Case Law Developments

By James W. Bryan

As a periodic feature of the newsletter, a summary of recent case law developments on insurance coverage under North Carolina law is in order. What follows are noteworthy insurance coverage cases in 2015. The first three are personal lines cases, and the next three are commercial lines cases, with a reinsurance case thrown in for extra measure.

Personal Auto Policy – Resident of Household. Integon National Ins. Co. v. Mooring, 772 S.E.2d 876 (N.C. App. 2015)(unpublished). The Court of Appeals continued to give a broad interpretation to who is an insured under a personal auto policy. The issue was whether the adult driver of a car, Macie Mooring, was covered under her father's auto liability policy where her negligence caused the death of her two passengers in a motor vehicle accident. The policy listed her as a driver but did not list any vehicle owned by her or the vehicle she was driving in the accident. She was nineteen years old, living with her boyfriend in her primary residence mobile home, but her father lived in a separate residence. She slept at her father's residence about 2-4 times per month and kept her clothes there. The term "insured" in the policy was defined as "You or any family member for the ownership, maintenance or use of any auto or trailer." The policy defined "family member" as "a person related to [the insured] by blood, marriage, or adoption who is a resident of [the insured's] household...." The court noted that the word "resident" is flexible, elastic, slippery and somewhat ambiguous, meaning anything from a place of abode for more than a temporary period of time to a permanent and established home. Determinations of whether a particular person is a resident of the household of a named insured are individualized and fact-specific. Where coverage under an auto policy extends to members of the insured's household, the term "household" has been broadly interpreted -- members of a family need not actually reside under a common roof to be deemed part of the same household. The court sided with Macie Mooring, finding her an insured under the policy because the record showed that the father intended Macie to be covered as an insured under the policy and she was wholly dependent on her father for her housing and basic needs. The father provided Macie with furnished, rent-free housing at a mobile home park he owned in Goldsboro, provided her with a vehicle and automobile insurance, paid for her gas, paid all of her utilities and expenses, and gave her spending money. The lesson here is that the "resident of household" issue continues to generate coverage litigation.

Personal Auto Policy – UIM Stacking. Integon National Ins. Co. v. Maurizzio, 769 S.E.2d 415 (N.C. App. 2015). Just when you thought stacking cases were a thing of the past. This case involved a single car accident with multiple claimants. The driver injured the two passengers, and one of the passengers, Daijah, wanted to stack the $50,000 underinsured motorist ("UIM") coverage of the policy insuring the tortfeasor vehicle and the $50,000 UIM coverage of her parent's auto policy. At issue was the multiple claimant exception in the UIM statute, which tends to limit stacking. The exception provides: "For purposes of an underinsured motorist claim asserted by a person injured in an accident where more than one person is injured, a highway vehicle will also be an 'underinsured highway vehicle' if the total amount actually paid to that person under all bodily injury liability bonds and insurance policies applicable at the time of the accident is less than the applicable limits of underinsured motorist coverage for the vehicle involved in the accident and insured under the owner's policy. Notwithstanding the immediately preceding sentence, a highway vehicle shall not be an 'underinsured motor vehicle' for purposes of an underinsured motorist claim under an owner's policy insuring that vehicle unless the owner's policy insuring that vehicle provides underinsured motorist coverage with limits that are greater than that policy's bodily injury liability limits." N.C. Gen.Stat. § 20–279.21(b)(4) (2013). Integon argued that pursuant to the second sentence of the statute, the exception was triggered and no stacking was allowed because the UIM limit of the tortfeasor's vehicle ($50,000) was not greater than the liability limit of the same

tortfeasor's vehicle $50,000. Rejecting this argument, the court held that the multiple claimant exception is not triggered simply because there were two claimants injured in an accident. The court ruled that here the multiple claimant exception was not triggered. This is so because, as per the first sentence of the above statute, the amount paid to Daijah under the liability policy of the tortfeasor vehicle ($50,000) "was not reduced due to liability payments to multiple claimants." Id. at 421. The amount of payment to the other passenger did not affect the amount of payment to Diajah. Diajah obtained the $50,000 policy limit of the liability policy. Thus, the court resorted to the general definition of "underinsured highway vehicle" in § 20–279.21(b)(4), and such definition must be used to determine the UIM coverage in this case. The applicable UIM coverage of both policies may be stacked in order to calculate the UIM limits and determine if the vehicle is an "underinsured highway vehicle." Therefore, the tortfeasor's vehicle was an underinsured highway vehicle within the meaning of the Financial Responsibility Act, and stacking of UIM coverage was allowed. The lesson here is that statutory interpretation of the UIM statute is not an easy undertaking.

