Insurance Coverage Issues for Lead Paint Claims

LITIGATION CONFERENCES

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INSURANCE "BASICS"

"Named Insured" vs. "Insured" vs. "Additional Insured"

- Important to review the "Who is an Insured" clause of policy to determine whether properties owned by corporations, LLCs or partnerships are covered when policy is issued to an individual and whether property management companies are covered

Policy Limits

- Per Occurrence/Per Property
- Aggregate vs. No Aggregate
- Exhaustion

Stacking Policy Limits Over Multiple Policies

- As a general rule, stacking of limits from consecutive policies that are triggered is prohibited by the language of the insurance policy.
- Not a rule of law, but dependent upon the language of the policy
- *Riley v. USAA*, 393 Md. 55 (2006) allowed stacking of limits.
  - "Occurrence" defined as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions, which results, ***during the policy period***, in: (a) bodily injury. . . ."
  - Under "Limit of Liability", policy stated that all bodily injury from repeated exposure should be considered one "occurrence"

- Court ruled that there was no reference to subsequent policies, and specifically noted that the definition of "occurrence" in the policy was limited to "bodily injury" that occurred, even from continuous and repeated exposure, "***during the policy period***" and therefore, subsequent policy limits could be stacked.
- Court distinguished New York case of *Hiraldo v. Allstate Ins. Co.*, which held that subsequent policy limits could not be stacked, noting that the "Limits of Liability" provision in the Allstate policy stated that "Regardless of the number of insured persons, injured persons, claims, claimants ***or policies involved*** . . ."
- Inclusion of "policies involved" made *Hiraldo* distinguishable.

- *Maryland Cas. Co. v. Hanson*, 169 Md. App. 484 (2006)
  - None of the policies involved contained a similar "during the policy period" in their definition of "Occurrence", like the policy in *Riley,* but neither did they have the "regardless of the number of policies involved" language in their "Limits of Liability" that the Allstate policies had in *Hiraldo.*
  - Court held that the policies were more like *Riley* than *Hiraldo,* and permitted the stacking of limits
- Neither *Riley* nor *Hanson* addressed how the policies "Other Insurance" clauses would operate, given that each successive policy was treated as a new policy of insurance.

Exclusions – General Pollution Exclusion vs. Lead Paint Exclusion

- Pollution Exclusion first showed up in insurance policies in 1970
- In *Sullins v. Allstate Ins.*, 340 Md. 503 (1995), the Court refused to apply the then-worded pollution exclusion to lead paint claims, reasoning that the industry intended to exclude environmental pollution damage, and bodily injury claims for lead paint did not fit this intended purpose.
- Modern pollution exclusion clauses, however, would unambiguously exclude lead paint claims, but have been supplanted by more specific lead paint exclusions.

- In response to *Sullins* and other cases around the country, insurance companies adopted a specific lead paint exclusion that left no doubt that lead paint claims were excluded under the policy
- Lead paint exclusions became prevalent in the 1990s, and by 1999, almost all policies contained a version of this exclusion.
- What this means is that by 2020, there will be virtually no insurance coverage available to satisfy lead paint liabilities.

“Qualified Offers” under Reduction of Lead Risk in Housing Act

- Limited coverage for lead paint claims creeped back into policies for “Qualified Offers” under Act, until Court found the qualified offer provisions unconstitutional in *Jackson v. The Dackman Co.*

Trigger of Coverage

Policies are Triggered by an "Occurrence" within Policy Period

- "Trigger" is a legal rule designed to determine when a policy must respond. An entire seminar could be given on the different types of triggers for coverage in different types of cases.
- Fortunately, *Riley* and *Hanson* adopted the "continuous trigger"
- The *Riley* Court adopted the rationale from *Chantel Assoc. v. Mt. Vernon Fire Ins. Co.*, 338 Md. 131 (1995) that "direct or indirect" damage to the cells, tissues and organs caused by lead constituted a "bodily injury", suffered as soon as children were exposed to lead.

- In *Riley,* Dr. Klein testified that lead was a toxin, and exposure results in cellular damage that might not be initially detected. Combined with testimony that the children were observed ingesting paint from the time they moved into the property, Court found a dispute of fact as to whether every policy thereafter was triggered.
- The *Hanson* Court explained it as: "proof of repeated exposure to lead, which, in turn, results in lead-based poisoning injuries that continue for several years with continuous exposure, the continuous injury or injury-in-fact trigger is applicable and thus triggers insurance coverage during all applicable policy periods."
- "Exposure plus bodily injury (even if unmanifested) is now sufficient under Maryland law to trigger coverage."

Allocation of Coverage

We have an "occurrence", have determined which policies are "triggered", and we have an exposure period occurring over multiple years, so the question is how to determine how much each insurance company has to pay.

