ACCEC
American College of Coverage and Extracontractual Counsel

Allocating the Defense:
Two Perspectives on *Arceneaux* and Beyond

American College of Coverage and Extracontractual Counsel
5th Annual Meeting

Chicago, IL
May 11-12, 2017

Laura A. Foggan
Crowell & Moring LLP

Jay Russell Sever
Phelps Dunbar LLP

Martin C. Pentz
Foley Hoag LLP

This paper is a joint project undertaken by counsel for both insurers and policyholders to provide analysis of the recent *Arceneaux* decision by the Louisiana Supreme Court, which addressed the question of whether defense obligations in long-tail exposure cases may be allocated among insurers – and the insured.

Section I is a summary of the recent *Arceneaux* decision. Section II(A) is an analysis of the case from the perspective of counsel for the insurer, and represents the views of panelists Jay Sever and Laura Foggan. Section II(B) is an analysis from the perspective of counsel for policyholders, and represents the views of panelist Martin Pentz. (Of course, the views expressed do not necessarily reflect those of the panelists' firms or any of their clients!)

I. The *Arceneaux* Decision

In 2016, in *Arceneaux v. Amstar Corp.*,[1] the Supreme Court of Louisiana became the latest court to address the issue of whether and how the cost of defense ought to be allocated among multiple insurers in long-tail exposure claim scenarios covered by commercial general liability ("CGL") insurance. *Arceneaux* arose out of an underlying action in which the insured, American Sugar Refining, Inc. ("American Sugar"), was sued by approximately 100 former employees. The former employees alleged that they were exposed to loud noise while working for American Sugar and suffered resulting hearing loss.[2] The exposures allegedly occurred during various years from 1941 until 2006.[3] The insurer, Continental Casualty Company ("Continental") had insured American Sugar from 1963 to 1978, although bodily injury to employees was excluded for most of this period, excepting only some 26 months during the period 1975 to 1978.[4] Continental thus was on the relevant risk for about 26 months out of more than 60 years of exposure, and American Sugar evidently had no coverage for a substantial portion of the remaining time.[5]

The Continental policy employed widely-used wording for the pertinent definitions. "Bodily injury" was defined as "bodily injury, sickness or disease sustained by any person which occurs during the policy period, including death at any time resulting therefrom."[6] "Occurrence" was defined as "an accident, including continuous or repeated exposure to conditions, which

---

[1] *Arceneaux v. Amstar Corp.*, 200 So. 3d 277 (La. 2016).

[2] *Id.* at 279-80.

[3] *Id.* at 280.

[4] *Id.*

[5] *See id.*

[6] *Id.*

results in bodily injury or property damage neither expected nor intended from the standpoint of the insured."[7]

In 2007, American Sugar brought a third-party demand against Continental alleging breach of the duty to defend the underlying action.[8] American Sugar sought full coverage of its past defense costs and asked Continental to provide a complete defense going forward. Continental agreed to pay only 25% of the defense (subject to a full reservation of rights) on a theory that responsibility for defense costs should be prorated across the full period of exposure.[9] The trial and intermediate appellate courts both rejected Continental's position, and ruled instead that American Sugar was entitled to a complete defense from Continental (at least prospectively) without proration of defense costs.[10] Continental sought further review of this question by the Supreme Court of Louisiana, which was granted.[11]

In an opinion reversing the trial court's order, the Supreme Court of Louisiana noted that "there appears to be no Louisiana precedent on the precise issue the court is presented with in this case, which is 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."[12] It considered, therefore, "two general approaches" that have emerged nationwide: "the pro rata allocation method and the joint and several allocation method."[13] For analysis favoring joint and several allocation, the Court looked to the seminal *Keene Corp. v. Insurance Co. of North America* decision from the U.S. Court of Appeals for the District of Columbia.[14] For analysis favoring pro rata allocation, it looked primarily to the equally seminal *Insurance Co. of North America v. Forty-Eight Insulations, Inc.* decision from the U.S. Court of Appeals for the Sixth Circuit.[15]

Ultimately, the Court adopted the pro rata allocation method.[16] Among other reasons, it observed that the policy language limited coverage to bodily injury occurring during the policy

---

[7] *Id.*

[8] *Id.*

[9] *Id.* at 280-81.

