THE RUBIC'S CUBE:
ALLOCATION OF COVERAGE

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I. SCOPE OF ARTICLE

The concept of allocation is of immense importance to both insureds and their insurers. Allocation arises any time that more than one policy may respond to a risk; where the loss fits into more than one category of insurance; or where an insured is held liable for both covered and non-covered claims. The manner in which courts decide allocation in different contexts can mean the difference between vast liability for an insurer or no liability at all. Consequently, allocation is one of the most contentious issues in coverage cases, and there is a relatively wide-ranging scope of case law on the subject. This paper is an overview of the various key allocation issues including the effect of other insurance provisions, indemnity agreements, trigger and long-tail allocation cases.

II. ALLOCATION BETWEEN CARRIERS

A. Multiple Policies or Lines of Coverage for the Same Loss

1. Concurrent Policies or Lines of Coverage

Where concurrent policies apply to the same loss, Texas courts first look to interpret any "other insurance" clauses contained within those policies. *See Nutmeg Ins. Co. v. Employers Ins. Co. of Wausau*, No. Civ.A. 3:04-CV-1762B, 2006 WL 453235, *12 (N.D. Tex. Feb. 24, 2006). "Two or more policies must 'generally cover the same property and interest therein against the same risk in favor of the same party' for the policies to be concurrent" and for the "other insurance" clauses to be applicable. *Id.* (citing *State Farm Fire & Cas. Co. v. Griffin*, 888 S.W.2d 150, 155 (Tex. App.—Houston [1st Dist.] 1994, no writ); *CNA Lloyds of Tex. v. St. Paul Ins. Co.*, 902 S.W.2d 657, 659–60 (Tex. App.—Austin 1995, writ dism'd by agr.); *St. Paul Mercury Ins. Co. v. Lexington Ins. Co.*, 78 F.3d 202, 206 (5th Cir. 1996)). Additionally, even where the potentially applicable policies do not provide identical coverage, the coverage does not need to be completely coextensive for them to be considered "other insurance" as to each other. *Id.* (citing *Am. Cent. Ins. Co. v. Harrison*, 205 S.W.2d 417, 420 (Tex. Civ. App.—Eastland 1947, writ ref'd n.r.e.)). Generally, "other insurance" clauses are designed by insurers to "avoid an insured's temptation or fraud of over-insuring . . . property or inflicting self-injury." *St. Paul Mercury Ins. Co. v. Lexington Ins. Co.*, 78 F.3d 202, 206 (5th Cir. 1996) (citing *Hardware Dealers Mut. Fire Ins. Co. v. Farmers Ins. Exch.*, 444 S.W.2d 583, 586 (Tex. 1969)).

Other insurance clauses typically fall into three categories: (1) pro rata clauses, which restrict the liability of concurring insurers to an apportionment basis; (2) excess clauses, which restrict the liability of an insurer to excess coverage after another insurer has paid up to its policy limits; and (3) escape clauses, which avoid all liability in the event of other insurance. *Id.* (citing *Hardware Dealers*, 444 S.W.2d at 586). When only one of the concurrent policies covering a matter contains an "other insurance" clause, it is given effect without complication. However, "[p]roblems arise when more than one policy covers the same insured and each policy has an 'other insurance' clause which restricts its liability by reason of the existence of other coverage."[1] *Hardware Dealers*, 444 S.W.2d at 590.

Where the "other insurance" clauses conflict, Texas law follows the rule of "dominant consideration" of the rights of the insured. *Nutmeg Ins. Co.*, 2006 WL 453235, *12 (citing *Hardware Dealers*, 444 S.W.2d at 590). Under the "dominant consideration" rule, "[b]oth insurers make a concession . . . that whatever result [the court] reach[es] about the insurers' rights, the insured's coverage must be no less than if she had been protected by only one of the policies." *Hardware Dealers*, 444 S.W.2d at 589. Along the same lines, "if a conflict would cause a gap in the coverage for the insured, the policies must be

[1] "When, from the point of view of the insured, she has coverage from either one of two policies but for the other, and each contains a provision which is reasonably subject to a construction that it conflicts with a provision in the other concurrent insurance, there is a conflict in the provision." *Hardware Dealers*, 444 S.W.2d at 590.

prorated." *Nutmeg Ins.*, 2006 WL 453235, *12 (citing *Hardware Dealers*, 444 S.W.2d at 590; *St. Paul Mercury*, 78 F.3d at 210). However, if the terms of the insurance policies are clear and unambiguous, a court may not vary the policies' terms. *Id.* (citing *Canutillo Indep. Sch. Dist. v. Nat'l Union Fire Ins. Co.*, 99 F.3d 696, 700 (5th Cir. 1996)).

a. Mutually Repugnant Provisions

The *Hardware Dealers* line of cases applies where multiple "other insurance" clauses in two primary policies of coverage conflict. The repugnancy between the policy provisions is generally solved "by ignoring the two offending provisions." *Hardware Dealers*, 444 S.W.2d at 590 (choosing to ignore an escape clause and an excess clause, since both policies, minus those clauses, cover the insured). Thus, the general rule under Texas law is that where two or more liability insurance policies issued by different insurers provide coverage to the same insured and contain mutually repugnant "other insurance" clauses, then the insurers will allocate the loss equally.[2] *Harris v. Am. Protection Ins. Co.*, 158 S.W.3d 614, 621 (Tex. App.—Fort Worth 2005, no pet.); *Royal Ins. Co. v. Hartford Underwriters Ins. Co.*, 391 F.3d 639, 644 (5th Cir. 2004). This rule has been extended to apply in cases where two excess policies contain conflicting "other insurance" provisions. *See Westchester Fire Ins. v. Heddington Ins. Ltd.*, 883 F. Supp. 158 (S.D. Tex. 1995), *aff'd*, 84 F.3d 432 (5th Cir. 1996) (citing *Hardware Dealers*, 444 S.W.2d at 590).

The waters become somewhat muddy where additional insured status is sought on top of an insured's own purchased coverage or where a subcontractor has an enforceable duty to indemnify a contractor. For example, in 2003, the Fifth Circuit held that where a subcontractor has an enforceable duty to indemnify a contractor, and the contractor is an additional insured under the subcontractor's primary policy, then the contractor's primary policy is excess to the subcontractor's primary policy *even if* the primary policies contain repugnant "other insurance" clauses. *Am. Indem. Lloyds v. Travelers Prop. & Cas. Inc. Co.*, 335 F.3d 429, 436 (5th Cir. 2003).

In that case, American Indemnity Lloyds ("American") insured Elite Masonry ("Elite"), a subcontractor. Travelers Property and Casualty Company ("Travelers") insured Caddell Construction Company ("Caddell"), a general contractor. Caddell contracted with Elite to work on construction of a prison near Beaumont. The contract provided that Elite had a duty to defend and indemnify Caddell for any claims arising out of the work done under the contract, unless a judicial proceeding determined that fault for the claim was solely attributable to Caddell or its officers, agents, or employees. The contract also required Elite to name Caddell as an additional insured under the American policy. *Am. Indem. Lloyds*, 335 F.3d at 431.

An employee of Elite was injured on the job. In 1998, he sued Elite and Caddell, alleging negligence and gross negligence. *Id.* Travelers initially undertook Caddell's defense, but then demanded that American assume the defense. American agreed to assume the defense, but in 2000 demanded that Travelers share in the defense costs, citing the policies' identical other insurance provisions. *Id.* at 433–34. Travelers did not respond and declined an invitation to participate in settlement discussions. The underlying case settled for an amount within American's policy limits. American demanded that Travelers reimburse it for half of the cost of the defense and indemnity of Caddell. When Travelers refused, American filed a declaratory judgment action seeking a declaration that it was entitled to recover those costs pursuant to the other insurance clause. Travelers prevailed on summary judgment before the district court, relying on the indemnity clause in the contract between Elite and Caddell, and American appealed. *Id.* at 434–35.

The Fifth Circuit acknowledged that this case addressed a novel issue under Texas law, and thus looked to authorities from other jurisdictions. *Id.* at 435. The court noted that while generally where two primary insurers offering concurrent coverage and containing identical "other insurance" clauses will share the costs equally,

[2] If one insurer pays more than its share, it may make an equitable subrogation claim against the other insurer(s). *See e.g.*, *Employers Cas. Co. v. Transport Ins. Co.*, 444 S.W.2d 606, 610 (Tex. 1969).

there was a well-recognized exception where one insured has a duty to indemnify another insured. The court, relying on *Wal-Mart Stores, Inc. v. RLI Ins. Co.*, 292 F.3d 583, 588-94 (8th Cir. 2002), noted that American, as Elite's primary insurer, would ultimately pay for the entire cost of the settlement anyway. Travelers, as Caddell's subrogee, could seek indemnification from Elite under the contract between the Caddell and Elite. Elite, in turn, would tender Travelers' claim for indemnification to American. The court reasoned that treating the subcontractor's policy as primary and the contractor's policy as excess avoided the circuitous litigation described above. *American Indemnity Lloyds*, 335 F.3d at 436-37.

The court also relied on cases that took the position that requiring the contractor's primary policy to share in the costs with the subcontractor's primary policy essentially negated the contract's indemnification provision. *Id*. at 437-40 (discussing *J. Walters Const. Inc. v. Gilman Paper Co.*, 620 So.2d 219 (Fla. App. 1993); *Rossmoor Sanitation Inc. v. Pylon, Inc*., 119 Cal. Rptr. 449 (Cal. 1975); and *Aetna Ins. Co. v. Fidelity & Cas. Co*., 483 F.2d 471 (5th Cir. 1973) (applying Florida law)). The court predicted that the Texas Supreme Court, if presented with the issue, would follow the emerging majority rule and recognize this exception.[3]

In *Wal-Mart Stores v. RLI Ins. Co.*, 292 F.3d 583 (8th Cir. 2002), the case upon which the *American Indemnity Lloyds* court most heavily relied, the Eighth Circuit held that Wal-Mart and its primary insurer, National Union, had no duty to reimburse the excess carrier of its indemnitor for the cost of a $11 million settlement. Its indemnitor, Cheyenne, had two insurance policies: a primary policy through St. Paul with $1 million limits, and an excess policy through RLI with $10 million limits. Wal-Mart was an additional insured under the Cheyenne policies. Wal-Mart had its own $10 million primary policy with National Union. *Wal-Mart*, 292 F.3d at 585-86. All parties agreed that St. Paul had a duty to pay its $1 million limits first. The question before the court was whether National Union, as a primary insurer, paid its $10 million next, or whether RLI paid next. The Eighth Circuit held that the indemnity agreements trumped the "other insurance" clauses because any result would eventually lead to RLI being liable for the $10 million. *Id*. at 592-94.

In another recent case dealing with potential coverage for an additional insured, the Northern District of Texas acknowledged that "an apportionment or allocation question [might] remain" after a determination could be made as to (1) a party's additional insured status, and (2) whether the policy at issue was primary or excess due to its "other insurance" clause.[4] *See Genesis Indem. Ins. Co. v. Tudor Ins. Co.*, No. Civ.A. 3:04-CV-1052-D, 2006 WL 317002, *8 (N.D. Tex. Feb. 10, 2006). In that case, the court denied two parties' cross-motions for summary judgment regarding an apartment complex's additional-insured status because the record was not sufficiently developed to permit the court to decide if a duty to indemnify existed. *Id.* at *7.

(1) *Determining Additional Insured Status*

In Texas, the term "additional insured" carries a clear technical meaning. *Transport Int'l Pool, Inc. v. Cont'l Ins. Co.*, 166 S.W.3d 781, 786 (Tex. App.—Fort Worth 2005, no pet. h.); *W. Indem. Ins. Co. v. Am. Physicians Ins. Exch*., 950 S.W.2d 185, 188 (Tex. App.—Austin 1997, no writ). An additional insured is a party protected under a policy without being named in the policy. *Transport Int'l*, 166 S.W.3d at 786; *W. Indem.*, 950 S.W.2d at 188–89. A party typically becomes an additional insured pursuant to an agreement obligating the named insured to add the additional insured to the named insured's pre-existing

[3]The court also held that Travelers had no duty to share in the defense costs with American, noting that under Texas law an excess insurer generally has no duty to participate in the defense of the insurer until the primary coverage is exhausted. *See e.g., Keck, Mahin & Cate v. Nat'l Union Fire Ins. Co*., 20 S.W.3d 692, 700 (Tex. 2000). In this case, because the settlement of the underlying claim did not exceed American's policy limits, and because Travelers had no duty to participate in the defense until the American policy was exhausted, Travelers had no duty to contribute towards the defense costs. *Id*. at 443-44.

[4]*See Swicegood v. Med. Protective Co.*, 2003 WL 22234928 (N.D. Tex. Sept. 19, 2003) (interpreting Texas law to provide that apportionment or allocation not made in underlying third-party litigation may be made in first-party coverage cases).

insurance policy. *Transport Int'l*, 166 S.W.3d at 786; *W. Indem.*, 950 S.W.2d at 189.

The majority of recent opinions interpreting Texas law have held that coverage "should apply to an additional insured even when the named insured is without fault if, but for the additional insured's relationship with the named insured's work, the additional insured would have no liability."[5] The exception to this apparent rule is where the policy at issue contains a "sole negligence" exclusion, or an exclusion that can be interpreted as such.[6] A discussion of several relevant opinions follows.

First, in *Highland Park Shopping Village v. Trinity Universal Ins. Co.*, the Dallas Court of Appeals considered whether a shopping center (Highland Park) and its owner (Henry Miller) were additional insureds under a CGL policy issued to Ward Brothers Plumbing Company, whose employee had been injured in the Highland Park parking garage while riding a Man Lift. 36 S.W.3d at 917. Watkins, the Ward Brothers employee, had been doing repair work required by Highland Village prior to his injury. *Id.* He had borrowed a ladder from Highland Park to use in his work, and after completing the job, Watkins returned the ladder to the garage basement and used the Man Lift to reach his car, which was parked outside the garage. *Id.* Watkins' lawsuit against Highland Park and Miller was based on his complaint that the Man Lift was unsafe. *Id.*

The Ward Brothers policy with Trinity Universal Insurance Company contained the following endorsement:

> WHO IS AN INSURED (Section II) is amended to include as an insured the person or organization shown in the Schedule, but only with respect to liability arising out of "your work" for that insured by or for you.

