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ALI Restatement Misstates Law On Long-Tail Harm Claims

By **David Cox and Gerald Konkel** (March 29, 2018, 1:22 PM EDT)

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A restatement of the law is "primarily addressed to courts" with an "aim" to provide a "clear formulation[] of common law and its statutory elements or variations and reflect the law as it presently stands or might appropriately be stated by a court."[1] A restatement's articulation of black-letter legal rules is "expected to aspire toward the precision of statutory language," while also "reflecting the flexibility and capacity for development and growth of the common law."[2]

The current draft of the first Restatement of the Law on Liability Insurance is faithful to these principles in many respects; however, the draft section on "allocation" contravenes these principles by purporting to proclaim a default "pro rata" "rule" for "Allocation in Long-Tail Harm Claims Covered by Occurrence-Based Policies," that may be "altered" by a "term" in the policy, "except to the extent that the term cannot be harmonized with an allocation term in another policy that provides coverage for the claim."[3] This proposed default "rule" on allocation neither "reflects the law as it presently stands," nor does it "reflect the flexibility and capacity for development and growth of the common law." It does the opposite. Its effect, if the American Law Institute adopts it and it is then considered by courts, instead would be to stifle an ongoing vibrant consideration and reconsideration by courts of the "all sums" versus "pro rata" so-called "allocation" issue.[4]

As an initial matter, general liability insurance policies are contracts — contracts with highly standardized terms that frequently have emerged from richly extensive drafting histories — that are animated by basic contract interpretation principles. That is, generalized "rules" do not dictate how a policy responds, but rather consideration of policy language and its application to underlying liabilities is driven by reliance on common contract interpretation principles.

Of course, the prevalence of standardized policy language may allow "rules" to arise based on the interpretation of that language. The high courts in eight states have considered such language and definitively determined that the so-called "rule" for their states — not the "default" rule, but the "rule" founded on interpretation — is that standardized general liability policies respond on an "all sums" basis.[5] The draft restatement neither reflects the law "as it presently stands" nor as it likely will ever be in those states.

In other jurisdictions, multiple state intermediate appellate and trial courts, as well as federal courts, have held that the "rule" is "all sums" based on their interpretation of standardized language in historical general liability policies. Still other courts have articulated a rule that is some variation of "pro rata," not as a default, but based on a different interpretation that often is buttressed, or solely supported, by "public policy reasons."[6]

No court has adopted the default rule proposed by the draft restatement. No court likely ever will accept, in particular, the proposition that a so-called "default rule" of pro rata allocation prevails over a policy's contrary language simply because other policies in the policyholder's insurance program call for "pro rata" allocation. Such a rule would violate universal principles of contract interpretation.[7]

Curiously, the reporters who drafted the restatement invoke the New York Court of Appeal's "all sums" decision in Viking Pump as being "illustrative of" the so-called "pro rata default rule,"[8] but, more accurately, Viking Pump is illustrative of how consideration of pertinent standardized terms found in most historic general liability policies reveals that pro rata allocation is antithetical to contracting intent.

The Viking Pump court, in determining that "all sums" applied to asbestos-related bodily injury claims under policies that had standardized prior insurance and noncumulation of liability conditions ("noncumulation conditions") discussed the brittle "premise" upon which "pro rata allocation" relies. The court observed that pro rata allocation is "a legal fiction" that treats continuous and indivisible injuries spanning over a number of years "as distinct in each policy period."[9] The court held that the "very essence" or lone "premise" upon which this "legal fiction" rests is with policy language that "[that] limits indemnification to losses and occurrences during the policy period ... ."[10] Additionally, and importantly, the New York Court of Appeals reiterated that its prior "pro rata" "holding in Consolidated Edison does not require pro rata allocation in the face of policy language undermining the very premise upon which the imposition of pro rata allocation rests."[11]

The Viking Pump court determined that language in standardized noncumulation conditions "negates" the pro rata allocation premise in that such language plainly "contemplate[s]" that the same loss arising from a continuous injury could be covered by multiple policies in distinct policy periods during which injury transpired.[12] That Viking Pump recognized that standardized policy language in a condition reflects a contractual intent to cover "all sums" of the policyholder's liability that triggers coverage has profound interpretative significance based on the fundamental structure of general liability policies.

