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December 15, 2022

Radiator Spec. Co. v. Arrowood Indem. Co., et al., 383 N.C. 387 (2022).

In The Supreme Court Of North Carolina 2022-Ncsc-134 No. 20pa21 Filed 16 December 2022

Radiator Speciality Company V. Arrowood Indemnity Company (As Successor To Guaranty National Insurance Company, Royal Indemnity Company, And Royal Indemnity Company Of America); Columbia Casualty Company; Continental Casualty Company; Fireman's Fund Insurance Company; Insurance Company Of North America; Landmark American Insurance Company; Munich Reinsurance America, Inc. (As Successor To American Reinsurance Company); Mutual Fire, Marine And Inland Insurance Company; National Union Fire Insurance Company Of Pittsburgh, Pa; Pacific Employers Insurance Company; St. Paul Surplus Lines Insurance Company; Sirius America Insurance Company (As Successor To Imperial Casualty And Indemnity Company); United National Insurance Company; Westchester Fire Insurance Company; Zurich American Insurance Company Of Illinois

On discretionary view pursuant to N.C.G.S. § 7A-31 of a unanimous, unpublished decision of the Court of Appeals, No. COA19-507, 2020 WL 7039144 (N.C. Ct. App. Dec. 1, 2020), reversing in part and affirming in part a judgment entered on 27 February 2019 by Judge W. David Lee in Superior Court, Mecklenburg County. On 10 August 2021, the Supreme Court allowed defendant Fireman's Fund Insurance Company's cross-petition for discretionary review and Landmark American Insurance Company and National Union Fire Insurance Company of Pittsburgh, PA's conditional petition for discretionary review. Heard in the Supreme Court on 30 August 2022.

- McGuireWoods LLP, by Bradley R. Kutrow; and Perkins Coie LLP, by, Jonathan G. Hardin and Catherine J. Del Prete, for plaintiff-appellant.
- Fox Rothschild LLP, by Matthew Nis Leerberg and Troy D. Shelton; and Rivkin Radler LLP, by Michael A. Kotula, for defendant-appellant Fireman's Fund Insurance Company.
- Goldberg Segalla LLP, by David L. Brown and Allegra A. Sinclair; and Nicolaides Fink Thorpe
- Michaelides Sullivan LLP, by Matthew J. Fink, pro hac vice, and Mark J. Sobczak, pro hac vice, for defendant-appellee National Union Fire Insurance Company of Pittsburgh, PA.
- Hedrick Gardner Kincheloe & Garofalo, LLP, by M. Duane Jones and Paul C. Lawrence; and Musick, Peeler & Garrett LLP, by David A. Tartaglio, Stephen M. Green, and Steven T. Adams, for defendant-appellee Landmark American Insurance Company.
- Robinson, Bradshaw & Hinson, P.A., by R. Steven DeGeorge, for United Policyholders, amicus curiae.
- Cranfill Sumner LLP, by Jennifer A. Welch; and Crowell & Moring, by Laura Foggan for Complex Insurance Claims Litigation Association and American Property Casualty Insurance Association, amici curiae.

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- EARLS, Justice.

1. Radiator Specialty Company (RSC) is a North Carolina-based manufacturer of automotive, hardware, and plumbing products, including cleaners, degreasers, and lubricants. Some of the products RSC has manufactured contained benzene. Over the past twenty years, RSC has been named in hundreds of personal injury lawsuits seeking damages for bodily injury allegedly caused by repeated exposure to benzene over time. During that same period, RSC purchased more than one-hundred.

Standard-form product liability policies from twenty-five insurers, including the three insurers remaining in this action: Fireman's Fund Insurance Company (Fireman's Fund), Landmark American Insurance Company (Landmark), and National Union Fire Insurance Company of Pittsburgh, PA (National Union) [collectively, the insurers]. RSC now seeks compensation from those insurers for liabilities it has incurred as a result of its benzene litigation.

2. This case presents a challenge that is unique from personal injury cases in which the injury occurs at a definite time and place. Unlike a car crash, for example, where the injury takes place on a clearly discernable date, benzene exposure may take place over the course of several years, spanning multiple insurance-policy periods and implicating different providers. More complicated still, the consequences of that exposure may not become apparent for even longer. As a result, as the courts of New York have stated, [c]ourts across the country have grappled with so-called "long-tail" claims—such as those seeking to recover for personal injuries due to toxic exposure and property damage resulting from gradual or continuing environmental contaminations—in the insurance context. These types of claims present unique complications because they often involve exposure to an injury-inducing harm over the course of multiple policy periods, spawning litigation over which policies are triggered in the first instance, how liability should be allocated among triggered policies and the respective insurers, and at what point insureds may turn to excess insurance for coverage.

In re Viking Pump, Inc., 27 N.Y.3d 244, 255 (2016).

