PRO-RATING DEFENSE COSTS TO AN INSURED FOR PERIODS OF UNINSURANCE; WHAT HAPPENED TO THE DUTY TO DEFEND?: *SECURITY INSURANCE CO. OF HARTFORD V. LUMBERMENS MUTUAL CASUALTY CO.*

Elizabeth Festa[*]

TABLE OF CONTENTS

---

* Candidate for Juris Doctor, University of Connecticut School of Law, 2005; Bachelor of Arts, Colby College, 2001. Ms. Festa would like to thank Attorney Michael Taylor for his insightful guidance and assistance in the development of this Note.

INTRODUCTION

A debate continues in this country regarding the proper allocation of defense costs in cases involving long latency loss claims implicating multiple successive insurers where coverage is interrupted by periods of uninsurance. More specifically, the question debated is whether it is appropriate to allocate defense costs to the insured with respect to the periods of uninsurance, and if so, how? The Connecticut Supreme Court recently had the opportunity to decide precisely this question, as one of first impression, in *Security Insurance Company of Hartford v. Lumbermens Mutual Casualty Co.* (*Lumbermens*).[1] In a unanimous decision, the Court held that where coverage is interrupted by periods of uninsurance defense costs are to be pro-rated by time-on-risk to the insured with respect to the periods of uninsurance."[2]

As was the case in *Lumbermens*, this issue usually arises in the context of toxic tort claims, where exposure to a toxin results in injuries of a progressive and cumulative nature. One of the most common examples is asbestos exposure. Asbestos, a mineral compound of high strength and flexibility, is capable of withstanding high temperatures. As a result, it has many commercial uses.[3] Unfortunately, small asbestos particles often become airborne.[4] Once inhaled the asbestos particles are deposited in the lungs.[5] The presence of these particles in the lungs can cause a number of

1. Sec. Ins. Co. of Hartford v. Lumbermens Mut. Cas. Co., 826 A.2d 107 (Conn. 2003) (hereinafter cited as *Lumbermens II*). There is no Connecticut appellate case deciding this issue. A number of Connecticut superior courts have addressed the issue of allocation among multiple insurers. *See* Met. Life Ins. Co. v. Aetna Cas. & Sur. Co., No. 115305, 1999 Conn. Super. LEXIS 1000, (Conn. Super. Ct. Apr. 16, 1999, Koletsky, J.); Reichhold Chem., Inc. v. Hartford Accident & Indem. Co., No. 085884, 1998 Conn. Super. LEXIS 3222 (Conn. Super. Ct. Oct. 1, 1998); Reichhold Chem., Inc. v. Hartford Accident & Ind. *Co.*, No. 085884, 1999 Conn. Super. LEXIS 2066 (Conn. Super. Ct. Feb. 11, 1999). The Second Circuit has not addressed the issue directly. *See* Dicola v. Am. S.S. Owners Mut. Prot. & Indem. Ass'n. 158 F.3d 65, 85 n.12. (2d Cir. 1998); Stonewall Ins. Co. v. Asbestos Claims Mgmt. Corp., 73 F.3d 1178 (2d Cir. 1995).

2. *Lumbermens II*, 826 A.2d at 127.

3. Asbestos use has been particularly widespread in the construction industry, especially in products such as home insulation, cement, paint, and tile. 15 ATTORNEY'S TEXTBOOK OF MEDICINE ¶ 205C.10 (Roscoe N. Gray & Louise J. Gordy eds., 3d ed. 2003); 13 ATTORNEY'S TEXTBOOK OF MEDICINE ¶ 134A.30 (Roscoe N. Gray & Louise J. Gordy eds., 3d ed. 2003) (products containing asbestos and sources of exposure).

4. Such as when asbestos is mined, processed, or used in construction. Ins. Co. of N. Am. v. Forty-Eight Insulations, Inc., 633 F.2d 1212, 1214 (6th Cir. 1980).

5. It is impossible to cough out or expel asbestos particles from lung tissue. Thus once inhaled they remain in the lungs permanently. Porter v. Am. Optical Corp., 641 F.2d 1128, 1133 (5th Cir. 1981).

pulmonary diseases, including but not limited to asbestosis,[6] mesothelioma,[7] and broncheogenic carcinoma (lung cancer).[8] These diseases result from cumulative body reactions to the inhaled particles. While continuous or heavy exposure may accelerate the progression, these diseases develop slowly, requiring anywhere between ten to forty years to fully manifest.

Litigation involving asbestos typically arises when an individual previously employed in an industry using asbestos-laden products or materials contracts an asbestos-related disease and commences litigation against the manufacturer of the asbestos-laden product for failing to warn that asbestos was an inherently dangerous product[9] or his employer for bodily injuries resulting from the inhalation of asbestos while on the job, or both.

The manufactures and/or employers sued typically have insurance policies protecting them from liability, these polices are by and large occurrence based comprehensive general liability policies. The standard form language used in most comprehensive general liability insurance policies provides:

---

6. Asbestosis is a process by which the human body reacts to the presence of asbestos particles in the lungs. The particles cause inflammation until fibrosis, the laying down of scar tissue surrounding the asbestos particles, occurs. Eventually, as asbestos particles collect in the lungs, the scar tissue replaces the healthy lung tissue, causing shortness of breath and other breathing difficulties. Asbestosis is a condition in and of itself, but it can also hasten the onset of other illnesses such as emphysema, bronchitis, and pneumonia. Asbestosis typically does not manifest until twenty to forty years following initial exposure, and it rarely occurs in less then ten years. *See Porter*, 641 F.2d at 1133; 13 ATTORNEYS' TEXTBOOK OF MEDICINE , *supra* note 3, ¶ 134A.34(1) (describing asbestosis).

7. Mesothelioma is cancer of the mesothelial cells. The mesothelial cells are those that line the chest wall and surrounding the organs of the chest cavity. Mesothelioma does not usually manifest until at least twenty years following excessive inhalation of asbestos. Although easily discoverable and diagnosable shortly after manifestation, there is currently no satisfactory treatment for mesothelioma. Within several years of the initial development of the tumor, the victim almost always dies. *Forty-Eight Insulations Inc.*, 633 F.2d at 1214 n.1. *See also* 13 ATTORNEYS' TEXTBOOK OF MEDICINE, *supra* note 3, ¶ 134A.34(2) (describing mesothelioma).

8. The exact correlation between lung cancer and asbestos has not been established. It appears, however, that inhalation of asbestos accelerates the development of lung cancer in persons who smoke. *Forty-Eight Insulations, Inc.*, 633 F.2d at 1214 n.1. "[I]t is accepted that the synergistic effects of cigarette smoking and asbestos exposure increase the risk of lung cancer by a factor of 50, and the smoking of a more than one pack of cigarettes a day by a factor of 87." 13 ATTORNEYS' TEXTBOOK OF MEDICINE, *supra* note 3, ¶ 134A.32(3).

9. *Forty-Eight Insulations Inc.*, 633 F.2d at 1214-15.

> The company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury or property damage to which this insurance applies, caused by an occurrence,[10] and the company shall have the right and duty to defend any suit against the insured seeking damages on account of such bodily injury or property damage, even if any of the allegations of the suit are groundless, false or fraudulent, . . .[11]

These polices, however, were drafted with the expectation that they would be applied to the ordinary situation, such as a car accident, where both the accident and resulting harm take place almost simultaneously. Under such circumstances it is easy to ascertain when an injury occurred and, therefore, if the policy is triggered.[12] Applying such a policy to a cumulative and progressive disease like asbestosis, where it is virtually impossible to assign injury to a specific date, is much more difficult.

Further complicating the situation is that comprehensive general liability policies are generally issued for only one year at a time. Therefore, given the latent nature of asbestos-related diseases, the employer and/or manufacturer will most likely have purchased a number of occurrence based comprehensive general liability policies, from several different insurance companies, during the period of time between initial exposure and manifestation. As a result, when a claim for an asbestos-related injury is made, any one of a number of insurance policies are potentially triggered, depending on the date of the injury.

Much controversy and division has surrounded the determination of when an asbestos-injury occurs and therefore which of the several insurance policies are triggered. The courts have yet to reach a unanimous answer to this question, adopting instead four different trigger theories; manifestation, exposure, injury-in-fact, and the multiple, continuous or successive trigger.[13] Regardless of which trigger theory a court adopts, a

---

10. "Occurrence" is defined by the standard form policy as an accident including continuous or repeated exposure to conditions. Marcy Louise Kahn, *Looking for "Bodily Injury:" What Triggers Coverage Under a Standard Comprehensive General Liability Policy?*, 19 FORUM 532, 534 (1984).

11. *Id.* at 532.

12. *See* Stonewall Ins. Co. v. Asbestos Claims Mgmt. Corp., 73 F.3d 1178, 1186 (2d Cir. 1995).

13. 2 JEFFREY W. STEMPEL, LAW OF INSURANCE CONTRACT DISPUTES, § 14.09(b) (2004). Under the manifestation theory an injury occurs when it manifests itself or becomes reasonably capable of diagnosis. Under the exposure theory a policy is triggered when the

difficult question remains—how defense costs are to be allocated among the multiple insurers whose policies have been triggered? This question is even more difficult when there is a period or periods of uninsurance.

This Note will examine accuracy the Connecticut Supreme Court's decision to pro-rate defense costs to the inured with respect to the period of uninsurance. Part I provides an in-depth discussion of the *Lumbermens* opinion. Part II describes the framework in which *Lumbermens* was decided, including a brief discussion of rules of insurance contract interpretation in Connecticut, the language and purpose of occurrence based comprehensive general liability insurance, and the methods of allocation adopted by the various courts prior to the *Lumbermens* decision. Part III discusses the accuracy of the Court's reliance on *Insurance Co. of North America v. Forty-Eight Insulations, Inc.*[14] and *Owens-Illinois., Inc. v. United Insurance Co.*.[15] Finally, Part IV discusses the circular reasoning utilized by the Court in rejecting the appellant's arguments.

