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2005-06
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Committee on Insurance (AC-In)

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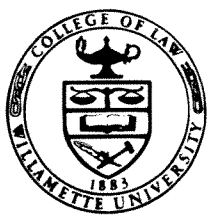

THE UNANSWERED QUESTION OF ENVIRONMENTAL INSURANCE ALLOCATION IN OREGON LAW

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I. INTRODUCTION

Environmental insurance allocation, an unresolved issue under Oregon law, poses significant problems for insurance companies and Oregon policyholders. Moreover, the public interest in cleaning up Oregon's contaminated lands and waters frequently rests on issues of environmental insurance allocation. Hundreds of polluted sites dot the Oregon landscape, a legacy of over 150 years of settlement and development since we attained statehood. Federal and state environmental cleanup legislation and regulations in the 1980s imposed joint and several, strict, retroactive liability on many current and former owners and operators for the costs of cleaning up these sites.[1] In fact, the Oregon Department of Environmental Quality (DEQ) has identified over 550 sites that are sufficiently contaminated to require private and public entities and individuals to conduct investigations and cleanups.

Beginning early in the twentieth century, many entities and individuals that were later held responsible for contaminated sites purchased comprehensive general liability (CGL) policies.[2] In Oregon,

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1. *See, e.g.*, Resource Conservation and Recovery Act (RCRA), 42 U.S.C.A. §§ 6901-6908a (2000); Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C.A. §§ 9601-9609 (2000); OR. REV. STAT. §§ 465.200-.510 (2001).

2. CGL policies provide extremely broad coverage against legal liability. As one com-

an extremely broad range of public entities, including municipalities, ports, and school districts, obtained CGL policies. Private industry, from privately held, single-site businesses to publicly held corporations with multiple industrial sites, likewise obtained CGL policies. Many different general liability carriers issued CGL policies to Oregon entities over the course of the twentieth century.

Soon after the enactment of the 1980s strict liability pollution statutes, claims for environmental cleanup began to be asserted against these policyholders. Often the claims related to contamination that had occurred as part of practices that, at the time, were state-of-the-art operations.[3] In response, policyholders turned to their historical general liability insurers to defend and indemnify them. Rather than accepting responsibility for these claims under their broad, all-risk policies, however, most CGL insurers refused to defend and indemnify their Oregon insureds. After paying premiums for decades, policyholders were deprived of the benefit of coverage when they most needed it. Policyholders had little choice but to commence extraordinarily costly and time-consuming coverage litigation while simultaneously paying out large sums to satisfy their statutory obligations to clean contaminated sites. Some companies were bankrupted in the face of this typically catastrophic financial burden.[4] Others were simply unable to fund the work that the Oregon DEQ or the United States Environmental Protection Agency (EPA) requested.

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commentator noted:

> Standard form comprehensive general liability insurance is legal liability insurance. It is tortfeasor insurance. It is litigation insurance, and it is insurance that covers wrongdoers. Liability insurance has been essential to the development of our agricultural and industrial economy because it provides economic stability to farms, businesses and industries. In exchange for a fee paid by the policyholder in the form of a policy premium, liability insurance shifts the burden of risks that potentially could be economically devastating from the policyholder to the insurance company. Liability insurance protects not only the policyholder, but also the policyholder's customers, neighbors, employees, owners, creditors and the public.

Eugene R. Anderson et al., *Liability Insurance Coverage for Pollution Claims*, 12 U. HAW. L. REV. 83, 88 (1990).

3. *See* Carl A. Salisbury, *Pollution Liability Insurance Coverage, the Standard-Form Pollution Exclusion, and the Insurance Industry: A Case Study in Collective Amnesia*, 21 ENVTL. L. 357, 358 n.2 (1991). "[E]ven spokespersons for the insurance industry acknowledge that most of the damage that is the subject of such [environmental property damage] claims occurred unintentionally." *Id.*

4. *See, e.g.*, St. Paul Fire & Marine Ins. Co., Inc. v. McCormick & Baxter Creosoting Co., 870 P.2d 260, 261 (Or. Ct. App. 1994), *aff'd in part, rev'd in part*, 923 P.2d 1200 (Or. 1996).

In the wake of the Oregon Supreme Court's 1996 decision in *St. Paul Fire & Marine Ins. Co. v. McCormick & Baxter Creosoting Co.*[5] and the Oregon Legislature's enactment of the Oregon Environmental Cleanup Assistance Act,[6] CGL insurers gradually have changed course and have begun to pay for environmental pollution claims. Currently, disputes between policyholders and carriers over coverage issues are infrequent. Instead, the contested arena has shifted to disputes over how much each carrier must pay of the policyholder's investigation and remediation costs. In other words, the issue is how to allocate those costs among all liable insurers. Unlike the coverage questions that were definitively resolved by Oregon's appellate courts and legislature,[7] the issue of environmental insurance allocation is unresolved.

The uncertainty surrounding the allocation issue has a profound effect in Oregon. The absence of a rule that clearly allocates cleanup liability among insurers leads to prolonged litigation over the issue. This, in turn, results in years of delay in beginning cleanups, and wastes millions of dollars in legal fees in the process.[8]

The following example illustrates how cleanup cases typically arise in Oregon and how the absence of an allocation rule harms insurers, Oregon policyholders, and Oregon's public interest in quick and thorough cleanup of contaminated sites. A typical scenario involves a marginally profitable business that discovers contamination on its property. Most frequently, the contamination is completely unrelated to current operations. Instead, the contamination occurred twenty-five or more years ago, at a time when environmental regulations were inadequate (or nonexistent) and standard operating practices were not sufficiently rigorous to prevent the contamination. Whether it operated the business at the time of contamination, the business quickly discovers that it is liable as the current owner or operator of the site, that major environmental cleanups routinely carry multimillion-dollar price tags, and that even minor site con-

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5. 870 P.2d at 269.

6. OR. REV. STAT. §§ 465.475-.510 (2001).

7. *Id.*; *St. Paul Fire*, 870 P.2d at 269.

8. The expense of determining allocation issues is immense. Insurance companies and property owners spend an estimated $500 million annually to litigate insurance coverage disputes. Owens-Illinois, Inc. v. United Ins. Co., 650 A.2d 974, 993 (N.J. 1994); Joren S. Bass, *The* Montrose *Decision and Long-Tail Environmental Liability: A New Approach to Allocating Risk Among Multiple Third-Party Insurers*, 5 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 209, 209 n.2 (1999).

taminations can cost hundreds of thousands of dollars to remedy. Many such legally responsible entities simply cannot foot the bill without insurance funds. However, these companies (or their predecessors on the property) have one useful asset—the comprehensive general liability insurance policies they purchased at the time the contamination occurred. Thus, the responsible entities rely on their CGL insurance policies[9] for financial assistance. Without insurance coverage, a significant portion of this financial burden would fall to the public,[10] or alternatively, sites would be left unremediated and would continue to threaten the health of Oregonians and the Oregon environment.

Therefore, CGL policies play a critical role in restoring the health of Oregon's polluted lands and waters. Although it is clear that insurers must cover environmental cleanups, it is not easy to access these funds: the uncertainty under Oregon law as to the allocation of the policyholder's environmental liability among the policyholder's insurers leads to litigation and delays the cleanup. CGL policies that work well in the face of simple, one-time losses (such as fires or auto accidents) are more difficult to interpret when presented with the complex problem of long-term, indivisible environmental damage.

The first part of the allocation problem is the long-term nature of contamination. Pollution damage typically occurs over a long pe-

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9. Generally, CGL policies cover only costs incurred because of damage to the property of third parties and do not cover costs arising solely out of damage to the policyholder's own property. However, groundwater and surface water, which often are polluted by chemicals leaching out of the soil from hazardous sites, are considered third-party property that belongs to the State of Oregon and therefore is covered by CGL policies. Lane Elec. Coop. v. Federated Rural Elec. Ins., 834 P.2d 502, 505 (Or. Ct. App. 1992), *rev. denied*, 843 P.2d 454 (Or. 1992). Moreover, because pollution migrates from soils and causes ongoing water contamination, CGL policies cover remediation of the polluting soils in order to prevent further pollution of the waters. *See St. Paul Fire*, 870 P.2d at 266 n.10 ("[T]he pollution to the soil is . . . inextricably linked to the pollution of the groundwater, for example having to clean the soil to prevent pollution to the water filtering through the soil."); Olds-Olympic, Inc. v. Commercial Union Ins. Co., 918 P.2d 923, 928, 931 n.20 (Wash. 1996); Boeing Co. v. Aetna Cas. & Sur. Co., 784 P.2d 507, 410 (Wash. 1990). Thus CGL policies are an invaluable source of funds for anyone responsible for cleaning up a contaminated site.

10. The Oregon DEQ's Orphan Site Program, funded in part by Oregon taxpayers, contributes to cleanups when the legally responsible party cannot pay for all of the cost of investigating and cleaning up a contaminated site. Oregon DEQ, Orphan Site Program, *at* http://www.deq.state.or.us/wmc/cleanup/orp0.htm (last visited Feb. 8, 2003). Landfill orphan site cleanups are an exception, paid for through a special fund created by taxes on solid waste disposal. OR. REV. STAT. § 459.311 (2001).

riod of time, as numerous releases of contaminants, and their subsequent migration to new areas, causes ongoing environmental harm. Because policyholders commonly purchased CGL policies covering one or three-year periods, and may over the course of many years have obtained policies from a variety of different insurance companies, pollution damage claims potentially invoke coverage under many different insurance policies and from many different insurance companies. Oregon courts have adopted the "injury-in-fact" rule for determining which policies are triggered by a contamination.[11] The injury-in-fact rule means that every insurer is liable for investigation and cleanup costs, as long as some environmental property damage happened during the policy period.[12] This rule effectively triggers every policy that has been effective at any time from the first release of pollutants until (at the least) the date that the policyholder discovered the pollution.[13]

The second part of the problem is the indivisibility of the contamination. Due to pollution's gradual nature and the inherent difficulty of determining precisely when any portion of the harm occurred, it is usually impossible to break down the harm into distinct time periods and assign responsibility for each time period to any particular policy period.