A condition does not grant coverage, nor does it expand or contract coverage promised elsewhere in a policy. Instead, it regulates or "conditions" coverage that already is extant in the policy. It is the "insuring agreement" in a policy, not a "condition," that "specifies what will be covered under the policy" and sets forth a policy's basic grant of coverage.[13] Accordingly, it cannot be the presence or absence of a noncumulation condition that determines whether a policy responds on an all-sums basis. Instead, noncumulation conditions offer contextual evidence that "all sums" already is embodied in the coverage grant. That is, the inherent structure and logic of a standardized insurance policy, as well the drafting history of noncumulation conditions, reflect the truth that the insuring agreements in these standard policies were intended to provide coverage on an "all sums" basis.

One of the noncumulation conditions considered by the Viking Pump court, in pertinent part, provided:

It is agreed that if any loss covered hereunder is also covered in whole or in part under any other excess Policy issued to the Insured prior to the inception date hereof[,] the limit of liability hereon . . . shall be reduced by any amounts due to the Insured on account of such loss under such prior insurance. Subject to the foregoing paragraph and to all the other terms and conditions of this policy in the event that personal injury or property damage arising out of an occurrence covered hereunder is continuing at the time of termination of this Policy the Company will continue to protect the Insured for liability in respect of such personal injury or property damage without payment of additional premium.[14]

This language is slightly modified from the London Market Insurers' "LRD 60" form, the first umbrella policy form to utilize a noncumulation condition.[15]

The Viking Pump court found that the first paragraph of this noncumulation condition:
plainly contemplate[s] that multiple successive insurance policies can indemnify the insured for the same loss or occurrence by acknowledging that a covered loss or occurrence may 'also [be] covered in whole or in part under any other excess [p]olicy issued to the [insured] prior to the inception date' of the instant policy.[16]

This first paragraph of the noncumulation condition is not an "insuring clause." It does not directly set forth any promise to the insured that the policy it has in its hands responds on an "all sums" basis. Instead, it is a condition that "contemplates," as the Viking Pump court recognized, that standardized policies from the era respond on such a basis.

With respect to the second paragraph of this condition, what the Viking Pump court termed a "continuing coverage clause," the court held that it
reinforc[es] our conclusion that all sums—not pro rata—was intended in such policies. The continuing coverage clause expressly extends a policy's protections beyond the policy period.[17]

The Viking Pump court held that this extension of a policy's protection beyond the policy period calls for "all sums" because "under a pro rata allocation, no policy covers a loss that began during a particular policy period and continues after termination of that period."[18]

The "continuing coverage clause" in the noncumulation condition in the LRD 60 umbrella form and other umbrella and excess policies illustrates the fact that "[i]n contemporary liability policies insuring clauses most commonly appear in sections of the policy with the label 'insuring agreement' or similar labels, but they also appear in other parts of a liability policy."[19] The LRD 60 form's insuring clauses are found in both the first "insuring agreement" of the policy as well as, redundantly, in the second "continuing coverage clause" paragraph of "Condition C Prior Insurance and Non Cumulation of Liability." As discussed herein, both of these insuring clauses redundantly extend protection to the insured for liability resulting from an occurrence that takes place in part during the policy period even for continuing injury beyond the policy period.

