a.m., the FAA issued a Notice to Airmen that affirmed the earlier order halting takeoffs and

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Coverage Disputes Involving Multiple Insureds or Claimants

By Jennifer R. Devery and Stacy A. Puente

Coverage disputes may become more complicated when multiple co-insureds or claimants assert rights to coverage under the same finite set of policy limits. For instance, some policyholders have argued that when co-insureds are seeking coverage under the same policy, the insurer must reserve a portion of the available policy limits for each insured so as to ratably distribute the available funds — even while presently pending claims remain outstanding against one of those insureds. If this were correct, however, the insurer would be placed in an untenable position. If the insurer is required to forego the reasonable settlement of presently pending claims in order to preserve shared limits for co-insureds, the insured facing outstanding claims could argue that the insurer violated its good faith duty to settle on its behalf when the opportunity arose. On the other hand, other co-insureds might later argue that the insurer violated the duty of good faith by failing to preserve adequate limits for future claims — leaving the insurer in what is essentially a no-win situation.

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How then may an insurer reconcile its duty to protect the interests of all co-insureds or claimants without being forced to pay out claims above and beyond the policy limits? Absent any policy provision governing the distribution of proceeds in these situations, courts have held that, except in very limited circumstances where there was evidence of insurer bad faith, an insurer's obligations to each respective insured are clear: Limits are to be paid out on a first-come, first-served basis until the policy limits have been exhausted.

The Rule: First Come, First Served

In order to resolve the conflict that may arise when multiple insureds assert rights under shared policy limits, courts allow an insurer to pay out these claims as they are submitted — regardless of the impact on other policyholders. The insurer is not required to consider potential claims when making settlement decisions regarding other policyholders. Rather, so long as the insurer's settlements are reasonable and in good faith, no co-insured may interfere with the settlements of other co-insureds, or demand that a portion of the shared policy limits be reserved for its own exclusive use.

For example, in *Travelers Indem. Co. v. Citgo Petroleum Corp.*, 166 F.3d 761 (5th Cir. 1999), Travelers defended a claim against one of two co-insureds involved in a fatal accident, ultimately settling that claim for the full policy limits. When the decedent's survivors later sued the second co-insured, Travelers denied coverage on the basis that the policy limits had been exhausted in the first settlement. The district court held that Travelers owed no duty to Citgo, the second co-insured, since the policy limits had been exhausted. On appeal, the Fifth Circuit affirmed — finding that Travelers was required to settle the claim against its insured, and Citgo did not allege that the settlement was unreasonable. *Id.* at 768-69. As the court explained:

> Texas courts have also held that an insurer is free to favor a claim by one claimant over a claim by another claimant in pursuit of this duty. We find that the logic of these positions requires that an insurer be free to settle suits against one of its insureds without being hindered by potential liability to co-insured parties who have not yet been sued. *Id.* at 764.

Significantly, the Fifth Circuit acknowledged the "Catch-22" that insurers would face if Citgo's position were accepted:

> Citgo's position in essence means that fulfilling the [insurer's duty to accept a reasonable settlement offer] by exhausting policy limits (or reducing them to a level inadequate for further settlement) triggers potential liability to any other insured that is not included in the settlement. Thus, under Citgo's proposal, an insurer faced with liabilities of multiple insured parties that exceed its policy limits would face an excess liability threat regardless of whether it attempted to create a comprehensive settlement or acted as Travelers did here. Allowing the insurer to focus on only the claim actually before it ... avoids this dilemma. *Id.* at 767.

The Missouri Court of Appeals arrived at the same result in *Millers Mut. Ins. Ass'n of Ill. v. Shell Oil Co.*, 959 S.W.2d 864 (Mo. Ct. App. 1997). Noting the "dilemma" insurers confront when multiple co-insureds seek coverage of claims under the same finite set of policy limits, the *Millers Mutual* court held that an insurer "should not be obligated to defend an additional insured after paying its limits in a reasonable settlement for the named insured." *Id.* at 870. The court reasoned:

> A settlement offer given to only one insured that would exhaust coverage under the liability limit of the policy creates a dilemma for the insurer. An insurer should not be precluded from accepting a reasonable settlement offer for

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> fewer than all insureds. By accepting the offer the insurer would avoid being subjected to liability exceeding the policy limits due to its rejection of a reasonable offer. *Id.* (citations omitted).

Similarly, in *In re Drexel Burnham Lambert Group, Inc.*, 134 B.R. 493 (Bankr. S.D.N.Y. 1991), the Bankruptcy Court for the Southern District of New York rejected the proposition that an insurer must reserve a portion of shared limits to pay claims against a particular insured. There, applying New York law, the court approved a settlement on behalf of one co-insured that consumed 30% of the policy's limits, finding the insurer's settlement payment "reasonable in light of the case law too numerous to be cited that imposes a duty to settle." *Id.* at 498. The court reasoned that "to impose a duty upon an insurer to ascertain all claims under a policy before settling any claims, and to require the insurer to settle individual claims at its peril is contrary to the policy of encouraging compromise and speedy settlement, and turns legal common sense on its head." *Id.* (citations omitted).

The "case law too numerous to be cited that imposes a duty to settle," referenced in the *Drexel Burnham* decision, has primarily arisen out of circumstances where multiple *claimants* asserted rights under a single set of policy limits. In such situations, a vast majority of courts have also allowed an insurer to resolve these competing claims serially.

Specifically, New York courts have termed an insurer's obligation to reasonably resolve claims as opportunities arise, without regard for other, potential claimants, the "first in time, first in right" rule. For example, in *Gerdes v. Travelers Ins. Co.*, 440 N.Y.S.2d 976 (N.Y. Sup. Ct. 1981), three claimants involved in a single auto accident each sought to collect benefits from the driver's uninsured motorist coverage, which provided $20,000 in limits. One claimant initiated arbitration proceedings months before the other two, causing them to seek an order staying the first claimant's arbitration in order to divide the $20,000 limit ratably among all three. The court rejected the

New York courts have termed an insurer's obligation to reasonably resolve claims as opportunities arise, without regard for other, potential claimants, the 'first in time, first in right' rule.

arguments of the two petitioning claimants, finding that the policy did not contain any provision requiring pro rata distribution of policy proceeds among multiple competing claimants:

> [T]he contest of multiple plaintiffs for the limited assets of a common defendant has generally — at least in this jurisdiction — been solved in terms of chronological priority, the *'first in time, first in right'* rule. Thus, an insurer who settles with some parties ... is liable only for the remainder of the policy limits even though it may have been aware that the total claims would probably exceed the policy limits ... *Id.* at 978 (emphasis added; multiple citations omitted).