The long-term, indivisible nature of pollution damage inevitably leads to the question of environmental insurance allocation: given enormous cleanup costs and many insurers who are obligated to cover those costs, how should those costs be allocated among the insurers? Many states' courts have confronted the issue,[14] and two possible answers have emerged. Some courts hold that the total loss must be divided proportionally among all insurers that covered the risk, and that the insured must recover separately from each insurer (the "pro rata" rule). Other courts conclude that the policyholder may recover fully from the policy or policies of its choice, up to the limits of each policy, after which the chosen insurer(s) may seek

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11. *See St. Paul Fire*, 870 P.2d at 265. "[A]ll that is required to trigger coverage is damage to property *during* the policy period." *Id.*

12. *Id.*

13. The "known loss" rule, which prohibits future insurance coverage for known past liabilities, has been interpreted by a federal court applying Oregon law to preclude future environmental coverage once the insured discovers the past damage. City of Corvallis v. Hartford Accident & Indem. Co., No. CIV 89-294-JU, 1991 WL 523876, at *8 (D. Or. May 30, 1991).

14. Insurance is a matter of contract law that is resolved on a state-by-state basis.

contribution from other insurers (the "all sums" rule).

In Oregon, the allocation question remains unsettled. Oregon's appellate courts have yet to face the question of environmental insurance allocation. The consequences of this gap in our case law are enormous—policyholders and insurers litigate the allocation issue time and time again, and in the process delay cleanups by months or years and consume funds that could be used more efficiently for remediation.[15] Although the lack of a rule harms both policyholders and insurers, it also injures the Oregon public, as contaminated sites continue to threaten the health of Oregonians and our environment. Last, the lack of a clear rule also clogs Oregon courts and strains judicial resources. Judges recognize that the allocation issue is the most important unanswered question in environmental insurance law[16] and, not surprisingly, it is often litigated.

Part II of this Article explains the all sums and pro rata approaches. Part III explores the legal and equitable analysis underlying the pro rata and all sums rules as developed by courts outside of Oregon. Finally, Part IV analyzes relevant Oregon law, and Part V concludes that existing Oregon insurance and contract law requires the adoption of the all sums rule, and that equitable concerns also favor all sums allocation.

II. TWO APPROACHES: ALL SUMS AND PRO RATA

The appellate courts of seventeen states have addressed the problem of environmental insurance allocation. The majority have adopted the all sums rule—nine have chosen all sums[17] and six have

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15. *See* Owens-Illinois, Inc. v. United Ins. Co., 650 A.2d 974, 993 (N.J. 1994); *see* Bass, *supra* note 8.

16. A former Oregon Multnomah County Circuit Court judge who presided over several complex insurance cases has called the allocation question the most important environmental insurance question today. Judge William J. Keyes, Presentation at Ball Janik LLP, Portland, Oregon (Sept. 24, 2002).

17. Aerojet-General Corp. v. Transp. Indem. Co., 948 P.2d 909, 919-20 n.10 (Cal. 1997); Armstrong World Ind. v. Aetna Cas. & Sur. Co., 52 Cal. Rptr. 2d 690, 705-10, 742-43 (Cal. Ct. App. 1996); Hercules, Inc. v. AIU Ins. Co., 784 A.2d 481, 492 (Del. 2001); Monsanto Co. v. C.E. Health Comp. & Liab. Ins. Co., 652 A.2d 30, 35 (Del. 1994) (applying Missouri law); Allstate Ins. Co. v. Dana Corp., 737 N.E.2d 1177, 1188-92 (Ind. Ct. App. 2000), *aff'd in part*, 759 N.E.2d 1049 (Ind. 2001); Rubenstein v. Royal Ins. Co. of Am., 694 N.E.2d 381, 388 (Mass. App. Ct. 1998), *aff'd in part*, 707 N.E.2d 367 (Mass. 1999); Goodyear Tire & Rubber Co. v. Aetna Cas. & Sur. Co., 769 N.E.2d 835, 840-42 (Ohio 2002); J.H. France Refractories Co. v. Allstate Ins. Co., 626 A.2d 502, 507-09 (Pa. 1993); Tex. Prop. & Cas. Ins. Guar. Ass'n v. Southwest Aggregates, Inc., 982 S.W.2d 600, 605, 607 (Tex. App. 1998); Am. Nat'l Fire Ins. Co. v. B & L Trucking & Constr. Co., 951

selected pro rata.[18] The courts of Illinois and Michigan are split.[19] In addition, four federal appellate courts have considered the issue—one has adopted all sums and three have chosen pro rata.[20]

A. All Sums

According to the majority rule,[21] each insurance company is responsible to the policyholder for "all sums" that result from the cleanup, subject only to its policy limits.[22] The all sums rule allows the policyholder to choose among its CGL policies and collect all of

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P.2d 250, 251 (Wash. 1998); *see also* Mary Rose Alexander & Roger E. Warin, *Trigger of Coverage and Allocating Costs Among Triggered Policies, Third Annual Advanced ALI-ABA Course of Study, Environmental Insurance: Past, Present and Future* (June 13-14, 2002).

18. Pub. Serv. Co. of Colo. v. Wallis & Cos., 986 P.2d 924, 935-37 (Colo. 1999) (time-on-the-risk); Sentinel Ins. Co. v. First Ins. Co. of Haw., Ltd., 875 P.2d 894, 918-19 (Haw. 1994) (time-on-the-risk); Domtar, Inc. v. Niagra Fire Ins. Co., 563 N.W.2d 724, 732 (Minn. 1997) (time-on-the-risk); Carter-Wallace, Inc. v. Admiral Ins. Co., 712 A.2d 1116, 1124 (N.J. 1998) (mixed time-on-the-risk and percentage of coverage); Owens-Illinois, Inc. v. United Ins. Co., 650 A.2d 974, 993 (N.J. 1994) (mixed time-on-the-risk and percentage of coverage); Consol. Edison Co. of N.Y., Inc. v. Allstate Ins. Co., 774 N.E.2d 687, 695 (N.Y. 2002) (adopting pro rata, but not deciding which pro rata scheme applies); Sharon Steel Corp. v. Aetna Cas. & Sur. Co., 931 P.2d 127, 140-41 (Utah 1997) (time-on-the-risk and percentage of coverage); *see also* Alexander & Warin, *supra* note 17.

19. *Compare* Maremont Corp. v. Cont'l Cas. Co., 760 N.E.2d 550, 555-56 (Ill. App. Ct. 2001) (time-on-the-risk) *with* Zurich Ins. Co. v. Northbrook Excess & Surplus Ins. Co., 494 N.E.2d 634, 650 (Ill. App. Ct. 1986) ("nothing in this language . . . permits a reduction in the triggered policy's responsibility to pay 'all sums'"), *aff'd sub nom.* Zurich Ins. Co. v. Raymark Indus., Inc., 514 N.E.2d 150 (Ill. 1987). *Compare* 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) (time-on-the-risk), *with* Dow Corning Corp. v. Cont'l Cas. Co., No. 200143, 1999 WL 33435067, at *6-8 (Mich. Ct. App. Oct. 12, 1999) (all sums). *See also* Alexander & Warin, *supra* note 17.

20. Spartan Petroleum Co. v. Federated Mut. Ins. Co., 162 F.3d 805, 812 (4th Cir. 1998) (applying South Carolina law and adopting time-on-the-risk); Commercial Union Ins. Co. v. Sepco Corp., 918 F.2d 920, 922-25 (11th Cir. 1990) (discussing Alabama Insurance Guaranty Association); Keene Corp. v. Ins. Co. of N. Am., 667 F.2d 1034, 1047-48 (D.C. Cir. 1981) (seminal all sums case); Porter v. Am. Optical Corp., 641 F.2d 1128, 1145 (5th Cir. 1981) (applying Louisiana law and adopting time-on-the-risk); *see also* Alexander & Warin, *supra* note 17.

21. Goodyear Tire & Rubber Co. v. Aetna Cas. & Sur. Co., 769 N.E.2d 835, 841 (Ohio 2002) (also naming all sums the majority rule) (citing Am. Nat'l Fire Ins. Co. v. B & L Trucking & Constr. Co., 951 P.2d 250 (Wash. 1998)); *B & L Trucking*, 951 P.2d at 256 (naming all sums the majority rule).

22. Keene Corp. v. Ins. Co. of N. Am., 667 F.2d 1034, 1048-49 (D.C. Cir. 1981); *Goodyear*, 769 N.E.2d at 840, 841; *B & L Trucking*, 951 P.2d at 256. Some courts label this rule "joint and several" allocation due to its similarity to the doctrine of joint and several liability. *See* Hercules, Inc. v. AIU Ins. Co., 784 A.2d 481, 488-91 n.27 (Del. 2001); Consol. Edison Co. of N.Y., Inc. v. Allstate Ins. Co., 774 N.E.2d 687, 694 (N.Y. 2002).

its cleanup costs from a single insurer (subject to the policy's limits).[23] If the limits under that policy will not cover the entire claim, the policyholder can select more policies until the claim is completely satisfied. The insurance company that the policyholder chooses is not arbitrarily burdened with the entire liability while the other insurers walk away with none. Rather, that insurance company, in turn, can pursue contribution claims against the policyholder's other insurers.[24]

Policyholders prefer this rule for two reasons. First, it virtually guarantees them full recovery because they can collect from a few solvent insurers and allow the insurers to determine how they will spread those costs equitably among themselves. Second, by allowing full recovery from one insurer, the all sums rule also minimizes the policyholder's transaction costs (in this case, the time and expense of negotiating and/or litigating with insurers). Thus, the all sums rule shifts transaction costs to the insurers, who must pursue contribution actions to spread the costs among all insurers.

