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# Commentary

## The "Non-Cumulation" Clause: Policyholders Cannot Have Their Cake and Eat it Too

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The following is a synopsis of an article with the same title that first appeared in the University of Kansas Law Review, Volume 61, Issue 3, 61 U. Kan. L. Rev. 701 (2013).

General liability insurance carriers and policyholders alike have long wrestled with how to apportion liability for damages arising from claims involving bodily injury or property damage happening over long time spans, such as asbestos bodily injury and environmental property damage claims (sometimes called "long-tail claims"). The cause and progression of injury or damage involved in such claims is often difficult or impossible to determine.[1] Policyholders, however, generally have the burden to prove that a loss "triggers" an insurance policy, *i.e.*, that at least some injury or damage leading to the damages for which the policyholder seeks coverage took place during the periods of the relevant policy.[2] Many courts have recognized that this burden can be difficult or impossible to meet for these types of claims. This has led many courts to accord a presumption to the policyholder that the injury or damage is continuous. Under this presumption, the injury or damage is deemed to have begun at some appropriate point (such as the date of first exposure to asbestos in asbestos bodily injury claims, or the date that the polluting operations began in pollution property damage claims) and to have happened continuously thereafter until some other appropriate date (such as the date of diagnosis or death in asbestos claims, or the date on which the cleanup is complete in pollution claims).[3]

Once courts resolve the trigger of coverage issue through the presumption of continuous injury or damage, the question then becomes who should pay for what portions of the relevant damages. With respect to long-tail claims, there often is no actual evidence of damage or injury during a given policy period, let alone evidence of how much injury or damage happened in any particular period.[4] In this context, insurers and policyholders have locked horns over the appropriate method for allocating liability for these claims.

With some exceptions, many insurers take the position that the plain language in these policies limits coverage to only those damages that the policyholder is liable to pay because of injury or damage happening during the

policy period.[5] These carriers point out that the continuous injury or damage trigger provides no basis for concluding that any more or less injury or damage happened in any one part of the continuous trigger period than another. Accordingly, to honor the plain meaning of the contract language, these insurers assert that the only legitimate method for allocating liability for these claims is to prorate the damages by spreading them evenly across the entire presumptive period of continuous injury or damage.[6] This approach is generally known as "pro rata allocation." In essence, pro rata allocation divides the total damages by the number of years during which injury or damage took place, and allocates the resulting sum to each triggered policy year, holding the policies in each year responsible only for the damages allocated to that year. In this way, pro rata allocation holds insurers responsible only for the damages reasonably presumed to have happened during their policy periods, thereby honoring the policy language and promoting an inherently equitable result.[7]

Most policyholders take a different view. Naturally, their goal is to maximize recovery under their insurance programs. In pursuing this goal, however, policyholders often take contradictory positions.

Historically, policyholders have argued that the only legitimate way to apportion damages under general liability policies is to apply a contractual version of joint-and-several liability, generally known in this context as "all sums" liability. The all sums approach potentially holds each triggered policy responsible for the entirety of the damages, regardless of how much of the injury or damage giving rise to those damages happened during a particular policy period (subject to policy limits).[8]

The inequity of this approach is apparent. Under all sums liability, a single insurer providing only one year of insurance can be held liable for damages due to injury or damage happening over the course of decades, thereby forcing the insurer to instigate costly contribution suits against other insurers, and requiring insurers to factor the possibility of such expanded liability into calculating premiums.[9]

In arguing for this approach, policyholders often point to the prior insurance/non-cumulation of liability clauses ("non-cumulation clauses") that are frequently found in commercial general liability ("CGL") policies. These clauses typically provide that, if a prior policy covers a loss also covered under a later policy, the limits of liability of the later policy shall be reduced by the "amounts due" under the prior insurance on account of that loss.[10] Policyholders argue that, because these clauses refer to the possibility that earlier and later policies might cover the same loss, their existence proves that insurers understood that CGL policies cover damages arising from bodily injury or property damage happening outside their policy periods.[11]

Over the years, all sums liability has gained some traction with courts in certain jurisdictions.[12] Now, policyholders and their advocates, who used these non-cumulation clauses to obtain all sums rulings, appear to have belatedly realized that the application of the non-cumulation clause under the all sums regime may, in some circumstances, actually reduce a policyholder's insurance recoveries to a sum lower than it would have recovered under the pro rata allocation approach.[13] Accordingly, policyholders now seek to avoid the consequences of the application of these clauses in the all sums context.

