SETTLEMENT CREDITS IN "ALL SUMS" JURISDICTIONS

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MEALEY'S ALL SUMS: REALLOCATION & SETTLEMENT CREDITS CONFERENCE

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An insurer who has been held jointly or severally liable and is required to pay "all sums" is entitled to off-set its liability. This off-set can be in the form of either a contribution action against other insurers or a credit against policies which have settled.[1] There is an emerging body of law with respect to the second type of off-set, i.e., settlement credits. Recently, courts have taken different views as to exactly how settlement credits should be applied. As every insurer is aware, the issue of how settlement credits apply could have an enormous impact on a targeted[2] insurers' ultimate liability. This article will explore the different approaches to settlement credits in "all sums" jurisdictions.

We begin this article, however, with a quick summary of a few "all sums" cases. We believe these summaries will enable the reader to better understand the backdrop against which an off-set will be measured.

One of the first "all sums" decisions can be traced to the rulings in *Keene Corp. v. Ins. Co. of N. Am.*, 667 F.2d 1034 (D.C.Cir. 1981). In *Keene*, the insured brought a declaratory judgment action against several of its insurers seeking coverage for injuries arising out of asbestos-related diseases. The court found that each insurer who was on the risk during a

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[1] There may be instances when both a contribution action and an off-set are appropriate in the same action. For example, in a matter where some underlying insurers have settled and others have not, a targeted insurer may be able to pursue a contribution action against non-settled insurers and at the same time obtain an off-set with respect to settled insurers.

[2] A targeted insurer is referred to in this article as one who is chosen by the insured to pay "all sums."

triggered policy period would be liable in full for indemnification and defense costs of the insured. In reaching its decision, the court reasoned, in part, that the insured would have "expected complete security from each policy it purchased." *Id.* at 1048.

Likewise, the court in, *J.H. France Refractories Co. v. Allstate Ins. Co*., 534 Pa. 29, 41-42, 626 A.2d 502, 508-509 (1993), concluded that each primary insurer who was on the risk during the development of an asbestos-related disease was jointly and severally liable and thus, the plaintiff should be free to select the policy or policies under which to be indemnified. In so doing, however, the court recognized that its decision could not alter the rules of contribution or the provisions of "other insurance" clauses in applicable policies. The court specifically found that there would be no bar against an insurer obtaining a share of indemnification or defense costs from other insurers under either the "other insurance" clauses or the doctrine of equitable contribution.

In *Rubenstein v. Royal Ins. Co. of Am.*, 44 Mass. App. Ct. 842, 852, 694 N.E.2d 381, 388 (1998), the court concluded that 'property damage' was continuous and that multiple policies were triggered to cover the same loss. The court further found that each policy provided indemnity for the insured's entire liability and that a remaining insurer would be jointly and severally liable for the entire claim. This court, like the *J.H. France* court, also found, however, that there would be no bar against an insurer obtaining a share of indemnification or defense costs from the other potentially liable insurers under the doctrine of equitable contribution.

Finally, in *Goodyear Tire & Rubber Co. v. Aetna Cas. & Sur. Co.*, 95 Ohio St. 3d 512, 516, 769 N.E.2d 835, 841 (2002), the Ohio Supreme Court was persuaded by the insured's argument that it "expected complete security from each policy that it purchased." The court therefore found that the insured was entitled to secure coverage from a single policy of its choice

that covers "all sums" incurred as damages during the applicable policy's period. In so doing, the court found that this approach would "promote economy for the insured," while still allowing targeted insurers the right to seek contribution from other responsible parties.

Unquestionably, the "all sums" decisions discussed above carry two resounding themes. First, an insured should be made whole since it "expected complete security" from the policies it purchased and second, a targeted insurer will have the right to off-set its "all sums" liability.

What happens, however, when an insurer is not allowed to off-set its liability through a contribution action because either, 1) the policyholder eliminated that possibility through settlements with its other insurers; or 2) a court finds that pursuing contribution rights against settled insurers frustrates judicial economy principles? Under these circumstances, some courts have determined that a targeted insurer, rather than pursuing its contribution rights, could off-set its liabilities through settlement credits.