I. *SECURITY INSURANCE CO. OF HARTFORD v. LUMBERMENS MUTUAL CASUALTY CO.*

A. FACTUAL SYNOPSIS

ACMAT Corporation is engaged in the construction and renovation business and at various times used a fireproofing spray containing asbestos.[16] On May 1, 1996 over one hundred claimants commenced litigation against ACMAT for bodily injuries allegedly resulting from the inhalation of asbestos (hereinafter "Bridgeport Litigation").[17] ACMAT is potentially liable for the period March 16, 1951 through May 1, 1996.[18]

---

claimant is exposed to the alleged cause of the disease regardless of when the injury became manifest or capable of diagnosis. Under the injury-in-fact or actual injury theory the occurrence giving rise to the third-party claim happens at the time when the body's defenses have been 'overwhelmed' so that significant injury is inevitable. Under the multiple, continuous, or successive trigger theory an occurrence has happened whenever the claimant is exposed to the cause of the injury, was injured in fact, or the injury becomes manifest. *Id.*

14. 633 F.2d 1212 (6th Cir. 1980).

15. 650 A.2d 974 (N.J. 1994).

16. ACMAT is a Connecticut corporation originally founded March 16, 1951, under the name Acoustical Materials Corporation. *Lumbermens II*, 826 A.2d at 110 n.2. On December 10, 1969, Acoustical Materials Corporation changed its name by amending its certificate of incorporation to ACMAT Corporation. *Id.* No change to the corporate structure took place. *Id.*

17. In re Bridgeport Asbestos Litig., No. 332364, 1998 WL 376024 (Conn. Super. Ct. June 24, 1998) [hereinafter Bridgeport Litigation]. ACMAT is only one of multiple defendants in this litigation. *Lumbermens II*, 826 A.2d at 110 n.3. "The model complaint

During the approximately forty-five year period for which ACMAT is potentially liable to the Bridgeport Litigation plaintiffs, ACMAT purchased occurrence based general liability policies from a number of different insurance companies.[19]

- March 16, 1951 - April 22, 1959: ACMAT purchased asbestos related insurance coverage, but does not know who the insurers were and has either lost or destroyed the policies. ACMAT did not demand that any insurance company provide it with a defense or pay defense costs with regard to this period.
- April 22, 1961 - January 1, 1964: ACMAT alleged Liberty Mutual Insurance Company (Liberty) provided ACMAT with asbestos related coverage. But ACMAT either lost or destroyed the policies. Liberty denied issuing these policies.
- January 1, 1964 - January 1, 1968 ACMAT alleged Greater New York Insurance Company (Greater New York) provided ACMAT with asbestos related coverage. But ACMAT has either lost or destroyed the policies. Greater New York denies issuing these policies.
- January 1, 1968 - January 1, 1972, ACMAT was insured by Travelers Insurance Company (Travelers).

[in the Bridgeport Litigation] alleges that the defendants (including ACMAT) were engaged in the business of buying, selling and installing asbestos products and asbestos materials. The model complaint further alleges that the plaintiffs, while working for their employers at various job sites, came into contact with asbestos materials and products. Specifically, the model complaint alleges that at all relevant times that the plaintiffs were working, they were 'forced to come in contact with and breathe, inhale and ingest airborne fibers and particles emitted by said [asbestos] products and materials as they were sawed, cut, mixed, installed, removed or otherwise used' by the plaintiffs. The complaint alleges that as a result of this contact with the asbestos the plaintiff's suffered permanent injuries, diseases, and death." *Id* at 110, n. 4. The claimants did not allege the precise dates of their injury. *Id.* at 110-111.

18. *See Lumbermens II,* 826 A.2d at 111; Sec. Ins. Co. of Hartford v. Lumbermens Mut. Cas. Co., No. 475565, 2001 Conn. Super. LEXIS 1387, at *6-7 (Conn. Super. Ct. May 9, 2001) (hereinafter *Lumbermens I*).

19. Asbestos-related injury insurance coverage was available to ACMAT from March 16, 1951 through April 1, 1985. ACMAT has been insured by "claims-made" as opposed to "occurrence" based comprehensive general liability policies since April 1, 1985. *Lumbermens I*, 2001 Conn. Super. LEXIS 1387, at *6. These policies specifically exclude coverage for claims related to asbestos and were the only comprehensive liability insurance available after April 1, 1985. *Id.* at *23 n.7. "Claims-made" policies are triggered by the assertion of a claim against the insured during the policy period. Evans v. Medical Inter-Ins. Exchange, 856 A.2d 609, 611-12 n.1 (D.C. 2004). "Occurrence" based polices are triggered by "bodily injury" resulting from an "occurrence" that takes place during the policy period. Only the "bodily injury," not the occurrence, needs to take place during the policy period to trigger coverage. *Lumbermens II,* 826 A.2d at 111 n.5.

- January 1, 1972 - January 1, 1976, ACMAT was insured by Security Insurance Company of Hartford (Security).
- January 1, 1976 - January 1, 1979, ACMAT was insured by Liberty
- January 1, 1979 - April 15, 1981, ACMAT was insured by Lumbermens Mutual Casualty Company (Lumbermens).
- April 15, 1981 - April 15, 1985, ACMAT was insured by Cigna Corporations (Cigna).[20]

ACMAT tendered the defense to each insured, demanding a defense or in the alternative a pro-rata share of the defense costs. Travelers, Liberty, Cigna, and Security agreed to participate in the defense of ACMAT pursuant to their obligations under the occurrence based comprehensive general liability policies they issued to ACMAT. Liberty and Greater New York refused ACMAT's demand with respect to the lost/missing policy periods.[21]

B. PROCEDURAL HISTORY

On August 26, 1996, Security filed a two-count complaint against ACMAT and Lumbermens. The first count sought a declaration that ACMAT and/or Lumbermens was responsible for an equitable portion of the defense costs attributable to the two year period Lumbermens provided coverage to ACMAT. The second count sought a declaration that ACMAT was responsible for an equitable portion of its defense costs attributable to the period after April 1, 1985 when ACMAT's insurance policies excluded asbestos coverage.[22]

In a decision dated July 12, 1999 the trial court (Graham, J.) granted Security's second renewed motion for summary judgment against ACMAT on the first count and denied Security's motion as to the second count. In ruling for Security, the trial court found that ACMAT was legally obligated to assume an equitable share of the defense costs by virtue of its having released Lumbermens from the latter's obligation to defend.[23] In ruling against Security, the trial court found that ACMAT was not responsible for

---

20. *Lumbermens II*, 826 A.2d at 111.

21. *Id.* at 111-12.

22. *Lumbermens I*, 2001 Conn. Super. LEXIS 1387, at *2.

23. *Id.* at *2-4. ACMAT had executed a buy-back agreement whereby it agreed to release Lumbermens from all obligations under its insurance policy. Because of this agreement, the court (Graham, J.) had previously granted Lumbermens' motion for summary judgment as to count one. *See* Sec. Ins. Co of Hartford v. Lumbermens Mut. Cas. Co., No. 475564, 1998 Conn. Super. LEXIS 1327, at *4-5 (Conn. Super. Ct. May 8, 1998).

defense costs proportionate to the period of time after 1985 when asbestos exposure coverage was not available.[24]

On November 30, 1999 Security filed an Amended Complaint, which added a third count against ACMAT as the remaining defendant. The third count sought a declaration that "ACMAT is obligated to assume an equitable share of the cost of its defense because of the period of time from 1951 through 1967, during which time ACMAT lost or destroyed its insurance policies and for which no insurer has provided coverage."[25]

On January 9, 2001, the third count was tried via oral argument based on a stipulation of facts and the trial court (Graham, J.) issued a written decision on May 9, 2001.[26] The trial court first determined that the Bridgeport Litigation involved a "continuous trigger situation such that all asbestos related injury policies issued during the extended exposure period have been triggered for coverage and all companies that issued such policies are responsible for defense costs related to the [Bridgeport Litigation]."[27] Then basing its decision on Second Circuit precedent and equitable considerations, the trial court held ACMAT was liable "for the share of defense costs proportionate to the years for which the relevant insurance policies have been lost or destroyed."[28] Accordingly, the trial court ordered ACMAT, as the insured to contribute, 50.18%, of all past, present, and future defense costs based on its liability under counts one and three.[29]

ACMAT appealed to the Connecticut Appellate Court.[30] The Connecticut Supreme Court thereafter transferred the case to itself.[31]

---

24. *Lumbermens I*, 2001 Conn. Super. LEXIS 1387, at *4; *see also* Sec. Ins. Co of Hartford v. Lumbermens Mut. Cas. Co., No. 475564, 1999 Conn. Super. LEXIS 1902 (Conn. Super. Ct. July 12, 1999). Security withdrew this count before trial. *Lumbermens I*, 2001 Conn. Super. LEXIS 1387, at *4.

25. *Lumbermens I*, 2001 Conn. Super. LEXIS 1387, at *4.

26. Brief for Appellant at 2, Sec. Ins. Co. of Hartford v. Lumbermens Mut. Cas. Co., No. 475565, 2001 Conn. Super. LEXIS 1387 (Conn. Super. Ct. May 9, 2001).

27. *Lumbermens I*, 2001 Conn. Super LEXIS 1387, at * 9.

28. *Id.* at *22.

29. *Id.* at *25. Of the 50.18%, a portion, 6.73%, corresponds to ACMAT's equitable contribution with respect to the buyback period, for which the trial court had previously held ACMAT responsible. *Id.* at *24-25. *See* Sec. Ins. Co. of Hartford v. Lumbermens Mut. Cas. Co., No. CV 960475565S, 1999 Conn. Super. LEXIS 1902 (Conn. Super. Ct. July 12, 1999).

