STATE OF NORTH CAROLINA
WAKE COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
19 CVS 02793

MURPHY-BROWN, LLC and SMITHFIELD FOODS, INC.,

Plaintiffs,

v.

ACE AMERICAN INSURANCE COMPANY; ACE PROPERTY & CASUALTY INSURANCE COMPANY; AMERICAN GUARANTEE & LIABILITY INSURANCE COMPANY; GREAT AMERICAN INSURANCE COMPANY OF NEW YORK; XL INSURANCE AMERICA, INC.; and XL SPECIALTY INSURANCE COMPANY,

Defendants.

ORDER AND OPINION ON MOTIONS FOR PARTIAL SUMMARY JUDGMENT ON INDEMNITY ALLOCATION ISSUES

THIS MATTER comes before the Court on Defendants ACE American Insurance Company, ACE Property & Casualty Insurance Company, American Guarantee & Liability Insurance Company, and Great American Insurance Company of New York's (collectively, "Certain Insurers") Amended Motion for Partial Summary Judgment on the Issue of Indemnity Allocation (ECF No. 681) and Defendants XL Insurance America, Inc. ("XLIA") and XL Specialty Insurance Company's ("XL Specialty") Amended Motion for Summary Judgment on Indemnity Allocation Issues (ECF No. 690) (collectively, the "Motions" or "Motions for Summary Judgment").[1]

[1] XLIA and XL Specialty are referred to in this opinion collectively as the "XL Defendants."

THE COURT, having considered the Motions, briefs, exhibits, arguments of counsel, and all appropriate matters of record, concludes that Certain Insurers' Amended Motion for Partial Summary Judgment on the Issue of Indemnity Allocation should be **GRANTED** and the XL Defendants' Amended Motion for Summary Judgment on Indemnity Allocation Issues should be **DENIED**.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, LLP, by Michael W. Mitchell, and Reed Smith, LLP, by Evan T. Knott, John D. Shugrue, Andrew M. Barrios, David Cummings, and Ashley B. Jordan, for Plaintiffs Murphy-Brown, LLC, and Smithfield Foods, Inc.

Bailey & Dixon, LLP, by John T. Crook and David S. Coats, and Clyde & Co. US LLP, by Marianne May, Shane Calendar, Daren McNally, Luke Barlow, and Thomas Carruthers, for Defendants ACE American Insurance Company and ACE Property & Casualty Insurance Company.

Maynard Nexsen, PC, by James W. Bryan, Brett Becker, and David S. Pokela, for Defendant American Guarantee & Liability Insurance Company.

Phelps Dunbar, LLP, by Thomas Contois, Justine Tate, Robert M. Kennedy, and Christy M. Maple, for Defendants XL Insurance America, Inc., and XL Specialty Insurance Company.

Cranfill Sumner & Hartzog, LLP, by Theodore B. Smyth, and Clyde & Co. US, LLP, by Bruce D. Celebrezze and Jason Chorley, for Great American Insurance Company of New York.

Davis, Judge.

FACTUAL AND PROCEDURAL BACKGROUND

1. "The Court does not make findings of fact on motions for summary judgment; rather, the Court summarizes material facts it considers to be uncontested." *Hyosung USA Inc. v. Travelers Prop. Cas. Co. of Am.*, 2021 NCBC LEXIS 115, at **3 (N.C. Super. Ct. Dec. 16, 2021) (cleaned up).

2. The core set of facts underlying this litigation are not in dispute.

3. The Plaintiffs in this lawsuit are Smithfield Foods, Inc. ("Smithfield") and Smithfield's wholly owned subsidiary Murphy-Brown, LLC ("Murphy-Brown").[2] (Sec. Am. Compl. ["SAC"], ECF No. 444.2, ¶¶ 12–13.) "Smithfield is the largest hog and pork producer in the world." (SAC ¶ 13.)

4. In 2013, property owners in eastern North Carolina who lived close to Smithfield's farming operations began filing lawsuits against Plaintiffs[3]—first in state court in 2013 and later in federal court beginning in 2014.[4] (SAC ¶¶ 28–31.) Each of these lawsuits consisted of similar allegations—that is, the assertion by the property owners that Plaintiffs' hog farming operations had resulted in both physical invasions of their property and the loss of the use and enjoyment of that property. (SAC ¶¶ 33–35.) The property owners alleged that Plaintiffs' hog farming operations had resulted in nuisance conditions such as odor, dust, noise, insects and pests, and buzzards. (SAC ¶ 34.) The property owners also asserted that Plaintiffs' trucks had caused excessive traffic, odor, noise, dust, and light. (SAC ¶ 35.)