B. Pro Rata

The minority rule divides investigation and cleanup costs proportionally among liable insurance policies. Insurers favor this rule for two main reasons. First, the pro rata rule often reduces the insurers' overall liability. For example, an insurer's pro rata share of cleanup costs may exceed its policy limits, leaving the policyholder to bear the remainder of that insurer's share.[25] Also, the pro rata rule typically assigns proportionate shares of liability to periods in which the policyholder is "missing" coverage, and most often as-

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23. *Goodyear*, 769 N.E.2d at 841; J.H. France Refractories Co. v. Allstate Ins. Co., 626 A.2d 502, 508-09 (Pa. 1993).

24. *Goodyear*, 769 N.E.2d at 841; *J.H. France*, 626 A.2d at 509.

25. This scenario is best understood by example. Suppose a policyholder had coverage for ten years. For the first three years, its policies had $1 million limits. For the last seven years, the policies had $5 million limits (thus, the coverage totals $38 million). If the cleanup costs total $20 million, then it might appear first that the policyholder will recover all of its costs. However, under the "time-on-the-risk" pro rata rule (discussed *infra* Part II.B.1), each policy receives a pro rated share of liability equal to the percent of time it covered the risk. In this case, each policy receives ten percent of the total liability, or $2 million. The last seven years' policies, with limits of $5 million, pay their $2 million shares. But the first three policies pay only up to their $1 million limits. Therefore, the policyholder recovers $17 million and is left to fund $3 million on its own. This is true even though the policyholder purchased $38 million of total coverage during that period, far exceeding the total cleanup cost.

signs that liability to the policyholder, not the insurers.[26] Periods of missing coverage include years covered by insurers that are now insolvent,[27] years for which the policyholder has lost its policies, and years before 1985 in which the policyholder elected not to obtain environmental coverage.[28] Second, pro rata allocation places the transaction costs on the policyholder. In contrast to the all sums rule, under the pro rata rule the policyholder must recover separately from each insurer. Under the pro rata rule, there are two allocation schemes, as follows.

1. Proportion by Years, or the "Time-on-the-Risk" Rule

Under the time-on-the-risk rule, each insurance company's share of liability equals the percentage of time that it covered the risk.[29] For example, if the contamination and resulting damage occurred over a period of ten years, and ten different insurers covered the policyholder for one year each, then each insurer must pay ten percent of the cleanup costs.[30]

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26. Stonewall Ins. Co. v. Asbestos Claims Mgmt. Corp., 73 F.3d 1178, 1202 (2d Cir. 1995); Owens-Illinois, Inc. v. United Ins. Co., 650 A.2d 974, 994 (N.J. 1994).

27. Commercial Union Ins. Co. v. Sepco Corp., 918 F.2d 920, 924-25 (11th Cir. 1990).

28. *Stonewall*, 73 F.3d at 1204. The argument that shares of liability should be assigned to time periods when policyholders chose not to obtain coverage typically applies only to periods before 1985. After 1985, most CGL policies excluded coverage for pollution damage. The only other option, at the time, was "environmental impairment liability" (EIL) policies. In contrast to CGL policies, which cover long-term losses, EIL policies cover "claims made" for damage that happens during the policy period, and thus do not apply retroactively to damage that occurred before 1985. *See* First State Ins. Co. v. Minn. Mining & Mfg. Co., No. CX-97-9793, slip op. at 15-18 (Minn. 2d Jud. Dist., Ramsey County, Mar. 15, 1999); Champion Dyeing & Finishing Co. v. Centennial Ins. Co., 810 A.2d 68, 70-71 (N.J. Super. Ct. App. Div. 2002); ZRZ Realty Co. v. Beneficial Fire & Cas. Ins. Co., No. 9708-06226, slip op. at 13 (Or. Multnomah County Cir. Ct. July 15, 2002) ("There was no occurrence-based liability insurance that plaintiffs could have purchased providing pollution insurance coverage . . . after 1985."). *But see* Olin Corp. v. Ins. Co. of N. Am., 221 F.3d 307, 325-27 (2d Cir. 2000). Finally, insurers have the burden of proving that the policyholder chose not to purchase insurance by showing that insurance was available in the market. Chem. Leaman Tank Lines, Inc. v. Aetna Cas. & Sur. Co., 177 F.3d 210, 230-31 (3d Cir. 1999), *on remand*, 71 F. Supp. 2d 394 (D.N.J. 1999).

29. *See, e.g.*, Pub. Serv. Co. of Colo. V. Wallis & Cos., 986 P.2d 924, 935-37 (Colo. 1999).

30. Owens-Illinois, Inc. v. United Ins. Co., 650 A.2d 974, 994 (N.J. 1994); Consol. Edison Co. of N.Y., Inc. v. Allstate Ins. Co., 774 N.E.2d 687, 695 (N.Y. 2002).

2. Proportion by Total Coverage, or "Percentage of Coverage"

Under this pro rata scheme, an insurer's liability depends on the percentage of the total coverage that it issued.[31] For instance, suppose two insurers covered a policyholder during a two-year period, each for one year. The first insurer contracted for $10 million of coverage, and the second for $20 million. The total coverage is $30 million. Consequently, the first insurer would be held liable for one-third of all liability, and the second for two-thirds.

III. LEGAL ANALYSIS BY NON-OREGON COURTS

Regardless of the jurisdiction, courts examining environmental insurance allocation review the same core set of issues—contract law and equitable concerns. Courts uniformly begin by attempting to discern the parties' contractual intent regarding allocation. State contract law instructs them to look first to the plain language of the policy.[32] If the court cannot decide based upon the policy language, it turns to extrinsic evidence.[33] Finally, if two or more reasonable interpretations still remain, courts apply the doctrine of *contra proferentem* and construe the contractual ambiguity against the insurer.[34] In addition to contract interpretation, most jurisdictions also consider equitable concerns.[35]

A. Plain Language

All courts start their analysis by examining the policy language at the heart of every environmental insurance allocation dispute.[36] At issue is the meaning of two standard policy clauses:

> The Company will pay on behalf of the insured *all sums* which the insured shall become legally obligated to pay as damages because of . . . property damage . . . to which this insurance ap-

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31. *Consol. Edison Co.*, 774 N.E.2d at 695.

32. Armstrong World Ind. v. Aetna Cas & Sur. Co, 52 Cal. Rptr. 2d 690, 697 (Cal. Ct. App. 1996); Goodyear Tire & Rubber Co. v. Aetna Cas. & Sur. Co., 769 N.E.2d 835, 840 (Ohio 2002); *Owens-Illinois, Inc.*, 650 A.2d at 988; *Consol. Edison Co.*, 774 N.E.2d at 693; Am. Nat'l Fire Ins. Co. v. B & L Trucking & Constr. Co., 951 P.2d 250, 256 (Wash. 1998).

33. *B & L Trucking*, 951 P.2d at 256.

34. Keene Corp. v. Ins. Co. of N. Am., 667 F.2d 1034, 1042 (D.C. Cir. 1981); *B & L Trucking*, 951 P.2d at 256.

35. *B & L Trucking*, 951 P.2d at 257.

36. *Id.* at 256.

plies, caused by an occurrence.

. . . .

'[P]roperty damage' means (1) physical injury to or destruction of tangible property which occurs *during the policy period.*[37]

All sums courts often distinguish between the *scope of coverage* clause (the all sums clause) and the *trigger of coverage* clause (the property-damage clause).[38] These courts hold that once the insurance policy has been triggered by property damage that occurs "during the policy period," the insurer is obligated to cover the policyholder for "all sums" arising out of that occurrence.[39] According to these courts, although the trigger of coverage clause mandates that some property damage must occur "during the policy period," the scope of coverage clause is not burdened by this time limit.[40] Therefore, under the plain language of the contract, the scope of coverage clause requires coverage for "all sums" that the insured must pay because of property damage, even if property damage persists beyond the policy period.

In support of this position, all sums courts often cite *Keene Corp. v. Insurance Co. of North America*, the seminal all sums opinion:

> [E]ach policy has a built-in trigger of coverage. Once triggered, each policy covers [the policyholder's] liability. There is *nothing* in the policies that provides for a reduction of the insurer's liability if an injury occurs only in part during a policy period. As we interpret the policies, they cover [the policyholder's] entire liability once they are triggered.[41]

Pro rata courts analyze the relationship between the trigger and scope of coverage clauses differently. In their view, when the two clauses are read in the context of the whole policy, the time limitation in the trigger clause ("during the policy period") must be ap-

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37. *Id.* at 253 (emphasis added). Because the insurance industry develops standard forms for CGL policies, the language of individual CGL policies varies only slightly in wording, and rarely, if ever, in the meaning of basic terms such as these. Salisbury, *supra* note 3, at 361 n.8.

38. *See* Aerojet-General Corp. v. Transp. Indem. Co., 948 P.2d 909, 920 n.10, 932 (Cal. 1997); Armstrong World Indus. v. Aetna Cas. & Sur. Co., 52 Cal. Rptr. 2d 690, 709, 742 (Cal. Ct. App. 1996).