Likewise, in *Allstate Ins. Co. v. Russell*, 788 N.Y.S.2d 401 (N.Y. App. Div. 2004), Allstate exhausted all uninsured motorist coverage on behalf of two passengers injured in an auto accident before the driver filed a demand for arbitration arising from that same accident. Allstate moved to stay the arbitration, arguing that it owed no obligation to the driver because it had already exhausted the policy limits. The trial court denied Allstate's motion, finding that in order to avoid awards in excess of its policy limits, Allstate should have consolidated the claims. However, the Appellate Division reversed, holding that, "as long as it does not act in bad faith, an insurer has no duty to pay out claims ratably and/or consolidate them." *Id.* at 402.

These recent New York decisions demonstrate the limited applicability of an older New York ruling in which an insurer was prohibited from preferring one insured over another when distributing shared insurance funds. In *Smoral v. Hanover Ins. Co.*, 322 N.Y.S.2d 12 (N.Y. App. Div. 1971), the insurer agreed to pay its full policy limits in exchange for an agreement in which the claimant released all claims against the policyholder (the car's owner) but "specifically reserved all rights" against the driver of the car, who was also insured under the policy. *Id.* at 13. The court found that the insurer had "fully protected" one of its co-insureds, but "left the other completely exposed." *Id.* at 14. Ultimately, the court found that to wholly abandon the interests of one insured in favor of another was tantamount to bad faith: "While [the duty of good faith] has most frequently been considered where the interests of the [insurer] have been preferred to the detriment of the insured, the same considerations would apply with equal force where the company preferred one of its insureds over another." *Id.* This interpretation of *Smoral* as being limited to its particular facts is confirmed by the fact that, after *Smoral*, the New York Appellate Division has repeatedly embraced the "first in time, first in right" principle in cases where the insurer was not alleged to have abandoned its insured as occurred in *Smoral*. *See, e.g., STV Group, Inc. v. American Continental Properties, Inc.*, 650 N.Y.S.2d 204, 205 (N.Y. App. Div. 1996) ("an insurer may settle with less than all of the claimants under a particular policy even if such settlement exhausts the policy proceeds"); *State Farm Ins. Co. v. Credle*, 643 N.Y.S.2d 97, 98 (N.Y. App. Div. 1996) (insurer did not act in "bad faith," and could not be required to pay more than the applicable policy limits, when it exhausted the policy by making payments on a chronological basis to two claimants, even though the insurer had notice, before the payments were

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made, that a third claimant had also made a claim for coverage).

Indeed, the more recent New York opinions are in accord with the vast majority of federal and state court decisions, which hold that an insurer must be free to settle claims against one co-insured without considering other possible claims against other co-insureds, and without being at risk for having to pay amounts in excess of the policy limits. *See, e.g., Voccio v. Reliance Ins. Cos.*, 703 F.2d 1, 3 (1st Cir. 1983) ("Judicial decisions have consistently allowed insurers to settle on the basis of 'first come, first served'"); *Bohn v. Sentry Ins. Co.*, 681 F. Supp. 357, 365 (E.D. La. 1988) (insurer did not commit bad faith by paying policy limits to settle a claim against one of two co-insureds who were co-defendants), *aff'd*, 868 F.2d 1269 (5th Cir. 1989); *Hartford Cas. Ins. Co. v. Dodd*, 416 F. Supp. 1216, 1219 (D. Md. 1976) ("A liability insurer may settle claims in good faith with some claimants, even if such settlements reduce the amount available to others"); *Farinas v. Florida Farm Bureau Gen'l Ins. Co.*, 850 So.2d 555, 561 (Fla. Dist. Ct. App. 2003) (an insurer faced with multiple claims against a single set of policy limits was free to exercise reasonable discretion in deciding which claims to settle, "and may even choose to settle certain claims to the exclusion of others"); *Harmon v. State Farm Mut. Auto. Ins. Co.*, 232 So.2d 206, 207-08 (Fla. Dist. Ct. App. 1970) ("where multiple claims arise out of one accident, the liability insurer has the right to enter reasonable settlements with some of those claimants, regardless of whether the settlements deplete or even exhaust the policy limits to the extent that one or more claimants are left without recourse against the insurance company"); *Miller v. Ga. Interlocal Risk Mgmt. Agency*, 501 S.E.2d 589, 590-91 (Ga. Ct. App. 1998) ("a liability insurer may, in good faith and without notification to others, settle part of multiple claims against its insured even though such settlements deplete or exhaust the policy limits so that remaining claimants have no recourse against (the) insurer"), quoting *Allstate Ins. Co. v. Evans*, 409 S.E.2d 273, 274 (Ga. Ct. App. 1991); *Country Mut. Ins. Co. v. Anderson*, 628 N.E.2d 499, 503 (Ill. App. Ct. 1993) ("There was no requirement that [the insurer] should have compromised the interests of [two co-insureds] and forego a settlement opportunity"); *Anglo-American Ins. Co. v. Molin*, 670 A.2d 194, 199 (Pa. Commw. Ct. 1995) (an insurer is not precluded from paying policy limits to settle a claim against just one of several alleged co-insureds, even though by doing so the policy limits available to the other co-insureds are diminished).

The Limited Circumstances Under Which First Come, First Served Is Not Applied

A few courts have declined to apply the first come, first served rule and instead have ratably distributed insurance proceeds. However, those decisions have arisen in situations where the insurer purportedly settled or refused to settle claims in bad faith.