The London Market Insurers revised its standard umbrella form in 1971 with its drafting of the Umbrella Policy (London 1971) form ("London 1971 umbrella form"). The London 1971 umbrella form was a reworking of the LRD 60 form that was primarily developed "to bring the policy language in line with certain language that was being used at the time in comprehensive general liability policies that were being issued as the schedule[d] primary policies ... ."[20] The London 1971 umbrella form modestly revised the LRD 60 form's insuring agreement and dropped the "continuing coverage clause" from the noncumulation condition.[21]

Last year, Peter Wilson, one of three drafters of the London 1971 umbrella form, testified as corporate designee for Certain Underwriters at Lloyd's London, and Certain London Market Companies on the drafting of the LRD 60 and London 1971 umbrella forms in a case styled, Cannon Elec. Inc. v. ACE Prop. and Cas. Co., Case No. BC 290354 (Los Angeles Cty. Super. Ct.). Wilson testified that the London 1971 umbrella form drafters removed the "continuing coverage clause" in the noncumulation condition as they "felt it was redundant" and not needed because:

Well, basically the whole intent of the policy is that if you have a loss that is in progress, in other words, the loss starts during the policy period but the policy expires and that loss is still in progress, it's not the intention to cut the assured off and say, oh, the policy is expired and we are not going to deal with the third-party damage or injury that is being caused.

I mean a typical example could be a plant explosion where there is damage to third-party properties by fire. The fire spreads. They can't get the fire out and the fire is still causing damage to other third-party properties after the expiration of the policy. Because it started during the period of the policy, that is a loss occurrence that is in progress, and we would be responding to all the damage resulting from that explosion.[22]

Wilson testified that this promise to cover "all the damage" — "all sums" of it — for a loss in progress, including loss beyond the policy period, was not only the intent of the London Market Insurers' umbrella policies but "it's basically ... the intention of all policies and you can look at many other policy forms and it doesn't spell that out. It doesn't have to spell it out."[23]

The Viking Pump court found that the "continuing coverage clause" "reinforced" its conclusion that policies were "intended" to respond on an "all sums" basis and not on a "pro rata" basis because "under a pro rata allocation, no policy covers a loss that began during a particular policy period and continued after termination of that period ... ."[24] Last year, London Market Insurers, through their corporate designee, admitted no "continuing coverage clause" is necessary for coverage that extends the policy's protection beyond the policy period because "the whole intent" of the policies — all standard general liability policies — is not to "cut the assured off" if a loss progresses beyond the policy period but rather to respond to "all the damage" resulting from that progressing loss.

The London Market Insurers' umbrella policy forms were drafted against the backdrop of underlying standard comprehensive general liability ("CGL") policies. The London forms' umbrella insuring agreements and pertinent definitions are substantively the same as those in the underlying standard CGL policies. These insuring agreements do not limit indemnification for damages to just that part of an occurrence's multiyear loss that took place during the policy period; rather they expressly extend protection for consequential damages and resulting death from a covered occurrence "at any time" that death takes place.[25] Neither the words in these policies evince, nor were they actually intended to, "cut the assured off" for such continuing losses. The "pro rata premise" that Viking Pump identified falls apart when one examines all of the pertinent terms of these standardized insuring agreements, particularly in the context of asbestos-related bodily injury claims.[26]

Beginning with the London LRD 60 umbrella form, umbrella and excess insurers in London and then in the United States began utilizing standardized noncumulation conditions to grapple with the broad grant of coverage set forth in their policies. As a result, noncumulation conditions are ubiquitous and standard conditions in many umbrella and excess follow-form occurrence-based general liability policies that were purchased historically by policyholders to increase coverage limits above a primary layer as part of their integrated general liability insurance programs. They are less common in underlying first-

dollar occurrence-based CGL policies,[27] although the drafters of the standardized CGL forms recurrently considered adding them to the standard form to grapple with the fact that the policies were broadly written such that an insured could "cumulate" or "pyramid" multiple policy limits from multiple policy years to respond to the same loss for the same occurrence.[28] The reason CGL policies in historic insurance programs typically lack noncumulation conditions that excess policies have was the merchandising pressures on CGL insurers which were seeking to market truly "comprehensive" general liability policies.

