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"Breaking Up Is Hard to Do—Coverage Allocation in Settlements and Judgments"

I. Introduction

A. Defining the Issue

Many lawsuits involve covered and uncovered claims and damages. The scenario presents indemnity problems for both policyholders, who want to maximize their coverage, and insurers that do not want to foot the bill for a settlement or judgment that includes amounts they do not contractually owe. If a lawsuit results in a settlement or judgment that has not allocated the covered and uncovered damages, the problem is magnified. By way of example, a jury may answer questions involving negligent conduct and fraudulent or intentional conduct, but be required to answer with only one set of damage questions—leaving the problem of how the damages are to be allocated between the negligent (covered) conduct and the fraudulent or intentional (uncovered) conduct.

B. Considerations

The most prevalent disputes in an allocation situation involve which party bears the burden of proof on the allocation (policyholder or insurer), whether the damages are capable of allocation, what will be the evidence, and in what forum the allocation will be decided, the tort lawsuit or a separate lawsuit for declaratory judgment. The law on allocation tends to be jurisdiction-specific, meaning recognition of a potential allocation issue should be considered sooner rather than later, and certainly monitored so that the insurer does not lose its ability to require an allocation.

II. Allocation in Settlements and Judgments

A. Burden of Proof

1. Can the Insured Forfeit the Right to Allocate?

While authority exists that provides an insured may forfeit the right to allocate,[1] the majority of authority does not result in a death knell for insureds, except in limited circumstances.[2] Moreover, it does not appear that an insured that waits until after a

settlement has been reached is too late to pursue an allocation.[3] On the other hand, in an oft-cited Delaware opinion, the court held that while the insurer had defended the insured under a reservation of rights, it could not seek a post-verdict allocation of damages because the record provided little evidence of the jury's methodology in reaching its award.[4] The court opined that further proceedings would not "illuminate a record darkened by ambiguity."

2. Burden of Proof on the Policyholder

Most jurisdictions find that the initial burden of proof follows the "general rule," that is, a policyholder must prove that all or at least part of the damages awarded in a judgment or included in a settlement are covered.[5] Assuming the insurer disagrees, the insurer has the burden of proving that some or all of the damages or settlement amounts are excluded. Once there is proof of covered and uncovered damages, some jurisdictions keep the burden of proving the actual allocation on the policyholder.[6]

The reasons for placing the burden on the policyholder are several, but typically boil down to who controls the information in the underlying litigation. When policyholders control the litigation and negotiate a settlement, courts have reasoned that the policyholder is in the better position to know how the settling parties viewed the settlement value and claims, especially if the policyholder chose counsel.[7] Not surprisingly, however, the policyholder's burden to allocate is often shifted to the insurer. Courts shift the burden to the insurer for reasons that seemingly mimic, at least in part, the reasons for placing the burden on the policyholder.

3. Burden of Proof on the Insurer

Courts will shift the burden of proof to allocate to the insurer for reasons that appear to be related to a court's sense of fairness. The reasons include: (1) when an insurer breached a duty to defend; or (2) when an insurer defended but failed to seek or request an allocation of a settlement or verdict. The emphasis here is that in many instances courts will find ways to shift the burden of allocation to insurers, effectively prohibiting the insurer's ability to seek an allocation, absent compelling evidence to support an allocation.

a. The Insurer Breaches the Duty to Defend

When an insurer breaches the duty to defend, a court will frequently require the insurer to allocate the resulting settlement or judgment amount between covered and uncovered claims.[8] One court reasoned that "placing the burden of allocation on insurers when they have a duty to defend provides an appropriate incentive for them to fulfill their defense obligations."[9] Thus, one of the perils of having wrongfully denied a defense will be the inability to ensure an accurate apportionment of indemnity costs.[10] In Massachusetts, the courts have gone so far as to hold that the breaching insurer is responsible for the entire amount of an unallocated settlement or judgment.[11] At least one jurisdiction reasoned that when the allocation issue arises in the context of a settlement, the breaching insurer may seek allocation,[12] but in Alaska when the breaching insurer is faced with a verdict, the insurer must indemnify the entire judgment.[13]

