PERRIN CONFERENCES

INSURANCE COVERAGE AND ALLOCATION ISSUES CONFERENCE

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CONTRIBUTION IN ALL SUMS ALLOCATION: THE MATH AND THE LAW

Christopher A. Johnson, Esq.
Hughes Socol Piers Resnick & Dym, Ltd.
Chicago, IL

Lauren Macina
Director, Quantitative Services
Alan Gray LLC
Washington, DC

Ben Mermelstein, PhD, FCAS
Partner
HighRock Analytics
Pittsburgh, PA

David Young
Vice President
Direct Claims
Resolute Management Inc.
Boston, MA

Contribution in All Sums Allocation - Roadmap

Three Part Panel Discussion

Part 1: All Sums & Contribution Background

Part 2: Allocation Methodologies

Part 3: Complicating Factors—Insolvencies, SIRs, Settlements

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***Continental v. Argonaut* (Or. 2025)—A Case Study**

Long-Tail Liabilities and Allocation

Long-Tail Claims Create Allocation Problems

Continuous or progressive injury spans multiple policy periods, sometimes decades

Common settings: asbestos bodily injury, construction defect, environmental contamination, PFAS, silica and talc

How do courts reconcile broad indemnity language with policy-period limitations when injury is indivisible across time?

Reading of the Policy	Practical Consequence
All sums	A triggered insurer may be obligated to pay the insured's entire loss up to its limits
Pro rata	A triggered insurer's coverage obligation is limited to an allocable share of the insured's liability

The "All Sums" Reading Delays the Allocation Problems

Under the "all sums" rule, resolution of allocation issues among insurers usually occurs in the context of contribution litigation *after* the insured has selected an insurer to pay "all sums."

Equitable Contribution – The Workhorse Theory

General Definition:

Equitable contribution permits an insurer that has paid more than its fair share of a common obligation to recover from other insurers covering the same insured and the same risk, with the same level of obligation.

Core Point	Practical Meaning
Independent right	The claim belongs to the paying insurer, not the insured
Equitable in nature	The remedy is driven by fairness, not solely by contract text
Same level of obligation	More straightforward among co-primary insurers; more complicated across primary and excess layers

Illustrative Case:

Pennsylvania General Insurance Co. v. Park-Ohio Industries (Ohio 2010) (providing a detailed equitable-contribution framework in an all-sums context, including the targeted insurer's burden of proof, the equitable nature of the remedy, and the interplay between contribution and the insured's cooperation duty).

Subrogation – Less Common Alternative

"It is…difficult to think of two legal concepts that have caused more confusion and headache for both courts and litigants than have contribution and subrogation. Although the concepts of contribution and subrogation are both equitable in nature, they are nevertheless distinct." *Fireman's Fund v. Maryland Casualty Co.* (Cal. App. Ct. 1998)

Subrogation – What is it?

The right to subrogation is derivative. The subrogated insurer "stands in the shoes" of its insured and succeeds to its insured's rights as against other insurers. The subrogated insurer's rights against other insurers can be no greater than its insured's rights.

Subrogation – Two Forms:

Contractual – the subrogated insurer's rights derive from a subrogation condition in its policy or from an agreement assigning the insured's rights (*e.g. Steadfast Ins. Co. v. Greenwich Ins. Co.* (Wis. 2019) (insurer succeeded to insured's breach of contract claim against non-paying insurer via subrogation condition in policy))

Equitable – the subrogated insurer's rights derive by operation of law (*e.g. Mt. Hawley Ins. Co. v. Zurich American* (Wash. Ct. App. 2019) (insurer succeeded to insured's breach of contract claim against non-defending insurer as a matter of law and equity; subrogation condition in policy did not establish a right to contractual subrogation))

OECAA Case Study – The *Schnitzer* Contribution Action

Continental v. Argonaut, 373 Or. 389. 567 P.3d 1059 (2025) and the related underlying "spike" case ***Schnitzer Steel Industries v. Continental***, unpublished, No. 14-35793 9*th*. Cir. 2016.

The applicable statute for Oregon Environmental Claims is ORS Sec. 465.480, Environmental Cleanup Assistance Act ("OECAA")

- Passed as SB 814 with advocacy from one of the attorneys for Schnitzer
- Rules for the selection of carriers by the insured and the potential subsequent contribution claim by the selected carrier against the other carriers who should share in the loss.
- Contains an exception to contribution against a carrier with a "good faith settlement" of the environmental claim

OECAA – The Basics

OECAA (ORS 465.480):

- **Preemption:** OECAA contribution rights under ORS 465.480 replace common law contribution rights.

- **"All-Sums":** An insurer can be targeted to pay all defense/indemnity costs, then seek contribution from other liable insurers.

- **Contribution Right/Settlement Bar:** An insurer who pays all or part of an environmental claim may seek contribution from any other insurer that has not entered into a good faith settlement.

- **Allocation –** The court **shall** consider: (1) time period insured; (2) policy limits, including exclusions; (3) most appropriate policy type; (4) terms of the policies that relate to equitable allocation; and (if the insured is uninsured for any part of the time period, the insured shall be considered an insurer for the purposes of allocation.

OECAA – It's as Easy as Pizza Pie… Right?

Carrier and an insured settle a slice. Other carriers can't argue the slice wasn't large enough.

Reality tends to be more complicated. How large is the pie? How late can a carrier settle and still have it be "good faith?" What if the selected carrier has already paid significant amounts not accounted for in the separate settlement of the "slice" carrier entered into with the insured?

How large are the slices of those carriers that have not settled?

OECAA Case Study – Background of *Schnitzer* Contribution Action

(**Hint**: you are unlikely to be graced with the pie example)

Continental v. Argonaut, began with the underlying claim from Schnitzer, and the subsequent case of ***Schnitzer Steel Industries v. Continental,*** filed in federal court in Oregon.

- **1999** - Schnitzer tenders the Portland Harbor Superfund Site to all carriers.
- Attorney rate and deduction issues result in less than 100% recovery.
- **2010** - Dissatisfied with the result, Schnitzer selects Continental for 100% defense and brings suit in federal court.
- **2014** - Continental is found liable for 100% of the defense until such time as it exhausts (DJ), and is also all held liable to pay the unpaid defense costs that it and the other carriers had not paid (damages).

OECAA Case Study – Continental's 2016 Contribution Action

Having paid and been held liable to pay tens of millions of dollars in 2014, Continental sues for contribution in 2016.

In the 2*nd* Q of 2019, Wausau and another carrier settle with Schnitzer.

This contribution suit is a good case study because it raises several topics we are addressing here today such as:

- Statutory basis for contribution (goal and intent)
- Who can be sued for contribution? (good faith settlement, when applicable)
- How are losses to be allocated? (defense/indemnity difference; statutory factors)
- What costs are recoverable by the targeted carrier against the others? Interest/attorney fees owed to the insured? Issue preclusion?

OECAA Case Study – Contribution Targets

ORS 465.480(4)(a):

- *An insurer that has paid all or part of* ***an environmental claim*** *may seek contribution from any other insurer that is liable or potentially liable to the insured and that* ***has not*** *entered into a good-faith settlement agreement with the insured regarding* ***the environmental claim****. (emphasis supplied, as these terms were subject to extensive argument)*. There is a rebuttable presumption of good faith.

- Continental (1) Paid an environmental claim; and (2) Wausau is liable as well.

- There is a right to contribution EXCEPT if Wausau has (1) Entered into a good -faith settlement (2) regarding the environmental claim.

OECAA Case Study – *Schnitzer* Trial Court Proceedings

Wausau brought a motion for a good faith determination, arguing in the absence of fraud the settlement releases it from contribution based upon the statutory language.

Continental argued (1) there is no bar if the settlement occurs after a contribution suit is filed, (2) the federal judgment it suffered in the Schnitzer underlying action was a final determination of liability for defense costs rendering Schnitzer and Wausau unable to settle any part of that which was included in the federal judgment (merger doctrine extinguishes the claim); and (3) The settlement was not in good faith.

OECAA Case Study – The *Schnitzer* Trial Court Conclusion

There is no contribution bar. Continental is vested in the defense costs (focusing on Continental's second argument) it has paid or will have to pay in the future and a settlement with other insurers cannot extinguish contribution rights on such a claim. "'Environmental claim' is a claim for defense costs at the Portland Harbor Superfund site. And currently and until Continental's policy is exhausted, Schnitzer does not possess a claim for it."

The court did not rule on the bad faith determination at all (although the parties argued significantly about a statement from the court), but as these were deemed two different "environmental" claims, contribution was allowed.

OECAA Case Study – The Oregon Court of Appeals Disagrees

Reversed and remanded, reasoning that there can be many "environmental claims" in a complex case, and that its settlement with Schnitzer was the settlement of an environmental claim that Schnitzer had against Wausau. It also found "merger" inapplicable because Wausau was not a party to the federal action (merger applies only to the same parties).

Dissent: Kamins, J. (dissenting with the two-judge majority), believed that the legislature did not intend for a defendant to be dismissed from ongoing litigation by contemporaneous settlement with the policyholder.

Judge Kamins contends that the reasonable construction of the statute ("has not entered into a good faith settlement") means contribution may be sought against an insurer who has not "at the time contribution is sought" entered into a settlement agreement with the insured." This is a temporal argument that Continental had raised: that an insurer "may not seek" (present tense) contribution from one who has already entered into (past tense) a good faith settlement.

OECAA Case Study – What does it mean “to seek”?

Discussion point: Wausau argued seeking something is an ongoing process and that until judgment is rendered a carrier is still seeking contribution. Thus, when Wausau settled while involved in contribution litigation with Continental, Wausau contends that Continental is still “seeking” contribution.

- What does it mean to “seek” in this context? Send a demand letter? File a suit? In this case, Continental had done both. What if it had not and this reading is correct?

OECAA Case Study – Oregon Supreme Court Proceedings

- Although Continental began its briefing on the statutory tenses (playing into Judge Kamins' dissent), the Supreme Court focused on the second argument, the same one upon which the trial court ruled, and so reversed the Court of Appeals. It focused not on the verb tenses in the statute, but rather on "the environmental claim."

- The court held that one who paid all or part of "an environmental claim" may seek contribution from one who has not entered into a settlement agreement regarding "the environmental claim" (i.e. the one that has been paid). While this result is similar to the trial court's reasoning, this Court finds that it need not answer whether the judgment extinguished Schnitzer's rights to settle the same "environmental claim" with another insurer because here the judgment was actually satisfied.

OECAA Case Study – Oregon Supreme Court Proceedings

- **Discussion point**: Was there a missed opportunity to present a rule with more global allocation (the tenses issue)? How narrowly can the selected carrier define the "environmental claim" it seeks to recover from the contribution defendant to allow it to argue it is a different claim than that which the contribution defendant settled with the insured?

Part 2 Overview – Allocation Methodologies: The Fight Behind the Math

Core Question: Once contribution is available, how should the common burden be divided among the policies in the contribution pool?

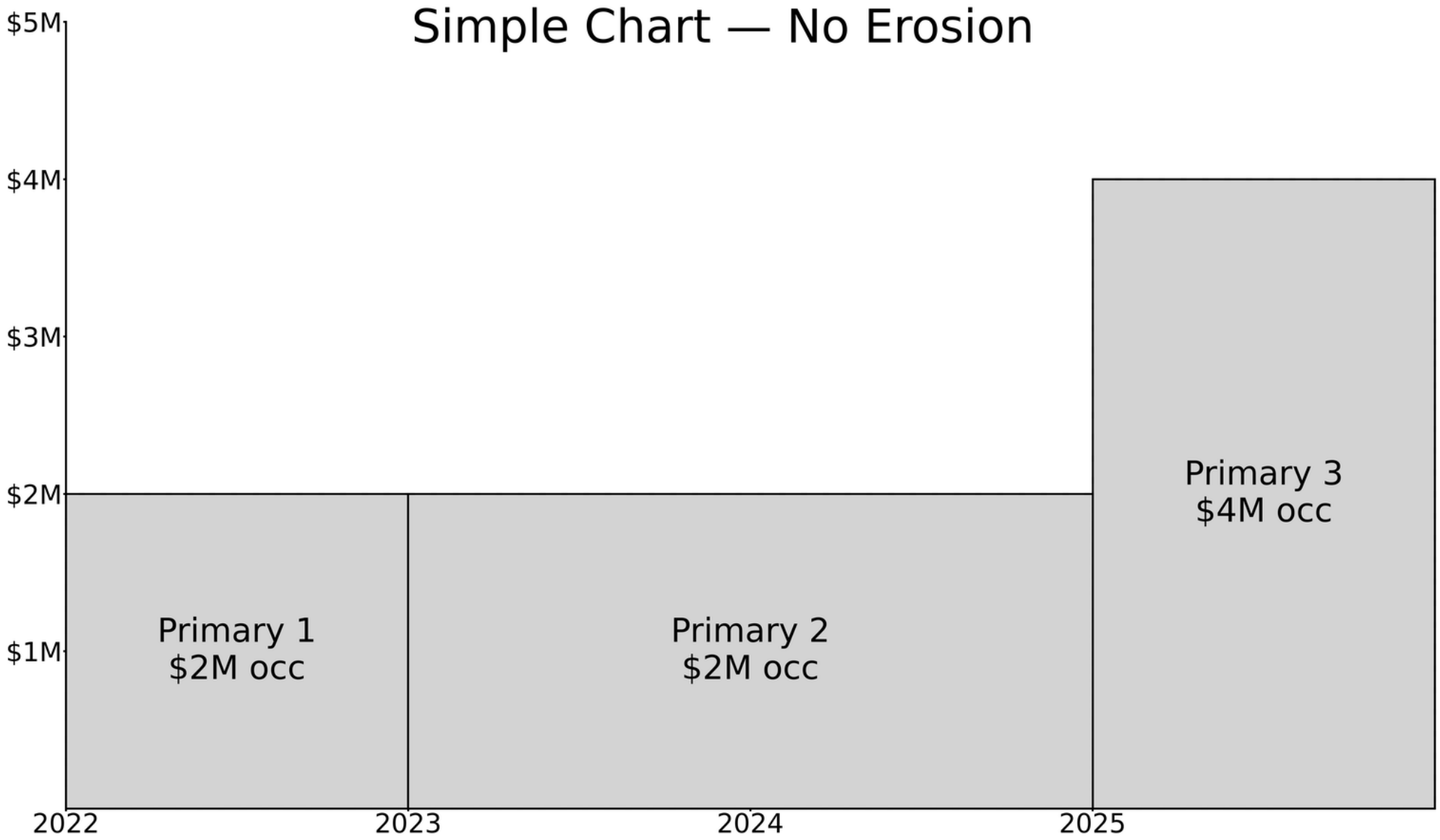
Unfortunate Answer: There is no single nationwide allocation rule. Courts often describe allocation as an equitable determination shaped by policy language, the nature of the loss, and the practical fit of the proposed methodology.