Despite the fact that most umbrella and excess follow form policies in historic insurance programs have noncumulation conditions and most CGL policies do not, the insuring agreements of CGL policies are substantively the same as those in most umbrella and excess follow form policies. Putting to the side its "harmonizing" exception to the exception of the rule, ALI's proposed default "pro rata" allocation rule that could be "altered" by a term such as a noncumulation condition in a policy, if followed by courts, would lead to absurd results. Most umbrella and excess policies in an insurance program would be construed as responding on an "all sums" basis. A handful of excess policies in the same program that have identical insuring agreements and charge similar premiums as the other policies in the program but lack noncumulation "conditions" and all primary policies would be construed as responding on a "pro rata" basis. That hybrid allocation result does not make sense when one considers that all such policies have standardized terms including substantively identical insuring agreements and were sold and bought in the context of assembling a coherent and integrated insurance program.[29] That result — the logical consequences of the proposed default pro rata allocation rule — already has been rejected, inelegantly but unequivocally, by the Second Circuit in the long-standing Olin Corporation coverage litigation. In the wake of Viking Pump, the Second Circuit in that case rejected an excess insurer's argument for a hybrid allocation/exhaustion approach.[30] The excess policies at issue in the case had noncumulation conditions.[31] The underlying primary policies did not.[32] The excess insurer argued that while "all sums" applied to its policies in light of the Viking Pump decision, a "pro rata approach" should be applied to the underlying primary policies to exhaust their policy limits.[33] The Second Circuit rejected the argument.[34]

The proposed restatement on this allocation issue does not "reflect the law as it presently stands" in any state or territory of the United States. Its default-pro rata-rule-but-could-be-altered-by-a-term structure solely rests on an insurer-view of a single case, the Viking Pump decision, instead of "reflecting the flexibility and capacity for development and growth of the common law." The recent Olin Corporation decision already reflects both the capacity of development of the law on this issue and the fact that the default pro rata-allocation-unless-a-policy-has-a-noncumulation condition insurer view of New York law may not be accurate. Its "harmonizing" exception to the exception of the rule is contrary to fundamental policy interpretation principles.

It is assumed that restatement will be submitted at the annual meeting in May for consideration and a vote of the ALI membership. However, it would be best for this section on allocation to be referred back for revision and resubmission so that it could more accurately reflect the current state of the law and an openness to the courts' continued thoughtful consideration and reexamination of the issue.

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[1] Restatement of the Law Liability Insurance, intro. at x (Council Draft No. 4, 2017) (quoting excerpt of the Revised Style Manual approved by the ALI Council in January 2015).

[2] Id.

[3] Restatement of the Law Liability Insurance, §41 (Council Draft No. 4, 2017).

[4] Historically, the issue perhaps has been misleadingly labeled as a question of "allocation," which implicitly suggests that multiple policies and/or parties must be apportioned — or "allocated" — responsibility for discrete shares of the policyholder's entire liability. Fidelity to policy language and canonical precepts of interpretation instruct that the issue more fairly implicates a scope of coverage issue: whether an historic standardized general liability policy's coverage grant for a continuous multi-period harm arising out of an occurrence covers all damages emanating from that harm (subject to policy limits) or only a "pro-rata" share of such damages.

[5] See State v. Cont'l Ins. Co., 55 Cal. 4th 186 (Cal. 2012); Hercules, Inc. v. AIU Ins. Co., 784 A.2d 481, 494 (Del. 2001); Zurich Ins. Co. v. Raymark Industries Inc., 514 N.E.2d 150 (Ill. 1987); J.H. France Refractories Co. v. Allstate Ins. Co., 534 Pa. 29 (Pa. 1993); Goodyear Tire & Rubber Co. v. Aetna Cas. & Sur. Co., 95 Ohio St. 3d 512 (Ohio 2002); Lennar Corp. v. Markel Am. Ins. Co., 413 S.W.3d 750, 758-759 (Tex. 2013); American Nat'l Fire Ins. Co. v. B&L Trucking & Constr. Co., 134 Wash. 2d 413 (Wash. 1998); and Plastics Eng'g Co. v. Liberty Mut. Ins. Co., 315 Wis. 2d 556 (Wis. 2009).

