

Maryland's Top Court Adopts Majority Pro Rata Allocation Rule in "Long Tail" Case

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On April 3, 2020, the Maryland Court of Appeals, in a closely-watched case, unanimously rejected the application of an "all sums" allocation and held that damages for continuous bodily injury must be allocated pro rata, by time-on-the-risk, across all insured and insurable periods that are "triggered" by a claimant's injuries. See *Rossello v. Zurich American Insurance Company*, No. 24, Sept. Term, 2019 (Md. Apr. 3, 2020). In doing so, the state's highest court sided with the majority of jurisdictions addressing the issue, which have adopted pro rata allocation in the "long tail" context.

At issue in *Rossello* was the extent of a liability insurer's responsibility for a substantial asbestos personal injury judgment against its insured, a defunct mechanical contractor (Lloyd E. Mitchell, Inc.), under several consecutive primary and umbrella/excess policies. Arguing that the policies' "all sums" language supported joint-and-several allocation, the claimant contended that the entire judgment could be collected under a single CGL policy. The trial court disagreed and found, based on pro rata allocation principles adopted by an intermediate Maryland appeals court in *Mayor & City Council of Baltimore v. Utica Mutual Insurance Company*, 802 A.2d 1070 (Md. Ct. Spec. App. 2002), *app. dismissed*, 821 A.2d 369 (Md. 2003) (asbestos-related property damage case) and other authority, that the damages should be allocated on a pro rata, time-on-the-risk basis across all "triggered" insured and insurable periods (here, 1974 to 1985).

The Court of Appeals affirmed. It began by addressing "trigger of coverage" principles for continuous bodily injury claims under CGL policies. The court concluded that "Maryland's appellate courts have . . . made clear that in extended exposure cases, 'continuous or progressive damage will constitute an 'occurrence' within the policy period that the asbestos remains [present].'" In other words, the *Rossello* court explained, "a policy period is triggered when actual injury occurs and progressive injury can therefore trigger multiple policy periods." Thus, according to the Court of Appeals, in cases like this, "exposure or injury stretching over many years often implicates multiple insurance policies or periods of no insurance and therefore implicates a continuous or injury-in-fact trigger."

The Court of Appeals then tackled the principal issue in the case: allocation. *Rossello* presented Maryland's highest court with its first opportunity to review the allocation holding in *Utica Mutual* from 2002, which had been applied multiple times by federal courts as "settled law" in Maryland and by the state's intermediate appeals court as recently as this January.

As described by the Court of Appeals, *Utica Mutual* recognized the "poor fit between the joint and several approach and long-term injuries under the language of the CGL." The court explained that pro rata allocation is "unmistakably consistent with the language of standard CGL policies," and "[c]onsistent with the policy language limiting coverage to that which occurs 'during the policy period,' the timing of the injury dictates both the manner in which the policies are triggered and the portion of damages for which each policy is responsible."

The court in *Rossello* also emphasized that the pro rata approach serves important public policy objectives; as adopted by the majority of states, it is "easy to administer, efficient, and . . . consistent with the reasonable expectations of the contracting parties." Quoting *Boston Gas Company v. Century Indemnity Company*, 910 N.E.2d 290 (Mass. 2009), the court said that, in sum, "pro rata allocation produces a more equitable result than joint and several allocation, which 'creates a false equivalence between an insured who has purchased insurance coverage continuously for many years and an insured who has purchased only one year of insurance coverage.'"

The Court of Appeals therefore adopted the reasoning of *Utica Mutual*, and thus, the pro rata approach to allocation for bodily injury under the CGL policies, holding:

(1) the obligation to indemnify [the insured] under the circumstances of this case, which involves continuing asbestos bodily harm, is to be prorated based on [the insurer's] time on the risk; (2) "the 'joint and several' or 'all sums' allocation method is incompatible with the injury-in-fact/continuing trigger that is applicable to the case at bar"; and (3) "***an insured who elects not to carry liability insurance for a period of time. . . will be liable for the prorated share that corresponds to periods of self-insurance or no coverage. . . unless a gap in coverage is due to the insured's inability to obtain insurance.***" (emphasis added)

In this case, the parties agreed that CGL asbestos coverage was not commercially available to the insured after 1985. However, according to the opinion, a fact question remained as to the reasonable commercial availability of CGL or excess coverage between 1977 (when the insured "unilaterally decided to terminate its coverage") and 1985. The court explained that, although allocation is inappropriate where coverage was not available, the insured's "decision not to purchase coverage does not render coverage unavailable for purposes of the pro rata calculation." Because the insured failed to meet its burden to show that coverage was unavailable between 1977 and 1985, those years were properly included in the pro rata allocation of damages.

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