5. The United States District Court for the Eastern District of North Carolina conducted five "bellwether" trials. (SAC ¶¶ 40–47.) Each of these trials resulted in verdicts for the property owners against Smithfield and Murphy-Brown.

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[2] In this Opinion, Smithfield and Murphy-Brown are often referred to collectively as "Plaintiffs."

[3] Those lawsuits are occasionally referred to herein as the "Underlying Lawsuits."

[4] Shortly before the filing of the federal suits, the property owners' state court actions were voluntarily dismissed. (SAC ¶ 30.)

(SAC ¶¶ 40–47.) On appeal from one of the resulting judgments, the United States Court of Appeals for the Fourth Circuit largely affirmed the judgment entered by the district court.[5] *McKiver v. Murphy-Brown, LLC*, 980 F.3d 937 (4th Cir. 2020). Smithfield and Murphy-Brown subsequently entered into a global settlement with all of the property owners. (SAC ¶ 47.)

6. In the present lawsuit, Plaintiffs have sued various insurers who provided primary and excess insurance coverage for their operations between 2010 and 2015. Plaintiffs contend that these insurers should be held liable for the amounts Plaintiffs paid to settle the Underlying Lawsuits as well the attorneys' fees and other costs Plaintiffs expended in defending the actions.

7. In order to analyze the present Motion, it is necessary to understand the layers of insurance coverage that Plaintiffs possessed during the years at issue.

A. Primary Coverage

8. Plaintiffs' first layer of coverage during the relevant policy periods consisted of commercial general liability policies and business auto policies.[6] Each of the Primary Policies is described below.

9. Defendant ACE American Insurance Company ("ACE") issued a commercial general liability policy ("GL Policy") and a business auto policy to

[5] The district court's punitive damages award was vacated due to an evidentiary error, and the case was remanded for rehearing on that issue. But in all other respects the district court's judgment was affirmed. *McKiver*, 980 F.3d at 977.

[6] The policies comprising the primary layer of insurance coverage are on occasion referred to herein collectively as the "Primary Policies."

Plaintiffs for the policy period of 30 April 2010 through 30 April 2011. ("ACE Auto Policy," ECF No. 515.1; "ACE GL Policy," ECF No. 515.2.)

10. Old Republic Insurance Company ("ORIC") issued a GL policy and a business auto policy to Plaintiffs for four consecutive policy years from 30 April 2011 to 30 April 2015. ("ORIC Policies," ECF Nos. 515.3–10.) Although ORIC was originally named as a defendant in this lawsuit, it ultimately entered into a settlement with Plaintiffs, resulting in a dismissal of all claims asserted by Plaintiffs against it. (ECF No. 508.)

11. The ACE GL Policy and the ORIC GL Policies (collectively, the "Primary GL Policies") were essentially "fronting policies," meaning that they constituted a form of self-insurance in which the insured's deductible amount equaled the policy limits of $5 million. (ACE GL Policy; ORIC GL Policies, ECF Nos. 515.7–10.)

12. The ACE Auto Policy and the ORIC Auto Policies (collectively, the "Primary Auto Policies") each have policy limits of $2 million with a deductible of $1 million, with the exception of one ORIC policy for the period of 30 April 2014 through 30 April 2015, which has a policy limit of $3 million and a deductible of $1 million. (ACE Auto Policy; ORIC Auto Policies, ECF Nos. 515.3–6.)

B. Excess Coverage

1. Zurich First-Layer Excess Policies

13. Defendant American Guarantee & Liability Insurance Company ("Zurich") issued first-layer excess policies (the "Zurich Policies") to Plaintiffs for four consecutive annual policy periods spanning from 30 April 2010 through 30 April 2014.

("Zurich Policies," ECF Nos. 515.11–14.) The Zurich Policies have a $25 million policy limit. (ECF Nos. 151.11–14, at p. 2; ECF Nos. 151.13–14, at p. 5.)