Importantly, the high courts in these eight states have been called upon to consider the issue and have ruled on it, sometimes long ago and sometimes more than once, because a substantial proportion of all general liability policies that potentially cover long-tail claims issued to companies that actually have had such liabilities were issued from or to these states. Furthermore, courts in other states, pursuant to their conflicts of law principles, often have applied these eight states' "all sums" allocation law in coverage disputes involving long-tail claims. Consequently, the influence of the eight "all sums" states very likely weighs heavier than others when assessing the balance of laws on the "all sums" versus "pro rata" question. This illustrates that assessing where the law "is" on a contract issue and where it is trending, is not simply a matter of either "counting" how many different state and federal courts have addressed a policy interpretation issue or reviewing only the recent cases on the issue but rather it also involves considering which courts have resolved the issue and their reasoning.

[6] See In re Viking Pump, Inc. & Warren Pumps, LLC, Insurance Appeals ("Viking Pump"), 27 N.Y.3d 244, 256-57 (N.Y. 2016) (compiling cases holding in favor of "pro rata" allocation).

[7] See e.g. Viking Pump, 27 N.Y.3d at 257 ("[W]e did not reach our conclusion in Consolidated Edison by adopting a blanket rule, based on policy concerns, that pro rata allocation was always the appropriate method of dividing indemnity among successive insurance policies. Rather, we relied on our general principles of contract interpretation and made clear that contract language controls the question of allocation. . . . We did not adopt a strict rule mandating either pro rata or all sums allocation because insurance contracts . . . should 'be enforced as written,' and 'parties to an insurance arrangement may generally 'contract as they wish and the courts will enforce their agreements without passing on the substance of them.") (citations omitted).

[8] Restatement of the Law Liability Insurance, Reporters' Note cmt. c. ("The New York Court of Appeals, in [Viking Pump] articulated and applied a version of the pro rata by years rule that is consistent with, and illustrative of, the pro rata default rule adopted in this Section.")

[9 Id. at 261.

[10] Id. at 261.

[11] Id. at 263 (discussing Consolidated Edison Co. v. Allstate Ins. Co. ("Consolidated Edison"), 98 N.Y.2d 208, 774 N.E.2d 687 (N.Y. 2002)). Importantly, the Consolidated Edison court in resolving how loss should be allocated for property damage taking place over decades resulting from different "leaks, spills, and drips", neither determined how many "occurrences" were involved nor the issue of "trigger." Consolidated Edison, 98 N.Y.2d at 224 ("[Con Edison's] theory of the case was that while the plant was in operation—long before any of the policies were issued—there were leaks, spills and drips that eventually migrated to the groundwater. Con Edison planned to establish that the dispersion of the pollutants was a gradual, continuous process, thus creating an inference that there was an accident or occurrence during each and every policy period, though there is no evidence of an accident during any particular policy period.") The Consolidated Edison court concluded that because it was uncertain when the occurrence or occurrences took place that resulted in property damage, pro rata allocation was "consistent with the language of the policies." Id. Closely read, Consolidated Edison turns on the court's determination that there was a possibility that separate occurrences were taking place during separate policy periods and grappling with how loss for such property damage should be allocated among policies. See id. (finding that joint and several allocation is particularly inappropriate where "it is impossible to determine the extent of the . . . damage that is the result of an occurrence in a particular policy period" because it "presupposes [an] ability to pin an accident to a particular policy period") (emphasis added). As discussed infra, there are language and arguments that the New York Court of Appeals did not consider in either Consolidated Edison or the very recent Keyspan Gas East Corp.v.Munich Reinsurance America, Inc. decision, where the insured conceded pro rata allocation applied, that demonstrate by the general liability policies' standard terms, particularly for coverage for damages for asbestos related bodily injury claims, the policies cannot be sensibly read as responding on a "pro rata" basis.

[12] Id. at 261.

