COMMITTEE ON INSURANCE COVERAGE LITIGATION

Coverage

Section of Litigation
American Bar Association

John E. James and Laura A. Foggan, Committee Cochairs
Editor in Chief: Erik A. Christiansen

Published by LexisNexis
Volume 19, Number 5, September/October 2009

Articles

3 **The Illinos *Pro Rata* Myth**

by Kenneth Anspach

For continuously triggered occurrences, the notion that *pro rata* is the accepted method of allocation of liability for defense and indemnity costs at the primary level in Illinois is a myth. *Pro rata* allocations have only been applied in Illinois in limited situations involving either the doctrine of horizontal exhaustion or where unique policy language limits the "all sums" application and where multiple occurrences, rather than a single, continuous occurrence, are the subject of the claim for coverage. Otherwise, the Illinois courts uniformly apply the holding of the Illinois Supreme Court in *Zurich Insurance Company v. Raymark Industries, Inc*. that the "all sums" language of the typical comprehensive general liability policy does not allow for proration.

17 **Occupational Disease Coverage for Work-Related Illness Claims in the Tort System**

by Kay M. Brady and Jeffrey J. Meagher

Manufacturing companies that used asbestos and other deleterious substances in their facilities may find themselves to be the targets of massive tort claims without the benefit of the insurance coverage they bought to protect them. The multimillion dollar question for these companies and their insurers is whether the term "occupational disease" includes work-related illness claims filed in the tort system or whether it is limited to claims filed under a statutory scheme like workers' compensation.

23 **What Does "Physical Damage" Mean when It Doesn't Work? "Physical Damage" as Loss of Function, Value, or Use in Liability and First Party Coverage**

by Sherilyn Pastor and Jerry P. Sattin

This article focuses on the scope of insurance available under policies covering risks of "physical damage." Specifically, it examines cases such as *Wakefern Food Corp. v. Liberty Mutual Fire Insurance Co.*, 968 A.2d 724 (N.J. Super. Ct. App. Div. 2009), *certif. denied*, C-1161, __ N.J. __ (July 16, 2009), that recognize that "physical damage" includes property which has lost its use, value, or function, even if only temporarily and even in the absence of any visible material change to the property.

Notifying Your Claims-Made Liability Carrier of A Claim: Better Late than Never

by Werner A. Powers and Charles C. Keeble, Jr.

Your company is named as a defendant in a "bet the company" lawsuit. Recognizing its serious nature, the lawsuit is immediately forwarded to both the company legal and risk management departments. Each department assumes the other will forward the lawsuit to the company's liability insurers. Neither does so, and the lawsuit instead "falls through the cracks."

Time passes. The cost of defending the lawsuit ultimately satisfies the company's retention and/or a potential settlement opportunity arises. The carrier is then contacted and requested to pay its insured's legal expenses in excess of the retention and/or to participate in the possible settlement of the lawsuit. Curious as to why these requests are being made of it with respect to a lawsuit not previously noticed to it, the carrier responds by denying coverage on the grounds of late notice. Further, per the carrier's declination of coverage letter, the fact that it has not been prejudiced as a result of the failure to timely notify it of the lawsuit is of absolutely no

(Continued on page 10)

Werner A. Powers is a partner in the Dallas office of the law firm of Haynes and Boone, LLP He is the founder of the firm's Insurance Practice Group. In addition to insurance coverage matters, his trial practice includes a broad spectrum of complex litigation matters, including insurance torts, securities, RICO and large contract disputes. Charles C. Keeble, Jr. is Of Counsel in the Dallas office of Haynes and Boone, LLP. Mr. Keeble concentrates his practice in the area of complex insurance coverage litigation. The opinions expressed in this article are not necessarily those of Haynes and Boone, LLP, its attorneys or its clients.

The Illinos *Pro Rata* Myth

by Kenneth Anspach

Kenneth Anspach is a solo practitioner in Chicago, Illinois where he concentrates in insurance coverage on behalf of policyholders, environmental law and commercial litigation. He is the author of numerous articles on the subject of insurance coverage, and the treatise, *Environmental Law and Insurance Handbook*, published by West Group in 1997. He is also a mediator for the Chancery Division of the Circuit Court of Cook County and Chair of the Civil Practice Committee of the Chicago Bar Association.