39. *Keene Corp.*, 667 F.2d at 1048-49; *Aerojet*, 948 P.2d at 932; *Goodyear*, 769 N.E.2d at 840, 841; *B & L Trucking*, 951 P.2d at 256.

40. *Keene Corp.*, 667 F.2d at 1048-49.

41. *Id.* at 1048; *see also Armstrong World Indus.*, 52 Cal. Rptr. 2d at 709.

plied to the scope of coverage clause.[42] Therefore, the scope of coverage clause can extend only to the cleanup costs for property damage that is deemed to have arisen during the policy period. Because the legal liability for cleanup costs arising from one period of property damage is usually indistinguishable from that arising from another period of property damage, these courts have applied a construct to allocate liability—they *presume* that the legal liability is divisible, and therefore they divide the costs of that liability between applicable policies. As explained below, however, although pro rata courts purport to rely on contract analysis, concerns about fairness appear to drive their conclusions.

B. Extrinsic Evidence of the Parties' Intent

Some courts have difficulty reconciling the plain language of the trigger and scope of coverage clauses and turn to extrinsic evidence to determine the parties' intent. Both all sums and pro rata courts review the drafting history of the CGL policy form because insurance companies use standard-form CGL contracts that the insurance industry created without policyholder input.[43]

In reviewing this history, all sums courts note that the industry leaders, including the drafters of the CGL policy, were aware that a CGL policy could be required to respond to gradual, long-term damages arising from a single factor, such as an accidental spill of a pollutant, and that the drafters consciously omitted pro rata allocation clauses from the policy.[44] Thus, some courts surmise that the

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42. Consol. Edison Co. of N.Y. v. Allstate Ins. Co., 774 N.E.2d 687, 695 (N.Y. 2002).

43. *See, e.g.*, Am. Home Prods. Corp. v. Liberty Mut. Ins. Co., 565 F. Supp. 1485, 1500-03 (S.D.N.Y. 1983); Montrose Chem. Corp. v. Admiral Ins. Co., 913 P.2d 878, 891 (Cal. 1995) ("Most courts and commentators have recognized . . . that . . . standardized industry provisions and the availability of interpretative literature are of considerable assistance in determining coverage issues."). *See* Salisbury, *supra* note 3, at 36-63.

44. *See Montrose Chem. Corp.*, 913 P.2d at 891-92 ("[I]n some exposure type cases involving cumulative injuries it is possible that more than one policy will afford coverage.") (quotations and citations omitted). In *Owens-Illinois, Inc. v. United Ins. Co.*, 650 A.2d 974 (N.J. 1994), the New Jersey Supreme Court cited specific statements made by insurance industry leaders in support of the all sums rule:

> [I]nsurance industry officials acknowledged that multiple policies of insurance would be triggered by a gradual release of contaminants causing progressive injury or damage. . . . [This was evidenced by statements made by] (1) Gilbert L. Bean, a drafter of the CGL policy: "[I]f the injury or damage from waste disposal should continue after the waste disposal ceased, as it usually does, it could produce losses on each side of a renewal date, and in fact over a period of years, with a separate

drafting history offers additional proof that insurers intended to be responsible for the full extent of a loss (up to their policy limits), even if it continued beyond their policy period, jointly with the other insurers whose policies covered the same continuous loss.[45]

In contrast, pro rata courts do not rely on drafting history. One court has rejected the drafting history as unreliable and unrepresentative of the industry.[46] Others review the history, but ultimately disregard it and decide the allocation issue on fairness considerations rather than on contract law.[47] Last, some pro rata courts decide on contract grounds but decline to discuss the drafting history at all.[48]

C. Contra Proferentem

If courts still cannot discern the intent of the parties, they refer to relevant rules of contract interpretation. One such rule, *contra proferentem*, is applied in disputes between policyholders and insurers and requires that any ambiguous clause that is subject to more than one reasonable interpretation be construed against the drafter-insurer.[49] The rule of *contra proferentem* is often justified due to the unequal bargaining positions of insurers and insureds. Unlike normal contracts between freely negotiating parties, insurance policies are adhesion contracts, and policyholders cannot alter their funda-

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> policy applying each year."; (2) a company claims manual: "When the injury is gradual, resulting from continuous or repeated exposures, and occurs over a period of time, coverage may be afforded under more than one policy—the policies in effect during the period of injury"; and (3) another drafter of the CGL policy: "[T]here is no pro-ration formula in the policy, as it seemed impossible to develop a formula which would handle every possible situation with complete equity."

Id. at 990 (citing Eugene R. Anderson et al., *Liability Insurance Coverage for Pollution Claims*, 59 MISS. L.J. 699, 729-30 (1989)). *See, e.g.*, Thomas Baker & Eva Orlebeke, *The Application of Per-Occurrence Limits from Successive Policies*, 3 ENVT'L CLAIMS J., 411, 412-19 (1991) (detailing both the deliberations of the ISO insurance committees and insurer committee members' explanations of the final CGL forms).

45. *See, e.g.*, J.H. France Refractories Co. v. Allstate Ins. Co., 626 A.2d 502, 508 (Pa. 1993).

46. United States Fid. & Guar. Co. v. Treadwell Corp., 58 F. Supp. 2d 77, 100-01 (S.D.N.Y. 1999).

47. *Owens-Illinois, Inc.*, 650 A.2d at 989-93.

48. Consol. Edison Co. of N.Y., Inc. v. Allstate Ins. Co., 774 N.E.2d 687, 693-96 (N.Y. 2002) (discussing allocation in terms of contract interpretation and distinguishing cases where joint and several allocation is appropriate).

49. Am. Nat'l Fire Ins. Co. v. B & L Trucking & Constr. Co., 951 P.2d 250, 256 (Wash. 1998) ("Any ambiguities remaining after examining applicable extrinsic evidence are resolved against the drafter-insurer and in favor of the insured.").

mental terms.[50]

Insurers and pro rata courts counter that well-informed policyholders, with experienced counsel and in-house risk management personnel, do not deserve this deference.[51] Those courts reject the doctrine of *contra proferentem* and adopt the insurers' interpretation of the insurance policies.[52]

D. Fairness

1. All Sums Analysis

Courts on the all sums side typically subordinate fairness concerns to contract analysis. These courts also discuss equities, how-

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50. Keene Corp. v. Ins. Co. of N. Am., 667 F.2d 1034, 1042 n.12 (D.C. Cir. 1981); Am. Home Prod. Corp. v. Liberty Mut. Ins. Co., 565 F. Supp. 1485, 1492 (S.D.N.Y. 1983); Montrose Chem. Corp. v. Admiral Ins. Co., 913 P.2d 878, 889 (Cal. 1995) ("These rules stem from the fact that the insurer typically drafts policy language, leaving the insured little or no meaningful opportunity or ability to bargain for modifications.").

One commentator ably describes the maxim and its rationale as follows:

> A policy of insurance is to an ordinary contract what a zebra is to a horse: same genera, different species. Taking this analogy to the brink of overuse, an insurance policy is a contract of a slightly different "stripe." Most ordinary contracts are presumed to be the product of negotiation and compromise. A typical insurance policy, on the other hand, is a contract of adhesion; that is, the insurance industry drafts it, and the policyholder must either take it or leave it. In fact, insurance companies share information and collaborate on the meaning and scope of the risks against which they insure in ways that in other industries would constitute antitrust violations. The McCarran-Ferguson Act, however, exempts the insurance industry from various aspects of the antitrust laws. For this reason, among others, courts construe insurance policies in accordance with rules that frequently favor policyholders. The most important of these rules of construction is a doctrine known as *contra proferentem* (literally: "against the one proffering"). It provides that when a term of an insurance policy is susceptible to more than one reasonable interpretation it must be construed against the insurance company that drafted it and in favor of coverage. One respected insurance commentator explained this principle as follows:
>
> > [T]he insured need only offer an interpretation that is not in itself unreasonable. Conversely, to sustain its construction of the contract, the insurer has the burden of establishing not only that the words used in the policy are susceptible of its construction, but also that such construction is the only construction that can fairly be placed on the language in question.
>
> This rule applies with particular force to policy restrictions or exclusions.

Salisbury, *supra* note 3, at 361-63.

51. Eagle Leasing Corp. v. Hartford Fire Ins. Co., 540 F.2d 1257, 1261 (5th Cir. 1976); *Owens-Illinois, Inc.*, 650 A.2d at 991.

52. *Owens-Illinois, Inc.*, 650 A.2d at 990 (adopting pro rata allocation, despite being "unable to find the answer to allocation in the language of the policies").

ever, and raise three fairness issues. They first acknowledge freedom of contract issues. Some courts find the all sums rule fair because insurers freely entered into contracts in which they accepted the risk of covering the policyholder's environmental property damage liability, up to the policy limits.[53] Other courts note that the all sums approach is fair because the insurers exercised exclusive control over the policy terms[54] and easily could have avoided the current allocation problem by more careful drafting (e.g., by including a pro rata allocation clause).[55] Moreover, insurers believed the terms were fair at the time of contracting.[56] All sums courts emphasize that the contracts' terms are controlling and that a court may not rewrite the contract based on judicial notions of fairness or public policy concerns.[57]

Second, all sums courts note that the contracts' outcomes are fair to insurers. On the one hand, the insurers are never held liable for more than their coverage limits, which they agreed to pay. On the other hand, no single insurer will be forced to shoulder the entire contamination liability alone because insurers can pursue contribution claims against other insurers that are obligated to cover the environmental property damage.[58] Therefore, it is very unlikely that any insurer will actually have to pay the full amount of its coverage limits.