b. The Insurer Defends the Policyholder

Courts often shift the burden of proof to the insurer in instances where the insurer has undertaken the policyholder's defense under a reservation of rights.[14] Courts reason that by defending under a reservation of rights, the insurer is obligated to protect the policyholder's interest in providing that defense. Protecting the policyholder's interest includes seeking an allocated verdict or advising the policyholder of the need for one.[15] The failure to seek an allocated verdict or to advise the policyholder of the need for one creates a conflict of interest between the policyholder and the insurer:

> The reason for this is that when grounds of liability are asserted, some of which are covered by insurance and some of which are not, a conflict of interest arises between the insurer and the insured. If the burden of apportioning damages between covered and non-covered were to rest on the insured, who is not in control of the defense, the insurer could obtain for itself an escape from responsibility merely by failing to request a special verdict or special interrogatories. The insurer is in the best position to see to it that the damages are allocated; therefore, it should be given the incentive to do so.[16]

In the oft-cited opinion of *Duke v. Hoch*, the court reasoned that the consequence to a policyholder of a non-allocated verdict is the "catastrophic loss of coverage."[17] Whereas, the risk to the insurer in requesting an allocated verdict is of no such magnitude, if of any consequence at all.[18] According to the court, allocating the verdict reveals neither the presence of insurance nor the amount of coverage.[19] This burden-shifting rationale has also been supported by other jurisdictions and commentators.[20]

The burden shift to the insurer, however, is not without some quirky opinions. In one case, appointed counsel for the insured actually requested a jury instruction that would have allowed the jury to apportion damages.[21] The tort plaintiff objected, and the trial court refused to give it on grounds that it would confuse the jury.[22] Nevertheless, in the declaratory judgment action on allocation, the court refused to remove the burden of proof from the defending insurer.[23] Notably, the opinion included a dissent stating that "[b]ecause [the insurer] informed [the policyholders] of the need for an apportioned verdict, and because [the insurer] requested a jury instruction that would have allowed for the apportionment of the judgment, [the insurer] fulfilled its obligations to [the policyholders. Accordingly, the burden of apportioning the verdict did not shift from [the policyholders] to [the insurer]."[24]

In an Alabama federal district court opinion, the insurer provided a defense in a construction defect action, but requested an intervention in the case to submit special verdict forms or special interrogatories, through the court to the jury, should the case go to trial.[25] The trial court denied the insurer's motion to intervene.[26] Before submission, the plaintiff requested that the court submit the case to the jury using a special verdict form, separating out the damages recovered for mental anguish (the covered damage).[27] Counsel for the policyholder, retained by the insurer, did not independently request a special verdict form, but did not object to the plaintiff's request for one.[28] The court denied the plaintiff's request, and the jury was provided with a general verdict form.[29]

The insurer then filed a declaratory judgment action after being denied the right to intervene. The court held that the burden to prove the allocation had not shifted to the insurer because the insurer had tried to intervene, but the trial court denied its motion.[30] Accordingly, the policyholder was fully informed and aware of the coverage issues during the pendency of the underlying lawsuit.[31] Although appointed counsel for the insured did not join in the plaintiff's request for a special verdict form, it also did not oppose the plaintiff's request.[32]

Finally, one last opinion, taking a more thoughtful analysis, from the Minnesota Supreme Court is worth noting. In *Remodeling Dimensions*, the policyholder was defended under a reservation of rights in a construction defect arbitration.[33] The arbitrator awarded the plaintiffs $45,000 for "basic house repairs.[34] The insurer eventually denied coverage for the award, which was then funded by the policyholder, which in turn brought a declaratory judgment action against the insurer.[35] *Id.* The district court concluded the insurer was responsible for the entire award, and the court of appeals reversed, finding that the claims against the insured were not covered losses under the policy.[36]

