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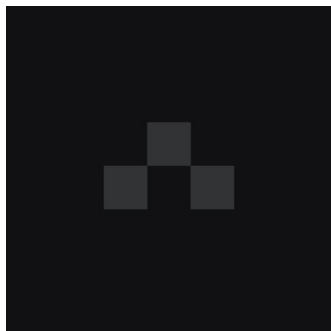
Second Circuit Finds an Exception to Pro Rata Allocation Rule

March 4, 2013

For over a decade now, courts across the nation have wrestled with the appropriate approach to allocating loss in insurance coverage cases concerning continuous property damage that takes place over many years. In trying to resolve this issue, judges face a number of significant obstacles. First, the policy language in the general liability policies that are usually implicated does not squarely address the issue, in part, because most of these occurrence-based policies were issued many years before long-term environmental damage became a widely understood phenomenon. Second, it is rarely possible to ascertain, even with the assistance of experts, what portion of the property damage — for example, groundwater contamination — took place in a given year within the period of years at issue.

Courts typically, either based on policy language or public policy, or some combination of both, end up in one of two camps applying one of two approaches: (i) the pro rata allocation approach, in which liability for property damage is divided over the applicable period of years, with an equal portion of the damages allocated to each policy year; or (ii) the all sums approach, in which the insured can recover the entire amount of damages, subject to policy limits, from any one policy, and the insurer must then seek contribution from the other insurers that issued policies during the applicable time period.

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