Personal Auto – UM – Arbitration - Statute of Limitations. Unitrin Auto & Home Ins. Co. v. Siarris, No. 3:14-CV-50, 2015 WL 457630 (W.D.N.C. Feb. 3, 2015), affirmed per curiam, 615 Fed.Appx. 164 (4th Cir. 2015) (unpublished). The Fourth Circuit Court of Appeals affirmed the United States District Court for the Western District of North Carolina and sided with the insurer on an uninsured motorist claim where the insured demanded arbitration but failed to file suit within the statute of limitations. The insured Bonnie Siarris was involved in an automobile accident in Charlotte with an unknown driver and allegedly suffered bodily injury as a result. The unknown driver fled the scene and has neither been located nor identified. Ms. Siarris' auto policy with Unitrin required the insurer to pay compensatory damages for uninsured motorist ("UM") coverage "which an insured is legally entitled to recover from the owner or operator of an uninsured motor vehicle." Approximately one week prior to the expiration of the statute of limitations for negligence actions, Ms. Siarris sent the insurer copies of letters demanding arbitration and identifying a chosen arbitrator, per the procedures laid out in the auto policy, but did not file a lawsuit, nor did she take any other action to recover from the unknown driver or Unitrin prior to the expiration of the statute of limitations. The district court granted summary judgment for the insurer because Ms. Siarris is not legally entitled to recover damages from an unknown driver. Using a line of case law, the court held that the insurer's liability under the UM policy was derivative of the unknown driver's liability, and therefore, the insured had no right to recover from the insurer unless she still had the right to recover from the driver. The court stated that even though Ms. Siarris demanded arbitration prior to the expiration of the statute of limitations this does not change the outcome. Demanding arbitration did not toll the statute or otherwise preserve her rights against the unknown driver. The court noted that although the filing of a lawsuit against an uninsured motorist is not a condition precedent to the insurer's liability under the UM coverage in the policy if there was such coverage, the insured was required to preserve her right to recover against the uninsured motorist in order to obtain UM benefits under the policy. This could have been accomplished in several ways, including filing a lawsuit pursuant to N.C. Gen.Stat. § 20–279.21(b)(3), entering into a tolling agreement, or simply initiating and completing arbitration prior to the expiration of the statute of limitations. The Fourth Circuit affirmed per curiam. The lesson here is that if the insured's UM claim has not been resolved as the 3-year statute of limitations is about to expire, the insured needs to file suit against the unknown driver before the statute of limitation runs.

CGL – Construction Defect - Trigger of Coverage – Allocation. Harleysville Mut. Ins. Co. v. Hartford Cas. Ins. Co., 2015 WL 859586 (E.D.N.C. February 27, 2015). The Eastern District of North Carolina issued a potentially far-reaching trigger of coverage and allocation ruling in a construction defect context. Rather than applying the injury-in-fact trigger theory for a latent property damage claim, the federal court applied a multiple trigger theory, and rather than following a time-on-the-risk allocation for indemnity, the court acted in equity and required the five insurers to share equally in paying indemnity costs. The insured roofing contractor had been sued in various underlying actions for allegedly defective work performed at three multi-family residential construction projects. General liability policies of the insured's five insurers spanned the period from 1998 to 2009 and none overlapped. In one project, the roofing work was completed in December 1999; in another project, it was completed in May 2001; and in the third project, the work in Phase III was performed between June 2000 and June 2001, the work in Phase IV between Oct. 2001 to April 2003, and the work in Phase V between Feb. and Oct. 2004. In the underlying actions against the insured, claimants alleged latent building defects which resulted in extensive water intrusion damages in their homes. In the declaratory

judgment action, the court cited to North Carolina's injury-in-fact trigger rule, "where the date of the injury-in-fact can be known with certainty, the insurance policy or policies on the risk on that date are triggered," and concluded that the start date of "property damage" and "occurrence" as alleged in the underlying actions is "inherently uncertain" and that the occurrence took place "at some unspecified and unknowable time between completion date and the date of the lawsuits." Id. at *16. This is because no claimant alleged "when the water intrusion started, ... when interior portions of buildings first became exposed to such water intrusion, ... [or] when 'deterioration to the finish and structural elements' first started as a result of contact with water." Id. The court held that "[w]hen, as in this case, the alleged accidents that cause the injuries-in-fact occur on dates that are not certain, there are possible multiple occurrences. ... Thus, all policies on the risk on the possible dates of those injury-causing events are triggered." Id. at *19. The court held that each insurer had a duty to defend and must share equally in the defense costs in the underlying actions. Id. at *20. Regarding indemnity, the court expressly rejected the time-on-the-risk allocation and instead held each insurer must share equally in the settlement costs for each underlying action. Id. at *27. The reasons for rejecting time-on-the-risk allocation were (1) the inability to determine "with precision down to a single period of months" the period between date of completion and date of manifestation and (2) "it is uncertain whether damages started occurring at all during any one policy period, rather than being certain that damages occurred throughout all policy periods." Id. at *28. The case is on appeal to the Fourth Circuit. The lesson here is to wait for the Fourth Circuit to sort it all out.