14. The Zurich Policies provide excess coverage that follows form to the underlying Primary Policies "to the extent such terms and conditions are not inconsistent or do not conflict with the terms and conditions" in the Zurich Policies. (*See, e.g.,* ECF No. 515.12, at p. 35.)[7] Furthermore, the Zurich Policies contain the following language:

> Notwithstanding anything to the contrary . . . , if underlying insurance does not apply to damages, for reasons other than exhaustion of applicable limits of insurance by payment of loss, then [the Zurich Policies] do[ ] not apply to such damages.

(*See, e.g.,* ECF No. 515.12, at p. 35.)

2. XL Specialty First-Layer Excess Policy

15. Defendant XL Specialty Insurance Company issued a first-layer excess policy to Plaintiffs for the policy period 30 April 2014 through 30 April 2015. ("XL Specialty Policy," ECF No. 515.25.) The XL Specialty Policy has a $25 million policy limit. (ECF No. 515.25, at p. 11.)[8]

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[7] A "follow-form" excess insurance policy "covers a liability loss that exceeds the underlying limits [of the underlying policy] only if the loss is covered by the underlying insurance." 1 LNPG: NEW APPLEMAN NORTH CAROLINA INSURANCE Litigation § 10.09[2] (LexisNexis 2022). Unless the policy specifies otherwise, a follow-form policy "is subject to the exact same provisions of the underlying policy." *Id.* at [1].

[8] The Zurich Policies and the XL Specialty Policy are collectively referred to as the "First Layer Excess Policies."

3. Great American Second-Layer Excess Policy

16. Defendant Great American Insurance Company of New York ("Great American") issued second-layer excess policies to Plaintiffs for five consecutive annual policy periods spanning from 30 April 2010 through 30 April 2015. ("Great American Excess Policies" or "Second Layer Excess Policies," ECF Nos. 515.15–19.) The Second-Layer Excess Policies provide excess coverage that follows form to the First Layer Excess Policies and cover losses up to $25 million in excess of the First Layer Excess Policies' limits. (*See, e.g.,* ECF No. 515.15, at p. 14.)

4. ACE P&C Third-Layer Excess Policies

17. Defendant ACE Property & Casualty Insurance Company ("ACE P&C") issued third-layer excess policies to Plaintiffs for five consecutive annual policy periods spanning from 30 April 2010 through 30 April 2015. ("ACE P&C Excess Policies" or "Third Layer Excess Policies," ECF Nos. 515.20–24.) The Third Layer Excess Policies provide excess coverage that follows form to the First Layer Excess Policies and cover losses up to $25 million in excess of the Second Layer Excess Policies. (*See, e.g.,* ECF No. 515.20, at p. 5.)

5. XL Insurance Fourth-Layer Excess Policies

18. Defendant XL Insurance, America, Inc. issued fourth-layer excess commercial general liability and business auto policies to Murphy-Brown for four consecutive annual policy periods spanning from 30 April 2010 through 30 April 2014. ("XL Excess Policies" or "Fourth Layer Excess Policies," ECF Nos. 515.26–29.) The Fourth Layer Excess Policies provide excess coverage that follows form to the First

Layer Excess Policies and cover losses up to $25 million in excess of the Third Layer Excess Policies. (*See e.g.,* ECF No. 515.29, at p. 14.)

C. Lawsuit

19. Plaintiffs filed an initial Complaint in this action on 5 March 2019. (ECF No. 4.) On the following day, this lawsuit was designated as a mandatory complex business case. (ECF No. 3.)

20. Plaintiffs filed an Amended Complaint on 19 March 2019. (ECF No. 9.) On 12 January 2021, the Court granted leave for Plaintiffs to file a Second Amended Complaint, which is currently the operative pleading in this matter. (ECF No. 453.)

21. The SAC contains seven claims: (1) a breach of contract claim against ACE for breach of its duty to defend the Underlying Lawsuits under the ACE Auto Policy; (2) a breach of contract claim against ORIC for breach of its duty to defend the Underlying Lawsuits under the ORIC Auto Policies; (3) a claim seeking a declaratory judgment that ACE and ORIC are "obligated to defend and/or reimburse the . . . defense costs incurred by [Plaintiffs]" from the Underlying Lawsuits; (4) a claim seeking a declaratory judgment that "ACE is estopped from asserting any coverage defenses" under the ACE Auto Policy; (5) a claim seeking a declaratory judgment that "ORIC is estopped from asserting any coverage defenses" under the ORIC Auto Policies; (6) a breach of contract claim against all Defendants for breach of their duty to indemnify Plaintiffs "under their respective Policies in connection with the settlement made by [Plaintiffs] with the [Underlying] Claimants"; and (7) a breach of contract claim against all Defendants with respect to their duty to

indemnify for "fail[ing] and refus[ing] to make the full limits of their respective policies available so as to enable [Plaintiffs] to settle the [Underlying Lawsuits]." (SAC ¶¶ 73–121.)