3. This dispute concerns which insurers are obligated to pay which costs arising from RSC's benzene liabilities pursuant to the terms of the insurers' liability insurance policies. To answer this question, we must decide as a matter of law (1) when each insurer's coverage is triggered in these circumstances—that is, whether coverage is triggered when a claimant is exposed to benzene, or instead, when the claimant develops observable bodily injury, such as sickness or disease (exposure vs. injury-in-fact); (2) how defense and indemnification costs are allocated among insurers when multiple policies in multiple years are triggered by the same claim (all sums vs. pro
rata); and (3) what underlying limits RSC must exhaust before seeking defense coverage from umbrella or excess policies (vertical vs. horizontal exhaustion).

I. Background

A. Factual Background

4. For over forty years, RSC produced and sold benzene-containing products, including a penetrating oil called Liquid Wrench. In the early 2000s, RSC became the subject of hundreds of personal injury lawsuits arising from its use of benzene in its products. Claimants sought damages for consequences they have suffered as a result of benzene exposure, including cancer and death.

Their claims represent what are known as long-tail claims: allegations of injury spanning over the course of years. In other words, many of the claimants assert that they were exposed to RSC's benzene-containing products for years or

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decades, eventually developing progressive diseases.

As a result of this litigation, RSC has faced approximately $45 million in defense and settlement costs. RSC has sought to have some of those costs covered by a multitude of insurance policies it purchased over several decades from different providers. Fireman's Fund, Landmark, and National Union are the only such insurers that are parties to this appeal.

5. From 1971 to 2014, RSC purchased over one-hundred standard-form product liability policies from more than a dozen insurers. Most of these policies provided coverage for one year. In 2013, RSC brought suit against its insurance providers seeking coverage for the damages it has paid out of pocket related to its benzene litigation. Though RSC argues that the trial court erroneously "awarded [it] only a tiny fraction of the insurance for which RSC paid more than $7.1 million in premiums," the insurers reject the notion that RSC has not been awarded the amount it is due under the policies they issued, including because "[RSC] settled with certain insurers, purchased policies with high per claim self-insured retentions or deductibles, lost some policies it bought, or bought no applicable coverage at all." To cover for those "gaps in its insurance program," the insurers argue that RSC now seeks to hold them responsible for liabilities they were never obligated to cover.

B. Procedural History

6. On 6 February 2013, RSC filed a declaratory judgment action pursuant to N.C.G.S. § 1-253 et seq. seeking a declaration of the duties and obligations of fifteen different defendant-insurers under policies they sold to RSC between 1971 and 2012.

7. An amended complaint filed with leave of the trial court on 5 July 2015 named nine of the original defendant insurance companies or successors in interest to the insurance companies that sold RSC primary and excess liability policies for the same period. The amended complaint raised additional claims for bad faith refusal to settle or pay and unfair or deceptive trade practices against National Union. Shortly thereafter, defendants filed both answers and motions for summary judgment on various issues of insurance contract interpretation. ¶ 8 On 28 and 29 January 2016, Judge W. David Lee issued orders addressing the issues raised in the summary judgment motions. In its Order on Trigger of Coverage, the trial court determined that "the exposure trigger is appropriate in the context of long tail bodily injury claims," meaning that "[t]he beginning of the triggered policy period is the date on which the claimant was first exposed to benzene" and "[t]he end of the triggered policy period is the date on which the claimant was last exposed to benzene." ¶ 9 In its Order Regarding Allocation, the trial court determined that "pro rata allocation applies to both defense and indemnity payments based on each insurer's 'time on the risk' over the RSC coverage block," rejecting the "all sums" approach and making RSC "responsible for its pro rata share of defense and indemnity costs where there has been settled, insolvent or lost policies, as well as periods where RSC was uninsured, underinsured or self-insured."

10. In its Order on Landmark's Motion for Summary Judgment [Order on Exhaustion], the trial court determined that vertical exhaustion applies to the duty to indemnify under Landmark's umbrella policy but horizontal exhaustion applies to Landmark's duty to defend. ¶ 11 After issuing the summary judgment orders, the case proceeded to a bench trial in June 2018 for determination of the date of exposure for any claimants for whom the exposure date was disputed.

12. After a bench trial, the trial court entered an order of final judgment, determining that the insurers were obligated to defend and indemnify RSC under their policies "subject to their respective policy limits and the following

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rulings of this [c]ourt," including the "Order Regarding Allocation." The court incorporated by reference a Sealed Order for Declaratory Relief entered on 22 February 2019 assigning past defense and indemnity costs to the insurers by applying pro rata allocation. As a result, the insurers were required to reimburse $1.8 million of RSC's past costs.

13. In an unpublished opinion, a unanimous panel of the Court of Appeals affirmed the judgment of the trial court and dismissed in part. Radiator Specialty Co. v. Arrowood Indem. Co., No. COA19-507, 2020 WL 7039144 (N.C. Ct. App. Dec. 1, 2020).