CGL – Duty to Defend – Arbitration - Pollution Exclusion – Tender of Notice. New NGC, Inc. v. ACE Am. Ins. Co., ____ F.3d ____, 2015 WL 2259172 (W.D.N.C. May 13, 2015). This case has a little bit of something for everyone. Insured NGC manufactures drywall only in the U.S. Many claimants nationwide filed individual and putative class action lawsuits against NGC alleging bodily injury and property damage arising out of exposure to the drywall ("Drywall Lawsuits"). The Drywall Lawsuits followed on the heels of thousands of nearly identical claims of claimants for damages stemming from drywall imported from China. In the Western District of North Carolina, NGC sued its various excess and primary commercial insurers covering the period of 1993 to 2009, seeking defense and indemnity for the Drywall Lawsuits. Issue I. Certain excess and umbrella policies had arbitration clauses related to pollution exclusion disputes. The federal court ordered those disputes subject to arbitration but declined to dismiss the entire civil action since the primary policies did not contain arbitration clauses. The court also declined to stay the entire case pending the arbitration since the determination of defense obligations under the primary policies "is not necessarily determinative of arbitrable issues." Id. at *3. Issue II. Unlike the absolute pollution exclusion found in many CGL policies that use environmental terms of art, the ACE primary policies contained a pollution exclusion with different wording – "Pollution includes the actual, alleged or potential presence in or introduction into the environment of any substance if such substance has, or is alleged to have, the effect of making the environment impure, harmful, or dangerous. Environment includes any air, land, structure or the air therein, watercourse or water, including underground water." In the Yee class action against NGC, the complaint alleged that NGC's defective drywall "emits high levels of sulfur into the air inside the homes that creates a noxious odor, destroys the home structure and mechanical systems and personal property therein, and causes potentially dangerous health consequences to the eyes and respiratory system." Id. at *6. After cataloguing the lengthy case law in North Carolina construing various pollution exclusions, the court held the ACE exclusion not ambiguous and found the facts fit squarely within the exclusion. "The sulfur released qualifies as 'pollution' because it is a substance that makes the environment impure, harmful, or dangerous. The air of the home qualifies as the environment because it is the air of a structure." Id. at *9. Issue III. The court did not buy the arguments made by the other primary insurer National Union on no duty to defend under its primary policies concerning the Yee class action. First, even though the named plaintiffs in Yee clearly alleged injuries post-dating the 1993-1999 policies, the class definition of plaintiffs was not restricted by date – "all owners and residents of homes in the United States that contain defective Drywall manufactured or sold by Defendants that emits excessive amounts of sulfur." Thus the insurer had a duty to defend because the putative class action does "present a mere possibility of coverage" under the 1993-1999 policies. Id. at *13. Second, National Union was not permitted to rely upon Consumer Product Safety Commission guidelines tying defective drywall to just 2001-2008. Extrinsic evidence may not be used to defeat a duty to defend triggered by the complaint. Issue IV. The court rejected National Union's argument that NGC failed to give proper notice of the Yee claim prior to June 18, 2010, the date NGC was allowed to amend its complaint to include the primary policies. Long before that date,

NGC reported to the insurer the Yee claim "under any and all applicable policies whether or not cited." This notice was sufficient. NGC was not required to specify the policy and years of coverage in its tender. The court held National Union "responsible for defense costs incurred from that date forward." Id. at *14. Issue V. National Union fared better as to individual drywall lawsuits. None alleged claims earlier than August 15, 2006. Thus National Union had no duty to defend NGC in individual lawsuits under the 1993-1999 primary policies. Issue VI. But a duty to defend was imposed on National Union as to the Cotilla and Johnson class actions because the allegations of drywall being used in the construction of homes "between 2004 and present" did not limit the other class action allegations which remained temporally unrestricted. Issue VII. Conversely, the court found no duty to defend as to the Brincku class action because the complaint was restricted to drywall manufactured at the Apollo Beach Plant and such plant did not begin operations until 2001. The lesson here is ACE escaped liability due to an uniquely worded pollution exclusion, and National Union was not so fortunate.