For continuously triggered occurrences, the notion that *pro rata* is the accepted method of allocation of liability for defense and indemnity costs at the primary level in Illinois is a myth. *Pro rata* allocations have only been applied in Illinois in limited situations involving either the doctrine of horizontal exhaustion or where unique policy language limits the ''all sums'' language of the typical comprehensive general liability policy and where multiple occurrences are the subject of the claim for coverage. Otherwise, the Illinois courts uniformly apply the holding of the Illinois Supreme Court in *Zurich Insurance Company v. Raymark Industries, Inc. (Zurich)*[1] that ''all sums'' does not allow for proration.

For continuously triggered occurrences, the notion that pro rata is the accepted method of allocation of liability for defense and indemnity costs at the primary level in Illinois is a myth

In Illinois, where coverage for a single occurrence is triggered amongst primary carriers insuring consecutive periods over a number of years, the insurance industry routinely asserts that its obligations of defense and of indemnification for judgments or settlements must be allocated on a *pro rata* basis. Under such a scheme, the insured would be allocated a portion of the indemnity costs for any gaps in coverage due to carrier insolvencies, coverage buybacks, self-insured retentions or lack of insurance. Yet, this approach fails to take into consideration the grant of coverage in the typical comprehensive general liability policy, which contains the following provision:

> The company will pay on behalf of the insured *all sums* which the insured shall become legally obligated to pay as damages because of bodily injury or property damage to which this insurance applies caused by an occurrence . . .[2]

This ''all sums'' provision has been interpreted in Illinois to require that ''each carrier covering the insured during the continuously triggered period is independently responsible for the for the full cost of defense once a specific policy period is implicated.''[3]

This ''all sums'' approach to allocation amongst primary carriers was first adopted by the Illinois Supreme Court in *Zurich*. In *Zurich*, the Court addressed the trigger of insurance coverage in cases involving bodily harm from asbestos exposure. The Court adopted the position advocated by the insured, that ''each carrier whose policy is triggered is jointly and severally liable for the total indemnity and defense costs of a claim without proration,'' holding as follows:

> The appellate court relied on the language of the policies. Zurich undertook to ''pay on behalf of [Raymark] all sums which [Raymark] shall become legally obligated to pay as damages because of * * * bodily injury * * * caused by an occurrence.'' Zurich further agreed ''to defend any suit against [Raymark] seeking damages on account of such bodily injury.'' The court found nothing in the policy language that permits proration. Zurich urges this court to adopt the pro rata approach set forth in *Insurance Co. of North America v. Forty-Eight Insulations, Inc.* (6th Cir. 1980), 633 F.2d 122, *aff'd on rehearing* (1981), 657 F.2d 814, *cert. denied* (1981), 454 U.S. 1109, 70 L. Ed. 2d 650, 102 S. Ct. 686.
>
> . . . Having rejected the premise underlying the *pro rata* approach adopted in *Forty-Eight* Insulations, we conclude that the appellate court did not err insofar as it declined to order the *pro rata* allocation of defense and indemnity obligations among the triggered policies. (Emphasis in original).[4]

This holding declining to apply *pro rata* allocation of defense and indemnity obligations has never been reversed.

However, instead of affording its insureds the full cost of defense and indemnity it owes them as set forth in *Zurich*, the insurance industry has worked steadfastly in the lower courts to attempt to chip away at *Zurich*, and thereby renege on its duties to its policyholders. Yet, when one examines the holdings of the cases the industry touts as having made inroads against the *Zurich* holding, one finds less than meets the eye. The battlegrounds of the industry's opposition to joint and several liability have included the following cases: *United States Gypsum Company v. Admiral Insurance Company (U.S. Gypsum)*,[5] *Outboard Marine Corporation v. Liberty Mutual Insurance Company (Outboard Marine II)*[6] and *AAA Disposal Systems, Inc. v. Aetna Casualty and Surety Company (AAA Disposal)*.[7] Ironically, these cases do not even address the issue of allocation at the primary coverage level. Instead, these cases deal with the issue of horizontal exhaustion as it relates to excess and umbrella coverage.