Third, courts consider the contract analysis outcome in terms of fairness to the policyholders. All sums jurisdictions conclude that because the insurer received the benefit of the bargain when the policyholder paid its premiums, the policyholder should expect, therefore, to receive the benefit, or coverage up to its policy limits,

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53. *See, e.g.*, Aerojet-General Corp. v. Transp. Indem. Co., 948 P.2d 909, 932 (Cal. 1997).

54. *Keene Corp.*, 667 F.2d at 1042 n.12; *Montrose Chem. Corp.*, 913 P.2d at 889; Salisbury, *supra* note 3, at 361-63.

55. *B & L Trucking*, 951 P.2d at 256. Policyholders also point out that insurers could have written claims-made clauses (which restrict coverage to a specific period), specific exclusions for long-term property damage indemnity, greater self-insured retentions and deductibles, or easily could have issued lower indemnity limits to restrict their long-term exposure (or conversely, increased premiums to cover the costs of such indemnities).

56. *B & L Trucking*, 951 P.2d at 257.

57. *Aerojet*, 948 P.2d at 932; *B & L Trucking*, 951 P.2d at 252.

58. *Keene Corp.*, 667 F.2d at 1050; Goodyear Tire & Rubber Co. v. Aetna Cas. & Sur. Co., 769 N.E.2d 835, 841 (Ohio 2002); J.H. France Refractories Co. v. Allstate Ins. Co., 626 A.2d 509, 509 (Pa. 1993).

of the contract for which it paid.[59]

2. Pro Rata Analysis

Pro rata courts tend to consider equitable issues extensively. Some pro rata jurisdictions hint at the unfairness of the all sums rule, and then proceed to rest their conclusions upon a contractual interpretation that the trigger of coverage clause limits the indemnity to damages that occur "during the policy period."[60] Because their analysis of contract terms is usually cursory or somewhat vague and their focus on fairness concerns is far more emphatic, one suspects that pro rata courts are swayed more by equitable concerns than by contract law. Indeed, several pro rata courts have so focused on fairness issues that they have abandoned contract law completely and based their decisions entirely on notions of equity.[61]

The fairness concerns of pro rata courts can be divided into three main themes. First, they challenge the foreseeability of long-term pollution liability, finding that no insurer could reasonably have contemplated such future risks and that imposing such unforeseen liability would be unjust.[62] Some courts perceive this injustice as adding another layer of unfairness to what they consider to be the already unjust trigger of coverage rule that, because of scientific uncertainty, imposes enormous liabilities on insurers without proof that environmental damage occurred during any specific policy period. As one court wrote, "[the policyholder] wants to combine this uncertainty-based approach [triggering many policies without proof of damage] . . . with an entitlement to choose a particular policy for indemnity."[63]

Second, pro rata jurisdictions are concerned with the ultimate costs borne by the insurers. They find it unfair to assign all liability to one insurance company when the pollution damage cannot be pinpointed in time and thus cannot be precisely attributed to any one insurer's policy.[64] Pro rata courts conclude that contribution actions

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59. *Keene Corp.*, 667 F.2d at 1042 n.12; *Goodyear*, 769 N.E.2d at 841 ("[The policyholder] expected complete security from each policy that it purchased.").

60. Olin Corp. v. Ins. Co. of N. Am., 221 F.3d 307, 323-24 (2d Cir. 2000); Consol. Edison Co. of N.Y., Inc. v. Allstate Ins. Co., 774 N.E.2d 687, 695 (N.Y. 2002).

61. Owens-Illinois, Inc. v. United Ins. Co., 650 A.2d 974, 991-93 (N.J. 1994) ("The other usual principles of [contract] interpretation do not provide much guidance.").

62. *Id.* at 988-90.

63. *Consol. Edison Co.*, 774 N.E.2d at 695.

64. *Id.*

among insurers are an inadequate solution to this problem because contribution may be impossible if the policyholder lacks evidence of its policies with other insurers or if other insurers are now insolvent.[65] Other courts believe that the enormous, unforeseen liabilities created by the all sums rule will translate into skyrocketing premiums and will bankrupt insurance companies, consequences that eventually will harm the very policyholders who prefer the all sums rule.[66]

Third, pro rata courts believe that the all sums rule creates a windfall for policyholders by imposing full liability under a single insurance policy, even though some of the property damage may have occurred during periods when the policyholder had no insurance, thereby effectively providing coverage for that uninsured period. The Sixth Circuit stated this concern as follows:

> Were we to adopt [the insured's] position on defense costs a manufacturer which had insurance coverage for only one year out of 20 would be entitled to a complete defense of all asbestos actions the same as a manufacturer which had coverage for 20 years out of 20. Neither logic nor precedent support such a result.[67]

These courts also fear that the all sums approach may give policyholders incentives to underinsure or to procure insurance from financially unstable carriers.[68]

IV. ANALYSIS UNDER OREGON LAW

Oregon's appellate courts, which have not yet grappled with environmental insurance allocation, are certain to face the issue in the very near future. The staggering liabilities involved in cleanups such as the Portland Harbor Superfund site,[69] as well as the presence

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65. *Olin Corp.*, 221 F.3d at 323.

66. *See* Am. Home Prod. Corp. v. Liberty Mut. Ins. Co., 565 F. Supp. 1485, 1511 (S.D.N.Y. 1983).

67. Ins. Co. of N. Am. v. Forty-Eight Insulations, Inc., 633 F.2d 1212, 1225 (6th Cir. 1980). *But see* Keene Corp. v. Ins. Co. of N. Am., 667 F.2d 1034, 1047-48 (D.C. Cir. 1981) (rejecting suggestion that an all sums rule would create an incentive not to purchase insurance since that would leave the insured uncovered for injuries that developed and manifested in the years of noncoverage).

68. *Olin Corp.*, 221 F.3d at 324-38; Owens-Illinois, Inc. v. United Ins. Co., 650 A.2d 974, 992 (N.J. 1994).

69. EPA, Portland Harbor Superfund Site, *at* http://yosemite.epa.gov/R10/CLEANUP.NSF/5c8919bc41f032578825685f006fd670/e46ae970d06761ce882567ac007316b9?OpenDocument (last visited Jan. 21, 2003); Brent Hunsberger, *Portland Harbor Joins*

of more than 550 other sites on Oregon's Confirmed Release List,[70] virtually guarantee that the allocation issue will be litigated and appealed.

This part of the Article discusses why, based on existing Oregon law, it is likely that the Oregon appellate courts will adopt the all sums rule. It first clarifies the context of *Lamb-Weston, Inc. v. Oregon Auto Insurance. Co.*,[71] a decision important to understanding what the Oregon Supreme Court has (and has not) said about this issue. Next, this part presents and applies the proper legal standard for such disputes under Oregon insurance law and concludes by reviewing fairness concerns.

A. Lamb-Weston, *Though Consistent with All Sums Allocation, Does Not Apply to Insurance Allocation Disputes Between an Insurance Company and a Policyholder*

Insurance companies commonly argue that *Lamb-Weston* requires Oregon courts to apply a pro rata rule for environmental insurance allocation. This argument is ill-founded. First, a careful reading of the case reveals that *Lamb-Weston* is fully consistent with all sums allocation. Second, *Lamb-Weston*'s holding, which applied pro rata allocation *between insurers only,* does not apply to cases *between a policyholder and an insurer*. Between policyholders and insurers, a different legal standard applies. Third, *Lamb-Weston* concerned "other insurance" clauses that even pro rata jurisdictions recognize as having nothing to do with the question of environmental insurance allocation.[72]

1. Lamb-Weston *Is Consistent with All Sums Allocation*

Lamb-Weston involved two concurrent insurance policies (that is, covering the same policy period) that covered a single automobile accident.[73] Each policy contained an "other insurance" clause in-

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Superfund Today, THE OREGONIAN, Dec. 1, 2000, at A01 (cleanup likely to cost tens of millions of dollars).

70. *See* DEQ, *supra* note 10.

71. Lamb-Weston, Inc. v. Or. Auto. Ins. Co., 341 P.2d 110 (Or. 1959), *modified on other grounds*, 346 P.2d 643 (Or. 1959).

72. *Lamb-Weston,* 341 P.2d at 117-19.

73. *Id.* at 111-12. More specifically, one policy (issued by St. Paul) insured Lamb-Weston, the company whose employee had an accident while driving a truck. *Id.* That truck had been leased by Lamb-Weston. *Id.* The other policy (issued by Oregon Auto Insurance Company) was issued to the lessor of the truck, and treated any lessee as an addi-

tended to restrict or eliminate the insurer's financial responsibility if other insurance was available to pay for the loss.[74] The two policies' other insurance clauses presented the court with an irreconcilable conflict. Rather than arbitrarily giving one policy precedence over the other, the court applied equitable principles, apportioning the loss pro rata by percentage of coverage.[75]

To understand what other courts can take from *Lamb-Weston* and apply in other allocation decisions, and to understand why *Lamb-Weston* is fully consistent with the all sums rule, it is important to realize that the *Lamb-Weston* court ultimately allocated costs *between insurers only* and that it did so only *after* it had determined that the insured was to be fully compensated by either one or both of its insurers. As the court explained:

> This issue, which is of first impression in this jurisdiction, *presents a question of importance only as between the insuring companies*, which bears upon the financial responsibility of each for the accrued loss, for it must be conceded by each insurance company that *if the other was not an insurer against this occurrence then it would be liable for the full amount.*[76]

Referring to an early case involving marine insurance, the court explained how this circumstance came to be:

> [I]t is the case of double assurance, that is, the assured has an obligation from two or more parties to perform the same thing, at the same time. When this is the case, the party holding such double assurance, may in the outset, and before making any election consider each debtor as liable for a proportionate part of the common burden, and recover accordingly; *or he may require either of the parties liable, to pay the whole*, and then it follows as a rule of law, founded upon the broadest principles of equity, that where one of two parties has paid the whole of a debt, for which each was originally and ultimately liable, *the party who has paid the whole or a disproportionate part of the common debt, shall have a remedy against the other for a contribution*, so that the burden may be borne equally according to their respective liabilities.[77]

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tional insured. *Id.*

74. *Id.* at 112-14.