Primary Methodologies for This Panel: Time-on-the-Risk; Limits-based; Time-and-Limits Variants

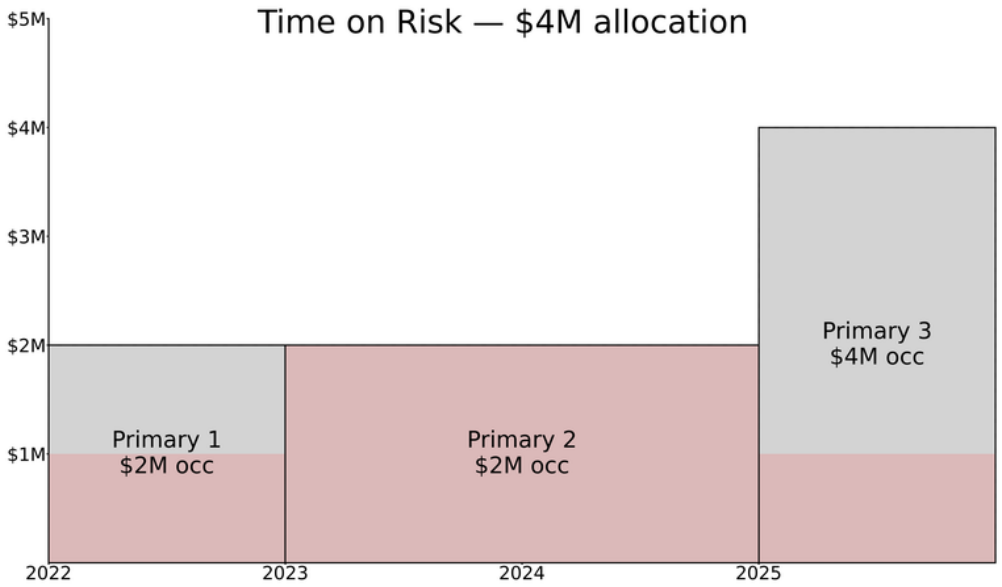
Key Authority: *Centennial Insurance Co. v. United States Fire Insurance Co.* (Cal. Ct. App. 2001) (identifying multiple equitable allocation methods and recognizing trial court discretion).

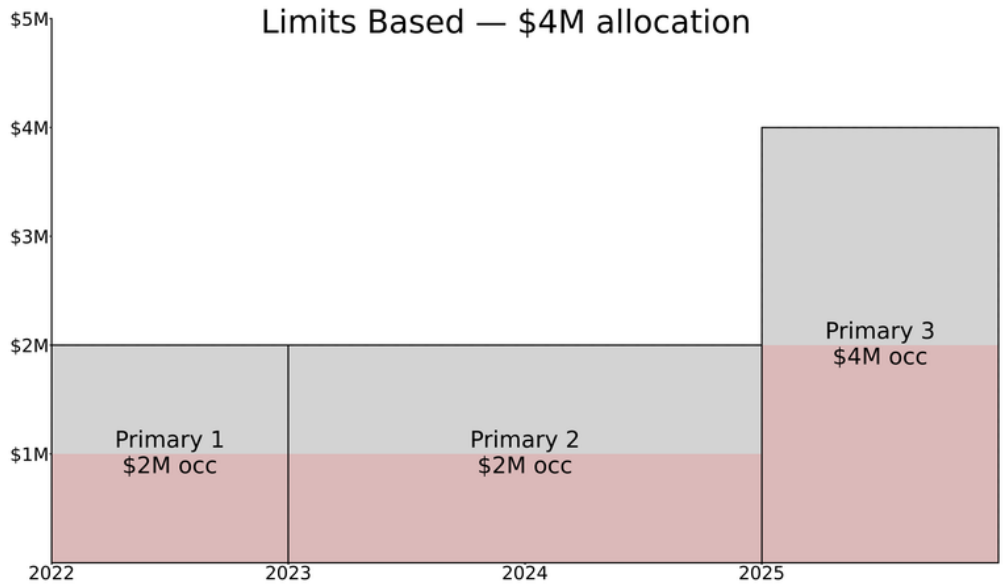
Why the Methodology Fight Matters: The chosen method can materially change each insurer's share. Contribution claims may seek apportionment of defense costs, indemnity payments, or both, and the characterization of a cost as defense or indemnity can affect the methodology analysis.

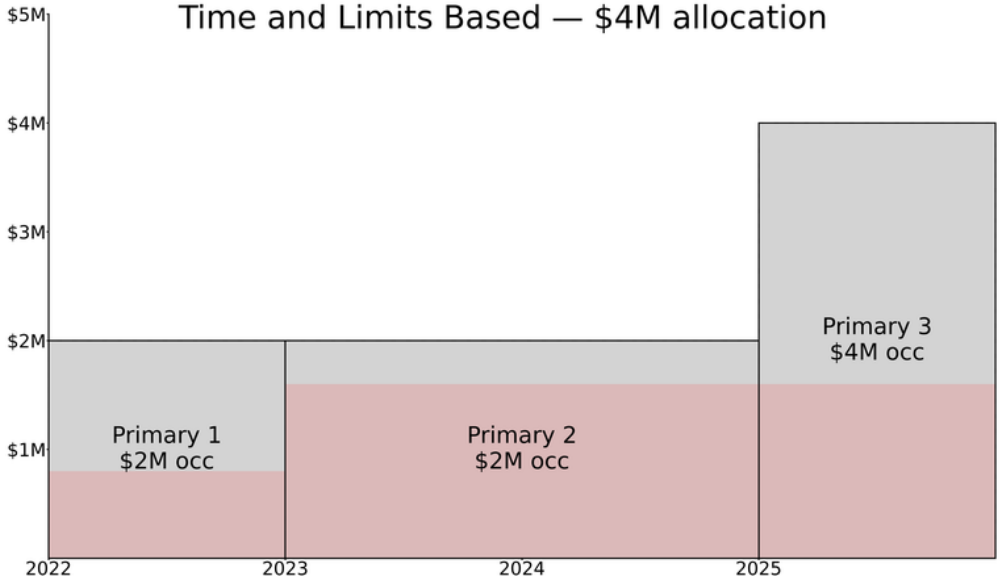
Simple example that shows difference between methodologies



Allocation according to three different methodologies

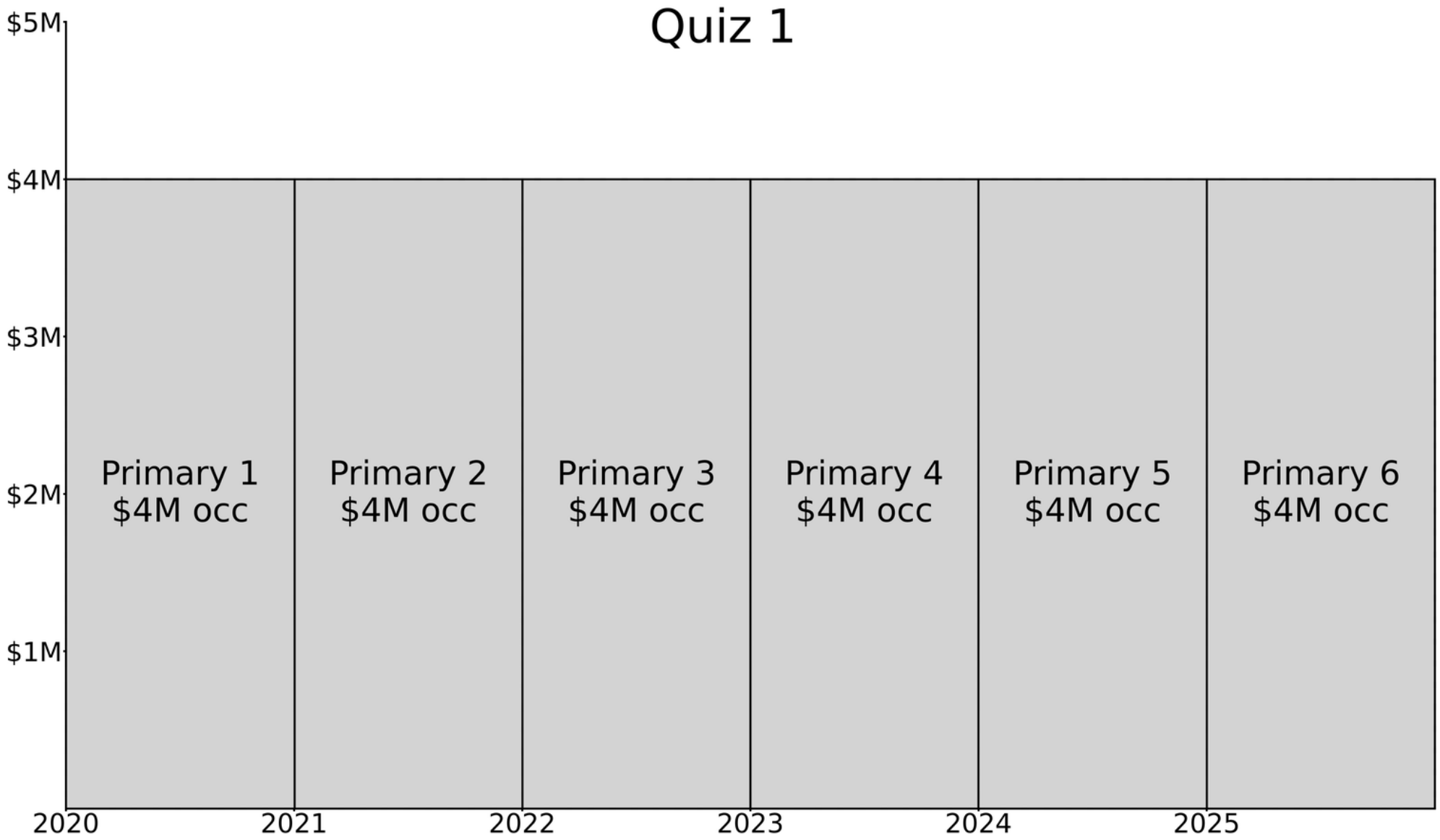






Time on Risk – Second policy gets twice the allocation with twice the policy length
Limits Based – Third policy gets twice the allocation with twice the limits
Time and Limits Based – Second policy (with twice the policy length) and third policy (with twice the limits) get twice the allocation of the first policy

How would three methods vary across this chart?