30. ACMAT appealed the trial court's grant of summary judgment in favor of Security with respect to count one, as well as the trial court's judgment in favor of Security as to count three. This Note will not discuss the Supreme Court's decision with respect to count one.

C. THE CONNECTICUT SUPREME COURT DECISION

On appeal ACMAT claimed that "the trial court improperly rendered judgment in favor of Security as to count three, pertaining to the lost policy period, because it failed to apply the joint and several method of allocating defense costs."[32] In support ACMAT argued the pro-rata method was inappropriate because it "(1) improperly treats the duty to defend in the same manner as the more narrow duty to indemnify; (2) improperly recognizes a claim for equitable contribution by an insurer against its insured; and (3) improperly recognizes a claim for reimbursement of defense costs by an insurer against its insured."[33] In the alternative, ACMAT argued that even if the Court were to adopt the pro-rata method in general, it should not do so in this case because the insured did not choose to forgo insurance.[34]

Thus the issue specifically before the Supreme Court was: To what extent, if any, is ACMAT liable for the defense costs incurred in defending the Bridgeport Litigation?[35]

The only policy on record before the Court was the Lumbermens policy issued in 1980.[36] In relevant part the policy provided that Lumbermens

> will pay on behalf of the Insured all sums which the Insured shall become legally obligated to pay as damages because of . . . bodily injury . . . to which this insurance applies, caused by an occurrence, and the company shall have the right and duty to defend any suit against the insured seeking damages on account of such bodily injury ... even if any of the allegations of the suit are groundless, false, or fraudulent, and may make such investigation and settlement of any claim or suit as it deems expedient, but the Company shall not be obligated to pay any claim or judgment or to defend any suit after the applicable limit of the Company's liability

---

31. Pursuant to CONN. GEN. STAT. § 51-199(c) (2003) and Conn. Practice Book § 65-1 (2004).

32. *Lumbermens II,* 826 A.2d at 115.

33. *Id. See also* Brief for Appellant, Sec. Ins. Co. of Hartford v. Lumbermens Mut. Cas. Co., 826 A.2d 107 (Conn. 2003).

34. *Lumbermens II,* 826 A.2d at 115.

35. *Id.* at 110.

36. *Id.* at 112 n.8.

> has been exhausted by payment of judgments or settlements."[37]

"Bodily injury" is defined by the policy as "bodily injury, sickness or disease sustained by any person which occurs during the policy period, including death at any time resulting therefrom . . . ."[38] "Occurrence" is defined as "an accident, including continuous or repeated exposure to conditions which results in bodily injury...neither expected nor intended from the standpoint of the insured . . . ."[39]

On July 22, 2003 the Supreme Court, in an opinion by Chief Justice Sullivan, held "the trial court properly applied the pro rata method of apportioning defense cost to the lost policy period."[40] The Court further concluded that the trial court properly recognized a cause of action for equitable contribution and reimbursement by an insurer against its insured." Accordingly, the Court ordered ACMAT to contribute 50.18% of all past, present, and future defense costs.[41]

The Court explicitly relied on the analysis of the Sixth Circuit in *Insurance Co. of North America v. Forty-Eight Insulations, Inc.* and the Supreme Court of New Jersey in *Owens- Illinois, Inc.* v. *United Insurance Co.* in affirming the trial court's allocation of defense costs to ACMAT on a pro-rata basis:[42]

> [A]pplying the pro-rata method allocation does not violate the reasonable expectations of the parties to the insurance contracts. Neither the insurers nor the insured could reasonably have expected that the insurers would be liable for losses occurring in periods outside of their respective policy coverage period. Additionally, we do not agree . . .

---

37. *Id.* at 112 n.8 (emphasis added). The trial court found the other policies triggered in the Bridgeport litigation afforded "substantially similar" coverage. *Id.*

38. *Id.* at 112 n.8.

39. *Id.* The policy also contained an "Other Insurance" clause and a contribution provision. *Id.*

40. *Id.* at 115. The court specifically did not decide the method of allocation between insurers where the claim does not involve uninsured periods. *Id.* at 127 n.18. The court also affirmed the trial court's decision with respect to the buyback period and reversed the trial court's order of contribution and reimbursement to nonparty insurers. *Id.* at 115, 127-28. Neither of these holdings is relevant to the topic of this Note and will therefore not be discussed.

41. *Id.* at 128.

42. *Id.* at 121. ("We are persuaded by the reasoning of the courts in *Forty-Eight Insulations, Inc.*, and *Owens-Illinois, Inc.*, and, accordingly, adopt the pro rata approach to the allocation of defense costs . . . .").

> that the insurance contract language was not so ambiguous as to how to allocate defense costs in long latency loss claims that it will bear the interpretation that the insurers should be liable for injuries that do not occur during the policy period . . . .[43]

Having adopted the pro-rata method, the Court rejected each of ACMAT's claims in turn. First, in rejecting ACMAT's claim that pro-rata allocation improperly treats the duty to defend like the narrower duty to indemnify, the Court relying on the rational set forth in *Forty-Eight Insulations*, found that:

> [I]n long latency loss claims that implicate multiple insurance policies, there is a reasonable means of prorating the costs of defense, i.e., time on the risk . . . . [B]ecause the duty to defend arises solely under contract and because the insurance companies have not contracted to defend the insured for periods outside of the policy period, requiring the insured to pay its fair share of the defense costs in a long latency loss suit that implicates multiple insurance policies does not treat the broad duty to defend as the more narrow duty to indemnify.[44]

Second, in rejecting ACMAT's claim that the pro-rata approach is improper because there is no cause of action for equitable contribution by an insurer against its insured, the Court found that those courts adopting the pro-rata method recognize the cause of action and that its applicability "necessarily follows from the rationale underlying the pro rata method of allocation, i.e., that the duty to defend does not extend to periods of self insurance."[45] Thus, contribution may be had where the pro-rata method is properly applied.[46]

Likewise, in rejecting ACMAT's claim that the pro-rata approach is improper because there is no cause of action for reimbursement by an insurer against its insured, the Court concluded "where the pro rata method of allocating defense costs applies, it is proper for the trial court to order the insured to reimburse its insurer for defense costs for periods of self-

43. *Id.* at 121.
44. *Id.* at 123.
45. *Id.* at 124.
46. *Id.*

insurance."[47] In reaching that conclusion, the Court first adopted the California Supreme Court's holding in *Buss v. Superior Court*[48] that "as to claims that are not even potentially covered . . . the insurer may indeed seek reimbursement for defense costs."[49] The Court then reasoned that "consistent with the pro rata method of allocation, we have concluded that time on risk is a reasonable means of prorating defense costs for periods of self-insurance. Those costs allocable to periods of self-insurance are not even potentially covered by the insurer's policies."[50]

Finally, the Court rejected ACMAT's claim that even if the Court were to adopt generally the pro-rata method of allocating defense costs, it should not do so in the present case because ACMAT did not chose to forgo insurance but merely lost or otherwise destroyed the policies of the identified insurers. The Court concluded that this "is a distinction without a difference,"[51] and that the pro-rata method is equitable because Security never contracted to pay for defense costs arising outside of its policy period and that ACMAT, in effect, chose to forgo insurance.[52]

The accuracy of the Court's reliance on *Owens-Illinois. Inc. v. United Insurance Company* and *Insurance Company of North America v. Forty-Eight Insulations, Inc.* in adopting the pro-rata method of allocation and the circular reasoning utilized by the Court in rejecting ACMAT's arguments on appeal are discussed below in Parts III and IV, respectively.

II. FRAMEWORK

To fully understand the Court's decision in *Lumbermens,* it is necessary to have clear understanding of three basic concepts: (a) the canons of insurance contract interpretation in Connecticut, (b) the language and purpose of the occurrence based comprehensive general liability policy, (c) the methods of allocating defense costs adopted by the courts prior to the *Lumbermens* decision.

---

47. *Id.*

48. 939 P.2d 766 (Cal. 1997).

49. *Lumbermens II*, 826 A.2d at 125.

50. *Id.*

51. *Id.* at 126 (relying on *Forty-Eight Insulations, Inc.*, in which the court treated the insured, who had lost or otherwise destroyed its policies, as self-insured, and United States Fidelity & Guaranty Co. v. Treadwell Corp., 58 F. Supp. 2d 77, 83 n.4 (S.D.N.Y. 1999), in which the court concluded there was no distinction between an insured that cannot identify its claimed insurers and an insurer that has chosen to forgo insurance).

52. *Lumbermens II*, 826 A.2d at 126.

A. CANONS OF INSURANCE CONTRACT CONSTRUCTION

The language of an insurance policy is interpreted much like that of any other written contract. In Connecticut, the principles governing construction of an insurance contract are well defined.

> The [i]nterpretation of an insurance policy, . . . involves a determination of the intent of the parties as expressed by the language of the policy . . . . The determinative question is the intent of the parties, that is, what coverage the . . . [insured] expected to receive and what the [insurer] was to provide, as disclosed by the provisions of the policy . . . . It is axiomatic that the contract of insurance be viewed in its entirety, and the intent of the parties for entering it derived from the four corners of the policy . . . . The policy words must be accorded their natural and ordinary meaning . . . .[53]

That is, if the policy language is clear and unambiguous the intention of the parties is to be derived from the plain meaning of the policy language, only if the policy language is ambiguous may extrinsic evidence be introduced to support a particular interpretation.[54] An insurance policy is ambiguous when it is reasonably susceptible to more than one reading.[55] Where language is ambiguous, the ambiguity is to be resolved (a) by examining the parties' intentions, (b) determining the reasonable expectations of the insured when he entered into the contract, and (c) against the insurer under the rule of *contra proferentem* as the drafter of the language.[56]

B. OCCURRENCE BASED COMPREHENSIVE GENERAL LIABILITY INSURANCE

Liability insurance is a relatively recent development recognized by most scholars as beginning with general accident and specific risk liability policies sold to manufacturers and merchants of the late nineteenth

---

53. Bd. of Educ. v. St. Paul Fire & Marine Ins. Co., 801 A.2d 752, 755-56 (Conn. 2002) (quoting Cmty. Action for Greater Middlesex County, Inc. v. Am. Alliance Ins. Co., 757 A.2d 1074, 1081 (Conn. 2000)) (emphasis added).

