2019 IL App (1st) 180209-U
No. 1-18-0209

SECOND DIVISION
February 13, 2019

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

CONTINENTAL CASUALTY COMPANY and COLUMBIA CASUALTY COMPANY,	)	Appeal from the Circuit Court of Cook County.
	)	
Plaintiffs and Counterdefendants,	)	
	)	No. 12 CH 17080
v.	)	
	)	
HENNESSY INDUSTRIES, INC., for itself and as successor-in-interest to Ammco Tools, Inc.; CERTAIN UNDERWRITERS AT LLOYD'S, LONDON, and CERTAIN LONDON MARKET INSURANCE COMPANIES; EQUITAS INSURANCE LIMITED; AMERICAN HOME ASSURANCE COMPANY; ALLSTATE INSURANCE COMPANY, as successor-in-interest to Northbrook Excess and Surplus Insurance Company, f/k/a Northbrook Insurance Company; MUNICH REINSURANCE AMERICA, INC., f/k/a American Re-Insurance Company; EXECUTIVE RISK INDEMNITY, INC., f/k/a American Excess Insurance Company; FIRST STATE INSURANCE COMPANY; TWIN CITY FIRE INSURANCE COMPANY; HARTFORD UNDERWRITERS INSURANCE COMPANY, f/k/a New York Underwriters Insurance Company; UNITED STATES FIRE INSURANCE COMPANY; TIG INSURANCE COMPANY, f/k/a International Insurance Company and successor-in-interest to International Surplus Lines Insurance Company; TRANSPORT	)	The Honorable Thomas Allen, Judge Presiding.

INSURANCE COMPANY, f/k/a Transport Indemnity Company; NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA; ZURICH AMERICAN INSURANCE COMPANY, as successor-in-interest to Zurich Insurance Company, U.S. Branch; and INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA,)

Defendants)

(Continental Casualty Company, Plaintiff and Counterdefendant-Appellant; Hennessy Industries, Inc., for itself and as successor-in-interest to Ammco Tools, Inc., Defendant, Cross-plaintiff, and Cross-defendant-Appellee; American Home Assurance Company, Defendant, Cross-plaintiff and Cross-defendant-Appellant; Allstate Insurance Company, as successor-in-interest to Northbrook Excess and Surplus Insurance Company f/k/a Northbrook Insurance Company, First State Insurance Company, Twin City Fire Insurance Company, Hartford Underwriters Insurance Company f/k/a New York Underwriters Insurance Company, and National Union Fire Insurance Company of Pittsburgh, PA, Defendants and Cross-defendants-Appellants).)

JUSTICE PUCINSKI delivered the judgment of the court.
Justices Mason and Hyman concurred in the judgment.

ORDER

¶ 1 *Held:* Because the non-cumulation clauses in the policies at issue only applied where more than one insurer was responsible for paying for the same portion of the loss and because the allocation method agreed upon by the parties allocated the losses in such a way that no policy covered the same portion of the loss as another policy, the trial court did not err in holding that the non-cumulation clauses did not apply.

¶ 2 At issue in this declaratory judgment action is the insurance coverage available to defendant Hennessy Industries, Inc. (“Hennessy”), for itself and as successor-in-interest to Ammco Tools, Inc. (“Ammco”), for personal injury claims arising out of the underlying claimants' exposure to asbestos through the use of automobile brake equipment manufactured by Ammco. In this appeal, plaintiff Continental Casualty Company ("Continental") and defendants American Home Assurance Company ("American Home"), National Union Fire Insurance Company of Pittsburgh, PA ("National Union"), First State Insurance Company ("First State"), and Allstate Insurance Company, as successor-in-interest to Northbrook Excess and Surplus Insurance Company f/k/a Northbrook Insurance Company ("Northbrook"), challenge the trial court's summary judgment determination that the non-cumulation and prior insurance clauses of their respective policies do not apply to the payment of the underlying claims. For the reasons that follow, we affirm.

¶ 3 BACKGROUND

¶ 4 Underlying Suits

¶ 5 Between the 1950s and mid-1980s, Ammco manufactured automobile brake equipment, including brake shoe grinders, brake lathes, and brake assembly washers. This equipment did not contain asbestos, but when used with brake shoes that did contain asbestos, Ammco's equipment was alleged to have caused the release of asbestos. Hennessy, as successor-in-interest to Ammco, was named in thousands of lawsuits ("underlying suits") that alleged that the underlying claimants suffered personal injuries from the asbestos exposure caused by their use of Ammco's products. These exposures were alleged to have occurred at numerous locations throughout the country.