[C]ases involving horizontal exhaustion have no applicability to allocations of coverage solely at the primary level

For example, *U.S. Gypsum* did not involve a dispute about allocation at the primary level, but between the primary and excess level. Gypsum, the insured, argued that its excess layer of coverage could be reached if exhaustion occurred in even one of a number of primary policies triggered over consecutive periods. The court disagreed, stating:

> In support of its position that "horizontal" exhaustion of all triggered primary policies is not required, Gypsum argues that each excess insurer has an independent obligation under its policy. According to Gypsum, under this independent obligation, the excess insurer must provide coverage once the underlying primary policy particular to the excess policy in question is exhausted regardless of whether the insurer has concurrent primary or excess insurance obligations. We disagree.[8]

Thus, the doctrine of "horizontal exhaustion" was borne. *U.S. Gypsum* explained the doctrine as being based upon the "other insurance" provision set forth in most excess policies, quoted in *U.S. Gypsum* as follows:

> "If other valid and collectible insurance with any other insurer is available to the insured covering a loss also covered by this Policy, other than insurance that is in excess of insurance afforded by this Policy, the insurance afforded by this Policy shall be in excess of and shall not contribute with such other insurance."[9]

The *U.S. Gypsum* court found that this "other insurance" provision requires that any one excess policy becomes excess over *all* other primary insurance, not just the primary insurance underneath that particular excess policy, as follows.

> This clause clearly sets forth this policy's status as an excess policy. The excess policy also unequivocally sets forth that the excess insurer will not contribute "if other valid and collectible insurance with *any* other insurer is available to the insured." This supports an interpretation that this policy serves as an excess policy to all triggered primary policies, regardless of whether they extend over multiple policy periods or only one.
>
> . . . .
>
> A plain reading of the "other insurance" provision contained in the policies requires Gypsum to exhaust all triggered primary insurance before pursuing coverage under those excess policies.[10]

Thus, horizontal exhaustion is the rule in Illinois in cases involving allocations between primary and excess levels of coverage. Yet, cases involving horizontal exhaustion have no applicability to allocations

COVERAGE (ISSN 1074-1887) is published bimonthly by LexisNexis, 1275 Broadway, Albany, NY 12204-2694. Periodicals postage is paid at Albany, NY, and additional Mailing Offices. One-year subscription (6 issues) costs $322; single issue, $60. POSTMASTER: Send address changes to ***COVERAGE,*** 136 Carlin Rd., Conklin, NY 13478-1531.

QUESTIONS ABOUT THIS PUBLICATION

For questions about missing issues, new subscriptions, billing, or other customer problems, call our Customer Service Department at 1-800-833-9844.

For editorial questions, call Bob Lopatin at 1-800-252-9257 (ext. 2582) or send email queries to Robert.M.Lopatin@lexisnexis.com.

of coverage solely at the primary level. That is so because cases involving excess coverage have employed a different standard of coverage, recognizing that excess carriers were paid a smaller premium than primary carriers to accommodate a lesser risk. As set forth in *Missouri Pac. R.R. v. International Ins. Co.*:[11]

> Under Illinois law, all underlying coverage must be exhausted before excess coverage may be reached. *United States Gypsum Co., 268 Ill. App. 3d at 653–54; Illinois Emcasco Insurance Co. v. Continental Casualty Co.*, 139 Ill. App. 3d 130, 133, 93 Ill. Dec. 666, 487 N.E.2d 110 (1985). This principle, commonly referred to as ''horizontal exhaustion,'' is required because excess coverage carries a smaller premium than primary coverage due to the lesser risk insured. *Illinois Emcasco Insurance Co.*, 139 Ill. App. 3d at 133.

In *Outboard Marine II*, another favorite of the insurance industry, the court was called upon to determine whether the insured's excess carriers were responsible for a period during consecutive triggered years of coverage where the insured had had no primary insurance. Following the holding regarding horizontal exhaustion in *U.S. Gypsum*, the court held, as follows:

> We find that *Gypsum* supports an allocation of the damages to OMC for the years during which it carried no insurance. This is the only fair approach. While the insurers agreed to indemnify OMC for ''all sums,'' it had to be for sums incurred during the policy period. *Gypsum* supports the notion that OMC cannot shift its responsibility for uninsured years to its *excess carriers*.[12]

Thus, note that the *Outboard Marine II* holding only addresses allocations between the primary and excess layers of coverage, not those occurring exclusively at the primary level. It is, therefore, in the context of the horizontal exhaustion doctrine that *Outboard Marine II* finds ''the policyholder responsible for a *pro rata* share for periods of no insurance or self-insurance.''[13]

While none of the cases relied upon by the insurance industry support a pro rata allocation of liability strictly at the primary level, one recent Illinois appellate decision examining allocation at the primary level has held such allocation must be joint and several

The same conclusion must be reached with respect to *AAA Disposal*. There, in construing the provisions of certain excess insurance policies, the court determined as it had in *Outboard Marine II* ''that excess policies are triggered only after the primary insurers' coverage is horizontally exhausted.''[14] Thus, *AAA Disposal* is also inapplicable where coverage is being construed only at the primary level.