54. Met. Life Ins. Co. v. Aetna Cas. & Sur. Co., 765 A.2d 891, 896-97 (Conn. 2001).

55. *Id.* at 897.

56. *See id.* at 896-97; *see also Cmty. Action for Greater Middlesex County, Inc.*, 757 A.2d at 1074, 1081.

century.[57] Coverage expanded to automobile liability policies in the late nineteenth and early twentieth centuries, in the form of coverage for damages resulting from accidents.[58] Liability insurance as a form of commercial insurance protection developed in the 1920s and 1930s and during the late 1930's to early 1940's coverage was expanded to include a "duty to defend."[59] As insurers began offering coverage packages rather than separate policies for separate categories of risk, the "comprehensive" general liability policy or CGL emerged.[60] The CGL continued to be written in "accident" form until 1966, at which time the "accident" concept was replaced by the "occurrence" concept in most CGL policies.[61] An "occurrence" is commonly defined as "an accident, including continuous or repeated exposure to conditions, which results, [during the policy period] in bodily injury or property damage neither expected nor intended from the standpoint of the insured."[62] Thus, the coverage of the standard CGL policy was explicitly expanded to include injuries or damages, such as those with long latency periods, which might not be characterized as having been derived from an "accident" under the earlier formulation.[63]

A "standard form" CGL policy has been in use since the early 1940s. Its uniform language was prepared and periodically revised by the National Bureau of Casualty Underwriters and the Mutual Insurance Rating Board

---

57. STEMPEL, *supra* note 13, § 14.01.

58. The term "accident" was not defined but was often interpreted by the courts to mean a single sudden event. *See e.g.,* Leggett v. Home Indem. Co., 461 F.2d 257 (10th Cir. 1972) (toxic fumes escaping over a five year period not an "accident"); Tennessee Corp. v. Hartford Accident & Indem. Co., 326 F. Supp. 520 (N.D. Ga. 1971) (where the continuous discharge of pollutants did not constitute an "accident").

59. STEMPEL, *supra* note 13, § 14.01.

60. *Id.* The modern CGL is the "commercial general liability policy." It is the successor of the "comprehensive general liability insurance policy" and both are commonly referred to by the acronym "CGL." *Id.* The purpose of the name change was to avoid the implication that CGLs covered everything. *Id. See also* 20 ERIC MILLS HOLMES, HOLMES' APPLEMAN ON INSURANCE LAW & PRACTICE 2D § 129.1 (2003).

61. STEMPEL, *supra* note 13, § 14.01.

62. *Id. See also* Michael Dore, *Insurance Coverage for Toxic Tort Claims: Solving the Self-Insurance Allocation Dilemma,* 28 TORT & INS. L.J. 823 (1993); Kahn, *supra* note 10. The 1966 form used the term "injurious exposure," but it was replaced with the phrase "continued or repeated exposure," with the intention of broadening coverage further. D. DEY & S. Ray, ANNOTATED COMPREHENSIVE GEN. LIAB. INS. POLICY 3 (1984) (1973 Form).

63. *See* Am. Home Prods. Corp. v. Liberty Mut. Ins. Co., 565 F. Supp. 1485, 1489 (S.D.N.Y. 1983); *Indep. Petrochemical Corp. v. Aetna Cas. & Sur. Co.*, 654 F. Supp. 1334, 1351 n.6 (D.D.C. 1986). *See also* Davis J. Howard, *"Continuous Trigger" Liability: Application to Toxic Waste Cases and Impact on the Number of "Occurrences,"* 22 TORT & INS. L.J. 624, 625 n.2 (1987); Dore, *supra* note 62.

(since 1972 the Insurance Services Office or ISO).[64] Today, the standard coverage grant language is 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 bodily injury or property damage to which this insurance applies, caused by an occurrence, and the company shall have the right and duty to defend any suit against the insured seeking damages on account of such bodily injury or property damage, even if any of the allegations of the suit are groundless, false or fraudulent, . . .[65]

"Occurrences," the event(s) causing the bodily injury, are clearly distinguished, from the resulting injury.[66] Thus the standard CGL is triggered if "bodily injury" takes place within the policy period, but it is not necessary for the "occurrence" or event causing the injury to take place during the policy period in order to trigger coverage.[67] Consequently, even if the event that caused the injury took place prior to the policy period, the injury will be covered if it occurs during the policy period. For this reason, CGLs are frequently described as providing "unlimited prospective coverage."[68]

The CGL embodies two major coverage components. In exchange for receiving a premium the insurer is required (1) to defend lawsuits against the insured, and (2) to indemnify the insured for any damages legally imposed against the insured in that lawsuit, to the extent those damages are covered by the policy.[69] Although these two obligations are often discussed simultaneously it is well established that they are independent and distinct.

The duty to indemnify derives from the following policy language: "the company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury or property damage to which this insurance applies, caused by an occurrence."

---

64. Dore, *supra* note 62; Kahn, *supra* note 10.

65. Kahn, *supra* note 10; SUSAN J. MILLER & PHILIP LEFEBVRE, 1 MILLER'S STANDARD INSURANCE POLICIES ANNOTATED 421 (4th ed. 1997).

66. Typically "bodily injury" is defined as "bodily injury, sickness or disease sustained by any person, which occurs during the policy period, including death at any time resulting therefrom." STEMPEL, *supra* note 13, § 14.01. *See also* Dore, *supra* note 62; Kahn, *supra* note 10.

67. Owens-Illinois, Inc. v. United Ins. Co., 650 A.2d 974, 982 (N.J. 1994).

68. STEMPEL, *supra* note 13, § 14.02.

69. HOLMES, *supra* note 60.

Thus the duty to indemnify arises only upon the establishment of a legal obligation to pay damages.[70]

The duty to defend, on the other hand, derives from the following policy language: "the company shall have the right and duty to defend any suit against the insured seeking damages on account of such bodily injury or property damage, even if any of the allegations of the suit are groundless, false or fraudulent . . . " and is triggered by the allegations of the underlying claim. The general rule in Connecticut is that "if an allegation of a complaint falls even 'possibly' within coverage" of the insurance policy, the insurer must defend the insured.[71] This rule follows from the well settled tenant that:

> An insurer's duty to defend, being much broader in scope and application than its duty to indemnify, is determined by reference to the allegations contained in the [underlying] complaint . . . . The obligation of the insurer to defend does not depend on whether the injured party will successfully maintain a cause of action against the insured but on whether he has, in his complaint, stated facts which bring the injury within the coverage. If the latter situation prevails, the policy requires the insurer to defend, irrespective of the insured's ultimate liability . . . . It necessarily follows that the insurers duty to defend is measured by the allegations of the complaint. Hence, if the complaint sets forth a cause of action within the coverage of the policy, the insurer must defend.[72]

The duty to defend is to be measured only by comparing the language of the policy to the allegations of the complaint, without consultation of any facts beyond those two documents.[73] In determining whether a

---

70. *See* Schilberg Integrated Metals Corp. v. Cont. Cas. Co., 819 A.2d 773, 783 (Conn. 2003) ("the liability insurer's duty to indemnify depends upon the facts established at trial and the theory under which judgment is actually rendered in the case."); *see generally* HOLMES, *supra* note 60.

71. *Schilberg Integrated Metals Corp.*, 819 A.2d at 783.

72. Board of Educ. v. St. Paul Fire & Marine Ins. Co., 801 A.2d 752, 754-55 (2002) (quoting Cmty. Action for Greater Middlesex County, Inc. v. Am. Alliance Ins. Co., 757 A.2d 1074 (Conn. 2000)).

73. Nationwide Mut. Ins. Co. v. Mortensen, 222 F. Supp. 2d 173, 181 (D. Conn. 2002) ("The existence of a duty to defend is determined on the basis of what is found within the four corners of the complaint; it is not affected by facts disclosed by independent investigation, including those that undermine or contradict the injured party's claim."); QSP,

particular claim is within the policy coverage, courts resolve all doubts in favor of the insured.[74]

If, however, the complaint alleges a liability that the policy does not cover, the insurer is not required to defend.[75] But where the complaint alleges multiple causes of action, some of which are covered by the policy and some of which are not, an insurer generally cannot divide the duty to defend. Once an insurer has a duty to defend an insured for one claim, the insurer must defend all claims brought at the same time, even if some of the claims are beyond the scope of the insured's coverage.[76]

C. METHODS OF ALLOCATION

Suits brought under CGL policies generally involve injuries and occurrences that happened simultaneously or in close temporal proximity. Under such circumstances it is easy to determine when the alleged injury happened and therefore which policy was triggered. However, in cases involving diseases, such as asbestosis, with long-latency periods, the occurrence that caused the injury (inhalation for example) takes place long before the ultimate injury (asbestosis, lung cancer, etc.) manifests itself. Inhalation, disease progression, and manifestation take place over long periods of time and across numerous policy periods. Thus different insurers are likely to be on risk during different points in the development of such an injury. The standard CGL policy language does not explicitly resolve questions of allocation where the successive policies on risk are triggered.[77]

Inc. v. Aetna Cas. & Sur. Co., 773 A.2d 906, 914 (2001) ("A liability insurer has a duty to defend its insured in a pending lawsuit if the pleadings allege a covered occurrence, even though facts outside the four corners of those pleadings indicate that the claim may be meritless or not covered.").

74. 22 ERIC MILLS HOLMES, HOLMES' APPLEMAN ON INSURANCE 2D § 136.1 (2003).