Id. The policy defined "your work," in pertinent part, as "work or operations performed by you or on your behalf. *Id.*

Highland Park and Miller demanded that Trinity defend Watkins' suit and indemnify them for any recovery. *Id.* Trinity refused, asserting that they were not covered because the suit alleged negligence only on the part of Highland Park and Miller, and not on the part of Ward Brothers. *Id.* The court of appeals found that based on two earlier opinions from other courts of appeals, the additional insured endorsement would cover the additional insureds for claims involving injuries to employees of the named insured. *Id.* (citing *McCarthy Bros.*, 7 S.W.3d at 725; *Trident NGL*, 988 S.W.2d at 451).

In *McCarthy*, an employee of a subcontractor, Crouch, sued the McCarthy Brothers Company for negligence arising out a duty it owed him as a business invitee. *Id.* at 918 (citing *McCarthy*, 7 S.W.3d at 727). Crouch's employee was injured as he walked down a slippery incline to get tools to perform his work, which was an integral part of his work for McCarthy. *Id.* (citing *McCarthy*, 7 S.W.3d at 730). McCarthy was an additional insured on a general liability policy issued to Crouch as the named insured. *Id.* (citing *McCarthy*, 7 S.W.3d at 727). The endorsement insured McCarthy "only with respect to liability arising out of 'your work' for that insured by or for you." *Id.* (citing *McCarthy*, 7 S.W.3d at 727). Ultimately the *McCarthy* court held that McCarthy's liability for the injury "arose out of" Crouch's work for McCarthy, because the employee's injury occurred while he was on the construction site for the purpose of carrying out Crouch's work for McCarthy. *Id.* (citing *McCarthy*, 7 S.W.3d at 730). Thus, there was held

[5] *Compare Mid-Continent Cas. Co. v. Chevron Pipe Line Co.*, 205 F.3d 222, 229 (5th Cir. 2000); *Mid-Continent Cas. Co. v. Swift Energy Co.*, 206 F.3d 487, 499–500 (5th Cir. 2000) ; *Highland Park Shopping Village v. Trinity Univ. Ins. Co.*, 36 S.W.3d 916, 918 (Tex. App.—Dallas 2001, no pet.); *McCarthy Bros. Co., v. Continental Lloyds Ins. Co.*, 7 S.W.3d 725, 730–31 (Tex. App.—Austin 1999, no pet.); *Admiral Ins. Co. v. Trident NGL, Inc.*, 988 S.W.2d 451, 454 (Tex. App.—Houston [1st Dist.] 1999, pet. denied); *and Northern Ins. Co. of N.Y. v. Austin Commercial, Inc.*, 908 F.Supp. 436 (N.D. Tex. 1991); *Granite Constr. Co. v. Bituminous Ins. Co.*, 832 S.W.2d 427 (Tex. App.—Amarillo 1992, no writ).

[6] *See D.R. Horton-Texas, Ltd. v. Markel Int'l Ins. Co*, No. 14-05-00486-CV, 2006 WL 176571, *4–5 (Tex. App.—Houston [14th Dist.] Jan. 26, 2006, no pet. h.); *Transport International*, 166 S.W.3d at 787; *Atonfina Petrochemicals, Inc. v. Cont'l Cas. Co.*, No. 04-0170, 2005 WL 3445514 (Tex. Dec. 16, 2005).

to be a causal connection between the injury and Crouch's performance of its work for McCarthy. *Id.* (citing *McCarthy*, 7 S.W.3d at 730).

Similarly, the First Court of Appeals in Houston faced a similar additional insured endorsement in *Trident NGL*. *Id.* (citing *Trident*, 988 S.W.2d at 454). In *Trident*, the endorsement restricted coverage for the additional insured for liability arising out of the named insured's operations. *Id.* (citing *Trident*, 988 S.W.2d at 454). *Trident* also involved an injury to an employee of the named insured occurring on the "premises of the additional named insured." *Id.* (citing *Trident*, 988 S.W.2d at 453). In *Trident*, the court followed the rule of the majority of courts around the county, and found that it was sufficient that the named insured's employee was injured while present at the scene in connection with performing the named insured's business, even if the cause of injury was the additional insured's negligence. *Id.* (citing *Trident*, 988 S.W.2d at 454–55).

The *Highland Park* court ultimately ruled in the manner that the *McCarthy Brothers* and *Trident NGL* courts ruled, and held that Highland Park and Miller were additional insureds, because Watkins' injury occurred while he was on the premises to do the work of his employer, and because his injury arose out of his employer's work. *Id.*

Additionally, in mid-December, the Texas Supreme Court issued an opinion in *Atonfina Petrochemicals* and held that a property owner was an additional insured under a contractor's comprehensive general liability policy with respect to an accident injuring the contractor's employee. In that case, A&B Builders, Inc. ("A&B") was hired to erect steel for construction on property owned by ATOFINA Petrochemicals, Inc. ("Fina"). The first day that A&B was scheduled to work, Larry Don Wisdom, an A&B employee, was injured while unloading steel. Following the accident, Wisdom sued Fina and two other defendants for negligence, alleging his injuries were caused "by the total negligence and carelessness of Defendants." *Id.* at *1. Fina subsequently sought a defense and coverage as an additional insured under A&B's comprehensive general liability policy, issued by Continental Casualty Company.

A&B's policy contained an endorsement providing that if A&B was required to add another person or organization as an additional insured under a written contract, and if a certificate of insurance listing that person had been issued, then that person or organization was added as an "additional insured." The trial court granted partial summary judgment, holding that Fina was an additional insured and that coverage was not barred by a limitation within the additional insured endorsement. However, the First District Court of Appeals of Houston reversed.

In reversing the court of appeals and reinstating the trial court's judgment, the Texas Supreme Court held that A&B and Fina had a written contract requiring A&B to provide insurance covering Fina. The Court found that even though the contract obligating A&B to "furnish . . . insurance" did not specify the type of coverage or the policy limits to be provided, it contained all the material terms. Further, Fina and A&B had worked together before and had an understanding that Fina was to be added to A&B's existing policy and that the coverage and policy limits were to be provided by that policy. Therefore, the contract between A&B and Fina was "sufficiently definite for the parties to understand their obligations."[7] *Id.* at *2 (citing *T.O. Stanley v. Boot Co. v. Bank of El Paso*, 847 S.W.2d 218, 221 (Tex. 1992)). Importantly, the Court also ruled that a paragraph in the policy stating that the additional insured endorsement "does not apply to . . . any liability arising out of any act, error or omission of the additional insured, or any of its employees" excluded *only* Fina's sole negligence. Because the pleadings alleged that the injuries were caused at least in part by A&B's negligence, coverage for Fina was afforded under the policy. A petition for rehearing of the case was filed on January 16, 2006.

[7]The Texas Supreme Court also made several other rulings in finding coverage for Fina. First, the Court did not fault Fina for not obtaining a certificate of insurance before beginning work, holding that nothing in the record indicated that the parties attempted to manufacture coverage after the accident, and that the issuance of a certificate was not a condition precedent to Fina's becoming an additional insured.

Two Texas appellate courts have even more recently held similarly. First, in *Transport International*, the court was faced with an employee (Doolin) of a construction company (Vratsinas) who was injured when a construction trailer he was occupying blew over in high winds. *Transport International*, 166 S.W.3d at 783. The trailer was owned by GE and was being leased to Vratsinas under a least agreement, which provided that Vratsinas was to procure and keep in full force and effect a CGL policy naming GE as an additional insured, as well as a commercial property insurance policy naming GE as a loss payee.

Doolin, the employee, filed suit for his injuries naming only GE as a defendant. Doolin alleged that GE "negligently and carelessly failed to properly anchor and tie the trailer down so that it was safe for its intended use as a construction office." *Id.* GE then filed a third-party petition against Vratsinas and its insurer (Continental), alleging that it was entitled to a defense and indemnity. GE, in its petition, sought a declaratory judgment that Continental and Vratsinas were liable for all of Doolin's claims against GE. Eventually, the trial court declared that Continental had no duty to defend or indemnity GE in Doolin's suit. GE appealed.

The Fort Worth Court of Appeals observed that Vratsinas' policy with Continental contained an exclusion stating that the policy did not apply "[t]o 'bodily injury' or 'property damage' arising out of the sole negligence of such person or organization," meaning the purported additional insured. *Transport International*, 166 S.W.3d at 785–86. The court looked to the plain language of the exclusion as well as Doolin's petition, which did not allege any acts of negligence or omissions other than those of GE. However, GE argued that coverage was not negated by the exclusion because (1) Vratsinas had sole responsibility for preparing the site at issue, (2) it was Vratsinas' responsibility to provide a firm and level ground for the safe installation of the construction trailer, (3) Vratsinas selected the site for the trailer, and (4) Vratsinas assumed all maintenance duties.

The *Transport International* court held that under the eight-corners rule, it could look only to Doolin's pleadings and the insurance policy at issue in determining whether Continental had a duty to defend. *Id.* at 787–88. The court ultimately concluded that coverage under the additional insured endorsement did not apply because the policy excluded coverage for GE's sole negligence. *Id.* at 788.

The Fourteenth District Court of Appeals in Houston held similarly in *D.R. Horton* in January. *D.R. Horton*, 2006 WL 176571, *4–5. In that case, the court found no duty to defend the additional insured (Horton) under two different policies because the underlying petition did not allege that the work of the named insured (Ramirez) caused damage. Ramirez, a masonry subcontractor, was not named in the underlying lawsuit, nor were any other of Horton's subcontractors.

(2) *Determining Whether Indemnity Agreements Are Valid*

Separate and distinct from the applicability of an additional insured clause is the issue of coverage for an insured's acceptance of contractual indemnity on another's behalf.[8] Under

[8]The applicability of an additional insured clause is independent of any indemnity obligation. *See* Diamond Offshore Co. v. A&B Builders, Inc., 302 F.3d 531 (5th Cir. 2002), *Mid-Continent Cas. Co. v. Swift Energy Co.*, 206 F.3d 487 (5th Cir. 2000); *LeBlanc v. Global Marine Drilling Co.*, 193 F.3d 873 (5th Cir. 1999); *Certain Underwriters at Lloyds' London v. Oryx Energy Co.*, 142 F.3d 255 (5th Cir. 1998); *Getty Oil Co. v. Insurance Co. of N. America*, 845 S.W.2d 794 (Tex. 1992). All of these cases explicitly reject the argument that the applicability of the additional insured clause depends on the validity of the indemnity agreement.

Additionally, numerous cases have rejected the position that an additional insured clause is simply designed to assure performance of an indemnity obligation and provides no coverage where the indemnity is unenforceable or too narrow to cover the loss. *Atofina Petrochemicals, Inc. v. Evanston Ins. Co.*, 104 S.W.3d 247, 250 (Tex. App.—Beaumont 2003); *Coastal Transport Co. v. Crown Central Petroleum Corp.*, 20 S.W.3d 119, 129 (Tex. App.—Houston [14th Dist.] 2000, writ denied); *Diamond Offshore Co. v. A&B Builders*, 302 F.3d 531 (5th Cir. 2002); *LeBlanc v. Global Marine Drilling Co.*, 193 F.3d 873 (5th Cir. 1999) (applying Louisiana law), *rehearing and suggestion for rehearing en banc denied*, 203 F.3d 826 (1999), *cert. denied sub nom Frank's Casing Crew & Rental Tools, Inc. v. Marine Drilling Mgmt. Co.*, 529 U.S. 1098 (2000); *Mid-Continent Cas. Co. v. Swift Energy Co.*, 206 F.3d 487 (5th

Texas law, an indemnity agreement under which a party seeks indemnity for its own negligence must express that intent clearly in the indemnity language. *See Ethyl Corp. v. Daniel Constr. Co.*, 725 S.W.2d 705, 708 (Tex. 1987); *Tesoro Petroleum Corp. v. Nabors Drilling USA*, 106 S.W.3d 118, 132 (Tex. App.—Houston [1st Dist.] 2002, pet. denied). Indemnity language must also appear conspicuously, such that "a reasonable person against whom it is to operate ought to have noticed it." *Dresser Indus., Inc. v. Page Petroleum, Inc.*, 853 S.W.2d 505, 510–11 (Tex. 1993) (adopting standards from the Uniform Commercial Code and noting that "language in capital headings, language in contrasting type or color, and language in an extremely short document, such as a telegram, is conspicuous"). The express negligence test is implicated where one party seeks indemnity from another party for its own negligence or strict liability. *See DDD Energy, Inc. v. Veritas DGC Land, Inc.*, 60 S.W.3d 880 (Tex. App.—Houston [14th Dist.] 2001, no pet.). However, it is not implicated where one party seeks indemnity from another party for a claim or lawsuit based upon claims other than negligence or strict liability. *See English v. BGP Int'l*, 174 S.W.3d 366, 375 (Tex. App.—Houston [14th Dist.] 2005) (holding that express negligence test was not applicable to claim for indemnification for trespass claims).

Furthermore, where an indemnity provision relating to oil, gas, mine, or water drilling states that it is to be construed and interpreted under Texas law, the provision may need to comply with the Texas Oilfield Anti-Indemnity Act ("TOAIA").[9] *See* TEX. CIV. PRAC. & REM. CODE ANN. § 127.001, *et seq.* TOAIA was enacted in 1973 in response to a perceived abuse in the drafting of indemnity provisions against drilling and other contractors. Oil well operators required these contractors to indemnify the operators for their own negligence when many of these contractors were having a difficult time obtaining liability insurance. The law is intended to limit the uninsured liability of these contractors. *See Ken Petroleum Corp. v. Questor Drilling Corp.*, 24 S.W.3d 344, 348 (Tex. 2000) (discussing generally legislative history of TOAIA).

The Texas Supreme Court in *Maxus Exploration* addressed the applicability of TOAIA to a drilling agreement entered into between two

Cir. 2000); *Certain Underwriters at Lloyds v. Oryx Energy Co.*, 142 F.3d 255 (5th Cir. 1998); *Kerr v. Smith Petroleum Co.*, 896 F.Supp. 608 (E.D. La. 1995) (applying Texas and Louisiana law).