For instance, in *Great Lakes Dredge & Dock Co. v. Commercial Union Assur. Co.*, No. 94 C 2579, 1999 WL 705599 (N.D. Ill. Aug. 27, 1999), an insurer exhausted policy limits on behalf of one insured, while failing to respond to an additional insured's simultaneous requests for coverage. The court held that the insurer's actions had been in bad faith, and therefore that the insurer's liability would not be satisfied by the exhaustion of the policy limits. *Id.* at *8. The court ultimately awarded the additional insured half of the policy limits. *Id.*

Moreover, in *Schwartz v. State Farm Fire & Cas. Co.*, 88 Cal. App. 4th 1329 (Cal. Ct. App. 2001), two insureds, exposed to liability from a single incident, sued their insurance company after it paid policy limits to other insureds. The court found that although the insurer knew that multiple plaintiffs would bring competing claims against the same funds, the insurer "nevertheless took no steps to reserve a proportionate share of the excess policy benefits in anticipation of the [plaintiff's] claim or to advise them before disbursing benefits" to the other insureds. *Id.* at 1334. The court reversed summary judgment in favor of the insurer, holding that "[t]he duty imposed by the covenant of good faith and fair dealing includes the duty not to favor the interest of one of its insureds over the interests of the other." *Id.* at 1337.

Thus, in contrast to the majority of cases, courts distributing shared insurance funds ratably have done so only after finding that the insurer reached an unreasonable settlement or otherwise acted in bad faith by appearing to prefer one insured over another when competing claims are presented to, or otherwise known to, the insurer at the time it settles with one insured but not the other. However, these outlying cases do not alter the first come, first served rule, which seeks to avoid placing the insurer at risk of bad faith liability to all of its co-insureds, and to prevent insurers from paying out amounts far in excess of the contractually defined policy limits.

Conclusion

Courts recognize that forcing an insurer to reserve policy limits for potential claims or for one insured's sole use, while claims that could be settled within policy limits remain outstanding, would place the insurer in a no-win situation. Under such circumstances, the insurer could potentially face bad-faith liability to *all* of its co-insureds, no matter how coverage was distributed, and might be forced to pay out amounts far in excess of the policy limits. In order to avoid this potential "Catch-22," these courts have correctly followed a "first come, first served" approach.

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landings at all airports. The FAA's ground stop order was lifted nationwide on Sept. 14, 2001. Reagan Airport did not reopen until Oct. 4, 2001.

United sought coverage under its policy, asserting a variety of arguments. The District Court, in an opinion authored by Judge Richard M. Berman, rejected United's claim that the policy's general Insuring Agreement did not require actual physical damage to provide coverage and could instead be triggered by the prohibition of access to United's gates. The court also rejected the argument that the destruction of United's ticket counter in the World Trade Center entitled United to recovery of its systemwide losses due to the ground stop order. The court likewise denied United's alternative claim that the accumulation of ash at its gates in Reagan Airport qualified as the type of "property damage" necessary to sustain a claim for nationwide losses under the business interruption provision.

With respect to the Civil Authority provision, United argued that its losses were covered because (a) governmental authorities issued the ground stop order and the closure of Reagan Airport as a direct result of damage to the Pentagon, and (b) the Pentagon is an "adjacent premises" to United's gates at Reagan Airport. ISOP denied coverage for the claim on the grounds that (a) the ground stop order and airport closure order were issued to prevent future attacks, not as a result of the damage to the Pentagon, and (b) the Pentagon does not qualify as an "adjacent premises."

The District Court agreed with ISOP. Judge Berman concluded that the Pentagon and Regan Airport are not "adjacent," finding that the two properties are 3.4 miles away from each other by car and separated by several intervening structures and properties. The court also ruled that "[n]othing in the record supports [United's] contention that access to Reagan Airport was barred until October 4, 2001 'as a direct result of damage' to the Pentagon." 385 F. Supp. 2d at 353.

The court found that the evidence indicated, to the contrary, that "access to Reagan Airport was barred until October 4, 2001 in order to 'prevent further attacks and as a matter of national security.'" *Id.* As evidence, the court cited to a Memorandum of Understanding between the U.S. Department of Transportation and the Metropolitan Washington Airports Authority on Assistance for Ronald Regan Washington National Airport dated Dec. 6, 2001, which stated as follows:

> Because of the location of [Reagan Airport] and the airport's flight paths that take aircraft near the White House, Pentagon, Capitol, and other facilities in the Nation's capital, the Federal Government required that [Reagan Airport] remain completely closed until October 4, 2001, when a phased reopening began. *Id.*

The court also cited to deposition testimony of the MWAA officer in charge of operations, who stated that "I certainly felt that [Reagan Airport] was at risk, at risk for further attack, which again was the reason for evacuating it in the first place." *Id.* at 354. Given this evidence, the court found that United failed to show that the ground stop and closure orders were the "direct result" of property damage at the Pentagon. *Id.* at 353-54.

[T]he court found that in order to recover, United must show that civil authority orders barred access to United's property as a direct result of damage to adjacent premises.

The Second Circuit's Analysis In *United Airlines*

The Second Circuit upheld Judge Berman's decision in an opinion authored by Judge Robert D. Sack and joined by Judges José Cabranes and Ralph K. Winter. The court flatly rejected United's claim that it need not show actual physical damage to recover its business interruption losses under the general Insuring Agreement. The court stated that United was trying to invent "fictitious" coverage under a so-called "Suppression of Damages" clause, which the court found "does not exist" in the policy. 439 F.3d at 133 n.3. The court also dismissed in a footnote United's contention that the accumulation of ash at its Reagan Airport gates constituted "property damage" that led to the closing of the airport. *Id.* at 134 n.4.

With respect to the Civil Authority Clause, the court found that in order to recover, United must show that civil authority orders barred access to United's property as a direct result of damage to adjacent premises. The court indicated its agreement with Judge Berman's conclusion that the Pentagon and Reagan Airport are not "adjacent premises," noting that "the properties are still 'separated by the Crystal City apartment complex, three highways, an active railway, fifteen identifiable parcels of property, a waterfowl sanctuary, and a wooded area.'" 439 F.3d at 134.