[10] *Id.* at 281.

[11] *Id.*

[12] *Id.* at 282.

[13] *Id.* at 282-83.

[14] *Id.* at 283 (citing *Keene Corp. v. Ins. Co. of N. Am.*, 667 F.2d 1034 (D.C. Cir. 1981)).

[15] *Id.* at 285 (citing *Ins. Co. of N. Am. v. Forty-Eight Insulations, Inc.*, 633 F.2d 1212 (6th Cir. 1980), *clarified on reh'g*, 657 F.2d 814 (6th Cir. 1981), *cert denied*, 454 U.S. 1109, 102 S. Ct. 686, 70 L. Ed. 2d 650 (1981)).

[16] *Id.* at 286.

period, that Louisiana tort law does not include the concept of joint and several liability, and that adopting joint and several liability for defense costs could inappropriately reduce incentives for policyholders to maintain continuous coverage.[17] Accordingly, the Court held that Continental would only be liable for its pro rata share of American Sugar's defense, based strictly on Continental's time on the risk, which Continental asserted to be about 3.3% and 3.7% in the two cases addressed by the appeal.[18] Two Justices filed concurring opinions expressing somewhat different rationales for reaching the same result.[19]

II. Significance of *Arceneaux*

A. Insurer Perspective[20]

1. Why Courts Increasingly Favor Pro Rata Allocation for Defense

The Louisiana Supreme Court is part of a trend by courts across the country toward a more equitable system of allocating defense costs in long latency injury claims. Within the last few decades a growing number of courts in other jurisdictions have adopted the pro rata allocation approach, which limits any one insurer's responsibility for defense and indemnity costs based on the proportionate responsibility of the insured or other insurers.[21]

Courts use various formulas to apply pro rata allocation. Some courts take into account policy limits, as well as time on the risk.[22] Other courts multiply the policy limits and the years of coverage.[23] Still other courts simply look to the amount of time an insurer is on the risk.[24] In applying such a formula, courts typically will look to all years that may be triggered for the

---

[17] *Id.* at 286-88.

[18] *Id.* at 289.

[19] *Id.* at 289-91 (Knoll, J., concurring in the result, and Crichton, J., separately concurring).

[20] This section is authored by Jay Sever and Alexis Joachim of Phelps Dunbar LLP.

[21] *See*, *Towns v. Northern Sec. Ins. Co.,* 184 Vt. 322 (2008); *EnergyNorth Natural Gas, Inc. v. Certain Underwriters at Lloyd's,* 156 N.H. 333 (2007); *Sec. Ins. Co. of Hartford v. Lumbermens Mut. Cas. Co.,* 264 Conn. 688 (2003); *Sharon Steel Corp. v. Aetna Cas. and Sur. Co.,* 931 P.2d 127 (Utah 1997); *Owens-Illinois Inc. v. United Ins. Co.,* 138 N.J. 437 (1994); *Ins. Co. North America v. Forty-Eight Insulations, Inc.,* 633 F.2d 1212 (6th Cir. 1980); *Certain Underwriters at Lloyds, London v. Arch Specialty Ins. Co.,* 246 Cal.App.4th 418 (3rd Dist. 2016); *Radiator Specialty Co. v. Fireman's Fund Ins. Co.,* No. 13 CVS 2271 (N.C. Super. Ct. Jan. 28, 2016). *See also, Boston Gas Co. v. Century Indemnity Co.,* 454 Mass. 337 (2009) (holding that indemnity should be determined based on a pro rata allocation, but left open the question of defense costs).

[22] *See, Owens-Illinois,* 138 N.J. at 479.

[23] *Sharon Steel Corp.,* 931 P.2d 127.