¶ 6 Procedural History

¶ 7 In May 2012, plaintiffs, Continental and Columbia Casualty Company, instituted this declaratory judgment action, seeking a determination of the insurance coverage available to Hennessy for the underlying suits pursuant to insurance policies issued by many insurers. After numerous counterclaims and cross-claims filed by various defendants, the parties stipulated that there existed only four actual and justiciable issues (the "Litigation Issues") and that all other issues in the case had been resolved through settlement. The trial court entered an agreed order pursuant to the parties' stipulation, which identified the Litigation Issues as follows:

> "i) The number of occurrences for purposes of determining the limits of liability in multi-year policies;
>
> ii) The limits of liability available under the multi-year policies;
>
> iii) How to calculate the applicable limits of liability for policies that were in effect for less or more than twelve months; and
>
> iv) How the non-cumulation clause in certain of the Insurers' policies impacts the amount of coverage, if any, available to Hennessy."

¶ 8 Hennessy, Continental, and Northbrook filed cross motions for summary judgment on Litigation Issue #1. After a hearing on the issue, the trial court granted the motions of Continental and Northbrook and denied Hennessy's motion, concluding that the continuous manufacture of the allegedly "defective" products constituted a single occurrence. Hennessy also filed a motion for partial summary judgment on Litigation Issue #3. In it, Hennessy argued that the insurance policies that covered more than one year plus a "stub" period (*i.e.*, a period of time less than one year[1]) provided an additional full annual aggregate limit for the stub period. After a hearing on the remaining motion against American Home, the trial court denied Hennessy's motion as it related to the stub period of American Home's policy, concluding that the issue was not ripe or justiciable as a result of the trial court's ruling on the number of

[1] For example, the American Re-Insurance policy covered the period of July 16, 1976, through December 31, 1977. The period of July 16, 1977, through December 31, 1977, is considered the stub period.

occurrences. The trial court's rulings on these motions are the subject of the appeal currently pending in Cause No. 1-18-0183.

¶ 9 Continental and Hennessy also filed cross motions for partial summary judgment on Litigation Issue #4. In its motion, Continental argued that non-cumulation clauses like the one in the three policies Continental issued to Ammco had been held enforceable by Illinois courts and that the non-cumulation clauses in its policies should be applied to the underlying suits, such that any payment made by Continental under the first policy issued to Ammco should reduce the limits of liability on the latter two. Transport Insurance Company f/k/a Transport Indemnity Company ("Transport"), American Home, and National Union joined in Continental's motion for summary judgment against Hennessy, to the extent that the non-cumulation clauses in their policies also applied.

¶ 10 Hennessy, on the other hand, argued in its motion for partial summary judgment and in response to Continental's motion that the non-cumulation clauses in the various insurers' policies were not triggered by the underlying suits, because Hennessy and the insurers had agreed to allocate the payment of the underlying claims *pro rata*, such that no insurance policy was liable for the same loss as any other policy. In support, Hennessy attached the affidavit of Timothy Greene, an insurance consultant retained by Hennessy to assist in "allocating defense fees and costs, settlements, and judgments incurred in connection with the asbestos lawsuits to the insurance policies, for the purpose of establishing the amounts of the Insurers' payments to Hennessy ***." Greene described the method for allocating the losses in the underlying suits as follows:

> "Since late 2015, the Insurers have paid to Hennessy proportionate shares of the asbestos losses at issue in this litigation (Hennessy's 'asbestos losses'). The loss for each asbestos

> claimant is allocated among the policies in effect during the time period for which a particular asbestos claimant alleges he or she was exposed to asbestos ('Exposure Period'). The share of a particular loss allocated to each policy is the percentage calculated by dividing the amount of time a policy was in effect during the Exposure Period as the numerator by the total number of days all triggered policies were in effect during the Exposure Period of each claimant as the denominator. The percentage for each policy is then applied to the loss allocable to the Insurers to determine the dollar amount allocated to each policy."

He also averred that the allocation method included allocating a share of the asbestos losses to Hennessy for "time periods for which its insurance policies are missing or for which the insurers are insolvent." Hennessy also argued in response to Continental's motion for partial summary judgment that Continental had failed to prove that any of the asbestos losses that were covered by Continental's policies were also covered by another policy.