22. On 22 December 2020, this Court entered partial summary judgment for Plaintiffs on their first and second claims, ruling that ORIC and ACE's "failure to provide a defense [in the Underlying Lawsuits] constitutes a breach of their respective duties to defend." *Murphy-Brown, LLC v. ACE Am. Ins. Co.*, 2020 NCBC LEXIS 154, at **4–25 (N.C. Super. Ct. Dec. 22, 2020). The Court concluded "that a duty to defend exists under Defendants' Primary Auto Polices[.]" *Id.* at **54.

23. On 5 August 2022, the Court entered an Order and Opinion that addressed various motions for summary judgment filed by the parties on a variety of issues in this case. (ECF No. 646.) In its Order and Opinion, the Court made the following rulings: (1) the Court granted Plaintiffs' Motion requesting a ruling that ACE[9] was estopped from asserting coverage defenses based on its breach of the duty to defend; (2) the Court denied Defendants' Motion for Partial Summary Judgment requesting a ruling that coverage under any policy was barred by a lack of an "accident" or "occurrence" based on the Court's determination that a genuine issue of material fact existed on that issue; (3) the Court granted, in part, and denied, in part, Plaintiffs' and Defendants' Motions for Partial Summary Judgment based on the "Pollution Exclusion" contained in Defendants' various insurance policies; and (4) the Court granted, in part, and denied, in part, XL Specialty's Motion for Partial

[9] By this time, ORIC was no longer a party to this litigation by virtue of its settlement with Plaintiffs.

Summary Judgment based on the "Known Injury" provision contained within its policy. (ECF No. 646, at pp. 60–61.)

24. On 3 January 2023, the Court entered an Order denying Plaintiffs' Rule 54(b) Motion for Reconsideration/Clarification and Rule 59(e) Motion to Amend Regarding Summary Judgment Ruling. (ECF No. 669.)

25. On 3 March 2023, Certain Insurers and the XL Defendants filed the Motions for Summary Judgment currently before the Court. (ECF Nos. 681, 690.)

26. The Motions came before the Court for a hearing on 18 July 2023. The Motions are now ripe for decision.

LEGAL STANDARD

I. Summary Judgment

27. It is well established that "[s]ummary judgment is proper 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.' " *Morrell v. Hardin Creek, Inc.*, 371 N.C. 672, 680 (2018) (quoting N.C. R. Civ. P. 56(c)). "[A] genuine issue is one which can be maintained by substantial evidence." *Kessing v. Nat'l Mortg. Corp.*, 278 N.C. 523, 534 (1971). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion and means more than a scintilla or a permissible inference." *Daughtridge v. Tanager Land, LLC*, 373 N.C. 182, 187 (2019) (citation and internal quotation marks omitted).

28. On a motion for summary judgment, "[t]he evidence must be considered 'in a light most favorable to the non-moving party.' " *McCutchen v. McCutchen*, 360 N.C. 280, 286 (2006) (quoting *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 470 (2004)). "[T]he party moving for summary judgment ultimately has the burden of establishing the lack of any triable issue of fact." *Pembee Mfg. Corp. v. Cape Fear Constr. Co.*, 313 N.C. 488, 491 (1985).

29. The party moving for summary judgment may satisfy its burden by proving that "an essential element of the opposing party's claim does not exist, cannot be proven at trial, or would be barred by an affirmative defense, or by showing through discovery that the opposing party cannot produce evidence to support an essential element of [the] claim[.]" *Dobson v. Harris*, 352 N.C. 77, 83 (2000) (citations omitted). "If the moving party satisfies its burden of proof, then the burden shifts to the non-moving party to 'set forth *specific facts* showing that there is a genuine issue for trial.' " *Lowe v. Bradford*, 305 N.C. 366, 369–70 (1982) (quoting N.C. R. Civ. P. 56(e)). If the nonmoving party does not satisfy its burden, then "summary judgment, if appropriate, shall be entered against [the nonmovant]." *United Cmty. Bank (Ga.) v. Wolfe*, 369 N.C. 555, 558 (2017) (quoting N.C. R. Civ. P. 56(e)).