Currently, there is caselaw to support three different methods under which an insurer may obtain settlement credits against sums it may owe in an "all sums" jurisdiction.[3] The three methods of settlement credits can be best summarized as follows:

1. Credit for all settled policy limits;
2. Credit based on pro-rata limits; and
3. Credit based on actual amounts of settlements.

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[3] The settlement credits discussed herein are based upon the policyholder's settlement with other insurers in situations where more than one policy year is implicated. This article does not address, for example, an insurer's right to pursue recovery and/or obtain settlement credits from other third-parties such underlying tort-feasors.

I. Credit For All Settled Policy Limits

In *GenCorp, Inc. v. AIU Ins. Co.*, 297 F.Supp. 2d 995 (N.D. Ohio 2003), the district court correctly granted certain excess insurers' motions for summary judgment finding that all underlying settled policy limits had to be applied as a credit to the policyholder's alleged losses.[4]

GenCorp originally sued its primary and excess insurers seeking indemnification for its liability and defense costs resulting from pending environmental claims. During the course of that litigation, GenCorp settled with two of its primary insurers and dismissed its claims against them agreeing that these insurers would have no further obligations to GenCorp under their policies. Some of the excess insurers, including American Re-Insurance Company ("American Re") had issued several policies to GenCorp, some of which were in excess of $11 million. American Re, along with other excess insurers, filed a motion for summary judgment arguing that there was no practical likelihood that GenCorp would incur $11 million in liability sufficient to trigger the policies in excess of that amount. The court granted the excess insurers' motion. *GenCorp, Inc. v. AIU Ins. Co.*, 104 F.Supp. 2d 740 (N.D. Ohio 2000).

After the court dismissed these "higher level" excess policies, GenCorp settled with its last, remaining primary insurer. Again, GenCorp dismissed its claims as to that primary insurer and agreed that it had no further obligation to GenCorp under its policies.

Subsequent to GenCorp's settlement with its last primary insurer, the district court dismissed, without prejudice, GenCorp's claims against the remaining excess insurers. The district court relied on the Sixth Circuit decision of *Lincoln Elec. Co. v. St. Paul Fire & Marine Ins. Co.*, 210 F.3d 672 (6th Cir. 2000), wherein the court had predicted that a pro-rata time on the risk allocation would be utilized by Ohio courts. *GenCorp*, 104 F.Supp. 2d at 752.

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[4] The *GenCorp* court did not use the term "settlement credits" because it found it to be a "term of art" which it believed imports into Ohio law a term from the law of other states.

After the district court's dismissal of the remaining excess insurers on justiciability grounds, however, the Ohio Supreme Court decided *Goodyear Tire & Rubber Co. v. Aetna Cas. & Sur. Co.*, 95 Ohio St. 3d 512, 769 N.E.2d 835 (2002), ("*Goodyear*"). The court in *Goodyear* rejected a pro-rata allocation approach and instead ruled that a chosen primary insurer would be responsible for "all sums" should its policy be chosen by the insured. Armed with the Ohio Supreme Court's decision in *Goodyear*, GenCorp re-filed its declaratory judgment action against its excess insurers contending that, in light of the *Goodyear* decision, the excess insurers were jointly and severally liable and that GenCorp could choose any year in which to place its losses. *GenCorp, Inc. v. AIU Ins. Co.*, 297 F.Supp. 2d 995 (N.D. Ohio 2003).

Certain defendants, including American Re, filed third-party complaints against GenCorp's settled primary insurers. American Re argued that, to the extent it could be found liable to GenCorp, it was entitled to contribution or indemnification from GenCorp's primary insurers.