¶ 11 Continental, American Home, National Union, Transport, and First State argued in response that the method used to allocate the asbestos losses amongst the insurers was not *pro rata*, but instead was more like an all-sums allocation[2] that accounted for the various insurers' contribution rights. Continental, American Home, National Union, and Transport further argued that the allocation method described by Greene was adopted by Hennessy and its insurers in a confidential cost sharing agreement ("CSA"), which contained a confidentiality provision that precluded its disclosure for purposes of briefing on the Litigation Issues. Thus, the trial court should not have considered the parties' agreed-upon allocation method in determining whether the non-cumulation clauses applied.

[2] Under an all-sums allocation, all triggered insurers are jointly and severally liable for the total loss, and the insured may choose to "spike" its loss under any one of the triggered policies.

¶ 12 Continental, American Home, National Union, and Transport further argued that, even if the agreed-upon allocation method was to be considered, it was not a pure *pro rata* method, because it resulted in some insurers paying for losses that occurred outside their policy periods. Specifically, because there are three trigger periods for asbestos claims—exposure, sickness, and disease—by allocating a claimant's total loss, which includes damages attributable to sickness and disease, to only those insurers whose policies were in effect during exposure, the liable insurers are necessarily paying for damages (related to the claimant's sickness and disease) occurring outside their policy periods.

¶ 13 In final reply, Hennessy argued that it did not violate the confidentiality terms of the CSA through Greene's description of the agreed-upon allocation method and that Continental and First State opened the door to the introduction of the CSA by misrepresenting the terms of the CSA when they argued that the CSA resolved the contribution rights between the insurers.

¶ 14 Continental also filed a motion to strike any reference to the CSA in Hennessy's summary judgment briefs and asked the trial court to refrain from considering the CSA in deciding the cross motions for partial summary judgment. Continental's motion was based on the argument that the confidentiality clause of the CSA prevented its disclosure and consideration in connection with the motions for partial summary judgment. Hennessy opposed the motion on the basis that it did not reference or discuss the CSA in its initial briefs and that it disclosed the CSA only after Continental opened the door by misrepresenting the CSA's terms.

¶ 15 After a hearing on the motions for partial summary judgment, the trial court found that because the allocation method utilized by the parties was a *pro rata* allocation at its core, in that none of the insurers were jointly liable for any portion of the same loss, the non-cumulation clauses did not apply. Thus, the trial court granted Hennessy's motion for partial summary judgment and denied Continental's. In the written "Agreed Final Order" memorializing the trial court's decision on Litigation Issue #4, the trial court noted that all other issues in the case had been resolved by agreement of the parties or by the trial court's decision on Litigation Issue #1, and that the Agreed Final Order "fully and finally resolve[d] all disputes between all parties before the Court and is the final judgment in this action."[3]

¶ 16 Continental then instituted this timely appeal. American Home, National Union, First State, and Northbrook joined in Continental's appeal.[4]

¶ 17 Relevant Insurance Policy Provisions

¶ 18 Continental issued three umbrella policies to Ammco that collectively covered the period of July 5, 1967, through July 5, 1976. Those policies contained the following non-cumulation clause:

> "It is agreed, that if any loss is also covered in whole or in part under any other excess policy issued to the insured prior to the inception date hereof, the Company's limit of liability as stated in Item 3 of the Declarations shall be reduced by any amounts due to the Insured on account of such loss under such prior insurance."

¶ 19 Northbrook issued a single umbrella policy covering the period of July 5, 1975, through December 31, 1978. That policy contained the following non-cumulation clause:

> "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

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[3] The other Litigation Issues were resolved prior to or with the entry of the Agreed Final Order. They are not relevant to this appeal, however, so we do not discuss them in detail.

[4] Hartford Underwriters Insurance Company, f/k/a New York Underwriters Insurance Company, and Twin City Fire Insurance Company also filed notices of joining in Continental's appeal, but neither filed a brief in this Court.

liability hereon as stated in Item 2 of the Declarations shall be reduced by any amounts due to the Insured on account of such loss under such prior insurance."

