LA Supreme Court Ruling a Sweet One for Insurer

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MG+M attorney Natasha Corb analyzes a recent Louisiana Supreme Court decision finding that an insurer's payments of defense costs may be prorated in long-latency disease cases under certain circumstances.

Recently, the Louisiana Supreme Court in *Arceneaux et al. v. Amstar Corp. et. al*, 2015-0588 (La. 9/7/16, 1) decided that, in long latency disease cases, an insurer's payments of defense costs may be prorated when the insurer's occurrence-based policy was effective only during part of the plaintiffs' exposure years.

Plaintiffs in *Arceneaux* alleged hearing loss from occupational noise exposures at American Sugar Refining, Inc.'s ("American Sugar") facility in Arabi, Louisiana. *Id.* at 1-2. The approximately one hundred plaintiffs' exposures occurred between 1941 – 2006. *Id.* at 2. Continental Casualty Company ("Continental") issued eight general liability policies to American Sugar, effective from March 1, 1963 – March 1, 1978. *Id.* Each policy contained bodily injury exclusions for injuries that American Sugar employees experienced in the course and scope of their employment. *Id.*Importantly, in the last policy, the exclusion was deleted by special endorsement. *Id.* That endorsement was effective on December 31, 1975, and provided bodily injury coverage through March 1, 1978, for a total of twenty-six months. *Id.*

American Sugar brought a third-party demand against Continental alleging that Continental's duty to defend required a complete defense in accordance with the policy, even if some of the plaintiffs' claims fell outside of the coverage period. *Id.* Continental asserted that defense costs should be prorated amongst the insurers, and periods of non-coverage should be borne by the insured. *Id.*Particularly, Continental maintained that a complete defense was improper because its policies only covered twenty-six months of the alleged sixty-year exposure period. *Id.*

Prior to assessing the merits of Continental's argument, the Court distinguished an insurer's duty to defend from its duty to indemnify. *Id.* at 5. The duty to defend "arises whenever the pleadings against the insured disclose even a *possibility* of liability" *Id.* (emphasis added). In contrast, an insurer's duty to indemnify in long latency disease cases requires liability "to be prorated among insurance carriers that were on the risk during periods of exposure to injurious conditions" *Id.* at 5-6 (citing *Norfolk S. Corp. v. California Union Ins. Co*., 2002-0369, pp. 42-43 (La. App. 1. Cir. 9/12/03), 859 So.2d 167, 197-98, *writ denied*, 2003-2742 (La. 12/19/03), 861 So.2d 579). While Louisiana courts determined that proration is proper in regard to an insurer's duty to indemnify, no such precedent existed as to its duty to defend. *Id.* at 6-7. Thus, prior to *Arceneaux,* insurers and insureds had no defined method to allocate defense costs in latent disease lawsuits.

At the outset of its analysis, the Court discussed two nationwide approaches to allocating defense costs in long latency disease cases: the pro rata allocation, and joint and several allocation. *Id.* at 7. "Under pro rata allocation, insurance carriers of triggered policies are responsible for a share of defense costs based at least in part on the period of time they are on the risk." *Id.* If an insured has periods of non-coverage after defense costs are divided, then an insurer only pays its pro rata share.*Id.* Conversely, joint and several allocation allows the insured to choose one insurer "that is on the risk" and hold it liable "for the entire loss up to the policy limits." *Id.* Defense costs are divided amongst insurance carriers, even for periods where no coverage was in place. *Id.* Under this scheme, the selected insurer bears the burden of seeking contribution from other insurers. *Id.* Consequently, the treatment of uninsured time periods is the most significant difference between these two methods. *Id.* (citing *Owens–Illinois, Inc. v. United Ins. Co.*, 138 N.J. 437, 650 A.2d 974, 989 (1994)).

Ultimately, the Court implemented the pro rata approach to allocate defense costs because Continental's policy language *explicitly limited* coverage to bodily injuries during eighty-six percent[1] of the policy period. *Id.* at 12 (emphasis added). Since neither party "could reasonably expect that the insurer was liable for losses that occurred outside the policy coverage period," pro rata allocation was proper. *Id.* at 13 (citing *Sec. Ins. Co. of Hartford v. Lumbermens Mut. Cas. Co.*, 826 A.2d 107, 121 (Conn. 2003)). Furthermore, "the pro rata allocation scheme is an equitable system that can be readily used in long latency disease claims in Louisiana" to clearly apportion defense costs, and promote risk spreading. *Id.* at 13-4. However, the Court importantly noted that "[t]he manner in which defense costs are to be allocated [in a long latency disease lawsuit] may need to be determined on a case by case basis, according to the *preciselanguage* of the insurance contract at issue" *Id.* at 13 (emphasis added).

Despite the Court's guidance, some questions remain unanswered. For instance, in latent injury claims, policies in place at the time of the first injurious exposure have often been discarded "under the mistaken notion that they were no longer in effect." Mielenhausen, Thomas, *Missing Policies Proof – Turning Burden Into Opportunity*, ABA Section of Litigation Insurance Coverage Litigation Committee CLE Seminar, March 3-5, 2011. Several sources may be used by a defendant to prove the existence and terms of these insurance policies, including testimony from the "comptroller who purchased the insurance [and] the agent who sold the insurance," along with insurance declaration pages, certificates of insurance, policy index cards, reinsurance records, and publications from insurance industry organizations. *Id.* Moreover, these sources may include the insurer's precise policy language for bodily injury coverage in place during a particular policy period. *Id*. Thus, if testimony and/or documents evidence the appropriate policy language, it appears that an insurer could benefit from the *Arceneaux* ruling.[2]

Notably, dicta and the ultimate ruling in *Arceneaux* seem to conflict. While *Arceneaux* provides that "the pro rata allocation scheme is an equitable system that can be readily used in long latency disease claims in Louisiana," the Court's limited ruling was specific to the particular language of an insurance policy in a long latency disease lawsuit. *Arceneaux* at 13-4. Currently, it seems that*Arceneaux* will only be applied to cases with similar facts. However, Louisiana courts could extend the *Arceneaux* ruling to parol evidence of insurance policies that accurately depict policy language.

[1] As discussed *supra*, Continental issued eight policies to American Sugar from March 1, 1963 – March 1, 1978, totaling to fifteen years, or one hundred eighty months. Because Continental's policies only provided coverage for bodily injury to American Sugar's employees in the course and scope of their employment for twenty-six months, there were one hundred fifty-four months where such coverage was excluded. Thus, eighty-six percent of the entirety of policies issued to American Sugar contained exclusions for bodily injury to employees of American Sugar.

[2] Similar to other jurisdictions, Louisiana requires that only an original document may be used to prove its existence and contents contained therein. *See* La. CE Art. 1002. However, Louisiana allows a party to introduce parol evidence to establish the existence and contents of an insurance policy in a long latency disease lawsuit after that party has proved by a preponderance of the evidence "that the instrument is either lost or otherwise unavailable" (*See Hoerner v. ANCO Insulations, Inc.,* 2000-2333 (La.App. 4 Cir. 1/23/02, 39), 812 So.2d 45, 73-4, *writ denied*, 2002-0935 (La. 6/21/02), 819 So.2d 1023, and *writ denied*, 2002-0965 (La. 6/21/02), 819 So.2d 1023, and *writ denied*, 2002-0967 (La. 6/21/02), 819 So.2d 1023, and *writ denied*, 2002-0972 (La. 6/21/02), 819 So.2d 1024).

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