GenCorp's settled primary insurers moved to dismiss the third-party complaints. In agreeing that the third-party complaints should be dismissed, the district court found that GenCorp's settlements with its primary insurers extinguished all claims related to the issues in dispute as between them. *Id*. at 1006. Since the settlements extinguished all of GenCorp's claims against them, the third-party plaintiff excess insurers had no legal basis for asserting that the third-party defendant primary insurers were "responsible" parties from whom they could seek contribution. *Id*. at 999. In this same ruling, however, the district court also found that the settlement with the primary insurers exhausted GenCorp's primary insurance for purposes of making claims under the excess policies. The court stated:

> GenCorp's settlement with its primary insurers extinguished all claims related to the issues in dispute in *GenCorp I* that GenCorp

> had against its primary insurers. That settlement also exhausted GenCorp's primary insurance for purposes of making claims under its excess insurance. GenCorp's excess insurers have the same obligation to pay GenCorp's environmental-related liabilities as they would have had if GenCorp's primary insurers had paid GenCorp the maximum amount covered by GenCorp's primary insurance policies. *Id*.

Subsequent to the dismissal of the third-party complaints, American Re and other excess insurers filed a motion for summary judgment requesting credit for the settlements that GenCorp reached with its primary and excess insurers. American Re argued that the credit had to be in the full amount of all policy limits available under all of the settled policies. Because the combined limits of GenCorp's settled primary and secondary policies exceeded GenCorp's liability for any one of the occurrences, American Re's policies could not be triggered.

The district court granted the excess insurers' motion for summary judgment and correctly determined that the excess insurers were entitled to a credit for the full policy limits of all settled policies. First, GenCorp had eliminated any possibility that the excess insurers could pursue the primary insurers for contribution, a right given to them by the Ohio Supreme Court in the *Goodyear* case. Moreover, the district court aptly recognized that GenCorp had already made its allocation of liability among its primary insurers when it settled with them. As the court noted, GenCorp could have settled with just one or two of its primary insurers or sought a partial settlement with any one of them. GenCorp did not do that. Instead, it settled with all of its primary insurers and released all of them from any further liability. In so doing, it exhausted its primary coverage as to all primary polices and as to all primary years. The court stated:

> "It is not possible for GenCorp now to decide to allocate its liability to one policy or to one policy year because this would be contrary to the settlements it has reached." *Id*. at 1007.

The district court also rejected GenCorp's argument that the excess insurers would obtain a windfall if settlement credits were allowed.

> [T]here can be a windfall only if GenCorp is allowed to exhaust a single primary insurer's coverage and load the whole of the remainder of its liability on the excess insurers. In that way, GenCorp might receive more than it would have received at trail, and, as will be seen, it would receive a windfall at the expense of the excess insurers. *Id*. at 1003.

Finally, the district court granted the excess insurers' motion for settled policy limits because it found that to do otherwise, would subject the excess insurers to payment of more than their contracted-for share of GenCorp's liability. *Id*. at 1007.

The district court's decision in *GenCorp* correctly takes into account principles of law that allow for an appropriate distribution of liabilities in cases where an "all sums" ruling applies and the insured has already settled with some or all of its primary and/or underlying insurers. It guarantees that a targeted insurer will not pay more than its contracted-share of liability and secures the insurer's rights to an off-set. Remember, every case in which a court has made an "all sums" ruling, has done so with the express proviso that the targeted insurer has contribution rights. If those rights are no longer available (due to the policyholder's self-interested actions) then a credit is appropriate.

Moreover, the *GenCorp* decision correctly places the risk of settlement on the party (the insured) who negotiated and controlled it. After all, the excess insurers were complete strangers to the settlements, they had no control over the amount, terms, conditions and no choice whatsoever in determining whether the settlements were reasonable. Under these circumstances, it is entirely appropriate that any risks associated with a settlement be borne by the party who negotiated it.

Finally, some courts which have ruled than an "all sums" allocation method is appropriate, have done so on the basis that the insured would have expected "complete security" from each policy it purchased. Since it is the insured who controls the settlements, it in essence

controls its "expectations of security." If a policyholder chooses to compromise its "security," the risk of that bargain should be borne by it and not by the excess insurers.

II. Credit Based Upon Pro Rata Limits

Another court which reached conclusions similar to the GenCorp court, was the Third Circuit in *Koppers Co. v. Aetna Cas. & Sur. Co.*, 98 F.3d 1440 (3rd Cir. 1996). Applying Pennsylvania law, the court promulgated a "pro rata apportioned share set-off rule" in cases where an "all sums" ruling applies and where a policyholder has settled with most, if not all, of its insurers.

