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LOUISIANA INSURER NEWS: PRO RATA ALLOCATION OF DEFENSE COSTS MAKES FIRST APPEARANCE

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The Louisiana Supreme Court recently re-visited longstanding jurisprudence providing a new approach in Louisiana to the insurer's duty to defend as it pertains to the allocation of defense cost payments. Specifically, in *Arceneaux v. Amstar Corp.*, 2015-0588 (La. 9/7/16), __ So.3d __ (2016), 2016 WL 4699163, the Louisiana Supreme Court decided whether the duty to defend in long latency disease cases may be prorated between insurer and insured when occurrence-based policies provide coverage for only a portion of the time during which exposure occurred. The court determined that the pro rata approach is appropriate in this case when analyzing the facts presented, as well as the relevant policy language.

Arceneaux arose from claims asserted by a group of approximately 100 plaintiffs who alleged to have suffered hearing loss from exposure to unreasonably loud noise in the course of their work at defendant's, American Sugar Refining, Inc. ("American Sugar"), refinery in Arabi, Louisiana. The various plaintiffs worked at the refinery within the time span of 1941 to 2006. During that time, Continental Casualty Company ("Continental") issued eight general liability policies to American Sugar, effective from March 1, 1963 to March 1, 1978. Each of the policies contained exclusions for bodily injury to employees of the insured arising out of the course and scope of employment. The final policy issued, however, omitted the exclusion by special endorsement effective December 31, 1975. Therefore, the policy provided coverage for bodily injury that occurred from December 31, 1975 through the end of the policy's coverage period on March 1, 1978, for a total period of twenty-six months.

The pertinent section of the policy provides:

> The company will pay on behalf of the insured all sums which the insured…shall become legally obligated to pay as damages because of
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> Y. bodily injury
> Z. property damage
>
> To which this insurance applies, cause by an occurrence, and the company shall have the right and duty to defend any suit against the insured seeking damages on account of such bodily injury or property damage, even if any of the allegations of the suit are groundless, false or fraudulent…

Additionally, the policy defined bodily injury as, "bodily injury, sickness of disease sustained by any person which occurs during the policy period, including death at any time resulting therefrom." "Occurrence" is defined by the policy as, " an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured."

American Sugar Refining, Inc. filed a third-party demand against Continental asserting that the duty to defend as agreed upon in the policy provides for a complete defense so long as the duty to defend attaches, even if some claims fall outside of coverage. American Sugar sought past defense costs, a complete defense going forward, and penalties and attorney's fees. In response, Continental asserted that defense costs should be prorated among insurers and the insured if there are periods of non-coverage. Specifically, Continental argued that it should not have to provide a complete defense because its policies only covered twenty-six months of the approximately sixty-year exposure period alleged by the plaintiffs.

The Louisiana Supreme Court held that under the specific language of the policy, the duty to defend should be prorated between the insurer and insured. The court first noted that an insurer's duty to defend and duty to indemnify are distinct from one another. While Louisiana courts have long recognized that liability should be prorated under an insurer's duty to indemnify, no Louisiana court has recognized such a right under the duty to defend. As such, the issue of whether an insurer's duty to defend may be prorated among insurers and the insured during periods of self-insurance in long latency disease cases was one of first impression in Louisiana.

The court noted that two general approaches have emerged nationally to address the issue. The first "pro rata" approach calls for insurance carriers of triggered policies to pay for a share of defense costs based at least in part on the period of time they are on the risk. Thus, defense costs are divided among insurers, and if the insured has periods of non-coverage, the insured is responsible for its pro rata share. Under the second "joint and several" approach, the insured selects one insurer that is on the risk and holds it liable for the entire loss up to the applicable policy limits. Thereafter, the selected insurer has the burden of collecting

contribution from the other various insurers. Under the joint and several approach, defense costs are divided only among the insurance carriers, even for periods during which there was no coverage in place.

Looking to the language of the policy itself, the Louisiana Supreme Court ultimately adopted the pro rata approach. Specifically, the court found that the policy's language limited coverage to bodily injury that exclusively occurred during the policy period. Additionally, the court noted that the pro rata method of allocation preserved the reasonable expectations of the parties because, under the terms of the policy, neither party could reasonably expect that the insurer was liable for losses that occurred outside of the applicable policy period. "To hold otherwise would entitle an insured to receive coverage for a period in which it did not pay a premium." As such, "the pro rata allocation scheme is an equitable system, that can be readily used in long latency disease claims in Louisiana." Finally, the court concluded that the most appropriate method to apportion defense costs is by utilizing a metric which takes into account the amount of time an insurer was "on the risk." Accordingly, the length of time that an insurer provided coverage to its insured will govern its potential exposure.