The Minnesota Supreme Court was asked to decide whether the burden of allocating a jury award between covered and uncovered damages shifted to the insurer, under an estoppel theory, because the insurer did not notify the policyholder that it should seek an allocation or attempt on its own to have the verdict allocated.[37] The court considered the following factors in deciding whether estoppel applied:

(1) Whether the insurer had a duty to defend or was controlling the defense of the litigation;

(2) Whether an allocation of the covered versus non-covered claims or damages would have been allowed in the underlying lawsuit;

(3) Whether the insured suffered prejudice by the insurer's failure to provide notice that the verdict needed to be allocated; and

(4) Whether the insured has to show that it would have asked for an allocation if it had the ability to do so. In other words, the insured had to show that the failure of the carrier to request allocation caused its damages.

According to the court, if the policyholder established all of these elements, the insurer would be estopped from claiming that the insured had the burden of proving allocation. Instead, the burden would shift to the insurer to prove by a preponderance of the evidence that some, or all, of the award was attributable to non-covered claims.[38] If the insurer met its burden, both parties could present evidence and the district court must, as best it can, establish the allocation that the trier-of-fact would have made if allocation had been requested.[39] The court also noted that the burden to prove allocation of an award remained with a policyholder unless: (1) the insurer failed to make a timely disclosure of the insured's interest in obtaining a written explanation of the award; (2) the insured affirmatively showed prejudice by the inability to obtain a written explanation of the

award caused by the conduct of the insurer; and (3) that it would have sought such an award if it had the ability to do so.[40]

c. The Insurer Has No Obligation to Defend

The majority of opinions addressing allocation of a settlement or a judgment have done so in the context of primary policies including a defense obligation. As discussed, it is this control of the defense that typically results in a court shifting the burden of proving the allocation to the insurer. But, this rationale does not answer the question when an insurer does not have an obligation to defend, such as when there is an SIR under which the insured provides its own defense or when the policy at issue is an excess or umbrella policy.

With very little discussion, the Wisconsin Court of Appeals placed the burden of allocation upon an umbrella insurer.[41] In *Valley Bancorp*, a policyholder placed its primary insurer on notice and was provided a defense subject to a reservation of rights.[42] Five months before trial, the umbrella insurer was placed on notice.[43] The umbrella insurer wrote to the policyholder, informing it that it appeared no covered damages were being sought, with the possible exception of libel and slander.[44] The case went to trial resulting in an excess judgment, which was funded by the primary insurer and the insured, who in turn sued the umbrella insurer.[45] The court noted the general rule in Wisconsin that when a claim consists of a variety of acts, some of which are covered and others that are not, that resulting liability falls within the terms of the insurance policy unless the uncovered risk is the sole cause of damages.[46] Because the court could not determine with certainty what facts were relied upon by the jury in making its determinations, it had to determine who bore the responsibility for proving whether the conduct covered by the insurance policy gave rise to the damages determined by the jury, which it placed upon the insurer.[47] The court reasoned that the umbrella insurer was aware that covered claims for libel and slander were possibly asserted, but discounted the importance of these claims.[48] Because evidence was admitted relating to the libel and slander claims, whether coverage existed was uncertain.[49] When there are uncertainties over coverage, the insurer bears the burden of resolving coverage issues.[50]

For different reasons, a Pennsylvania court also placed the burden upon an excess insurer.[51] In *Butterfield v. Giuntoli*, a verdict was rendered that included punitive damages, but did not include a finding of whether the punitive damages were awarded based on vicarious liability or direct liability. If punitive damages were awarded for vicarious liability, they were potentially covered under Pennsylvania law. If the damages were awarded directly, they would not be covered.[52] Because the insurer had the burden to prove that the punitive damages were excluded from coverage as a matter of law, the insurer had the burden to show that the jury assessed the punitive damages solely on the basis of direct liability.[53]