II. Rules of Construction — Contracts of Insurance

30. "An insurance policy is a contract[,] and its provisions govern the rights and duties of the parties thereto." *C. D. Spangler Constr. Co. v. Indus. Crankshaft & Eng'g Co.*, 326 N.C. 133, 142 (1990) (citing *Fidelity Bankers Life Ins. Co. v. Dortch*, 318 N.C. 378, 380 (1986)). Thus, general contract interpretation rules apply when

interpreting an insurance policy. *Accardi v. Hartford Underwriters Ins. Co.*, 373 N.C. 292, 295 (2020). "In North Carolina, determining the meaning of language in an insurance policy presents a question of law for the Court." *Id.*

31. "[I]t is well settled in North Carolina that insurance policies are construed strictly against insurance companies and in favor of the insured." *State Cap. Ins. Co. v. Nationwide Mut. Ins. Co.*, 318 N.C. 534, 546 (1986) (citations omitted). Accordingly, "a contract of insurance should be given that construction which a reasonable person in the position of the insured would have understood it to mean[.]" *Grant v. Emmco Ins. Co.*, 295 N.C. 39, 43 (1978). In addition,

> [t]hose provisions in an insurance policy which extend coverage to the insured must be construed liberally so as to afford coverage whenever possible by reasonable construction. However, the converse is true when interpreting the exclusionary provisions of a policy; exclusionary provisions are not favored and, if ambiguous, will be construed against the insurer and in favor of the insured.

N.C. Farm Bureau Mut. Ins. Co. v. Stox, 330 N.C. 697, 702 (1992) (citation omitted).

32. An ambiguity exists when "in the opinion of the court, the language of the policy is fairly and reasonably susceptible to either of the constructions for which the parties contend." *Wachovia Bank & Tr. Co. v. Westchester Fire Ins. Co.*, 276 N.C. 348, 354 (1970). In those circumstances, our Supreme Court has instructed that "any ambiguity or uncertainty as to the words used in the policy should be construed against the insurance company and in favor of the policyholder or beneficiary." *Accardi*, 373 N.C. at 295; see *also Woods v. Nationwide Mut. Ins. Co.*, 295 N.C. 500, 506 (1978). Further, when otherwise unambiguous policy language "become[s] ambiguous as applied to the various causes of loss set forth in the policy, the

ambiguity will be construed against the insurer." *Pleasant v. Motors Ins. Co.*, 280 N.C. 100, 102 (1971).

33. Nevertheless, "[i]f a court finds that no ambiguity exists, . . . the court must construe the document according to its terms." *Accardi*, 373 N.C. at 295*; see also Woods*, 295 N.C. at 506 ("[I]f the meaning of the policy is clear and only one reasonable interpretation exists, the courts must enforce the contract as written; they may not, under the guise of construing an ambiguous term, rewrite the contract or impose liabilities on the parties not bargained for and found therein."); *Cowell v. Gaston Cty.*, 190 N.C. App. 743, 746 (2008) (stating that "the language used in the policy is the polar star that must guide the courts") (quoting *McDowell Motor Co. v. New York Underwriters Ins. Co.*, 233 N.C. 251, 253 (1951)).

ANALYSIS

34. The two Motions currently before the Court (one filed by Certain Insurers and one filed by the XL Defendants) both address a common issue. That issue concerns the proper method that should be utilized to allocate indemnity liability in this action among the various insurers in light of the fact that the nuisance injuries giving rise to the Underlying Lawsuits crossed over into multiple policy periods for which—as detailed above—coverage was provided by various insurers.

35. Our Supreme Court recently explained the nature of this inquiry as follows:

> [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.

Radiator Specialty Co. v. Arrowood Indem. Co., 383 N.C. 387, 389–90 (2022) (quoting *In re Viking Pump, Inc.*, 27 N.Y. 3d. 244, 255 (2016)).

