

Wiley Rein Helps Secure Broad Fourth Circuit Court of Appeals Affirmation of *Pro Rata* Allocation

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The United States Court of Appeals for the Fourth Circuit issued an opinion forcefully adopting a *pro rata* time on the risk allocation method, holding that an insurer could be held liable only for periods of risk that it had contracted to cover, even if its policyholder was jointly and severally liable for harm sustained over a longer period. *Pennsylvania National Mutual Casualty Insurance Co. v. Roberts, et al.*, Nos. 10-1987, 10-1988, 2012 WL 336150 (4th Cir. Feb. 3, 2012).

Applying Maryland law, the Fourth Circuit stated that coverage was limited to bodily injury "occur[ing] during the policy period" and that to hold the insurer liable for any other period would "upend insurance underwriting." The decision also addresses the implications of the allocation determination for insurance underwriting. Wiley Rein LLP, led by Laura A. Foggan, chair of the firm's Insurance Appellate Group, represented the Complex Insurance Claims Litigation Association (CICLA) as an *amicus curiae* in this appeal.

The underlying claim sought damages due to lead poisoning from the policyholder, a realty company, that had managed the claimant's home from her birth in January 1991 until November 1993, when the company sold the property, alleging the policyholder's negligence caused her to suffer lead poisoning. The claimant had been diagnosed with the condition in September 1992, the plaintiff alleged, and continued to exhibit an elevated blood lead level until August 1995. The policyholder tendered the claim to its insurer, which had issued liability insurance policies covering the period from January 1992 to January 1994. The insurer agreed to defend the realty company subject to a reservation of its rights. The case proceeded to

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trial and yielded an \$850,000 judgment against the defendants, for which the policyholder and the property's subsequent purchaser were jointly and severally liable. The insurer filed a declaratory judgment action, seeking a determination that it should be liable only for a 22-month portion of the period of the underlying plaintiff's exposure to the risk of lead poisoning: from January 1992, when its first insurance policy period started, to November 1993, when the policyholder sold the property. The underlying plaintiff countered that the insurer should be liable for the entire judgment "in light of 'the joint and several liability of [its] insured.'"

The Fourth Circuit agreed with Penn National that the judgment should be allocated on a *pro rata* basis, and it rejected joint and several liability to the insurer as inconsistent with the contract, Maryland law, and fundamental insurance principles. Because the insurance policies covered only harm "occur[ing] during the policy period," the insurer was not liable for harm sustained outside that period. The court held that, in contrast to the policyholder's joint and several liability, the question of an insurer's liability "can be answered only by reference to the insurance contract."

In addition, adopting arguments advanced in the *amicus* brief Wiley Rein LLP filed on behalf of CICLA, the Fourth Circuit recognized that holding the insurer liable for the entire judgment "would upend insurance underwriting." "[The underlying plaintiff's] approach would impose the same amount of liability on an insurance company whether it provided coverage for one month or for 10 years." The court explained that, not only would such an approach yield higher costs and accompanying higher policyholder premiums, it also would "disincentive" tortfeasors from obtaining comprehensive insurance coverage. It recognized that "the pro rata approach not only allocates liability across multiple insurers of a single tortfeasor, but also 'accommodates the need to hold liable those businesses that chose not to purchase insurance or coverage' by allocating liability to them for periods which they were uninsured."