But see Emery Air Freight Corp. v. General Transport Sys., 933 S.W.2d 312 (Tex. App.—Houston [14th Dist.] 1996, no writ h.), where the court of appeals held that the contract at issue did not satisfy the *Getty* test because the indemnity agreement, which was unenforceable, did not contain a separate provision requiring General Transport to obtain insurance to support the indemnity agreement. Thus the court held that the additional insured provision was not independent, but existed solely to support the indemnity agreement. *Emery Air*, 933 S.W.2d at 315. The court affirmed a motion for summary judgment in General Transport's favor and held that General Transport did not breach its contract with Emery Air by failing to have Emery Air added as an additional insured under its policies. *Id.*

[9] Relevant sections of TOAIA include:

Section 127.003. Agreement Void and Unenforceable

(a) Except as otherwise provided by this chapter, a covenant, promise, agreement, or understanding contained in, collateral to, or affecting an agreement pertaining to a well for oil, gas, or water or to a mine for a mineral is void if it purports to indemnify a person against loss or liability for damage that:

(1) is caused by or results from the sole or concurrent negligence of the indemnitee, his agent or employee, or an individual contractor directly responsible to the indemnitee; and

(2) arises from:

(A) personal injury or death;

(B) property injury;

(C) any other loss, damage, or expense that arises from personal injury, death, or property injury.

* * *

Section 127.005. Insurance Coverage

(a) This chapter does not apply to an agreement that provides for indemnity if the parties agree in writing that the indemnity obligation will be supported by liability insurance to be furnished by the indemnitor subject to the limitations specified in Subsection (b) or (c).

(b) With respect to a mutual indemnity obligation, the indemnity obligation is limited to the extent of the coverage and dollar limits of insurance or qualified self-insurance each party as indemnitor has agreed to obtain for the benefit of the other party as indemnitee.

(c) With respect to a unilateral indemnity obligation, the amount of insurance required may not exceed $500,000.

Texas contractors to drill an oil well in Kansas. *See Maxus Exploration Co. v. Moran Bros., Inc.*, 817 S.W.2d 50, 57 (Tex. 1991). The Texas Supreme Court in that instance held that, in the absence of a choice-of-law provision in the agreement, Kansas law applied. Regarding TOAIA, the Court said:

> One can argue that the Texas Legislature's purpose in enacting Chapter 127 is to protect Texas contractors who work in mineral wells and mines wherever they may be situated, but we think it more plausible that it had the more limited objective of protecting contractors who drill wells in Texas. We do not read the statute to have an extraterritorial reach, *absent some agreement between the parties*.

Maxus Exploration, 817 S.W.2d at 57 (emphasis added).

The *Chesapeake Operating* court distinguished *Maxus Exploration* and concluded that where the parties' agreement contained an enforceable choice-of-law provision selecting Texas law, TOAIA could apply to drilling operations located outside Texas. *Chesapeake Operating, Inc. v. Nabors Drilling USA, Inc.*, 94 S.W.3d 163, 169–70 (Tex. App.—Houston [14th Dist.] 2002, no writ h.). The court emphasized the last portion of the *Maxus Exploration* court's statement. *Chesapeake Operating*, 94 S.W.3d at 179. The court also noted that nothing in the text of the statute limited its operation merely to Texas oilfield operations. *Id*. at 175. The court therefore held that TOAIA, and not its Louisiana counterpart, governed the enforceability of the indemnity agreements between Chesapeake Operating and Nabors Drilling, even though the drilling operations occurred in Louisiana.

b. Non-Mutually Repugnant Provisions

As mentioned above, where "other insurance" clauses are not mutually repugnant, there is no conflict, and the excess clause generally prevails. *See Nutmeg*, 2006 WL 453235, *12. When this occurs, the insurer with the excess clause is not liable for the loss until the policy containing the pro rata clause has been exhausted. *See id.*; *see, e.g., Allstate Ins. Co. v. Universal Underwriters Ins. Co.*, 439 S.W.2d 385 (Tex. Civ. App.—Houston [14th Dist.] 1969, no writ); *Canal Ins. Co. v. GENSCO, Inc.*, 404 S.W.2d 908 (Tex. Civ. App.—San Antonio 1966, no writ); *but see St. Paul Mercury Ins. Co. v. Lexington Ins. Co.*, 888 F. Supp. 1372 (S.D. Tex. 1995), *aff'd*, 78 F.3d 202 (5th Cir. 1996) (prorating loss between pro rata clause and escape clause).

In *Nutmeg*, an opinion released in February of this year, the Northern District was faced with three applicable policies: (1) the Wausau policy (a CGL policy effective from June 1, 1999 to June 1, 2002), (2) the Virginia Surety policy (a CGL policy effective from December 31, 2000 to December 31, 2003), and (3) the Nutmeg policy (a professional liability policy effective November 20, 2000 to November 20, 2002). *Nutmeg*, 2006 WL 453235. The Wausau policy stated that it was primary and would share with all other insurance "by equal shares" if "all of the other insurance permitted contribution." *Id.* at *4. If the other insurance did not permit contribution by equal shares, the Wausau policy provided that it would contribute "by limits," and that each insurer's share [would be] based on the ratio of its applicable limit of insurance to the total applicable limits of insurance of all [the] insurers." *Id.* The Virginia Surety policy provided that it was primary, but that it would permit contribution "by equal shares" if "all of the other insurance permit[ted] contribution by equal shares." *Id.* at *5. It also stated that "[i]f any other the other insurance [did] not permit contribution by equal shares, that it would contribute "by limits." *Id.*

Both the Wausau and Virginia Surety policies also contained the following provision, with minor distinctions:

b. Excess Insurance

> This insurance is excess over any of the other insurance, whether primary, excess, contingent or on any other basis:
>
> (1) That is Fire, Extended Coverage, Builder's Risk,

> Installation Risk or similar coverages for "your work."

Id. at *4–5.

The *Nutmeg* court reviewed the definitions of "your work" contained within those two policies as well as the Nutmeg policy as a whole, and found that the Nutmeg policy was not a policy covering "your work" within the meanings of the Wausau and Virginia Surety policies. *Id.* at *13. Therefore, those two policies were not excess over the Nutmeg policy. *Id.* Instead, the Nutmeg policy was specifically written to be excess of the other two, because it contained the following "other insurance" clause:

> **(G) OTHER INSURANCE**
>
> If any **Claim** or **Wrongful Act** noticed to the company under this Policy is insured by another valid policy or policies, then this Policy shall apply only in excess of the amount of any deductibles, retentions and limits of liability under such other policy or policies, whether such other policy or policies are stated to be primary, contributory, excess, contingent or otherwise, unless such other insurance is written specifically excess of this Policy by reference in such other policy to the Policy Number indicated on this Policy's Declarations.

Id. at *5.

Therefore, the court held, Nutmeg's duty to defend was excess over Wausau and Virginia Surety's duties. *Id.* at *13–14. Because an excess carrier is only responsible for defense and settlement costs when the limits of the primary coverages are exhausted, Nutmeg was not bound to pay any defense costs until the coverages under the Wausau policy and the Virginia Surety policy were exhausted, even though the Nutmeg policy was not a "true excess policy" that resulted from an insured's purchasing one policy specifically as primary coverage and another specifically as excess coverage. *Id.*

c. Primary Policies Versus True Excess Policies

Several Texas cases address the effect of a primary insurer's use of an excess-type "other insurance" clause against a "true" excess carrier. *See Emscor Mfg., Inc. v. Alliance Ins. Group*, 879 S.W.2d 894, 903 (Tex. App.—Houston [14th Dist.] 1994, writ denied) (holding that primary policy "other insurance" language would be disregarded and that the primary policy will be required to exhaust before the excess policy must begin to contribute); *St. Paul Mercury Ins. Co. v. Lexington Ins. Co.*, 78 F.3d 202, 209 (5th Cir. 1996) ("[The *Emscor*] rule results from the difference in the nature of primary policies and excess policies.); *Utica Nat'l Ins. Co. v. Fidelity & Cas. Co. of New York*, 812 S.W.2d 656 (Tex. App.—Dallas 1991, writ denied); *Union Indem. Ins. Co. v. Certain Underwriters*, 614 F. Supp. 1015, 1017 (S.D. Tex. 1985). Texas courts have not required excess carriers to prorate with a primary carrier whose policy contains an excess clause. *See Liberty Mut. Ins. Co. v. United States Fire Ins. Co.*, 590 S.W.2d 783 (Tex. Civ. App.—Houston [14th Dist.] 1979, writ ref'd n.r.e.; *Carrabba v. Employers Cas. Co.*, 742 S.W.2d 209 (Tex. App.—Houston [14th Dist.] 1987, no writ).

d. Multiple Lines of Coverage

Another frequently litigated issue between insurers whose policies have been triggered is which policy must respond first where there are differing lines of coverage or differences in policy specificity. Under the doctrine known as the "Pennsylvania rule," where there is a loss which is covered by a specific policy written for that loss, and which loss is covered by a blanket policy, the policy which is specifically written to cover that loss must respond first. *See, e.g., Holden v. Connex-Metalna Mgmt. Consulting GMBH*, 302 F.3d 358, 365–66 (5th Cir. 2002) (applying Louisiana law) (citations omitted); *Cont'l Cas. Co. v. Suttenfield*, 236 F.2d 433, 438 (5th Cir. 1956) (applying Texas law); *Employers Cas. Co. v. Hicks Rubber Co.*, 160 S.W.2d 96, 99 (Tex. Civ. App.—Waco 1942), *rev'd on other grounds*, 169 S.W.2d 142 (Tex. 1943).

"[W]here there is a policy more specifically

tailored to the circumstances of the claim, it [is] appropriate to designate that policy as the primary insurer." *Frankenmuth Mut. Ins. Co. v. Continental Ins. Co.*, 537 N.W.2d 879, 882 (Mich. 1995). This rule has been applied by courts around the country for many years. *See, e.g., Frankenmuth Mut. Ins. Co.*, 537 N.W.2d at 882; *Hennekens v. All Nation Ins. Co.*, 295 N.W.2d 84, 87 (Minn. 1980); *JF Shea Co. v. Hynds Plumbing & Heating Co.*, 619 P.2d 1207, 1210 (Nev. 1980); *Redeemer Covenant Church v. Church Mut. Ins. Co.*, 567 N.W.2d 71, 80–81 (Minn. Ct. App. 1997); *Odessa Sch. Dist. v. Ins. Co. of Am.*, 791 P.2d 237, 242 (Wash. App. 1990); *Liberty Mut. Ins. Co. v. Home Ins. Co.*, 583 F.Supp. 849, 852 (W.D. Pa. 1984); *Parker v. Harleysville Mut. Ins. Co.*, 469 A.2d 41, 44–45 (N.J. Super. Ct. App. Div. 1983); *Caribou Four Corners, Inc. v. Truck Ins. Exch.*, 443 F.2d 796, 802–03 (10th Cir. 1971) (applying Utah law); *Hastings Mut. Ins. Co. v. Auto Ins. Co.*, 780 F.Supp. 1153, 1156–57 (W.D. Mich. 1991); *U.S. Fire Ins. Co. v. Ins. Co. of N. Am.*, 328 F.Supp. 43, 47 (E.D. Mo. 1971).

The Pennsylvania rule has also been adopted by Texas courts. *See Suttenfield*, 236 F.2d at 438 (applying Texas law) (holding that "where two or more policies of insurance are partly coextensive as to assumed hazards, the primary liability should be cast upon company whose policy affords specific insurance"); *Maryland Cas. Co. v. Nieman-Marcus Co.*, 186 F.2d 140, 143 (5th Cir. 1951) (applying Texas law) (finding that "if equitable considerations . . . are to be entertained, there is much to be said for the view . . . that between two insurers, one limiting its liability to [specific injuries], [and] the other being general, the [specific] insurer should be held primarily liable because the risk it had specifically insured against was the source of the liability"); *Constitution State Ins. Co. v. Mich. Mut. Ins. Co.*, 1996 WL 383117, *2 (Tex.App. –San Antonio July 10, 1996) (not designated for publication)[10] (finding that in order "to determine which carrier holds the primary coverage on a claim, [Texas courts] look to the cause of the loss and the general or specific coverages provided for in the policy"[11]); *Hicks Rubber Co.*, 160 S.W.2d at 99 (upholding the trial court's allocation of a greater portion of responsibility for defense and settlement to an insurer with a more specific policy).

2. Consecutive Policies

Another situation where questions of allocation arise is where multiple consecutive policies apply, as in long-tail bodily injury asbestos or other claims. When addressing these types of coverage issues, the trigger of coverage[12] that will apply (exposure trigger, injury-in-fact trigger, continuous trigger, manifestation trigger) will determine which insurers are required to respond to the claims.[13] Some trigger options may result in the triggering of just one policy period per "occurrence" and thus do away with any need for allocation.

Texas has generally recognized two substantively different trigger theories in the property damage and bodily injury contexts. Texas courts appear to recognize the inherent distinction in tort law between "bodily injury" and

[10]This opinion was withdrawn and superseded by 1996 WL 543276 (Tex. App.—San Antonio Sept. 25, 1996) (not designated for publication) (dismissing the case and withdrawing the opinion at the request of the parties).

[11]*Constitution State Ins. Co.* involved an errors and commissions policy and a general liability policy. *Constitution State Ins. Co.*, 1996 WL 383117, *1.

[12]The existence of bodily injury or property damage happening during a policy period determines whether a specific policy is "triggered" or is "on the risk." Trigger of coverage, therefore, is the issue of which policy or policies must respond to a specific claim or occurrence. Most insurance claims, such as the common slip and fall case, take place only in one policy period, so there is no problem in deciding which insurance policy must respond to the claim. Indeed, allocation is mostly irrelevant in such matters (though not always so). *See John Burns Constr. Co. v. Indiana Ins. So.*, 727 N.E. 211 (Ill. 2000) (Only one policy period, but overlapping coverage. Insured can choose policy to respond where more than one is triggered without any contribution right on the part of the carrier). *See also Am. Nat'l Fire Ins. Co. v. Nat'l Union Fire Ins. Co. of Pittsburg*, 796 N.E.2d 1133, 1139–40 (Ill. Ct. App. 2003); *Liberty Mut. Ins. Co. v. Tokio Marine & Fire Ins. Co.*, No. 03 C 4765, 2004 WL 2125411, *6 (N.D.Ill. Sept. 22, 2004). *But see Pekin Ins. Co. v. Fidel. & Guar. Ins. Co.*, 830 N.E.2d 10, 19 (Ill. Ct. App. 2005) (distinguishing *John Burns* and finding that an insured could not "deselect" its own coverage in favor of coverage under a policy where it was an omnibus insured, rather than a named or additional insured).

[13]The number of occurrences and the extent of loss suffered during each policy period will also be important to the allocation formula.