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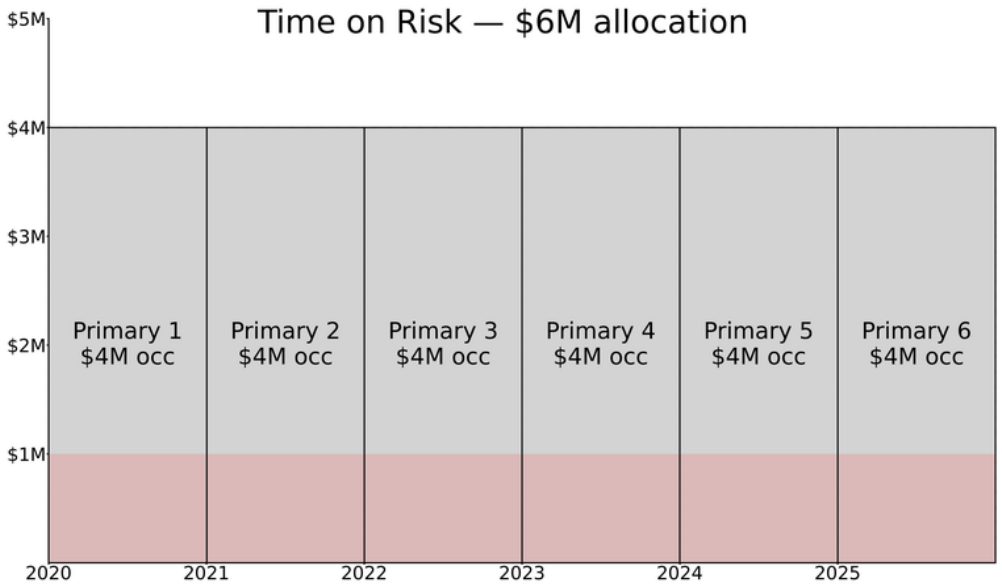
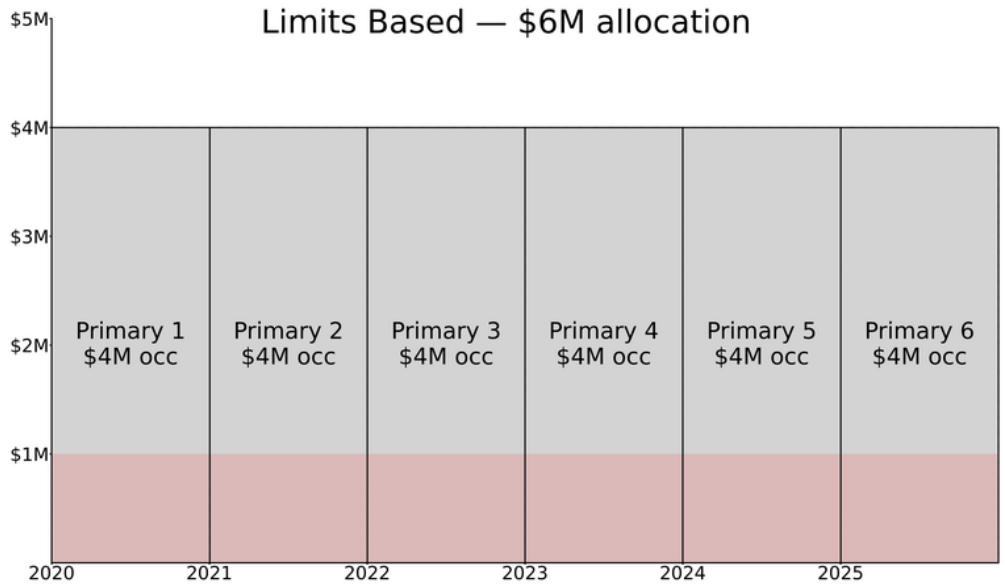
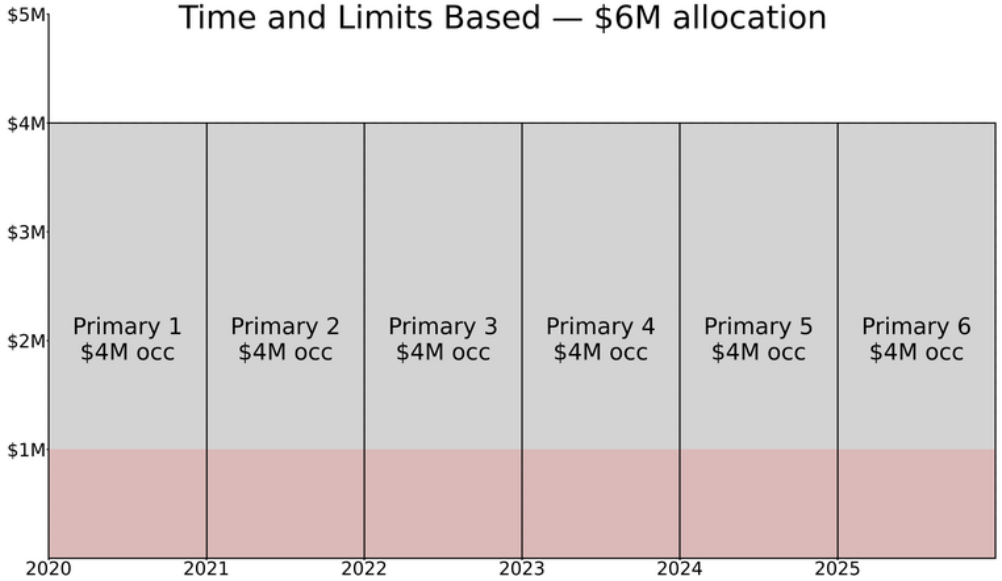
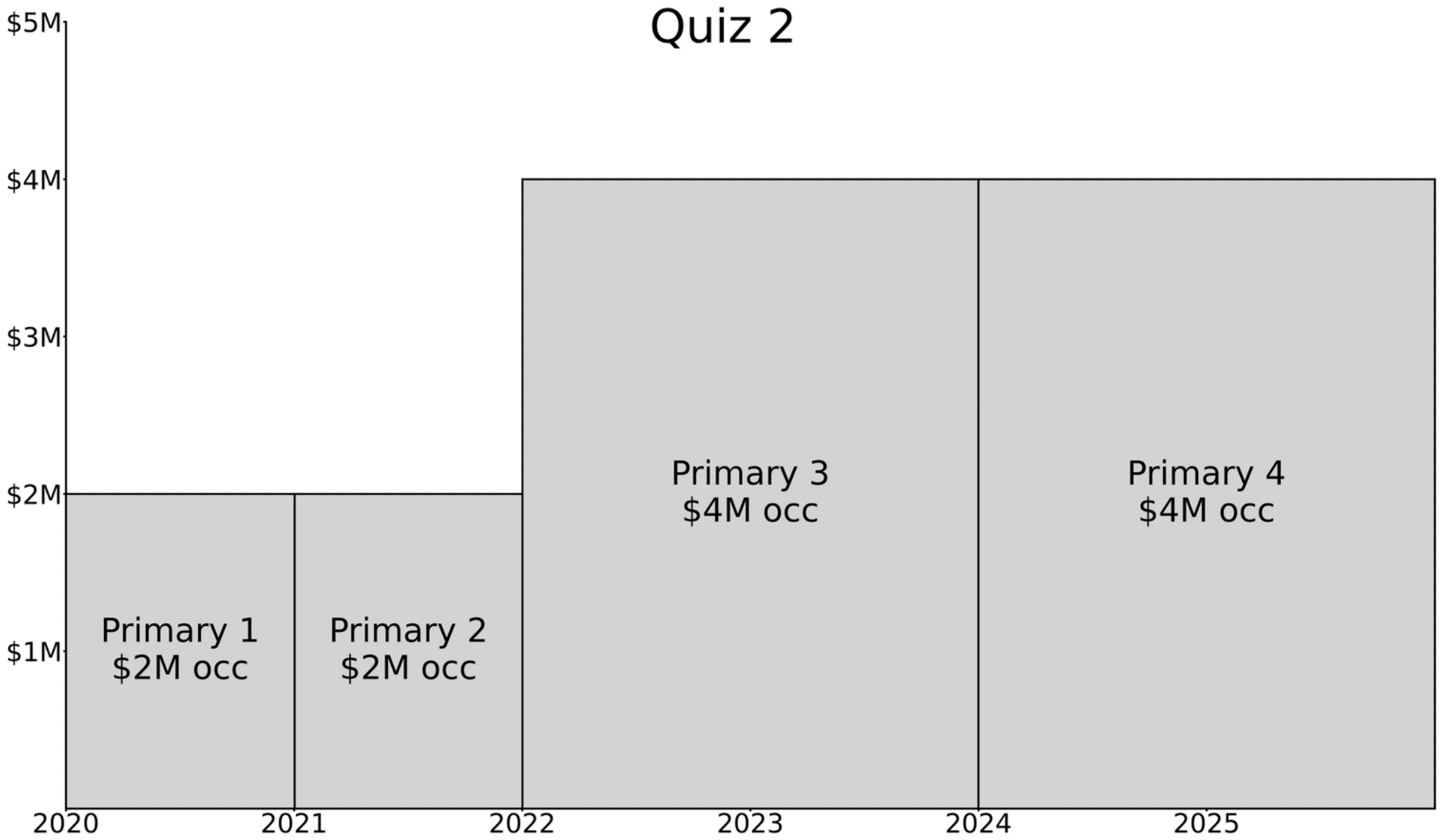






All three methods result in the same allocation because they all have the same time on risk and the same limits.

How would three methods vary across this chart?



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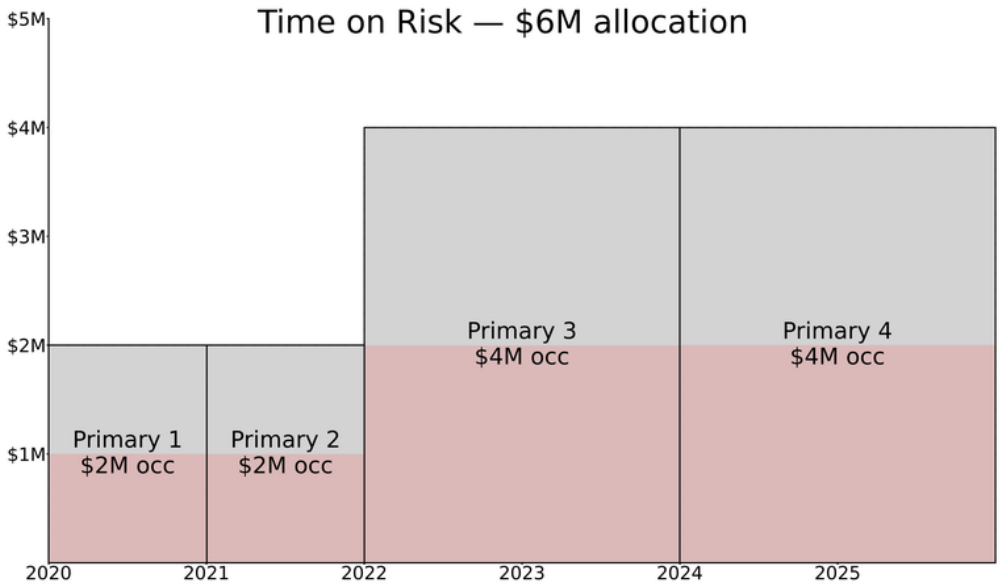
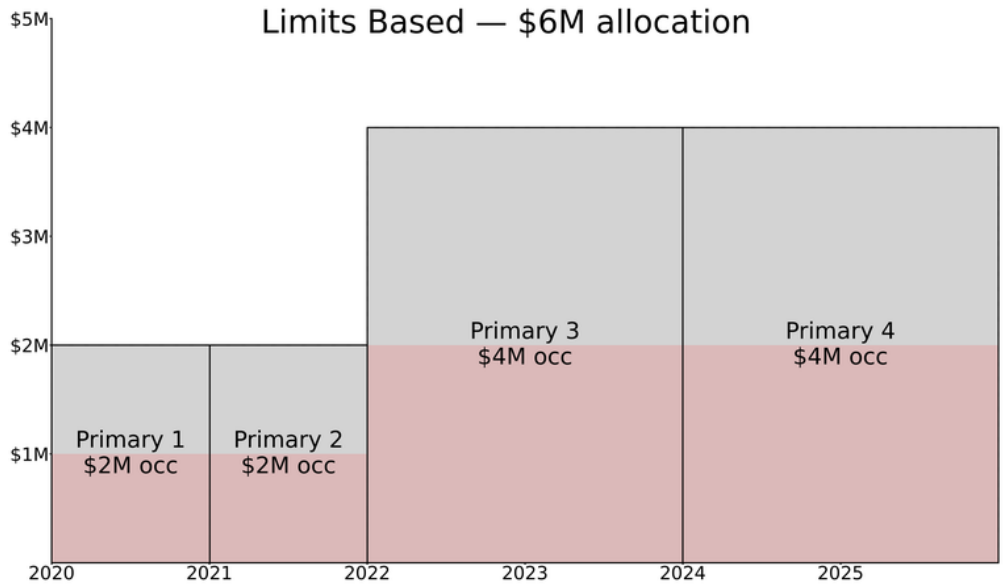
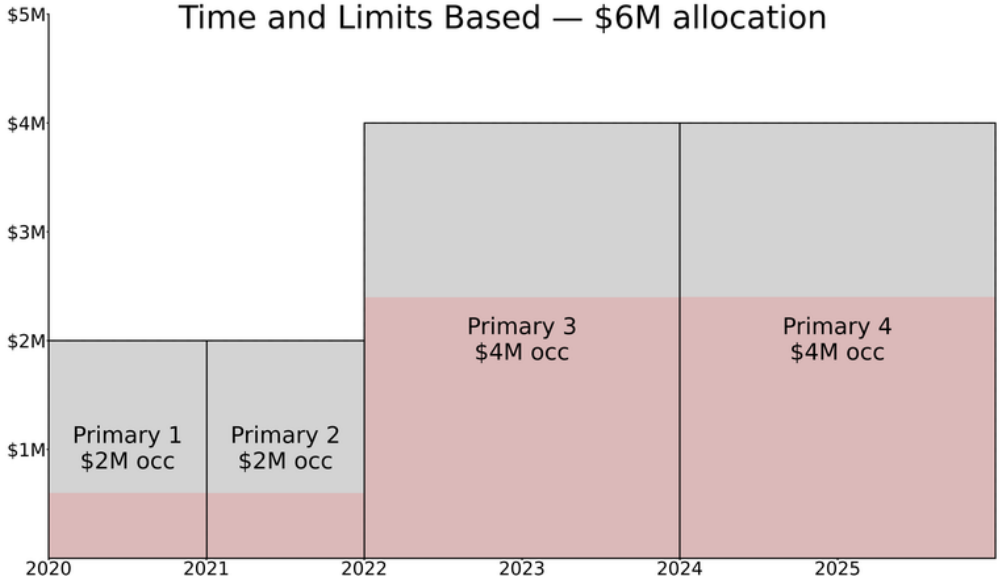
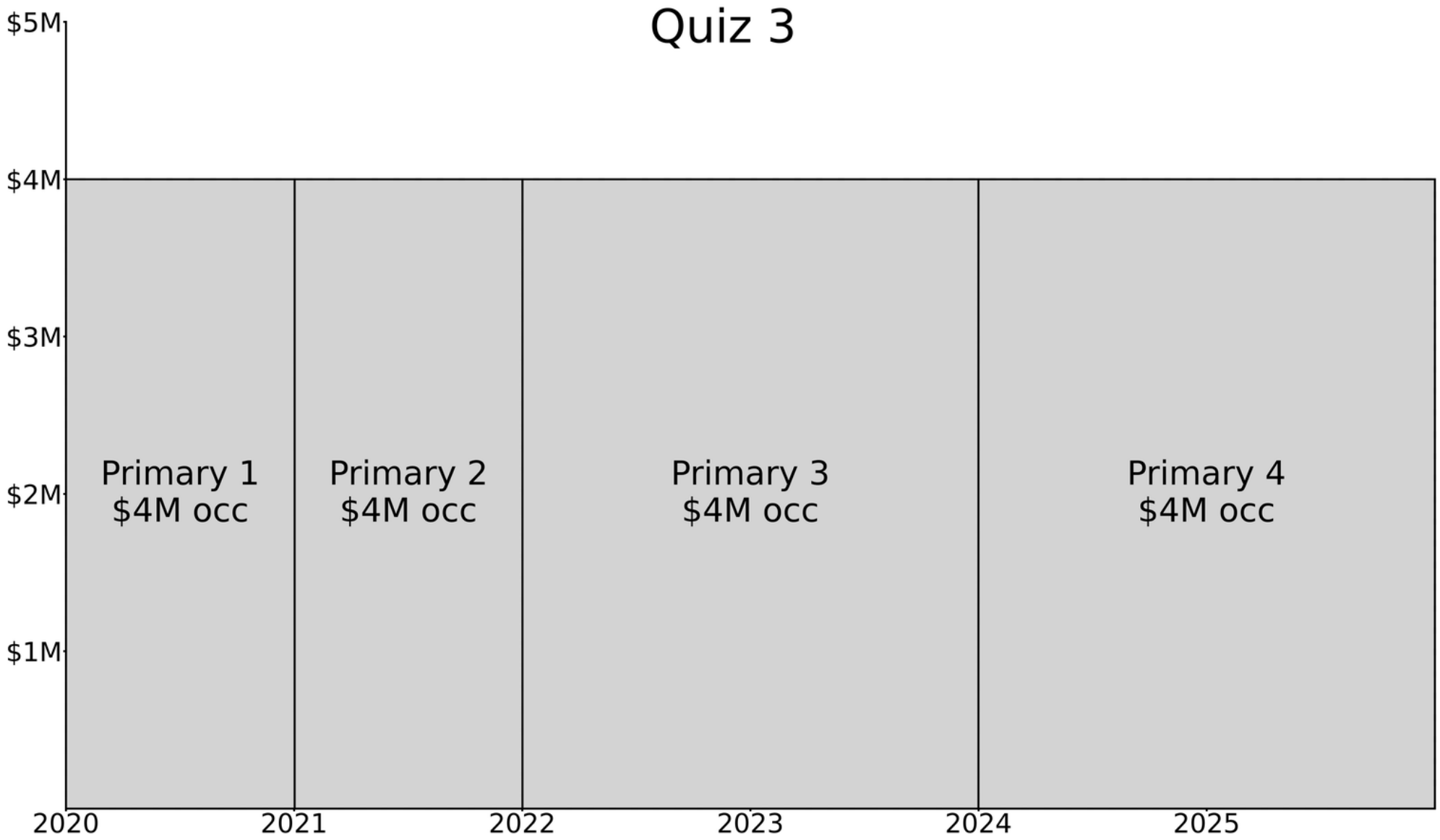






Time on Risk and Limits Based are the same since policies with twice the policy length also have twice the limits. Time and Limits Based gives even more to the longer and taller policies, taking into account both the higher time and the higher limits.