[24] *Arceneaux v. Amstar Corp.,* 200 So.3d, 277, 289.

claim, regardless of whether the insured is self-insured or uninsured and regardless of whether policies are lost/destroyed or whether coverage is denied for a particular year.[25]

In reaching the conclusion that pro rata is more appropriate than the joint and several allocation method for defense, these courts tend to focus on the following factors: (1) policy language/contract interpretation; (2) reasonable expectations; (3) equity/public policy; and (4) judicial economy. Each factor is discussed more fully below:

a. Policy Language

Pro rata courts start with language of the policy itself, applying basic contract interpretation rules. An insurance policy is a contract that must be analyzed using the general rules of contract interpretation and it is the "responsibility of the judiciary to determine the common intent of the parties."[26]

Generally, pursuant to the terms of an insurance policy, an insurer is obligated to defend an insured for suits seeking damages for "bodily injury" or "property damage," but only if such "bodily injury" or "property damage" "occurs during the policy period." Other versions provide that an insurer has "the right and duty to defend any suit against the insured seeking damages on account of … 'bodily injury.'" "Bodily injury" is defined as "bodily injury, sickness or disease sustained by any person which occurs *during the policy period,* including death at any time resulting therefrom." (emphasis added).

The *Arceneaux* court recognized that the policy language itself limited "coverage for bodily injury to that which occurs during the policy period."[27] In fact, Justice Knoll's concurring opinion focused solely on this approach.[28] According to Justice Knoll, the case is a simple contract dispute and based on the language of the policy, the bodily injury must occur during the policy period for coverage to be triggered.[29]

Moreover, the courts have discounted the "all sums which the insured shall become legally obligated to pay as damages" language — *i.e.,* the language courts cite to support application of the joint and several allocation method. This language, according to the courts, does not bear the interpretation that the insurer should be liable for injuries that do not occur

---

[25] *See, Forty-Eight Insulations,* 633 F.2d at 1215 n. 4 (treating an insured which has lost or otherwise destroyed policies as self-insured); *Sec. Ins. Co. of Hartford,* 264 Conn. at 720 (finding that for purposes of allocating costs to the insured periods during which it was uninsured or lost or destroyed policies will be considered).

[26] *Arceneaux,* 200 So.3d at 286.

[27] *Arceneaux,* 200 So.3d at 286.

[28] *Arceneaux,* 200 So.3d at 290.

[29] *Id.*

during the policy period and, consequently, that the insurer should be liable for all defense costs relating to such injuries.[30]

b. Reasonable Expectations

Next, based on the policy language analysis above, the courts explain that "neither the insurers nor the insured could reasonably have expected that the insurers would be liable for losses occurring in periods outside of their respective policy coverage periods."[31] More specifically, "[n]o reasonable policyholder could have expected that a single one-year policy would cover all losses caused by toxic industrial wastes released into the environment over the course of several decades."[32] According to *Boston Gas*, "[a]ny reasonable insured purchasing a series of occurrence-based policies would have understood that each policy covered it only for property damage occurring during the policy year."[33] Further, as explained in *Arceneaux*, although the duty to defend is broader than the duty to indemnify, "neither obligation is broader than the policy's coverage period in the context of long latency disease cases that trigger occurrence-based policies."[34]

c. Equity and Public Policy

Courts have increasingly recognized that a significant public policy benefit exists in requiring the policyholder to bear the risk of uninsured years, as a pro rata allocation system produces a more equitable result than joint and several allocation.[35] In *Arceneaux*, the court explained that a pro rata allocation is "reasonable" because the joint and several scheme "would treat an insured who had uninterrupted policies for twenty years the same as an insured who had a triggered policy for one year."[36] To hold otherwise, would entitle an insured to receive coverage for a period in which it did not pay a premium.[37]

The court in *Owens-Illinois, Inc.* explained:

> The theory of insurance is that of transferring risks. Insurance companies accept risks from manufacturers and either retain the risks or spread the risks through reinsurance.... Because insurance companies can spread costs throughout an industry and thus achieve cost efficiency, the law should, at a minimum, not

---

30 *Sec. Ins. Co. of Hartford,* 264 Conn. at 710.

31 *Id*.

32 *Boston Gas Co.,* 454 Mass. at 363.

33 *Id*.

34 *Arceneaux,* 200 So.3d at 286.

35 *Boston Gas Co.,* 454 Mass. at 365 and *Arceneaux,* 200 So.3d at 287.