"property damage" and, following from those distinctions, apply different theories of trigger to each. For instance, Texas courts have almost uniformly employed the "manifestation" trigger to property damage claims,[14] as tort law only recognizes property damages that are apparent or have "manifested."[15] In other words, where there are latent or hidden problems, such as defective construction in a building that has not been identified or found, the owner of the property is not yet harmed and never will be unless the problem is found. *See Dorchester Development Corporation v. Safeco Insurance Company*, 737 S.W.2d 380 (Tex. Civ. App.—Dallas 1987, no writ).

a. Property Damage Trigger

In *Dorchester*, a general contractor sued for damages resulting from faulty construction work. After the general contractor, the insured, sought a defense from its carrier, the carrier sought declaratory judgment seeking a finding of no coverage. The trial court granted summary judgment stating there was no occurrence or property damage so as to trigger the policy since the damages did not become apparent or "manifest" until after the expiration of the policy period. The Dallas Court of Appeals, relying on decisions from Idaho and Florida, affirmed the trial court decision holding that coverage is not afforded "unless an identifiable damage or injury, other than merely causative negligence, took place during the policy period . . . no liability exists on the part of the insurer unless the property damage manifests itself, or becomes apparent during the policy period. Since the [insured] admitted . . . that such damages were not manifested during the policy period, there was no 'occurrence' during the policy period." *Id*. at 383.

The Dallas Court of Appeals reiterated the *Dorchester* ruling in *Cullen/Frost Bank of Dallas, N.A. v. Commonwealth Lloyds Insurance Co.*, 852 S.W.2d 252 (Tex. App.—Dallas 1993, writ denied).[16] In *Frost*, condominium owners who purchased units from an insured filed a lawsuit seeking recovery for negligent workmanship. The insured sought defense and indemnity under various policies of insurance issued by two different carriers. The insured denied coverage and sought a declaratory judgment asserting that the allegations in the underlying suit did not fall within the scope of coverage. The trial court granted summary judgment for the carrier finding that:

[14]Texas cases applying the manifestation trigger theory include *Mathews Heating & Air Conditioning, LLC v. Liberty Mut. Fire Ins. Co.*, 384 F.Supp.2d 988, 993 (N.D. Tex. 2004); *Flores v. Allstate Texas Lloyd's Co.*, 278 F.Supp.2d 810, 815–16 (S.D. Tex. 2003); *Vesta Fire Ins. Corp. v. Nutmeg Ins. Co.*, No. A-00-CA-468-SS, 2003 WL 22508504 (W.D. Tex. Sept. 29, 2003); *State Farm Fire & Cas. Co. v. Rodriguez*, 88 S.W.3d 313, 322–23 (Tex.App.—San Antonio Jul. 24, 2002, pet. denied); *Closner v. State Farm Lloyds*, 64 S.W.3d 51 (Tex. App.—San Antonio 2001, no pet.); *Am. Home Assur. Co. v. Unitramp Ltd.*, 146 F.3d. 311 (5th Cir. 1998); *Travelers Indem. Co. v. Page & Assocs. Constr. Co.*, No. 07-97-0338-CV, 1998 WL 720957 (Tex. App.—Amarillo 1998, n.w.h.); *Federated Mut. Ins. Co. v. Grapevine Excavation, Inc.*, 18 F.Supp.2d 636 (N.D. Tex. 1998); *TIG Ins. Co. v. United States Fire Ins. Co.*, No. Civ.A. B-97-187, 1998 WL 34097459 (S.D. Tex., Sept. 11, 1998); *State Farm Mut. Auto. Ins. Co. v. Kelly*, 945 S.W.2d 905 (Tex. App.—Austin 1997, writ denied); *Cullen/Frost Bank of Dallas v. Commonwealth Lloyd's Ins. Co.*, 852 S.W.2d 252 (Tex. App.—Dallas 1993, writ denied); *Snug Harbor, Ltd. v. Zurich Ins.*, 968 F.2d 538 (5th Cir. 1992); *Carpenter Plastering Co. v. Puritan Ins. Co.*, CIV. A. No. 3-87-2435-R., 1988 WL 156829 (N.D. Tex. Aug. 23, 1988); *Epina Props., Ltd. v. Zurich Am. Ins. Co.*, No. CA3:97-CV-0581-BC., 1998 WL 223727 (N.D. Tex. Apr. 24, 1988); *Dorchester Development Corp. v. Safeco Ins. Co.*, 737 S.W.2d 380 (Tex. App.—Dallas 1987, no writ).

There is one Texas decision that rejects the manifestation rule. *Pilgrim Enters., Inc. v. Maryland Cas. Co.*, 24 S.W.3d 488 (Tex. App.—Houston [1st Dist.] 2000, no pet.). In *Pilgrim*, the Court opted for an exposure trigger.

[15]One of the elements of a negligence cause of action is actual loss or damage. W. PAGE KEETON, ET AL., PROSSER AND KEETON ON TORTS § 30, at 164-65 (5th ed. 1984). "Since the action for negligence developed chiefly out of the old form of action on the case, it retained the rule of that action, that proof of damage was an essential part of the plaintiff's case . . . The threat of future harm, not yet realized, is not enough." *Id.*

[16]The Amarillo, Dallas and San Antonio Courts of Appeal have all recognized the continuing vitality of *Dorchester* in opinions not issued for publication. *See Travelers & Indem. Co. v. Page & Assoc. Constr. Co.*, No. 07-97-0338-CV., 1998 WL 720957 (Tex. App.—Amarillo, Oct. 15, 1988), *vacated in part on reh'g by* No. 07-97-0388-CV, 1999 WL 7673 (Tex. App.—Amarillo, Jan. 9, 1999, pet. denied); *Aetna Cas. & Sur. Co. v. Naran*, No. 05-96-01486-CV., 1999 WL 59782 (Tex. App.—Dallas, Feb. 10, 1999, pet. denied); *Vanguard Underwriters Ins. Co. v. Forist*, No. 04-97-00806-CV., 1999 WL 498200 (Tex. App.—San Antonio, July 14, 1999, pet. denied).

> [C]overage is not afforded unless an identifiable damage is or injury, other than merely causative negligence, takes place during the policy period. The time of the occurrence is when the complaining party actually was damaged, not the time when the wrongful act was committed . . . . [I]n cases involving continuous or repeated exposure to a condition, there can be more than one manifestation of damage and, hence, an occurrence under more than one policy. Under the definitions of occurrence at issue here, there can be a new occurrence each time the complaining party suffers damages.

One large departure from the manifestation rule occurred several years ago in *Pilgrim Enters., Inc. v. Maryland Cas. Co.*, 24 S.W.3d 488 (Tex. App.—Houston [1st Dist.] 2000, no pet.), where the First Court of Appeals in Houston opted to apply the "exposure" test to both bodily injury and property damage claims arising out of exposure to a toxic chemical and adopted the *Azrock* analysis as the most appropriate in cases of progressive, latent injury.

The Fifth Circuit, however, has consistently applied the manifestation trigger in property damage cases, and it has clarified what constitutes "manifestation." In *American Assurance Company vs. Unitramp Limited*, 146 F.3d 311 (5th Cir. 1998) the Court, after recognizing that although the manifestation rule "has not been expressly adopted by the Texas Supreme Court, the state's lower courts have recognized and applied it," went on to discuss when manifestation takes place. The Fifth Circuit commented that "identifiable" as used by Texas appellate courts is synonymous with "manifest" and "apparent," which mean "capable of easy perception." *Id.* at 314. "The date of occurrence is when the damage is capable of being easily perceived, recognized and understood." *Id.*

Where a manifestation trigger is applied, allocation is not, except in uncommon circumstances, necessary.

b. Bodily Injury Trigger

"Bodily injury" claims present a more complex problem under Texas law. Unlike property damage, where the owner may suffer no harm until the problem is apparent or manifest, Texas courts recognize that bodily injury can adversely affect or harm (e.g., cause disease) someone even if they are wholly unaware of it.[17] For instance, an individual who has been exposed to asbestos may suffer continuing and increasing harm as the minuscule particles of asbestos wiggle and tear tissue and that harm takes a toll on the person whether known or unknown.

With respect to bodily injury claims, the Texas Supreme Court has not adopted a trigger theory. In the absence of binding precedent, the federal courts and the intermediate state courts of appeal have attempted to predict the trigger theory the Texas Supreme Court would adopt. In latent or progressive bodily injury cases, those courts have recently applied the exposure test.[18] Several years ago, the Fifth Circuit issued its opinion in *Guaranty National Insurance Co. v. Azrock Industries, Inc.*, 211 F.3d 239, (5th Cir. 2000). At the trial court level, Federal District Court Judge Lynn Hughes had taken the somewhat unique

[17] *See Childs v. Haussecker*, 974 S.W.2d 31, 37-39 (Tex. 1994) (applying discovery rule to latent occupational diseases).

[18] In *Mustang Tractor & Equip. Co. v. Liberty Mut. Ins. Co.*, 1993 WL 566032, *aff'd*, 76 F.3d 89 (5th Cir. 1996), the court rejected the manifestation theory but declined to decide between the continuous trigger and exposure theories. In *Dayton Ind. School Dist. v. Nat'l Gypsum Co.*, 682 F. Supp. 1403 (E.D. Tex. 1988), the court adopted the continuous trigger theory, but the opinion was vacated on appeal on the grounds that the plaintiffs lacked standing. The *Dayton* court relied on *Nat'l Standard Ins. Co. v. Cont'l Ins. Co.*, 1984 WL 23448 (N.D. Tex., April 9, 1994), an unpublished decision that held that the insurer had a duty to defend the insured in all cases alleging exposure to various chemicals "from the date of initial exposure to such chemicals to the date of manifestation of disease." *See also Millennium Petrochemicals, Inc. v. Brown & Root Holdings, Inc.*, 2004 WL 2011478 (5th Cir., Sept. 10, 2004) (citing *Pustejovsky v. Rapid-Am. Corp.*, 35 S.W.3d 643, 647 (2000) for the proposition that the Texas Supreme Court has adopted the exposure theory). The *Pustejovsky* court merely quoted language from *Gideon* and discussed the single action rule in the context of asbestos litigation. *See Pustejovski*, 35 S.W.3d at 647 (quoting *Gideon v. Johns-Manville Sales Corp.*, 761 F.2d 1129, 1137 (5th Cir. 1985)).

position that a manifestation trigger applied in an asbestos bodily injury case. Interestingly, the Fifth Circuit panel addressing Texas law was made up of three judges from Louisiana, all of whom were familiar with and supportive of the Louisiana cases adopting an exposure trigger in asbestos cases. The decision specifically addressed the issue of trigger of coverage in a bodily injury context following a discussion of manifestation, exposure, continuous trigger, and injury-in-fact theories. The Court distinguished away previous Fifth Circuit cases adopting a manifestation trigger by noting, correctly, that Texas law has distinguished between property damage and bodily injury cases.

Noting that there is no controlling authority in Texas, the Court acknowledged that Louisiana law had adopted an exposure trigger and that, while injury-in-fact had a credible basis in bodily injury cases, exposure made more sense in their opinion (as well as stating that they were not persuaded that there was any "defensible reason" to apply a different trigger of coverage for Texas law than that of previously adopted cases construing Louisiana law). This case, upon publication, was the first major decision on trigger of coverage in asbestos bodily injury cases under Texas law. The second was the *Pilgrim* case cited above; however, that case did not specifically include bodily injury claims. The Fifth Circuit most recently held in *Millennium Petrochemicals, Inc. v. Brown & Root Holdings, Inc.*, 390 F.3d 336, 341 (5th Cir. 2004) that the Texas Supreme Court has adopted the exposure theory for asbestos litigation, citing the Texas Supreme Court's opinion in *Pustejovsky v. Rapid-Am. Corp.*, 35 S.W.3d 643 (Tex. 2000) ("[The plaintiff's] injury is . . . the inhalation of fibers and the invasion of his body by those fibers, thus causing him physical damage.") (quoting *Gideon v. Johns-Manville Sales Corp.*, 761 F.2d 1129, 1137 (5th Cir. 1985)). The *Pustejovsky* court, however, merely quoted language from the *Gideon* case and discussed the single-action rule in the context of asbestos litigation.[19]

The few other state courts considering Texas law on bodily injury trigger, on the other hand, have adopted a variety of triggers. A continuous trigger theory was adopted by a Beaumont trial court in a breast implant case, concluding that the "continuous trigger theory best comports with common sense dictates that 'damage or injury,' in the case of toxic or harmful substances, begins with the first exposure and continues up to and through the manifestation of illness." *Bristol-Myers Squibb Co. v. AIU Ins. Co.*, No. A-145,672 (58th Jud. Dist., Jefferson Co., Tex., May 3, 1996) (Order on Motions for Summary Judgment).

c. Allocation with Consecutive Policies

The Austin Court of Appeals noted in *CNA Lloyds of Texas v. St. Paul Ins. Co.*, 902 S.W.2d 657 (Tex. Civ. App.—Austin 1995, writ dism'd by agr.) that cases involving multiple consecutive insurers and one claim based on a continuous occurrence can involve three separate determinations: 1) trigger of coverage, 2) extent of coverage, and 3) allocation of liability among multiple insurers. *Id*. at 660. Putting aside the issues of trigger and extent of coverage, there are only a handful of Texas cases that have dealt with the third issue, allocation of liability among multiple insurers. In fact, if the issues of defense costs and indemnity are separated, as they logically should be, there is indeed only one published Texas state court case discussing indemnity allocation in this context—*CNA Lloyds*, *supra*, and there are only five cases discussing defense cost allocation—*Hartford Cas. Ins. Co. v. Exec. Risk Specialty Ins. Co.*, No. 05-03-00546-CV, 2004 WL 2404382 (Tex. App.—Dallas Oct. 24, 2004, pet. denied); *Utica Nat'l Ins. Co. of*

[19] *See also Mustang Tractor & Equipment Co. v. Liberty Mutual Ins. Co.*, 1993 WL 566032, slip op. at 21-23 (S.D. Tex. Oct. 6, 1993), *aff'd on other grounds*, 76 F.3d. 89 (5th Cir. 1996), an environmental injury case, where the federal district court held in an unpublished opinion that either the "exposure" theory or the "continuous trigger" theory applies to latent, progressive personal injury cases. Additionally, in *Dayton Independent School District v. National Gypsum Co.*, 682 F.Supp. 1403 (E.D. Tex. 1988), another federal district court adopted the continuous trigger theory, but the opinion was vacated on appeal on the grounds that the plaintiffs lacked standing. The *Dayton* court relied on *National Standard Insurance Co. v. Continental Insurance Co.*, 1984 WL 23448 (N.D. Tex. April 9, 1984), an unpublished decision which held that the insurer had a duty to defend the insured in all cases alleging exposure to various chemicals "from the date of initial exposure to such chemicals to the date of manifestation of disease."