How would three methods vary across this chart?



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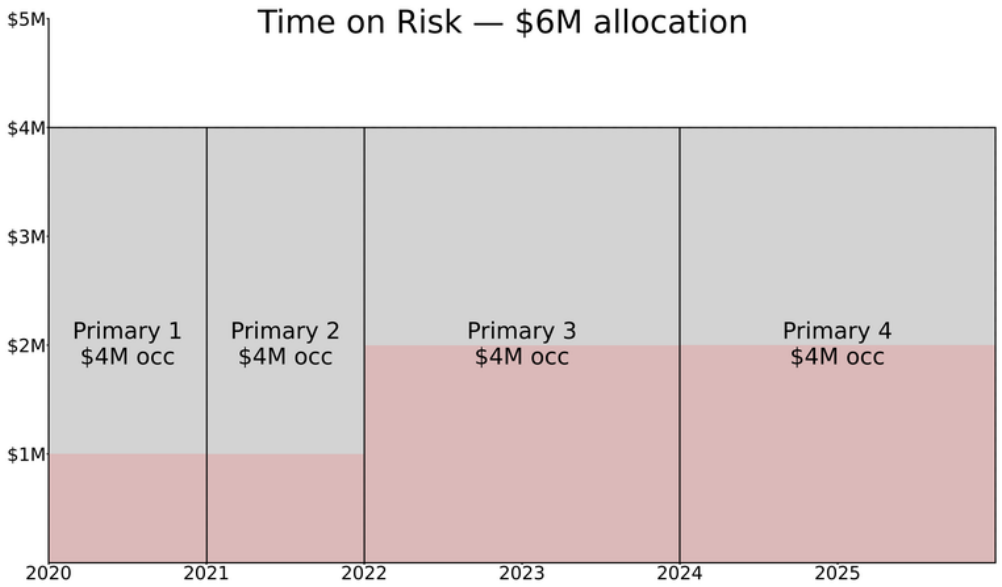
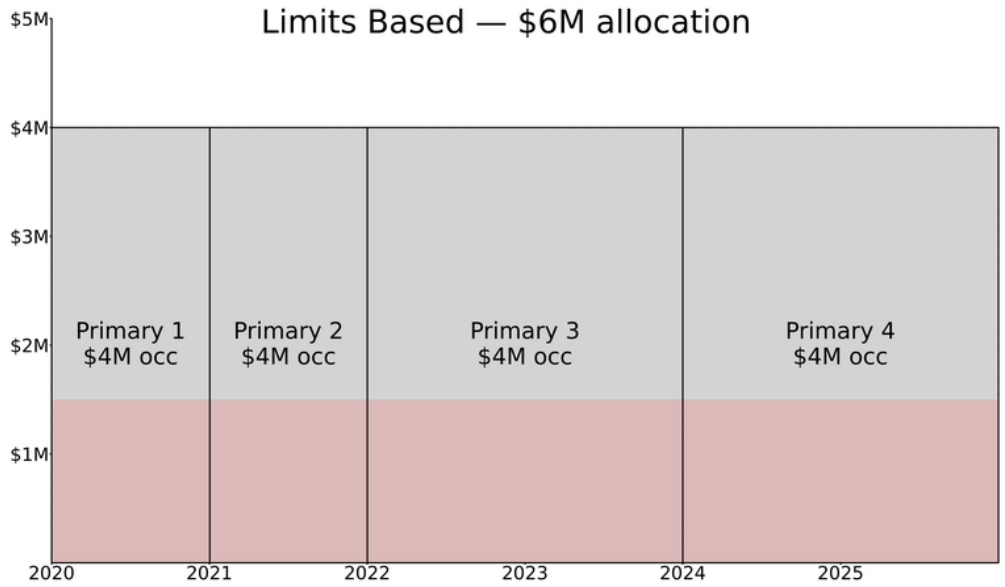
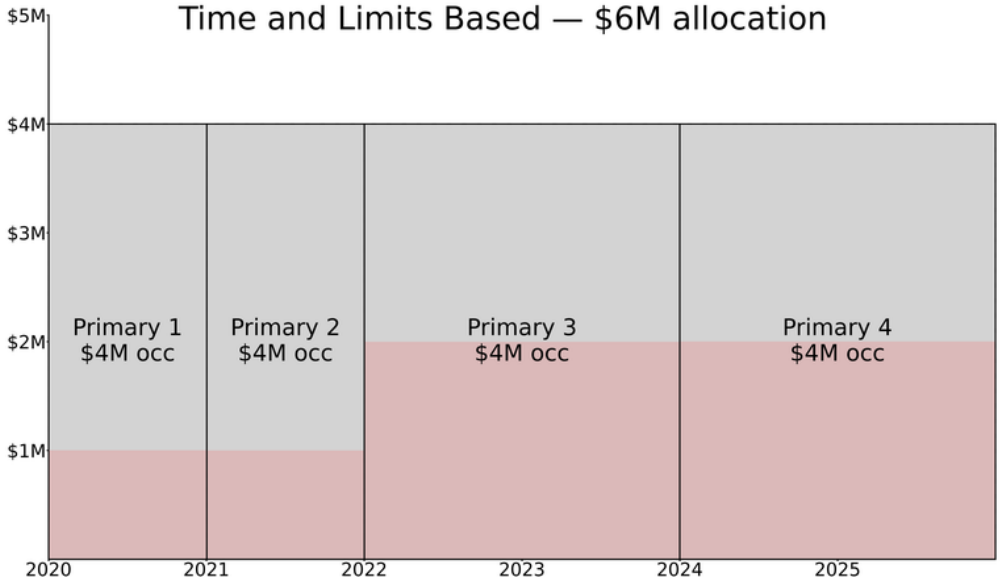
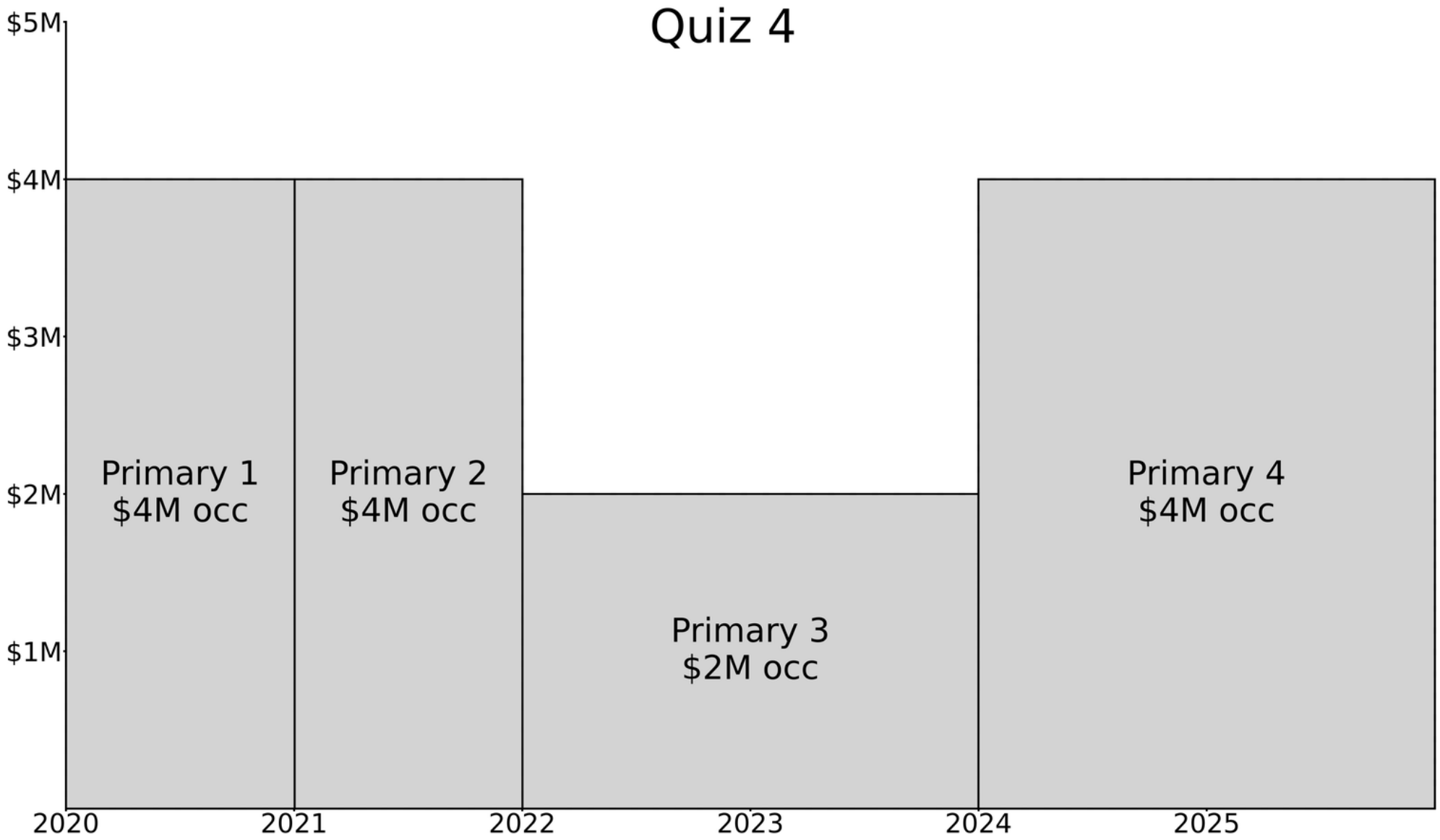






Time on Risk and Time and Limits Based are the same since only the length of the policies differs. Limits Based gives all policies the same allocation since they all have the same limits.

How would three methods vary across this chart?



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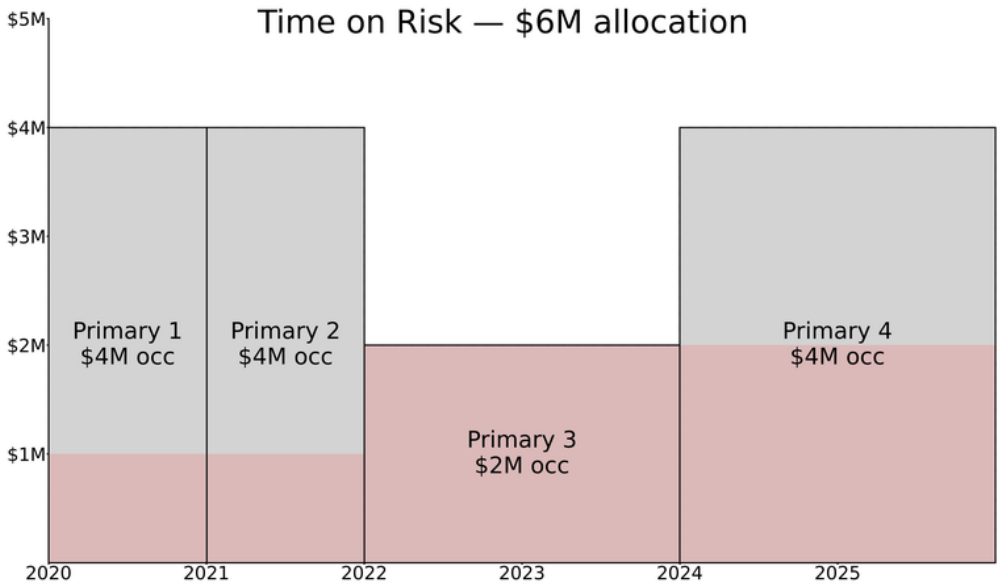
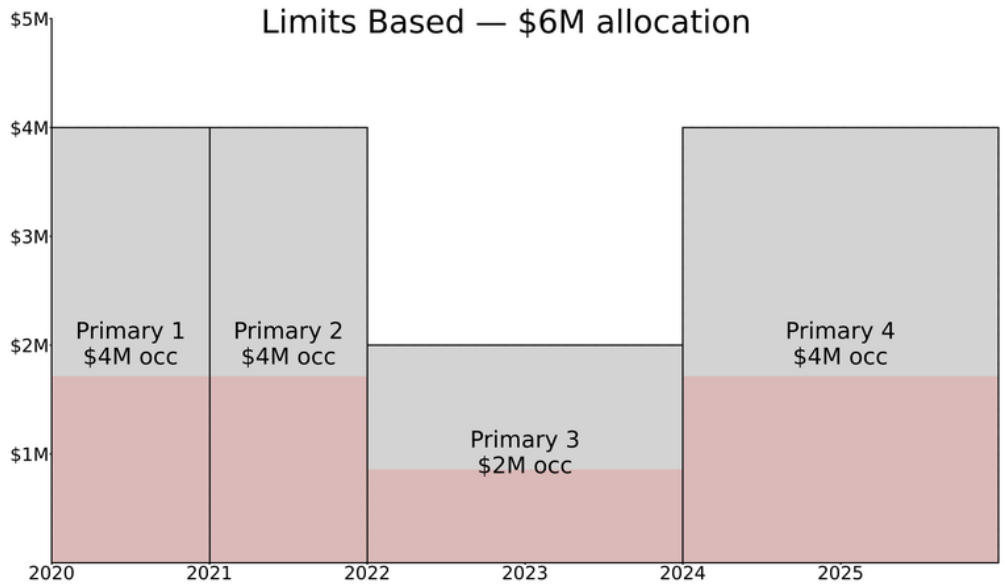
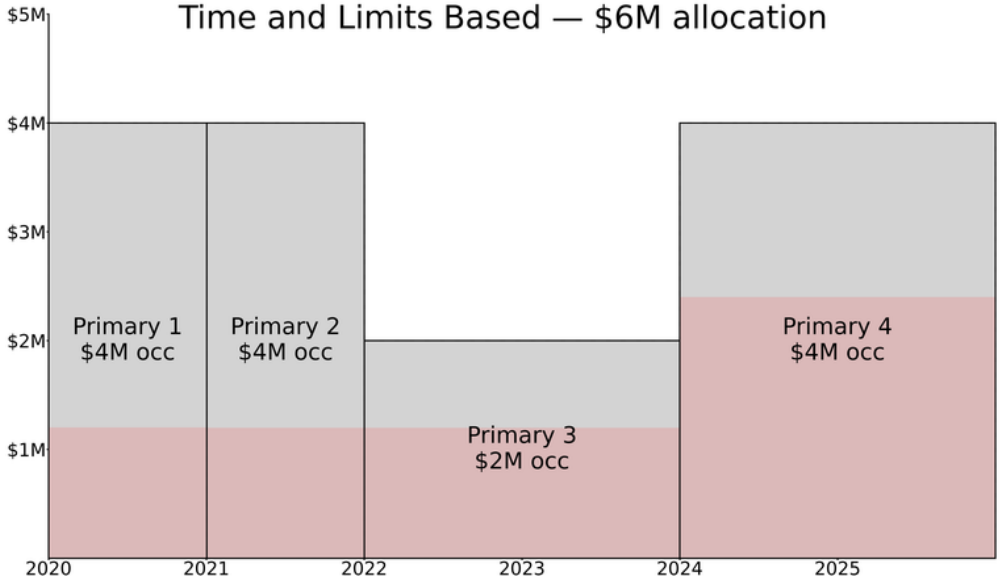






All allocations are different.