The most notable point about the *Butterfield* opinion is the court's discussion of the insurer's position as an excess carrier. The court noted that, even though the insurer was a second level excess carrier, it had the right to participate in the defense of the underlying case under the terms of the policy. The court noted that the insurer's counsel was present in the courtroom every day of the trial, and the court allowed the insurer's counsel to attend all discussions held in chambers between the parties. Moreover, the

insurer's counsel was in regular contact outside of the court with the defense attorneys handling the case. The court reasoned that "[the insurer] fully participated in the case short of entering [an] appearance." Further, the court stated that the insurer was in the best position to request specific interrogatories as it was their issue of indemnification at stake. The court noted that the insurer's "cavalier approach to the legal proceedings was risky because [it] had the opportunity to resolve the issues by submitting specific instructions . . . yet declined to do so . . . ."[54]

The *Camden-Clark* opinion on certified question from the federal district court, cited previously, addressed a policy that included an SIR that did not require the insurer to defend but gave it a right to participate. Based on the policy language and precedent, the court concluded that the policyholder would have the burden to allocate since the insurer did not have a duty to defend. The court pointed out, however, that circumstances could arise changing this burden if the insured requested that the insurer participate in the defense of the underlying case, and the insurer affirmatively chose not to participate. In that instance, the court found that the insurer should not be permitted to complain that the verdict was not allocated between covered and non-covered claims because it was given the option of participating, including the attendant opportunity to request an allocated verdict and refused.[55]

Based on the supreme court's decision, the case continued in the federal district court. That court found that the insurer did not request an allocation of the jury verdict, but that it was undisputed that the insurer had no duty to defend; therefore, the question was whether the policyholder requested that the insurer participate in the defense, and if so, whether the insurer affirmatively chose not to participate.[56] The evidence on this issue included that the insurer made suggestions as to defense strategy, demanded that certain actions be taken in the policyholder's defense and prevented the insured from discussing settlement without the insurer's participation. However, the insured never demanded that the insurer take an active role in the case or participate in the defense. Despite the insured's arguments to the contrary, the court held that the evidence failed to rise to the level of a "request" on the part of the insured for a defense, nor was there any evidence that the insurer declined to participate in the defense.[57] Accordingly, the court held that, because the insurer did not have a duty to defend, no burden-shifting exception existed, and the insured had the burden of showing the existence of coverage.[58] Also of note, the court held that the insured could not determine how the jury intended to segregate damages without an allocated verdict form, meaning that the insured could not meet its burden of showing that the damages were covered under the policy.[59]

III. Allocation Evidentiary Issues

A. Judge or Jury

Whether allocation will be decided by a judge or jury has also varied by jurisdiction. In some instances, a determination by a judge or jury depends upon whether there are no disputed material facts. In one case, the Fifth Circuit remanded the case for an allocation, acknowledging the difficulty of the apportionment decision, and that it was reluctant to force an insured to retry a case that it settled after its insurer unjustifiably denied its defense.[60] But, the court concluded that it could not cannot allow a policyholder to settle allegations against it (some of which might be covered by its

insurance, some of which might not) for its policy limits and then seek full indemnification from its insurer when some of that settled liability may be for acts clearly excluded by that policy.[61] The Fifth Circuit's conclusion is consistent with the rationale of another jurisdiction noting that:

> despite the problems that are inherent in any post facto analysis of settlement claims, if the district court is to make an allocation of the settlement amount, it should accept whatever evidence is available regarding the intent behind the settlement decision. If the court finds that there is a material issue of fact as to how the settlement amount was allocated, that finding should be made at trial and not on summary judgment.[62]

B. Evidence

Common sense dictates that the evidence used to prove allocation in a settlement versus allocation of a verdict or judgment is likely different, with the settlement scenario allowing broader proof. With regard to a settlement, there are the allegations included in the complaint; there is the settlement agreement between the insured and the plaintiff; and there are the facts that would have been the subject of the lawsuit, had it been tried.[63] A settlement allocation may also include evidence of a policyholder's justification of a settlement.[64] One jurisdiction found that three types of evidence were available for proving an allocation of a settlement: (1) evidence of how the insured itself (or its attorneys) evaluated the claims at the time of settlement; (2) the information that was known to the insured at the time of settlement, such as court rulings, deposition testimony, or the insured's personal knowledge of the underlying facts; or (3) expert testimony about how the settlement should be allocated among the settled claims in light of what was known to the insured at the time of settlement.[65]