Koppers Company, Inc., ("Koppers") brought an action against its primary and excess liability insurers to recover for breach of contract on allegations that they failed to pay claims for property damage caused by pollution. Koppers entered into settlement agreements with several of its insurers prior to trial, leaving only certain London excess insurers as defendants. Following a jury's determination that the excess policies had been triggered and that Koppers incurred a total of $70 million in property damage liability, the district court entered judgment for Koppers, holding its excess insurers liable for the full amount of the claim without reducing the verdict to account for Koppers' previous settlements. On appeal, the Third Circuit reversed the district court, finding that it committed reversible error by failing to account for those settled insurers' apportioned shares.

The Third Circuit, applying Pennsylvania law and relying on the case of *J.H. France*, found that an insurer whose coverage had been triggered was jointly and severally liable for the full amount of the claim up to its policy limits, and that the insured was entitled to select the policy or policies under which it would be indemnified. *Koppers*, 98 F.3d at 1449. The Third Circuit also noted, however, that the Pennsylvania Supreme Court holding in *J.H. France* did not alter the rules of contribution; therefore, an insured who was saddled with more than its fair

share of liability could seek a "share of indemnification or defense costs from other insurers." *Id*.[5]

Given that Koppers had settled with all of its other insurers, the court found that it had to either: 1) reduce the judgment to account for the settling insurers' apportioned shares of liability, or 2) permit the non-settling insurers to seek contribution from the settled insurers and, in turn, permit the settled insurers to seek reimbursement from Koppers.[6]

The Third Circuit predicted that the Pennsylvania Supreme Court would choose the former rule: reducing the judgment to account for the settled insurers' apportioned share of liability. It therefore adopted "the apportioned share set-off rule." *Id*. at 1452. Under the "apportioned share set-off rule," the excess insurer would not be required to pay until the underlying primary coverage had been exhausted. The court explained that a settlement with a primary insurer functionally "exhausts" primary coverage and therefore triggers the excess policy, though by settling the policyholder loses any right to the difference between the settlement amount and the primary policy's limits. The excess insurer simply cannot be made liable for any part of the difference as it never agreed to pay for losses below its attachment points. Consequently, the excess insurer would be liable only for amounts in excess of the specified policy limits of the policies directly underlying them.

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[5] The Court also noted that *J.H. France* did not hold that an insured, having recovered part of its loss from one insurer, could recover an amount equal to its entire loss from another.

[6] Although the *Koppers* decision does not explain why the settled insurers could seek reimbursement from Koppers, we believe that the settlement agreements may have contained indemnification provisions which required Koppers to indemnify the settled insurers should a claim for contribution be filed against them.

In this case, there were two primary policies directly underlying the 12 excess policies. The court found that these two primary policies had been "exhausted" regardless of the amount Koppers received in settlement.

The *Koppers* court also faced a situation where there were several other primary and excess insurers that had issued policies in effect before and after the excess policies at issue. With respect to other years of primary insurance, the court found that the apportioned share could be full policy limits. However, with respect to settled excess policies, the court found that an apportioned share may, for example, be limits of each settled excess policy compared to the total limits of all triggered policies. Consequently, the Third Circuit found the following potential points of credit:

1. all primary and underlying limits in year of targeted coverage;
2. potentially all primary limits in years other than year(s) of targeted coverage;
3. a pro rata apportioned share of settled excess coverage in years other than the year(s) of targeted coverage (formula – those limits in comparison to total limits of all triggered years).[7]

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[7] On remand, the district court undertook to reduce the verdict to account for Koppers' settlements with other defendant insurers. Adopting the reasoning of the Court of Appeals, the district court held that the insured must bear the burden of having settled for less than policy limits with any of its carriers, and that an excess insurer has no duty to drop down to cover any gap that may exist between the settlement amount and the limits of an underlying policy. Therefore, the district court found it was required to mold the verdict for each site.