75. *See Schilberg Integrated Metals Corp.*, 819 A.2d at 783.

76. Clinton v. Aetna Life & Sur. Co., 594 A.2d 1046, 1049 (Conn. Super. Ct. 1991) ("when a complaint alleges several causes of action or theories of recovery against the insured, one of which is within the coverage of the policy, a duty on the part of the insurer to defend arises"); *see* HOLMES, *supra* note 74, at § 136.2(D).

77. Most CGL polices have "other insurance" clauses dictating allocation between two or more policies which insure the same risk. However, such clauses refer only to concurrent, not successive, policies. For a description of the three general types of "other insurance" clauses – excess, pro-rata and escape – see *Owens – Illinois, Inc.*, 650 A.2d at 991 (internal citations and quotation marks omitted).

While the majority of courts permit allocation of defense costs between insurers, they have yet to adopt a uniform manner of allocation.[78] Two general approaches have emerged, the pro-rata and joint-and-several methods of allocation. With regard to the insured's potential obligations, "[u]nder the pro-rata method, the insured is liable for costs attributable to losses occurring during periods when it was uninsured, while under the joint and several method, all costs are allocated among insurers . . . . Using either method, allocation will exist among the insurance companies on risk . . . . The real difference between the [methods] is in their treatment of periods of self insurance."[79]

1. Joint-And-Several Method of Allocation[80]

---

78. *But see* Sloan Constr. Co. v. Central Nat'l Ins. Co., 236 S.E.2d 818, 820 (S.C. 1977) ("[Any form of allocation is inappropriate] where two companies insured the identical risk and both policies provide for furnishing the insured with a defense, neither company, absent a contractual relationship can require contribution from the other for the expenses of the defense where one denies liability and refuses to defend. The duty to defend is personal to both insurers; neither is entitled to divide the duty.").

79. *Lumbermens II*, 826 A.2d (2003) at 701-02 (quoting *Owens-Illinois, Inc.*, 650 A.2d at 990).

80. The leading case applying the joint-and-several method is Keene Corp. v. Insurance Co. of North America, 667 F.2d 1034 (D.C. Cir. 1981). Prior to the *Keene Corp.* decision, the predominant case applying the joint and several method of allocation was Gruol Constr. Co. v. Insurance Co. of North America, 524 P.2d 427 (Wash. Ct. App. 1974) (continuous property damage—insurance coverage for damage to building caused by dry rot as a result of defective backfilling during construction). *See also* Emons Indus., Inc., *v.* Liberty Mut. Fire Ins. Co., 481 F. Supp. 1022 (S.D.N.Y. 1979) (duty to defend diethylstelbesterol (DES) liability cases); Transamerica Ins. Co. v. Bellafonte Ins. Co., 490 F. Supp. 935 (E.D. Pa. 1980) (drugs causing birth defects).

Keene and *Lumbermens* are factually similar. Plaintiff corporation, Keene, manufactured thermal insulation products containing asbestos from 1948-1972. *Keene Corp.*, 667 F.2d at 1038. Keene was named co-defendant in over 6,000 lawsuits for injuries resulting from exposure to its products. *Id.* From 1961 through 1981 (time of litigation) Keene was issued virtually identical CGL policies from a number of insurance companies. *Id.* at 1038-39. Keene tendered its defense to each of these insurance companies, which either accepted partial responsibility or denied responsibility all together. *Id.* at 1039. Keene filed for declaratory judgment and damages. *Id.* After adopting the "triple trigger" or "continuous trigger" approach, the D.C. Circuit held that: (1) once coverage is triggered under a given policy, the insurer is fully liable (subject only to its policy limits and "other insurance" clauses) to the policyholder for both indemnification and defense costs, without pro-ration to the policyholder, even if part of the injury may have occurred at time when the policyholder was self-insured, and (2) insurance companies whose policies are triggered may seek contribution from each other, under the "other insurance" clauses of their policies, but not from the policyholder. *Id.* at 1047, 1050.

The court reasoned that: (a) because the "all sums" language of the policies means that each policy purchased by Keene provides it with the right to be free of liability for asbestos

The basic premise of the joint-and-several method of allocation is that, given the broad "all sums" language of the policies, each policy triggered may be obliged to satisfy claims until the limits of the policy are exhausted.[81] This method of allocation allows the policyholder to choose among its CGL policies and collect indemnification from a single insurer subject only to the policy's limits. That is not to say the insurance company chosen by the policyholder is burdened with the entire liability and other insurers are let off the hook, the burden is merely placed on the defending insurance company to pursue contribution claims against the policyholder's other insurers.[82] For example, if exposure and the resulting injury occurred over a period of thirty years, and each of ten different insurers covered the policyholder for three years, the insured could select one of the insurers to defend the suit. Thereafter the insurer selected could pursue contribution and reimbursement from the other nine insurers.

Policyholders normally prefer this method of allocation for two reasons. "First, it virtually guarantees them full recovery because they can collect from a few solvent insurers and allow the insurers to determine how they will spread those costs equitably among themselves. Second, by allowing full recovery from one insurer, [this rule] also minimizes the policyholder's transactions costs (time and expense of negotiating and/or litigating with insurers). Thus [this rule] shifts transaction costs to the

---

related disease, allocating a pro-rata share of the liability to Keene for prior periods for which it was uninsured would thereby undermine the expected function of the CGL policies purchased and violate the reasonable expectations of the contracting parties; (b) since the language of the policies includes a built-in trigger of coverage, it is a fiction to say Keene also had a "self-insurance" policy that is triggered for periods in which no other policy was purchased; and (c) in keeping with its holding that each insurer is fully liable to Keene for indemnification, an insurer must defend Keene, so long as the complaint indicates Keene may be liable for injury and the facts alleged in the complaint indicate that its policy covers the alleged injury. *Id.* at 1047-50. The policyholder may choose which insured will defend it and the insurer chosen to defend the policyholder may share the costs of the defense with other insurers under the doctrine of contribution or as dictated by the "other insurance" clauses. *Id.* at 1050 n. 37.

81. STEMPEL, *supra* note 13, § 14.10. The name "joint-and-several" is somewhat of a misnomer. It is not "joint-and-several" liability such as that in the context of tort law, where a tortfeasor who is found ten percent negligent is required to pay one hundred percent of a judgment if the other liable defendants turn out to be insolvent. In this context an insured is never required to pay more than its policy limits, i.e. its contractual stake. *Id.*

82. DAVID W. STEUBER ET AL., PRACTICING LAW INST., EMERGING ISSUES IN ENVIRONMENTAL INSURANCE COVERAGE LITIGATION, IN FIFTH ANNUAL LITIGATION MANAGEMENT SUPERCOURSE (PLI Litig. & Admin. Practice Course Handbook Series No. 496, 1994) WL, PLI/Lit 331, 360.

insurers, who must pursue contribution actions to spread the costs among all insurers."[83]

The joint-and-several method has been adopted by a number of courts including; the Third Circuit,[84] the District of Columbia,[85] the District of New Jersey,[86] the Supreme Courts of Pennsylvania[87] and Washington,[88] and the California Court of Appeals.[89]

2. Pro-Rata Method of Allocation[90]

---

83. Christopher R. Hermann et al., *The Unanswered Question of Environmental Insurance Allocation in Oregon Law.*, 39 Willamette L. Rev. 1131, 1138 (2003).

84. New Castle Co. v. Hartford Acc. & Indem., 933 F.2d 1162 (3d Cir. 1991) (applying Delaware law); ACANDS, Inc. v. Aetna Cas. & Sur. Co., 764 F.2d 968 (3d Cir. 1985) (applying Pennsylvania law).

85. *Keene*, 667 F.2d 1034; Eli Lilly & Co. v. Home Ins. Co., 653 F. Supp. 1 (D.D.C. 1984).

86. Lac D'Amiante du Quebec, Lte. v. Am. Home Assur. Co., 613 F. Supp. 1549 (D.N.J. 1985).

87. J.H. France Refractories Co. v. Allstate Ins. Co., 626 A.2d 502 (Pa. 1993).

88. Am. Nat'l Fire Ins. Co. v. B & L Trucking, 951 P.2d 250 (Wash. 1998).

89. Armstrong World Indus. Inc., v. Aetna Cas. & Sur. Co., 52 Cal. Rptr. 2d 690 (Cal. Ct. App. 1996).

90. The seminal case applying the pro-rata method is *Forty-Eight Insulations, Inc.* 633 F.2d 1212 (6th Cir. 1980). Forty-Eight Insulations, Inc. manufactured various products containing asbestos from 1923 until 1970. Forty-Eight was named as a defendant in thousands of asbestos suits. From 1955 to 1977 Forty-Eight purchased twelve different CGL policies issued by five different companies. *Id.* at 1226 n.28. Forty-Eight believed it had insurance coverage prior to 1955 but was unable to prove coverage. One of the insurers, Insurance Company of North America, filed a diversity action, seeking a declaration as to which carrier was liable. *Id.* at 1214-16.

The district court adopted a version of the exposure theory of liability and pro-rated liability among all the insurance companies that were on risk while the injured victim was inhaling the asbestos. The district court treated Forty-Eight Insulations as self-insured for those years it did not have insurance and therefore responsible for a pro-rata share of the cost of indemnification and the cost of defending the underlying suits. Forty-Eight Insulations appealed only the part of the district court's decision pro-rating the cost of defending the lawsuits. *Id.* at 1224.