36. As an initial matter, the Court is satisfied that no genuine issue of material fact exists regarding this issue and that this issue is instead purely a question of law. The Court, in its discretion, concludes that a ruling at the summary judgment stage is appropriate. *Duke Energy Carolinas, LLC v. AG Ins. SA/NV*, 2020 NCBC LEXIS 70, at **13 (N.C. Super. Ct. Jun. 5, 2020) ("In the circumstances of this case, the Court concludes that addressing [the Motion for Partial Summary Judgment] at this time will not result in an advisory opinion and is instead a prudent use of the Court's time and resources.").

37. Because the arguments of Certain Insurers and the XL Defendants differ in key respects, the Court will analyze them separately.

A. Certain Insurers' Motion for Summary Judgment

38. Certain Insurers argue that any indemnity amounts that Plaintiffs may ultimately recover in this action should be allocated among the applicable insurers on a "pro rata" basis based on the amount of time each insurer provided coverage to Plaintiffs.[10] Plaintiffs, conversely, urge the Court to apply an "all sums" allocation

[10] Despite making these arguments, Certain Insurers (and the XL Defendants) have expressly reserved their right to argue at trial that no coverage at all exists under their respective policies based on their contention that the Underlying Lawsuits did not arise from

method in which Plaintiffs may recover the entirety of their loss from any individual insurer that provided coverage during the period in which the nuisance injuries occurred.

39. Our Supreme Court has explained the difference between these two approaches. "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." *Radiator Specialty*, 383 N.C. at 406–07. "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. 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*. (cleaned up).

40. The arguments asserted by Certain Insurers and Plaintiffs are analyzed in detail below but can be broadly summarized as follows: Certain Insurers rely on a provision in their policies stating that the policy solely covers injuries for accidents occurring during the stated temporal period of the policy—that is, the dates listed therein during which the policy is effective. Based on this provision, Certain Insurers

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any "accident" or "occurrence" as defined in their policies (based on their contention that the underlying nuisance injuries were either intentional or substantially certain to occur from the standpoint of Plaintiffs).

contend, they have contracted to provide coverage *only* for injuries occurring during their limited "time on the risk."

41. Plaintiffs, on the other hand, rely on a separate provision in Certain Insurers' policies stating that a covered injury also includes "any continuation, change, or resumption" of that injury *after the policy period has ended*. Based on the latter provision, Plaintiffs assert that each insurer's indemnity liability is not, in fact, limited to their "time on the risk." Alternatively, Plaintiffs contend, the policies are ambiguous and should therefore be construed in their favor as insureds—meaning that an "all sums" allocation method should be utilized in lieu of a pro rata method.

42. Therefore, it is necessary to examine the provisions of the policies at issue that are pertinent to the parties' respective arguments on this issue.

43. Both ACE and ORIC issued Primary Auto Policies that contain the same functionally identical provision providing that coverage was being afforded for accidents occurring "during the policy period." That provision states as follows:

> We will pay all sums an "insured" legally must pay as damages because of "bodily injury" or "property damage" to which this insurance applies, caused by an "accident" and resulting from the ownership, maintenance or use of a covered "auto"
>
> . . .
>
> Under this Coverage Form, we cover "accidents" and "losses" occurring
> a. *During the policy period* shown in the Declarations; and
> b. Within the coverage territory.

(*E.g.,* ECF No. 515.1, at pp. 16, 23 (emphasis added).)[11]

[11] By virtue of the First Layer Excess Policies' follow form provisions, the above-quoted language also became part of the Excess Policies.

44. In addition, all of the Zurich Policies for the period from 2010 through 2014 contain a "Continuing Coverage" provision stating as follows:

> **Bodily injury** or **property damage** which occurs during the policy period . . . *includes any continuation, change or resumption of that* ***bodily injury*** *or* ***property damage*** *after the policy period*[.]

(*E.g.,* ECF No. 515.11, at p. 37 (emphasis added).)[12]

45. Certain Insurers argue that the inclusion of the "during the policy period" language in the relevant policies mandates a *pro rata* approach to allocating the indemnifiable damages from the Underlying Lawsuits between the applicable insurance policies. According to Certain Insurers, this language means just what it says—they have contracted to provide coverage only for accidents occurring during the time period in which their policies were in effect.