While none of the cases relied upon by the insurance industry support a *pro rata* allocation of liability strictly at the primary level, one recent Illinois appellate decision examining allocation at the primary level has held such allocation must be joint and several. In *Caterpillar, Inc. v. Century Indemnity Co. (Caterpillar)*,[15] the court addressed the allocation of the costs of defending asbestos claims against the insured, Caterpillar, implicating multiple and successive policy years under primary policies, some of which were covered by insurance, and some where Caterpillar was either self-insured or had no insurance. In *Caterpillar* the insurer (INA) argued that defense costs should be allocated *pro rata* over the years of successive primary coverage, and that for the periods that Caterpillar was either self-insured, had self-insured retentions, had deductibles or had no insurance (all of which INA also categorized as periods of self-insurance), Caterpillar should be treated as an insurer on the risk and also share liability *pro rata*. On the other hand, Caterpillar argued that defense costs should be allocated on an ''all sums'' basis for which any one insurer would be liable for the entire amount. On the issue of whether Caterpillar was to be treated as another insurer for allocation purposes, the court stated: ''We disagree with INA. Caterpillar is not to be included in the allocation for periods when it was self-insured.'' With respect to whether defense costs were to be allocated on a *pro rata* or an ''all sums'' basis, the court ruled that such costs were to be paid on an ''all sums'' basis, as follows:

> Based on our above analysis, we conclude that there is nothing in the language of the INA policies that permits a *pro rata* reduction in its obligation to pay ''all sums'' and defend ''any suit.'' This conclusion is also prescribed by the decision in *Zurich Insurance Co. v. Raymark Industries, Inc.*, 118 Ill.2d 23, 514 N.E.2d 150, 112 Ill. Dec. 684 (1987), which is controlling in this case.[16]

The *Caterpillar* court thus found ''all sums'' to be the applicable methodology to allocate defense costs. In so doing, the *Caterpillar* court distinguished both *U.S. Gypsum* and *Outboard Marine II*.

Similarly, in *Benoy Motor Sales, Inc. v. Universal Underwriters Insurance Company (Benoy)*,[17] the court held that in a continuous trigger scenario, gaps in the insured's primary coverage are the responsibility of the primary insurers, not of

the insured. In *Benoy*, the Illinois Environmental Protection Agency sued ten automobile dealerships for recovery of costs incurred due to the release of hazardous substances at the Lenz Oil facility. The dealerships sold used crank oil to Lenz Oil, which leaked at the Lenz Oil site and contaminated the groundwater. Between 1977 and 1985, the dealerships purchased ''Unicover'' broad coverage insurance policies from Universal Underwriters Insurance Company. The trial court found Universal was not responsible to pay costs covering any period where a particular dealer that did not have an active policy. In other words, shipments made during gaps in coverage were not covered. The appellate court reversed. Although the court recognized there were gaps in coverage, the court held the policies anticipated the continuing nature of pollution damage. The Unicover III policy, for instance, said: ''All injury arising out of continuous or repeated exposure to substantially the same general conditions will be considered as arising out of one occurrence.''[18] The court noted environmental pollution does not stop and start in discrete time periods. It is a continuing process. The court, quoting *U.S. Gypsum*, held when property damage is deemed to have occurred continuously for a fixed period—'' 'every insurer on the risk at any time during the trigger period is jointly and severally liable to the extent of their policy limits.' ''[19] The court concluded coverage ''should not be excluded for any dealer insured by Universal while the pollution process was occurring.''[20] Thus, *Benoy*, a First District case involving primary insurers addressing gaps in coverage over the continuous trigger of property damage liability, held that the trial court's exclusion of gap periods from coverage by the insuring primary carriers was erroneous.[21]

Contrast *Zurich* and its progeny, *Caterpillar* and *Benoy*, to *Federal Insurance Company v. Binney & Smith, Inc. (Binney & Smith, Inc.)*.[22] There, in construing coverage arising from separate and distinct occurrences over a period of years, the court found the primary carrier, Federal Insurance Company, liable on a *pro rata* basis. The court specifically distinguished *Zurich* by noting:

> Even though the three Federal policies in this case contained ''all sums'' language, the policies also contained limiting language in the definition of ''advertising injury.'' The language limits the definition of an ''advertising injury'' to offenses ''committed during the policy period in the course of the named insured's advertising activities.'' A policy period limitation to coverage is exactly what was missing from the insurance contracts at issue in Zurich, allowing for the proper application of joint and several liability under the ''all sums'' rule.
>
> . . . .
>
> In light of the separate and distinct nature of the occurrences at issue here, we find the trial court erred in determining Federal was required to pay Binney ''all sums'' Binney became legally obligated to pay as damages because of an advertising injury, regardless of whether the claimed injury occurred during the policy period.[23]

Thus, in *Binney & Smith, Inc.*, although a *pro rata* allocation was made, the court distinguished *Zurich* by noting that the definition of ''advertising injury'' placed a limitation on the otherwise all-encompassing nature of the ''all sums'' rule, and by noting that the occurrences were separate and distinct rather than continuous.

Finally, on the trial court level in the Circuit Court of Cook County, Illinois, the court in *John Crane, Inc. v. Admiral Insurance Co.*,[24] relying upon *Zurich*, found that primary carriers are jointly and severally liable for defense and indemnity. There, the court stated that in *Zurich*, ''The Supreme Court . . . held that the primary insurers are liable on an all sums methodology and rejected a pro-rata time on the risk allocation . . . *Therefore, when faced with allocation among different primary insurers, all sums remains the law in the First District.*''[25] Thus, the assertion that a *pro rata* allocation approach to liability would control the allocation of liability between an insured and its primary carriers is wholly unsupportable.

A related issue is the insurance industry's attempt to force its insureds to contribute on a *pro rata* basis for defense costs where one or more of the insured's primary policies was ''bought back'' in a previous claim settlement agreement with one of its carriers. In *Liberty Mutual Insurance Company v. Lumbermens Mutual Casualty Company (Liberty Mutual v. Lumbermens)*,[26] the court addressed whether primary carriers may obtain contribution from the insured for defense costs for coverage periods that were ''bought back'' in settlements between the insured and its former carrier covering those periods. The court held that an insurer may not obtain equitable contribution towards defense costs from an insured whose policies with another insurer were bought back by that other insurer. In *Liberty Mutual v. Lumbermens*, one insurer, Liberty Mutual Insurance Company (Liberty) sought recovery for defense costs under the doctrine of equitable contribution from Lumbermens Mutual Casualty Company (Lumbermens) and its insured, Sears, Roebuck and Company (Sears) for the costs of defending four

lawsuits alleging wrongful conduct that spanned the period of Lumbermens' policies. Liberty sought such equitable contribution on the theory that a 2005 buy-back agreement between Lumbermens and Sears provided that Sears, by agreeing to indemnify Lumbermens, was contractually obligated to assume the liability of Lumbermens under the previously existing Lumbermens' policies. The court noted that, while the 2005 agreement did have such an indemnification provision, it also provided that the Lumbermens policies were deemed exhausted. The court further found that under *Zurich* the Illinois Supreme Court had determined that " '[o]nce the applicable indemnity limits of a policy are exhausted by the payment of judgments or settlement, no insurance is afforded by that policy' and the insurer 'is no longer obligated to defend any actions against [the insured].' "[27] Accordingly, the court held, "The Lumbermens policies became exhausted as a result of the Agreement in 2005; therefore Liberty is not entitled to contribution on defense costs that were subsequently incurred."[28] Thus, in *Liberty Mutual v. Lumbermens*, the court ruled that, under Illinois law, Liberty had no claim against its insured based upon equitable contribution under policies deemed exhausted under a buy-back agreement with Lumbermens.

[P]ro rata allocations of liability for defense and indemnity costs have only been applied in Illinois in limited situations involving either the doctrine of horizontal exhaustion or where unique policy language limits the "all sums" application and where multiple occurrences, rather than a single, continuous occurrence are the subject of the claim for coverage

In conclusion, *pro rata* allocations of liability for defense and indemnity costs have only been applied in Illinois in limited situations involving either the doctrine of horizontal exhaustion or where unique policy language limits the "all sums" application and where multiple occurrences, rather than a single, continuous occurrence are the subject of the claim for coverage. Otherwise, the Illinois courts uniformly apply the holding of the Illinois Supreme Court in *Zurich* that the "all sums" language of the typical comprehensive general liability policy does not allow for proration. The notion that *pro rata* is the accepted method of allocation at the primary level in Illinois is a myth.