With regard to a verdict or judgment, the totality of the jury instructions and the jury's answers should be considered.[66] The trial transcript and any expert reports from the underlying trial would also be relevant.[67] However, remember that some courts may not be so anxious to retry a case that has been previously litigated, as the evidence would be from the underlying lawsuit at which the judgment creditor had already prevailed, resulting in the court ordering the allocation issue to mediation.[68]

C. Standard of Proof

Most courts will not require that an allocation between covered and uncovered claims be proven with mathematical precision. The nature of the issue is, at best, an imprecise guess of the respective amounts.[69]

IV. Preserving Allocation

A. Reservation of Rights

Clearly, the insurer should reserve rights when trying to preserve a later issue of allocation. But, as demonstrated above, protecting the insurer from the burden of proof on the allocation may not be enough with only a reservation of rights. The insurer may need to take some action to enforce the reservation of rights with respect to an allocation. When defending under a reservation of rights and the case appears likely to go to trial,

the insurer should also inform the policyholder about the potential need for special questions and instructions or allocated settlements (and, that if it does not instruct counsel to do so, the policyholder may be unable to meet its burden of proof for indemnity) and advise of the divergent interest between the policyholder and the insurer. Moreover, making a record of the insurer's issuance of this "notice" may better posture the insurer in a subsequent allocation action.

An insurer may want to go so far as taking the initiative to obtain the allocated verdict. For instance, in a recent decision, a New York federal district court found that the insurer's reservation of rights, combined with its prior conduct in attempting to intervene for the purpose of requesting special interrogatories, even though the intervention was denied, was sufficient to keep the burden of proof on the insured to allocate.[70] This rationale is consistent with that used by the Alabama court in *Owners Ins. Co. v. Shep Jones Constr., Inc.* discussed above. Additionally, an insurer would be wise not to let the allocation issue go silent at a mediation of the underlying lawsuit.

Of course, reserving rights when the insurer is excess raises different questions. An excess insurer, in most jurisdictions, is not required to reserve rights because it has no contractual obligations to the insured until a case has settled or gone to judgment in an amount exceeding the limits of the policy beneath it.[71] Accordingly, an excess insurer should not be estopped from raising defenses regarding uncovered claims when it reserves rights after settlement or judgment and seeks an allocation. Arguably, because the excess insurer does not control the defense, the burden of proving the allocation should fall to the insured.

B. Intervention or Declaratory Judgment

As demonstrated by the cases discussed above, some insurers have taken the approach of seeking intervention into the tort case solely for the purpose of proposing appropriate jury questions. Also, as demonstrated by the cases above, a court may not grant the request. Presumably, if the court believes that the proposed allocation questions could confuse the jury, interject the availability of insurance, or affect the liability of the policyholder, the court will deny the request. Additionally, special questions may not resolve the allocation issue, such as a case that may turn on policy language that is of no consequence in the tort suit.

Many of the cases discussed above demonstrate that insurers (or policyholders) file declaratory judgment actions to resolve the allocation issue. Almost certainly, an allocation declaratory judgment will occur after the tort case has concluded, since a court may otherwise deem the allocation issue not ripe for determination. Even if the allocation issue must be delayed until completion of the tort case, however, an insurer should consider a reservation of rights and a disclosure of the potential need for allocation.

V. Conclusion

Considerations regarding allocation can include: control of the defense; notification to the insured (in writing) of the potential need for allocation; the susceptibleness of the damages to allocation; which party is in the better position to lay the groundwork for allocation; an explanation of the potential conflict of interest; and the

insurer's participation in a settlement. Some thought should be given to these considerations as early as possible, with close monitoring of the tort case so that the allocation issue is positioned appropriately for resolution.