36 *Arceneaux,* 200 So.3d at 287.

37 *Id*.

provide disincentives to parties to acquire insurance when available to cover their risks. Spreading the risk is conceptually more efficient. (Citation omitted.)[38]

The joint and several liability approach provides a disincentive to insureds to obtain uninterrupted insurance coverage and would result in a windfall to those companies that had broken chains of insurance.[39] Moreover, the joint and several method "'creates a false equivalence between an insured who has purchased insurance coverage continually for many years and an insured who has purchased only one year of insurance coverage.' … This false equivalence would tend to 'reduce the incentive of ... property owners to insure against future risks.'"[40]

d. Judicial Efficiency

The *Boston Gas* court also focused on the aspect of judicial efficiency.[41] The joint and several allocation approach, according to the court, is inefficient in that it does not ultimately resolve the allocation issue.[42] Instead, the issue is postponed and divided into two parts — the policyholder first chooses the triggered insurer to pursue and second, the triggered insurer then sues other insurers for contribution.[43] As a result, the joint and several approach increases litigation costs, which are then passed on to policyholders via higher premiums, whereas the pro rata approach resolves all coverage and allocation issues in a single proceeding.[44]

2. The Pro Rata Allocation Method Supports Reimbursement of Defense Costs

Based on the pro rata allocation method, an insurer that is providing a complete defense to an insured is entitled to reimbursement of defense costs for uncovered claims, including those claims that are not triggered for that policy period or those claims that otherwise are not covered

---

38 *Owens-Illinois, Inc.*, 650 A.2d at 992.

39 *Id*.

40 *Boston Gas Co.*, 454 Mass. at 365-66.

41 *Boston Gas Co.*, 454 Mass. at 364-65 *citing to EnergyNorth Natural Gas, Inc.*, 156 N.H. at 345.

42 *Boston Gas Co.*, 454 Mass. at 364-65.

43 *Boston Gas Co.*, 454 Mass. at 365.

44 *Id*.

under the terms and conditions of a policy.[45] Still other courts have held that an insurer has a right to reimbursement of defense costs when no ultimate duty to defend exists.[46]

In support of reimbursement, courts similarly look to the policy language, as well as equity and public policy. As explained by the Connecticut Supreme Court:

> A cause of action for reimbursement is cognizable to the extent required to ensure that the insured not reap a benefit for which it has not paid and thus be unjustly enriched. Where the insurer defends the insured against an action that includes claims not even potentially covered by the insurance policy, a court will order reimbursement for the cost of defending the uncovered claims in order to prevent the insured from receiving a windfall. Consistent with the pro rata method of allocation, we have concluded that time on the risk is a reasonable means of prorating defense costs for periods of self-insurance. Those costs allocable to periods of self-insurance are not even potentially covered by the insurer's policies. The insured has not paid premiums to the insurer for the cost of defending periods of self-insurance, and the insurer has not bargained to bear these costs. Thus, the insured would be unjustly enriched were we to conclude that there is no claim for reimbursement for the cost expended by the insurers in defending periods of self-insurance. Accordingly, we conclude that, where the pro rata method of apportionment applies, there is a cause of action for reimbursement by an insurer against its insured.[47]

3. The Pro Rata Allocation of Defense Costs and its Application to Other Case Types

Pro rata allocation of defense costs should not be limited to long-tail environmental cases, as the logic underlying it should be extended to apply to any claim involving multiple years of coverage, multiple policies, or gaps in coverage. Examples of such case types include construction defect claims, products liability claims, the non-environmental aspect of oil and gas claims, and continuous bodily injury claims (sexual molestation or abuse). The essential issues in these cases mimic those of long-tail environmental claims in that multiple policies are triggered for damages that occur over a span of several years. The same four factors (discussed above) supporting pro rata allocation can be applied just as persuasively to them, proving that a pro rata allocation method should not be limited to long-tail environmental cases.