A 2011 article by Christopher C. French, "The Non-Cumulation Clause: An Other Insurance Clause by Another Name," appears to have been motivated by this belated realization. This article makes a case for the conclusion that courts which have accepted all sums liability should not enforce non-cumulation clauses.[14] The foundation of Mr. French's arguments is that non-cumulation clauses resulted from the transition in the 1960s from CGL policies that insured "accidents" to policies insuring "occurrences."[15] The earlier, accident-based policies were triggered when the "accident," or the event causing the relevant injury or damage, happened during the policy period. Under the newer occurrence-based policies, it was the injury or damage itself, rather than its cause, which had to take place during the policy period to trigger coverage.[16] Thus, the transition from accident-based to occurrence-based policies raised the possibility that both an earlier accident-based policy and a later occurrence-based policy would cover the same loss. In response, underwriters developed non-cumulation clauses to prevent a double recovery.[17]

Mr. French uses this historical context to assert that the non-cumulation clause does not apply in any other context. Specifically, Mr. French argues that the clause was intended solely to avoid situations in which an insurer had to pay under both an earlier, accident-based policy (because the cause of the injury or damage

happened during its policy period) and under a later, occurrence-based policy (because the resultant injury or damage happened during that policy period).[18] The drafters, Mr. French claims, did not anticipate later developments in insurance law, such as all sums liability or the continuous trigger theory.[19] Accordingly, Mr. French maintains, the non-cumulation clause is "hopelessly ambiguous" and is nothing more than a rebranded "other insurance" provision.[20]

Reasoning that non-cumulation clauses, like other insurance clauses, "purport to shift the liability for a loss from the policy at issue to other policies issued in prior years, so the same principles apply,"[21] Mr. French relies on superficial similarities between the clauses. However, other insurance clauses generally apply to *concurrent* coverage situations, in which two or more policies issued in the same year cover the same loss.[22] In contrast, non-cumulation clauses address the situation in which *consecutive* policies apply to the same loss.[23] Furthermore, fundamental principles of contract construction require insurance contracts to be interpreted in their entirety, giving effect to all terms and provisions. Mr. French's assertion that other insurance and non-cumulation clauses are the same violates this cardinal principle.[24]

Mr. French further asserts that the non-cumulation clause is ambiguous when applied to long-tail claims, implying that any such ambiguities arise only because the non-cumulation clause is somehow incompatible with the all sums approach, despite years of policyholder arguments that the existence of the clause supports this approach. In essence, Mr. French asserts that difficulties in applying a contract provision render it ambiguous. In fact, precisely the opposite is true.[25] Moreover, several courts have concluded that the non-cumulation clause is unambiguous and applies in the all sums context.[26] For instance, in *Stonewall Insurance Co. v. E.I. du Pont de Nemours & Co.*, the court recognized that the non-cumulation clause applies under the all sums approach to limit the amount a policyholder may seek from a subsequent excess insurer.[27] *Stonewall* recognized that importing ambiguities into a non-cumulation clause by divorcing key terms from the context in which they appear would "dishonor the spirit of the clause" and permit the insured to improperly obtain a double recovery.[28] Similarly, both *Hercules, Inc. v. AIU Insurance Co.* and *Outboard Marine Corp. v. Liberty Mutual Insurance Co.* implicitly recognized that non-cumulation clauses do not apply in the context of pro rata allocation, but would apply under the all sums approach.[29]

Additionally, Mr. French contends that there is no "amount due" under prior insurance, as referenced in the non-cumulation clause, unless and until the policyholder presents a claim under those policies. Accordingly, this argument goes, the non-cumulation clause does not apply unless and until the policyholder demands payment under the earlier policies.[30] This argument disregards the fact, in asserting all sums liability, policyholders are maintaining that all policies issued during the relevant injury or damage period are jointly and severally liable; thus, the very nature of the all sums theory means that the policyholder is asserting that there are "amounts due" for the loss under all policies. The argument also misconstrues the word "due" which, under the appropriate definition here, is defined as "owed" or "owing as a debt."[31] Because all sums proposes that all policies on the risk during the relevant timeframe owe coverage, the notion that there are no "amounts due" under the earlier policies until the policyholder presents a claim directly contradicts the all sums theory.