[1] *See General Accident and Life Assurance Co. v. Clark*, 34 F.2d 833, 836 (9th Cir. 1929) (finding where the jury awarded joint punitive damages to both of the plaintiffs without apportionment, the party seeking recovery from the insurer had the burden of apportionment and there was no liability to the insurance company for the punitive damages until the plaintiff proved apportionment).

[2] *E.g., Bor-Son Bldg. Corp. v. Employers Comm. Union Ins. Co.*, 323 N.W.2d 58, 64 (Minn. 1982) ("The ensuing settlement, however, failed to allocate monies on the various claims that had been presented to the defendants and their insurers just prior to that settlement . . . Moreover, since there was no allocation of damage monies that HRA received from the settling defendants that would establish the amount Bor-Son paid toward the settlement of that loss of rental claim, and since Bor-Son, in this case, furnished no evidence to establish that fact, Bor-Son failed to meet its burden of proving its claim for reimbursement."); *D.R. Horton, Inc. v. American Guar. & Liab. Ins. Co.*, 864 F. Supp. 2d 541, 564 (N.D. Tex. 2012) ("[E]ven if there were some evidence of insured property damage that took place during the July 1, 1999 to July 1, 2000 policy year, there is no probative summary judgment evidence that would enable the court to allocate, distinguish, or apportion that damage from the cost of correcting the defects in the construction work itself or the taking of preventive action to keep future damage from occurring. Texas law supports the proposition that, in such an event, a take-nothing judgment is appropriate."); *Bob Useldinger & Sons, Inc. v. Hangsleben*, 505 N.W.2d 323, (Minn. 1993) (unallocated settlement is not enforceable in a *Miller – Shugart* agreement).

[3] *E.g., UnitedHealth Group Inc. v. Columbia Cas. Co.*, 941 F. Supp. 2d 1029 (D. Minn. 2013); *Trovillion Const. & Development, Inc. v. Mid-Continent Cas. Co.*, 2014 WL 201678 (M.D. Fla. Jan. 17, 2014) ("Florida law requires Trovillion, the party seeking recovery, to allocate the settlement amount between covered and uncovered claims . . . Inability to allocate precludes recovery." (citations omitted)); *Bradfield v. Mid-Continent Cas. Co.*, 143 F. Supp. 3d 1215, 1244 (M.D. Fla. 2015) ("Even if the Bradfields could demonstrate that some of their damages were covered by the Winfree Policy, Mid-Continent would still not have any duty to indemnify, and there would be no insurance coverage, due to the Bradfields' failure to allocate the amount of the MSA and Consent Judgment between covered and uncovered damages.").

[4] *See TIG Ins. Co. v. Premier Parks, Inc.*, 2004 WL 728858 (Del. Super. Ct. March 10, 2004).

[5] *E.g., Perdue Farms, Inc. v. Travelers Cas. & Surety Co.*, 448 F.3d 252, 263 (4th Cir. 2006) ("[T]he burden is on the insured to prove the amounts attributable to covered claims."); *Executive Risk Indem. v. Cigna Corp.*, 74 A.3d 179, 183 (Pa. Super Ct. 2013); *Mutual of Enumclaw Ins. Co. v. Dan Paulson Constr. Co.*, 169 P.3d 1, 10 (Wash. 2007) ("Absent a successful bad faith claim and the resulting coverage by estoppel, the insured still has the burden of proving how much of the [settlement] should be allocated to covered claims." (citation omitted)); *TranSched Systems Ltd. v. Federal Ins. Co.*, 67 F. Supp. 3d 523, 533 (D.R.I. 2014) ("An insured has the burden to allocate, but that burden arises only after it has been demonstrated that a portion of the verdict or settlement is covered by the policy or policies and a portion is not.").

[6] *E.g., Camden-Clark Memorial Hospital Ass'n v. St. Paul Fire & Marine Ins. Co.*, 682 S.E.2d 566, 575 (W.Va. 2009); *UnitedHealth*, 941 F. Supp. 2d at 1032.