¶ 20 American Home issued two excess policies that collectively covered the period of July 16, 1974, through December 31, 1977. One of those policies followed the terms of the Continental policies, including the non-cumulation clause included those policies. The other American Home policy followed the terms of the Northbrook policy, including its non-cumulation clause quoted above. National Union issued a single excess policy that covered the period of December 31, 1977, through December 31, 1978, and that followed the terms of the Northbrook policy, including its non-cumulation clause quoted above.

¶ 21 First State issued six policies, which collectively covered the period of December 31, 1978, through September 30, 1982. Two of those policies contained the following non-cumulation clause:

"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 as stated in Insuring Agreements 2c and 2d shall be reduced by any amounts due to the Insured on account of such loss under such prior insurance."

The remaining policies contained the following language:

"If other collectible insurance with any other INSURER is available to the INSURED covering a loss covered hereunder, except insurance purchased to apply in excess of the sum of the RETAINED LIMIT and LIMIT of LIABILITY hereunder, the insurance hereunder shall be in excess of, and not contribute with, such other insurance. If collectible insurance under any other policy(ies) of the COMPANY is available to the INSURED, covering a loss also covered hereunder (other than underlying insurance of which the insurance afforded by this policy is in excess), the COMPANY's total liability shall in no event exceed the greater or greatest limit of liability applicable to such loss under this or any other such policy(ies). If other collectible insurance under any policy(ies) of the COMPANY is available to the INSURED, the ULTIMATE NET LOSS as the result of any one OCCURRENCE not covered by underlying insurance shall not be cumulative."

¶ 22 ANALYSIS

¶ 23 On appeal, Continental, joined by American Home, National Union, First State, and Northbrook, argues that the trial court erred in granting Hennessy's motion for partial summary judgment on Litigation Issue #4, because the trial court improperly considered the parties' allocation method in determining the application of the non-cumulation clauses and because the allocation method results in insurers paying for losses that occurred outside their policy periods, thereby triggering the non-cumulation clauses. For the reasons that follow, we affirm.

¶ 24 Preliminarily, we observe that summary judgment is to be granted "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." 735 ILCS 5/2-1005(c) (West 2016). We review both the trial court's grant of summary judgment and the interpretation of the Policies *de novo*. *Valley Forge Insurance Co. v. Swiderski Electronics, Inc.*, 223 Ill. 2d 352, 360 (2006).

¶ 25 The determination of whether the non-cumulation clauses in the relevant policies are triggered is dependent on the interpretation of the respective non-cumulation clauses. Our supreme court has summarized the principles governing our interpretation of insurance policies:

> "Because an insurance policy is a contract, the rules applicable to contract interpretation govern the interpretation of an insurance policy. [Citations.] Our primary function is to ascertain and give effect to the intention of the parties, as expressed in the policy language. [Citations.] If the language is unambiguous, the provision will be applied as written, unless it contravenes public policy. [Citations.] The rule that policy provisions limiting an insurer's liability will be construed liberally in favor of coverage only applies where the provision is ambiguous. [Citations.] A policy provision is not rendered ambiguous simply because the parties disagree as to its meaning. [Citations.] Rather, an ambiguity will be found where the policy language is susceptible to more than one reasonable interpretation. [Citations.] While we will not strain to find an ambiguity where none exists [citation], neither will we adopt an interpretation which rests on 'gossamer distinctions' that the average person, for whom the policy is written, cannot be expected to understand [citation]."

Founders Insurance Co. v. Munoz, 237 Ill. 2d 424, 433 (2010).

¶ 26 Although the precise language varies slightly, the non-cumulation clauses of all the policies at issue in this appeal are clear in providing that they apply only where a covered loss is also covered in whole or part by a prior policy. In other words, if more than one policy is responsible for payment of the same loss, then the limits of liability of the later-issued policies are reduced by amounts paid on that loss by prior policies. This is consistent with the purpose of non-cumulation clauses—"to prevent any attempt by policyholders to recover under a subsequent policy *** for a loss that had already been covered by the prior *** policy." *Olin Corp. v. OneBeacon America Insurance Co.*, 864 F.3d 130, 148 (2d Cir. 2017). None of the parties to this appeal disputes this basic premise or contends that the language of the non-cumulation clauses is ambiguous. Rather, the appellants contend that the trial court erred in considering the allocation method utilized by the parties for the payment of the underlying claims when determining whether the non-cumulation clauses applied. They further argue that even if the parties' allocation method is considered, it resulted in insurers paying for losses that occurred outside their policy periods, thus triggering application of the non-cumulation clauses. We address each of these in turn.

