NC Litigation Update: Long-Tail Claims

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Trigger, Allocation and Exhaustion of Insurance Coverage for Long-Tail Claims

In December of 2022, after nearly a decade of litigation, the North Carolina Supreme Court published a decision regarding trigger, allocation and exhaustion of commercial insurance policies in the context of long-tail personal injury claims arising from benzene exposure.

Radiator Speciality Co. v. Arrowood Indem. Co., 2022-NCSC-134, 881 S.E.2d 597, 2022 N.C. LEXIS 1122 (N.C. Dec. 16, 2022)

Factual and Procedural Background

North Carolina-based, Radiator Specialty Company, is an automotive products manufacturer that manufactured and sold certain lubricant and penetrant products through the late 1970s that contained the chemical, benzene. At some time in the early 2000s, Radiator Specialty became the subject of personal injury lawsuits alleging that individuals that came into contact with or otherwise used the benzene-containing products were diagnosed with progressive diseases, including fatal cancers.

From 1971 to 2014, Radiator Specialty, purchased standard-form commercial general liability policies that afforded coverage for benzene-related claims. Radiator Specialty, having incurred approximately $45 million in defense and settlement costs as a result of the benzene-related injury lawsuits, sought defense and indemnity coverage from its insurers under the various primary, umbrella and excess policies it purchased through the decades. Following settlement with some of its carriers, Radiator Specialty filed a declaratory judgment suit in North Carolina state court against the remaining carriers seeking coverage for defense and indemnity. After years of litigation, partial, dispositive rulings, a bench trial in 2018, a stipulated judgment in February 2019 and a trip to the Court of Appeals—resulting in a December 2020 unpublished ruling—the remaining parties, Radiator Specialty, and three carriers sought discretionary review from the North Carolina Supreme Court.

The parties specifically sought clarification and a ruling on the following three items:

1. Whether coverage for the benzene related claims was triggered on the theory of injury-in-fact or the exposure theory;
2. Whether the defense and indemnity coverage was to be allocated via the all-sums approach or the pro-rata approach; and
3. Whether horizontal or vertical exhaustion to the policies.

The Exposure Theory Dictated the Trigger of Coverage for Benzene-Related Claims

The North Carolina Supreme Court ultimately held that, in the case of benzene-related, long-tail claims, the trigger for coverage is based on the time during which the individual was exposed to the benzene-containing product, and not when that individual begins to show signs of illness or disease. Significantly, the Court discussed the indeterminate nature of benzene and asbestos-like exposures and pointed to the language contained in the carrier's standard-form policies, defining "bodily injury" often as something caused by an "occurrence", which includes exposure. Significantly, the Court noted that benzene or asbestos exposure is neither discrete nor so certain, and as such, it coverage could not be triggered based on an injury-in-fact, which requires a more definitive time as to when injury or damage occurred[1].

The Court also noted that, unlike asbestos and other environmental contaminant claims, which can trigger policies well after exposure, benzene-related claims, under an exposure theory, can be pinned down to an end date and do not result in a continuous trigger of coverage under policies. The Court noted that benzene, unlike other long-tail exposure claims involving asbestos and other environmental contaminants, mutates DNA upon exposure with an individual, but is expelled from the body within a matter of days. As such, under the exposure theory, a benzene claim triggers the policies applicable during the time the individual was first exposed to benzene up until the individual has ceased his or her exposure to the benzene-containing product.

Pro-Rata Allocation Applied Based on the Plain Language of the Policies

The Court next turned to the issue of allocation of defense and indemnity costs. The Court recognized that the insuring agreements for the carriers' policies agreed to pay "all sums" or "those sums" that Radiator Specialty was "legally obligated to pay as damages because of 'bodily injury,'" but also recognized that the policies contained limiting language that stated, "This insurance applies only to bodily injury…which occurs during the policy period." The carriers argued that the plain language contained in their respective insuring agreements required the application of pro-rata allocation of coverage for Radiator Specialty's defense and indemnity costs during the applicable policy years. The Court noted that pro-rata allocation acknowledges the allocation of coverage for defense and indemnity costs for a carrier's applicable "time on the risk". That is, instead of allowing an all sums approach, where Radiator Specialty could select one carrier to seek all defense and indemnity costs from, including those costs falling outside of a carrier's applicable policy period, that it would require Radiator Specialty to seek only those defense and indemnity costs falling within each carrier's respective policy period. The carriers argued that it was inequitable to allow "[a]n insured who chooses to purchase broad coverage from a financially-secure insurer every year over a ten-year period…" to seek all defense and indemnity costs from an insurer that sold the insured a policy of insurance covering one singular year.