[7] *UnitedHealth*, 941 F. Supp. 2d at 1036-37; *American Medical Response Northwest, Inc. v. ACE American Ins. Co.*, 31 F. Supp. 3d 1087, 1098 (D. Or. 2014) ("As a party to the underlying settlements, [the policyholder] is in the best position to know the bases for the settlements in the underlying cases. Therefore, [the policyholder] has the burden to prove the underlying settlements were for covered claims."); *Raychem Corp. v. Federal Ins. Co.*, 853 F. Supp. 1170, 1176 (N.D. Cal. 1994) (the insured had

the burden of making a prima facie showing that the settlement and defense costs incurred related to covered claims).

[8] *Narragansett Elec. Co. v. American Home Assur. Co.*, 999 F. Supp. 2d 511, 522 (S.D.N.Y. 2014) ("When a party is found liable for breach of the duty to defend, the general rule in Massachusetts is that the insurer is liable for all defense costs and, in the event a claim is covered, the entire resulting judgment or settlement, unless the insurer can prove the allocation among covered and uncovered claims.").

[9] *Automax Hyundai South, L.L.C. v. Zurich Am. Ins. Co.*, 720 F.3d 798, 802 (10th Cir. 2013).

[10] *Automax*, 720 F.3d at 810.

[11] *Liquor Liab. Joint Under. Ass'n v. Hermitage Ins. Co.*, 644 N.E.2d 964, 969 (Mass. 1995); *Palermo v. Fireman's Fund Ins. Co.*, 676 N.E.2d 1158, (Mass. Ct. App. 1997).

[12] *Afcan v. Mutual Fire, Marine and Inland Ins. Co.*, 595 P.2d 638, 647 (Alaska 1979).

[13] *E.g., Bellefonte Ins. Co. v. Wayson*, 489 F. Supp. 58, 60 (D. Alaska 1980) ("It is not for [the insurer] to contest coverage at this late date when its breach forced the City to take up its own defense and incur liability in the process."); *Marston v. Merchants Mut. Ins. Co.*, 319 A.2d 111, 114 (Me. 1974) ("[I]n any action in which there is an allegation in the complaint which would establish liability within the coverage of the policy even though there are other allegations as to liability outside the coverage of the policy, a general verdict with no special findings of fact is binding on the insurer as to its liability under the insurance policy.").

[14] *E.g., MedMarc Cas. Ins. Co. v. Forest Healthcare, Inc.*, 199 S.W.3d 58, 61-62 (Ark. 2004); *Camden-Clark*, 682 S.E.2d at 576; *Remodeling Dimensions, Inc. v. Integrity Mut. Ins. Co.*, 819 N.W.2d 602, 618 (Minn. 2012).

[15] *E.g., Duke v. Hoch*, 468 F.2d 973, 979 (5th Cir. 1972); *Magnum Foods, Inc. v. Continental Cas. Co.*, 36 F.3d 1491, 1498–99 (10th Cir.1994).

[16] *Magnum Foods*, 36 F.3d at 1498-99.

[17] *See Duke*, 468 F.2d at 979.

[18] *See id.*

[19] *See id.*

[20] *See Western States Mt. Ins. Co.*, 268 F.2d 790, 793 (7th Cir. 1959); *Buckly v. Orem*, 760 P.2d 1037, 1042 (Idaho Ct. App. 1986); Allan D. Windt, Insurance Claims & Disputes, § 6.27 ("An exception, however, should be made to that rule in those cases in which the circumstances surrounding the defense of the underlying action were such that the insurer was obligated to seek an allocated verdict or advise the insured of the need for one, but failed to fulfill that obligation. In that event, the burden of persuasion should be placed on the insurer.").

[21] *See MedMarc*, 199 S.W.3d at 60.

[22] *See id.*

[23] *See id.* at 62.

[24] *Id.* at 64.