The Second Circuit ruled however, that it need not resolve the "adjacent premises" question because United could not show that Reagan Airport was shut down as a result of damage to the Pentagon. The court noted that the first ground stop order was issued before the Pentagon was even struck. The court further ruled that the evidence showed that the government's decision "to halt operations at the Airport indefinitely was based on fears of future attacks." *Id.* The Second Circuit referred to the same Memorandum of Understanding cited by the District Court but a different portion of the testimony provided by the MWAA officer in charge, in which he stated that "[t]he decision to evacuate was the result of what the terrorists had demonstrated at the Pentagon and knowledge that other aircraft were suspect or in fact being high-jacked themselves." *Id.* at 135 n.7. The court interpreted this testimony as evidence that the "attack on the Pentagon 'caused' the shutdown only in the sense that it made the

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government fearful of future attacks." *Id.* Finally, the court observed that Reagan Airport was allowed to reopen once it met certain safety standards and not based on the repair or rebuilding of the Pentagon. The court thus concluded that the government's closure orders were not the direct result of property damage at the Pentagon and ruled against United.

Other Airport Cases Denying Policyholders' Claims for Coverage

The Second Circuit's decision in *United Airlines* places it in agreement with three other courts that denied similar claims for coverage related to the halting of airport operations. The *City of Chicago* case turns on an analysis of an Ingress/Egress provision and a Preservation of Property provision while *Paradies Shops* and *Philadelphia Parking Authority* focus on claims under the Civil Authority clause.

City of Chicago involved a claim by Chicago against Factory Mutual Insurance Company for coverage of business losses at O'Hare, Midway, and Meigs Field airports due to the FAA ground stop orders. The city did not seek coverage under the Civil Authority clause, likely because the policy explicitly stated that the civil authority orders must have been issued as a direct result of physical damage at the insured's property "or within 1,000 feet of it." 2004 WL 549447, at *4. The Northern District of Illinois denied coverage under the Ingress/Egress provision, finding that this coverage implicitly included the same territorial restriction. More to the point, the court found that there was no coverage under the Preservation of Property provision because it afforded coverage only where business was interrupted to prevent immediately pending physical loss to the insured's property. Importantly, the court ruled that the FAA orders were not issued to prevent damage to Chicago's airports, stating:

> The ground stop order was ultimately imposed to protect against any further terrorist attacks like those that damaged and/or destroyed the World Trade Center and the Pentagon. There is no evidence that the FAA's ground stop was in any way imposed in order to protect Midway, O'Hare, or Meigs Field from immediately impending physical loss or damage. *Id.* at *4.

City of Chicago was the first case to make a ruling on the reason for the FAA's ground stop orders, and its decision on this point was cited in both *Paradies Shops* and *United Air Lines.*

In *Paradies Shops*, the policyholder was an owner of various airport boutiques at 62 airports across the country. The Northern District of Georgia rejected the policyholder's claim for civil authority coverage, finding that the FAA's ground stop order did not specifically bar access to the policyholder's premises but rather grounded all flights. The court rejected as hearsay the affidavits of the policyholder's store managers that unnamed airport officials told them the airports were closed. After quoting from *City of Chicago*, the court also concluded that there was no coverage under the Civil Authority provision because "the ground stop order was issued as a result of the threat of additional terrorist attacks involving the nation's airlines and not because of the existing disasters at the World Trade Center, the Pentagon, or Stony Creek Township, Pennsylvania." Slip op. at 16-17. To reach this finding, the court cited Senate testimony by then-Secretary of Transportation Norman Mineta that he personally ordered the ground stop and that "with the risk of additional flights that might be used as terrorist weapons, I believe it was the right and necessary step to take." Slip op. at 6. The court concluded that because the ground stop order was designed to protect against future damage, it was not issued as "a direct result" of already existing property loss. *Id.* at 17.

Philadelphia Parking Authority involved a claim for business interruption losses by a Pennsylvania state agency that operates parking garages at the Philadelphia International Airport. Like United Air Lines, the Parking Authority argued that it should not have to show actual physical damage in order to recover under the business interruption provisions. The court rejected this claim, ruling that the policy as a whole unambiguously required property damage as a precondition to recovery of business interruption losses. The court further ruled that the insured could not recover under the Civil Authority provision because the FAA's ground stop order clearly did not bar access to the policyholder's premises. Based on this ruling, the court stated that it need not decide whether the FAA issued the ground stop order as a direct result of damage at the World Trade Center, Pentagon, and Stony Creek Township, PA. This case was a significant win for the insurer because the court ruled on a motion to dismiss, avoiding the time and expense of discovery.

The *US Airways* Case

In *US Airways*, the Virginia state court initially denied the insurer's summary judgment motion and then ruled in favor of the policyholder after a bench trial. US Airways asserted claims for business interruption losses due to the FAA's ground stop order and the closure of Reagan Airport. At the summary judgment stage, the court ruled that US Airways need not prove that its own property was damaged in order to recover under the Civil Authority provision. Inexplicably, however, the court proceeded to say that "a jury could find that coverage applied under the civil or military intervention provision" without addressing the insurer's argument that the ground stop order was issued to prevent future property damage as opposed to damage that had already taken place in New York, Virginia, and Pennsylvania. *Id.* at *3, *5. The court provided no discussion of the pertinent Memorandum of Understanding or any testimony of the WMAA officer-in-charge or the Secretary of Transportation.

After a subsequent bench trial, the court ruled that there was coverage under the Civil Authority provision because the policy did "not require actual damage or loss of property to invoke coverage," and the ground stop and airport closure orders were

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issued "as a direct result of risk of damage or loss to US Airways property." *Id.* at *5. Specifically, the court found that Reagan Airport was closed "as a direct result of fear that United Flight 93 was heading for the airport." *Id.* The court cited to testimony of the WMAA officer-in-charge that "it was his understanding that Reagan National Airport could be a target of a terrorist attack." *Id.* This court's rulings place it squarely at odds with the above-cited courts that addressed the same issue. On the one hand, the Virginia court agreed with and reinforced their conclusion that the government's orders were issued based on a fear of further terrorist attacks, not as a direct result of preceding property damage. On the other hand, this court held that prevention of future harm is a covered peril under the Civil Authority clause in direct contravention of the other authorities cited above. The court's analysis appears to turn on the policy language defining "peril insured against" as "all *risk* of direct physical loss of or damage to property described herein ... " *Id.* at *5 (emphasis added).