---

[45] *Buss v. Superior Court,* 939 P.2d 766 (Cal. 1997); *Sec. Ins. Co. of Hartford,* 264 Conn. 717; *Travelers Property Cas. Co. v. R.L. Polk & Co.,* 2008 WL 786678 (E.D. Mich. 2016); *Hebela v. Healthcare Ins. Co.,* 851 A.2d 75 (N.J. Super. 2004); *Travelers Prop. Cas. Co. v. Hillerich & Bradsby Co.,* 598 F.3d 257 (6th Cir. 2010); *Nationwide Mut. Ins. Co. v. Flagg,* 789 A.2d 586 (Del. Super. 2001); *E.E.O.C. v. Southern Pub. Co., Inc.,* 894 F.2d 785 (5th Cir. 1990).

[46] *Hecla Mining Co. v. New Hampshire Ins. Co.,* 811 P.2d 1083 (Colo. 1991); *Horace Mann Ins. Co. v. Hanke,* 312 P.3d 429 (Mon. 2013); *Resure, Inc. v. Chemical Distributors, Inc.,* 927 F. Supp. 190 (M.D. La. 1996) (applying Nevada law); *Cincinnati Ins. Co. v. Grand Pointe, LLC,* 501 F. Supp.2d 1145 (E.D. Tenn. 2007).

[47] *Sec. Ins. Co. of Hartford,* 264 Conn. 716-17.

Construction defect may be the most obvious area ripe for extension of *Areceneaux*. In fact, the South Carolina Supreme Court recently held that for construction defect cases indemnity should be determined based on a pro rata allocation.[48] In *Crossmann*, the South Carolina Supreme Court overruled *Golden Hills Builders, Inc.* finding in favor of a joint and several approach and adopting a time on the risk approach. The court focused on the language of the policy at issue:

> [W]e construe the standard CGL policy to require that each insurer cover only that portion of a loss attributable to property damage that occurred during its policy period. In light of the difficulty in proving the exact amount of damage incurred during each policy period, we adopt the [time on risk] formula . . . as the default method for allocating shares of the loss. . . .[T]he premise [is] that each insurer is responsible only for a pro rata portion of the total loss, and each pro rata portion must be defined by the insurer's time on the risk.[49]

Applying the pro rata allocation method for defense is a natural extension of this ruling.

For example, in applying the factors noted to a construction defect claim: The insurance policies at issue generally involve similar policy language requiring that the property damage occur during the policy period. Such language, as discussed in *Arceneaux* and *Crossmann,* provides that coverage is limited to property damage that occurs *during the policy period*. As far as reasonable expectations, the same can be said for contractors as for the insureds involved in long latency claims, in that no reasonable contractor would expect to have a single-year policy provide coverage for losses that span years of damage; and thus, the application of the pro rata method is supported by a contractor's reasonable expectations. Equity and public policy also favor the pro rata allocation method for construction defect claims. Under a joint and several allocation approach a contractor could obtain insurance every other year and likely have adequate coverage to provide continuous protection, essentially allowing the insured to receive coverage for a period of time in which it did not pay a premium. On the other hand, under a pro rata method, the contractor has an incentive to obtain uninterrupted insurance coverage to obtain complete protection. Finally, for the same reasons discussed in *Boston Gas,* the pro rata method supports judicial economy in resolving all disputes once, rather than resolving the disputes in two parts with an increased litigation cost.

---

[48] *Crossmann Cmtys. of N.C. v. Harleysville Mut. Ins. Co.*, 395 S.C. 40 (S.C. 2011).

[49] *Crossmann,* 395 S.C. at 66.

4. The Absence of Coverage Has No Impact on a Pro Rata Allocation

Under the pro rata allocation approach, an insured's lack of coverage vis-à-vis a coverage denial, uninsured years or a self-insured retention has no bearing on the method of allocation for defense costs. To accurately formulate an insurer's pro rata share, the court must take into account **all** years of damage regardless of whether coverage is available to the insured. Such a formulation is the only fair and equitable means of applying this approach.

If the insured chose not to obtain insurance, the insured should bear the responsibility of contributing to its defense, as the absence of coverage was at the insured's own doing. If the insured chose an insurance program with a self-insured retention, the insured again should bear the responsibility of contributing to its defense, as the insured is essentially acting as an insurer. Moreover, if coverage is denied by another carrier, other carriers defending should not be penalized for that denial and required to absorb the cost of an insured's defense. The insured should bear the responsibility of contributing to its defense, as a denial of coverage is premised on the insured's failure to obtain and procure the proper coverage.