Texas v. Texas Prop. & Cas. Ins. Guar. Ass'n, 110 S.W.3d 450 (Tex. App.—Austin 2001), *aff'd in part, rev'd in part sub nom., Utica Nat'l Ins. Co. of Texas v. Am. Indem. Co.*, 141 S.W.2d 198 (Tex. 2004); *Texas Prop. & Cas. Ins. Guar. Assoc. v. Southwest Aggregates*, 982 S.W.2d 600 (Tex. App.—Austin 1998, no pet.); *Gulf Chem. & Metallurgical Corp. v. Associated Metals & Minerals Corp.*, 1 F.3d 365 (5th Cir. 1993); and *LaFarge Corp. v. Hartford Cas. Ins. Co.*, 61 F.3d 389 (5th Cir. 1995).

Before discussing these cases and their approaches to allocation, it is necessary to look at the one Texas Supreme Court opinion that has indirectly affected the handful of other allocation cases in the state. That case is *American Physicians Insurance Exchange v. Garcia*, 876 S.W.2d 842 (Tex. 1994).

(1) *Garcia*

Garcia is not so much an allocation case as a Stowers and contribution case. It does not involve the issues normally inherent in allocation cases and but mainly avoids addressing those few allocation-related issues potentially raised. It does not directly address trigger, uninsured periods, or the differences between "joint and several" versus "pro rata" allocation. It does address a limit of liability (i.e., *Stowers*) issue and an exhaustion issue. More important to our purpose, it also favorably references a key allocation case from another state, though not for its allocation component, leading to considerable misunderstanding and confusion in later cases.

Garcia involves a physician malpractice claim where the insured physician sued his professional liability carrier claiming that it had failed to defend or properly settle his case. The decision, written by Justice Cornyn, now a United States Senator, is a lengthy, fact intensive opinion. At its essence, however, the malpractice was agreed to be a single occurrence occurring over four years with four different policies and two different carriers. Three of the policies, from 1981 to 1983, had $500,000 limits while one policy, from 1980, had $100,000 limits.

For purposes of the settlement demands, the defendant carrier argued that the limits of all of the policies could not be "stacked" and that coverage was limited to $500,000 while the plaintiffs never made a settlement demand less than $600,000. The Court noted that no *Stowers* duty was triggered unless there was a settlement demand within the applicable limits and specifically held that the consecutive policies, covering distinct policy periods, could not be "stacked" to multiply coverage for a single claim involving indivisible injury.

In its "stacking" analysis, the Court favorably cited *Keene Corp. v. Insurance Co. of North America*, 667 F.2d 1034 (D.C. Cir. 1981), *cert denied*, 455 U.S. 1007 (1982). Addressing the question of applying the limits of liability to "injuries that are covered by multiple policies," the Court quoted from *Keene*:

> Keene claims that it is entitled to full indemnity for each injury up to the sum of the limits provided by the applicable policies. We do not agree. The principle of indemnity implicit in the policies requires that successive policies cover single [continuing] injuries. *That principle, however, does not require that Keene be entitled to "stack" applicable policies' limits of liability*. To the extent possible, we have tried to construe the policies in such a way that the insurer's contractual obligations [for continuing injuries or occurrences] are the same as their obligations for other injuries. Keene is entitled to nothing more. *Therefore, we hold that only one policy's limits can apply to each injury*. Keene may select the policy under which it is to be indemnified.

Garcia, 876 S.W.2d at 854 (citing *Keene* at 1049-50) (emphasis in the original).

In other words, having addressed the stacking issue, the Court turned to the issue of which policy should initially respond to the risk. The Court then went on to hold, and this is the key language, that:

If a single occurrence triggers more than

> one policy, covering different policy periods, then different limits may have applied at different times. In such a case, the insured's indemnity limit should be whatever limit applied at the single point in time during the coverage periods of the triggered policies when the insured's limit was highest. The insured is generally in the best position to identify the policy or policies that would maximize coverage. Once the applicable limit is identified, all insurers whose policies are triggered must allocate funding of the indemnity limit among themselves according to their subrogation rights (emphasis added).

In other words, the insured may initially choose the policy to exhaust based on a "single point in time." In other words, the insured cannot simply pick one year, exhaust it, and then pick another. One set of limits appears to be the maximum.

But just as important, the Court expressly protected carriers from being burdened with an unfair share by the insured's choice of one policy rather than another, through "allocation among themselves" according to their subrogation rights. This provision, overlooked in later cases, means that the insured only gets the initial choice of the policy to exhaust, but that all triggered policies are still potentially required to contribute, and potentially even the insured for "bare periods." The parties must allocate the loss according to their respective rights (presumably including contribution and "other insurance" rights). However, *Garcia* does not address or adopt a specific allocation approach and does not say when such an allocation among carriers should take place (i.e., as part of the original suit or as a separate subrogation/contribution action).

Garcia, therefore, is not a wholesale adoption of *Keene*, nor is it a decision which allows the insurer to unfairly burden any carrier with an undue or unfair share of the indemnity burden. Indeed, the case leaves far more questions unanswered than it answers. For instance, who is responsible for uninsured periods? Most importantly for our purposes, it does not adopt the *Keene* formula for allocation.

(2) *Forty-Eight Insulations* and *Keene*[20]

Although there have been an increasing number of cases in recent years over the allocation of liability and defense costs for multi-year, multi-carrier claims, courts in the various jurisdictions are generally divided between two main allocation approaches generally described as "pro rata" and

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[20] **KEY POINTS**

FORTY-EIGHT INSULATIONS, 633 F.2d 1212 (6th Cir. 1980), *clarified and aff'd on reh'g*, 657 F.2d 814 (6th Cir. 1981).

- TRIGGER: Exposure. Date of first contact with the body (asbestos-inhalation) or, in environmental cases, date on which pollution began (discharge into the environment).
- ALLOCATION OF LIABILITY: Pro rated among all of the insurers which were on the risk while the injured victim was exposed (breathed asbestos). First Circuit Court decision articulating Atime on the risk" theory.
  - Court's Hypo -- 9-year exposure history. Insurer A provided 3 years of coverage; Insurer B, 3 years and risk was uninsured for 3 years. Allocated 1/3 A, 1/3 to B, 1/3 to insured.
- Insured treated like an insurer for any uninsured years during exposure.

KEY POINTS

KEENE, 667 F.2d 1034 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 1007 (1982).

- ISSUES: Insurers duty to indemnify divided into three logical steps: first, the trigger of coverage under the policies; second, the extent of coverage once a policy has been triggered; and, third, the allocation of liability among insurers if more than one policy is triggered.
- TRIGGER: What policies must respond to the progressive loss? Continuous Trigger, all policies from initial exposure through manifestation.
- SCOPE OR EXTENT OF TRIGGERED POLICY'S COVERAGE: Joint and several. Each insurer whose policy has been triggered must respond jointly and severally and indemnify the insured for all losses, up to the policy limits. Insured may target.
  - No stacking. Only one policy's limits can apply to each injury. Insured may select the policy under which it is to be determined.
- ALLOCATION OF LIABILITY: Since one triggered policy must respond fully, no allocation per se necessary. Targeted insurer may apportion liability through separate contribution action.
- No allocation to insured if it purchased insurance that covers any part of the injury/trigger period.

"joint and several."[21]

The "pro rata" approach urged by many carriers allocates liability for a particular claim among all triggered policies from the outset or, as described in *United States Fidelity and Guaranty Co. v. Treadwell Corp.*, 58 F.Supp.2d 77 (S.D.N.Y. 1999), the "first instance." The pro rata approach is usually identified with the seminal case of *Insurance Co. of North America v. Forty-Eight Insulations, Inc.*, 633 F.2d 1212 (6th Cir. 1980). Under this approach, the insured can recover only a share of its overall loss from any one insurer, that share to be determined on the basis of some facially objective factor, such as the insurer's proportion of time on the risk or proportion of total policy limits.[22] The reasoning is, primarily, that a carrier only contracts to pay claims covered by the policy. Thus, when the claim can be readily apportioned between covered and non-covered periods, the carrier should only bear the risk for which it contracted.

The "joint and several" approach[23] requires that each triggered policy is jointly and severally liable for the insured's liability and, therefore, that the insured can collect under any one triggered policy the full amount of indemnity that is due, subject only to that policy's liability limits.[24]

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[21]There are, of course, other formulas or approaches, but these two represent the two dominant allocation formulas.

[22]*See, e.g., Stryker Corp. v. Nat'l Union Fire Ins. Co.*, No. 4:01-CV-157, 2005 WL 1610663 (W.D. Mich. Jul. 1, 2005) (applying pro rata "time on the risk" formula, but noting that Michigan appellate courts are split on the issue); *Atchison, Topeka, & Santa Fe Ry. Co. v. Stonewall Ins. Co.*, 71 P.3d 1097 (Kan. 2003) (finding that joint and several liability is inconsistent with the term "all sums" in the policies at issue); *Norfolk S. Corp. v. California Union Ins. Co.*, 859 So.2d 167 (La. Ct. App. 2003) (allocation should be pro rata based on each insurers' time on the risk and the degree of risk assumed); *Mayor & City Council of Baltimore v. Utica Mut. Ins. Co.*, 802 A.2d 1070, 1101–01 (Md. Ct. Spec. App. 2002) (damages allocated on a pro rata basis from the perspective of time on the risk among triggered primary insurance policies and periods of self-insurance); *Aetna Cas. & Sur. Co. v. Wallace & Gale Co.*, 284 B.R. 557 (D. Md. 2002) (on reconsideration, reversing prior ruling that adopted "all sums" allocation in favor of pro rata allocation, based on *Mayor & City Counsel of Baltimore*); *Quincy Mut. Fire Ins. Co. v. Borough of Bellmawr*, 799 A.2d 499 (N.J. 2002) (affirming *Owens-Illinois, Inc. v. United Ins. Co.*, 650 A.2d 974, 985-94 (N.J. 1994), and concluding that pro rata allocation of loss among insurers should reflect number of days rather than years on risk when underlying facts require that degree of precision); *Consolidated Edison Co. v. Allstate Ins. Co.*, 774 N.E.2d 678 (N.Y. 2002) (adopting a time on the risk rule); *Nationwide Ins. Co. v. Cent. Missouri Elec. Co-op, Inc.*, 278 F.3d 742 (8th Cir. 2001) (applying Missouri law) (apportioning damages based on time on the risk formula); *Metro. Life Ins. Co. v. Aetna Cas. & Sur. Co.*, No. X04CV950115305S, 1999 WL 244642, at *6-9 (Conn. Super. Ct. April 16, 1999); *N. States Power Co. v. Fidelity & Cas. Co. of New York*, 523 N.W.2d 657, 662-64 (Minn. 1994) (allocating liability based on each insurer's proportion of time on the risk); *Nationwide Mut. Ins. Co. v. Nationwide Mut. Ins. Co.*, 643 So.2d 551, 561 (Ala. 1994) (allocating two primary carriers' liability in accordance with the proportion that the limits of each policy bore to the total limit of insurance applicable to the loss); *cf. Security Ins. Co. of Hartford v. Lumbermens Mut. Cas. Co.*, 826 A.2d 107 (Conn. 2003) (adopting the pro rata approach to the allocation of defense costs in long latency loss claims that implicate multiple insurance policies); *Gulf Chem. & Metallurgical Corp. v. Associated Metals & Minerals Corp.*, 1 F.3d 365, 371-73 (5th Cir. 1993) (allocating defense costs pro rata); *Ins. Co. of N. Am. v. Forty-Eight Insulations, Inc.*, 633 F.2d 1212, 1224-25 (6th Cir. 1980) (same), *clarified*, 657 F.2d 814, 816 (6th Cir. 1981); *Cont'l Ins. Co. v. Morgan, Olmstead, Kennedy & Gardner, Inc.*, 83 Cal.App.3d 593, 608, 148 Cal.Rptr. 57, 66 (Ct. App. 1978) (allocating liability for defense costs based on the ratio of each insurer's policy limits to the sum of all policy limits).

See generally Armstrong World Indus., Inc. v. Aetna Cas. & Sur. Co., 46 Cal.App. 4th 1, 51-53 & n.16, 52 Cal.Rptr.2d 690, 707-08 & n.16 (Ct. App. 1996) (discussing different apportionment formulae and citing cases). If one of the insurers is insolvent, the insured is saddled with that insurer's share of the liability. *See Koppers Co. v. Aetna Cas. & Sur. Co.*, 98 F.3d 1440, 1449-50 n.9 (3d Cir. 1996) (applying Pennsylvania law) (insured settling with primary liability insurer for less than policy limits loses any right to recover from excess insurer for difference between settlement amount and primary policy's limits; excess insurer never agreed to pay for losses below specified floor); *Benjamin Moore & Co. v. Aetna Cas. & Sur. Co.*, 843 A.2d 1094 (N.J. 2004) ("Policyholders who chose to 'go bare' or underinsure must sustain the burden of those choices. Likewise, policyholders are required to underwrite the risk of insurer insolvency or bankruptcy."); *Olin Corp. v. Ins. Co. of N. Am.*, 221 F.3d 307, 323 (2d Cir. 2000) (applying New York law) (allocation avoids "saddling one insurer with the full loss" and forces the insured to "absorb the loss for periods when it self-insured and can prevent it from benefiting from coverage for injuries that took place when it was paying no premiums").

[23]Often used interchangeably with the term "all sums," although "all sums" is probable better understood to refer to cases where courts hold that the term "all sums" in the insuring agreement requires the carrier to pay the entire claim up to policy limits without contribution from other sources. *Am. Nat'l Fire Ins. Co. v. B&L Trucking & Constr. Co.*, 951 P.2d 250, 258 (Wash. 1998).