First, it deducted the policy limits of the directly underlying exhausted primary policies from the verdict. Second, it determined the combined pro rata shares of the other settled primary and excess insurers and deducted that amount from the verdict for each site. The district court found that this second calculation was a three step process:

1) It had to identify all policies that covered Koppers' loss.
2) It had to interpret the 'other insurance' clauses in the applicable policies and resolve any conflict between them.
3) It had to determine the pro rata share of the reduced verdict for which these settled policies

The Third Circuit's decision in *Koppers* does not dramatically differ from the *GenCorp* ruling. Both courts correctly found that, primary policies in the year(s) of the targeted insurer will be deemed "exhausted" regardless of the amount the insured receives in settlement. "Exhausted" under these circumstances means that the excess insurer will be given credit for full policy limits. In other words, the insured, who controlled and directed the settlements, loses its right to coverage of the difference between the settlement amount and the primary policy's limits.

In addition, the court in *Koppers* noted that there were only two primary policies directly underlying the 12 excess targeted policies. The court ruled that all primary policies in the targeted years had to be deemed "exhausted." Arguably, if there were additional excess policies in years other than the two targeted years, then all primary policies in those other years would also have to be deemed "exhausted." The excess insurer would have then received settlement credits for all of these other years, just as the excess insurers received in *GenCorp*.

III. Credit Based On Actual Amounts Of Settlements

A third method of credit can be found in cases where the targeted insurer requested an off-set for the actual funds the policyholder received in settlements from other insurers.

> were responsible, and deduct that amount from the reduced verdict to reach the molded verdict for which the London Insurers would be responsible.

The district court then determined how the liability would be apportioned between the excess policies. Although the excess policies stood on equal ground for purposes of liability, the policies had different limits; therefore, the court prorated each insurer's liability according to the limits of its policies. First, the court determined the reduced verdict for each site by subtracting the limits of the underlying triggered policies from the original verdict. Then, the court multiplied the reduced verdict for each site by a fraction. The numerator of this fraction would be the sum of applicable coverage limits of all settling excess policies. The denominator would be the sum of the limits of all applicable triggered excess policies, both settling and nonsettling. This fraction would yield a percentage equal to the settled excess insurers' apportioned share of the verdict. Finally, that percentage of each site's reduced verdict would be deducted from each reduced verdict to determine the amount of the molded verdict.

In *Rubenstein v. Royal Ins. Co. of Am.*, 44 Mass. App. Ct. 842, 694 N.E.2d 381 (1998), ("*Rubenstein*") Security Mills Limited Partnership (SMLP) discovered leakage of fuel oil from an abandoned 15,000 gallon underground tank on property they purchased from Security Mills Realty Trust (trustees). SMLP brought a civil action against the trustees for damages due to the contamination of the soil surrounding the tank. *Id*. After the SMLP suit was filed, the trustees requested a defense from its insurers. *Id*. at 844, 694 N.E.2d at 383. All of the insurers declined, except Wausau, which, under a reservation of rights, agreed to advance the trustees their legal fees and expenses. In 1990, the trustees filed a declaratory judgment action against its remaining insurance companies, Liberty Mutual, Royal, Commercial Union, Lumbermens and Continental, seeking a declaration that the insurance companies had a duty to defend and indemnify.

By 1993, the trustees had either settled their claims, or entered into stipulations with, all of their insurers except Royal. After various motions were litigated on a number of issues, the court determined that Royal had a duty to defend the trustees for the underlying lawsuit. *Id*. Subsequent to the rulings on the duty to defend issue, the parties conducted a jury trial to determine factual issues that would govern resolution of whether Royal also had a duty to indemnify. *Id*. Based upon the jury's verdict, the judge found that the SMLP claims were covered and that Royal was obligated to: 1) pay the trustees for defense costs not previously absorbed by Wausau, and 2) indemnify the trustees for the full amount of the underlying settlement. However, the trial judge also reduced the amount of Royal's indemnity obligation by the amount the trustees had previously received from the other settling insurers. Both parties appealed.

