One Per Occurrence Limit per Policy Period or One Per Occurrence Limit . . . Period? ? New York Court of Appeals Reaffirms Noncumulation Clause Means what it Says

Introduction

Liability insurance policies written on a per occurrence basis generally provide coverage for losses that occur during the policy period and arise out of an ?occurrence.? In general (and subject to policy definitions) ?occurrence? means not only a temporally discrete accident or event, but also ?continuous exposure? to the same harmful conditions. Such ?continuous exposure? may occur during more than one consecutive policy period and cause what is, for all intents and purposes, indivisible, continuing injury or property damage. Examples of that type of continuous exposure resulting in continuing injury or damage include, among others, exposure of tenants to cracked or peeling lead paint in an apartment building for a period of years, exposure of persons to asbestos products, or exposure of groundwater to hazardous waste over a period of years, resulting in liability for clean-up costs under the Comprehensive Environmental Response, Compensation, and Liability Act (?CERCLA?) (a/k/a ?Superfund?).

Issues concerning the timing and number of occurrences, and per-policy allocation of loss, are particularly important in coverage cases where continuous exposure to conditions spans multiple policy periods and causes continuing, indivisible injury or property damage during those periods. The liability insurer's indemnity obligation is limited to a specified limit per occurrence. In a continuous exposure case, the ?occurrence? happens continuously over a period during which multiple consecutive policies are in effect.. There is one occurrence?sometimes referred to as a ?continuing occurrence??but it takes place during each of several consecutive policy periods. Does that mean that the insurer is obligated to pay a maximum of one per occurrence limit for all loss that occurs during its total coverage period, irrespective of how many policies it issued during that period, or must it pay up to one per occurrence limit per policy for whatever portion of the loss falls, or is deemed to fall, within that policy?

The answer to that question can have significant economic consequences for the liability insurer, and, of course, its reinsurers. If a liability insurer issues a landlord three, consecutive one-year-term policies with per occurrence limits of $X, and a tenant sustains injury attributable to continuous exposure to cracked or peeling lead paint, then, all else equal, the answer will determine whether the insurer's maximum total indemnity obligation is $X or three-times that amount ($X multiplied by the number of policies involved).

Noncumulation Provisions and Hiraldo v. Allstate

?Noncumulation? provisions are designed to limit the insurer's liability to a single per occurrence limit when continuous exposure to the same harmful conditions causes bodily injury or property damage during multiple policy periods. In Hiraldo v Allstate Ins. Co., 5 N. Y.3d 508 (2005), the New York Court of Appeals interpreted a noncumulation clause that provided:

Regardless of the number of insured persons, injured persons, claims, claimants or policies involved, our total liability under Business Liability Protection coverage for damages resulting from one loss will not exceed the limit of liability for Coverage X shown on the declarations page. All bodily injury, personal injury and property damage resulting from one accident or from continuous or repeated exposure to the same general conditions is considered the result of one loss.

5 N.Y.3d at 512 (quoting noncumulation clause). Finding this language ?clear,? a unanimous Court of Appeals, in a case presenting facts materially identical to our lead paint exposure hypothetical, held that the clause limited to a single policy limit the insurer's obligation to indemnify the insured landlord. Id. at 511, 512-13.

Nesmith v. Allstate: Reaffirming Hiraldo

In Nesmith v. Allstate Ins. Co., __ N.Y.3d ___, 2014 NY Slip Op 08217 (Nov. 25, 2014), the Court of Appeals interpreted a materially identical clause as limiting to one policy limit claims brought for lead paint exposure, but in a situation involving two separate groups of claimants. Associate Judge Robert S. Smith?who wrote the opinion of the Court in Hiraldo? wrote the majority opinion in Nesmith, in which Associate Judges Victoria A. Graffeo, Susan Phillips Read and Sheila Abdus-Salaam joined. Associate Judge Eugene F. Pigott, Jr. wrote a dissenting opinion in which Chief Judge Jonathan Lippman joined. Associate Judge Jenny Rivera did not take part in the decision.