The Sixth Circuit adopted a slightly different version of the exposure theory, finding that the date of the occurrence is the date on which the injury-producing agent first contacts the body (i.e., when the asbestos fibers contacted the lungs), and that additional exposures were to be considered as arising out of one occurrence. The court adopted this particular trigger theory in order to maximize coverage. *Id.* at 1221-22. Forty-Eight was effectively uninsured after 1976 and any other theory would have put the date of occurrence after 1976. After adopting the exposure theory, the Court held that the duty to defend is based in contract, and each insurer contracted to pay only those costs attributable to bodily injury during its policy period. The Court reasoned that an insurer must bear the entire cost of defense only when there is no reasonable means of pro-rating the costs of defense between covered and not-covered items, and that having adopted the exposure theory, such means

The basic premise of the pro-rata method of allocation is the insured contracts to pay the entire cost of defending a claim which has arisen within the policy period but has not contracted to pay defense costs for occurrences which took place outside the policy period, thus where the distinction can be made the insured must pay for the defense of a non-covered risk.[91] Under this method of allocation, defense costs are divided proportionally among the different insurance companies and the insured (for periods of self-insurance).[92]

Insurers usually prefer this method to the joint-and-several method for three significant reasons. First, the pro-rata method often reduces the insurer's overall liability. If an insurer's pro-rated share exceeds its policy limits, the policyholder is left to bear the remainder. Second, the policyholder is assigned liability for any periods for which it lacked insurance.[93] Third, the transaction costs are borne by the policyholder rather than the insurer, for the policyholder must recover separately from each insurer.[94]

There are two general types of allocation under the pro-rata method, allocation by time-on-risk and allocation by percentage of coverage.

Under the time-on-risk rule, each insurance company's share of liability equals the percentage of time that it covered the risk.[95] Thus, if exposure and the resulting injury occurred over a period of 30 years, and each of ten different insurers covered the policyholder for three years, then each insurer must pay ten percent of the liability.[96] One problem with the time-on-risk method of allocation is that while

> [T]ime on the risk is a factor in assessing the degree of risk, it is not the only factor and has only a superficial

---

were available. Accordingly, the Court found that indemnification and defense costs for each underlying asbestos claim should be pro-rated among all years in which the claimant breathed asbestos fibers. For those years which the Forty Eight Insulations, Inc. did not have insurance, it was considered "self-insured" and thus responsible for the pro-rata share of indemnification and defense costs during that period. *Id.* at 1224-5.

91. *Forty-Eight Insulations, Inc.* 633 F.2d at 1224-25.

92. *See* STEMPEL, *supra* note 13, § 14.10.

93. *See generally Owens-Illinois, Inc.*, 650 A.2d 974; *Stownewall Ins. Co.*, 73 F.3d 1178.

94. *See* STEMPEL, *supra* note 13, § 14.10.

95. *Forty-Eight Insulations, Inc.*, 633 F.2d 1212.

96. Owens-Illinois, Inc. v. United Ins. Co., 650 A.2d 974 (N.J. 1994); *See* Stonewall Ins. Co. v. Asbestos Claims Mgmt. Corp., 73 F.3d 1178, 1202 (2d Cir. 1995) (an insurer's liability is determined by "multiplying the judgment or settlement by a fraction that has as its denominators the entire number of years of the claimant's injury, and as its numerator the number of years within the period when the policy was in effect.").

> connection to the actual risks assumed and losses incurred. In addition, temporal proration may be inequitable among insurers because of changes in insurance products, premiums charged, and the mix of claims. For example, under a temporal proration formula, long-ago insurers who may have charged bargain basement coverage rates prior to the surfacing of any reason for concern may owe as much or more than latter-day insurers who charged higher premiums and had greater reason to expect the claims at issue.[97]

Nevertheless, this method of allocation has been adopted by a number of courts.[98]

Under the percentage of coverage rule, an insured's liability depends on the percentage of total coverage that it issued.[99] For example, if two insurers covered a policyholder during a two-year period, each for one year, and the first insurer contracted for $10 million of coverage, and the second for $20 million, the total coverage is $30 million. The first insurer would be held liable for one-third of all liability and the second for two-thirds. The rationale behind this method of allocation is that "policy limits bear a relationship to the risk assumed, premium charged, and profit made by the insurer. Consequently, where a loss occurs over several policy periods or involves several layers of coverage, policy limits proration imposes responsibility on the insurers in proportion to the risks assumed and the premiums earned."[100] One problem with this rule, however, is that it may unfairly advantage insurers on risk for the early years of a multi-year loss. "The later carriers may be forced to pay more simply because of inflation or policyholders' increased sensitivity to risk,"[101] or based on the

---

97. STEMPEL, *supra* note 13, § 14.10.

98. *See, e.g.*, Lincoln Elec. Co. v. St. Paul Fire & Marine Ins. Co., 210 F. 3d 672 (6th Cir. 2000) (applying Ohio law); Ducre v. Executive Officers of Halter Marine Ins., 752 F.2d 976 (5th Cir. 1985); *Porter v. Am. Optical Corp.*, 641 F.2d 1128 (5th Cir. 1981); Uniroyal, Inc. v. Home Ins. Co., 707 F.Supp. 1368, 1391 (E.D.N.Y. 1988); N. States Power Co. v. Fid. & Cas. Co. of N.Y., 523 N.W.2d 657 (Minn. 1994); Ins. Co. v. Asbestos Claims Management Co., 73 F.3d 1178 (2d Cir. 1995); Gulf Chemical & Metallurigal Corp. v. Assoc. Metals & Mineral Corp., 1 F.3d 365, 372 (5th Cir. 1993); Fireman's Fund Ins. Co., v. Ex-Cell-O Corp., 685 F. Supp. 621, 626 (E.D. Mich 1987).

99. STEMPEL, *supra* note 13, § 14.10.

100. *Id.*

101. *Id.*

fact that they collected much higher premiums. Nevertheless, this method of allocation has also been endorsed by a number of courts.[102]

III. *OWENS-ILLINOIS, INC. v. UNITED INSURANCE CO. & INSURANCE CO. OF NORTH AMERICA v. FORTY-EIGHT INSURLATIONS, INC.*

In adopting the pro-rata method, the Connecticut Supreme Court explicitly relied on the reasoning of the Sixth Circuit in *Insurance Co. of North America v. Forty-Eight Insulations, Inc.* and the Supreme Court of New Jersey in *Owens-Illinois, Inc.*, v. *United Insurance Co.* Specifically, the Court stated, "[w]e are persuaded by the reasoning of the courts in *Forty-Eight Insulations, Inc.*, and *Owens-Illinois, Inc.*, and, accordingly, adopt the pro rata approach to the allocation of defense costs in long latency loss claims that implicate multiple insurance policies." [103] Upon examination, the Court's substantial reliance on these two cases may not be warranted.

A. *INSURANCE CO. OF NORTH AMERICA v. FORTY-EIGHT INSULATIONS, INC.*[104]

In *Forty-Eight Insulations, Inc.*, the Sixth Circuit pro-rated liability among all the insurance companies on risk during the injured party's exposure to asbestos. With respect to the years of exposure for which Forty-Eight Insulations, Inc. could not prove coverage, the Court treated Forty-Eight Insulations, Inc. as self-insured and responsible for a pro-rata share of the costs of defending the underlying suit. In doing so the Court reasoned:

> An insurer must bear the entire cost of defense when there is no reasonable means of prorating the costs of defense between the covered and the not-covered items. Thus, in the typical situation 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. In such cases, apportioning defense costs between the insured claim and

102. *See, e.g.*, Armstrong World Indus. v. Aetna Cas. & Sur. Co., 52 Cal. Rptr. 2d 690, 707 (Cal. Ct. App. 1996); *Owens-Illinois, Inc.*, 650 A.2d 974.

103. *Lumbermens II*, 826 A.2d at 710.

104. 633 F.2d 1212 (6th Cir. 1980). *See supra* note 90 for a factual summary of this case.

> the uninsured claim is very difficult. As a result, courts impose the full cost of defense on the insurer.
>
> These considerations do not apply where defense costs can be readily apportioned. The duty to defend arises solely under contract. An insurer contracts to pay the entire cost of defending a claim which has arisen within the policy period. The insurer has not contracted to pay defense costs for occurrences which took place outside the policy period. Where the distinction can be readily made, the insured must pay its fair share for the defense of the non-covered risk.
>
> In this case Forty-Eight's own exposure theory, substantially adopted by the district court, establishes that a reasonable means of proration is available. Forty-Eight has urged that indemnity costs can be allocated by the number of years that a worker inhaled asbestos fibers. By embracing the exposure theory, we have agreed. There is no reason why this same theory should not apply to defense costs...were we to adopt Forty-Eight's position on defense costs a manufacturer which had insurance coverage for only one year out of 20 would be entitled to a complete defense of all asbestos actions the same as a manufacturer which had coverage for 20 years out of 20.[105]

The Connecticut Supreme Court adopted the reasoning of the Sixth Circuit in its entirety. The propriety of the Court's decision is far from clear.

First, it is clear from the language quoted above, that the Sixth Circuit found that exposure theory, as adopted, provided a reasonable means of pro-rating defense costs.[106] Therefore, the Sixth Circuit's decision to pro-rate defense cost between the insurers and the insured (for periods of self-insurance) is inextricably tied to its adoption of the exposure trigger. The Connecticut Supreme Court relied on the language quoted above in adopting the pro-rata method of allocating defense costs, but did not, however, adopt the exposure theory. Rather the Court adopted instead the

105. *Id.* at 1224-25 (internal quotation marks and citations omitted) (emphasis added).

106. Under the exposure theory adopted by the court, initial exposure to asbestos fibers in any given year triggers coverage; any additional exposure to asbestos fibers is treated as arising out of the same occurrence. *See id.* at 1225.

continuous trigger theory.[107] Thus, the Court's reliance on the Sixth Circuit's rationale appears to be without merit.[108]

A clue to the Court's logic, however, might be found in its description of the trial court's adoption of the continuous trigger method and its second reference to the language quoted above. In describing the trial court's adoption of the continuous trigger the Court stated, "the Bridgeport asbestos litigation involved a 'continuous trigger situation' such that all asbestos related injury policies issued during the extended exposure period have been triggered for coverage . . . .'"[109] By such description the "continuous trigger" merely results in an extended exposure period.