[1] Zurich Insurance Company v. Raymark Industries, Inc., 118 Ill. 2d 23, 514 N.E.2d 150 (1987).

[2] *See, e.g.*, Ludwig Candy Company v. Iowa National Mutual Insurance Company, 78 Ill. App. 3d 306, 396 N.E.2d 1329 (1st Dist. 1979).

[3] Caterpillar, Inc. v. Century Indemnity Co., 2007 Ill. App. LEXIS 1420 (3rd Dist. 2007).

[4] *Zurich Insurance Company*, 118 Ill. 2d at 49–51.

[5] United States Gypsum Company v. Admiral Insurance Company, 268 Ill. App. 3d 598, 643 N.E.2d 1226 (1st Dist. 1995).

[6] Outboard Marine Corporation v. Liberty Mutual Insurance Company, 283 Ill. App. 3d 630, 670 N.E.2d 740 (2nd Dist. 1996). Please note that this case is referenced as "*Outboard Marine II*" in the text to distinguish it from its predecessor, Outboard Marine Corporation v. Liberty Mutual Insurance Company, 154 Ill. 2d 90, 607 N.E.2d 1204 (1992).

[7] AAA Disposal Systems, Inc. v. Aetna Casualty and Surety Company, 355 Ill. App. 3d 275, 821 N.E.2d 1278 (1st Dist. 2005).

[8] *United States Gypsum Co.*, 268 Ill. App. 3d at 653.

[9] *United States Gypsum Co.*, 268 Ill. App. 3d at 653.

[10] *United States Gypsum Co.*, 268 Ill. App. 3d at 654.

[11] Missouri Pac. R.R. v. International Ins. Co., 288 Ill. App. 3d 69, 679 N.E.2d 801 (2d Dist. 1997).

[12] *Outboard Marine Corporation*, 283 Ill. App. 3d 630, 642 (Emphasis added).

[13] *Outboard Marine Corporation*, 283 Ill. App. 3d 630, 643.

[14] *AAA Disposal Systems, Inc.*, 355 Ill. App. 3d 275, 286.

[15] *Caterpillar, Inc.*, 2007 Ill. App. LEXIS 1420.

[16] *Caterpillar, Inc.*, 2007 Ill. App. LEXIS 1420 at 17–18.

[17] Benoy Motor Sales, Inc. v. Universal Underwriters Insurance Company (Benoy), 287 Ill. App. 3d 942, 679 N.E.2d 414 (1st Dist. 1997).

[18] *Benoy Motor Sales, Inc.*, 287 Ill. App. 3d at 947–948.

[19] *Benoy Motor Sales, Inc.*, 287 Ill. App. 3d at 948, quoting *U.S. Gypsum Co.*, 268 Ill. App. 3d at 644.

[20] *Benoy Motor Sales, Inc.*, 287 Ill. App. 3d at 948.

[21] *Benoy* was also cited with approval by the United States District Court for the Northern District of Illinois in Coltec Industries Inc. v. Zurich Insurance Company, 2004 U.S. Dist. LEXIS 1207 (N.D. Ill. 2004) for the proposition that primary insurers are jointly and severally liable to the extent of their policy limits.

[22] Federal Insurance Company v. Binney & Smith, Inc., 2009 Ill. App. LEXIS 599 (1st Dist. 2009).

[23] *Binney & Smith, Inc.*, 2009 Ill. App. LEXIS 599 at 30–35.

[24] John Crane, Inc. v. Admiral Insurance Co., Cook County No. 04 CH 8266, April 12, 2006, 2006 WL1010495 (interlocutory ruling subject to appeal).

[25] *John Crane, Inc.*, 2006 WL 1010495 at 12 (Emphasis added.).

[26] Liberty Mutual Insurance Company v. Lumbermens Mutual Casualty Company, 2007 U.S. Dist. LEXIS 54133 (N.D. Ill. 2007).

[27] Liberty Mutual Insurance Company v. Lumbermens Mutual Casualty Company, 2007 U.S. Dist. LEXIS 54133 at 3.

[28] Liberty Mutual Insurance Company v. Lumbermens Mutual Casualty Company, 2007 U.S. Dist. LEXIS 54133 at 3.