The "amount due" contention also is flawed because, if correct, it would enable policyholders to unilaterally circumvent the non-cumulation clause by selecting the order in which to target its policies. Yet Mr. French acknowledges that the purpose of the clause was to prevent the policyholder from recovering under earlier accident-based policies and later occurrence-based policies for the same loss, and nothing would prevent a policyholder from using this same "amount due" argument to avoid the application of the clause in the accident- and occurrence-based policy context. Policyholders could simply target the later occurrence-based policy with a non-cumulation clause first, and then turn to the earlier accident-based policy. The "amount due" argument would thus render the non-cumulation clause a nullity even in the historical context in which Mr. French acknowledges it is supposed to operate. Various courts have rejected the "amount due" argument because it would permit the policyholder to manipulate its order of recovery in this way, thereby rendering the clause mere surplusage.[32]

The non-cumulation clause ought not to be applied when pro rata allocation, as opposed to all sums

liability, is employed. Pro rata allocation honors the policy language by limiting an insurer's liability to injury or damage happening only within its policy period. Accordingly, under the pro rata approach, the non-cumulation clause should not apply, since no earlier policy is paying for the same loss as a later policy.[33] Yet through their advocacy, policyholders have persuaded some courts to adopt the all sums approach. All sums liability is closely analogous to, if not identical to, precisely the situation that gave rise to the need for the clause in the first place. Thus, the all sums framework falls squarely within the scope of these clauses.

Ultimately, policyholders should be required to lie in the bed they made: non-cumulation clauses, which policyholders have used effectively in some jurisdictions to achieve the all sums result they desire, do and should apply in the all sums context. Simply put, if, as policyholders contend, the non-cumulation clause supports the all sums approach, then it must apply under that approach. If Mr. French is right, and the clause does not apply in the all sums context because it is limited to recoveries under accident- and occurrence-based policies, then it is irrelevant to the allocation issue and does not support all sums liability in the first place.

## Endnotes

1. *See* A.W. Chesterton Co. v. Massachusetts Insurers Insolvency Fund, 838 N.E.2d 1237, 1251 n.11 (Mass. 2005) ("Because the injurious effects of asbestos may not be apparent, or capable of medical diagnosis, for many years after initial exposure, the question 'what is bodily injury' and 'when does it occur' often assume primary importance in insurance coverage disputes involving asbestos."); Farmers Mut. Fire Ins. Co. of Salem v. New Jersey Prop.-Liab. Ins. Guar. Ass'n, Nos. L-0619-09, L-1004-09, 2011 WL 2671583, at *3 (N.J. Super. Ct. App. Div. July 11, 2011) ("The problem with environmental contamination claims is that the damage that triggers insurance liability will not occur due to a single event, but 'usually is attributable to events that begin, develop and intensify over a sustained period of time [and] [t]herefore, the damages ha[ve] occurred or been triggered along a continuous timeline during which several successive policies issued to the insured were in effect.' ") (alteration in original) (quoting Quincy Mut. Fire. Ins. Co. v. Borough of Bellmawr, 172 N.J. 409, 416–17 (2002)); *In re* Liquidation of Integrity Ins. Co., No. C-0063-03, 2012 WL 1314181, at *9 (N.J. Super. Ct. App. Div. Apr. 18, 2012) (injury from asbestos exposure is not "quick to manifest, but instead, may remain unrecognized for substantial periods of time, thereby rendering uncertain the ultimate liability that will accrue to an insured"); Jamaica D. Potts & Kenneth S. Rivlin, *Not So Fast: The Sealed Air Asbestos Settlement And Methods Of Risk Management in the Acquisition of Companies with Asbestos Liabilities*, 11 N.Y.U. ENVTL. L.J. 626, 631–32 (2003) (mesothelioma, a fatal cancer of the outer lung and chest cavity caused by prolonged inhalation of asbestos, may occur up to forty years after exposure to asbestos fibers).