[25] *See Owners Ins. Co. v. Shep Jones Constr., Inc.*, 2012 WL 1642169 (N.D. Ala. May 3, 2012), *overruled on other grounds, Pennsylvania Nat. Mut. Cas. Ins. Co. v. St. Catherine of Siena Parish*, 790 F.3d 1173 (11th Cir. 2015).

[26] *See id.*

[27] *See id.*

[28] *See id.*

[29] *See id.*

[30] *See id.*

[31] *See id.*

[32] *See id.*

[33] *See Remodeling Dimensions*, 819 N.W.2d at 609-10.

[34] *See id.* at 609-10.

[35] *See id.*

[36] *See id.*

[37] *See id.* at 616.

[38] *See id.* at 618.

[39] *See id.* at 618.

[40] *See id*. at 619.
[41] *See Valley Bancorp. v. Auto Owners Ins. Co.*, 569 N.W.2d 345 (Wis. Ct. App. 1997).
[42] *See id.* at 347.
[43] *See id.*
[44] *See id.* at 348.
[45] *See id.*
[46] *See id.* at 349.
[47] *See id.*
[48] *See id.*
[49] *See id.*
[50]*See id.*
[51] *Butterfield v. Giuntoli*, 670 A.2d 646 (Pa. Super. 1995).
[52] *See id.* at 654-55.
[53]*See id.* at 657.
[54] *See id*. at 658.
[55] *Camden-Clark*, 682 S.E.2d at 577.
[56] *Camden-Clark Memorial Hospital Corp. v. St. Paul Fire & Marine Ins. Co.*, 717 F. Supp. 2d 529 (S.D. W.Va. 2010).
[57] *See id*. at 538.
[58] *See id*.
[59] *See id*.
[60] *Enserch Corp. v. Shand Morahan & Co., Inc.*, 952 F.2d 1485, 1494 (5th Cir. 1992).
[61] *See id.*
[62] *American Home Assur. Co. v. Libbey-Owens-Ford Co.*, 786 F.2d 22, 30-31 (1st. Cir. 1986).
[63] *See Enserch*, 952 F.2d at 1494.
[64] *E.g., Comsys Info. Tech. Serv., Inc. v. Twin City Fire Ins. Co.*, 130 S.W.3d 181, 199-200 (Tex. App.—Houston [14th Dist.] 2003, pet. denied); *Perdue Farms*, 448 F.3d at 264.
[65]*UnitedHealth Group, Inc. v. Columbia Cas. Co.*, ___ F. Supp. 3d ___, 2014 WL 4783394 at *9 (D. Minn. Sept. 25, 2014).
[66] *See Magnum Foods*, 36 F.3d at 1499-1502.
[67] *See Arnett v. Mid-Continent Cas. Co.*, 2010 WL 2821981 at *6 (M.D. Fla. July 16, 2010).
[68] *See TranSched Systems.*, 67 F. Supp. 3d at 534.
[69] *See Perdue Farms*, 448 F.3d at 263-64 ("[T]he only proper solution is a rough apportionment of settlement amounts among covered and non-covered claims."); *Remodeling Dimensions*, 819 N.W. 2d at 614 (both parties may present evidence and the district court must, as best it can, establish the allocation the arbitrator would have made if allocation had been requested);
[70] *See Uvino v. Harleysville Worcester Ins. Co.*, 2015 WL 925940 (S.D.N.Y. March 4, 2015).
[71] *E.g., TIG Ins. Co. v. Tyco Int'l, Ltd.*, 919 F. Supp. 2d 439, 457 (Pa. 2013); *Portal Pipe Line Co. v. Stonewall Ins. Co.*, 845 P.2d 746, 750 (Mont. 1993); *Hatco Corp. v. W.R. Grace & Co.—Conn.*, 801 F. Supp. 1334, 1363 (D.N.J. 1992); *St. Paul Fire & Marine Ins. Co. v. Children's Hospital Nat'l Medical Center*, 670 F. Supp. 393, 402 (D.D.C.1987) (holding that excess carrier cannot be estopped to deny coverage because "it is the duty to defend that gives rise to the duty to disclaim coverage").