[24]*See, e.g., Wheeling Pittsburgh Corp. v. Am. Ins. Co.*,

Under this approach, as noted in *Prudential Lines, Inc. v. American Steamship Owners Mutual Protection and Indemnity Association, Inc.*, 158 F.3d 65 (2d Cir. 1998), "(i) the insured selects a single policy from which to seek indemnification, (ii) that insurer pays the claim, and (iii) then the insurer seeks contribution from other liability insurers under the "other insurance" provisions of the policies or under the common law doctrine of contribution." *Prudential Lines*, 158 F.3d at 84 (citing *Keene*, 667 F.2d at 1049-50 & n.35; *ACandS, Inc. v. Aetna Cas. & Sur. Co.*, 764 F.2d 968, 974 (3d Cir. 1985); *J.H. France Refractories Co. v. Allstate Ins. Co.*, 626 A.2d 502, 509 (Pa. 1993)). The purpose of this approach, *inter alia*, is to transfer the risk that an insurer is insolvent from the insured to one or more of the insured's other carriers. However, part (iii) means yet another suit in many cases.

As noted by the court in *Treadwell*, under either approach the carrier is liable only for its share, however calculated, of the overall liability. 58 F.Supp.2d at 97. Indeed, the *Treadwell* court recognized fundamental insight lost on many allocation commentators which is simply that:

> The only difference [between pro rata and joint and several allocation] is when such allocation occurs: under the pro rata approach, allocation occurs when the loss is paid in the first instance; under the joint and several approach, by contrast, allocation occurs in the second proceeding, when the loss becomes the subject of contribution among policies and insurers. [Citation omitted]. Thus, it does not follow, as Treadwell appears to reason, that if the joint and several approach is warranted, Treadwell will be off the hook for the years in which it lacked insurance; instead, the question of whether to pro rate to Treadwell would merely be postponed to a second proceeding.[25]

Id.

As is noted above, the *Garcia* court did not specifically adopt a *Keene* allocation for the State of Texas. Indeed, it never reached the issue. However, when the Austin Court of Appeals considered the issue of allocation in *CNA Lloyds*, it ostensibly assumed that the *Garcia*'s favorable discussion of *Keene* as to the "stacking" issue signaled a wholehearted and encompassing adoption of *Keene*'s allocation analysis.

(3) *CNA Lloyds*

CNA Lloyds involved a dental malpractice claim which took place over several years in which the dentist had consecutive, non-

No. Civ.A. 93-C-340, 2003 WL 23652106 (W.Va. Cir. Ct., Oct. 18, 2003); *Goodyear Tire & Rubber Co. v. Aetna Cas. & Sur. Co.*, 769 N.E.2d 835 (Ohio 2002) adopting the "all sums" method of allocation and finding that the insured could select any triggered policy and require the insurer to bear the burden of paying "all sums" that the insured was legally obligated to pay for damages); *Hercules, Inc. v. AIU Ins. Co.*, 784 A.2d 481 (Del. 2001) (holding that pro rata allocation was inconsistent with the "all sums" provisions in the policies); *Aluminum Co. of Am. v. Aetna Cas. & Sur. Co.*, 998 P.2d 856, 883–84 (Wash. 2000) (applying Pennsylvania law); *In re Prudential Lines, Inc. v. Am. Steamship Owners Mut. Protection and Indem. Ass'n*, 158 F.3d 65, 83 (2d Cir. 1998); *B&L Trucking*, 951 P.2d at 258 (relying on the "all sums" language to apply joint and several liability); *Koppers Co. v. Aetna Cas. & Sur. Co.*, 98 F.3d 1440, 1449-50 n.9 (3d Cir. 1996) (applying Pennsylvania law) (extending *J.H. France*'s joint and several liability approach to claims involving progressive property damage); *ACandS, Inc. v. Aetna Cas. & Sur. Co.*, 764 F.2d 968, 974 (3d Cir. 1985) (rejecting prorationing of losses on the grounds that the policies required the insurers to pay all sums that the insured became legally obligated to pay because of bodily injury during the policy period); *Keene*, 667 F.2d at 1048; *Dayton Indep. Sch. Dist. v. Nat'l Gypsum Co.*, 682 F.Supp. 1403, 1410-211 (E.D. Tex. 1988), *rev'd on other grounds sub nom, W.R. Grace & Co. v. Continental Cas. Co.*, 896 F.2d 865 (5th Cir. 1990); *Lac D'Amiante du Quebec, Ltée. v. Am. Home Assurance Co.*, 613 F.Supp. 1549, 1561-63 (D.N.J. 1985); *Sandoz, Inc. v. Employer's Liab. Assurance Corp.*, 554 F.Supp. 257, 266-67 (D.N.J. 1983) ("plain language of these policies requires that each triggered policy shall respond in full" to asbestos claims); *J.H. France Refractories Co. v. Allstate Ins. Co.*, 626 A.2d 502, 508-09 (Pa. 1993) (every triggered insurer is jointly and severally liable for a policyholder's liability with respect to asbestos-related bodily injury).

[25]The *Treadwell* court continued by noting that the crucial point is that the two issues—whether to allocate among all potentially liable parties in the first instance and whether or not to pro rate to the insured based on the uninsured periods—are analytically distinct. *Treadwell*, 58 F.Supp.2d at 97 n.16.

overlapping professional liability coverage. The issue identified by the court is concisely described as "the allocation of liability among multiple insurers." The *CNA Lloyds* court, upon identifying the issue, immediately launched into a discussion of *Keene* and its allocation analysis. Interestingly, the Court acknowledged that *Garcia* did not deal with this issue, but it noted in footnote 6 that *Garcia* "relie[d] in part on the *Keene* court's reasoning." Thereupon, the Court went on to wholeheartedly and without reservation adopt the *Keene* joint and several allocation formula without any reference or analysis of the pro rata approach.

The Court's analysis turned on the holding of *Keene* that once coverage under an insurance policy is triggered, an insurer is liable up to its policy limits, subject to "other insurance" clauses, and the Court noted that, as described in *Keene*, "there is nothing in the policies that provides for a reduction of the insurer's liability if an injury occurs only in part during a policy period." *CNA Lloyds*, 902 S.W.2d at 661 (citing *Keene*, 667 F.2d at 1048).

Even so, *CNA Lloyds* recognized and adopted the *Keene* court's assurance that "its holding did not mean "that a single insurer will be saddled with full liability for an injury." When more than one policy applies to a loss, the "other insurance" provisions of each policy provide a scheme by which the insurer's liability is to be apportioned. *Id.* (citing *Keene*, 667 F.2d at 1050).

Then, again attempting to link *Garcia* with *Keene*, the Court stated that:

> We believe *American Physicians* echoed *Keene*'s assurance by stating: Once the applicable limit [of coverage] is identified, all insurers whose policies are triggered must allocate funding of the indemnity limit among themselves according to their subrogation rights.

Id.

In other words, as noted by *Treadwell*, adopting the joint and several approach does not give the insured a pass on uninsured periods or saddle any insurer with an unfair burden. Rather, the joint and several approach merely means that a second lawsuit will be required to do what the pro rata approach would do "in the first instance."

(4) *Southwest Aggregates*

Three years later, in November 1998, the Austin Court of Appeals again took up the issue of allocation, but this time focused on defense costs rather than indemnity. In *Texas Property and Casualty Insurance Guaranty Association v. Southwest Aggregates, Inc.*, 982 S.W.2d 600 (Tex.App.—Austin 1998, no pet.), the issue of allocation of defense costs was addressed in connection with silicosis bodily injury claims. The issue arose when an allocation agreement between two carriers broke down because one of the carriers, Employers Casualty, went into receivership. The successor to the obligations of Employers Casualty, the Texas Property & Casualty Insurance Guaranty Association, or TPCIGA, is a quasi-governmental entity with statutory protections not available to normal insurers. In this case, TPCIGA raised the issue as to whether an insurer's duty to defend its insured is reduced pro rata when the occurrence for which the insured is sued occurs partially within and partially outside the policy period.

The remaining carrier, Alliance, argued that when there is coverage under consecutive, non-overlapping policies issued by different insurance companies which are triggered by a claim of injury across all the policy periods, each insurer's duty to defend is determined by a ratio of that insurer's "time on the risk" over the total time period for which damage is claimed to have occurred. Alliance argued that Texas law adopted this position, citing *Gulf Chemical* and *LaFarge*. TPCIGA however, argued that Texas would follow the joint and several approach set out in *Keene* to the effect that while insurers may apportion defense costs among themselves any way they chose, each insurer whose policy obligations are triggered independently owes the insured a complete defense.

The Austin Court of Appeals held that "Texas has adopted the *Keene* approach."[26] The court

[26]The *Southwest Aggregates* court emphasized the fact that "the Texas Supreme Court has quoted *Keene* at length . .

noted that the Texas Supreme Court, quoting *Keene*, had rejected stacking and allowed the insured to select the policy under which it was to be indemnified. It then made the logical leap that adopting those principles of *Keene* were consistent with, and apparently called for, the adoption of the *Keene* joint and several approach to allocation. The Court also noted that in *CNA Lloyds*, it had held that an insurer's duty to indemnify was not reduced where there was concurrent coverage among consecutive insurers and so adopting *Keene* in the duty to defend context was merely extending the same rule already adopted by *CNA Lloyds*. Then, the court rejected the Fifth Circuit rulings in *Gulf Chemical* and *LaFarge*, stating that those cases' reliance on *Forty-Eight Insulations* was inconsistent with *Keene*'s holding that each insurer is fully liable to the insured for defense costs.[27]

The Austin Court of Appeals reaffirmed its *Southwest Aggregates* decision in *Utica National* and found that the Texas Property and Casualty Insurance Guaranty Association owed no duty to bear defense costs where two solvent insurers continued to owed a duty to defend. *Utica National*, 110 S.W.3d at 457–58. However, the court also found that the trial court did not abuse its discretion in awarding defense costs pro rata as to those two insurers. The Dallas Court of Appeals also recently held in *Hartford Casualty* that the two insurers who had a duty to defend were required to bear a pro rata share of defense costs. *Hartford Cas.*, 2004 WL 2404382, *2.

(5) *GenCorp Inc. v. AIU Insurance Co.*

Finally, a recent Sixth Circuit decision that is expected to have nationwide implications is *GenCorp Inc. v. AIU Insurance Co.*, 138 Fed. Appx. 732, 2005 WL 1607035 (6th Cir. 2005, reh'g en banc denied). In that case, an insured sued certain of its excess insurers for breach of contract after settling with certain of its primary and umbrella insurers, alleging that the excess carriers improperly failed to indemnify the insured's liability for environmental clean-up at six sites. *Id.* at 733. The insured argued based on an Ohio Supreme Court decision that since it could no longer look to its primary insurers for coverage because it settled with them, it had exhausted that coverage and was entitled to then look to one or more of its excess policies to cover the rest of its liabilities. *Id.* at 734 (citing *Goodyear Tire & Rubber Co. v. Aetna Cas. & Sur. Co.*, 769 N.E.2d 835 (Ohio 2002)).

The Sixth Circuit, in its review of *Goodyear*, found that the "all sums" approach for allocation liability among multiple primary policies meant that "'the insured [was] entitled to secure coverage from a single policy of its choice that covers all sums incurred as damages during the policy period, subject to that policy's limit of coverage.'" *Id.* at 733 (quoting *Goodyear*, 769 N.E.2d at 841). According to *Goodyear*, the "all sums" approach places the burden on the chosen insurer to seek contribution from other triggered policy provisions. *Id.* (citing *Goodyear Tire*, 769 N.E.2d at 841). If the chosen policy does not cover the insured's entire claim, then the insured "may pursue coverage under other primary or excess insurance policies," but "[t]he answer to the question of what insurance may be tapped next is dependent upon the terms of the particular policy that is put into effect by [the insured]." *Id.* (citing *Goodyear Tire*, 769 N.E.2d at 841–42).

The district court rejected the insured's argument and the Sixth Circuit affirmed. *Id.* at 734 ("Because the district court's opinion carefully and correctly sets out the law governing the issues raised, and clearly articulates the reasons underlying its decision, issuance of a full written opinion by this court would serve no useful purpose."). The court determined that by settling with its primary and umbrella insurers, the insured had made the choice to allocate its liability

. ." 982 S.W.2d at 605.

[27] *See also Gulf Chem. & Metallurgical*, 1 F.3d at 371–72. In stark contrast to the decisions in *CNA Lloyds* and *Southwest Aggregates*, the Fifth Circuit in *Gulf Chemical* previously adopted and analyzed allocation of defense costs based upon an analysis of *Forty-Eight Insulations* with hardly a mention of *Keene*. The Court described *Forty-Eight Insulations* as the "seminal decision" on defense-cost apportionment. The Court, in adopting *Forty-Eight Insulations*' apportionment/allocation approach to defense costs noted that there was no Texas court case addressing the issue (this was five years before *Southwest Aggregates*) and noting that there was nothing in Texas law to prevent a pro rata apportionment based upon the time that each insurer "accepted the risk of exposure." *Id.* at 372.

as broadly as possible, which meant that it had to demonstrate that its liabilities would exceed the cumulative limits of all the primary and umbrella policies before it could trigger the excess policies. *Id.* It held that, viewing the evidence in the light most favorable to the insured, the combined limits of the primary policies exceeded the insured's own maximum estimates of its liability at the six polluted sites, so there was no basis on which to conclude that any of the excess insurers' policies would ever be triggered. *Id.*

III. ALLOCATION BETWEEN COVERED AND UNCOVERED CLAIMS

A. Uncovered Claims Against an Insured

Texas courts consistently hold that no duty to indemnify arises unless the underlying litigation establishes liability for damages covered by the insuring agreement of the policy at issue. *Heyden Newport Chem. Corp. v. Southern Gen. Ins. Co.*, 387 S.W.2d 22, 25 (Tex. 1965)); *CU Lloyd's of Texas v. Hatfield*, 126 S.W.3d 679, 682 (Tex. App.—Houston [14th Dist.] 2004, pet. denied); *Collier v. Allstate County Mut. Ins. Co.*, 64 S.W.3d 54, 62 (Tex. App.—Fort Worth 2001, no pet.); *Reser v. State Farm Fire & Cas. Co.*, 981 S.W.2d 260, 263 (Tex. App.—San Antonio 1998, no pet.); *see also Trinity Universal Ins. Co. v. Cowan*, 945 S.W.2d 819, 821 (Tex. 1997) (finding that unlike the duty to defend, the duty to indemnify under Texas law is triggered by the actual, proven facts establishing liability in the underlying suit).