There are two predominant methods to do so, the "All Sums" (also known as "Joint and Several") approach and the *Pro Rata* approach.

The "All Sums" approach is generally thought to favor insureds, and consequently plaintiffs, as it generally results in more coverage available to satisfy claims. The *Pro Rata* approach is generally favored by insurers, as it general reduces the amount of the coverage obligation.

Under the "All Sums" approach, the "insurers' liability to the plaintiff was joint and several, such that the plaintiff was entitled to select one of the triggered policies and collect the full amount of indemnification from that policy. Once the plaintiff has been compensated, the insurers were responsible for allocating the loss among themselves." *Keene Corporation v. Insurance Company of North America*, 667 F.2d 1034 (D.C. Cir. 1981).

Under the "All Sums" approach, the problem of indivisible injury is resolved simply by collapsing the continuous injury into one year, allowing a policyholder to simply select one triggered year and exhaust the coverage provided during that period in satisfaction of its claim, and then force the insurers to sue each other for contribution.

Maryland rejected the "All Sums" approach in *Mayor & City of Baltimore v. Utica Mutual Ins. Co.*, 145 Md. App. 256 (2002)

- "[C]ollecting all the indemnity from a particular policy [for an injury spanning multiple policy periods] . . . is not consistent with the language of the policies providing indemnification for . . . liability that resulted from an accident or occurrence '*during the policy period*.'"
- "To compress long-term damage of a continuing nature into a single policy period, which would effectively be called for under the 'joint and several' or 'all sums' approach is 'intuitively suspect.'"
- *Utica Mutual* Court adopted the *pro rata* time on the risk allocation, stating that "each insurer is liable for that period of time it was on the risk compared to the entire period during which damages occurred."

- "[A]n insured who elects not to carry liability insurance for a period of time, either by electing to be self-insured, or by purchasing a policy which withholds coverage pursuant to a particular exclusion . . . will be liable for the prorated share that corresponds to periods of self-insurance or no coverage[.]"
- Losses are prorated to the insured unless a gap in coverage is due to the insured's inability to obtain insurance.
- "This straightforward method accommodates the need to hold liable those businesses that chose not to purchase insurance or coverage, or to self-insure."

First lead paint case to recognize the *pro rata* by time on the risk allocation was *Riley v. USAA*, 161 Md. App. 573 (2005), where the Court stated that "Appellee's theory runs counter to the *pro rata* by time-on-the-risk allocation method adopted in continuous injury cases in Maryland. . . . Maryland law dictates that the judgment be allocated pro rata among the policies based on their time on the risk."

The Court of Appeals, in affirming the COSA in *Riley,* was silent on the subject, but did not reject the COSA's application of the methodology.

The *Hanson* Court also recognized Maryland's adherence to the *pro rata* time on the risk allocation, stating that: "From a pro rata standpoint, appellant was on the risk here 100 percent of the time."

Admittedly, in both *Riley* and *Hanson*, there was a single insurer who was "on the risk" for the entire period of time. Notwithstanding, both recognized that *pro rata* time on the risk allocation was the appropriate allocation method to apply in lead paint cases where exposure occurs over multiple policy periods and multiple years.

Interesting footnote 11 in *Hanson*:

> In a footnote, the circuit court stated, "If [Hanson and CMC] can establish an inability to determine technically how to attribute damages among each of the insurance periods, Maryland law dictates that the judgment be allocated pro rata among the policies based on their time on the risk. *See Bausch & Lomb, Inc.* [*supra*,], 355 Md. 566, 584-89, 735 A.2d 1081 (1999). In light of our discussion of pro rata allocation among several insurers above, we determine that the court mistook the Court of Appeals' holding in *Bausch & Lomb* concerning expert testimony to determine attribution of liability and our adopting *pro rata* allocation for deciding liability among several insurers.

Is this a suggestion that *pro rata* allocation only applies in deciding liability among several insurers, rather than several policy periods?

Penn. National Mut. Ins. Co. v. Roberts

The first case to apply Maryland law on *pro rata* time on the risk allocation to lead exposure over multiple policy periods where an insurer was not "on the risk" for the entire period of exposure was *Penn. National Mut. Ins. Co. v. Roberts*, 668 F.3d 106 (4th Cir. 2012)

- It did not make new law. *Roberts* specifically noted that in lead paint or continuous trigger cases, Maryland applies a *pro rata* time on the risk allocation, citing to *Utica Mutual, Riley,* and *Hanson,* as well as *In re Wallace & Gale Co.*, 385 F.3d 820, 835 (4th Cir. 2004).
- *Roberts* was, however, the first reported opinion after these cases that addressed the mechanics of how you go about determining time on the risk.