Time-on-the-Risk Allocation

Basic Approach: Time-on-the-risk allocates the loss according to the duration of each insurer's coverage during the triggered period.

Why Use It?: It is a sensible solution in cases involving continuous, indivisible injury over long periods. It spreads the burden broadly and evenly across the triggered years. It is often defended as predictable and easy to administer.

Arguments for Time-on-the-Risk: Duration is a neutral proxy for risk assumption. A simple rule reduces satellite litigation among insurers.

Arguments Against Time-on-the-Risk: It may underweight major differences in purchased limits (and the premiums received for those limits). It may treat materially different towers as if they assumed the same economic risk. It may overstate the significance of low-limit or sparsely-insured years.

Illustrative Authorities:

Danaher Corp. v. Travelers Indem. Co. (S.D.N.Y. 2019)(defense and indemnity allocated pro rata by time on risk)

Fireman's Fund v. Maryland Casualty Co. (Cal. App. Ct. 1998) (defense and indemnity allocated pro rata by time on risk)

Time-on-the-Risk – Defense vs. Indemnity

Competing Allocation Methods: Courts are sometimes willing to apply differing methodologies for the allocation of defense versus indemnity—*in the same action*.

OECAA Highlight: *National Surety Corp v. TIG Insurance Co.*:

- Indemnity Allocation Method: average of a policy's pro rata share of the time on the risk and that policy's pro rata share of limits (D. Or. 2022)
- Defense Allocation Method: pro rata by time on the risk (D. Or. 2025)
- OECAA statutory factors include time *and* limits (ORS 465.480(5))
- Nonetheless, the District Court reasoned policy limits have little relevance to allocation of defense costs, particularly where defense costs are paid in addition to limits.

Claims and Strategy Implications:

Contribution disputes may involve defense only, indemnity only, or mixed payments, depending on the governing law and the posture of the case. Claims professionals should separately track defense and indemnity early during the life of a claim because the proof and methodology fights may differ by cost category.

Limits-Based Allocation

Basic Approach: Limits-based allocation assigns each insurer a proportional share based on its policy limits on the risk during the triggered period.

Why Use It?: Limits-based allocation is as easy to administer as time on the risk. The method can protect against rapid erosion and/or exhaustion of earlier-in-time policies, which generally carry lower limits of liability.

Arguments for Limits-Based Allocation: Advocates contend limits-based allocation is a more appropriate proxy for risk assumption than time on the risk. When allocating by limits, a carrier's share may better reflect the magnitude of the risk it assumed—and the magnitude of the premium the insurer received.

Arguments Against Limits-Based Allocation: Primary policies usually cover defense in-addition-to limits—a $100K primary policy incorporates the same defense obligation as a $2M primary policy. The greater-limit-equals-greater-premium argument might be too simplistic. The method does not consider the economic realities at the time the policies were purchased. Which limits count?

Strategic Significance: Limits-based allocation tends to matter most where the tower changes materially over time or where one side wants to emphasize the magnitude of risk transferred, rather than duration alone. Primary carrier v. umbrella/excess carrier considerations: does horizontal exhaustion apply?

Illustrative Authority: *Steadfast Ins. Co. v. Greenwich Ins. Co.* (Wis. 2019) (adopting pro rata by policy limits method of allocating defense among successively-issued policies)

Combined Time-and-Limits Allocation

Basic Approach: This method allocates the loss in proportion to the triggered policies' duration and limits, on the theory that both factors matter in measuring each insurer's share of the common burden.

Why Use It?: Time-and-limits allocation is often viewed as more tailored than pure time on the risk or limits-based allocation methods. Depending on the coverage profile and the loss-type, time-and-limits allocation can better account for major differences in tower size across years.

Arguments for Time-and-Limits Allocation: Time-and-limits allocation may soften both the "underweighting" effect of time on the risk allocation and the "overweighting" effect of limits-based allocation. Consideration of two allocation factors may be viewed as more equitable than allocation by a single factor.

Arguments Against Time-and-Limits Allocation: In some cases, the "time" factor of time-and-limits allocation may not affect the allocation whatsoever—consider a coverage profile where each policy was in effect for one year. Time-and-limits allocation is not well defined. What is the formula? Which policies' limits count? Should the formula weight one factor over the other?

Strategic Significance: There is no "single" time-and-limits allocation methodology. Hence, time-and-limits allocation methods present the opportunity for creative lawyering and negotiating. Consider the effects of weighting one factor over the other and argue the equities in favor of your position.

Illustrative Authorities: *Sharon Steel Corp. v. Aetna Casualty and Surety* (Utah 1997); *Carter-Wallace, Inc. v. Admiral Insurance Co.* (N.J. 1998); *Armstrong World Industries, Inc. v. Aetna Casualty & Surety* (Cal. Ct. App. 1996)

OECAA Case Study – ORS 465.480(5) Allocation Factors

ORS 465.480(5):

The court **shall** allocate ……based on the following factors:

(a) The total period of time that each solvent insurer issued a general liability insurance policy to the insured applicable to the environmental claim;

(b) The policy limits, including any exclusions to coverage, of each of the general liability insurance policies that provide coverage or payment for the environmental claim for which the insured is liable or potentially liable;

(c) The policy that provides the most appropriate type of coverage for the type of environmental claim;

(d) The terms of the policies that related to the equitable allocation between insurers; **and**

(e) If the insured is an uninsured for any part of the time period included in the environmental claim, the insured shall be considered an insurer for purposes of allocation.

OECAA Case Study – ORS 465.480(5) Allocation Factors

- The parties in Continental v. Argonaut differed greatly on their interpretations of the appropriate allocation under these factors. For example, consider:
  - Are policy limits relevant when allocating defense costs that are paid outside of limits?
  - Exhaustion claims of carriers may need to be considered
  - Drop down issues (umbrella v. primary)
  - Additional insured coverage (should it matter that the insured claiming coverage is more remote on such a policy)?

OECAA Case Study – Application of ORS 465.480(5) in *Schnitzer*

PHSS Allocation of $25M Total Defense

Policy	(1) Years on Risk	(2) Policy Limit	(3) Equitable Factor A	(4) Equitable Factor B	Policy weight (1)x(2)x(3)x(4)	Allocation Percentage	Dollar Allocation
A	5	$5,000,000.00	0.1	1	2,500,000	35.1%	$8.78M
A (pre-1972)	2	$5,000,000.00	0.1	0.5	500,000	7.0%	$1.76M
A (total)					**3,000,000**	**42.1%**	**$10.53M**
Continental	4.75	$500,000.00	1	1	2,375,000	33.4%	$8.34M
Continental (post 1980)	2	$500,000.00	1	0.5	500,000	7.0%	$1.76M
Continental (total)					**2,875,000**	**40.4%**	**$10.09M**
B	1	$500,000.00	1	0.5	**250,000**	**3.5%**	**$0.88M**
C	1	$1,000,000.00	1	0.1	**100,000**	**1.4%**	**$0.35M**
D (1965-1970)	4.25	$100,000.00	1	0.5	212,500	3.0%	$0.75M
D (A.I. 1)	5	$500,000.00	1	0.2	500,000	7.0%	$1.76M
D (A.I. 2)	2.85	$500,000.00	1	0.1	142,500	2.0%	$0.50M
D (A.I. 3)	2	$100,000.00	1	0.2	40,000	0.6%	$0.14M
D (total)					**895,000**	**12.6%**	**$3.14M**
				Total weight	7,120,000		

OECAA Case Study – Application of ORS 465.480(5) in *Schnitzer*

The trial court didn't adopt the recommendations of the parties, and used years times risk as the starting point (finding the statute so required, although there are varying decisions on this in Oregon). It then made adjustments based on "equitable factors, " split into two columns since some carriers received a reduced share for two different reasons.

ICSOP, for example, received a 90% reduction based on the drop-down nature of the obligation (based on the "type of coverage" factor in the statute), seen by the court as different from the risk taken on by the primary insurers.

Other factors were applied based upon the carrier being tied to this loss through an additional insured, and for periods during which the insured did not operate at one or more of the sites during the effective dates of the policies.

The basis for allocation was not challenged on appeal (except ICSOP prevailed on its argument that it was not subject to contribution at all because it was not required to drop down; and Wausau still contends that certain policies were exhausted).

Allocation Method – Why Framing Matters

No Single Allocation Method Is Universally Required:

Courts often describe allocation as an equitable determination informed by policy language, the nature of the underlying loss, and the practical fit of the proposed methodology. Allocation in the contribution context is an emerging area of law.

Practical Consequences and Strategic Considerations:

Methodology arguments are usually also arguments about fairness. Optics matter in these cases.

Equitable factors introduce uncertainty and unpredictability.

Equitable factors also introduce the opportunity for creative arguments.

Early evaluation of allocation methods is critically important and can direct case strategy.

Part 3 Overview – The Complicating Factors

The Complicating Factors:

- Insolvencies and Orphan Shares
- Self-Insured Retentions (SIRs)
- Fronting Policies
- Settled Coverage

These issues affect:

1. Which insurers remain as a target for contribution
2. Defenses to contribution claims
3. The amount of contribution recovery

Insolvency and the Orphan Share

Core Question: When one triggered insurer in a tower is insolvent, who absorbs the orphan share for purposes of attaching coverage at higher layers?

Common Pro Rata View: The orphan share often remains with the insured. The rationale is that the insured selected the insolvent carrier and other insurers should not automatically absorb that default.

Olin Corp. v. Insurance Co. of North America (2d Cir. 2000). *AAA Disposal Systems, Inc. v. Aetna Casualty & Surety Co.*, (Ill. App. Ct. 2005).

All Sums / Contribution Context: Insolvencies heavily affect reallocation and contribution modeling. An insurer seeking contribution could be in the position of having to stand in for multiple insolvencies across multiple triggered years. There is no uniform legal rule—courts continue to grapple with this issue, and it presents a fertile area for creative arguments.

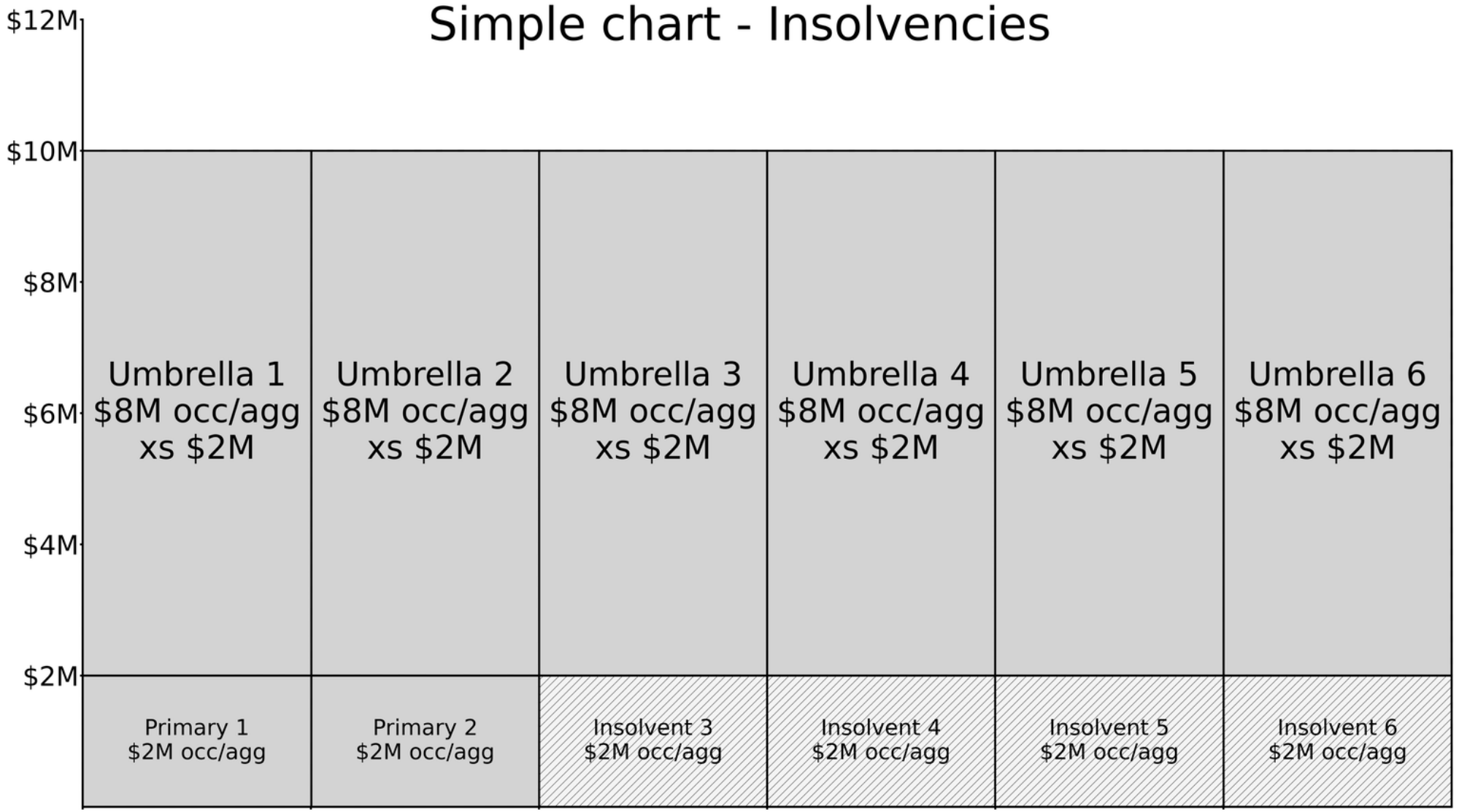
Claims and Strategy Implications:

Identify insolvent and missing years early. Identify potential avenues of recovery from state guaranty funds or from insolvent insurer through liquidator proceedings.