In Nesmith the Allstate Insurance Company, beginning in 1991, issued three consecutive one-year policies to the insured

landlord-owner of a two-family rental home, which contained a noncumulation clause stating:
Regardless of the number of insured persons, injured persons, claims, claimants or policies involved, our total liability under the Family Liability Protection coverage for damages resulting from one accidental loss will not exceed the limit shown on the declarations page. All bodily injury and property damage resulting from one accidental loss or from continuous or repeated exposure to the same general conditions is considered the result of one accidental loss.
Slip op. at 2. The per occurrence limit on the declarations page was $500,000.00. Id.

Plaintiff A and her children lived in one of the apartments from November 1992 through September 1993. In July 1993, the New York State Department of Health notified the landlord that one of A's children had elevated lead levels in her blood and that there were a number of areas of the apartment that violated the Department's lead paint regulations. The Department identified, and ordered the landlord to correct, the violations; the landlord made repairs; and in 1993 the Department notified the Landlord that the violations had ?been corrected.? See slip op. at 2-3.

Family A moved out in September 1993 and Family B, who also had children, moved into the apartment. One of Family B's children developed elevated lead levels, and in December 1994 the Department notified the landlord of violations and directed the landlord to address them. According to the Court ?the parties seem to assume that the elevated readings resulted at least in part from events on or before September 29, 1994, the last day of [the insurer's] coverage.? See slip op. at 3.

In 2004 the children of Families A and B separately commenced law suits against the landlord seeking damages for bodily injuries that were allegedly caused by their exposure to lead paint while living in the apartment. The children of Family A action settled for $350,000.00, which the insurer paid.

The children of Family B action was settled in 2008 by a stipulation that left open the number of policy limits issue for future litigation. Allstate paid $150,000.00 of this second settlement, which it claimed was the remaining amount of insurance coverage. The children of Family B then brought a declaratory judgment action against Allstate, which alleged that it was entitled to collect another $350,000.00 from Allstate because a separate $500,0000.00 policy limit allegedly applied to the injury the Family B children allegedly suffered.

The trial court ruled in favor of the Family B children, holding that a separate limit applied because the Family B children were not injured by exposure ?to the same conditions? as the Family A children.

The Appellate Division, Fourth Department reversed, holding that, ?under Hiraldo, the renewal of the policy could not make an additional limit available; that, under the plain terms of the noncumulation clause, the number of claims and claimants could not do so either; and that the injury to the [Family A and Family B] children. . . resulted ?from continuous or repeated exposure to the same general conditions,' so that the injuries were only one "accidental loss" within the meaning of the policy.? See slip op. at 3-4 (citing Nesmith v. Allstate Ins. Co., 103 A.D.3d 190, 193-94 (4th Dep't 2013)). New York's highest court granted leave to appeal and affirmed.

The Court explained that the language of the Hiraldo noncumulation clause was materially identical to the noncumulation clause in the case before it. Hiraldo, said the Court, ?involved a single child, who had lived in the building in question for three years while three successive Allstate policies, each with a limit of $300,000, were in force[,]? and ?[t]he plaintiffs claimed that the child had been exposed to lead paint continuously during the terms of all three policies, and that therefore $900,000 in coverage was available to him.? Slip op. at 4. The Hiraldo Court rejected the plaintiff's argument because it was ?inconsistent with the policy's plain statement that Allstate's liability was limited to the amount shown on the declaration page, $500,000, ?[r]egardless of the number of . . . policies involved.'? See slip op. at 4-5.

?Here,? said the Court, the Family B children ?[did] not, and could not under Hiraldo, argue that the annual renewals of the landlord's policy increased the limits of the available coverage[,]? ?[a]nd the noncumulation clause is equally clear in saying that the number of ?injured persons', ?claims' and ?claimants' makes no difference.? See slip op. at 5.

The Family B children's ?only argument? was that the ?alleged injuries? to the Family A children and the injuries the Family B children allegedly sustained were ?separate losses because they did not result ?from continuous or repeated exposure to the same general conditions.'? See slip op. at 5. The Court rejected that argument, explaining that both families' children ?were exposed to the same hazard, lead paint, in the same apartment.? The Court noted that ?[p]erhaps they were not exposed to exactly the same conditions; but to say that the ?general conditions' were not the same would deprive the word "general" of all meaning.? See Slip op. at 5.

