

Maryland Finally set to Diagnose an Allocation Method for Progressive Injuries

The Only Thing Progressing Slower Than Latent Injury Claims are Latent Injury Coverage Rules

Maryland's highest court recently heard arguments regarding the proper method of allocation of the covered damages from a slowly progressing asbestos injury amongst insurance policies in place over a period of years. *Rossello v. Zurich American Insurance Company*, Case No. 2436 (Md. 2019). The court may also be forced to determine what the proper trigger of coverage is for latent bodily injury claims, although the plaintiff has not framed the issue in that manner.

In *Rossello*, the plaintiff, Patrick Rossello, worked for a period of years for the now-defunct Lloyd E. Mitchell, Inc. ("Mitchell"), a construction company operating until 1976. In 1974 he was exposed to and inhaled asbestos fibers. He was ultimately diagnosed in 2013 with malignant mesothelioma as a result of that exposure. Rossello obtained a judgment for approximately \$2,700,000 against Mitchell and secured the right to pursue its insurance. As relevant to this dispute, Mitchell carried liability insurance policies, which provide coverage for asbestos related claims, from 1974 to 1977.

Rossello seeks to hold Zurich, as successor to Maryland Casualty Company, accountable for the full value of his award, based on the 1974 policy. Although this contention actually implicates two separate issues, plaintiff's counsel passed over the initial trigger of coverage issue and focused instead on the issue of allocation of coverage.

The *Rossello* court is anticipated to decide between the "pro rata" and "all sums" methods of allocation, but despite the insured's counsel's oversight, will likely have to address the proper trigger of coverage. As a precursor to determining how a covered latent bodily injury award is split amongst the various policies, you first have to determine which policy periods are triggered. Courts have taken a variety of approaches to this issue. Generally, these approaches focus on the time of initial exposure, the overall time of exposure (where the victim was exposed for an extended period of time), the period of time in which the disease was developing, and the time of diagnosis.

States have adopted approaches involving nearly every combination of these approaches. Plaintiff's counsel appears to be advocating an initial exposure approach to trigger of coverage, attempting to pin the 1974 policy with the full award. Zurich's counsel, on the other hand, identified the trigger of coverage issue and contended that an "injury-in-fact" trigger applies. Although an "injury-in-fact" trigger has been applied in different ways, Zurich pushed for an interpretation that would span the time frame from first exposure to diagnosis, under the premise that the injury was developing during that entire period of time.

Only after determining which policy periods are triggered can the court turn to the question of how to allocate coverage between those years that are triggered. The pro rata method, which is

generally more favorable to insurers, forces the insured to seek coverage from each policy period in place during the period of years deemed to be triggered. In an all sums jurisdiction, on the other hand, policyholders are able to recover the full amount of the loss from any single policy in place during the triggered years, leaving that insurer to seek contribution from the other triggered insurers.

The selection of allocation method becomes particularly relevant when there are coverage issues – or no coverage at all – during some of the triggered years. When that is the case, as is true in *Rossello*, either the insured (if pro rata) or the insurer (if all sums) is left holding the bag for those years that are either uninsured, underinsured, or have coverage issues to contend with. Zurich argues that bodily injury occurred here continuously from 1974 until diagnosis in 2013 then claims that the damages should be divided equally during that time period such that Zurich should only be responsible for the time that they were on the risk, from 1974-1977.

In the absence of any clear guiding law on the allocation issue in Maryland, it will be interesting to see how the state deals with this issue. Maryland is one of the few states remaining that has not established a clear rule on this issue. With the lower court's ruling in its favor, Zurich may have a marginal advantage, but the high court will review the issue *de novo*, meaning it will not be bound by the legal analysis of the lower court. We will monitor the outcome of this case and provide an update when that decision is published, including its potential impact on latent property damage and construction defect claims.

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