46. Plaintiffs, conversely, contend that Certain Insurers are ignoring the "Continuing Coverage" provision, which—in Plaintiffs' view—should be construed as allowing coverage under these policies even for injuries that occur outside the designated policy periods because those injuries were a "continuation, change or resumption" of the very same injuries that *did* occur during the policy period. As a result, Plaintiffs assert that the "Continuing Coverage" provision precludes application of pro rata allocation and instead mandates allocation based on the "all sums" approach. In the alternative, Plaintiffs argue that the simultaneous inclusion of these two provisions results in an ambiguity, which must be resolved in favor of the insured.

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[12] All of the other excess policies "follow form" in all relevant respects to the Primary Auto Policies and the First Layer Excess policies.

47. Before determining how the "Continuing Coverage" provision should be interpreted, the Court must first decide the threshold issue of whether it even applies. Certain Insurers take the position that the provision does not apply—asserting that "[b]ecause the underlying [claimants] asserted *recurrent* nuisance claims, the Underlying Lawsuits did not involve the 'continuation, change or resumption' of any bodily injury." (ECF No. 682, at p. 23 (emphasis added).)

48. The Court disagrees and finds that Certain Insurers' argument on this issue is largely based on semantics. Based on the undisputed evidence of record, it is clear that the nuisance injuries at issue were not one-time injuries and instead reappeared on a recurring basis for a period of years. The phrase "continuation, change or resumption" is broad enough to encompass the type of recurrent injuries at issue in this case. *See McKiver*, 980 F.3d at 954 ("Here, maintenance of odiferous, noisy, and pest-ridden farm operations resulted in repeated -- i.e., recurrent -- invasions of [landowners'] properties."). The Court rejects Certain Insurers' contention that additional wording would need to be included within the Continuing Coverage provision in order for it to apply to the type of injuries at issue here.

49. However, the Court's determination that the Continuing Coverage provision applies does not end the analysis. The Court must next address the extent, if any, to which the "during the policy period" language (relied upon by Certain Insurers) is affected by the Continuing Coverage provision (relied on by Plaintiffs) for purposes of deciding whether a pro rata or an all sums approach to indemnity allocation should be used on these facts.

50. In their various briefs, the parties have cited numerous cases from outside North Carolina addressing this question. However, although these cases are informative and demonstrate that different jurisdictions have adopted differing approaches to this issue, the Court, of course, is bound by controlling North Carolina law.

51. Our Supreme Court very recently addressed a virtually identical issue in *Radiator Specialty*. Although, as discussed below, the specific type of injury at issue in that case was different than the recurring nuisance injuries existing here, the Court finds that the Supreme Court's analysis is nevertheless controlling in the present case.[13]

52. In *Radiator Specialty*, a manufacturer whose products contained benzene was named as a defendant in "hundreds of personal injury lawsuits seeking damages for bodily injury allegedly caused by repeated exposure to benzene over time." *Radiator Specialty*, 383 N.C. at 389. The ensuing litigation resulted in approximately $45 million in liability and defense costs. *Id.* at 390. The manufacturer's insurance structure consisted of over one-hundred policies and twenty-five individual insurers. *Id.* at 389. The manufacturer subsequently filed a lawsuit seeking a determination of the respective obligations of fifteen insurers in connection with the benzene litigation. *Id.* at 391.

53. In its opinion, the Supreme Court addressed a number of coverage-related issues, one of which concerned the proper method of allocation of the insurers'

[13] For this reason, the Court deems it appropriate to quote extensively from the Supreme Court's opinion in *Radiator Specialty*.

indemnity liability. Much like Plaintiffs in the present case, the manufacturer in *Radiator Specialty* contended that certain language in the applicable policies mandated an all sums—rather than a pro rata—allocation despite the inclusion of the phrase "during the policy period" in the policies. *Id*. at 410–11. The Supreme Court summarized the manufacturer's argument as follows:

> Similarly, [the manufacturer] argues that there is language in the policies that is "antithetical to *pro rata* allocation, including continuing coverage, non-cumulation, and prior-insurance provisions," which all presuppose that (1) multiple policies may be called upon to indemnify [the manufacturer] for a single loss or occurrence, and (2) insurers may be required to indemnify the insured for losses arising outside of the policy period. For example, [the manufacturer] notes that all three of the insurers' policies "extend coverage beyond the policy period to liability for 'death resulting *at any time* from the bodily injury," provisions which other courts "have found incompatible with *pro rata* allocation." At the same time, [the manufacturer] emphasizes "the glaring *absence* of any express *pro rata* limitation[,]" an omission that is "particularly notable given that the Insurers have been aware of the hotly contested issue of 'all sums' vs. *pro rata* allocation *for decades*."