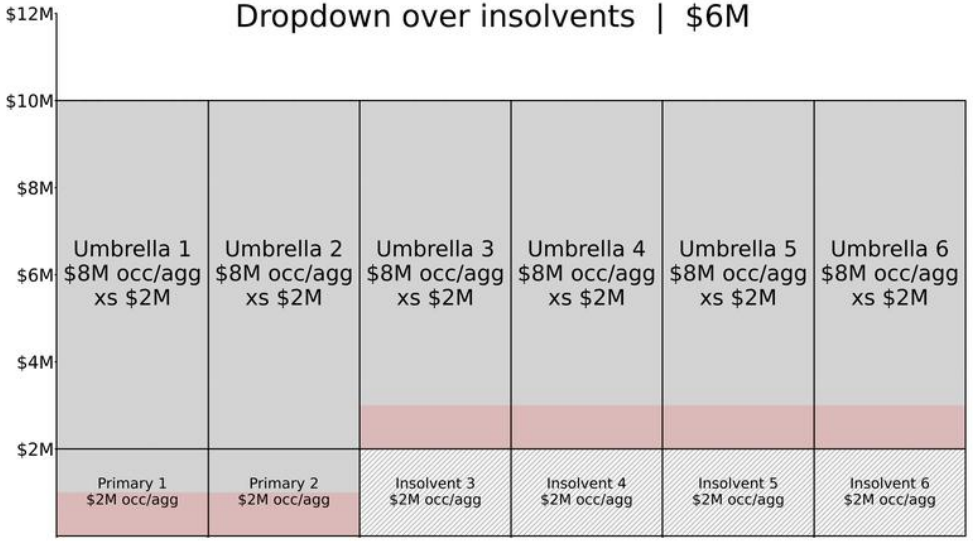
Determine the practical effect of the insolvency gap(s) under varying allocation methodologies.

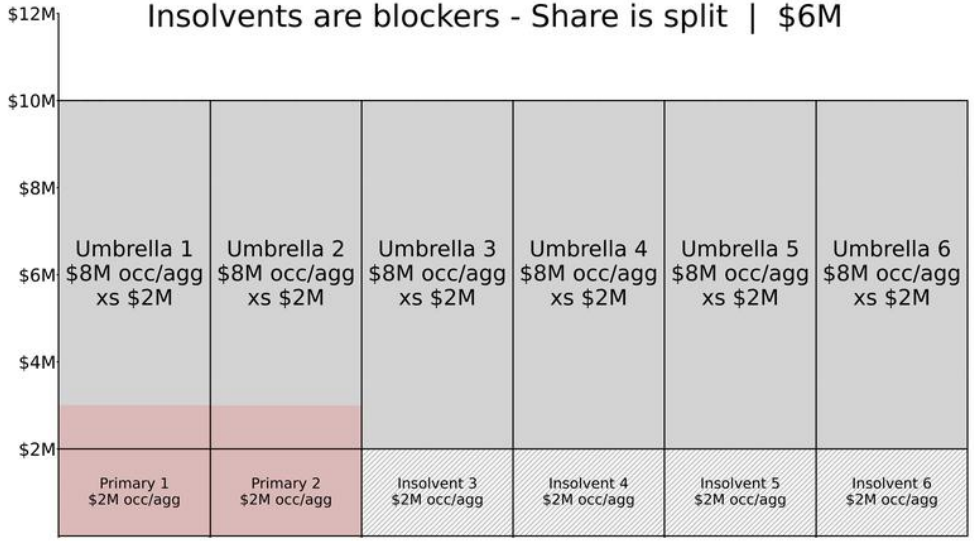
Consider equitable arguments and potential drop-down language of policies excess of insolvent policy.

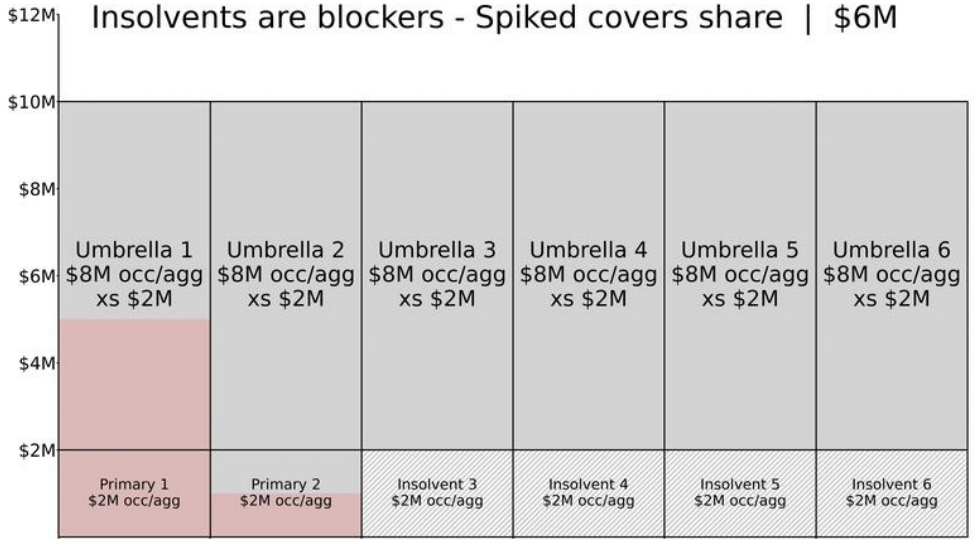
Insolvency and the Orphan Share – Hypothetical Chart



Insolvency and the Orphan Share – Allocation Methods



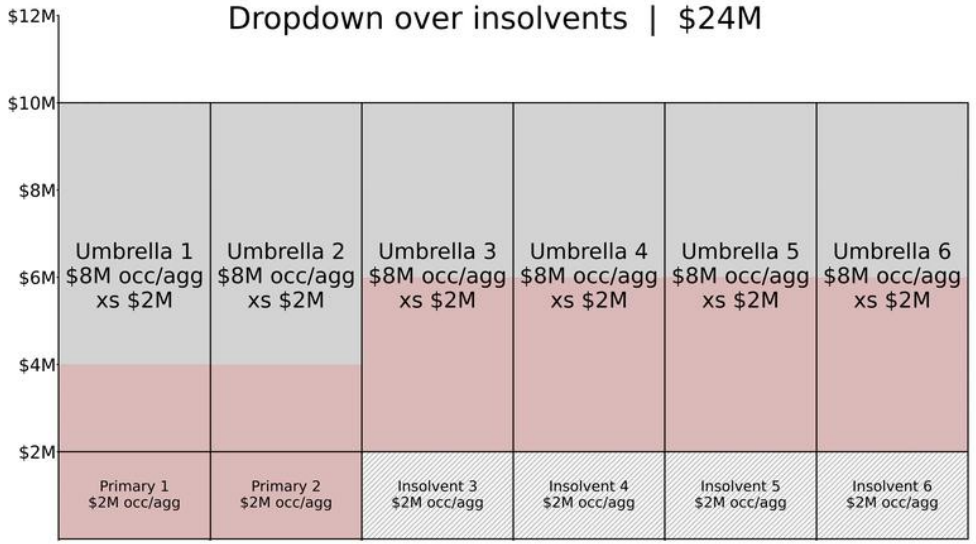


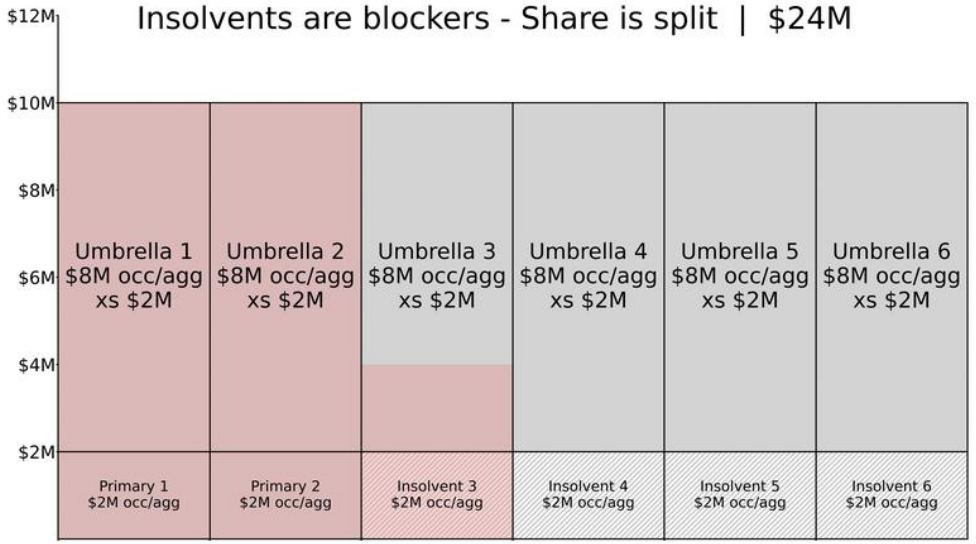


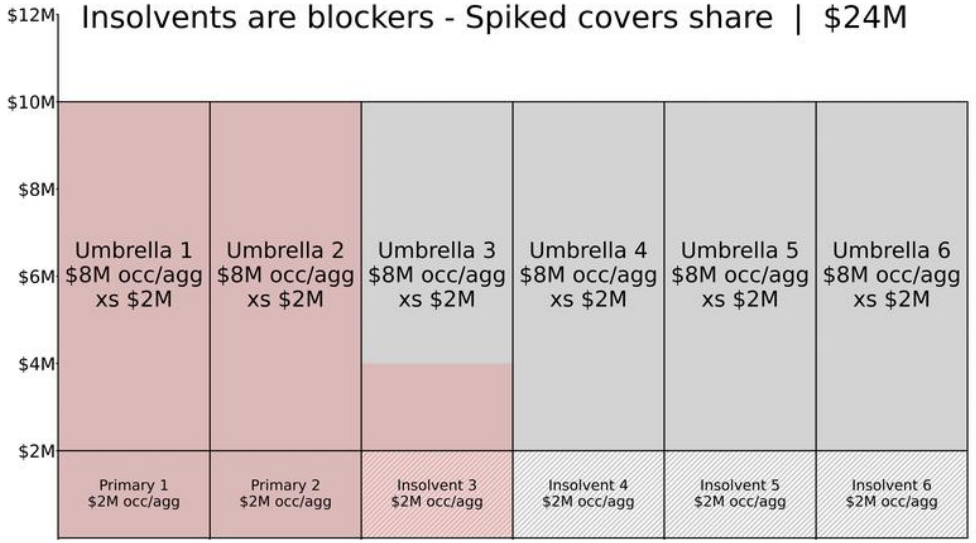
In the extremes:

- Umbrella policies could drop down over insolvents, or
- Umbrella policies could refuse to pay until underlying insolvents are allocated real dollars covered by the insured

Insolvency and the Orphan Share – Allocation Methods







- With dropdown, policyholder has access to all limits without needing to cover insolvencies.
- If insolvents are "blockers" policyholder can only access limits without an underlying insolvent before needing to spike through an unrecoverable insolvent.

Excess Attachment and "Drop Down" Issues

Core Question: If the underlying insurer is insolvent, must the excess insurer drop down and fill the gap?

Majority Rule: No drop down absent policy language requiring it.

Illustrative Authority: *Werner Industries, Inc. v. First State Insurance Co.* (N.J. 1988).

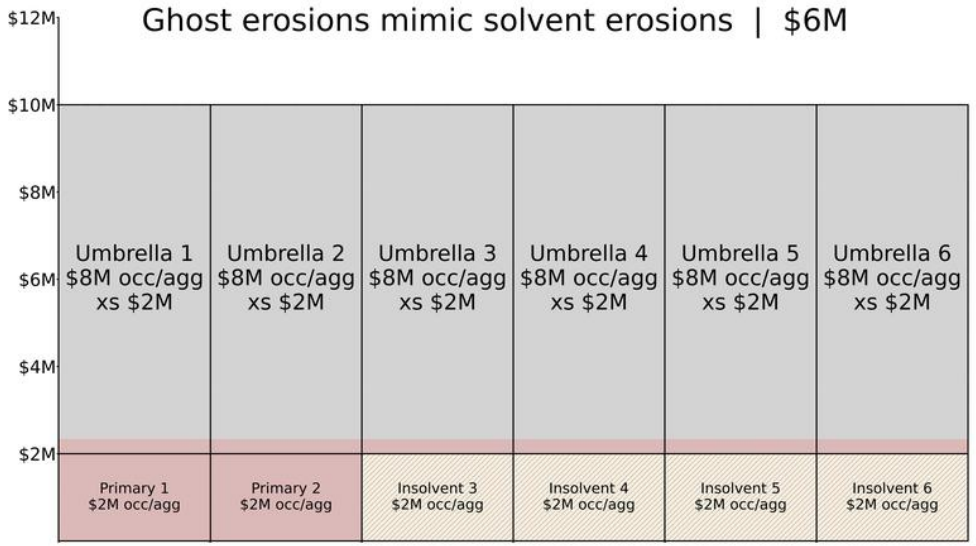
Language That May Trigger a Different Result: Attachment wording conditioned upon exhaustion of the "collectible" or "recoverable" underlying insurance.