[13] Restatement of the Law Liability Insurance, §3 cmt. b. (Council Draft No. 4, 2017) ("Contemporary insurance policies commonly contain a section labeled "insuring agreement" that specifies what will be covered under the policy provided that all of the conditions in the policy are met and no exclusions apply. Insuring agreements always contain insuring clauses . . . .")

[14] Viking Pump, 27 N.Y.3d at 261.

[15] The purpose of the non-cumulation condition in the occurrence-based LRD 60 form was to prevent a double recovery for the same loss from an occurrence that is otherwise redundantly covered in whole under earlier accident-based Price Forbes umbrella policy forms. See Christopher C. French, The "Non-Cumulation Clause": An "Other Insurance" Clause by Another Name, 60 U. Kan. L. Rev. 375, 387 & n. 25 (2011); see also Transcript of Deposition of Peter Wilson at 129:7-136:17 (Jan. 24, 2017), Cannon Elec., Inc. v. ACE Prop. and Cas. Co., Case No. BC 290354 (Los Angeles Ct. Super Ct.) [hereinafter Wilson Deposition I] (a copy of this transcript is on file with the authors).

[16] Id.

[17] Id. at 262.

[18] Id.

[19] Restatement of the Law Liability Insurance, §31 cmt. a. (Council Draft No. 4, 2017).

[20] Wilson Deposition I at 71:10-72:2; see also Transcript of Deposition of Peter Wilson at 11:5-19 (Sept. 29, 1998), Interlake Corp. v. Certain Underwriters Lloyd's London, No. 2-97-0277 (Ill. App. Ct. Feb. 10, 1998) [hereinafter Wilson Deposition II] (a copy of this transcript is on file with the authors).

[21] Almost all umbrella and excess policies in historic general liability insurance programs contain or follow form to standardized language in either of London Market Insurers' LRD 60 or London 1971 umbrella forms including these policies' non-cumulation conditions. This is so because domestic insurers followed the market leader and adopted the policy language for their own forms or issued following form coverage above London Market Insurers' coverage.

[22] Wilson Deposition I at 95:14-97:2, 97:4-23.

[23] Wilson Deposition I at 98:5- 11.

[24] Viking Pump, 27 N.Y.3d at 262.

[25] The drafting history of the standardized terms "damages" and "bodily injury" (which is defined to include "death at any time resulting therefrom") demonstrates that the intent of all standard CGL and umbrella forms was, as the language plainly states, to cover all consequential damages including specifically damages for consequential death flowing from injury during the policy period — even such damages and death that take place beyond it. See Explanatory Memorandum of Changes Comprehensive General Liability Insurance February 1, 1966 Edition at 8, 9; see also Alfred E. Reichenberger, The Gen. Liab. Ins. Poly's—Analysis of 1973 Revisions, in FRED L. BARDENWERPER & DONALD J. HIRSCH, GEN. LIAB. INS.—1973 REVISIONS, 10 (1974) ("[A]death which results after the end of the policy period will be covered if it was caused by an injury which occurred during the policy period."); George H. Tinker, Comprehensive General Liability Insurance — Perspective and Overview, 25 Fed'n Ins. Couns. Q. 217, 240 (1975) ("[D]eath which results after the end of the policy period, but which is the result of an injury which occurred during the policy period, is not to be regarded as a separate bodily injury but will be *covered by the policy in force at the time of injury* ... .") (emphasis added); Robert E. Keeton, Insurance Law Basic Text, 84 (1971) (discussing the 1966 CGL form "This change in the form of the provisions about 'bodily injury,' 'death' and 'damages' clarifies the point that one cannot double the amount within policy limits by claiming that death is a separate injury; it is treated as part of the original injury even when it occurs at a substantially later time."); see also Wilson Deposition I at 98:18-100:10 (testifying about the "death at any time" language in the London 1971 umbrella form, and explaining that death after the policy period resulting from injury during that period is "pulled into" the policy's occurrence limit).