14. First, the Court of Appeals held that the trial court appropriately applied an exposure theory for when coverage was triggered as opposed to an injury-in-fact theory. Radiator Specialty Co., 2020 WL 7039144, at *3. According to the court, it was undisputed that the policies issued by defendants were standard-form policies with materially identical language on the issue of when coverage triggers. These policies provided that the insurer would pay "all sums which the insured shall become legally obligated to pay as damages because of bodily injury . . . caused by an occurrence[.]" The policies generally define "bodily injury" as injury, sickness, or disease sustained by a person, and "occurrence" as an accident including exposure. Id. (alterations in original). The court rejected RSC's argument that this Court's decision in Gaston County Dyeing Machine Co. v. Northfield Insurance Co., 351 N.C. 293 (2000), established that an injury-in-fact trigger applied to all standard-form policies. Radiator Specialty Co., 2020 WL 7039144, at *3. Instead, the court noted that application of an injury-in-fact trigger in Gaston, a case involving property damage caused by a ruptured pressure vessel, "was premised upon the notion that a court could determine that 'an injury-in-fact occurs on a date certain and all subsequent damages flow from the single event.' " Id. (quoting Gaston, 351 N.C. at 304). By contrast, the court took "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." Id. Accordingly, the court concluded that because "[i]njury resulting from benzene or asbestos exposure is neither discrete nor so certain . . . [r]eading the contract language and interpreting it by its terms, it seems clear that a 'bodily injury' is something caused by an 'occurrence,' which can include exposure," and thus that "the trial court did not err in applying an exposure theory of coverage instead of injury-in-fact." Radiator Specialty Co., 2020 WL 7039144, at *4 (citing Imperial Cas. & Indem. Co. v. Radiator Specialty Co., 862 F. Supp. 1437 (E.D.N.C. 1994), aff'd, 67 F.3d 534 (4th Cir. 1995)).

15. Second, the Court of Appeals held that the trial court "erred in applying pro rata allocation of liability instead of an 'all sums' allocation" in its intermediate Order Regarding Allocation but concluded that "this error was rendered moot by the entry of the final judgment." Id. According to the court, [t]he policies, by their language, are clear—any claims covered by a particular policy must be defended and indemnified by the insurer under that policy. By prorating plaintiff's costs and damages based upon "time on the risk," the trial court reallocated those damages, potentially imposing more costs on one party, and removing them from another, who might be differently obligated. We recognize that these policies represent multiple years of coverage, but judicial expediency is no excuse. We hold that it was indeed error to prorate these costs where the contracts explicitly imposed those obligations otherwise. Id. The court concluded, however, that the trial court's error was corrected by the trial court's final judgment which "assigned costs—both in terms of defense and indemnification—to specific parties based upon their contractual obligations." Radiator Specialty Co., 2020 WL 7039144, at *5. In the court's view, by entering a judgment requiring each insurer to "defend and indemnify plaintiff on the . . . claims . . . 'subject to its respective policy limits,' " the trial court "specifie[d] that the allocation is not pro rata, but is instead subject to the contractual limitations established in the policies," which the court interpreted to require all sums

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allocation. Id. Therefore, although the court "recognize[d] the error in the intermediate order," it held that the error "was rendered moot by entry of the final judgment." Id.

16. Third, the Court of Appeals held that the trial court did not err in applying horizontal exhaustion to Landmark's duty to defend. Id. According to the court, Landmark's insurance policy "stated that it had the duty to defend suits when (1) the applicable limits of underlying insurance were used up in the payment of judgments or settlements, or (2) no other valid and collectible insurance was available." Id. Because the policy specifically used the phrase "other insurance," the court agreed with Landmark that "this language suggests that the policy was only triggered when any other policies held by plaintiff were exhausted." Id. Therefore, the court held that "a proper interpretation of the contract reveals that Landmark offered an excess policy, to be available when all other policies were exhausted." Id.

17. Finally, the Court of Appeals dismissed as moot RSC's challenge to the trial court's intermediate order concluding that the defendant-insurers "were not estopped from denying coverage of claims" because the trial court in its final judgment held that the defendant-insurers "owed both a duty to defend and a duty to indemnify" and dismissed one defendant-insurer's challenge to a summary judgment motion addressing cessation of coverage under its own policy. Radiator Specialty Co., 2020 WL 7039144, at *5–6.1

18. On 10 August 2021, this Court allowed RSC's petition for discretionary review, Fireman's Fund's cross-petition for discretionary review, and Landmark and National Union's conditional petition for discretionary review. C. Policies in Dispute

19. National Union issued six annual policies to RSC that were effective from 27 November 1987 through 1 May 1992. Five of the policies provide primary liability coverage, and the sixth policy provides excess coverage over the primary policy in effect from 1 May 1991 through 1 May 1992. The primary policies in effect from 27 November 1987 to 1 May 1990 state the following:

a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" . . . included within the "products-completed operations hazard" to which this insurance applies. No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under SUPPLEMENTARY PAYMENTS. This insurance applies only to bodily injury . . . which occurs during the policy period. The "bodily injury" must be caused by an "occurrence." The "occurrence" must take place in the "coverage territory". We will have the right and duty to

1. After the Court of Appeals issued its decision, RSC moved for rehearing on the determination that the allocation issue had been rendered moot by the trial court's final judgment. The Court of Appeals denied the motion.

20. The primary policies in effect from 1 May 1990 to 1 May 1992 state the following:

a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" . . . to which this insurance applies. We will have the right and duty to defend any "suit" seeking those damages . . . .