- *Roberts* rejected the argument that *pro rata* allocation only applied when allocating liability across multiple policies of a single insured, noting other jurisdictions applying the *pro rata* approach do not distinguish the allocation method based upon the number of tortfeasors. Court noted that the approach is concerned about the length of a policy period, not the number of tortfeasors involved.
- While the *Roberts* Court recognized joint and several liability, it held that the allocation issue could only be resolved by reference to the insurance contract and contract law, not tort doctrines.
- Court rejected as not germane any arguments that *pro rata* allocation was an “end run” around the doctrine of joint and several liability.

- The *Roberts* Court also noted that not applying a *pro rata* allocation would upend insurance underwriting, as it was "neither equitable nor fair to require an insurance company to pay for coverage during a period for which no effective coverage is in force."
- Applying the "All Sums" approach would impose the same amount of liability on an insurance company whether it provided coverage for one month or for 10 years.
- The "All Sums" approach would discourage tortfeasors from buying insurance, or buying insurance for all applicable periods of risk.
- Finally, the uncertainty generated under the "All Sums" approach would impose significant costs on both insurers and policyholders.

- *Roberts* recognized that the denominator in the time on the risk equation, meaning the total amount of time that a plaintiff was exposed to lead paint, drives the amount of an insurer's exposure, so the insured and plaintiff has an incentive to shrink the denominator, while the insurer has an incentive to maximize the denominator.
- The *Roberts* Court used the date of the plaintiff's birth as the starting point, noting that the plaintiff presented evidence at trial through her expert that it was quite possible for an infant to suffer lead poisoning, that there was chipping paint in the home since before the plaintiff was born, that plaintiff and her mother alleged exposure since infancy, and because the plaintiff's home contained readily accessible sources of lead that the infant could ingest.

- Court applied judicial estoppel to preclude the plaintiff from arguing during the coverage litigation positions that were contrary to the positions taken in the underlying lead paint trial.
- The end date for the denominator was determined to be the last date that the plaintiff had an elevated blood lead level, resulting in a period of exposure of 55 months.
- As to the numerator, the *Roberts* Court applied the time from the first policy issued to its insured, until its insured sold the property to another party, which was 22 months.
- From there, it was simple math of the verdict multiplied by 22/55

Post – *Roberts* Opinions

Penn. National v. Jacob Dackman & Sons, 2017 U.S. Dist. LEXIS 148907 (2017)

- How to determine time on the risk and period of exposure
- Determined that periods where a policy was exhausted counted towards the insured's share, not the insurer's share
- Period of exposure started when the plaintiff first moved into property, given testimony that it contained chipping leaded paint, that the plaintiff was observed putting paint chips in mouth, and expert testified in underlying trial that exposure could occur at infancy through lead dust.
- Period of exposure did not start at first EBBL

- Nor, however, was the end date of exposure the last EBBL, especially when the plaintiff's expert in the underlying trial testified that the plaintiff had declining EBBLs after moving out of the property and could not state that there was continued lead exposure.
- Real question is whether this should have been determined at the summary judgment stage. There were clearly material disputes of fact as to both the start and the end date of exposure, yet the Judge resolved those questions of fact without the aid of expert testimony.
- Which leads us to our last slide

Declaratory Judgment Actions

- There appears to be a misconception that the only evidence that can be utilized in a subsequent DJ action is the evidence presented at trial, and by selectively presenting evidence at trial, you can bind an insurance company to the facts and evidence elicited.
- Certainly, you cannot take contradictory positions from those that you asserted in the underlying trial. Judicial estoppel prevents this.
- However, an insurance company, or really any party, may present additional evidence in a DJ action as long as the issues were not fairly litigated in the underlying trial.

- In *Allstate Ins. Co. v. Atwood*, 319 Md. 247 (1990), the Court ruled that "[a]s a general matter, a liability insurer is bound by the finding in a tort action against its insured that the insured was liable due to negligence."
- Recognizing that an insured and the underlying plaintiff may collude in the underlying trial to maximize insurance coverage, the *Atwood* Court noted that in a DJ action, the Judge should determine whether the issue in the coverage action was "fairly litigated" in the underlying trial.
- If "fairly litigated," the insurer is bound by the jury determination
- If not "fairly litigated," the insurer may relitigate the matter in the DJ action.

- Thus, issues such as the full period of exposure might not be presented at trial, either because it does not help advance any issue remaining in the underlying litigation, or in an attempt to minimize the period of exposure and maximize the "time on the risk."
- The parties may, with the use of experts and other evidence, present evidence for the trier of fact, which is the judge in most DJ actions, to determine the appropriate period of exposure to lead paint.
- This is where the U.S. District Court erred in *Jacob Dackman & Sons*, as the Judge should have heard testimony and reviewed evidence not solely from the underlying trial, but also developed through the DJ action itself.