2. *See*, *e.g.*, Port Auth. v. Affiliated FM Ins. Co., 245 F. Supp. 2d 563, 582 (D.N.J. 2001) ("The insured bears the burden of demonstrating physical damage or loss manifesting within the pertinent policy period in order to demonstrate a relevant loss."); Rotella v. Mid-Continent Cas. Co., No. 3:08-CV-0486-G, 2008 WL 2694754, at *3 (N.D. Tex. July 10, 2008) (noting that the insured bears the burden of proving that the claimed damages occurred during the policy period); St. Michael's Orthodox Catholic Church v. Preferred Risk Mut. Ins. Co., 496 N.E.2d 1176, 1178 (Ill. App. Ct. 1986) (noting that the insured has the burden of proving that a loss falls within the terms of the policy); Harford Cnty. v. Harford Mut. Ins. Co., 610 A.2d 286, 295 (Md. Ct. Spec. App. 1992) ("The burden to show that property damage occurred within the coverage of the policies is . . . upon the insured."); Ratner v. Canadian Universal Ins. Co., 269 N.E.2d 227, 230 (Mass. 1971) (accepting as a general principle that plaintiff seeking to recover for breach of insurance policy agreement "must allege and prove the cause of action is within the contract's terms"); Am. States Ins. Co. v. Mathis, 974 S.W.2d 647, 649 (Mo. Ct. App. 1998) (noting that the policyholder has the burden of showing that a policy covers the loss and damages at issue and that the insurer must show the applicability of any exclusions); Chase Manhattan Bank, N.A. v. Travelers Grp., Inc., 702 N.Y.S.2d 60, 60 (N.Y. App. Div. 2000) (same), *aff'd as modified*, 743 N.Y.S.2d 867 (N.Y. App. Div. 2002) (mem.); Garrett v. Pilot Life Ins. Co., 128 S.E.2d 171, 173 (S.C. 1962) (same); Kozlik v. Gulf Ins. Co., 673 N.W.2d 343, 347 (Wis.

Ct. App. 2003) (the policyholder must prove that the damages at issue fall within the scope of the insuring agreements).

3. *See*, *e.g.*, Hercules, Inc. v. AIU Ins. Co., 784 A.2d 481, 492 n.33 (Del. 2001); Chicago Bridge & Iron Co. v. Certain Underwriters at Lloyd's, London, 797 N.E.2d 434, 443 (Mass. App. Ct. 2003); Owens-Ill., Inc. v. United Ins. Co., 650 A.2d 974, 980 (N.J. 1994).

4. *See* Michael G. Doherty, *Allocating Progressive Injury Liability Among Successive Insurance Policies*, 64 U. CHI. L. REV. 257, 258 (1997) (alluding to the scientific impossibilities in allocating liability to each policy in long-tail claims for injuries happening only within each insurer's respective policy period); William R. Hickman & Mary R. DeYoung, *Allocation of Environmental Cleanup Liability Between Successive Insurers*, 17 N. KY. L. REV. 291, 292 (1990) (deeming it "virtually impossible" to correlate degrees of damage to particular policies where successive policies are implicated); James F. Hogg, *The Tale of a Tail*, 24 WM. MITCHELL L. REV. 515, 525–26 (1998) (describing how claims for progressive injury have raised questions of proof as to when the injury occurred, how long the injury continued, and whether there was a single occurrence or multiple occurrences).