* * * No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under SUPPLEMENTARY PAYMENTS.

b. This insurance applies to "bodily injury" . . . only if:

(1) The "bodily injury" is caused by an "occurrence" that takes place in the "coverage territory," and

(2) The "bodily injury" . . . occurs during the policy period.

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The sixth policy provides excess coverage and incorporates and adopts the terms of the primary policy from the period of 1 May 1991 to 1 May 1992. All six policies define "bodily injury" as "bodily injury, sickness, or disease sustained by a person, including death resulting from any of these at any time." The policies define the term "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions."

21. Fireman's Fund issued three excess liability insurance policies to RSC that were effective during three periods of time: from 10 December 1976 to 17 October 1977; from 17 October 1977 to 17 October 1978; and from 1 May 1979 to 1 May 1980. Each excess policy incorporated language from certain underlying policies providing primary liability insurance. Agreement #1: I. COVERAGE — Underwriters hereby agree, subject to the limitations, terms and conditions hereinafter mentioned, to indemnify the Assured for all sums which the Assured shall be obligated to pay by reason of liability: (a) Imposed upon the Assured by law, or (b) assumed under contract or agreement by the Named Assured and/or any officer, director, stockholder, partner or employee of the Named Assured, while acting in his capacity as such, for damages on account of — (i) Personal Injuries (ii) Property Damage . . . . caused by or arising out of each occurrence happening anywhere in the world, ... THIS POLICY IS SUBJECT TO THE FOLLOWING DEFINITIONS: . . . .

2. PERSONAL INJURIES — The term "Personal Injuries" wherever used herein means bodily injury (including death at any time resulting therefrom), . . . sickness, disease, disability, ... 5. OCURRENCE — The term "Occurrence" wherever used herein shall mean an accident or a happening or event or a continuous or repeated exposure to conditions which unexpectedly and unintentionally results in personal injury, [or] property damage . . . during the policy period. All such exposure to substantially the same general conditions existing at or emanating from one premises location shall be deemed one occurrence. Agreement #2: INSURING AGREEMENTS: I. Coverage. To pay on behalf of the insured the ultimate net loss in excess of the applicable underlying (or retained) limit hereinafter stated, which the insured shall become obligated to pay by reason of the liability imposed upon the insured by law or assumed by the insured under contract: (a) PERSONAL INJURY LIABILITY. For damages, including damages for care and loss of services, because of personal injury, including death at any time resulting therefrom, sustained by any person or persons, (b) PROPERTY DAMAGE LIABILITY. For damages because of injury to or destruction of tangible property including consequential loss resulting therefrom[.] . . . caused by an occurrence. . . . . IV. Other Definitions. When used in this policy . . . .(a) "Personal Injury" means (1) bodily injury, sickness, disease, disability . . . . (e) "Occurrence." With respect to Coverage 1(a) and 1(b) occurrence shall mean an accident, including injurious exposure to conditions, which results, during the policy period, in personal injury or property damage neither expected nor intended from the standpoint of the insured. . . . V. Policy Period, Territory. This policy applies only to personal injury, [or] property damage . . . occurrences which happen anywhere during the policy period.

Agreement #3: I. COVERAGE To indemnify the INSURED for ULTIMATE NET LOSS, as defined hereinafter, in excess of RETAINED LIMIT, as herein stated, all sums which the INSURED shall be obligated to pay by reason of liability imposed upon the INSURED by law or liability assumed by the INSURED under contract or agreement for damages and expenses, because of: A. PERSONAL INJURY, as hereinafter defined; B. PROPERTY DAMAGE, as hereinafter defined; . . . . to which this policy applies, caused by an OCCURRENCE, as hereinafter defined, happening anywhere in the world. . . . .

DEFINITIONS . . . .

H. OCCURRENCE: With respect to Coverage 1(A) and 1(B) "OCCURRENCE" shall mean an accident or event including continuous repeated exposure to conditions, which results, during the policy period, in PERSONAL INJURY or

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PROPERTY DAMAGE neither expected nor intended from the standpoint of the INSURED. For the purpose of determining the limit of the Company's liability, all personal injury and property damage arising out of continuous or repeated exposure to substantially the same general conditions shall be considered as arising out of one OCCURRENCE. . . . . I. PERSONAL INJURY: The term PERSONAL INJURY wherever used herein means: (1) bodily injury, sickness, disease, disability or shock, including death at any time resulting therefrom . . . . which occurs during the policy period.