Family B's children attempted to support their not-the-?same-general-conditions? argument by contending that ?because the landlord made an effort to correct the problem after [Family A's] children were exposed and before [Family B's children] moved in, the ?conditions' that injured [Family B's children] must have been new ones.? But the Court rejected this contention because Family B's children made ?no claim, and the record provides no basis for inferring, that a new lead paint hazard had been introduced into the apartment[,]? and that the only ?possible conclusion? it could draw ?from this record is that the landlord's remedial efforts were not wholly successful, and that the same general conditions?the presence of lead paint that endangered children's health?continued to exist.? See slip op. at 5-6.

The Court therefore concluded that ?[b]ecause [both Families' children] . . . were injured by exposure to the same general conditions their injuries were part of a single ?accidental loss'? within the meaning of the noncumulation clause, ?only one policy limit is available to the two families.? See Slip op. at 6.

Judge Pigott's Dissent

Judge Pigott's dissenting opinion argued that the majority's interpretation of the noncumulation clause was ?inconsistent with the reasonable expectations of the insured.? See Dissent, slip op. at 2 (citing Ace Wire & Cable Co., Inc. v Aetna Cas. & Sur. Co., 60 N.Y.2d 390, 398 (1983)). That interpretation ?would mean that, for purposes of insurance coverage, the insured's alleged failure to remove lead paint in the building before [Family B's children] moved in was the equivalent of the landlord having done nothing at all.? Dissent, slip op. at 2-3. ?In other words,? argued the dissent, ?if there is any possibility of a nexus between the cause of the injuries during policy year one and the cause of injuries in any later policy year, even if the injuries were suffered by different children from different families living in the apartment at different times, coverage is only available under the first policy year.? Dissent, Slip op. at 3.

The dissent also argued that the pricing of the insurance showed that the majority's interpretation of the noncumulation clause was contrary to the insured's reasonable expectations. Under the majority's interpretation of the noncumulation clause, ?when the insured renewed his policy and paid his premium, he procured less protection with respect to lead paint claims.? See Dissent, slip op. at 3. Had the insured known ?that his later policies would not cover lead paint injuries occurring after his remediation efforts, he surely would not have continued purchasing the insurance at essentially the same premium from the same insurer.? Dissent, slip op. at 3.

Some Observations about Nesmith

We are not surprised that the majority applied the noncumulation clause to limit the insurer's indemnity obligation to a single policy limit for both families' law suits. The noncumulation clause's unambiguous terms required that result, and under New York contract and insurance law, unambiguous contract or policy provisions are ordinarily enforced as written. See, e.g.,White v. Continental Cas. Co., 9 N.Y.3d 264, 267 (2007); Greenfield v. Philles Records, 98 N.Y.2d 562, 569-70 (2002).

The Family B children might have fared better had Nesmith been the Court of Appeals' first interpretation of the noncumulation provision. Then, to find the clause unambiguous as applied to the Nesmith facts the Court would have had to take some relatively bold interpretive steps in a case with more difficult facts than those Hiraldo presented.

First, it would have had to conclude that ?number of policies involved? meant number of policies in force during the policy period, whether coextensive with the policy period or at least overlapping a portion of it. The existence of multiple policies providing coverage is not a phenomenon confined to continuous exposure to the same conditions cases that span multiple policy periods. Even in cases involving a loss that occurs at a discrete time, there may be overlapping coverage, and thus a ?number of policies involved.?

In view of the loss-follows-premium arguments that Judge Pigott made, and given that when insureds ordinarily review an insurance policy, their perspective is presumably focused principally, if not exclusively, on that particular policy's coverage period, it would

not seem unreasonable for such an insured to conclude that ?number of policies involved? means number of policies involved that are in force during the policy period and may provide coverage for the same loss taking place during that policy period. Such a conclusion could draw further support from the emphasis that liability insurance policies ordinarily place on coverage being limited to losses that occur within the policy period, and because of the somewhat arcane nature of the concept that indivisible injury may occur over a multiyear period and arise out of a continuous exposure to conditions over the same multiyear period.