¶ 27 First, the appellants argue that the trial court should not have considered the parties' agreed-upon allocation method in determining whether the non-cumulation clauses are triggered. Instead, they argue, the trial court should have only considered whether the losses at issue triggered more than one policy. According to appellants, if more than one policy was triggered, then the non-cumulation clauses were also triggered and the limits of liability of later-issued policies should be reduced by payments made under earlier policies, without consideration of how the payment of the losses were actually allocated. Otherwise, appellants argue, Hennessy would obtain a windfall through the stacking of multiple policies.

¶ 28 This argument fails, however, because the language of the non-cumulation clauses does not support it. Although a policy may be triggered by a loss, that does not necessarily mean that it will ultimately provide coverage for that loss. For example, a loss may occur within a policy's coverage period, thereby generally triggering the policy, but through the application of exceptions, exclusions, and conditions, the insurer may never be required to provide coverage to the insured. Given the purpose of non-cumulation clauses, it would be unfair to insureds under such circumstances to reduce the limits of liability for payments never made by an insurer, since there is no risk of double payment. Presumably for this reason, the language of the non-cumulation clauses states that the clauses apply when a loss is *covered*, *i.e.*, paid for, by more than one policy, not simply where more than one policy is generally triggered. Thus, it was, in fact, necessary for the trial court to examine whether more than one policy was required to actually pay for the same loss—a determination that depended on the allocation method utilized by the parties. After all, there is no risk of Hennessy receiving greater coverage than it is entitled to if no loss is actually paid by more than one insurer.

¶ 29 The appellants also argue that the trial court erred in considering the agreed-upon allocation method, because the agreement on the allocation method was memorialized in the CSA, which contained a confidentiality provision that precluded the disclosure of the CSA or its terms except in specific, enumerated circumstances. In the trial court, Continental moved to strike the references to the CSA in Hennessy's summary judgment briefs, but the trial court never issued a formal ruling on the motion. Other than a general statement during arguments in the trial court that consideration of the terms of the CSA was inappropriate, Continental made no effort to obtain a ruling on its motion to strike. It did not specifically mention the motion to strike or request a ruling on it. Because it was Continental's responsibility to obtain a ruling on the motion, Continental's failure to do so and its subsequent filing of a notice of appeal is deemed an abandonment of the motion to strike. See *Rodriguez v. Illinois Prisoner Review Board*, 376 Ill. App. 3d 429, 433 (2007); *Commerce Trust Co. v. Air 1st Aviation Companies, Inc.*, 366 Ill. App. 3d 135, 142 (2006) (where the movant did not obtain a ruling from the trial court on its motion to exclude a witness's testimony, the motion was considered abandoned).

¶ 30 Moreover, we note that despite claiming that Hennessy's reliance on the agreed-upon allocation method violated the confidentiality provision of the CSA, Continental itself (and thus the appellants joining with Continental) has, as we will discuss, extensively argued the specifics of the parties' allocation method, both on appeal and in the trial court. In addition, we observe that despite claiming that the provisions of the CSA are confidential and could not be used in support of Hennessy's motion for summary judgment on Litigation Issue #4, Continental argued the opposite when it sought to introduce provisions of the CSA in support of its motion for summary judgment on Litigation Issue #4. Finally, Litigation Issue #4, as drafted by the parties, frames the issue as follows: "[h]ow the non-cumulation clause in certain of the Insurers' policies impacts the amount of coverage, if any, available to Hennessy." As discussed above, this determination cannot be made in a vacuum; the application of the non-cumulation clauses is dependent on an allocation under which more than one insurer is responsible for paying for the same loss, and this can only be determined by examining the actual allocation method utilized by the parties. Thus, by asking the trial court to determine what impact the non-cumulation clauses had on the specific amount of coverage available to Hennessy, the parties necessarily contemplated (or should have) and invited the trial court to examine the agreed-upon allocation.

¶ 31 Given Continental's failure to obtain a ruling on its motion to strike, the necessity of considering the allocation method to determine the issue the parties have presented, and Continental's repeated reliance on the terms of the CSA, we do not view the confidentiality provisions or the CSA as an impediment to our consideration of the allocation method utilized by the parties.