22. Finally, Landmark issued umbrella/excess liability policies to RSC, which were effective from 8 October 2003 to 1 May 2014. Each policy contains the same provisions, including: A. Coverage For "Bodily Injury" Liability The policies afford coverage for "bodily injury" liability: I. INSURING AGREEMENT 1. We will pay on behalf of the insured those sums in excess of the "retained limit" which the insured becomes legally obligated to pay as damages to which this insurance applies because of "bodily injury" . . . . 3. This insurance applies to "bodily injury" [ ] only if: a. The "bodily injury" [ ] is caused by an occurrence; b. The "bodily injury" [ ] occurs during the policy period . . . . II. Standard of Review

23. Summary judgment is reviewed de novo. In re Will of Jones, 362 N.C. 569, 573 (2008). Summary judgment is appropriate where there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. N.C.G.S. § 1A-1, Rule 56(c) (2021); Meadows v. Cigar Supply Co., 91 N.C. App. 404, 406 (1988). Insurance contract interpretation is a question of law. Wachovia Bank & Tr. Co. v. Westchester Fire Ins. Co., 276 N.C. 348, 354 (1970). III. Analysis A. Trigger of Coverage – Exposure vs. Injury-in-Fact

24. The parties dispute at what point each insurer's coverage was triggered. All of the relevant policies provide coverage for "bodily injur[ies]" caused by an "occurrence." The policies tend to define "bodily injury" or "personal injury" as injury, sickness, or disease sustained by a person, and "occurrence" as an accident including exposure. The issue this Court must decide, then, is the point at which the various benzene claimants experienced bodily injury such that RSC's coverage under the policies was activated. Put differently, we must decide which policies apply to which claims by determining the relevant event that activates an insurer's coverage.

25. Landmark and National Union argue that this activating or triggering event is a claimant's actual exposure to benzene. Fireman's Fund and RSC contend that the policies do not provide coverage until there is a cognizable injury. As discussed below, we agree with the trial court and the Court of Appeals that a claimant's period of exposure to benzene is the appropriate reference point in determining which policies provide coverage for a given benzene-related injury. 1. Injury-in-fact Trigger Theory

26. Fireman's Fund's primary argument in support of an injury-in-fact trigger is that the terms of the policies it offered RSC "provide coverage for 'Personal Injuries' . . . which they define as 'bodily injury,' 'sickness' and 'disease,' which results 'during the policy period.' " According to Fireman's Fund, these terms require an injury-in-fact trigger because the policies only "afford[ ] coverage for actual injury which occurs during the policy period." Fireman's Fund claims that the policies it offered RSC cannot be triggered by benzene exposure alone because benzene exposure is not itself an injury-causing occurrence.2

27. Next, Fireman's Fund argues that case law supports an injury-in-fact trigger.

2. Medical and scientific evidence presented at the trial was filed under seal. This opinion therefore discusses sealed information only in general terms.

Fireman's Fund points to this Court's decision in Gaston County Dyeing Machine Co. v. Northfield Insurance Co., which held that coverage for property damage was triggered by an "injury-in-fact." 351 N.C. 293, 302–03 (2000). Gaston concerned the point at which insurance coverage for property damage caused

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by a ruptured pressure vessel was triggered. Id. at 295. We explained that when "the accident that causes an injury-in-fact occurs on a date certain and all subsequent damages flow from the single event, there is but a single occurrence; and only the policies on the risk on the date of the injury-causing event are triggered." Id. at 304.

28. According to Fireman's Fund, the same logic applies here. Fireman's Fund argues that, even though benzene exposure is the cause of the claimants' injuries, it is the actual injury—the resulting cancers or other physical ailments—that allows claimants to "present claims and file suits against [RSC] in the underlying benzene actions . . . Stated differently, the benzene claimants each allege that [RSC] is liable to them for their cancers—not for the exposure itself." Although Fireman's Fund acknowledges that "unlike the property damage in Gaston, the 'bodily injury' here is not a single state confined to a narrow period of time," Fireman's Fund contends that "the key question is the same. Whatever acts prompted the accident in Gaston, it was not until the pressure vessel ruptured that damage occurred. If it hadn't ruptured, there would not have been any property damage." Likewise, with respect to benzene exposure, Fireman's Fund argues that "[w]hatever exposures prompted the various mutations, it was not until a malignancy developed that injury occurred."

29. Fireman's Fund further argues that the injury-in-fact approach is "widely accepted" and recognizes that "multiple policy periods can be triggered in connection with progressive disease claims." In support of this assertion, Fireman's Fund cites numerous cases applying an injury-in-fact trigger of coverage while still allowing for the "application of a multiple trigger[3] in the context of bodily injury coverage for the progressive disease claims at issue." See, e.g., Dow Chem. Co. v. Associated Indem. Corp., 724 F. Supp. 474, as supplemented, 727 F. Supp. 1524 (E.D. Mich. 1989); Am. Home Prods. Corp. v. Lib. Mut. Ins. Co., 565 F. Supp. 1485 (S.D.N.Y. 1983), as modified, 748 F.2d 760 (2d Cir. 1984); Stonewall Ins. Co. v. Asbestos Claims Mgmt. Corp., 73 F.3d 1178 (2d Cir. 1995). Relying on these cases, Fireman's Fund argues that the appropriate question in applying the injury-in-fact framework is "at which points in time are there identifiable or actual 'personal injuries' . . . proven to have occurred to a reasonable degree of medical certainty?" ¶ 30 Finally, Fireman's Fund argues that benzene exposure causes identifiable injuries-in-fact at various points in time from malignancy until diagnosis or death.