75. *Id.* at 117-19.

76. *Id.* at 113 (emphasis added).

77. *Id.* at 135 (quoting Wiggin v. Suffolk Ins. Co., 35 Mass. 145, 153 (1836)) (emphasis added). This interpretation of *Lamb-Weston* has been discussed previously. *See* David A. Bledsoe & Stephen M. Feldman, *All Sums or Pro Rata? Dealing with Multi-Year Insur-*

Thus, *Lamb-Weston* is properly read as consistent with all sums allocation because, as between the insured and its two insurers, each insurer had an obligation to cover the policyholder's entire loss. This means that each insurer was liable to the policyholder for the entire loss, subject to the policy's limits and to the prohibition against double recovery. The Oregon Supreme Court and the Oregon Court of Appeals have applied this same all sums-like analysis in subsequent cases.[78]

With respect to the initial allocation between the insurer and the policyholder, though, *Lamb-Weston* is inconsistent with a pro rata approach. As the *Lamb-Weston* court explained, an insured holding double insurance has the option of requiring one insurer to pay all of its loss or of seeking a proportionate share from each insurer.[79] In the words of the Oregon Court of Appeals, "Each [of two insurers] would be liable for the entire loss if the other were not present in the case."[80] In contrast, under the pro rata approach, each insurer would be liable to the insured for only its pro rata share of the loss, never for the "entire loss."

2. Lamb-Weston *Is the Wrong Legal Standard for Insurer-Policyholder Disputes About the Meaning of Policy Language*

Although *Lamb-Weston* is compatible with pro rata allocation among liable insurers, it provides neither framework nor guidance for an action between a single insurance company and its policyholder about the meaning of the trigger and scope of coverage clauses. Other courts have noted precisely this distinction.[81]

Lamb-Weston holds that when two insurance companies disagree as to conflicting insurance clauses in their respective policies, and it is unclear how a court should interpret them, liability should

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ance Issues, 21 LITIG. J. 3, 5 (2002).

78. Hoffman Constr. Co. of Alaska v. Fred S. James & Co. of Or., 836 P.2d 703, 708 (Or. 1992) ("[T]he 'OTHER INSURANCE' condition, a standard provision contained in many umbrella insurance policies, is intended to limit defendant's liability in the event that other insurance *is available* to plaintiffs."); Liberty Mut. Ins. Co. v. Truck Ins. Exch., 420 P.2d 66, 70 (Or. 1966) ("[e]ach [of two insurers] would be liable for the entire loss if the other were not present in the case").

79. *Lamb-Weston*, 341 P.2d at 135.

80. *Liberty Mut.*, 420 P.2d at 70.

81. Armstrong World Indus. v. Aetna Cas. & Sur. Co., 52 Cal. Rptr. 2d 690, 710 (Cal. Ct. App. 1996) (policyholder/insurer disputes are primarily resolved by the plain language of the contract, whereas in disputes between insurers, "policy considerations may come into play").

be prorated between them as an equitable matter.[82] An entirely different situation is presented when the insurer and the policyholder, as unequal bargainers, disagree about how to interpret ambiguous clauses within a single insurance policy.[83] In such circumstances, if an Oregon court cannot resolve the ambiguity, and two reasonable interpretations can withstand judicial scrutiny, the court cannot turn to equitable factors. Instead, well-settled Oregon law holds that such a court must apply the rule of *contra proferentem* and construe any ambiguities against the drafter (the insurer).[84] In short, the proper legal standard for analyzing ambiguous policy language turns on whether the court is resolving an ambiguity among insurers only, or between an insurer and a policyholder.

3. *"Other Insurance" Clauses Have No Bearing on Environmental Insurance Allocation*

Lamb-Weston hinged on the interpretation of "other insurance" clauses.[85] Oregon appellate courts have never examined other insurance clauses in the environmental, long-term property damage context.[86] Courts outside of Oregon, though, have examined other insurance clauses in long-term environmental contamination cases and have soundly rejected their relevance to the question of environmental insurance allocation. Those courts agree that the sole function of other insurance clauses is to prevent a policyholder from recovering all of its damages from multiple policies that covered the same period[87]—in other words, to prevent the policyholder from recovering more than it lost from the insurers covering the same policy period. In contrast, the question of all sums or pro rata alloca-

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82. *Lamb-Weston*, 341 P.2d at 119.

83. *Supra* note 50; Am. Nat'l Fire Ins. Co. v. B & L Trucking & Constr. Co., 951 P.2d 250, 256 (Wash. 1998) ("Any ambiguities remaining after examining applicable extrinsic evidence are resolved against the drafter-insurer and in favor of the insured"). A more detailed discussion of Oregon contract law follows.

84. *Hoffman Constr. Co.*, 836 P.2d at 706-07.

85. *Lamb-Weston*, 341 P.2d at 119.

86. Moreover, Oregon appellate courts that have considered other insurance clauses have applied them only to resolve contribution claims between concurrent insurers, and never as a means of limiting an insured's recovery. *Lamb-Weston, Inc.*, 341 P.2d at 118-19 (describing the circumstances as one of "overlapping" coverage); Forest Indus. Ins. Exch. v. Viking Ins. Co., 728 P.2d 943, 944 (Or. Ct. App. 1986) (action for contribution between insurers); *Liberty Mut.*, 420 P.2d at 68 n.3 (*Lamb-Weston* applies "[w]here concurrent, applicable policies of insurance contain repugnant 'other-insurance' clauses.").

87. Owens-Illinois, Inc. v. United Ins. Co., 650 A.2d 974, 991 (N.J. 1994).

tion concerns the recovery of the policyholder's actual cleanup costs among successive insurers. Notably, even courts that have adopted pro rata allocation schemes realize that other insurance clauses have "nothing to do" with the determination of multi-year allocation issues:

> [Other insurance] clauses apply when two or more policies provide coverage *during the same period*, and they serve to prevent multiple recoveries from such policies. Here, by contrast, the issue was whether any coverage potentially existed at all among certain high-level policies that were in force during successive years. "Other insurance" clauses have nothing to do with this determination.[88]

B. Oregon Contract Law Governs Disputes Over Policy Terms Between an Insurance Company and a Policyholder

The *Lamb-Weston* approach for pro rata allocation *between insurers* is not the correct standard for adjudicating disputes *between policyholders and insurers* regarding the contested scope and trigger of coverage clauses in consecutive policies. Rather, Oregon law prescribes a well-defined methodology for analyzing such disputes. The interpretation of insurance policies follows contract law; therefore, the starting point is to ascertain the parties' intent as expressed by the plain language of the policy.[89]

To interpret a contract, Oregon courts adhere rigorously to three analytical steps. First, the court "examines the text of the disputed provision, in the context of the document as a whole. If the provision is clear, the analysis ends."[90] Second, if the text is not

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88. Consol. Edison Co. of N.Y., Inc., v. Allstate Ins. Co., 774 N.E.2d 687, 694 (N.Y. 2002) (emphasis added).

89. *Hoffman Constr. Co.*, 836 P.2d at 706 (citing Totten v. N.Y. Life Ins. Co., 696 P.2d 1082, 1086 (Or. 1985)). *See also* OR. REV. STAT. § 742.016(1) (2001).

90. Yogman v. Parrott, 937 P.2d 1019, 1021 (Or. 1997). The *Yogman* court also quotes Oregon Revised Statutes (ORS) section 42.230. In interpreting contracts, courts must "ascertain and declare what is, in terms or in substance, contained therein, not to insert what has been omitted, or to omit what has been inserted . . . ." *Yogman*, 937 P.2d at 1021. *See also* OR. REV. STAT. § 742.016(1) (2001) ("Except as provided in ORS § 742.043 [regarding temporary binders], every contract of insurance shall be construed according to the terms and conditions of the policy."); Fisher v. Cal. Ins. Co., 388 P.2d 441, 444 (Or. 1964) ("Contracts, including insurance contracts, are to be construed as a whole, not as a congeries of separate parts."); Mortgage Bancorporation v. N.H. Ins. Co., 677 P.2d 726, 728 (Or. Ct. App. 1984) (if policy language has plain, ordinary meaning subject to only one reasonable reading, court must end analysis there). Note that, unlike *Hoffman Construction Co.*, the *Yogman* court did not face an insurance question. *Yogman*, 937 P.2d at 1019. However, the

clear, the court "examine[s] extrinsic evidence of the contracting parties' intent."[91] Third, if the provision remains ambiguous, the court must apply relevant "maxims of construction."[92] In the case of insurance contracts, the relevant maxim dictates that a court must resolve any remaining ambiguity in an insurance policy against the insurer and in favor of the policyholder.[93] This maxim, *contra proferentem*, is commonly justified by the unequal bargaining positions of the policyholder and the insurer. Courts and legal commentators find that, unlike contracts between freely negotiating parties, insurance policies are adhesion contracts and that policyholders have no control over their fundamental terms.[94]

C. Oregon Contract Law, When Applied to the Allocation Problem, Yields the All Sums Rule

1. The Policy's Plain Language

To decide the allocation issue, the Oregon courts' task is to interpret the parties' intent as expressed by two standardized CGL clauses (stated earlier and reprinted here for reader convenience) that lie at the heart of every allocation dispute:

> The Company will pay on behalf of the insured *all sums* which the insured shall become legally obligated to pay as damages because of . . . property damage . . . to which this insurance applies, caused by an occurrence . . . .
>
> . . . .
>
> '[P]roperty damage' means (1) physical injury to or destruction of tangible property which occurs *during the policy period* . . . .[95]

Yogman decision is an authoritative contract opinion that sets forth the contract analysis framework much more clearly than does *Hoffman Construction Co.* and other insurance cases; for that reason, this Article cites *Yogman* for basic contract principles.