On appeal, the Virginia Supreme Court reversed the trial court's decision, but ruled in favor of the insurer on the basis that US Airways was required to offset its insurance claim by the funds it had received from the federal government under the Air Transportation Safety and System Stabilization Act. *See PMA Capital Ins. Co. v. US Airways, Inc.*, No. 051179, 2006 WL 508787 (Vir. Mar. 3, 2006). The Virginia Supreme Court did not reach the civil authority issue. Its final order, however, "reversed and annulled" the judgment of the trial court. *See PMA Capital Ins. Co. v. US Airways, Inc.*, 051179, final order (Vir. May 25, 2006).

CONCLUSION

The Second Circuit's opinion in *United Airlines* is the most recent decision in a steady line of cases to find that the governmental orders ceasing all air traffic and closing certain airports on 9/11 were issued to prevent future terrorist attacks and were not the "direct result" of property damage that had already occurred at the World Trade Center, the Pentagon, and Stony Creek Township, PA. The majority of these cases consequently hold that there is no coverage under the Civil Authority provision for business interruption losses associated with policyholders' airport-related operations. The *US Airways* trial court decision reaches a similar factual conclusion about the motivations for the governmental orders, but an opposite holding on the scope of the Civil Authority provision. While policy language can explain some differences in different judicial holdings, the result reached in *US Airways* would create an entirely new aspect of civil authority coverage — one that extends coverage for preventive measures. To date, courts have traditionally rejected such claims under the Civil Authority provision. *See, e.g., Syufy Enters. v. Home Ins. Co. of Indiana*, Civil Action No. 94-0756 (FMS), 1995 WL 129229 (N.D. Cal. Mar. 21, 1995) (rejecting coverage for losses sustained as result of curfews imposed after the Rodney King verdict on the basis that the curfews were ordered to prevent potential looting and rioting). Based on the Virginia Supreme Court's decision, the trial court ruling in *US Airways* has been nullified and is no longer valid law. Setting this ruling aside, the courts that have addressed civil authority coverage for airport-related losses have nearly unanimously ruled in the insurers' favor.

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place. *Id.* at 1121-22 (*quoting Owens-Illinois*). Thus, if a policyholder purchased more coverage in a particular year, a greater proportion of the loss may be allocated to that year than to years in which the policyholder purchased less coverage. While this approach seems straightforward, complications can arise if the policyholder did not only purchase policies with "one-year" terms, but also purchased multi-year policies (*ie*, single policies providing coverage for more than 1 year and often over multiple annual periods). If the policyholder purchased multi-year policies, is the policyholder entitled to a single occurrence limit for the entire policy period, or can it claim a separate occurrence limit for each annual period that the policy was in effect?

While policy language varies, multi-year general liability policies typically provide a separate "occurrence" limit and "annual aggregate" limit. For example, a 3-year policy may provide a $1 million per "occurrence" limit for the length of the policy, but explicitly provide a $1 million "annual aggregate" for separate occurrences. If the claims against the policyholder are deemed to be "multiple occurrences," annual limits may be available under a multi-year policy, because, in that instance, the policyholder's claims would bring the annual aggregate into play. Thus, in our example, it is possible that up to $3 million in coverage would be available to the policyholder if the claims constitute three or more separate occurrences.

Issues arise, however, when claims against the policyholder are found to constitute a single "occurrence." In that situation, policyholders sometimes argue that they are entitled to a separate occurrence limit for each annual period of the policy, because such an approach maximizes coverage. Insurance companies, on the other hand, point out that the policy language itself provides that only a single occurrence limit is available for the entire policy term. Thus, if the claims against the policyholder only constitute one "occurrence," the policy can only provide one occurrence limit, even if the policy may be in effect for 2 or 3 years. Thus, in the example discussed above, the insurance company would take the position that only $1 million in coverage is available for a single occurrence, assuming that all other coverage requirements have been satisfied.

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Majority View: One Occurrence Limit

The vast majority of courts that have addressed this issue have found that, unless there is specific language to the contrary, where the claims constitute a single occurrence, a policy purchased for more than 1 year only provides one occurrence limit for the entire policy term (*ie,* "term limits") — not a separate occurrence limit for each year of the policy. *E.g., Society of Roman Catholic Church v. Interstate Fire & Cas. Co.*, 26 F.3d 1359, 1366 (5th Cir. 1994) ("Clearly, a three-year 'occurrence' policy provides less coverage than three one-year policies, because an occurrence could last longer than one year."); *Greene, Tweed & Co. v. Hartford Accident & Indem. Co.*, Civ. A. No. 03-3637, 2006 WL 1050110, at *10 (E.D. Pa. Apr. 21, 2006) (holding that the multi-year policy distinguished "per-occurrence and aggregate limits" and that only one occurrence limit was available for the policyholder's asbestos liabilities); *Maryland Cas. Co. v. W.R. Grace Co.*, No. 88 CIV. 2613, 1996 WL 169326, at *5 (S.D.N.Y. April 11, 1996) (court refused to "alter the plain terms of the contract by adding the word 'annual' where it simply does not otherwise exist."); *CSX Transp., Inc. v. Commercial Union Ins. Co.*, 82 F.3d 478, 483 (D.C. Cir. 1996) (finding that that "[t]he coverage limitation is devoid of any language suggesting that 'each occurrence' should be read as 'each occurrence each year.'"); *General Refractories Co. v. Allstate Ins. Co.*, Civ. A. No. 89-7924, 1994 WL 246274, at *3 (E.D. Pa. June 8, 1994) ("the plain and unambiguous language of each [policy] establishes that only one per occurrence limit is available for any single occurrence during the policy period") (quotation and citation omitted); *Diamond Trans. System, Inc. v. Travelers Indem. Co.*, 817 F. Supp. 710, 712 (N.D. Ill. 1993) (limiting policyholder to one occurrence limit); *Chesapeake & Ohio Ry. Co. v. Certain Underwriters at Lloyd's London*, 834 F. Supp. 456, 462-63 (D.D.C. 1993) (only one occurrence limit applied, despite annual aggregates language and policyholder's annual payment of premiums); *Hercules, Inc. v. AIU Ins. Co.*, 784 A.2d 481, 495 (Del. 2001) (upholding trial court ruling that a single per occurrence limit applied); *Outboard Marine Corp. v. Liberty Mut. Ins. Co.*, 670 N.E.2d 740, 751 (Ill. App. Ct. 1996) (finding that trial court erred in annualizing limits in connection with settlement credits); *Diamond Shamrock Chem. Co. v. Aetna Cas. & Sur. Co.*, 609 A.2d 440, 468 (N.J. Super. Ct. App. Div. 1992) ("the excess policies establish a single limit of liability for an occurrence without regard to whether the injury or injuries attributable to the occurrence take place at the same time, in one year, or over three years."). *See also Travelers Cas. & Sur. Co. v. Constitution Reins. Corp.*, No. 01-71057, 2004 WL 2387313, at *4 (E.D. Mich. Aug. 2, 2004) (reinsurance) ("Interpreting 'each occurrence' to mean 'each occurrence, each year' would require reading in a contract term that is not there.").