5. *See*, *e.g.*, Nationwide Ins. Co. v. Cent. Mo. Elec. Coop., 278 F.3d 742, 748 (8th Cir. 2001); Olin Corp. v. Ins. Co. of N. Am., 221 F.3d 307, 324–25 (2d Cir. 2000); Spartan Petroleum Co. v. Federated Mut. Ins. Co., 162 F.3d 805, 812 (4th Cir. 1998); Gulf Chem. & Metallurgical Corp. v. Associated Metals & Minerals Corp., 1 F.3d 365, 371–73 (5th Cir. 1993); Commercial Union Ins. Co. v. Sepco Corp., 765 F.2d 1543, 1544 (11th Cir. 1985); Ins. Co. of N. Am. v. Forty-Eight Insulations, Inc., 633 F.2d 1212, 1224-25 (6th Cir. 1980); Pub. Serv. Co. v. Wallis & Cos., 986 P.2d 924, 939–40 (Colo. 1999); Sec. Ins. Co. v. Lumbermens Mut. Cas. Co., 826 A.2d 107, 123 (Conn. 2003); Sentinel Ins. Co. v. First Ins. Co. of Haw., Ltd., 875 P.2d 894, 918 (Haw. 1994); Outboard Marine Corp. v. Liberty Mut. Ins. Co., 670 N.E.2d 740, 748 (Ill. App. Ct. 1996); Atchison, Topeka & Santa Fe Ry. Co. v. Stonewall Ins. Co., 71 P.3d 1097, 1134 (Kan. 2003); Aetna Cas. & Sur. Co. v. Commonwealth, 179 S.W.3d 830, 842 (Ky. 2005); Norfolk S. Corp. v. Cal. Union Ins. Co., 859 So. 2d 201, 297–98 (La. Ct. App. 2003); Mayor of Balt. v. Utica Mut. Ins. Co., 802 A.2d 1070, 1101–04 (Md. Ct. Spec. App. 2002); Boston Gas Co. v. Century Indem. Co., 910 N.E.2d 290, 312 (Mass. 2009); Arco Indus. Corp. v. Am. Motorists Ins. Co., 594 N.W.2d 61, 69 (Mich. Ct. App. 1998), *aff'd*, 617 N.W.2d 330 (Mich. 2000); N. States Power Co. v. Fid. & Cas. Co., 523 N.W. 2d 657, 662–64 (Minn. 1994); Mallinckrodt Inc. v. Cont'l Ins. Co., Cause No. 05cc-001214 (Mo. Cir. Ct. of St. Louis Cnty. Nov. 8, 2012); Dutton-Lainson Co. v. Cont'l Ins. Co., 778 N.W.2d 433, 445 (Neb. 2010); Energy-North Natural Gas, Inc. v. Certain Underwriters at Lloyd's, 934 A.2d 517, 527 (N.H. 2007); Owens-Ill., Inc. v. United Ins. Co., 650 A.2d 974, 993–95 (N.J. 1994); Consol. Edison Co. of N.Y., Inc. v. Allstate Ins. Co., 774 N.E.2d 687, 694–95 (N.Y. 2002); Sharon Steel Corp. v. Aetna Cas. & Sur. Co., 931 P.2d 127, 140–42 (Utah 1997); Towns v. N. Sec. Ins. Co., 964 A.2d 1150, 1167 (Vt. 2008).

6. *See*, *e.g.*, Ins. Co. of N. Am. v. Forty-Eight Insulations, Inc., 633 F.2d 1212, 1224-25 (6th Cir. 1980); Sec. Ins. Co. v. Lumbermens Mut. Cas. Co., 826 A.2d 107, 121 (Conn. 2003); Outboard Marine Corp. v. Liberty Mut. Ins. Co., 670 N.E.2d 740, 749 (Ill. App. Ct. 1996); Boston Gas Co. v. Century Indem. Co., 910 N.E.2d 290, 312 (Mass. 2009); Arco Indus. Corp. v. Am. Motorists Ins. Co., 594 N.W.2d 61, 69 (Mich. Ct. App. 1998), *aff'd*, 617 N.W.2d 330 (Mich. 2000).

7. *See* Arco Indus. Corp. v. Am. Motorists Ins. Co., 594 N.W.2d 61, 69-70 (Mich. Ct. App. 1998), *aff'd*, 617 N.W.2d 330 (Mich. 2000).

8. *See*, *e.g.*, Keene Corp. v. Ins. Co. of N. Am., 667 F.2d 1034 (D.C. Cir. 1981).

9. *See* Doherty, *supra* note 4, at 271-72, 281.