Where certain of the claims fall under the policy and are covered, and other claims or causes of action are excluded, Texas law apportions the insurer's liability between the covered and uncovered claims. *See, e.g., Enserch Corp. v. Shand Morahan & Co.*, 952 F.2d 1485, 1494 (5th Cir. 1992); *Society of Professionals in Dispute Resolution, Inc. v. Mt. Airy Ins. Co.*, 1997 WL 711446, at *7 (N.D. Tex. Nov. 7, 1997); *Willcox v. Am. Home Assur. Co.*, 900 F.Supp. 850, 856 (S.D. Tex. 1995); *Winn v. Cont'l Cas. Co.*, 494 S.W.2d 601, 605 (Tex. Civ. App.—Tyler 1973, no writ).

Even where an insurer wrongfully refuses to defend its insured, this action does not estop it or operate as a waiver of its right to assert the policy defense of noncoverage. *Enserch*, 952 F.2d at 1493; *Willcox*, 900 F.Supp. at 856. "The damages recited in either a judgment or a settlement of the underlying lawsuit must be apportioned between claims covered by the policy and those that are not." *Willcox*, 900 F.Supp. at 856 (citing *Enserch*, 952 F.2d at 1494). In the context of a settlement, indemnification is proper only when the claims settled are shown to be within the scope of policy coverage. *Id.* (citing *Winn*, 494 S.W.2d at 604). The insurer is "legally obligated" to pay damages for covered claims, whether the legal obligation is fixed by judgment or by contract. *Id.* The burden of apportioning damages between covered and non-covered claims, however, rests on the insured. *Id.* (citing *Winn*, 494 S.W.2d at 605; *Maurice Pincoffs Co. v. S. Stevedoring Co.*, 489 S.W.2d 277, 278 (Tex. 1972).

In *Enserch*, the Fifth Circuit reversed and remanded so that the court could make the necessary apportionment findings. *Enserch*, 952 F.2d at 1494–95. The court explained that "we cannot allow an insured to settle allegations against it (some of which might be covered by its insurance, some of which might not) for its policy limits and then seek full indemnification from its insurer when some of that settled liability may be for acts clearly excluded by that policy").

In an unpublished opinion from the Northern District of Texas, the court held that an insurer was not precluded from contesting coverage of certain claims for purposes of the apportionment of settlement amounts, where settlement did not address whether any part of liability was covered by policy. *Society of Professionals in Dispute Resolution*, 1997 WL 711446, *7–8. That court also explained that the specific allocation of settlement costs is an appropriate issue for the court to decide as a matter of law on summary judgment. *Id.* at *8 (citing *Enserch*, 952 F.2d at 1494–95).

In a third case, *Willcox*, the Southern District stated that the damages recited in judgment or settlement of underlying lawsuit had to be apportioned between covered and noncovered claims. *Willcox*, 900 F.Supp. at 856. In *Winn*,

decided by the Tyler Court of Appeals, the court found that an insured failed to satisfy his burden to apportion a settlement between alleged civil coverage and admitted criminal noncoverage. *Winn*, 494 S.W.2d at 605.

While allocation of covered versus non-covered claims now appears to be the status quo, a more complicated question under Texas law is whether an insurer can recover from its insured for settlement payments made for uncovered claims.

B. Recovering from an Insured for Uncovered Claims

Can an insurance company recoup or gain reimbursement of defense costs from its insured in circumstances where it has provided a defense but it is later adjudicated that there was not, in fact, a defense obligation? Recoupment is a device to allocate a portion of defense costs to the insured is a most recent and limited form of allocation. Reimbursement focuses on requiring the insured to pay only the amount by which the cost of the defense has been increased by the inclusion of non-covered claims. This allocation will not apply in most cases as it will be difficult, if not impossible, to distinguish between the cost of defense attributable to defending the covered from the non-covered claims. Even so, there will be many cases where the costs can be distinguished and this allocation approach is potentially applicable. In other words, where the carrier did not have a duty to defend either the entire claim, or some portion of the claim, its payments constitute an unjust enrichment on the part of the insured.

The most prominent case to have applied reimbursement/recoupment outside of Texas is *Buss v. Superior Court*, 65 Cal.Rptr.2d 366, 939 P.2d 766 (Cal. 1977). Among the issues considered in that case was the right of the carrier to recover defense costs from its insured where it had defended one potentially covered claim in a suit where there were over two dozen claims which were clearly not covered by the policy. The carrier had properly reserved the right to seek recoupment of defense costs regarding claims where there was no potential for coverage. The Court held that the carrier in fact had a right to recover from the insured those defense costs incurred in the defense of the non-covered claims.

The Court's reasoning was based on the idea that the carrier's duty to defend extended only to potentially covered claims, but not the claims for which there was no possibility of coverage. When the non-covered claims were joined or intertwined in the same lawsuit with a potentially covered claim, the carrier was required to defend against all the claims in order to assure that the insured's contract rights under the policy were fully protected. *Id.* at 774–75. However, to prevent equitable windfall to the insured, the carrier was entitled to recover amounts which it was required to advance for the defense inasmuch as the contract did not require it to ultimately pay those amounts. *Id.* at 776–78.

In essence, the Court held that the insurance contract purchased by the insured promised only a defense to potentially covered claims; therefore, the insured had not paid premiums to defend a defense against non-covered claims. The insured would have been unjustly enriched if it was allowed to keep what was, in effect, a loan of defense services, which were required only as a protective measure. Therefore, the Court found that the law of restitution created a right of reimbursement implied in law, even if the insured refused to agree to such a right when demanding a defense. *Id.* at 776–77.

Both before and after *Buss*, several jurisdictions adopted the recoupment form of allocation, while only a handful have either rejected or appeared to reject it. A partial list of cases favorably considering reimbursement allocation include *Blue Ridge Ins. Co. v. Jacobsen*, 22 P.3d 313 (Cal. 2001) (an insurer may seek reimbursement for non-covered claims included in a reasonable settlement payment where it sends (1) a timely and express reservation of rights, (2) an express notification of the insurer's intent to accept a proposed settlement offer, and (3) an express offer to the insureds that they may assume their own defense when the insurer and insureds disagree whether to accept the proposed settlement); *United Nat'l Ins. Co. v. SST Fitness Corp.*, 309 F.3d 914 (6th Cir. 2002) (applying Ohio law) (allowing recoupment of defense costs

because (1) the circumstances made it reasonably certain that the parties intended to agree that the insurer would recoup those costs if there was no duty to pay them, and (a) the insurer timely and explicitly reserved its rights to recoup the costs, and (b) it provided specific and adequate notice of the possibility of reimbursement); *Enron Corp. v. Lawyers Title Ins. Co.*, 940 F.2d 307, 311 (8th Cir. 1991) (Virgin Island law) ("Courts have taken a strong stand against holding insurers liable for the defense costs of claiming their policies do not cover, even when those claims are joinded with covered claims"); *E.E.O.C. v. Southern Publishing Co., Inc.*, 894 F.2d 785, 791 (5th Cir. 1990) (insured required to pay costs of defending non-covered claim after carrier had obtained dismissal of covered state court claims); *Gon v. First State Ins. Co*, 871 F.2d 863, 868-69 (9th Cir. 1989) (applying California law) (recoupment appropriate in theory, but not applicable on facts of case); *Baw Constr. Co. v. Mission Ins. Co.*, 836 F.2d 1164, 1173-74 (9th Cir. 1988) (district court properly allocated defense costs between covered and non-covered claims and properly declined to allocate where covered and non-covered claims factual intertwined); and *Grand Cove II Condo. Assoc., Inc. v. Ginsberg*, 676 A.2d 1123, 1130-31 (N.J. Super. App. Div. 1996) (remanding for apportionment hearing, without specifying type of apportionment).

A partial list of cases appear to consider and reject recoupment include *Gen. Agents Ins. Co. v. Midwest Sporting Goods Co.*, 828 N.E.2d 1092 (Ill. 2005) ("we cannot condone an arrangement where an insurer can unilaterally modify its contract, through a reservation of rights, to allow for reimbursement of defense costs in the event a court later finds that the insurer owes no duty to defend") (citing *Shoshone First Bank v. Pac. Employers Ins. Co.*, 2 P.3d 510, 514 (Wy. 2000) ("unless an agreement to the contrary is found in the policy, the insurer is liable for all the costs of defending the action")); *J.G. Indus., Inc. v. Nat'l Union Fire Ins. Co.*, 578 N.E.2d 1259, 1267 (Ill. Ct. App. 1991) (refusing to allocate between covered defamation claim and non-covered retaliatory discharge claim); and *Badoyia v. Illinois Founders Ins. Co.*, 1997 WL 738863 (Ill. Ct. App. Nov. 26, 1997).

The Texas Supreme Court has issued two contradicting opinions on the reimbursement issue. In the first of the two cases, *Texas Association of Counties v. Matagorda County*, 52 S.W.3d 128 (Tex. 2000), the Court decided that a carrier could not seek reimbursement of settlement proceeds from its insured because a claim was not covered, unless the insured expressly had agreed to the settlement and to the carrier's right to seek reimbursement. As a practical matter, *Matagorda County* precluded reimbursement in almost all cases.

The second Texas Supreme Court case on point is *Excess Underwriters at Lloyd's London v. Frank's Casing Crew & Rental Tools, Inc.*, No. 02-0730, 2005 WL 125321 (Tex. May 27, 2005). Former Supreme Court Justice Priscilla Owen, now a judge on the 5th Circuit, wrote the majority opinion for the 7-0 decision in *Frank's Casing*, where the Court distinguished its *Matagorda County* opinion and held that it does not foreclose an action for reimbursement. *Frank's Casing* allows carriers to seek reimbursement in circumstances where the insured has either asserted their right in a reservation of rights letter, has notified the policyholder that it intends to seek reimbursement, and either (a) the policyholder agrees that the settlement is reasonable, or (b) the policyholder demands that the carrier settle the case by accepting the underlying plaintiff's settlement offer.

In January 2006, however, the Court granted a petition for rehearing filed by Frank's Casing, and oral argument was heard on February 15, 2006. At oral argument, the Court did not indicate when it might issue a second decision in *Frank's Casing*. Given the split in the original decisions, the fact that the *Frank's Casing* opinion represented only seven justices (with two of those concurring in only a part of the opinion), and Justice Owen's departure since the opinion were rendered, it is unclear what decision the Court will render.

C. Claims Against Uncovered Defendants

The question of allocation for covered versus non-covered defendants often arises in the context of directors' and officers' liability insurance.

Although entity coverage is available in the D&O insurance marketplace, many policies insure only claims against the company's directors and officers on an individual basis. Where no coverage has been purchased for the company itself, but where a party brings claims against both the directors and/or officers and the company, courts typically apply the "larger settlement rule" to allocate indemnity payments between the parties.

While Texas courts have not specifically addressed the issue, several federal courts outside of Texas have. *See Telxon Corp. v. Federal Ins. Co.*, 309 F.3d 386 (6th Cir. 2002); *Owens Corning v. Nat'l Union Fire Ins. Co.*, 257 F.3d 484 (6th Cir. 2001); *Piper Jaffray Cos. v. Nat'l Union Fire Ins. Co.*, 38 F.Supp.2d 771 (D. Minn. 1999); *Nordstrom, Inc. v. Chubb & Son, Inc.*, 54 F.3d 1424 (9th Cir. 1995) (stating that the "larger settlement rule" means that "responsibility for any portion of the settlement should be allocated away from the insured party only if the acts of the uninsured party are determined to have increased the settlement," and rejecting a bright-line rule applicable to all settlements under D&O policies); *Safeway Stores, Inc. v. Nat'l Union Fire Ins. Co.*, 64 F.2d 1281 (9th Cir. 1995); *Nodaway Valley Bank v. Cont'l Cas. Co.*, 715 F.Supp. 1458 (W.D. Mo. 1989), *aff'd*, 916 F.2d 1362 (8th Cir. 1990).

Another option for courts determining how to allocate between covered and non-covered defendants is the "relative exposure rule," which requires courts to balance at least eleven factors in an elaborate inquiry designed to determine (1) what happened in a settlement, and (2) who really paid for what relief. *See Caterpillar, Inc. v. Great Am. Ins. Co.*, 62 F.3d 955 (7th Cir. 1995). The Seventh Circuit in *Caterpillar* explicitly rejected the "relative exposure rule" in favor of the "larger settlement rule." Other courts that have adopted the "larger settlement rule" have done so after determining that the rule best effectuated the parties' intent. *See, e.g., Nordstrom*, 54 F.3d at 1433.

IV. CONCURRENT CAUSE

In the context of lawsuits dealing with concurrent causation, the question of allocation for covered versus non-covered claims becomes especially interesting, and the burden of proof falls to the insured, as it does generally with covered versus non-covered claims. Under the doctrine of concurrent causes, when covered and non-covered perils combine to create a loss, the insured is entitled to recover only that portion of the damage caused solely by the covered peril(s). *Utica Nat'l Ins. Co. v. American Indem. Co.*, 141 S.W.3d 198, 204 (Tex. 2004); *Travelers Indem. Co. v. McKillip*, 469 S.W.2d 160, 162 (Tex. 1979); *State Farm Lloyds v. Kaip*, No. 05-99-01363-CV, 2001 WL 670497, *2 (Tex. App.—Dallas June 15, 2001); *State Farm Fire & Cas. Co. v. Rodriguez*, 88 S.W.3d 313, 320–21 (Tex. App.—San Antonio 1999, pet. denied); *Wallis v. United Servs. Auto. Ass'n*, 2 S.W.3d 300, 302–03 (Tex.App.—San Antonio 1999, pet. denied).

"Texas courts distinguish between a new and independent cause and a concurrent act." *Benitz v. Gould Group*, 27 S.W.3d 109, 116 (Tex. App.—San Antonio 2000, no pet.). "A concurrent act cooperates with the original act in bringing about the injury and does not cut off the liability of the original actor." *Id.* "A 'new and independent cause' sometimes referred to as a superseding cause, however, is an act or omission of a separate and independent agency that destroys the causal connection between the negligent act or omission of the defendant and the injury complained of, and thereby becomes the immediate cause of such injury." *Id.*

The following criteria are applied to determine if an act is a concurring or a new and independent cause:

a. the fact that its intervention brings about harm different in kind from that which would otherwise have resulted from the actor's negligence;

b. the fact that its operation or the consequences thereof appear after the event to be extraordinary rather than normal in view of the circumstances existing at the time of its operations;

c. the fact that the intervening force is operating independently of any situation created by the actor's negligence or, on the other hand, is or is not a normal result of such a situation;

d. the fact that the operation of the intervening force is due to a third person's act or to his failure to act;

e. the fact that the intervening force is due to an act of a third person which is wrongful toward the other and as such subjects the third person to liability to him;

f. the degree of culpability of a wrongful intervening force in motion.