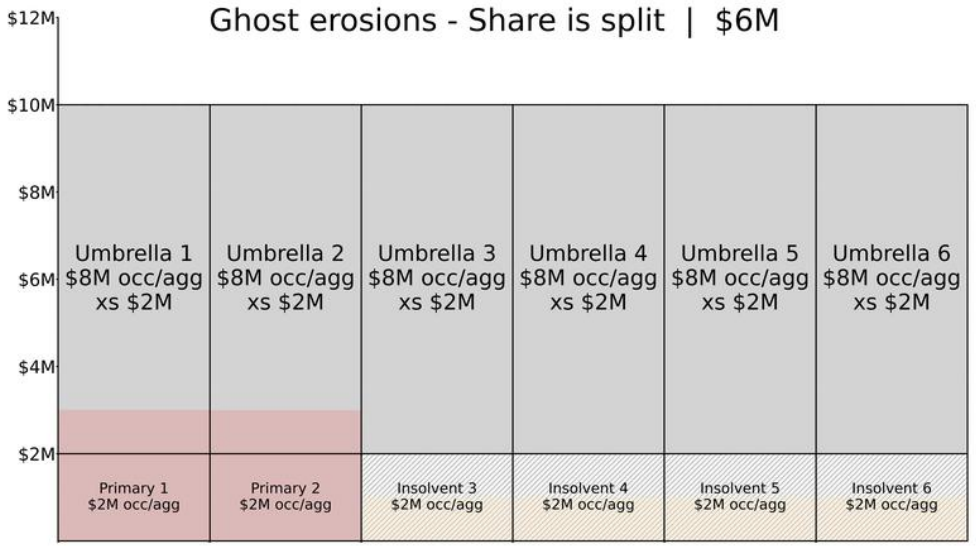
Illustrative Authority: *Reserve Insurance Co. v. Pisciotta* (Cal. 1982).

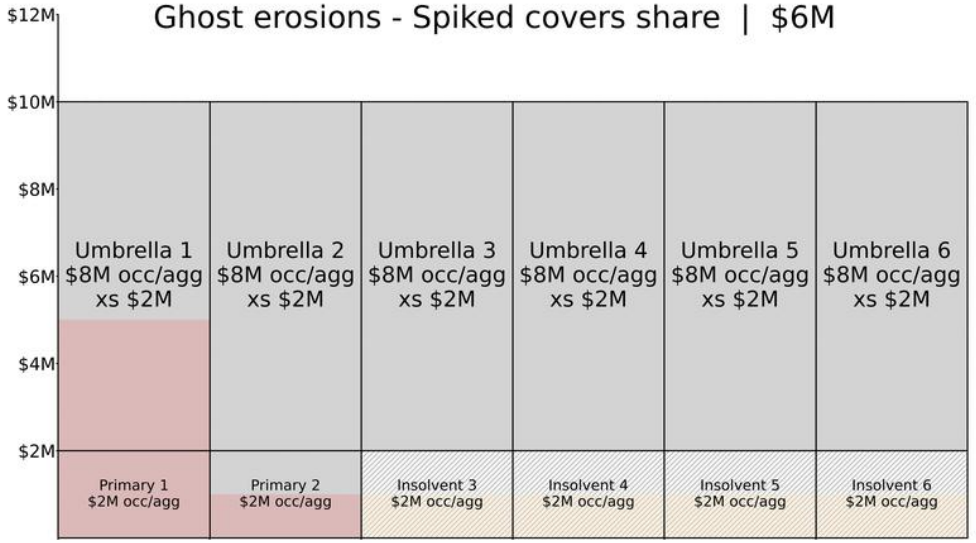
Practical Point: Even where there is no formal drop down, the insured may still be able to fill the gap and reach the excess layer.

Illustrative Authority: *United States Fidelity & Guaranty Co. v. Treadwell Corp.* (S.D.N.Y. 1999).

Insolvency and the Orphan Share – Allocation Methods

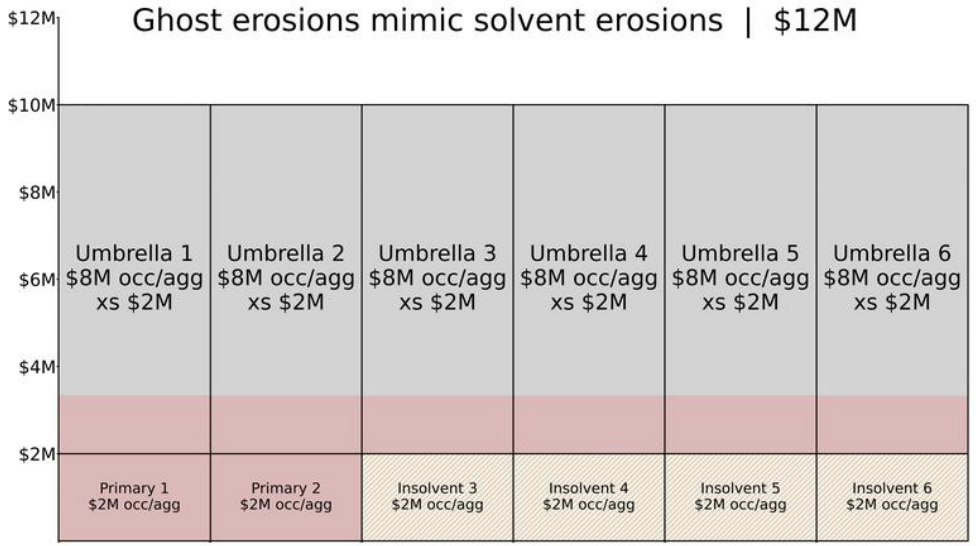


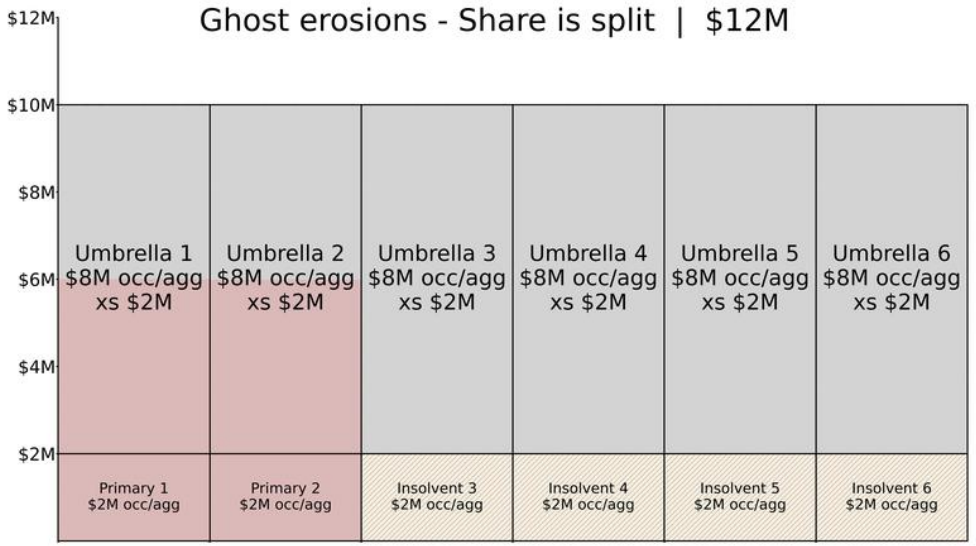




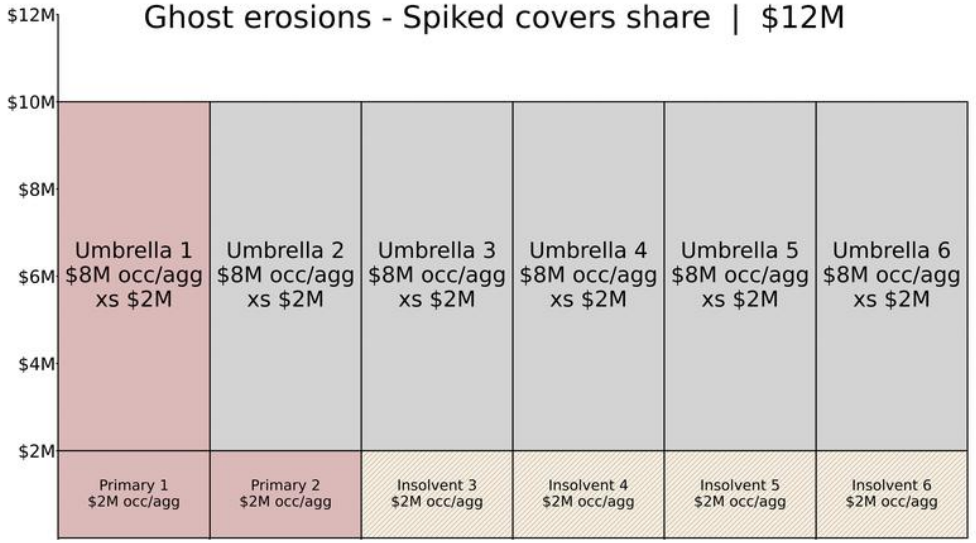
If insolvents can be allocated "ghost" erosions covered by triggered and attached solvent policies, policyholder may be able to access limits above insolvent policies even without drop down and without allocating unrecoverable dollars to the insolvents.

Insolvency and the Orphan Share – Allocation Methods

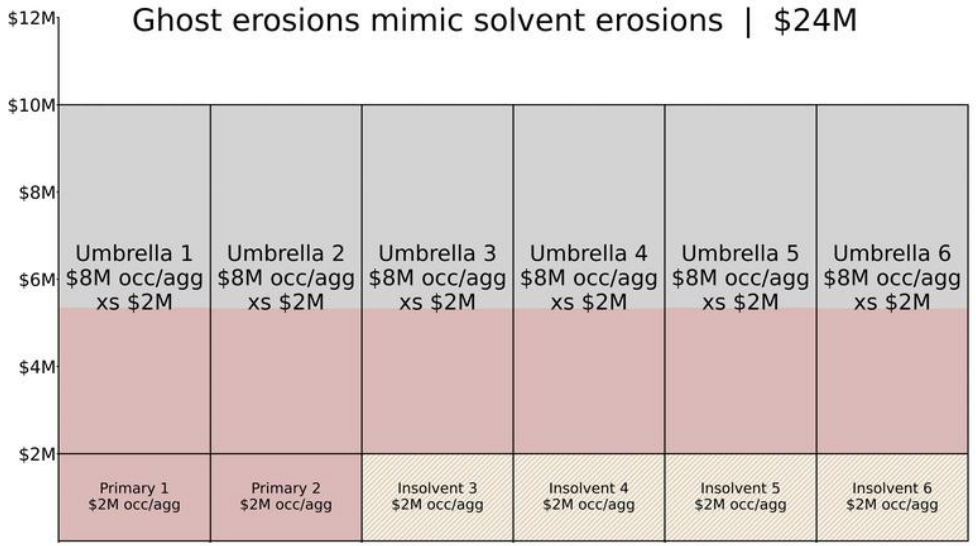


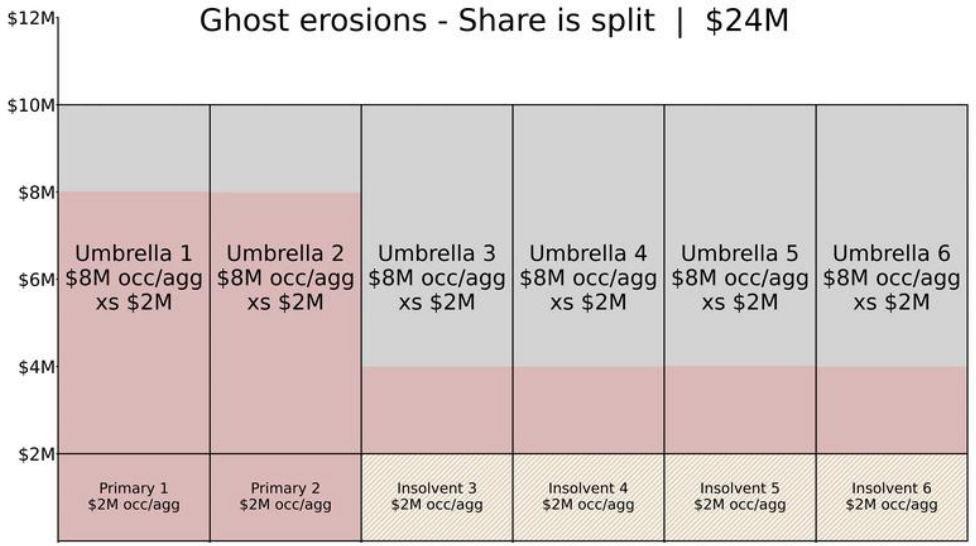


- "Ghost" erosions move quicker when they mimic the erosions of solvent policies covering the insolvent share.
- Umbrella policies above insolvents benefit relative to policies above solvent policies if the "ghost" erosions do not mimic a reallocation of insolvent shares.

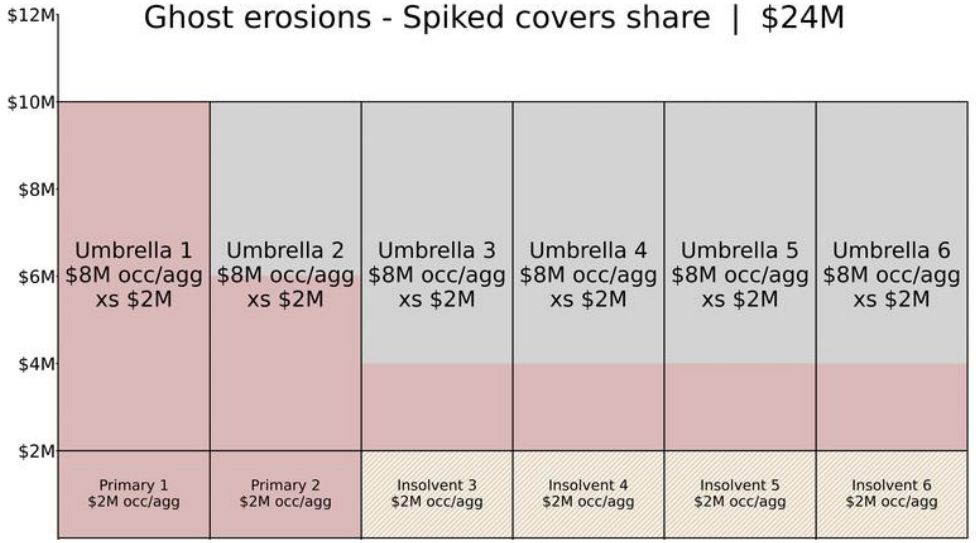


Insolvency and the Orphan Share – Allocation Methods





Policyholder can avoid covering insolvent shares so long as there is enough solvent coverage triggered and attached to cover the "ghost" erosions needed to attach policies above insolvents.