91. *Yogman*, 937 P.2d at 1022 (citing OR. REV. STAT. § 41.740 as allowing extrinsic evidence admissible "to explain an ambiguity" in contract).

92. *Id.*

93. *Hoffman Constr. Co.*, 836 P.2d at 706-07.

94. *See supra* note 50. This rule applies with particular force to policy restrictions or exclusions.

95. Am. Nat'l Fire Ins. Co. v. B & L Trucking & Constr. Co., Inc., 951 P.2d 250, 253 (Wash. 1998) (emphasis added). The terms of CGL policies rarely vary in substance because the insurance industry drafted the terms in standard-form policies that the policyholder is not typically free to negotiate. Salisbury, *supra* note 3, at 361-63. Thus, this Article assumes that an Oregon court would review a standard-form CGL policy. However,

Applying the first step of Oregon contract interpretation, the court must "examine the text of the disputed provision, in the context of the document as a whole."[96] In doing so, the court must "ascertain and declare what is, in terms or in substance, contained therein, not to insert what has been omitted, or to omit what has been inserted."[97]

The plain language of the CGL policy provides two separate clauses: one with a time restriction, and the other without. The *trigger* of coverage clause dictates that, to trigger a policy, some property damage must occur "during the policy period." On the other hand, the *scope* of coverage clause dictates which costs the insurer must pay once that property damage occurs. According to the scope of coverage clause, the insurer must pay "all sums which the insured shall become legally obligated to pay as damages because of" the property damage. The scope of coverage clause does not promise to pay "part of all sums," or even "all sums that arise during the policy period." Unlike the *trigger* clause, the *scope* of coverage clause simply does not contain a time restriction.

To apply the "during the policy period" language to the scope of coverage clause would be "to insert what has been omitted" and to rewrite the terms of the contract. This courts cannot do.[98] Other jurisdictions have strongly emphasized the distinction between the trigger and scope of coverage clauses in adopting the all sums rule.[99] Oregon courts, as well, have noted that "[t]he apportionment of liability is a separate issue from the trigger of coverage issue."[100] Thus, the plain language of the CGL policy supports the Oregon

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should a court be faced with policy terms that differ substantially from the standard form, the court, of course, would have to examine those terms, and the analysis in this part of the Article might not apply. Oregon law firmly requires insurance policy interpretation to begin with the contract terms themselves. *Hoffman Constr. Co.*, 836 P.2d at 706 (citing OR. REV. STAT. § 742.016(1)).

96. *Consol. Edison*, 774 N.E.2d at 694.

97. OR. REV. STAT. § 42.230 (2001).

98. *Id.* (in interpreting a contract, a court's job is to "ascertain and declare what is, in terms or in substance, contained therein, not to insert what has been omitted, or to omit what has been inserted . . . ."). *See also* Aerojet-General Corp. v. Transp. Indem. Co., 948 P.2d 909, 909, 932-33 n.26 (Cal. 1997) (reversing court of appeals' decision to rewrite contract terms under the court's notion of fairness and public policy); *B & L Trucking*, 951 P.2d at 257.

99. *See Aerojet*, 948 P.2d at 919 n.10, 932.

100. St. Paul Fire & Marine Ins. Co., Inc. v. McCormick & Baxter Creosoting Co., 870 P.2d 260, 265 (Or. Ct. App. 1994), *aff'd in part, rev'd in part*, 923 P.2d 1200 (Or. 1996).

courts' adoption of the all sums rule, or at least the conclusion that the all sums interpretation is reasonable.

The pro rata counterargument, in contrast, is analytically weak. Insurers argue that because a court must read the contract as a whole[101] in order to avoid rendering another clause meaningless or absurd,[102] the court must graft the trigger clause's time restriction onto the scope of coverage clause. This argument lacks merit because the scope of coverage clause has a reasonable meaning even when construed as written and without any time limit. Indeed, reading the scope of coverage clause without any time limit gives full effect to the remainder of the contract. Therefore, the pro rata approach does not preclude other interpretations of the clauses. At most, it is one of several reasonable constructions that creates an ambiguity during the first stage of contract interpretation.

2. Extrinsic Evidence

Should an Oregon court find the trigger and scope of coverage clauses unclear, it must turn, according to *Yogman v. Parrot*, to extrinsic evidence to determine the parties' intent.[103] This second layer of analysis also favors the all sums rule. The drafting history of the CGL policy provides the most useful extrinsic evidence because insurers use standard-form CGL policies developed by the insurance industry as a whole.[104] As spelled out above, the drafting history shows that insurers foresaw the possibility that their policies would cover damages that first arose during their policy periods but continued to cause damage in subsequent policy periods.[105]

Unless other evidence surfaces, pro rata arguments based on extrinsic evidence are unpersuasive. Insurers often argue that statements made as part of the CGL policy's drafting history carry no

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101. Fisher v. Cal. Ins. Co., 388 P.2d 441, 444 (Or. 1964) ("Contracts, including insurance contracts, are to be construed as a whole, not as a congeries of separate parts.").

102. Hoffman Constr. Co. of Alaska v. Fred S. James & Co. of Oregon, 836 P.2d 703, 708 (Or. 1992); Harlan v. Valley Ins. Co., 875 P.2d 471, 473 (Or. Ct. App. 1994).

103. Yogman v. Parrott, 937 P.2d 1019, 1022 (Or. 1997).

104. *See, e,g.*, Am. Home Prod. Corp. v. Liberty Mut. Ins. Co., 565 F. Supp. 1485, 1500-03 (S.D.N.Y. 1983); Montrose Chem. Corp. v. Admiral Ins. Co., 913 P.2d 878, 891 (Cal. 1995) ("Most courts and commentators have recognized . . . that . . . standardized industry provisions and the availability of interpretative literature are of considerable assistance in determining coverage issues.").

105. *See supra* note 43; J.H. France Refractories Co. v. Allstate Ins. Co., 626 A.2d 502, 508 (Pa. 1993).

weight because such statements were not made by employees of the specific insurance companies that happened to have appeared in that particular litigation.[106] The statements were made, however, by those whom the insurance industry as a whole hired to draft their standard CGL forms, which individual companies then affirmatively adopted for their own use. Surely the insurers knew how their drafters intended their standard forms to function.[107] The alternative explanation seems unreasonable—that the insurers were unaware of how the very people they relied on to draft their contracts meant for those contracts to function. Insurers are in the business of calculating risk. It appears entirely uncalculated, and antithetical to the purpose of the industry, for insurers not to understand the intent of their own contracts.[108]

3. Contra Proferentem

It appears unlikely that an Oregon court would reach the third step, application of *contra proferentem*. If, however, after following the first two steps, a court still finds the policy terms capable of more than one reasonable interpretation, the court must apply relevant "maxims of construction."[109] Given that the all sums interpretation of the trigger and indemnity clauses appears reasonable (at the least), even an Oregon court inclined towards the pro rata construction would likely find that at least two reasonable interpretations exist, and therefore conclude that the clauses are ambiguous.

In an insurance policy dispute between a policyholder and an insurer, the relevant maxim is *contra proferentem*, meaning that the ambiguous terms must be construed against the drafter (the insurer).[110] The rule in Oregon is clear: if ambiguity remains, it must be resolved against the drafter.[111] A court cannot, at this stage of

106. *See, e.g.*, United States Fid. & Guar. Co. v. Treadwell Corp., 58 F. Supp. 2d 77, 100-01 (S.D.N.Y. 1999).

107. *See, e.g., Montrose Chem. Corp.*, 913 P.2d at 891 (reasonable to assume that insurers knew "precisely" what change in policy terms entailed).

108. Presumably an insurer could argue that it was aware of the drafters' intent but nonetheless intended the all sums clause to operate differently. This argument, though, would backfire because it would appear to acknowledge the reasonableness of the all sums interpretation, which leads to a contractual ambiguity that would ultimately be resolved in the policyholder's favor.

109. Yogman v. Parrott, 937 P.2d 1019, 1022 (Or. 1997); Hoffman Constr. Co. of Alaska v. Fred S. James & Co. of Or., 836 P.2d 703, 706-07 (Or. 1992).

110. *Hoffman Constr. Co.*, 836 P.2d at 706-07.

111. *Id.*

contract interpretation, substitute the *Lamb-Weston* holding and fashion an equitable remedy. Furthermore, Oregon courts have not adopted the "sophisticated policyholder" rule that appears to be the sole reason why other state courts have failed to apply the maxim of *contra proferentem*. Thus, the all sums rule is the approach most consistent with each of the three steps required by Oregon law for insurance policy interpretation.