10. *See*, *e.g.*, Teck Metals, Ltd. v. Certain Underwriters at Lloyd's, 735 F.Supp. 2d 1231, 1238 (E.D. Wash. 2010); Chicago Bridge & Iron Co. v. Certain Underwriters at Lloyd's, London, 797 N.E.2d 434, 441 (Mass. App. Ct. 2003).

11. *See*, *e.g.*, Hercules, Inc. v. AIU Ins. Co., 784 A.2d 481, 485 (Del. 2001); Viking Pump, Inc. v. Century Indem. Co., 2 A.3d 76, 107 (Del. Ch. 2009); Chicago Bridge & Iron Co. v. Certain Underwriters at Lloyd's,

London, 797 N.E.2d 434, 441 (Mass. App. Ct. 2003).

12. *See*, *e.g.*, Hercules Inc. v. AIU Ins. Co., 784 A.2d 481 (Del. 2001); Allstate Ins. Co. v. Dana Corp., 759 N.E.2d 1049 (Ind. 2001); Goodyear Tire & Rubber Co. v. Aetna Cas. & Sur. Co., 769 N.E.2d 835 (Ohio 2002); J.H. France Refractories Co. v. Allstate Ins. Co., 626 A.2d 502 (Pa. 1993).

13. To explain, the plain language of the non-cumulation clause requires the policyholder to initially recover under policies with periods in the earliest years and work forward. However, the clause reduces the limits of the policies in each succeeding year by the amounts due for the loss from the prior policies. For example, assume a claim that involves one occurrence that resulted in $10 million in indemnity damages and which triggered ten consecutive policy years, with each year providing $1 million in limits. Under the "all sums" approach, enforcement of the non-cumulation clause would reduce the policyholder's recovery to $1 million. This is because the non-cumulation clause would reduce the limits available under the policies in years two through ten by the $1 million amount due under the first policy year, leaving no limits available in those succeeding years. Under the pro rata allocation approach, however, the policyholder would recover $10 million in this same hypothetical (assuming no other coverage issues applied). For a more detailed example, see Jan Michaels, et. al., *The "Non-Cumulation Clause": Policyholders Cannot Have Their Cake and Eat it Too*, 61 U. KAN. L. REV. 701, 718-722 (2013).

14. Christopher C. French, *The "Non-Cumulation Clause": An "Other Insurance" Clause by Another Name*, 60 U. KAN. L. REV. 375 (2011).

15. James M. Fischer, *Insurance Coverage for Mass Exposure Tort Claims: The Debate Over the Appropriate Trigger Rule*, 45 DRAKE L. REV. 625, 633 (1997); George B. Flanigan, *CGL Policies of 1941 to 1966: Origins of Product Liability*, CPCU EJOURNAL, Aug. 2005, at 1 (providing sample form language of early GL policies).

16. The authors note that these generalizations are not to be taken as substitutes for an analysis of the relevant policy language at issue in a particular case. For instance, and by way of example only, in their practice the authors have encountered some policies that require both the injury or damage *and* the occurrence – the cause of the injury or damage – to happen during the policy period in order to trigger coverage.

17. French, *supra* note 13, at 386.

18. *Id.* at 386-87.

19. *Id.* at 387.

20. *Id.* at 404, 407.

21. French, *supra* note 13, at 407.

22. *See*, *e.g.*, Schoenecker v. Haines, 277 N.W.2d 782, 783 (Wis. 1979).