As noted in *Arceneaux* and *Forty-Eight Insulations,* this result is "reasonable as the joint and several scheme would treat an insured who had uninterrupted policies for twenty years the same as an insured who had a triggered policy for one year." To hold otherwise would entitle an insured to receive coverage for a period in which it did not pay a premium.

B. Policyholder Perspective[50]

1. The Indivisible Right and Duty to Defend

From the perspective of the insured, *Arceneaux* is conceptually flawed because it confuses an insurer's right and duty to *provide* a defense with mere reimbursement of defense expenses (or some portion thereof). The fundamental problem with the court's analysis is that it ignores not only the insured's right to *be defended* – and not just reimbursed, but also the insurer's *right* to control the defense to ensure its interests are adequately protected – a right the insurer in *Arceneaux* may have been content to jettison, but which nevertheless forms a part of the parties' bargain. At least in the narrow circumstances there presented, *Arceneaux* undercuts the rights of both parties by treating as divisible that which is not.

CGL policies do not typically address defense obligations in terms of defense expense payments (or partial payments), but rather by providing the insurer a right and duty to *conduct* the defense – and a reciprocal right of the insured to receive such performance. "It is common – almost universal – for liability insurance policies to give the insurer both the *right* to control the defense of any claim covered by the policy and the *duty* to provide that defense."[51] The insurer's

---

[50] This section is authored by Martin Pentz and Daniel McFadden of Foley Hoag LLP.

[51] *Sherwood Brands v. Hartford Accident & Indem. Co.*, 698 A.2d 1078, 1083 (Md. 1997) (emphasis in original); *see Pilkington N. Am., Inc. v. Travelers Cas. & Sur. Co.*, 861 N.E.2d 121, 127 (Ohio 2006) (explaining that such language "gives the insurer the right to control the conduct of the litigation in order to safeguard its interests").

right of control "is important to the insurer as a mechanism for protecting and minimizing its duty of indemnification," such that the insurer can "make certain that a proper defense is made to the claim and that unwarranted, overstated, and collusive claims are exposed and defeated."[52] While assuming this right, the insurer also assumes a duty to defend the insured, including "hiring competent counsel" and "keeping abreast of the progress and status of litigation in order that it may act intelligently and in good faith on settlement offers."[53] The arrangement is one of mutual benefit. Putting aside the financial incentives created by the high-stakes phenomenon of long-tail tort liability, one can readily imagine an insurer on the risk for most, though not all, of the period during which injury was occurring *insisting* on a right to conduct (and thus control) the defense, in spite of the existence of a relatively brief uninsured period.

Because the defense of a lawsuit is necessarily a coordinated exercise, the right and duty to defend are generally held to be indivisible within any given lawsuit. For example, courts typically have held that if any one claim in an action triggers a duty to defend, then the duty extends to *every* other claim in the action, whether covered or not.[54] In other words, "the duty to defend one claim creates a duty to defend all claims."[55] "If any of the claims against the insured arguably arise from covered events, the insurer is required to defend the entire action."[56] Indeed, what would be the alternative? Uncovered but factually related claims are likely to bear on the outcome of any covered allegations. If the "right and duty" to defend were divisible, then the insured would lose a complete defense of the covered subject matter, and the insurer would lose an important safeguard against incompetence or collusion that bears on its indemnity obligations.

The indivisibility of the defense duty is consistent with the CGL wordings typically at issue in cases addressing coverage for long-tail liabilities. For example, in *Arceneaux*, which dealt with wording derived from the 1973 standard provisions, while the policy defined "bodily injury" as injury, sickness or disease which occurs during the policy period, it then stated that the insurer had "the right and duty to defend any suit against the insured seeking damages on account of such bodily injury . . .."[57] In other words, if the suit involved covered (*i.e.*, policy-period) injury, then the insurer would be entitled and obligated to *defend the suit*, not to chip in some allocated share of defense costs. Had the policy drafters intended the defense obligation to be parsed and shared with the insured where some injury took place outside of the covered period, they were capable of crafting a defense sharing provision suitable for such circumstances.