4. Fairness and Judicial-Economy Rationales Favor All Sums

Issues of fairness and judicial economy also strongly favor the adoption of the all sums rule. These issues are most important for the legislature's consideration because Oregon law requires courts to base their analysis on the policy's terms and prohibits courts from rewriting a contract to reflect its own ideas of fairness.[112] Nonetheless, we discuss these issues because, regardless of the letter of the law, fairness concerns clearly are of paramount importance to many courts.

a. The Public Interest

Equitable factors should lead Oregon courts to adhere to all sums allocation. Although most courts discuss the fairness of the competing rules to policyholders and insurers, they fail to consider impacts on the public interest. The all sums rule is far more protective of the public interest than are competing rules. This is true because all sums is the most effective approach for fully compensating a policyholder for its loss; and if a policyholder cannot fully recover, the public will suffer the consequences. First, a policyholder may not be able to fund a large portion of a cleanup immediately and, therefore, may delay its remediation of the site. In the meantime, the public suffers continuing threats to its health and its natural resources. Second, if the cleanup is simply too expensive and the policyholder cannot afford all or a part of it, Oregon taxpayers will inherit that expense through the DEQ's Orphan Site Program.[113]

The problem with the pro rata approach is that the policyholder cannot fully recover its cleanup costs in either of two fairly typical scenarios: (1) where any policy's proportionate share of liability ex-

112. *See* OR. REV. STAT. § 42.230 (2001) (in interpreting a contract, a court's job is to "ascertain and declare what is, in terms or in substance, contained therein, not to insert what has been omitted, or to omit what has been inserted.").

113. *See* DEQ, *supra* note 10.

ceeds policy limits;[114] or (2) where the policyholder is missing coverage in one or more periods because one of its insurers is now insolvent, it has lost its historic policies (not uncommon for policies issued in the early to mid 1900s), or the policyholders chose not to obtain environmental insurance during any period in which contamination occurred.

To illustrate, assume that during a nine-year period of coverage, three insurers covered the policyholder for three years each, at $1 million per year (or a total of $3 million per insurer). The total coverage, therefore, amounted to $9 million. If a cleanup cost $3 million, then under either a time-on-the-risk or percentage of coverage approach, each insurer would be responsible for one-third of the cost, or $1 million.

If the first insurer were insolvent, however, the policyholder could not collect the first insurer's share ($1 million), regardless of the fact that the solvent insurers' aggregate policy limits are more than sufficient to cover the insolvent insurer's portion. That is, even though both of the financially stable insurers contracted to provide $3 million of coverage, for a total of $6 million of coverage, the policyholder can only access $2 million. Pro rata allocation among insurers leaves $1 million for the policyholder to bear, even though the policyholder purchased adequate insurance to protect itself against the risk of environmental cleanup costs. If the policyholder cannot afford that sum, one of several negative results will follow. First, the cleanup may not be completed adequately. Second, the cleanup may be delayed until the policyholder can accumulate the necessary funds. Last, if the policyholder cannot generate enough capital, Oregon taxpayers will help foot the bill.

b. Policyholders' and Insurers' Interests

Two main concerns are at play for policyholders and insurers: the financial consequences of the contract, and fairness at the time of contracting. The scenario described above illustrates the financial consequences of each rule. Under the pro rata rule, the policyholder will argue that a $2 million recovery, for a $3 million cleanup, is unjust. Each insurer individually promised $3 million of coverage, and the policyholder promised to pay (and actually paid) its premiums. The policyholder upheld its end of the deal, and therefore so

114. For an example of this scenario, see *supra* note 25.

should the insurer. Contract law dictates that both should receive the benefit of the bargain. Yet now the policyholder can recover only $2 million out of an available pool of $6 million. The insurer receives a windfall, and the policyholder is left to pay out of pocket.

The insurer will argue that the all sums rule is unfair because one of the three insurers may be forced to pay for the entire cleanup. This argument, though, is flawed. First, one insurer will rarely wind up with all of the liability because any one insurer can obtain contribution from all other insurers whose policies are triggered. Thus, one insurer would pay all costs (up to its policies' limits) only if all other insurers are insolvent or no other policies can be found, an improbable situation. Second, even if all of the other insurers are insolvent, the remaining insurer is not stranded with unlimited liability. Rather, it must pay only up to its policy limits, which it originally bargained to pay. No insurer can be held to pay more than its policy limits, regardless of the amount of the cleanup.

The insurers' final argument concerning financial consequences appears to be that the all sums rule will result in enormous, unforeseen liabilities that will cause soaring premiums on new policies or that will bankrupt insurers. There is no evidence, however, that this parade of horribles has begun in any of the numerous jurisdictions that have chosen to follow the all sums rule.[115]

Ultimately, however, the fairness of either rules' financial consequences should not be judged by real life outcomes. Instead, fairness is a function of how well the rule reflects the risk transference at the heart of the insurance bargain. If an insurer fairly bargained for the risk, then the all sums rule is likewise fair because the insurer never ends up paying more than its fairly-bargained-for policy limits. That is, the insurer is simply fulfilling its fair contractual obligation (and further, insurers rarely are forced to pay their full policy limits because they spread their liability among all the solvent insurers through contribution actions). On the other hand, if the insurer never bargained for the risk that pollution liability now imposes, then forcing an insurer to pay its policy limit is repugnant. In that case, insurers are forced to absorb millions of dollars of unforeseeable liability for which they never agreed to pay.

Thus, we now turn to the pivotal issue: fairness at the time of contracting. The two sides can briefly be summarized as follows.

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115. *See* Keene Corp. v. Ins. Co. of N. Am., 667 F.2d 1034, 1034 (D.C. Cir. 1981); J.H. France Refractories Co. v. Allstate Ins. Co., 626 A.2d 502, 502 (Pa. 1993).

Proponents of the all sums rule argue that the policy terms were fair at the time of contracting because of the insurers' bargaining position. The insurer freely entered into the contract, and had the bargaining advantage by drafting all of the contract's terms. Since insurers gambled on an uncertain future, and controlled the terms that predicted the future, they must be willing to accept their good predictions with the bad. The opposite result penalizes the policyholder, who did not have the opportunity to influence the contract's terms. In that case, the policyholder is stuck with the downside but can never realize the upside.

Proponents of the pro rata rule counter that insurers never contemplated paying the enormous pollution liabilities that are now forced upon them. CGL policies were designed to cover actual lawsuits against the insured for discrete accidents, not regulatory actions by the government for pollution damage that spans several decades. Insurers argue that no one could have anticipated the enactment of statutes like the Federal Comprehensive Environmental Response, Compensation and Liability Act (CERCLA),[116] which imposed retroactive, strict liability for historic releases of hazardous substances. Furthermore, no one could have foreseen the extent of the damages, even if one could have predicted that liability might have arisen.

Considering all of these arguments, three issues swing the balance of the equities towards the all sums rule. First, because the equities turn upon fairness at the time of contracting, the only just result appears to place the burden on the party who had control of the terms at the time of contracting. The insurers exercised complete control over the policies' terms, and could have structured the insurance policies to either disclaim long-term environmental losses or to include a pro rata allocation rule to apply to them. With this sole authority comes both benefits and risk. Presumably, the insurers have predicted the future correctly on some issues and, therefore, should profit from those decisions. On the other hand, insurers have failed to foresee other circumstances, and sometimes will suffer the consequences. Because insurers are rewarded with the upsides of their future predictions, it seems only fair that they should also have to bear the financial downsides of such predictions. Moreover, there does not appear to be any rationale for placing the burden of the insurers' lack of foresight on policyholders. Because

116. 42 U.S.C. §§ 9601-9607 (2000).

insurance policies are contracts of adhesion, policyholders had no opportunity to influence their terms and should not be punished for mistakes in drafting them.

Second, the drafting history of the CGL policy indicates that the insurance industry was aware that long-term environmental losses could trigger multiple CGL policies and that there would be overlapping "all sums" coverage.[117] This seems to undercut the argument that environmental contamination claims were not foreseeable. Although the magnitude of the risk may have been difficult to ascertain, the existence of the risk was apparent. The consequences of the insurance industry's failure to limit or avoid that risk cannot be imposed fairly on the policyholders, who had no opportunity to draft the contract terms at all.

Third, and last, the public interest must be measured alongside that of the policyholder and the insured, and protection of the public interest clearly favors the all sums rule. As explained above, Oregon's public health, and the integrity of its lands and waters, continues to be put at risk as long as we lack a clear rule on allocation. The ensuing litigation delays cleanup by years and wastes millions of dollars in legal fees. Protecting the public interest favors the all sums rule because all sums is the most effective system for fully compensating the policyholder for its loss. If the policyholder does not completely recover, and the policyholder cannot afford to fund the remaining cleanup costs, then one of two consequences will result: (1) the policyholder will not conclude the cleanup (or will finish it inadequately); or (2) the Oregon DEQ's Orphan Site Program will be called upon to assist, meaning that Oregon taxpayers will foot the bill. Both scenarios harm Oregon's public interest.

V. CONCLUSION

The consequences of Oregon's lack of a clear rule on environmental insurance allocation are significant. Our state's waters and land are put at risk, along with public health, while litigation over the issue delays cleanup by months and years. This litigation also drains millions of dollars that could otherwise be spent on the cleanups. Oregon should follow the lead of the majority of state appellate courts and adopt the all sums rule. Oregon contract law, an analysis of the plain language of the CGL policy, and traditional principles of

117. *See supra* note 44.

contract construction all militate in favor of the all sums rule.

Finally, even though contract analysis does not allow a court to rewrite a contract based on notions of fairness, the equities also favor adoption of the all sums rule. The public interest is best served by all sums allocation, which guarantees cleanup funds and prevents shortfalls that ultimately must be borne by the Oregon public.