23. *See, e.g.*, Liberty Mut. Ins. Co. v. Treesdale Inc., 418 F.3d 330, 344–45 (3d Cir. 2005) (explaining that the non-cumulation clause, like all anti-stacking clauses, does not eliminate coverage but simply provides that if a single occurrence gives rise to an injury during more than one policy period, only one occurrence limit will apply; as such, it is not an escape clause); Plastics Eng'g Co. v. Liberty Mut. Ins. Co., 466 F. Supp. 2d 1071, 1082 (E.D. Wis. 2006), *aff'd*, 316 F. App'x 501 (7th Cir. 2009) ("The court finds significant the distinction between concurrent and successive policies. 'Other insurance' provisions . . . deal with the situation of concurrent coverage. At issue in the present case is a 'non-cumulation' provision, which is intended to address successive policies."); Air Prods. & Chems., Inc. v. Hartford Accident & Indem. Co., No. 86–7501, 1989 WL 73656, at *2 (E.D. Pa. June 30, 1989), *aff'd in part, rev'd in part*, 25 F.3d 177 (3d Cir. 1994) (finding that non-cumulation clause did not constitute an escape clause given that it sought only to limit, rather than preclude, the insurer's liability for claims against its insured); Spaulding Composites Co. v. Aetna Cas. & Sur. Co., 819 A.2d 410, 421 (N.J. 2003) ("Because it is well settled that an escape clause is a sub-species of other insurance . . . and because a non-cumulation clause is not an other-insurance clause, it follows that a non-cumulation clause technically is not an escape clause."). The recent ruling in *Mt. McKinley Insurance Co. v. Corning Inc.*, No. 04398 (N.Y. App. Div. Sept. 7, 2012) rejected the application of a non-cumulation clause in the "all

sums" context, but did so based on a misapprehension of the nature of the clause. Attempting to distinguish the Delaware Chancery court's holding in *Viking Pump* v. *Century Indem. Co.*, 2 A.3d 76 (Del. Ch. 2009), that non-cumulation clauses applied in an "all sums" context, *Corning* emphasized the fact that the "other insurance" clauses at issue in the case before it applied only to concurrent coverage and, thus, did not mandate joint and several liability. *Corning*, No. 04398. The court implicitly grouped non-cumulation clauses and the "other insurance" clauses at issue together for purposes of its analysis, and in doing so erroneously assumed that non-cumulation clauses apply only in the concurrent coverage context. *Id.*

24. *See, e.g.*, Enter. Tools, Inc. v. Export-Import Bank of the U.S., 799 F.2d 437, 439 (8th Cir. 1986) (stating that "clauses must be read in context," suggesting that an insurance contract must be read as a whole to determine what the parties reasonably intended by its terms); Gfeller v. Scottsdale Vista N. Townhomes Ass'n, 969 P.2d 658, 660 (Ariz. Ct. App. 1998) (where possible, a court should interpret a contract in such a way as to reconcile and give meaning to all of its terms).

25. *See*, *e.g.*, Drews Distrib., Inc. v. Leisure Time Tech., Inc., No. 97-2391, 1999 WL 183811, at *11–12 (4th Cir. Apr. 5, 1999) (observing that a contract is not ambiguous merely because it is difficult to construe); Candid Corp. v. Assurance Co., No. CV054008138, 2007 WL 1120616, at *9 n.5 (Conn. Super. Ct. March 29, 2007) (noting that difficulties in applying a particular contract provision to a given set of factual circumstances do not render the provision itself ambiguous); McCann v. Glynn Lumber Co., 34 S.E.2d 839, 845 (Ga. 1945) (noting that a contract is not ambiguous merely because it may be difficult to construe); Shivvers v. Am. Family Ins. Co., 589 N.W.2d 129, 135 (Neb. 1999) ("[A]n otherwise unambiguous provision is not made ambiguous simply because it is difficult to apply to the facts of a particular case." (quoting Quinlan v. Coombs, 314 N.W. 2d 125, 128 (Wis. Ct. App. 1981)) (internal quotation marks omitted)).