¶ 32 The appellants next argue that even if the agreed-upon allocation method is considered, it does not qualify as a *pro rata* allocation because, under it, insurers are required to pay for losses that occurred outside their policy periods. For that same reason, appellants argue, the non-cumulation clauses apply. As an initial matter, we observe that the parties spend a lot of time going back and forth over the label to be assigned to the agreed-upon allocation method—all sums, *pro rata*, hybrid. The fact of the matter is, however, that the application of the non-cumulation clauses does not depend on fitting the agreed-upon allocation into a particular category or applying a certain label. Rather, the application of the non-cumulation clauses depends entirely on whether the agreed-upon allocation results in multiple insurers being responsible for paying for the same loss. Thus, to the extent that either appellants' or Hennessy's contentions depend on the label assigned to the allocation method, those contentions are irrelevant and beside the point.

¶ 33 At the heart of appellants' position is the contention that the agreed-upon allocation results in insurers paying for losses that occurred outside of their policy periods, thus triggering application of the non-cumulation clauses. For example, appellants argue, asbestos claims trigger insurance coverage at three points in time: exposure to the asbestos, sickness, and disease. *Zurich Ins. Co. v. Raymark Industries, Inc.*, 118 Ill. 2d 23, 57 (1987). Under the agreed-upon allocation, a claimant's total loss, including the loss sustained during the sickness and disease periods, is allocated among only those insurers whose policies were in effect during the exposure period. Thus, those insurers are allocated a portion of the claimant's loss that did not occur during their policy periods—the portion of the loss attributable to the claimant's sickness and disease. Appellants also argue that they are responsible for additional losses occurring outside of their policy period because they are allocated losses that occurred during periods that Ammco was uninsured.

¶ 34 Appellants' argument misconstrues the requirements of the non-cumulation clauses and, therefore, fails. Appellants' position is based on the notion that the non-cumulation clauses apply where an insurer is required to indemnify against portions of losses that occur outside its policy period. That is not the case, however. The language of the non-cumulation clauses plainly provides that the clauses apply when multiple insurers are responsible for indemnifying the insured for the same loss. This premise was acknowledged in the appellate brief filed by Continental, American Home, and National Union: "Where there is no loss covered by another policy, due to the facts of the loss or the allocation method utilized, a non-cumulation provision has no application because, by its own terms, no portion of loss is covered by prior insurance to which the non-cumulation provision can apply." Nevertheless, immediately after acknowledging such, appellants go on to argue that the non-cumulation clauses do not apply because the insurers are allocated losses that occurred outside their policy periods.

¶ 35 Nowhere in any of the non-cumulation clauses is there any language that provides for their application if an insurer is required to indemnify an insured for a loss that partially occurs outside the insurer's policy period. Nor does the conclusion that multiple insurers are responsible for the same loss necessarily follow from an allocation of losses outside an insurer's policy period. As will be demonstrated below, it is entirely possible that even if an insurer is allocated losses from outside its policy period, no other insurer will also be responsible for coverage of that same portion of the loss. Accordingly, the fact that, under the agreed-upon allocation method, appellants might be allocated losses that partially occurred outside their policy periods does not require a conclusion that the non-cumulation clauses apply.

¶ 36 As we have mentioned numerous times, to make the determination of whether the appellants' non-cumulation clauses apply in this particular case, we must examine the agreed-upon allocation method to assess whether it is possible that multiple insurers would be required to indemnify Hennessy for the same loss. We determine that such a situation is not possible under the agreed-upon allocation method.

¶ 37 Greene's affidavit described the allocation method agreed upon by the parties, and none of the appellants have disputed his description. The agreed-upon method allocates a claimant's total loss on a time-on-the-risk basis. The policies to which a portion of the claimant's loss is allocated is determined by which policies were in effect during the claimant's "Exposure Period," *i.e.*, the time during which the claimant alleges he was exposed to asbestos. The portion of the loss allocated to each of the relevant policies is determined by dividing the number of days the policy was in effect during the Exposure Period by the total number of days that all triggered policies (*i.e.*, those policies in effect during the Exposure Period) were in effect during the Exposure Period. The result is the percentage of the loss to be allocated to that policy. Hennessy is responsible for the portion of the loss allocated to any period of time during the Exposure Period where there are missing policies or the insurers are insolvent. The periods of time during the Exposure Period where the policies are missing or the insurers are insolvent should be distinguished from the periods of time that Hennessy was completely uninsured at the excess level (January 15, 1960, through July 5, 1967, and after August 1, 1986). Although there was no coverage provided to Hennessy for the periods during the Exposure Period where the policies were missing or the insurers were insolvent, Hennessy was insured, but simply could not recover under the policies because they were missing or the insurers were insolvent. In contrast, for the periods of January 15, 1960, through July 5, 1967, and after August 1, 1986, it appears Hennessy simply did not purchase any excess insurance.