Self-Insured Retentions in Contribution

The Real Legal Fight: Who Pays the SIR?

Pro rata jurisdictions: insured typically required to satisfy each policy's SIR or deductible for coverage to attach—satisfaction of one policy's SIR does not satisfy a second policy's SIR.

Benjamin Moore & Co. v. Aetna Casualty & Surety Co. (N.J. 2004)(insured must satisfy deductible in each triggered year of coverage)

All sums jurisdictions: insured typically avoids selecting triggered year(s) with SIR obligations—selected insurer seeking contribution then left to satisfy SIRs in other triggered year(s) or seek participation of insured

Allianz v. ACE (Or. Cir. Ct., Multnomah Cty., 2025) (paying primary insurer must allocate to and exhaust SIRs, fronting policies, and primary policies in all triggered years prior to attachment of excess policies)

Fronting Policies – Oregon and California Diverge

Issue	Oregon Approach	California Approach
Lead case	*Allianz Global Risks US Insurance Co. v. ACE Property & Casualty* (Or. 2021)	*Aerojet-General Corp. v. Transport Indemnity Co.* (Cal. 1997)
Basic view	Fronting arrangements do not automatically remove the policy from the contribution analysis	Paying insurers may not use a fronting policy to compel equitable contribution from the policyholder
Reasoning	Contribution turns on policy obligations, not just side agreements between insurer and insured	Insurer's defense duty arose under its own policies and was not affected by the insured's agreement with the fronting carrier; equitable contribution applies only between insurers, not between insurer and insured or an uninsured or self-insured party
Practical effect	Fronting years may remain in the denominator and in the contribution pool	In California, a fronting year cannot be used to force the policyholder to contribute together with insurers, and *Aerojet* treated the insured as effectively uninsured for that purpose

Additional Authority (Ohio): In *Chemical Solvents, Inc. v. Greenwich Insurance Co.* (6th Cir. 2023), the Sixth Circuit held under Ohio's all-sums framework that targeted insurers could seek equitable contribution from other triggered policies even where the insured bore downstream financial consequences through a captive reinsurance arrangement.

Settled Coverage – Overview

Key Question: Are settled insurers protected from contribution claims?

Approach	General Effect
Settlement-protective / contribution-limiting	Settlement may bar or narrow later contribution claims, depending on the governing statute or doctrine. Questions arise regarding whether and to what extent non-settling insurer might be entitled to setoff.
Contribution-preserving	Settlement with the insured does not necessarily extinguish the contribution rights of non-settling insurers.

Why This Is Crucial:

Settlement with the insured may or may not remove a policy from the contribution target pool

Settlement with the insured may not eliminate contribution exposure

The governing jurisdiction's approach should shape reserving, exposure valuations, and settlement negotiations

The law is not uniform

OECAA Case Study – Other Interesting Issues (Appeal Pending)

1. Attorney Fees Awarded Against Continental

2. Pre-judgment Interest Awarded Against Continental

   - Continental argues that ORS 465.480(5) allows contribution for any "recoverable costs" and that this includes statutory attorney fees and interest (ORS 742.061 and 82.010(1)(a)). The language is different from the provision that grants the right to the insured to seek all defense and indemnity costs from a single insurer, which Continental argues means the contribution recovery extends to costs too and not just actual defense and indemnity paid.

   - In this case, Continental states that it was advancing the same arguments as the other carriers would have made (had they been parties to the targeting suit), who should share in the cost to further the goals of the statute in reaching a fair and equitable allocation of the risk initially borne by the selected carrier.

OECAA Case Study – Other Interesting Issues (Appeal Pending)

Discussion point: Suppose interests were vastly different and the selected carrier was recalcitrant in ways the others were not (not the facts here).

Wausau argues that OECAA refers in many places to "defense and indemnity costs" and that the "costs" that are recoverable are those that are defense or indemnity. It argues that the recovery is for an "environmental claim" which is defined in terms of defense and indemnity. It finds no direct authority in the statute authorizing recovery of contribution for attorney fees and prejudgment interest. It contends that the statute does not set out to make the selected carrier whole, pointing to the good faith settlement provision as an example of a provision that would frequently render a selected insurer less than whole.

The financial impact of this decision, which is before the Court of Appeals as we speak, is significant given the 2014 date of the original underlying federal court decision in the Schnitzer v. Continental matter.

OECAA Case Study – Other Interesting Issues (Appeal Pending)

1. What if the selected carrier is differently situated from the other carriers on an issue such as attorney fees or adjustments for reasonable and necessary issues? Does that raise an allocation question or a recoverability question?

2. Is there issue preclusion? What standard should the trial court give to rulings in the insured vs. selected carrier trial?

Practical Considerations for Practitioners

For Policyholder Counsel: Choose your forum wisely – all sums vs. pro rata still matters enormously. Focus early on tower selection, exhaustion structure, and whether fronting policies, settled policies, or insolvencies change the contribution target pool. Preserve arguments concerning policyholder-finance provisions.

For Insurer Counsel and Claims Professionals:

- **Early Identification and Record-Building:** Identify all triggered, settled, insolvent, and fronting years early. Track and analyze defense separately from indemnity because the methodology fight may differ. Be mindful of notice requirements and timing-based defenses. Obtain copies of other insurers' settlements and identify indemnification and/or judgment reduction provisions that might require policyholder participation.
- **Reserving and Reporting:** Reserve for downstream contribution exposure, not just the payment to the insured. Measure both gross booked exposure and expected net exposure after contribution. Coordinate early with claims teams, coverage counsel, reinsurance teams, and expert allocation consultants.
- **Contribution and Settlement Strategy:** Use tolling agreements where appropriate to preserve contribution rights while carrier-group discussions continue. Assess settlement-credit rules and denominator effects before resolving with the insured. Draft settlements with downstream contribution, credit, and finality issues in mind, especially global and/or undifferentiated settlements. Evaluate net exposure after contribution—what is your true post-reallocation number?

For Allocation Experts: Understand not just the methodology, but the legal assumptions driving the model. Be prepared to model alternative methodologies, denominators, attachment structures, and pool-composition assumptions. Coordinate closely with coverage counsel on the complicating factors: SIRs, settlements, fronting policies, insolvencies, and exhaustion and attachment.

Questions for Panel Discussion

Audience Q&A

The All Sums Framework

From *Keene* to Contribution Litigation

Keene Corp. v. Insurance Co. of North America (D.C. Cir. 1981) is the canonical starting point for joint-and-several "all sums" allocation

However, the *Keene* court recognized the selected insurer's right to apportionment:

> This does not mean that a single insurer will be saddled with full liability for any injury. When more than one policy applies to a loss, the 'other insurance' provisions of each policy provide a scheme by which the insurers' liability is to be apportioned. … These provisions of the policies must govern the allocation of liability among the insurers in any particular case… . However, the primary duty of the insurers whose coverage is triggered…is to ensure that Keene is indemnified in full.

All Sums v. Pro Rata: Jurisdictional Landscape

Approach	Illustrative Jurisdictions	Notes
All sums	California, Delaware, Indiana, Ohio, Oregon (OECAA), Pennsylvania, Washington, Wisconsin	Insured may target one policy or year first; contribution disputes follow (see, e.g. , *Goodyear Tire & Rubber v. Aetna Casualty & Surety Co.*, (Ohio 2002))
Pro Rata	Connecticut, Massachusetts, Minnesota, New Hampshire, New Jersey, South Carolina, Vermont	Allocation issues are generally resolved as part of the determination of an insurer's coverage obligation
Hybrid	Illinois; New York	**Illinois**: asbestos bodily injury = all sums environmental property damage = pro rata **New York**: generally pro rata, but all sums where non-cumulation clauses apply (*In re Viking Pump* (N.Y. 2016))

Summary: When Does Contribution Come Into Play?

Contribution Arises When:

Multiple policies are triggered by the same long-tail loss One (or more) insurers pays more than its equitable share of a common obligation, and the paying insurer(s) seeks contribution from other insurers covering the same risk (*e.g., Penn. Gen. Ins. Co. v. Park-Ohio Industries* (Ohio 2010) (contribution available in context of coverage for underlying asbestos liabilities; insured must cooperate with selected insurer))

Contribution Generally Does NOT Arise When:

Only one policy is triggered, the loss falls entirely within a single policy period, or the paying insurer occupies a genuinely different level of obligation and was required to pay first (*e.g., Lubrizol v. National Union* (Ohio 2020) (damages caused by defective resin occurred at discernible and knowable points in time—successive polices not triggered for same damage))

Contribution vs. Subrogation: Impact of Selective Tender

What is Selective Tender?

In certain jurisdictions, an insured's tender of a claim to only *one* insurer may preclude that selected insurer from seeking contribution from other insurers. This concept is often referred to as "selective" tender or "targeted" tender.

Selective Tender—the Law:

Washington:

Selective tender may bar contribution while leaving room for equitable subrogation or conventional subrogation by assignment (*e.g. Mutual of Enumclaw v. USF* (Wash. 2008) (tender is a condition precedent to triggering a duty under an insurance policy—if an insurer is not tendered a claim, it cannot have any obligation for that claim and thus cannot owe contribution))

Illinois:

Selective tender may bar contribution among chronologically-concurrent insurers in cases involving non-long tail liabilities (*e.g. John Burns Const. Co. v. Indiana Ins. Co.* (Ill. 2000)).

Selective tender does not bar contribution among chronologically-consecutive insurers in cases involving long-tail liabilities (*e.g. Ill. Sch. Dist. Agency v. St. Charles Dist. 303* (Ill. App. Ct. 2012)).

Other Allocation Methods

Equal Shares:

Each insurer pays an equal share, regardless of time on the risk or policy limits. More often a fallback or special-case approach than the preferred long-tail methodology

Mission Insurance Co. v. Allendale Mutual Insurance Co. (Wash. 1981)

Reliance Insurance Co. v. St. Paul Surplus Lines Insurance Co. (4th Cir. 1985)

Less Common Approaches:

- Premium-based allocation
- Volumetric or fact-based approaches

Practical Reality:

Most courts still gravitate toward time-on-the-risk, limits-based, or combined time-and-limits approaches.

Proof Problems and Common Defenses in Contribution Litigation

Reality of Pursuing Contribution After Being "Spiked":

The "spiked" or paying insurer begins to look more like an insured. The paying insurer must prove that its payments correspond to covered loss within a triggered period. Payment amounts are sometimes subject to scrutiny of reasonableness and necessity.

Contribution claims often require policy reconstruction and/or lost policy trials, payment records and claim file records (sometimes dating back decades), and expert allocation support.

Prosecuting a contribution claim may require the paying insurer to advocate pro-policyholder positions

Common Defenses:

The typical defenses to coverage usually apply—exhaustion and attachment defenses, effect of anti-stacking and non-cumulation clauses, application of "other insurance" conditions, notice- and other timing-based defenses, offsets for settlement and application of policy exclusions.

When Settlement Can Limit Contribution

Oregon – OECAA Is Settlement-Protective, but the Bar Is Claim-Specific:

An insurer that settles an environmental claim with its insured may be entitled to a contribution bar under OECAA. *See* ORS 465.480(4)(a).

Current Oregon Authority: *Continental Casualty Co. v. Argonaut Insurance Co.*, Oregon Supreme Court (2025), rev'g Oregon Court of Appeals (2024).

Other Settlement-Limiting Variants:

Ohio: settlement may be treated as policy exhaustion for contribution purposes. *See OneBeacon America Insurance Co. v. American Motorists Insurance Co.* (6th Cir. 2012).

Pennsylvania: insured's claim against non-settling insurers becomes subject to an apportioned-share setoff. *See Koppers Co. v. Aetna Casualty & Surety Co.* (3d Cir. 1996)

When Settlement Does Not Eliminate Contribution Exposure

General Rule in Many Jurisdictions: A settlement between one insurer and the policyholder does not, by itself, extinguish the equitable contribution rights of other insurers that already paid more than their share.

Why?: A paying insurer's right to equitable contribution is independent of the rights of the insured. The insured cannot ordinarily release a nonparty insurer's contribution rights by private settlement.

Illustrative Authorities:

Fireman's Fund Insurance Co. v. Maryland Casualty Co. (Cal. Ct. App. 1998)

Employers Insurance of Wausau v. Travelers Indemnity Co. (Cal. Ct. App. 2006)

Potomac Insurance Co. v. Pennsylvania Manufacturers' Ass'n Insurance Co. (N.J. 2013)

Maryland Casualty Co. v. W.R. Grace & Co. (2d Cir. 2000).

Vertical Exhaustion After Kaiser Cement

Current Authority: *Truck Insurance Exchange v. Kaiser Cement & Gypsum Corp.* (Cal. 2024).

What the California Supreme Court Held	What the Decision Did Not Resolve
First-level excess policies can attach through vertical exhaustion of directly underlying insurance	It did not automatically resolve all downstream contribution disputes among participating insurers
California does not impose horizontal exhaustion as a prerequisite to first-level excess attachment under the policy language at issue	It did not eliminate disputes over denominator treatment, reachable layers, or contribution target pool composition
The insured may reach excess in one tower without exhausting every primary policy across every triggered year	It did not decide every primary-versus-excess contribution issue

Why It Matters Here:

The concepts of horizontal exhaustion and vertical exhaustion affect which policies a selected insurer may target for contribution.

Jurisdictions that have adopted vertical exhaustion between an insurer and its insured may nonetheless consider adopting horizontal exhaustion for purposes contribution issues.

Application of horizontal exhaustion may (1) significantly limit the contribution target pool of a paying primary insurer, and (2) offer significant protection to excess carriers by delaying attachment.