---

[52] *Sherwood*, 698 A.2d at 1083.

[53] *R.C. Wegman Constr. Co. v. Admiral Ins. Co.*, 629 F.3d 724, 728 (7th Cir. 2011) (quoting 4 Couch on Insurance § 202:17 (3d ed. 2007)).

[54] *E.g.*, *AMCO Ins. Co. v. Inspired Techs., Inc.*, 648 F.3d 875, 880 (8th Cir. 2011).

[55] *AMCO*, 648 F.3d at 880.

[56] *Frontier Insulation Contrs., v. Merchants Mut. Ins. Co.*, 91 N.Y.2d 169, 175 (N.Y. 1997).

[57] *Arceneaux*, 200 So.3d at 280.

2. Courts Have Rejected Allocation of the Defense In Long-Tail Liability Cases

Consistent with these principles and wordings, many courts have concluded that, even in long-tail liability cases, every triggered insurer independently bears a complete defense obligation for the entire case, so long as some portion of the claimed injury occurred during its policy period. The progenitor of this approach is generally acknowledged to be the U.S. Court of Appeals for the D.C. Circuit's decision in 1981 in *Keene*. In that case, Keene, the insured, had manufactured asbestos-containing insulation from 1948 to 1972, resulting in thousands of underlying claims against it for asbestos-related injuries.[58] It was insured by four separate insurers beginning in 1961.[59] The policies typically provided for "all sums" coverage for damages "because of bodily injury . . . caused by an occurrence," where an occurrence was defined as "an accident, including injurious exposure to conditions, which results, during the policy period, in bodily injury."[60] The court adopted essentially a continuous trigger of coverage, in which "inhalation exposure, exposure in residence [in the body], and manifestation [of disease]" all constitute "bodily injury."[61] To the extent such injury spanned multiple policy periods and, therefore, triggered multiple policies, the court held that each "insurer must defend Keene" and "is fully liable for defense costs."[62]

Since *Keene*, courts in various states have reached similar conclusions. For example, in 2015, in *Peabody Essex Museum, Inc. v. United States First Insurance Co.*, environmental contamination had occurred between 1960 and 1986, and the defendant insurer had been on the risk from 1983 to 1985.[63] The U.S. Court of Appeals for First Circuit held as a matter of Massachusetts law that, in light of the "all-encompassing" and "in for one, in for all" nature of the duty to defend, the triggered insurer was responsible for a complete defense, not merely a prorated share, notwithstanding that indemnity might be subject to *pro rata* allocation.[64]

Similarly, in 2009, in *Plastics Engineering Co. v. Liberty Mutual Insurance Co.*, the Supreme Court of Wisconsin held, in a case involving several decades of underlying asbestos

---

[58] 667 F.2d. at 1038.

[59] *Id.* at 1038-39.

[60] *Id.* at 1039.

[61] *Id.* at 1042-47.

[62] *Id.* at 1050.

[63] *Peabody Essex Museum, Inc. v. United States Fire Ins. Co.*, 802 F.3d 39, 42 (1st Cir. 2015).

[64] *Id.* at 53; *see also Narragansett Elec. Co. v. Am. Home Assur. Co.*, 999 F. Supp. 2d 511, 519-21 (S.D.N.Y. 2014) (holding under Massachusetts law that defense costs in pollution case could not be prorated), *rev'd on other grounds*, 2016 U.S. App. LEXIS 11647 (2d Cir. Jun. 23, 2016).

exposures, that "there can be no pro rata approach to the duty to defend."[65] The court based this ruling on the unitary nature of defense obligations, explaining that "[w]e do not base the scope of a duty to defend upon whether some allegations fall outside of the complaint or whether some of the damages fall party within and partly outside a policy period," and, therefore, "[i]f a duty to defend arises, the insurer must defend the lawsuit in its entirety."[66]