¶ 38 As an initial matter, for the periods of time that Hennessy was uninsured at the excess level (*i.e.*, had not purchased excess insurance), the non-cumulation clauses do not apply because there were no other policies in effect for those periods. The language of the non-cumulation clauses is clear that the clauses are triggered only if a loss is covered in whole or in part under any other prior excess policy. Where Hennessy was uninsured, there obviously was no other excess policy to provide coverage for that period and, thus, the non-cumulation clauses could not be triggered. In addition, with respect to the time period after August 1, 1986, even if Hennessy did have insurance during that time, it would have no effect on the application of the non-cumulation clauses application to the appellants, because any such policies would have been issued to Hennessy *after* the appellants' policies, and the non-cumulation clauses only apply where the loss is covered by a *prior* policy.

¶ 39 Furthermore, under the agreed-upon allocation, 100% of the claimant's loss is allocated—either to Hennessy or an insurer—and each allocated portion is separate and distinct from the others. Under this method, each insurer pays only its allocated portion of the claimant's loss and nothing more; no two insurers are responsible for paying the same portion of the loss. Thus, the non-cumulation clauses also do not apply, because no portion of the loss is covered in whole or in part by more than one policy.

¶ 40 Our determination is supported by the decision of the Second District in *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 283 Ill. App. 3d 630 (1996). In that case, the insured, Outboard Marine, manufactured outboard motors, the process of which resulted in polychlorinated byphenyl contamination of Waukegan Harbor between 1953 and 1976. *Id.* at 635-37. Among other things, the allocation of the insured's damages amongst the triggered excess insurers was at issue. After finding that the contamination of the harbor was a single, continuing occurrence that triggered multiple policies, the trial court concluded it would be impossible to determine the precise amount of contamination that occurred during each of the policy periods. *Id.* at 639. Accordingly, the trial court determined that the best method of allocating the damages would be to apply a *pro rata*, time-on-the-risk allocation. *Id.* Before doing so, however, the trial court reduced the total damages by 25% to account for the years in the trigger period during which Outboard Marine was uninsured. *Id.* After further reduction for payments from Outboard Marine's primary insurers, the remaining damages were allocated among the excess insurers. *Id.*

¶ 41 On appeal, the Second District addressed the applicability of the insurers' non-cumulation and other insurance clauses. It held as follows:

> "We find that it would be illogical to enforce one insurer's clause in a situation involving a 'continuous occurrence' which theoretically could be looked at as a separate occurrence for the purpose of each policy which has been assessed a *pro rata* damage allocation. We find that the 'other insurance' clauses cannot be applied because each excess insurer is only paying a *pro rata* portion of the total damages attributable to this 'continuing occurrence.' To apply the 'prior insurance' and 'non-cumulation of liability' clauses would give the insurers a double credit and would deprive the insured of the full value of its premium. Additionally, we note that enforcement of the clauses would be inequitable because no excess insurer is concurrently liable with any other and application of the clauses would make the other insurers liable for damages occurring outside their policy periods." *Id.* at 644-45.

¶ 42 Like in the present case, the loss in *Outboard Marine* could not be accurately divided among the insurers based on the portion of the damages that actually occurred during their policy periods, because it was impossible to determine when, exactly, each element of damage occurred. Accordingly, like here, the loss in *Outboard Marine* was allocated to the various policies based on a time-on-the-risk approach, such that each policy was assigned a distinct and separate portion of the loss; no two policies were jointly or concurrently liable for indemnifying the same portion of the total loss. Also like in *Outboard Marine*, if the appellants here were to receive credits against their portion for another insurer's payment of a separate and distinct portion, the insurers would receive double credit and Hennessy would be deprived the full value of the premiums paid by Ammco.