On appeal, Royal argued that the trial court should have pro-rated the loss and allocated the damages among the various insurers and years of coverage. In addition, Royal took the

position that the trustees suffered no harm with respect to the defense cost issue because all of the defense costs had been absorbed by Wausau. Any balance, argued Royal, should be "deemed" paid from proceeds of a judgment that the insured obtained from one of its other primary insurers. Finally, and in the alternative, Royal argued that since the trustee's defense had been assumed by one insurer, the insured had no further cause of action against it.

The court of appeals rejected Royal's arguments on both the duty to defend and indemnify. First, the court found that the insured was entitled to a full and complete defense from every insurer having a duty to defend. Next, the court rejected Royal's allocation argument and found that, under its "all sums" policy language, Royal would be jointly and severally liable for the entire claim. Nevertheless, it noted that there would be no bar against Royal obtaining a share of indemnification or defense from other insurers under the doctrine of equitable contribution.

On cross-appeal, the trustees maintained that the trial court erred in off-setting Royal's obligations with funds they received in settlements with other insurers. They argued that, at most, the credit should have been limited to that portion of each settlement which was paid to discharge each of the insurer's duty to defend.

The court of appeals also rejected the trustee's arguments. Even though the settlement agreements were not part of the record, and therefore it could not say with certainty whether some portion of the funds were attributable to indemnity versus defense, it noted that the trustees had received reimbursement for almost, if not all, of their defense costs from Wausau. Consequently, any award of damages against Royal should be credited towards the indemnity

obligation. The court therefore affirmed the trial court's ruling, finding that Royal was entitled to an off-set for amounts paid by the other insurers.[8]

In *Weyerhaeuser Co. v. Commercial Union Ins. Co.*, 142 Wash. 2d 654, 15 P.3d 115 (2000), ("*Weyerhaeuser*"), the insured was responsible for cleaning up hazardous waste at approximately 130 sites nationwide. In an effort to recover costs for some of these sites, Weyerhaeuser filed a declaratory judgment action against 34 insurers seeking a declaration of coverage with regard to property damage at 42 sites. Prior to trial, the court granted the defendant insurers' motion for summary judgment with regard to 15 sites, finding no coverage where the government had not instituted legal action because there was no claim of liability by a third party. The supreme court reversed, finding that CGL policies may provide coverage in situations where an insured engages in the cleanup of pollution damages in cooperation with an environmental agency. Subsequent to this decision, all insurers except Commercial Union Insurance Co. ("CU") settled with Weyerhaeuser. *Id*. at 662, 15 P.3d at 120.

CU filed a motion claiming that the funds which Weyerhaeuser had received in the settlements from its other insurers were more than sufficient to pay all proven and covered

[8] In *Liberty Mutual v. The Black & Decker Corp.,* 2004 W.L. 1941351 (D. Mass), the court, applying Massachusetts law, found that Liberty Mutual would be held jointly and severally liable under its "all sums" policy for damages arising out of two environmentally contaminated sites. Liberty Mutual argued that its obligations had to be reduced by any settlement money paid by one of the settled insurers relative to these two sites. The court agreed and held that, Liberty Mutual had a right of reduction in damages equal to the portion of the other insurer's settlement, if any, that could be allocated to the particular two sites at issue. Black & Decker argued that the other insurer's settlement did not relate to these two sites and therefore Liberty Mutual should not be allowed any reduction in its obligations.

The other insurer's settlement agreement was not part of the record so the court could not make a ruling. Nevertheless, it stated that, "to the degree that this becomes an issue for resolution, at an appropriate time Black & Decker may move for an appropriate protective order and submit this settlement for *in camera* review, with sealed memorandum from the parties." *Id.* at 14. The court then, in a footnote stated that, "if the settlement does not identify specific sites, then one appropriate calculation method might be, after final judgment, to divide the amount of damages attributable to these sites by the total amount of damages; multiply that ratio by the amount of the Aetna settlement, if any, attributable to indemnity; and then subtract that product from the damages attributable to these two sites." *Id.* at 15.

damages as to the various phased sites, as well as other released sites. CU argued that, under fundamental principles of law, Weyerhaeuser was prohibited from receiving a double or multiple recovery. Since Weyerhaeuser had already received more than its proven damages, CU argued that it should not be found liable.