The Court agreed with the insurers and noted that the "during the policy period" contained in the insuring agreement of the standard-form policies necessarily limited the policies and dictated that the defense and indemnity costs must be allocated pro-rata, based on the "time on the risk". The Court based its allocation decision on similar findings made by courts across the country where presented with similar allocation arguments. The Court also recognized, however, that in making an allocation decision, courts must look to the policy to ensure that it does not contain non-cumulation or other continuing coverage provisions that may serve to allow an all-sums allocation approach[2].

Vertical Policy Exhaustion Applied, Allowing Access to an Umbrella Policy

Lastly, the Court discussed whether vertical or horizontal exhaustion applied to address the primacy of coverage application for Radiator Specialty's defense and indemnity costs. Vertical exhaustion permits a claimant and/or insured to access coverage obtained from an umbrella or excess policy once the primary policy issued for the same applicable policy period is exhausted. Horizontal exhaustion requires that a claimant and/or insured exhaust all primary policies for all policy periods **before** they can access coverage from an umbrella or excess policy. One of the remaining insurers in the lawsuit issued an umbrella policy to Radiator Specialty during a certain policy period. The primary policy for that year, contained a specific exclusion for pre-existing damage claims, which served to preclude coverage for the benzene-related claims. As such, the only policy in force during that year was the umbrella policy. The carrier for that policy argued that Radiator Specialty could not seek coverage from the umbrella policy because its policy specifically required that all underlying insurance must be exhausted prior to accessing the umbrella policy. The "Other Insurance" clause in the policy stated, in pertinent part:

[Landmark] will have the right and duty to defend any "suit" seeking those [i.e., covered] damages when:

1. The applicable limits of insurance of the "underlying insurance" and other insurance have been used up in the payment of judgments or settlements; or
2. No other valid and collectible insurance is available to the insured for damages covered by this policy.

Radiator Specialty argued that Landmark's umbrella policy should be accessible prior to exhaustion of all other primary policies as the applicable underlying, primary policy was not valid and collectible given the exclusion, therefore triggering coverage under the umbrella policy.

The Court noted that Landmark's position necessarily ignored the conjunction "or" contained in its policy and that the presence of that conjunction permitted Radiator to seek coverage under the Landmark umbrella policy because there was no other valid and collectible insurance available to it for the applicable policy period. The Court reasoned that the "Other Insurance" clause in the policy referred to policies specifically issued for the same, applicable policy period, as the umbrella policy, not other policies issued for different policy periods. The Court recognized that other North Carolina courts have come to the same conclusion[3].

The Court ultimately held that Radiator Specialty could seek vertical exhaustion to access coverage from the Landmark umbrella policy because the Other Insurance clause there was no other valid and collectible insurance available during the same policy period and it was otherwise permitted by the Other Insurance clause to do so.

Questions? Please contact an MGC attorney.

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[1] See *Gaston County Dyeing Machine Co. v. Northfield Insurance Company*, 351 N.C. 293, 302-03, 524 S.E.2d 558 (2000) (applying the "injury-in-fact" trigger for coverage as the property damage arose from a ruptured pressure vessel, which occurred on a specific date in time).

[2] *See i.e. In re Viking Pump*, 27 N.Y.3d 244, 264, 33 N.Y.S.3d 118, 52 N.E.3d 1144 (2016) (reasoning that 'it would be inconsistent with the language of the non-cumulation clauses to use pro rata allocation' because ''such policy provisions plainly contemplate that multiple successive insurance policies can indemnify the insured for the same loss or occurrence"); see also *Duke Energy Carolinas, LLC v. AG Ins. SA/NV*, No. 17 CVS 5594, 2020 WL 3042168 (N.C. Super. Ct. June 5, 2020)(finding that a non-cumulation clause in the policy "recognize[d] that damage may extend beyond the policy period in which the triggering property damage first occurs and reflect eh parties' agreement that such damage shall be treated as if all damage occurred in a single premium period, subject to a single policy limit").

[3] *See City of Greensboro v. Rsrv. Ins. Co.*, 70 N.C. App. 651, 660, 321 S.E.2d 232 (1984) (explaining that "other insurance" language is implicated only where "policies provide overlapping or concurrent coverage").