In rejecting ACMAT's claim that the pro-rata method improperly treats the duty to defend like the narrower duty to indemnify, the Court relied for a second time on the language quoted above. In this instance however, the Court explained "in long latency loss claims that implicate multiple insurance policies, there is a reasonable means of prorating the costs of defense, i.e., time on the risk."[110] Although the Sixth Circuit did not use the term "time on the risk," functionally, however, that is how it allocated defense costs.[111] Accordingly, the Court's reliance on the rationale of *Forty-Eight Insulations. Inc.* may not be faulty, but merely cryptic.

Second, the Connecticut Supreme Court defends the pro-rating of defense costs by surmising that apportionment of defense costs pursuant to the joint-and-several method would provide the insured with a windfall. In doing so the Court relies on the Sixth Circuit's statement that "were we to adopt [the insured's position] on defense costs [an insured] which had

---

107. Under the continuous trigger theory adopted by the Connecticut Supreme Court "an occurrence has happened whenever the claimant was exposed to the cause of injury, was injured in fact, or the injury became manifest." *Lumbermens II*, 826 A.2d at 114 n.12. Any and all of these events trigger the applicable insurance policy in force at the time of the event. *Id.*

108. As noted by the New Jersey Supreme Court, "[t]he choice of trigger theory is related to the method a court will choose to allocate damages between insurers." *Owens-Illinois, Inc.*, 650 A.2d at 985 (citation and internal quotations omitted).

109. *Lumbermens II*, 826 A.2d at 113-14 (emphasis added).

110. *Id.* at 123.

111. *Forty-Eight Insulations, Inc.*, 633 F.2d at 1225; Insurance Co. of N. America v. Forty-Eight Insulations, Inc., 451 F. Supp. 1230, 1244 (E.D. Mich. 1978) ("The cumulative and indivisible nature of the injuries makes it impossible to determine when any given portion of such injuries occurred. Consequently, the resulting judgment [and defense costs] relates to the entire period of exposure and must be apportioned by the length of each insurer's coverage...Since a portion of the injury is allocated to the period for which Forty-Eight is considered self-insured, it must be treated as an insurer, and a portion of the defense costs must be allocated to that period.")

insurance coverage for only one year out of 20 would be entitled to a complete defense of all asbestos actions the same as an [insured] which had coverage for 20 years out of 20."[112] This statement, however, distorts the coverage provided by the joint-and-several method. As noted by the Court of Appeals for the District of Columbia in *Keene Corp. v. Insurance Co. of North America*, "[a]s a matter of probability, the more years of coverage that an insured has purchased, the smaller will be the number of injuries for which it will be liable. An insured will not be covered for an injury if it has insurance neither when the plaintiff's disease was developing nor when the disease manifested itself."[113] Therefore, as a practical matter an insured with insurance coverage for only one year out of twenty will not receive the same coverage as an insured with insurance coverage for twenty years out of twenty.

B. *OWENS-ILLINOIS, INC. v. UNITED INSURANCE COMPANY*[114]

---

112. *Lumbermens II*, 826 A.2d at 120.

113. *Keene Corp.*, 667 F.2d at 1049.

114. 650 A.2d 974 (N.J. 1994). O-I is the manufacturer of Kaylo, a thermal insulation product containing around 15% asbestos. O-I manufactured and distributed Kaylo from 1948-1958. Between the 1948 and 1963 O-I was self-insured, it maintained no insurance to cover product liability, but rather chose to bear the risk itself. From 1963-1977, O-I was insured by Aetna Casualty & Surety Co. (Aetna) under excess indemnity (umbrella) insurance policies. In 1975 Owens Insurance Limited (OIL) was established to provide reinsurance and loss prevention services to O-I. In 1977, OIL provided casualty insurance, including product-liability coverage to O-I. United Insurance Company (United) provided primary coverage under a CGL. OIL issued the excess umbrella policy and reinsurance with various companies, including United. In 1978 O-I notified Aetna, of asbestos-related claims involving Kaylo. Aetna denied coverage, maintaining manifestation of the disease triggered coverage, and the policy in effect at the time of manifestation should respond, not Aetna. In 1980 O–I notified the other insurance companies, which declined coverage, maintaining exposure to the product, which predated their policies, triggered coverage. O-I sought declaratory judgment from the Chancery Division that Aetna and OIL, the two lead carriers were obligated to provide coverage for O-I's asbestos-related claims. *Id.* at 976-77. The pertinent language of both the United and OIL policies closely resembled that of the standard CGL policy. *Id.* at 979.

The trial court adopted the continuous trigger method and held all insurers whose policies were triggered were jointly-and-severally liable to the extent of their policy limits. The appellate court affirmed, adopting the continuous trigger theory, concluding that insurers' liability was joint-and-several, and that allocation of damages on a pro-rated basis was not feasible in light of the indivisible nature of the injury and damages sustained. *Id.* at 978. The New Jersey Supreme Court adopted the continuous trigger theory, but reversed as to the joint-and-several allocation. The New Jersey Supreme Court adopted a version of the pro-rata method and held that defense costs should be allocated by policy limits multiplied by time on risk. *Id.* at 995. The Court held that the insured was to share in the allocation where periods of uninsurance reflected a decision by the insured to forgo coverage. *Id.*

In *Owens-Illinois, Inc.* the New Jersey Supreme Court pro-rated defense costs to the insured with respect to those periods for which the insured chose to forgo coverage.[115] In holding the insured responsible for a pro-rata share of the costs of defending the underlying suit, the New Jersey Supreme Court was candid in stating that it was unable to find the answer to allocation in the language of the policies.[116] The Court based its holding instead on the mode of allocation which would encourage the acquisition of adequate insurance coverage and which would best reflect the reasonable expectations of the parties. The Court's determination with respect each of these factors was dependant on the period of uninsurance reflecting a conscious decision on the part of the insured to forgo available coverage.[117] As a result, the reasoning of *Owens-Illinois, Inc.* is inapplicable to the circumstances of *Lumbermens*.

First, in choosing a method of allocation, the New Jersey Supreme Court chose the pro-rata method because it would encourage the purchase of adequate insurance coverage. In doing so the Court reasoned:

> The theory of insurance is that of transferring risks. Insurance companies accept risks from manufacturers and either retain the risks or spread the risk through reinsurance. Because insurance companies can spread costs throughout an industry and thus achieve cost efficiency, the law should, at a minimum, not provide disincentives to parties to acquire insurance when available to cover their risks. Spreading the risks is conceptually more efficient.
>
> Almost all such insurance controversies are retrospective, and to reflect now on what might have been done if the parties had contemplated today's problem is almost fatuous. Our job, however, is not just to solve today's problems but to create incentives that will tend to minimize their recurrence . . . . Future actors would know that if they do not transfer to insurance companies the risk of their activities that cause continuous and progressive injury, they may bear that untransfered risk.[118]

115. *Id.* at 995.
116. *Id.* at 990.
117. *Id.* at 977, 995.
118. *Id.* at 992 (emphasis added).

The Connecticut Supreme Court adopted this reasoning in its entirety. Applying such reasoning to the circumstances in *Lumbermens,* however, makes little sense. ACMAT purchased adequate insurance coverage from two identified carriers. It transferred the risk to the insurance companies. Fifty-years later, it merely could not produce the policies. This is not surprising given that "few companies keep records more than 15 or 20 years, if that long."[119]

The *Lumbermens* decision may encourage parties to maintain records of the policies they purchase, but creating such an incentive is hardly necessary. The burden of proof in insurance coverage disputes ordinarily rests with the insured. If the insured cannot produce its policies or proof of coverage it will not receive indemnification.[120] That alone is a sufficient impetus for the parties to keep track of their policies. Moreover, if the Connecticut Supreme Court intended to create such an incentive there is no evidence of it in the language of the *Lumbermens* decision.

Second, in choosing a method of allocation, the New Jersey Supreme Court adopted the pro-rata method because it reflected the reasonable expectations of the parties involved, as measured by the risks transferred and retained during the years of exposure. The Court sought to avoid providing a windfall to the insured, whose lack of adequate coverage reflected a conscious assumption of the risk.

> A fair method of allocation appears to be one that is related to both time on the risk and the degree of risk assumed. When periods of no insurance reflect a decision by an actor to assume or retain a risk, as opposed to periods when coverage for a risk is not available, to expect the risk-bearer to share in the allocation is reasonable. Estimating the degree of risk assumed is difficult but not impossible.[121]

It is clear from this language that the holding of *Owens-Illinois, Inc.* is limited to circumstances in which periods of uninsurance represent a decision by the insured to go bare, i.e. "to assume or retain a risk." So limited, the holding of *Owens-Illinois, Inc.,* does not apply to the

---

119. *Forty-Eight Insulations, Inc.*, 633 F.2d at 1225.

120. *See also* Northeast Utils. v. Century Indem. Co., No. X03CV 990495495S, 1999 Conn. Super LEXIS 1660, at *7 (Conn. Super. Ct. June 21, 1999) ("Under Connecticut law, [the insured] has the initial burden of proving the existence and terms of unavailable agreements.").

121. *Owens-Illinois, Inc.*, 650 A.2d at 995 (emphasis added).

circumstances in *Lumbermens*. ACMAT purchased an unbroken chain of insurance coverage. The periods of uninsurance in *Lumbermens* do not reflect a conscious decision on the part of the insured to forgo available coverage, but rather a period for which the policies, purchased and paid for, have been either lost or destroyed.[122]

IV. ACMAT'S ARGUMENTS ON APPEAL

As noted above in Part I, ACMAT made four claims on appeal each of which the Court summarily rejected. In rejecting each of ACMAT's arguments the Court relied on its prior adoption of the pro-rata method and the underlying rationale. Because, however, ACMAT's first three claims attack the adoption of the pro-rata method itself the reasoning employed by the Court is circular and begs the question.