3. The multiple trigger approach recognizes that multiple events may trigger an insurer's coverage such that an insurer may be held liable from the date of the injury-causing occurrence until manifestation of the injury. See J.H. France Refractories Co. v. Allstate Ins. Co., 534 Pa. 29 (1993). Courts that have adopted this approach in the asbestos context, for example, have recognized that "exposure to asbestos or silica, progression of the pathology, or manifestation of the disease" may all trigger an insurer's liability if the insurer was on the risk at the time of any one of these relevant events. Id. at 37.

Quoting Wilder v. Amatex Corp., 314 N.C. 550, 560 (1985), Fireman's Fund argues that this Court has already established that "[e]xposure to disease-causing agents is not itself an injury" and that "in the context of disease claims," the point in time when "the immune system fails and disease occurs . . . constitutes the first injury." Though recognizing that benzene is a cancer-causing agent, Fireman's Fund argues that exposure does not necessarily have such consequences, and "[t]hus, to describe a mutation or series of mutations that has not developed into a malignancy as 'bodily injury' is not reasonable." In Fireman's Fund's view, a cognizable injury only arises when a malignancy develops into "an 'evolving cancer,' and actual impairment, injuries, sickness, and disease" result, thereby triggering coverage.

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31. RSC similarly argues that a policy's coverage is triggered if and when a claimant suffers bodily injury, sickness, disease, or death during the policy period. According to RSC, both the trial court and the Court of Appeals "erred in holding that coverage is triggered only if a claimant experienced exposure to benzene during the policy period." Rather, RSC argues that both Gaston and the plain language of the policies at issue compel application of the injury-in-fact approach. However, RSC contends that "there is a factual dispute among the parties about how an injury-in-fact trigger applies to the facts of this case." Specifically, because an injury-in-fact trigger has not yet been applied in this litigation, RSC urges that this Court should not be the first to determine "during which policy periods . . . each benzene claimant's alleged injuries in fact occur[ed]." RSC contends that there is "[c]onflicting medical expert testimony" creating factual and evidentiary disputes that the trial court did not resolve, and which this Court cannot resolve. Accordingly, RSC asks this Court to remand the case to the trial court to allow it "to apply an injury-in-fact trigger of coverage in the first instance."

2. The Exposure Trigger

32. By contrast, Landmark and National Union ask this Court to hold that the policies providing coverage for benzene exposure were triggered during the exposure period. As National Union puts it, the lower courts "correctly held that coverage is triggered under those policies in effect during a given claimant's exposure to Benzene." This means that "coverage is triggered if, and only if, the underlying claimant was exposed to benzene during that policy's effective dates because a claimant only experiences 'bodily injury' during exposure to benzene." Landmark and National Union agree that both North Carolina law and medical evidence require this conclusion.

33. Central to their position is the argument that "a claimant only experiences 'bodily injury' during exposure to benzene." According to National Union, Fireman's Fund's argument "requiring malignancy and/or diagnosable illness" as opposed to DNA damage "functionally reads the term 'bodily injury' out of the definition of 'bodily injury' by equating it with 'sickness' or 'disease.' " In addition to medical evidence presented at trial, both Landmark and National Union rely on the United States District Court for the Eastern District of North Carolina's decision in Imperial Cas. & Indem. Co. v. Radiator Specialty Co., 862 F. Supp. 1437 (E.D.N.C. 1994), in support of their position.

34. In that case, the court expressly rejected the manifestation trigger theory for progressive bodily injury and applied the exposure trigger theory based on the "view that exposure to the dangerous substance at issue during the policy period caused immediate, albeit undetectable, physical harm which ultimately led to disease or physical impairment after the expiration of the policy period."4 Id. at 1442. (quoting Cont'l Ins. Cos. v. Ne. Pharm. & Chem. Co., 811 F.2d 1180, 1190 (8th Cir. 1987)). Both National Union and Landmark argue that this holding is consistent with evidence that the actual bodily injuries caused by benzene exposure happen in the days following exposure, whereas the consequences of the injury may take much longer to become detectable.

35. Despite its relevance, Fireman's Fund contends that Gaston's adoption of an injury-in-fact trigger renders Imperial Casualty irrelevant because, although the federal court in that case predicted that this Court would adopt an exposure theory,

4. Citing Imperial Casualty, National Union points out that "the majority of federal cases on this issue [progressive diseases] have found coverage by adopting the 'exposure' or the 'continuous exposure,' theory of when injury occurs." 862 F. Supp. at 1442 (citing Cont'l Ins. Companies v. Ne. Pharm. And Chem. Co., 811 F.2d 1180, 1190 (8th Cir. 1987).

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This court opted for the injury-in-fact approach in Gaston. Landmark and National Union reject this assertion. For example, National Union responds that Gaston "differs from [Imperial Casualty and] this case because it assessed trigger of coverage for property damage occurring on a date certain, not claims for bodily injury caused by long-term benzene exposure." According to National Union, Gaston actually confirms that courts must "look[ ] to the evidence to determine when the damage took place and not when the consequences of the damage became evident." Likewise, Landmark takes the position that Gaston did not adopt an injury-in-fact trigger in the bodily-injury context, noting that Gaston considered property damage occurring on a date certain, rather than progressive bodily injury resulting from exposure to a harmful substance.