26. *See*, *e.g.*, Liberty Mut. Ins. Co. v. Treesdale Inc., 418 F.3d 330, 341–44 (3d Cir. 2005) (enforcing a clear and unambiguous non-cumulation clause); Plantation Pipeline Co. v. Cont'l Cas. Co., No. 1:0-CV-2811-WBH, 2008 WL 4737163, at *7 (N.D. Ga. July 31, 2008) (finding that the term "loss" in the non-cumulation clause is not ambiguous when viewed in the context of the clause's remaining language); Cal. Ins. Co. v. Stimson Lumber Co., No. Civ. 01-514-HA, 2004 WL 1173185, at *31–32 (D. Or. May 26, 2004), *aff'd in part, rev'd in part*, 325 F. App'x 496 (9th Cir. 2009) (adopting insurer's construction of the term "loss" in the non-cumulation clause and enforcing the clause in favor of the insurer); Endicott Johnson Corp. v. Liberty Mut. Ins. Co., 928 F. Supp. 176, 182 (N.D.N.Y. 1996) (enforcing a non-cumulation clause that is clear in both content and title); O-I Brockway Glass Container v. Liberty Mut. Ins. Co., No. Civ. 90-2797 (AET), 1994 WL 910935, at *8 (D.N.J. Feb. 10, 1994) ("[N]o confusion or ambiguity exists regarding the Non-Cumulation clause. '[T]he words of an insurance policy should be given their ordinary meaning, and in the absence of an ambiguity, a court should not engage in a strained construction to support the imposition of liability.' " (alteration in original) (quoting Longobardi v. Chubb Ins. Co., 582 A.2d 1257 (N.J. 1990))); Air Prods. & Chems., Inc. v. Hartford Accident & Indem. Co., Civ. A. No. 86-7501, 1989 WL 73656, at *6–7 (E.D. Pa. June 30, 1989), *aff'd in part, vacated in part*, 25 F.3d 177 (3d Cir. 1994) (concluding that there is no basis for failing to enforce the terms of the non-cumulation provision); Stonewall Ins. Co. v. E.I. du Pont de Nemours & Co., 996 A.2d 1254, 1259 (Del. 2010) (agreeing with the motion judge's application of the unambiguous non-cumulation clause); Hercules, Inc. v. AIU Ins. Co., 784 A.2d 481, 493–94 (Del. 2001) (applying a non-cumulation clause and "all sums" provisions to determine insurance coverage); Viking Pump, Inc. v. Century Indem. Co., 2 A.3d 76, 127 (Del. Ch. 2009) (emphasizing that the language of the non-cumulation clause works precisely in an "all sums" context); Hiraldo v. Allstate Ins. Co., 840 N.E.2d 563, 564–65 (N.Y. 2005) (enforcing a non-cumulation clause); Mark IV Indus. v. Lumbermens Mut. Cas. Co., 2006 N.Y. Misc. LEXIS 1294, at *15 (N.Y. App. Div. Apr. 28, 2006) (holding that the ordinary language of the non-cumulation provision applied).

27. 996 A.2d 1254, 1259-60 (Del. 2010).

28. *Id.* at 1260.

29. *Hercules*, 784 A.2d 481, 494-95 (Del. 2001); *Outboard*, 670 N.E.2d 740, 750 (Ill. App. Ct. 1996).

30. French, *supra* note 13, at 391.

31. *See* MERRIAM-WEBSTER DICTIONARY, *Due*, *available at* http://www.merriam-webster.com/dictionary/due (last visited Feb. 16, 2013).

32. *See, e.g.*, Endicott Johnson Corp. v. Liberty Mut. Ins. Co., 928 F. Supp. 176, 181–82 (N.D.N.Y. 1996) (finding that the relevant non-cumulation clause was not ambiguous, and therefore plaintiff could not "stack"); O-I Brockway Glass Container, Inc. v. Liberty Mut. Ins. Co., No. Civ. 90-2797 (AET), 1994 WL 910935, at *7–10 (D.N.J. Feb. 10, 1994) (rejecting the policyholder's argument that it could invoke coverage in reverse chronological order).

33. *See* Viking Pump, Inc. v. Century Indem. Co., 2 A.3d 76, 123 (Del. Ch. 2009) (reasoning that after application of pro rata allocation, the "very premise upon which the [n]on-[c]umulation . . . provision[] [is] based is absent, because there is no common injury"); Outboard Marine Corp. v. Liberty Mut. Ins. Co., 670 N.E.2d 740, 754 (Ill. App. Ct. 1996) (declining to give effect to non-cumulation clause under a pro rata allocation scheme); Spaulding Composites Co. v. Aetna Cas. & Sur. Co., 819 A.2d 410, 422 (N.J. 2003) (explaining that once a court adopts pro rata allocation, the non-cumulation clause "drops out" of the policy). ■

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