ACMAT's claims were as follows:

1) The pro-rata method is inappropriate because it improperly treats the duty to defend like the narrower duty to indemnify.
2) The pro-rata method is inappropriate because it improperly recognizes a claim for equitable contribution by an insurer against its insured.
3) The pro-rata method is inappropriate because it improperly recognizes a claim for reimbursement of defense costs by an insurer against its insured.
4) Even if the Court adopts the pro-rata method, it should not do so in this case because the insured did not choose to forgo insurance. [123]

The circular nature of the Court's reasoning is most apparent in its rejection of ACMAT's third claim of error. Under the third claim,

---

122. *Lumbermens I*, 2001 Conn. Super. LEXIS 1387, at *18 ("[T]he present issue as to the third count concerns a period of time in which asbestos exposure insurance coverage was available was purchased by ACMAT and ACMAT never released the insurance companies from their obligations.").

123. *Lumbermens II*, 826 A.2d at 115; *see also* Brief for Appellant, Sec. Ins. Co. of Hartford v. Lumbermens Mut. Cas. Co., 826 A.2d 107 (Conn. 2003). The Court's rejection of ACMAT's fourth claim is more incomplete than circular. Under the fourth claim, ACMAT argued that an insured who can identify its claimed insurers is distinguishable from an insured who chose to forgo purchasing insurance, and that while it may be proper to apply the pro-rata approach to the latter it is not proper to apply it to the former. The Court rejected ACMAT's argument finding that "this is a distinction without a difference" and that ACMAT "in effect, chose to forgo insurance," and therefore the pro-rata method was equitable. *Lumbermens II*, 826 A.2d at 126. The Court, however, never adequately explained (a) why it is a "distinction without a difference" or (b) exactly how ACMAT who purchased insurance and paid premiums "in effect, chose to forgo insurance."

ACMAT argued that there is no cause of action for reimbursement of defense costs by an insurer against its insured, the pro-rata method permits reimbursement and therefore the adoption of the pro-rata method is improper. In rejecting this argument the Court explicitly relied on its previous adoption of the pro-rata method, stating "[w]e conclude that, where the pro-rata method of allocating defense costs applies, it is proper for the trial court to order the insured to reimburse its insurer for defense costs for periods of self-insurance."[124] More specifically, the Court adopted the California Supreme Court's holding in *Buss v. Superior Court,*[125] that "[a]s to the claims that are at least potentially covered, the insurer may not seek reimbursement for defense costs . . . [a]s to the claims that are not even potentially covered, however, the insurer may indeed seek reimbursement for defense costs," and then found that the costs of defense pro-rated by time on risk are not even potentially covered by the insurer's policies.[126]

The Court's rejection of ACMAT's second claim is equally as circular. Under the second claim, ACMAT argued there is no cause of action for equitable contribution of defense costs by an insurer against its insured; the pro-rata method permits equitable contribution by an insured to the insurer and therefore the adoption of the pro-rata method is improper. In rejecting this argument, the Court held that where the pro-rata method of allocation

---

124. *Lumbermens II*, 826 A.2d at 124.

125. 939 P.2d 766, 775-76 (Cal. 1997).

126. *Lumbermens II,* 826 A.2d at 125-26. The Court's reliance on *Buss* is problematic for a number of other reasons. First, the California Supreme Court in *Buss* reaffirmed its holding that in a mixed action (an action in which some of the claims are at least potentially covered and the others are not) the insurer has a duty to defend the action in its entirety, stating, "[t]o defend meaningfully, the insurer must defend immediately. To defend immediately, it must defend entirely." *Buss,* 939 P.2d at 775. Second, the California Supreme Court holding differentiates between covered and uncovered "claims." In *Lumbermens,* the Connecticut Supreme Court differentiated between covered and uncovered "portions" of a single claim of bodily injury. 826 A.2d at 110-19. Finally, and most significantly, the California Supreme Court limited its holding as follows: "An insurer may obtain reimbursement *only* for defense costs that can be allocated *solely* to the claims that are not even potentially covered. To do that, it must carry the burden of proof as to these costs by a preponderance of the evidence. And to do *that* . . . it must accomplish a task that, 'if ever feasible,' may be 'extremely difficult.'" *Buss*, 939 P.2d at 781 (emphasis in original). Therefore, even if time on risk is a legitimate means of distinguishing between covered and uncovered portions of a single claim of bodily injury, under *Buss,* the insurer would have to prove by a preponderance of evidence that the funds sought were expended solely in defense of the specific uncovered portion of the injury. Given the indivisible nature of the bodily injury in question doing so is virtually impossible and time on the risk does not even address the question.

is properly applied, contribution from the insured may be had.[127] The Court acknowledged that the general rule in Connecticut is that "all insurers providing primary coverage to an insured are duty bound to defend the insured and will be required to contribute their pro rata share of the cost of defense."[128] The Court failed, however, to explain why that rule should be expanded to include the insured. Rather it merely pointed out that those courts adopting the pro-rata method permit contribution by the insured and that "the doctrine of equitable contribution necessarily follows from the rationale underlying the pro rata method of allocation . . . ."[129]

The Courts response to ACMAT's first claim is also circular though less explicitly so. ACMAT's first argument is that the very words of the policy the insurer's obligation to defend is very broad—broader than its obligation to indemnify. In effect it is so broad that it arises even where one count of the complaint is within policy coverage and other counts are not. Therefore the insured should not be liable for any costs of the defense, even if part of the underlying lawsuit concerned periods of time when the insured was uninsured, so long as any insurance company had a duty to defend. In rejecting ACMAT's this argument the Court concluded:

> [I]n long latency loss claims that implicate multiple insurance policies, there is a reasonable means of prorating the costs of defense, i.e., time on the risk . . . . [B]ecause the duty to defend arises solely under contract and because the insurance companies have not contracted to defend the insured for periods outside of the policy period, requiring the insured to pay its fair share of the defense costs in a long latency loss suit that implicates multiple insurance policies does not treat the broad duty to defend as the more narrow duty to indemnify.[130]

Thus the Court rested its rejection of ACMAT's claim upon the same foundation upon which it rested its adoption of the pro-rata method: (a) that an insurer must bear the entire cost of defense only when there is no reasonable means of pro-rating the costs of defense between covered and uncovered items, and (b) that time on the risk is a reasonable means of differentiating between those claims, which "possibly" fall within the coverage of the policy, and those that do not.

---

127. *Lumbermens II,* 826 A.2d at 124.
128. *Id.* at 123.
129. *Id.* at 124.
130. *Id.* at 123.

CONCLUSION

Should a portion of the defense costs in long-latency liability claims implicating multiple successive insurers be allocated to the insured when coverage is interrupted by periods of uninsurance? In 2003, the Connecticut Supreme Court answered this question in the affirmative, thereby settling, at least for the state of Connecticut, a frequently debated issue.

The decision, however, left many other questions unanswered. Three of the most significant are as follows:

- Given that the Supreme Court specifically limited its holding to those circumstances where coverage is interrupted by periods of uninsurance, how are costs to be allocated where coverage is uninterrupted?[131] Logic directs that the Court would adopt the pro-rata method in the uninterrupted situation as well. It remains unclear, however, whether the Court would retain the time-on-risk approach or embrace the policy limits approach adopted in *Owens-Illinois, Inc.*
- Ordinarily as a corollary to the insurer relieving the insured of its obligation to seek counsel and put on a defense, the insured surrenders to the insurer complete control over the conduct of the defense.[132] Where, however, the insured is held responsible for a majority or even a substantial portion of the costs of defending the underlying suit, does the insurer still retain control of the defense? And if the answer is no, may the insured conduct its defense in a manner contrary to the interests of the insurer?
- Do all forms of "self-insurance" receive identical treatment with respect to allocation of defense costs? "Self-insurance" arises out of various contexts, including but not limited to, the insured assuming the risk, the unavailability of the relevant insurance, the insolvency of the triggered insurer, or the insured having lost or destroyed the relevant policies. The Connecticut Supreme Court found that an insured who lost/destroyed its policies should be treated identically to an insured that assumed the risk, but never explained why.[133] On

131. *Lumbermens II*, 826 A.2d at 127 n.18 ("[w]e do not decide in this case how costs should be allocated if there is uninterrupted coverage").

132. *See generally* HOLMES, *supra* note 60, at § 136.1.

133. The Court acknowledges there is a distinction, but concludes it is immaterial and that ACMAT "in effect chose to forgo insurance." *Lumbermens II*, 826 A.2d at 718-19. In

> the other hand, the trial court found, that the insured was not responsible for a pro-rata share of the defense costs for the period after 1985 when asbestos coverage was no longer available.[134]

Moreover, the court's substantial and problematic reliance on *Insurance Co. of North America v. Forty-Eight Insulations, Inc.*, and *Owens-Illinois, Inc. v. United Insurance Co.* and in adopting the pro-rata method of allocation and its circular reasoning in rejecting ACMAT's arguments on appeal, calls into question the soundness of the decision.

And yet, despite its shortcomings, the holding articulated in *Lumbermens* is now Connecticut law and precedent. It will be cited and relied upon in future cases dealing with a variation of the facts present in *Lumbermens*, as well as, in circumstances that have not yet arisen nor were envisioned by the Connecticut Supreme Court.

---

doing so the court relies on *Forty-Eight Insulations, Inc.*, 633 F.2d at 1215 n.4, and U.S. Fidelity & Guaranty Co. v. Treadwell Corp., 58 F. Supp. 2d 77, 83 n.4 (S.D.N.Y. 1999). Neither court explains why the distinction is immaterial.

134. *Lumbermens I*, 2001 Conn. Super. LEXIS 1387, at *4. Security withdrew this count before trial. *Id.* at *4. Therefore, this issue was not before the Supreme Court on appeal.