36. Finally, National Union argues that this Court should not adopt Fireman's Fund's "continuous trigger" theory that would allow coverage from "all policies in effect from the time a claimant is exposed to benzene until diagnosis or death." Though National Union acknowledges that other courts have applied a continuous trigger theory in the context of asbestos claims, National Union argues that "benzene is different than asbestos" because "[u]nlike benzene, asbestos stays in the body permanently and may continue to cause new injuries after exposure." By contrast, benzene "causes injury only during the time periods in which a claimant is exposed to it and then is flushed from the body within hours or days." National Union notes that other jurisdictions have rejected the continuous trigger theory in cases involving exposure to "substances that cease causing injury once exposure stops" and cause illnesses that do not manifest until years later. See, e.g., In re Silicone Implant Ins. Coverage Litig., 667 N.W.2d 405 (Minn. 2003); Hancock Lab'ys, Inc. v. Admiral Ins. Co., 777 F.2d 520 (9th Cir. 1985).

3. Analysis

37. The unambiguous language of each of the relevant policies requires the insurers to indemnify RSC for claims raised by claimants who suffered some form of personal or bodily injury caused by an occurrence and specifies that either the occurrence or the resulting injury must take place during the effective period of the insurer's policy. But, as Landmark and National Union argue, the policies do not define personal or bodily injury to require some diagnosable sickness or disease for coverage to be triggered. For example, the term "personal injury" as used in Fireman's Fund's policies includes a "bodily injury," such as that caused by "exposure."

38. As Landmark and National Union argue, benzene causes bodily injury upon exposure. Fireman's Fund's and RSC's attempt to redefine "injury-in-fact" as death, disease, or some other physical manifestation of the harm confuses the injury with its consequences. Assuming there is no intervening cause, cancer is a manifestation of the injury that occurs upon benzene exposure that creates a compensable claim. It is not the injury itself. Even though we hold that exposure to benzene is synonymous with the coverage-triggering injury, that injury is only compensable if it results in damages. In other words, if a person is exposed to benzene but suffers no consequences as a result, the individual has sustained no compensable harm.

39. We are persuaded by the reasoning of Imperial Casualty. Quoting the Sixth Circuit's decision in a similar asbestos exposure case, the United States District Court for the Eastern District of North Carolina noted that "[c]umulative disease cases are different from the ordinary accident or disease situation" in part because, if the injury-in-fact theory were adopted, "the manufacturer's coverage becomes illusory since the manufacturer will likely be unable to secure any insurance coverage in later years when the disease manifests itself." Imperial Casualty, 862 F. Supp. at 1443 (quoting Ins. Co. of North Am. v. Forty-Eight Insulations, 633 F.2d 1212, 1219 (6th Cir. 1980)). This makes good sense: If coverage is triggered only upon disease manifestation, then a company that

obtained coverage during a period that it manufactured products with benzene could not invoke its coverage if the individuals who were exposed to benzene during the coverage period did not develop a disease or die until after the policy expired. That would make the availability of coverage to RSC predicated on its maintenance of coverage in perpetuity, even if RSC had stopped manufacturing benzene-containing products.

40. Gaston does not overrule or otherwise displace Imperial Casualty. In Gaston, this Court was selecting between "an 'injury-in-fact' or a 'date-of-discovery' trigger of coverage . . . where the date of property damage [was] known and undisputed." Gaston, 351 N.C. at 299. The Court of Appeals is correct that, in dealing with coverage for property damage, Gaston involved distinct factual circumstances. But at their core, the factual distinctions between this case and Gaston relate to how to properly define the injury, which in turn controls when coverage is triggered under the relevant policies.

41. Gaston explicitly rejected the notion that coverage-triggering damage "occurs 'for insurance purposes' at the time of manifestation or on the date of discovery." Id. at 303 (overruling W. Am. Ins. Co. v. Tufco Flooring E., 104 N.C. App. 312 (1991)). Instead, "the accident that causes an injury-in-fact occurs on a date certain and all subsequent damages flow from the single event, there is but a single occurrence; and only policies on the risk on the date of the injury-causing event are triggered." Id. at 304. Nothing in Gaston suggests either that exposure to a substance causing alterations to a person's DNA is not an "injury-in-fact" or that an insurer offering coverage when a claimant is exposed to benzene is not liable for all the damages arising from that injury.

42. Finally, Fireman's Fund argues that, if we apply the exposure theory to this case, we "should also hold that . . . policies in place throughout the development of a claimant's malignancy and the 'evolving cancer,' and the resulting bodily injury, sickness, and disease should be triggered too." According to Fireman's Fund, "it would be anomalous to hold that coverage is triggered by exposure alone, when the claimant is healthy, but that there is no coverage triggered during the times when a claimant" is ill. This application of a continuous trigger would be at odds with our holding that, in benzene cases, the injury that triggers coverage occurs at the time of exposure.