¶ 43 Appellants argue that *Outboard Marine* is distinguishable from the present case because the insurers in *Outboard Marine* were not allocated any portion of the loss that occurred outside their respective policy periods. The decision in *Outboard Marine* does not support this contention, however. Although it is true, as appellants point out, that the insured in *Outboard Marine* was allocated a portion of the loss for periods during which it was uninsured,[5] that alone does not indicate that the insurers were allocated only those precise damages that occurred during their respective policy periods. In fact, the *Outboard Marine* court noted that the reason the trial court implemented a time-on-the-risk allocation of the damages was because it found "it highly speculative as to the percentage of damage actually attributable to each of the policy periods" and that it would be "impossible to allocate damages for any given year with any degree of certainty." *Id.* at 639. In other words, the allocation method in *Outboard Marine* was chosen precisely *because* there was no way to allocate the insurers only the damages that occurred within their respective policy periods.

¶ 44 More importantly, however, is the fact that the appellants continue to misconstrue the requirements of the non-cumulation clauses. Again, the language of the clauses provides for their application where more than one policy is required to indemnify for the same loss, *not* where the policy is required to indemnify for a loss that occurred outside its policy period. As explained above, the agreed-upon allocation in this case, like the allocation in *Outboard Marine*, precludes any policy from covering any portion of the loss also covered by another, prior policy.

[5] It is worth emphasizing that the allocation method in *Outboard Marine*, including the allocation of losses during uninsured periods to the insured, was imposed by the trial court. Here, the parties voluntarily agreed to the allocation method that did not attribute losses during uninsured periods (*i.e.*, periods where Hennessy failed to purchase excess insurance) to Hennessy.

¶ 45 We find it important to note one distinction between the allocation in *Outboard Marine* and the allocation in the present case. Whereas the allocation method in *Outboard Marine* was imposed by the trial court, here, the parties voluntarily agreed to the allocation method to be utilized to allocate the losses. Like with any other agreement, absent any argument or evidence to the contrary, we assume that the parties considered the effects of the agreement's terms and that the parties' assent to the agreement's terms indicates their willingness to be bound by those terms. The appellants have made no contention—here or in the trial court—that they were coerced into assenting to the allocation method in this case, that Hennessy made a material misrepresentation that induced appellants' assent to the allocation method, or that some other basis existed to conclude that appellants' assent to the allocation method was anything other than willing and voluntary.

¶ 46 We also recognize that, as appellants bemoan, as a result of the allocation method adopted by the parties in this case and the fact that it is impossible to precisely determine how and to what extent an asbestos claimant is damaged during each relevant policy period, it is possible that insurers could be allocated a portion of damages that occurred outside their policy periods. This, however, is not a result of the application or non-application of the non-cumulation clauses; rather, again, it is precisely what the insurers signed up for when they agreed to an allocation method that allocated the total loss only to those policies in effect during the Exposure Period and did not separately account for uninsured periods. To the extent that the insurers now find this to somehow be unfair, the fault lies with them, and application of the non-cumulation clauses (even if they did apply) would not change the fact that they might be allocated losses that occurred outside their policy periods. The appellants' attempts to escape their obligations under the allocation method to which they agreed by fabricating a completely unsupported interpretation of the non-cumulation clauses cannot be countenanced.

¶ 47 Finally, we pause to note that appellants rely heavily on the decision in *John Crane Inc. v. Admiral Insurance Co.*, 2016 WL 4619165, for the proposition that non-cumulation clauses are enforceable in Illinois. We do not disagree that non-cumulation clauses are enforceable in this state, nor does Hennessy. We do disagree, however, that the non-cumulation clauses are triggered in this case for the reasons explained above. Moreover, other than reinforcing the undisputed notion that non-cumulation clauses are enforceable in Illinois, the decision in *John Crane* is entirely irrelevant to our analysis in this case, as the insurers there were responsible for the loss on an all-sums basis, meaning that they were all jointly and severally liable for the same loss. In such a situation, non-cumulation clauses are unquestionably triggered.

¶ 48 In sum, the agreed-upon allocation method in the present case allocated the loss in such a way that each triggered insurer is responsible only for its separate and distinct portion. Accordingly, no insurer is responsible for covering the same portion of a loss that is also covered by another policy. Any displeasure that appellants have over the fact that their separate and distinct portions of the loss might include damages that occurred outside their respective policy periods is purely buyer's remorse resulting from their agreement to an allocation method that limited the relevant policies to those in effect during the Exposure Period and that did not exclude uninsured periods.

¶ 49 CONCLUSION

¶ 50 For the foregoing reasons, the judgment of the Circuit Court of Cook County is affirmed.

¶ 51 Affirmed.