Minority View: Annual Occurrence Limits

A minority of courts have taken the opposite approach, usually where the policy language is arguably less clear, and have found that annual occurrence limits are available under multi-year policies. For example, in *Commercial Union Insurance Co. v. Swiss Reinsurance America Corp.*, 413 F.3d 121 (1st Cir. 2005), the court, predicting New York and Massachusetts law, held that a reinsurer was bound by its cedent's decision to settle policies on an annualized basis. *Id.* at 127. The court further suggested that annual limits should apply regardless, based on the fact that the multi-year policies in that case followed form to policies that contained annualization language. *Id.* at 126 ("[A]rguably, Commercial Union's policy language should be read to dovetail with Maryland's policy; *ie,* by applying caps on the same annualized basis."). *See also, e.g., Stonewall Ins. Co. v. City of Palos Verde Estates*, 46 Cal. App. 4th 1810, 1849 (Cal. Ct. App. 1996) (court annualized limits, in part, because it found that the policy language was ambiguous).

Several older New Jersey cases had appeared to follow that minority approach deeming annual occurrence limits available under policies issued for more than 1 year. In *Chemical Leaman Tank Lines, Inc. v. Aetna Casualty & Surety Co.*, 978 F. Supp. 589 (D.N.J. 1997), *rev'd and remanded on other grounds*, 177 F.3d 210 (3d Cir. 1999), the court, predicting New Jersey law, held that the policyholder was entitled to a separate annual limit for each year that the policy was in effect in a case involving environmental property damage. The court principally relied on the New Jersey Supreme Court's trigger ruling in *Owens-Illinois, supra.* In *Owens-Illinois*, the court stated that property damage should be treated "as an occurrence within each of the years of a CGL policy." *Owens-Illinois* 650 A.2d at 995; *see also Chemical Leaman* at 607 (*quoting Owens-Illinois*). The *Chemical Leaman* court interpreted this language as requiring annualization of occurrence limits, notwithstanding language to the contrary. As stated by the court:

> On its face, this language appears to direct treatment of progressive property damage as *distinct* occurrences triggering per-occurrence limits in each year of a policy. Furthermore, a consideration of the context of this statement leads the Court to conclude that this is in fact the proper construction of *Owens-Illinois. Id.* at 607 (emphasis in original).

The *Chemical Leaman* court also looked to California case law in support of its conclusion. *Id.* at 607-08 (discussing *Armstrong World Indus. v. Aetna Cas. & Sur. Co.*, 45 Cal. App. 4th 1 (Cal. Ct. App. 1996)).

After the holding in *Chemical Leaman*, another New Jersey federal court also held that multi-year policies provide a separate annual limit for each year that the policy was in effect

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regardless of the number of occurrences. In *Mennen Co. v. Atlantic Mut. Ins. Co.*, No. 93-Civ-5273, 1999 WL 33654297 (D.N.J. Oct. 26, 1999), a case involving environmental pollution, the court cited *Chemical Leaman* and *Owens-Illinois* as deeming annual limits available under the multi-year policies at issue. *Id.* at *5. A New Jersey state court appears to have taken the same approach in *U.S. Mineral Products Co. v. American Insurance Co.*, 792 A.2d 500, 518 (N.J. Sup. Ct. App. Div. 2002) ("[L]osses in an environmental damages case must be treated as an occurrence in *each* of the periods covered by a comprehensive general liability policy.") (emphasis in original).

Improper Extension of *Owens-Illinois*

As discussed above, the New Jersey courts that have found annual limits to be available principally have relied on *Owens-Illinois* for the proposition that multi-year policies provide annual limits. However, upon a closer analysis, it appears that those courts have improperly extended *Owens-Illinois* beyond what it actually decided. At issue in *Owens-Illinois* was the manner in which losses for property damage should be allocated across multiple years. In holding that property damage should be treated "as an occurrence within each of the years of a CGL policy," the court merely was stating that each policy period during which property damage had occurred had been "triggered." The question of the limits provided by multi-year policies was simply not part of the ruling in *Owens-Illinois*.