43. Consistent with other courts that have decided the issue, National Union and Landmark have established that an injury occurs at the time of benzene exposure. To apply a continuous trigger approach in this context would be to adopt Fireman's Fund's and RSC's mischaracterization of the relevant injury: In order for the policies to provide coverage, we would be required to label the injury's consequences (e.g., cancer) as the bodily injury itself. Thus, under these circumstances, a continuous trigger is necessarily inconsistent with an exposure trigger.5 B. Allocation

44. Next, the parties ask this Court to determine how to properly allocate RSC's benzene liabilities among the providers. As discussed, while some injuries occur at a definite time and place, other injuries, such as those resulting from benzene exposure, are not so definite and could have resulted from any one exposure over a period of

5. Whether the multiple-trigger theory should apply in a given case requires a fact-intensive analysis regarding the nature of the injury in question. In the context of benzene exposure where DNA mutations occur upon exposure, benzene is expelled from the body within a matter of days, and the injury ceases shortly after exposure ceases, the cancer that may later result is not itself a new injury that would trigger additional policies. But where the injury-inducing condition persists over time, such as in the context of asbestos exposure or environmental contamination, or later results in new, distinct injuries, the multiple-trigger theory may be appropriate.

In these circumstances, the injury may implicate numerous insurance policies provided by different insurers over the course of the period during which the damage could have occurred. In such cases, it is necessary to determine how to apportion costs arising during the various policy years to the appropriate insurers.

45. The period during which a particular policy's coverage is triggered is referred to as "time on the risk." Under a pro rata, or time-on-the-risk, allocation approach, "each triggered policy bears a share of the total damages proportionate to the number of years it was on the risk, relative to the total number of years of triggered coverage." Thomas M. Jones & Jon D. Hurwitz, An Introduction to Insurance Allocation Issues in Multiple-Trigger Cases, 10 Vill. Envtl. L.J. 25, 42 (1999). As Fireman's Fund explains, "costs are allocated among the policies according to their respective time on the risk." By contrast, all sums, or joint and several, liability "allows recovery in full under any triggered policy of the policyholders' choosing and leaves the selected insurer to pursue cross-claims against other carriers whose policies were also available." Id. at

37. This means that "any policy on the risk for any portion of the period in which the insured sustained property damage or bodily injury is jointly and severally obligated to respond in full, up to its policy limits, for the loss." Id. at 37– 38.

46. All three insurers argue that pro rata allocation is appropriate based on the terms of their policies, whereas RSC advocates for adopting an all-sums approach.

The trial court applied the pro rata method, but the Court of Appeals held that all sums allocation was warranted. 1. Mootness ¶ 47 Although the Court of Appeals held that the trial court erroneously applied pro rata allocation in its intermediate order, it further held that this error was rendered moot because the trial court entered a final judgment "specif[ing] that the allocation is not pro rata, but is instead subject to the contractual limitations established in the policies," which the Court of Appeals interpreted to require all sums allocation. Radiator Specialty Co., 2020 WL 7039144, at *5.

48. RSC contends that the Court of Appeals reached the correct ultimate substantive conclusion—that the standard-form policy language compels an all sums rather than pro rata allocation of costs—but "muddled its correct legal ruling by mistakenly failing to apply it to the trial court's Final Judgment."

49. RSC argues that the trial court's final judgment incorporated the intermediate Order Regarding Allocation, which interpreted the disputed policy language to compel pro rata allocation. When the trial court's final judgment ordered the insurers to defend and indemnify RSC "subject to their respective policy limits," it meant "subject to their respective policy limits" as interpreted by the trial court (e.g., subject to their respective policy limits under a pro rata allocation method). RSC asks this Court to correct the Court of Appeals' error and ensure that it is paid in accordance with the all sums allocation method the Court of Appeals held to be required by the insurance policies.

50. The insurers do not appear to contest RSC's assertion that the Court of Appeals erred in holding that the trial court's final judgment order rendered its intermediate order moot. Instead, they ask that "[i]f this Court reverses the Court of Appeals' mootness determination, it should also reverse the Court of Appeals' unsupported endorsement of all-sums allocation because all-sums allocation is incompatible with the terms of the National Union policies, inequitable, and bad public policy."

51. Though RSC is correct that the Court of Appeals misconstrued the trial court's final judgment as calling for all sums allocation, our resolution of the substantive question—that pro rata allocation is appropriate—overrules the Court of Appeals' suggestion to the contrary. For the sake of clarity, the trial

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court's final judgment should be read to require costs to be assigned pro rata. 2. Pro Rata versus All Sums Allocation a. The insurers' pro rata allocation position.

52. The insurers' central argument is that the express language of the contracts contemplates pro rata rather than all sums allocation. For example, as National Union explains, its policies with RSC contain one of two substantively identical insuring provisions stating, in effect, that National Union "will pay those sums that [RSC] becomes legally obligated to pay as damages because of 'bodily injury' . . . . This insurance applies only to bodily injury . . . which occurs during the policy period." According to National Union, this "express and plain language require[s] pro-rata allocation, and the Court of Appeals erred in stating otherwise." National Union argues that all sums allocation is only appropriate when an insurance policy specifically contemplates pay.

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