[26] Liability insurance coverage must be read against the underlying liability it is intended to cover. A person injured by the tortious action of another is entitled to a single recovery in tort that will compensate the plaintiff for all consequential (proximately caused) harms — past, present and future — flowing from that injury:

Compensatory damages are not limited to recovery for past and present losses and injuries up to the time of trial or settlement. The plaintiff may also recover prospective damages which proximately result from the misconduct and flow from the past harm. ***If the injury is continuing in nature or the wrong done has permanent or future consequences, the law permits damages for such consequences****, provided the award does not violate the rule requiring reasonable certainty.*

N.Y. Prac., N.Y. Law of Torts § 21:13 (emphasis added); see also Restatement (Second) of Torts §910 ("One injured by the tort of another is entitled to recover damages from the other for all harm, past, present and prospective, legally caused by the tort.") Consequential damages, accordingly, may compensate for not-yet-manifested injury (including pain, suffering, loss of consortium, and death), provided it is reasonably certain to flow from the injury already suffered:
Consequential damages may flow later from an injury too slight to be noticed at the time it is inflicted. . . . so far as such consequential damages may be reasonably anticipated, they may be included in a recovery for the original injury, though even at the time of the trial they may not yet exist.

Schmidt v. Merchs. Despatch Transp. Co., 270 N.Y. 287, 297-301 (1936) (superseded by statute regarding statute of limitations) (emphasis added). For bodily injury claims, damages for "resulting" death "at any time" and resulting "care and loss of services," which by their nature as a damages award is prospective, are plainly covered under the terms of standard insuring agreements in historic occurrence-based general liability policies — all sums of such damages subject to policy limits — even though the damages may take place beyond the policy period.

[27] Liberty Mutual Insurance Company did make a noncumulation condition standard in its CGL policies.

[28] See "Definition of Occurrence", a report of the Joint Drafting Committee to the Joint Forms Committee, pages 4-5, attached to April 17, 1961, letter from George Katz to Edward Earle of the National Bureau ("Our proposal then is as follows: ... introduce a new provision, along the lines suggested by the final paragraph of Insuring Agreement IV in Dick Schmalz's memo, to avoid accumulation of limits in the exposure type of case that results when exposure continues over successive policy periods."); see also Explanatory Memorandum from the Joint Forms Committee to the Rating Committees of the National and Mutual Bureau Regarding May 4, 1961 Draft, June 7, 1961, page 7 (proposing a noncumulation condition "designed to prevent cumulations of liability under successive policies").

[29] The "harmonizing" exception to the exception of the default "pro rata" rule perhaps reflects the cognitive dissonance that arises from (i) assuming that the default rule for standardized general liability policies is "pro rata," (ii) recognizing that policies with certain standardized conditions — noncumulation conditions — simply cannot be construed as responding in any way other than an "all sums" basis, and (iii) an understanding that both categories of such policies are found in the same insurance "programs" with many of the same standardized terms and ought not to be construed in radically different ways. The way to relieve the cognitive dissonance is to recognize the truth: standardized general liability policies — those with noncumulation conditions and those without — were written in a manner and were intended to respond on an "all sums" basis.

[30] Olin Corp. v. OneBeacon Am. Ins. Co., 864 F.3d 130 (2017) (rejecting "'hybrid' allocation/exhaustion scheme" by rejecting excess insurer arguments that underlying primary policies that lacked noncumulation conditions had to be exhausted with a "pro rata approach.")

[31] Id. at 137.

[32] Id. at 144.

[33] Id. ("OneBeacon encourages us to adopt a "hybrid" allocation/exhaustion scheme, contending that, because the underlying INA policies do not contain Condition C [a non-cumulation condition], we must use pro rata allocation to determine whether the underlying primary policies have been exhausted. ... Only then, it argues, once OneBeacon's policies have attached, does all sums allocation apply to OneBeacon's excess policies.")

[34] Id. at 144-145. As to the proposed rule's call for courts making a "harmonizing" "pro rata" allocation ruling to policies in a program where some policies have a "term" pointing to "all sums" and others, according to the Reporters, do not, Olin, applying New York law, if anything, stands for the proposition that such harmonizing should be in favor of "all sums."