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North Carolina Supreme Court Addresses "Trigger of Coverage," Allocation and Exhaustion-Related Issues Arising Out of Benzene-Related Claims

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On December 16, 2022, the North Carolina Supreme Court decided *Radiator Specialty Co. v. Arrowood Indem. Co.*, 2022 N.C. LEXIS 1122 (Dec. 16, 2022), in which it addressed coverage issues arising out of claims by individuals alleging injury from exposure to benzene contained in the insured's products. Affirming in part and reversing in part the intermediate appellate court's decision, the court held: (1) an "exposure trigger" applied; (2) defense and indemnity costs were subject to pro-rata allocation; and (3) vertical exhaustion applied to the duty to defend under certain umbrella policies. Two justices concurred in part and dissented in part.

I. Background

In *Radiator Specialty*, the insured (RSC) was named in hundreds of underlying suits arising from individual plaintiffs' alleged exposure to benzene contained in its products. Between 1971 and 2012, RSC was insured under primary, umbrella and excess liability policies issued by various insurers. In 2013, RSC sued the insurers in North Carolina state court, seeking coverage for approximately $45 million in defense and indemnity costs incurred for the underlying claims. In 2016, the trial court decided motions for summary judgment on a number of coverage issues. Following a bench trial in 2018, the trial court entered final judgment, which required the insurers to reimburse $1.8 million of RSC's past costs. The rulings were appealed to the North Carolina Court of Appeals, which issued a decision in 2020. In 2021, the North Carolina Supreme Court granted RSC's and certain insurers' petitions for discretionary review of the Court of Appeals' decision.

II. The Supreme Court's Decision

A. "Trigger of Coverage"

The Supreme Court began by addressing "trigger of coverage." The parties did not dispute that the language of the relevant policies required a claimant to suffer "bodily injury" during the policy period. Instead, the parties disagreed over what constituted "bodily injury" for purposes of triggering coverage. Urging the court to apply a "manifestation trigger," one of the insurers contended that, although exposure to benzene was the cause of the claimants' injuries, exposure alone was not actual injury giving rise to a claim for damages against RSC. Rather, according to the insurer, the resulting cancers or other physical ailments were the actual injury. Other insurers argued for the application of an "exposure trigger" on the basis that injury happens in the days following benzene exposure, while the consequences of the injury take much longer to become detectable. According to those insurers, defining injury as physical manifestation of harm "confuses the injury with its consequences." *Id.* at *28.

The court held that the claims were subject to an "exposure trigger." It noted that the trial court (whose opinion the Court of Appeals affirmed) had taken ""judicial notice of the innumerable cases concerning asbestos and benzene exposure and recognize[d] how difficult it is to ascribe a 'date certain' or 'single event' to such harm.""[1] *Id.* at *10 (quoting *Radiator Specialty* Court of Appeals decision). The court said it was "persuaded by" the reasoning of *Imperial Cas. & Indem. Co. v. Radiator Specialty Co.*, 862 F. Supp. 1437 (E.D.N.C. 1994), in which a North Carolina federal trial court applied an "exposure trigger" to underlying asbestos-related bodily injury claims.

The Supreme Court distinguished its decision in *Gaston County Dyeing Machine Co. v. Northfield Ins. Co.*, 524 S.E.2d 558 (N.C. 2000), which had adopted an "injury-in-fact" trigger for property damage arising out of a chemical leak from a ruptured pressure vessel, on the basis that the holding in *Gaston* was limited to its facts.

In addition, the court rejected an alternative argument – advanced by the insurer that had advocated for the application for a "manifestation trigger" – that, under an exposure theory, policies in effect during the development of a claimant's malignancy and cancer also should be deemed triggered (in effect, that a "continuous trigger" applied). The court believed that applying a "continuous trigger" would be "at odds with [its] holding that, in benzene cases, the injury that triggers coverage occurs at the time of exposure." *Id.* at *31.

B. Allocation

The court next addressed allocation. The insurers argued for the application of pro-rata allocation, while RSC urged the court to adopt the "all sums" approach.