3. The Impact of *Arceneaux* Will Likely Be Limited

In *Arceneaux*, the Supreme Court of Louisiana recognized many of the principles articulated above. The court began its analysis by correctly noting that "an insurer's duty to defend is distinct from its duty to indemnify," and that law requiring the proration of indemnity does not necessarily require allocation of the defense.[67] The court also correctly noted that some courts have rejected *pro rata* allocation of the defense and cited *Keene* as a "leading decision" representing that approach.[68] Unfortunately, the court then chose to follow the reasoning of *Forty-Eight Insulations* and its progeny, which conflate the duty to *provide a defense* with a "contract[] . . . to pay defense costs."[69]

Ultimately, however, it appears that *Arceneaux* is unlikely to wield great influence in future analyses of defense obligations. In part, this is due to the fact that the *Arceneaux* court's analysis is tied to the somewhat idiosyncratic law of Louisiana.[70] "[T]he concept of 'joint and several' is not a concept that is currently part of Louisiana's tort law,"[71] and in such circumstances the court seemed to find it hard to believe that the parties would reasonably anticipate such an outcome as a matter of contract.

Further, future courts are likely to distinguish *Arceneaux* based on that fact that its holding was expressly tied to the specific policy language at issue.[72] That policy language defined "bodily injury" as "bodily injury, sickness or disease sustained by any person which

---

[65] *Plastics Eng. Co. v. Liberty Mut. Ins. Co.*, 759 N.W.2d 613, 627 (Wis. 2009).

[66] *Id.* As other examples, courts applying Rhode Island and Illinois law have likewise reject pro rata allocation of the defense. *See Emhart Indus. v. Home Ins. Co.*, 515 F. Supp. 2d 228 (D.R.I. 2007); *Chicago Bridge & Iron Co. v. Certain Underwriters at Lloyd's*, 797 N.E.2d 434, 444 (Mass. App. Ct. 2003).

[67] *Arceneaux*, 200 So. 3d at 282.

[68] *Id.* at 283.

[69] *Arceneaux*, 200 So. 3d at 285, *quoting Forty-Eight Insulations*, 633 F.2d at 1224-25.

[70] *Arceneaux*, 200 So. 3d at 286.

[71] *Id.*

[72] *Id.* ("We . . . adopt the pro rata allocation method for defense costs in this case before us based on the policy language.")

occurs during the policy period."[73] The court indicated that this specific wording created a "reasonable expectation[]" that the insurer would not be liable for "losses" that occurred outside of the policy period.[74] And, notably, the court stressed that courts in future cases would be required to examine the "precise language of the insurance contract at issue" to reach an outcome on a "case by case basis."[75] Accordingly, even the Louisiana courts might reach a different conclusion if the policy included different language, or additional provisions supporting coverage for out-of-period harm, such as a non-cumulation clause.

Future courts may also distinguish *Arceneaux* for its focus on discontinuities in coverage. For most, but not all, of the triggered insurer's time on the risk, its policies contained an exclusion for employee injury during the course of employment, which suggested a purpose to exclude claims (like the underlying plaintiffs') for hearing loss arising from employment-related industrial exposure.[76] The court seemed to conclude that, if proration were not required in this circumstance, then the insured would receive an unfair windfall for periods of time when it had purchased a policy that expressly excluded the asserted claim.[77]

Finally, it is notable that the two concurrences in *Arceneaux* reinforce the narrowness of its holding. Justice Knoll concurred specifically to explain that the case provides no "bright-line rule" for future courts, but rather that such courts must undertake their analysis of defense proration "on a case-by-case basis, according to the terms of the contract for insurance."[78] And Justice Crichton concurred to add that the holding was limited to "long latency occupational disease cases."[79]

In conclusion, allocation of defense is fundamentally inconsistent with the right and duty to defend agreed by the parties for their mutual benefit. And while *Arceneaux* regrettably held otherwise, it appears that its prospective applicability will be limited, and the debate on this issue will continue.

---

[73] *Id.* at 280.

[74] *See id.* at 286.

[75] *Id.* at 286.

[76] *Id.* at 280.

[77] *Id.* at 287.

[78] *Id.* at 290 (Knoll, J., concurring in the result).

[79] *Id.* (Crichton, J., concurring).