While not addressing the issue of the number of occurrence limits, subsequent New Jersey Supreme Court opinions have quoted language from *Chemical Leaman*. Again, however, it appears that these subsequent cases were merely reiterating the trigger holding in *Owens-Illinois*. *See Benjamin Moore & Co. v. Aetna Cas. & Sur. Co.*, 843 A.2d 1094, 1102 (N.J. 2004) ("[P]rogressive indivisible injuries '*should be* treated as an occurrence within each of the years of a CGL policy.'") (*quoting Spaulding, infra*, emphasis in original); *Spaulding Composites Co., Inc. v. Aetna Cas. & Sur. Co.*, 819 A.2d 410 (N.J. 2003) ("*On its face*, this language appears to direct treatment of progressive property damage as distinct occurrences triggering per-occurrence limits in each year of a policy.") (*quoting Chemical Leaman*, emphasis in original); *Carter-Wallace, Inc. v. Admiral Ins. Co.*, 712 A.2d 1116, 1124 (N.J. 1998) (stating that "[w]e believe Judge Brotman's well-reasoned opinion in *Chemical Leaman* represents a natural extension of *Owens-Illinois*.").

[T]wo more recent New Jersey appellate opinions have squarely held that* Owens-Illinois *should not be interpreted as requiring the imposition of annual occurrence limits.

Recent Opinions Reject 'Annual Occurrence Limits' Interpretation of *Owens-Illinois*

On the other hand, two more recent New Jersey appellate opinions have squarely held that *Owens-Illinois* should not be interpreted as requiring the imposition of annual occurrence limits. At issue in *Westinghouse Electric Corp. v. American Home Assurance Co.*, Nos. A-6706-01T5, A-6720-01T5, 2004 WL 1878764 (N.J. Super. Ct. App. Div. July 8, 2004), was insurance coverage for bodily injury claims resulting from products containing asbestos, polychlorinated biphenyls, and welding rods. *Id.* at *1. The court, although technically applying Pennsylvania law, nonetheless addressed the policyholder's argument that *Owens-Illinois* and *U.S. Mineral Products* dictated an annual limits approach. The court rejected the policyholder's argument, and held that:

> Neither of these two cases addressed the issue presented here; namely, whether a multiple-year policy can have one per-occurrence limit. Both New Jersey cases cited by plaintiff discussed the continuous-trigger theory in determining when an injury occurred in cases of progressive indivisible injury or damage resulting from exposure to injurious conditions. Under the continuous-trigger doctrine, the court could treat a progressive injury as an 'occurrence within each of the years' of a CGL policy. [*quoting Owens-Illinois*]. Because the question of multi-year policies was not addressed, plaintiff overreads the case and *United States Mineral Products*, which relied on it, for the proposition that when there are multiple-year policies, the policies have annual per-occurrence limits. *Id.* at 33.

Following *Westinghouse*, another New Jersey appellate court, although technically applying New York law, also agreed that *Carter-Wallace*, *Owens-Illinois*, and *U.S. Mineral Products* had no bearing on the issue of whether per-occurrence limits should be annualized in multi-year policies. *Uniroyal, Inc. v. American Re-Insurance Co.*, No. A-6718-02T1, 43-44 (N.J. Super. Ct. App. Div. Sept. 13, 2005) ("None of those decisions considered the question of whether a multi-year policy provided for a single per-occurrence limit over the entire length of the policy or for annualized per-occurrence limits for each year of the policy's existence.").

Both the *Westinghouse* and *Uniroyal* courts looked solely to the policy language in holding that the per-occurrence limits should not be annualized. In those cases, the policies provided for a single per-occurrence limit and an annual aggregate that might come into play if there were multiple occurrences. *Westinghouse* at *32-34, *Uniroyal* at 34-35. The *Westinghouse* and *Uniroyal* courts concluded that the word "annual" only applied to the "aggregate" limits available under the policies, not the "occurrence" limits. *Westinghouse* at *34, *Uniroyal* at 39-40 ("Indeed, the use of the word annual in the policy applies only to the aggregate coverage rather than to the per-occurrence limit which is set forth in an entirely different paragraph. If the parties had intended an

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OREGON INTERMEDIATE COURT TAKES A STAND ON ALLOCATION AND SETTLEMENTS

In *Cascade Corp. v. American Home Assurance Co., et al.*, No. A118185 (Or. Ct. App. May 17, 2006), an Oregon intermediate appellate court, applying Oregon law, reversed a trial court's pro rata allocation of a policyholder's liability for environmental contamination, holding that the lone remaining non-settling excess insurer was jointly and severally liable for all of the policyholder's unreimbursed past and future remediation and defense costs until exhaustion of its policy limits. The court also: 1) ordered the insurer to pay prejudgment interest from the date of the settlement exhausting the primary insurance coverage below the insurer's policies; and 2) reversed the trial court's decision not to award attorneys' fees to the policyholder, remanding the issue to the trial court for further consideration. In its decision, the court did not address the recently enacted Oregon claims statute, ORS 465.480, including whether the statute was constitutional and, if so, whether it mandated the same result.

Since the mid-1950s, the policyholder owned and operated an industrial facility in Oregon. From 1961 until 1975, the policyholder used trichloroethylene ("TCE") as a solvent to degrease and clean metal parts at the facility. In the 1980s, state and federal environmental agencies began investigating groundwater contamination around the plant. After discovery of contaminated groundwater, a nearby landowner sued the policyholder to recover its expenses associated with cleaning up contamination in that area. After a trial, a federal district court concluded that the policyholder was responsible for 70% of the property owner's cleanup costs.

In 1992, the policyholder sued its primary and excess liability insurers seeking indemnification for past cleanup and defense expenses as well as a declaration regarding coverage for its future defense and indemnity obligations. In 1997, prior to trial, the policyholder entered into a $9.75 million settlement — for remediation and defense expenses — with all but one of its primary insurers. During the trial, the policyholder entered into a $14 million settlement with certain excess insurers — for future costs only—leaving only two excess insurers as defendants (one of the excess insurers had the lone remaining small primary policy). After the trial, a jury found that the policyholder had approximately $3.8 million in unreimbursed past remediation and defense costs, and the limits of the remaining primary policy were paid.