The supreme court, at one point, appeared to dispute whether a "double recovery" was even prohibited: "[E]ven assuming the existence of a general rule barring double recovery absent policy language to that effect…." (emphasis added) *Id*. at 672, 15 P.3d at 125;[9] "Even accepting CU's legal argument" [that to indemnify is to make whole, and does not mean a double recovery.] (emphasis added) *Id*. at 673, 15 P.3d at 126. Despite this apparent uncertainty in the court's ruling, it went on to focus exclusively on which party should carry the burden of proving (with a clear emphasis on proving) a double recovery.

Without any analysis, and with no meaningful discussion on the issue, the court held that a non-settling insurer would be the entity responsible for carrying that burden. The only stated reason for its decision was that it was supported by the state's strong public policy of encouraging settlements. The court said:

> "Were we to hold the *insured* bears the burden of proving it has not received a double recovery, such a rule would encourage litigation and reward the nonsettling insurer for refusing to settle." *Id*.

The court, however, never explains why a rule placing the burden on a policyholder encourages litigation. Conversely, it never explains why placing the burden on non-settled insurers somehow discourages litigation. But, one can easily read the court's decision as saying

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[9] The *Weyerhaeuser* decision does not eliminate an insurer's rights to pursue an off-set. In this case, the court noted that the CU policy contained an "other insurance" clause "that arguably could apply to limit CU's liability," but that CU did not invoke this provision, nor did it provide the court with the other applicable insurance policies. *Weyerhaeuser*, 142 Wash. 2d at 673, 15 P.3d at 126

that, by placing an almost impossible burden on an excess insurer, it will have created such an unfair environment that the insurer would rather settle, (regardless of the merits of it claims), than litigate. This appears to be the only result the court hopes to accomplish.

In any event, and after determining that CU would have the burden of proving a double recovery, the court quickly set forth reasons why that burden would be almost impossible to meet. The court pointed out that other insurers who settled with Weyerhaeuser received more than a simple release of liability at specific sites and therefore, could not conclude that the settlement payments constituted payment solely for the clean-up of the sites at issue. The court noted that these other insurers also:

> "Purchased certainty by avoiding the risks of an adverse trial outcome not to mention foregoing the expenses associated with a lengthy trial and appeal." *Id.*

Although the above may have been true, the court erred, we believe, in not requiring Weyerhaeuser, (the actual party to the settlements), to come forward with establishing a value for these "risks." Certainly, Weyerhaeuser had to have valued them when deciding what to accept from its settling insurers. Rather than reaching this logical conclusion, the court placed the burden on CU, a non-party to the negotiations and a foreigner to the agreement. How could an insurer who was a third party to a settlement, prove the value of "certainty," "the avoidance of risks," and the "expenses associated" with trial and appeal of another insurer? It is no surprise that CU was unable to do so.

Obviously, the Weyerhaeuser decision is flawed for many reasons. First, and as noted above, it is fundamentally unfair to place a burden on a party to value a transaction that it had no involvement with, no control over, and no connection with whatsoever. Second, the court's ruling places too much control in the hands of the policyholder. Under the court's ruling, an insured could conceivably refuse to settle with an insurer for a reasonable and appropriate

amount thereby holding an excess insurer hostage for "all sums." Third, the court assumes that an insurer should settle, even if the lawsuit was based on a non-meritorious claim.

IV. Conclusion

Every court that has found an insurer to be jointly and severally liable due to "all sums" language in its policies, have found that the targeted insurer is entitled to off-set its liability. Some courts have discussed this in the context of contribution actions by one insurer against another. Other courts, due to settlement by insurers or because of judicial economy principles, find that an off-set through settlement credits is most appropriate.

The extent to which a targeted insurer will be entitled to a settlement credit varies. We have seen instances where courts have given credit for full settled policy limits, credits based on a "pro-rata" apportioned share, and in some instances, credit for only the actual amount of the other insurers' settlements.

In any jurisdiction where "all sums" applies, off-set issues will be of significant importance to both the policyholders and the insurers. As this area of law continues to develop, we are certain to see additional discussion and interesting decisions.

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