CGL Policy – Assault and Battery Limitation Endorsement.Arch Specialty Ins. Co. v. Hedrick, 2014 WL 6627039 (M.D.N.C. Nov. 21, 2014), affirmed per curiam, 612 Fed.Appx 681 (4th Cir. 2015). The Fourth Circuit Court of Appeals affirmed the United States District Court for the Middle District of North Carolina and sided with the insurer, upholding a limitation in coverage for an assault and battery claim. Around midnight, Hedrick and his companion Westmoreland were patrons of the insured nightclub Inferno. Westmoreland got involved in a fist fight, and he and Hedrick were ejected from the club by Inferno employees. While ejecting Hedrick, one employee put him in a headlock and eventually dropped him to the cement floor, which Hedrick's head hit. Inferno employees then dragged Hedrick out of the nightclub and left him outside, where he was found by a passerby who called for emergency aid. The commercial general liability policy issued to the nightclub by Arch Specialty contained an assault and battery coverage endorsement. Under the endorsement, the insurer was required to pay for damages arising out of or resulting from assault and battery and set an aggregate limit of $100,000 for "'injury' arising out of 'assault and battery.'" Less than a week before trial of the underlying tort action, under the policy's eroding limits provision, the insurer withdrew its defense of the insured due to the $100,000 limit having been exhausted by other claims. The insured did not appear at trial, the court struck the insured's answer, deeming admitted all allegations in the complaint, and Hedrick obtained a judgment against the insured for $3,250,000. The policy allowed Hedrick to sue the insurer on the judgment entered against the nightclub. An overriding issue was whether Hedrick's damages arose out of the assault and battery where the $100,000 limit was exhausted, or whether the damages are covered more broadly as an "occurrence" under the policy, for which additional coverage exists. The court applied two principles of law – the assault and battery endorsement's "arising out of" language requires only proximate causation, and although the insurance policy does not define the terms "assault" or "battery," the terms are not foreign to courts, nor are they ambiguous. The court concluded that if Hedrick's injuries were proximately caused by someone intending to cause harmful or offensive contact with him without his consent, the injuries are compensable, if at all, only under the limits of the assault and battery endorsement that the parties had agreed were exhausted. Although the tort action judgment against the insured contained negligence findings, the district court in the coverage action found that pursuant to the judgment Hedrick's injuries arose from a battery committed by the insured's bouncers. The court declared that the insurer has no liability to Hedrick on summary judgment, and because the insurer did not breach the policy, Hedrick's claims for breach of contract, unfair and deceptive trade practices, and bad faith must fail. The Fourth Circuit affirmed per curiam. The lesson here is that withdrawing a defense on the eve of trial can be a very risky undertaking but the insurer made the right call in this case.

Reinsurance – Duty Defend – Bad Faith Exclusion. Greenwich Ins. Co. v. Medical Mut. Ins. Co. of N.C., 88 F.Supp.3d 512 (E.D.N.C. 2015). The Eastern District of North Carolina had the opportunity to interpret a bad faith exclusion in a reinsurance policy and sided with the reinsurer. Medical malpractice insurer Medical Mutual defended its policyholder Dr. Thom in a malpractice action, rejected pre-trial settlement offers within the $1.0 mil. policy limit, and the jury verdict against the physician was $4.65 mil., far in excess of the policy limit. Dr. Thom sued Medical Mutual for bad faith, unfair and deceptive trade practices, and intentional and negligent infliction of emotional distress. Medical Mutual tendered the suit to its reinsurer Greenwich Insurance, but Greenwich denied coverage because of an exclusion for "loss, including defense expenses, resulting from any claim for ... any actual or alleged lack of good faith or unfair dealing in the handling of any claim or obligation under any insurance contract." The court called it an Errors and Omissions clause, but I

refer to it as a bad faith exclusion. In the declaratory judgment action filed by Greenwich, the court applied the "comparison test" and read the Thom complaint side-by-side with the policy to determine whether the events as alleged are covered or excluded. The court concluded that "the complaint alleges a lack of good faith or unfair dealing, and thus that the policy excludes coverage for all claims." Id. at 516. The court rejected the argument that the negligent infliction count was sufficient to trigger a defense and indemnity and stated as follows: "All the claims in Dr. Thom's complaint allege a single course of conduct whereby Medical Mutual handled Dr. Thom's insurance claim with a lack of good faith or with acts of unfair dealing. Accordingly, all the claims, and all potential loss, 'result from' and are inextricably intertwined with Dr. Thom's allegation of Medical Mutual's lack of good faith or unfair dealing in the handling of her insurance claim. Thus, they fall squarely within the Errors and Omissions clause." Id. at 517. The case is on appeal to the Fourth Circuit. The lesson here is that even reinsurance policies can sometimes involve the typical coverage issues of duty to defend and bad faith. We will see what the Fourth Circuit concludes.

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