Id. at 117.

The doctrine of concurrent causation is not an affirmative defense or an avoidance issue; rather, it is a rule embodying the basic principle that insureds are not entitled to recover under their insurance policies unless they prove their damage is covered by the policy. *Wallis*, 2 S.W.3d at 303; *Kaip*, 2001 WL 670497, *2. Thus, an insured may only recover for the amount of damage caused solely by the covered peril. *Id.*; *Kaip*, 2001 WL 670497, *2; *see also Tinsley v. State Farm Lloyds*, No. 14-04-00255-CV, 2005 WL 2675024 (Tex. App.—Houston [14th Dist.] Oct. 20, 2005, no pet. h.) (finding that "even if a combination of factors caused the damages, under the doctrine of concurrent causes, [the insured] is entitled to recover the portion of damages caused by the covered peril").

As mentioned above, the burden of segregating the damage attributable solely to the covered event in the context of concurrent causation is a coverage issue for which the *insured* carries the burden of proof. *Id.*; *Kaip*, 2001 WL 670497, *2. The insured must therefore present some evidence upon which the jury can allocate the damages attributable to the covered peril, and he must attempt to segregate the loss caused by the covered peril from the loss caused by the excluded peril, and to secure a jury finding on the amount of damage attributable to the different causes. *McKillip*, 469 S.W.2d at 162; *Wallis*, 2 S.W.3d at 303; *Kaip*, 2001 WL 670497, *2.

Although a plaintiff is not required to establish the amount of his damages with mathematical precision, there must be some reasonable basis upon which the jury's finding rests. *Rodriguez*, 88 S.W.3d at 320–21; *see also Indem. Co. v. McKillip*, 469 S.W.2d 160, 163 (Tex. 1971) ("It is essential that the insured produce evidence which will afford a reasonable basis for estimating the amount of damage or the proportionate part of damage caused by a risk covered by the insurance policy."); *Travelers Personal Security Ins. Co. v. McClelland*, No. 01-05-00093-CV, 2006 WL 133509 (Tex. App.—Houston [1st Dist.] Jan. 19, 2006 no pet. h.) (clarifying that *Rodriguez* does not require plaintiffs to explicitly state what damage is "solely attributable to the covered cause but, rather, that there is some evidence that provides a reasonable basis for the jury's findings).

In *Wallis*, witnesses testified that the insured's loss was caused by a combination of covered and non-covered perils, but the insured's experts failed to indicate the extent to which the covered peril damaged the Wallises' home. Thus, the court of appeals could not uphold a jury finding that thirty-five percent of the damage was caused by plumbing leaks, the covered perils. *Wallis*, 2 S.W.3d at 304. The court held that the Wallises' failure to allocate what portion of their claim was covered was "fatal to their claim." *Id.*

In *Kaip*, the insured (Kaip) also failed to carry her burden to prove the extent to which her claim was covered. *Kaip*, 2001 WL 670497, *3. At trial, Kaip did not attempt to segregate damage caused to her roof by the excluded perils from the damage to her roof caused by hail. Further, the jury was never given the opportunity to consider whether excluded perils caused a portion of the loss. Kaip's expert admitted that hail, wear and tear, deterioration, inherent defect, rain, and the way the shingles were laid all contributed to the damage to her roof. Because Kaip did not attempt to determine the amount of loss caused by hail and to secure a jury finding on the amount of damage

attributable to hail, she failed to meet her burden of proof. Therefore, there was no evidence to support the jury's finding that her entire roof had to be replaced because of a "physical loss," that is, that the roof had to be replaced either (1) solely because of hail damage, or (2) if in part due to hail damage, what portion was attributable to hail. Thus, the Dallas Court of Appeals found that there was no evidence to support the jury's finding.

Finally, it is interesting to note that courts interpreting Texas law have prohibited insureds from creatively relying on a "sole causation" theory where there is evidence that multiple causes combined to create the loss. *See General Star Indem. Co. v. Sherry Brooke Revocable Trust*, 243 F.Supp.2d 605, 634 (W.D. Tex. 2001). In *General Star*, the Western District held that the insured's waiver of any claim under "excluded perils" as opposed to "covered perils" was a legally insufficient attempt to circumvent the doctrine of concurrent causes' requirement of allocation. Texas law requires that the insured pay attention to, see, and care about damage attributable to non-covered perils and "present some evidence affording the jury a reasonable basis on which to allocate the damage." *Id.*

V. RELATED AND INDEPENDENT CAUSE

Another line of Texas cases has had far-reaching effects on allocation issues, by creating an "occurrence" where none had existed before. The Fifth Circuit had previously adopted the "related to and interdependent rule," which provides that there is no cause of action against a principal but for its agent's acts and, therefore no "occurrence" to invoke the policy. *See Am. States Ins. Co. v. Bailey*, 133 F.3d 363, 371–73 (5th Cir. 1998); *Am. Guar. & Liab. Ins. Co. v. 1906 Co.*, 129 F.3d 802, 810 (5th Cir. 1997); *Columbia Mut. Ins. Co. v. Fiesta Mart, Inc.*, 987 F.2d 1124 (5th Cir. 1993). However, this rule was very clearly rejected by the Texas Supreme Court in *King v. Dallas Fire Insurance Co.*, 85 S.W.3d 185, 186 (Tex. 2002).

In *King*, the Supreme Court addressed the question of "whether an employer's alleged negligent hiring, training, and supervision constitute[d] an 'occurrence' . . . although the injury was directly caused by the employee's intentional conduct." 85 S.W.3d at 186. In the underlying suit, Greg Jankowiak sued Carlyle King for injuries he sustained when one of King's employees, Carlos Lopez, attacked him. *Id.* at 186–87. Jankowiak's petition alleged that King was liable based on respondeat superior, as well as negligence in hiring, training, and supervising Lopez. *Id.* at 187. King's insurer, Dallas Fire, refused to defend, claiming that Jankowiak did not allege an occurrence because the actions of King's employee were intentional. *Id.* The supreme court disagreed, holding that "the insured's standpoint controls in determining whether there has been an 'occurrence' that triggers the duty to defend." *Id.* at 188.

The *King* court based its rejection of the "related to and interdependent rule" on the express language in the CGL policy (namely, the Separation of Insureds provision and the Intended Injury exclusion), Texas case law, and the evolution of the CGL policy. The court concluded that "the Fifth Circuit's rule improperly imputes the actor's intent to the insured. That is to say, whether one who contributes to an injury is negligent is an inquiry independent from whether another who directly causes the injury acted intentionally." *Id.*

Additionally, in *Acceptance Insurance Co. v. Lifecare Corp.*, 89 S.W.3d 773, 776 (Tex. App.—Corpus Christi 2002, no pet.), Lifecare had been sued in the underlying action for negligently providing false information about a former employee. After the employee (Willis) left Lifecare, he started working for Thomas Care Center, which had contacted Lifecare about Willis, but received incorrect information from them. During his employment at Thomas Care Center, Willis sexually assaulted the plaintiff in the underlying action. *Id.* Lifecare's insurers, Acceptance Insurance and Redland Insurance, refused to defend on the basis that the plaintiff had not alleged an occurrence. *Id.* The insurers relied on the Fifth Circuit's rule that, "when an agent's conduct is 'related and interdependent' with that of the principal, and absent the agent's conduct, there would be no claim against the principal, there is no covered occurrence." *Id.* at 779.

The Corpus Christi Court of Appeals, however, rejected this contention, relying on *King*, and held that "from the standpoint of [Lifecare], there was no intentional conduct. Rather, the negligent representation and its damages were an accident and thus [fell] within the terms of the CGL policy." *Id.* at 784. According to the court, "[t]he analysis of the term 'occurrence' is largely determined by whether the activity was expected or intended from the standpoint of the insured. It is the damage, and not the accident, which is neither expected nor intended. An event is accidental within the meaning of the policy coverage, if it is 'an effect that cannot be reasonably anticipated from the use of [the means that produced it], an effect which *the actor* did not intend to produce and which he cannot be charged with the design of producing . . . .'" *Id.* (quoting *Trinity Universal Ins. Co. v. Cowan*, 945 S.W.2d 819, 827 (Tex. 1997)).

Next, the Dallas Court of Appeals followed suit in *Roman Catholic Diocese of Dallas v. Interstate Fire & Casualty Co.*, 133 S.W.3d 887, 889 (Tex. App.—Dallas 2004, pet. denied). In that case, the plaintiff in the underlying lawsuit, John Doe, sued Father Patrick Lynch and the Diocese, alleging that Lynch repeatedly molested him beginning in 1977 and that the Diocese had been aware of Lynch's sexual propensities since 1966 when it learned that he had molested a boy in a church. Doe's causes of action against the Diocese included (1) respondeat superior, (2) agency, (3) negligence in hiring and retaining Lynch, (4) negligent supervision of Lynch, (5) negligence in failing to ascertain Lynch's dangerous sexual tendencies, (6) negligent failure to warn the plaintiff and his family of Lynch's dangerous sexual propensities, (7) breach of fiduciary duty, (8) knowing participation in breach of fiduciary duty, (9) fraud, (10) conspiracy, and (11) intentional infliction of emotional distress.

The excess insurers brought a declaratory judgment action, arguing that there was no coverage because (1) "the intentional and knowing torts alleged against the Diocese [did] not constitute an occurrence because, under those claims, Doe's injuries could not have been unexpected and unintentional[,]" and (2) "the negligence claims alleged against the Diocese [did] not constitute an occurrence because the Diocese's negligence is inextricably intertwined or related and interdependent with Lynch's criminal behavior." *Id.* at 891. The insurers asserted that *King* did not apply because, unlike the policy considered in *King*, their policies (1) did not contain a separation-of-insureds clause, (2) did not contain a provision stating that intent was to be determined from the standpoint of the insured, and (3) the prohibition against coverage for intentional injury was in the definition of occurrence instead of in an exclusion.

The trial court agreed with the insurers and granted their motions for summary judgment, but the Dallas Court of Appeals reversed. The court explained that *King* did not rely simply on the provisions of the policy at issue in that case, but rather based its decision that historically, the determination of an occurrence was made from the viewpoint of the insured. First, the court stated that "the lack of a separation-of-insureds clause in the policies [was] irrelevant because the Diocese [was] the only assured under the policies in the underlying case." *Id.* at 894. Second, the court noted that, historically, "the existence of an occurrence was determined from the viewpoint of the insured before that language was added to the policies. The language in the modern policies stating that intent is determined from the insured's viewpoint makes express what was previously implied in the law." *Id.* The court concluded "that, under the supreme court's explanation of Texas law in *King*, the determination of an occurrence under a liability policy is made from the viewpoint of the insured, unless the policy's terms provide otherwise, and any prior opinions from the Texas intermediate appellate courts—including this Court—and the federal courts to the contrary were implicitly overruled by *King*." *Id.* at 894–95.

The bases of Doe's allegations were not limited to the Diocese's intentional and knowing conduct, but also included allegations of negligence. According to the court, if Doe failed to prove that "the Diocese was aware of Lynch's pedophilia and his prior molestation, the trier of fact could still find the Diocese liable on these negligence grounds. Viewed from the Diocese's viewpoint, if it did not know of Lynch's sexual

propensities, then his molesting Doe was both unexpected and unintentional, and a judgment for Doe in the underlying case could fall within coverage under the policies." *Id.* at 895. Thus, the court reversed the trial court's grant of summary judgment, holding that the insurers "failed to establish as a matter of law that no judgment rendered in the underlying case could fall within coverage of the policies." *Id.* at 897.

Most recently, the Fifth Circuit applied *King* in *Lincoln General Insurance Co. v. Reyna*, 401 F.3d 347, 350 (5th Cir. 2005). The *Lincoln General* court was faced with a bus crash that occurred in Mexico. The a bus was owned by the insured (Reyna) and driven by one his employees (Lozano). The plaintiffs claimed negligent hiring, training, and supervision on the part of Reyna, which they asserted, based on *King*, equated to an "accident" under a business auto policy and independently triggered coverage and a duty to defend. *Id.* at 350. The plaintiffs argued that "the district court erred in determining 'accident' was restricted to an automobile collision and did not include coverage for negligent hiring, training, and supervision." *Id.* at 350–51. According to the plaintiffs, "[i]rrespective of the bus crash occurring in Mexico, . . . Lincoln's duty to defend Reyna was triggered by Reyna's actions of negligently hiring, training, and supervising Lozano, which occurred in Texas within the coverage area, because his actions constitute[d] an 'accident' under the Policy." *Id.* at 351. However, Lincoln argued that because the crash occurred outside the coverage area, coverage was never triggered and, therefore, it was not required to defend Reyna.

The Fifth Circuit agreed with Lincoln, concluding that "the court's determination [in *King*] that negligent hiring, training, and supervision is an occurrence applies in cases involving *intentional* conduct where the court is required to interpret intent and from whose standpoint." *Id.* at 353 (emphasis added). According to the court, "in cases involving injury caused by negligence where intent is clearly not at issue, the 'but for' or 'arising out of' standard still applies. Under the 'but for' standard, there could be no cause of action against the employer but for the employee's negligent conduct, and where the employee's conduct does not fall within the scope of coverage, there is no occurrence or accident to trigger coverage and the duty to defend." *Id.* at 354 (relying on *Fidelity & Guaranty Ins. Underwriters, Inc. v. McManus*, 633 S.W.2d 787 (Tex. 1982)). Applying that test to the *Lincoln General* facts, the Fifth Circuit held there was no coverage. The court reasoned that Reyna's negligence would not exist but for the bus crash in Mexico, for which there could be no coverage due to the policy's coverage territory requirement. *Id.* at 354–55.

VI. CONCLUSION

As is clear from the discussion above, there are countless allocation issues that can arise in insurance coverage litigation. From the situation where multiple policies or multiple lines of coverage are on the risk for the same injury, to the situation where a single insured and a single insurer must determine the amount of damages that result from covered versus non-covered claims, the law is constantly changing as the rules regarding the number of occurrences and the trigger theories that apply, among other things, are further explained by the courts. In the coming months and years, however, clarity will hopefully begin to emerge on these topics.