

## To Sue or Not to Sue, That is the Question

By Diane Taylor

When pursuing insurance coverage in response to claims for long-term injuries that trigger insurance policies issued by multiple insurers, it may make sense to sue some, but not all, such insurers. For instance, a policyholder may wish to avoid suing insurers that are insolvent or issued policies that are exhausted or that contain problematic exclusions.

Pursuing such a course is permissible in those states that follow an “all sums” approach to the allocation of coverage. The “all sums” approach allows the policyholder to choose any triggered insurance policy and look to that insurer for reimbursement of the entire loss, up to the policy’s limits. See J.H. France Refractories Co. v. Allstate Ins. Co., 626 A.2d 502, 508 (1993). Thus, the “all sums” approach is also known as “joint and several” or “pick and choose” allocation. Perhaps, even more important, the policyholder may also select a particular insurer to defend if the insurers are unable to agree on how an underlying matter will be defended. Id. at 510.

Moreover, courts in jurisdictions that follow an “all sums” approach have held that absent insurers are neither “necessary” nor “indispensable” to the action under Federal Rule of Civil Procedure 19 or comparable state rules. For example, in General Refractories Co. v. First State Insurance Co., 500 F.3d 306, 310-13 (3d Cir. 2007), the Third Circuit ruled that because a court may grant complete relief when there is joint and several liability among parties, any absent insurers were not “necessary” parties. Id. at 314. Further, the absent insurers were not “indispensable” since the defendant insurers were still free to pursue a claim for contribution or indemnification against the absent insurers in a separate action. Id. at 319-22.

Thus, bringing a coverage claim in a state that applies the “all sums” approach is favorable for policyholders. It maximizes coverage since the policyholder can select the insurance policies with the most promising coverage. Further, the approach minimizes a policyholder’s costs by shifting the transaction costs to a selected insurer, who will then be responsible for seeking contribution and indemnification from other liable insurers.

For questions, further information or consultation, please contact Diane Taylor at (215) 625-0123 or at [dtaylor@fried-epstein.com](mailto:dtaylor@fried-epstein.com).

*[Editor’s Note: Diane Taylor is an Associate at the Philadelphia office of Fried & Epstein LLP, which regularly represents policyholders in insurance coverage disputes. Information concerning Fried & Epstein’s Insurance Coverage Practice Group may be obtained by visiting the firm’s website at [www.fried-epstein.com](http://www.fried-epstein.com). The opinions expressed in this article are solely those of the author and do not necessarily reflect the views of Fried & Epstein or its clients. Responses to this article are welcome. Copyright 2010 Diane Taylor.*