The policyholder then argued that it was entitled to recover the remaining $3.8 million in past costs jointly and severally from the two non-settling excess insurers. In the alternative, the policyholder argued that, if allocation were necessary, the settlement amounts should be treated as the policy limits of those settled policies. In contrast, the insurers argued that the policyholder's liability should be apportioned over all triggered policies, including those that had been compromised through settlement and, for purposes of allocation, the policy limits should be used to determine each insurer's appropriate share. This approach is, of course, the basic approach of a pro rata allocation, which many states have adopted in cases involving injury found to occur over many years. In this case, the trial court had concluded that there were concurrent applicable policies with mutually repugnant "other insurance" clauses, and, pursuant to *Lamb-Weston, Inc. v. Oregon Automobile Insurance Co.*, 219 Or. 110, 341 P.2d 110 (1959), modified and rehearing denied, 219 Or. 130, 346 P.2d 643 (1959) (en banc), each remaining insurer would be allocated a portion of the policyholder's liability. The trial court used the policy limits of all excess policies as the basis for determining each excess insurer's share and allocated approximately 0.5% and 3.1% of the past and future costs to the two remaining excess insurers, respectively. The policyholder appealed, and the excess insurer receiving the smaller share settled.

However, the intermediate appellate court reversed the trial court's decision to allocate liability. It concluded that *Lamb-Weston* supports joint and several liability under Oregon law. In *Lamb-Weston*, two insurance policies covered property damage caused by a truck accident, but these two policies had incompatible "other insurance" clauses. The Oregon Supreme Court concluded that the clauses were mutually repugnant and that liability for the damage would be apportioned to both insurers based on the limits of each policy. In the intermediate appellate court's opinion, however, the "underlying principle" of *Lamb-Weston* was that "each insurer is fully liable to the insured" to the extent of its policy limits. The intermediate court also opined that "[o]ne insurer's overpayment does not reduce the obligation of other insurers to the insured," relying on *Thurman v. Signal Insurance Co.*, 260 Or. 524, 491 P.2d 1002 (1971). In *Thurman*, a policyholder sought recovery for her injuries under the uninsured motorist provisions of two automobile insurance policies (which exceeded $20,000). Although each policy provided limits of $10,000, anti-stacking language in both policies limited the total recovery available to the policyholder to $10,000 — with each insurer responsible for $5000. After one insurer paid $10,000, the Oregon Supreme Court concluded that the other insurer was still liable for its full $5000 share because an insurer's liability to its policyholder is not affected by the

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Laura A. Foggan and **Jonathan Woodruff** of Wiley Rein & Fielding LLP submitted this month's case brief. They represent the Complex Insurance Claims Litigation Association, which appeared as an amicus curiae in support of the insurers in this case.

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payments of other insurers. According to the intermediate appellate court, this reasoning also meant that "one insurer's reasonable settlement with the insured also does not reduce another insurer's obligation."

The Oregon intermediate court also stated that, applying its joint and several liability approach, a policyholder is not required to either: 1) seek payment from one insurer and let that insurer obtain contribution from other insurers; or 2) do as it did here and sue all insurers who provided concurrent coverage and accept the court's allocation of liability among them. In the intermediate court's opinion, the *Lamb-Weston* analysis did not depend on or relate to the number of insurers sued; an insurer sued singly could implead any other insurers — "thus producing the same procedural situation" to the policyholder; and it would discourage settlements with fewer than all insurers because any settlement for less than policy limits would "prevent the insured from ever recovering the full insured amount of its loss." The court overlooked the obvious point that settlements almost always result in a compromise, thus preventing the plaintiff from "recovering the full amount" it claims.

Ultimately, the Oregon intermediate court held that the last remaining excess insurer was liable for the $3.8 million in past costs plus the policyholder's future costs, until exhaustion of its policy's limits. Because the court determined that *Lamb-Weston* supported joint and several liability, the court explicitly noted that it was not addressing whether the recently enacted Oregon claims statute, ORS 465.480, mandated the same result, including the important unresolved arguments regarding whether that statute is constitutional.

The Oregon Supreme Court has not addressed the issues in this ruling and now will likely be asked to resolve these important questions regarding allocation of loss among insurers and policyholders in Oregon, including how settlements will affect such allocations.

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annual limit for the per-occurrence coverage, they would have used the phrase 'for each annual period' in the paragraph addressing per-occurrence limits. They did not.").

After that finding the policy language was unambiguous, both the *Westinghouse* and *Uniroyal* courts held that, because the language was clear, there was no need to address case law at all in reaching their conclusions that the multi-year policies only provided one "occurrence" limit. *Westinghouse* at 34 ("The policy clearly states that it is liable for only one per-occurrence limit per-policy period, not per year. Because the policy language is unambiguous, it is not necessary to resort to case law."); *Uniroyal* at 41 ("Applying the clear and unambiguous policy language, the per-occurrence limits may not be annualized within the multi-year policies. Because the policy language is clear and unambiguous, it is not necessary to resort to case law from other jurisdictions for interpretive assistance.").

The *Uniroyal* court further dismissed the policyholder's argument that the London excess policy's limits should be annualized because the London policy followed form to a multi-year policy that provided annualized limits. *Id.* at 40. The court concluded that "it is only appropriate to engage in the form-following analysis in circumstances in which the London policies themselves are silent." *Id.* The court further held that extrinsic evidence about the parties' course of dealings and method in which the premiums were paid "generally are irrelevant" and that "[s]uch a resort to extrinsic evidence of intent or expectation is inappropriate in the absence of any ambiguity." *Id.*

Conclusion

The recent *Westinghouse* and *Uniroyal* decisions demonstrate that the New Jersey state appellate courts do not believe that courts should require carriers to pay for annual occurrence limits under multi-year policies. Notwithstanding earlier New Jersey decisions to the contrary, *Westinghouse* and *Uniroyal* held that multi-year policies only provide one occurrence limit. And, while the New Jersey Supreme Court did address trigger and allocation in *Owens-Illinois* and *Carter-Wallace*, neither *Owens-Illinois* nor *Carter-Wallace* actually addressed the issue of the limits available under policies in effect for more than one annual period. The conclusions reached in *Westinghouse* and *Uniroyal* are thus correct, as both of those courts looked to the contract language in holding that only one occurrence limit applied. Certainly, such results now bring New Jersey into harmony with the overwhelming majority of other jurisdictions that have addressed this issue.

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