Second, the Court would have had to conclude that ?[a]ll bodily injury and property damage resulting from. . . continuous or repeated exposure to the same general conditions. . .? meant not only bodily injury or property damage occurring during the policy period, but also bodily injury or property damage occurring in an earlier or later policy period. But for essentially the same reasons why an insured arguably might reasonably conclude that ?number of policies involved? meant "number of policies" in force during all or a portion of the period covered by the policy containing the noncumulation clause, it seems at least arguably reasonable for an insured to conclude that ?bodily injury? resulting from the continuous exposure means ?bodily injury? that occurs during the policy period only, not also during multiple policy periods.

Third, the Court would have had to conclude that ?continuous or repeated exposure to the same general conditions? was not limited to such exposure as occurred during the policy period, but also included such exposure that occurred not only during the policy period, but also during a prior or future period. Again, from the standpoint of the facts in Nesmith, the conclusion that continuous or repeated exposure to the same general conditions does not mean exposure that occurred in prior policy periods?or might occur in hypothetical future periods?does not necessarily seem unreasonable.

But, for better or worse, Hiraldo had already expressly or implicitly endorsed the three conclusions discussed above, albeit in the context of a very straightforward factual scenario involving a single claimant, and injuries to that claimant that occurred within all three policy periods. Hiraldo thus effectively foreclosed reconsideration of whether those conclusions were warranted, and, as the Court pointed out, the logic of Hiraldo drove the result in Nesmith.

Judge Pigott's ?loss-follows-premium? arguments make sense and would have been persuasive if Hiraldo had not decided that the noncumulation clause provisions to which they related were unambiguous, or if he was arguing that Hiraldo might have been wrongly decided. But Hiraldo was controlling and Judge Pigott apparently was not suggesting that it was wrongly decided. See Dissent, slip op. at 1-2 (Allstate's noncumulation provision, ?[f]airly read, . . .provides that the policy limit - $500,000 limit for "each occurrence" - applies to limit the liability for lead exposure of children in one family during the course of that family's tenancy. Indeed, this is what we held in Hiraldo.?) (emphasis added).

We are not suggesting that Hiraldo was wrongfully decided. In fact, the Court interpreted the noncumulation clause in the way we think the industry intended it to be interpreted. Nor do we suggest that the Court should have revisited that interpretation because the facts in Nesmith might have caused the Court to have interpreted the noncumulation clause differently had Nesmith been a case of first impression. Finally, we do not suggest that the Court would necessarily have reached a different conclusion had Nesmith been a case of first impression.

Hiraldo's simple, straightforward facts might have influenced the types of arguments made for or against multiple policy limits (we haven't gone back and looked at the briefs, so we do not know what arguments were made or not). For example, the facts in Hiraldo arguably did not support the same type of loss-follows-premium arguments that Judge Pigott made in his dissent. It thus might have made it easier for the court to conclude (correctly or incorrectly) in Hiraldo that the noncumulation clause was unambiguous. But whether or not that might have been so should have no bearing on the Nesmith outcome, which follows logically from Hiraldo.

Noncumulation raise some interesting issues in both the insurance and reinsurance context. The clause interpreted by the Court here, for example, would, as the dissent intimated, cause the first policy to apply to the entire loss even though a portion of the loss occurred in a later policy period. All else equal, it would therefore justify allocating to the first of a series of the insurer's policies the entire portion of a settlement attributable to a particular loss that arose out of exposure to the same conditions. It may also bear on whether primary coverage is exhausted for purposes of determining whether excess carriers are required to pay a claim or contribute to a settlement.

Suppose in Nesmith there was a $2 million excess policy that attached once the primary policies were exhausted, the total amount required to settle the two claims was $1.5 million, and the exposure period for each claim was the same (1.5 years). Without the noncumulation clause, each of the three underlying primary policies would likely have to pay $500,000.00 toward the settlement, and the excess policy would not be required to contribute anything. But the noncumulation clause would require the primary carrier to pay $500,000.00 and the excess carrier to pay $1,000,000.00. Those differing results obviously have significant economic consequences for not only the carriers themselves, but also their reinsurers.