Reversing the Court of Appeals, the court held that the policy language supported pro-rata allocation. Citing decisions by high courts in other jurisdictions, it explained that "the modern trend is to apply pro rata allocation when limiting language like 'during the policy period' exists, even when the policy contains a reference to paying 'all sums' arising out of certain liabilities." *Id.* at *45. The court acknowledged that certain policies issued to RSC required the "occurrence" – rather than the "bodily injury" – to take place during the policy period, but it said that distinction was "inapposite" given its conclusion that exposure to benzene constitutes an "occurrence." *Id.* at *46. It added that, because there is "very little daylight between exposure and injury in the context of benzene exposure," there would be "virtually no practical purpose" in distinguishing between policy language limiting coverage to injury during the policy period and language limiting coverage to "occurrences" during the policy period. *Id.* at *47.

The court denied RSC's invitation to apply an "all sums" approach based on *Duke Energy Carolinas, LLC v. AG Ins. SA/NV*, 2020 WL 3042168 (N.C. Super. Ct. June 5, 2020). In *Duke Energy*, a North Carolina state trial court chose to apply "all sums" allocation on the grounds that the policy at issue contained a non-cumulation clause. The court noted that the New York Court of Appeals had reached a similar conclusion in *In re Viking Pump, Inc.*, 52 N.E.3d 1144 (N.Y. 2016). According to the *Radiator Specialty* court, however, those cases were factually distinguishable because: (1) the umbrella and excess policies at issue in *Radiator Specialty* did not contain non-cumulation clauses; and (2) "unlike asbestos exposure, . . . which was at issue in *In re Viking Pump*, . . . benzene exposure causes injury at the time of exposure, rather than a continuous injury." *Radiator Specialty*, 2022 N.C. LEXIS 1122, at *49-50. In addition, although certain excess policies issued to RSC defined "bodily injury" to include "any continuation, change or resumption of that 'bodily injury' . . . after the end of the policy period," the court found that such "continuing coverage" language did not mandate the application of "all sums" allocation because it "'simply sets forth the unremarkable proposition . . . [that] the policy in place when the injury occurs will cover all consequential damages, even those taking place after the policy period.'" *Id.* at *53 (quoting *New England Insulation Co. v. Liberty Mut. Ins. Co.*, 83 Mass. App. Ct. 631, 637 (2013)).

C. Vertical vs. Horizontal Exhaustion

Lastly, the court held that vertical exhaustion, instead of horizontal exhaustion, applied to the duty to defend under certain umbrella policies. Section 2 of the policies imposed a duty to defend where: (a) "the applicable limits of . . . the 'underlying insurance' *and other insurance* have been used up in the payment of judgments or settlements"; *or* (b) "[n]o other valid and collectible insurance is available to the insured for damages covered by this policy" (emphasis added). The court determined that the subsections were not to be read together because they were phrased in the disjunctive, and that subsection (b) was operative because the underlying policies included "pre-existing damage" exclusions that precluded coverage for the benzene claims (i.e., there was no "valid and collectible insurance" other than the excess policies). The court remanded the case to the trial court "to apply vertical exhaustion and to conduct other

proceedings consistent with this opinion." *Id.* at *63-64.

III. Conclusion

Radiator Specialty is notable for two reasons. First, in adopting pro-rata allocation over the "all sums" approach, it puts North Carolina among the majority of jurisdictions that have considered the issue. The decision, however, may not be the last word in the Tar Heel State. The court did not consider the potential impact of the non-cumulation clauses contained in certain underlying policies, reasoning that the clauses were not incorporated by the umbrella and excess policies at issue. Moreover, based on judicial notice taken by the trial court, the Supreme Court concluded that, under the "exposure trigger" it had adopted for benzene claims, injury did not continue beyond the policy period. Second, *Radiator Specialty* is one of the few appellate court decisions to address the timing of bodily injury from benzene exposure. The court concluded that injury happens at or shortly after exposure, and not when the consequences of the injury (e.g., cancer) manifest. The Supreme Court could rule differently in a case involving continuous injury under policies containing the type of non-cumulation clause that other courts, such as the New York Court of Appeals in *Viking Pump*, have found require "all sums" allocation.

[1] According to the decision, medical and scientific evidence was presented at trial, but it was sealed. Therefore, the Supreme Court discussed the evidence "only in general terms." *Radiator Specialty*, 2022 N.C. LEXIS 1122, at *20 n.2.