Id. at 411.

54. The Supreme Court stated that "[l]anguage indicating that an insurer will cover 'all sums' must be present in the policy to warrant application of all sums allocation." *Id*. at 412. Although acknowledging that the policies did, in fact, contain language essentially agreeing to pay "all sums" arising from certain types of liability, the Supreme Court observed that the insurers were able to point to other policy language overtly seeking to limit the coverage contained therein to injury "sustained during the respective policy periods." *Id*. at 412–13 (cleaned up). The Supreme Court then stated the following:

> As the insurers argue, the modern trend is to apply pro rata allocation when limiting language like "during the policy period" exists, even when

> the policy contains a reference to paying "all sums" arising out of certain liabilities. *See, e.g., Rossello*, 468 Md. at 119, 226 A.3d 444 (holding that, where "during the policy period" language was present, "the pro rata approach [was] unmistakably consistent with the language of standard ... policies"); *Crossmann Cmtys. of N.C.*, 395 S.C. at 62, 717 S.E.2d 589 (applying pro rata allocation where "during the policy period" limiting language was present and explaining that this interpretation "give[s] effect to each part of the insuring agreement (rather than focusing solely on the terms 'all sums' or 'those sums'), [and] . . . is consistent with the objectively reasonable expectations of the contracting parties").
>
> . . .
>
> Pursuant to the limiting language of Fireman's Fund's policies then, Fireman's Fund will only indemnify [the manufacturer] for the costs of such occurrences that take place "during the policy period." *See, e.g.*, *Bos. Gas Co. v. Century Indem. Co.*, 454 Mass. 337, 360, 910 N.E.2d 290, 307–08 (2009). Thus, even if a policy contains language promising to pay for "all sums" that [the manufacturer] "shall be obligated to pay ... because of" personal or bodily injury, contractual language that limits this phrase to *either* bodily injuries that occur during the policy period or occurrences that take place during the policy period makes clear that the insurer's obligation is not without limits.
>
> . . .
>
> [U]sing Fireman's Fund's policies as an example, the insurer agreed to pay for all of the sums (1) arising from bodily injuries; (2) resulting from occurrences; and (3) that took place during the policy periods. The language "during the policy period" therefore cabins the phrase "all sums" to a finite period of time. It follows that the insurers did not agree to cover all sums arising out of benzene exposure without regard to the policy periods during which incidents of exposure took place. Instead, "[c]onsistent with the policy language limiting coverage to that which occurs 'during the policy period,' the timing of the [occurrence/injury] dictates ... the portion of damages for which each policy is responsible." *See Rossello*, 468 Md. at 119, 226 A.3d 444.

Id. at 413–14.

55. The Supreme Court noted that courts in some jurisdictions had applied all sums allocation "even where the limiting language of 'during the policy period' appears." *Id*. at 414 n.12. But the Supreme Court stated that "[t]hese cases . . . tend to represent an outdated view of the proper interpretation of 'pro rata' language" and

that "[t]he truncated contractual interpretation they apply fails to full[y] consider the limiting effect of the phrase 'during the policy period.' " *Id.*

56. In reaching its conclusion that a pro rata (as opposed to all sums) allocation was proper, the Supreme Court distinguished two cases reaching an opposite conclusion—one of which was from this Court. *See id.* at 415 (citing *Duke Energy,* 2020 NCBC LEXIS 70, at **15–16). The Supreme Court stated that *Duke Energy* was distinguishable because

> [t]he [B]usiness [C]ourt's application of all sums allocation was based on the presence of non-cumulation provisions in the policy at issue, which "recognize[d] that damage may extend beyond the policy period in which the triggering property damage first occurs and reflect the parties' agreement that such damage shall be treated as if all damage occurred in a single premium period, subject to a single policy limit." *Duke Energy*, 2020 WL 3042168, at *8. Indeed, the [B]usiness [C]ourt "conclude[d] that the non-cumulation provisions make plain that the parties' Insuring Agreement in the Policies ... obligates the insurer to pay all sums which Duke becomes legally obligated to pay because of 'property damage.' " *Id.*

Radiator Specialty, 383 N.C. at 415.[14]

57. The Supreme Court similarly distinguished *Viking Pump*, a case that likewise concerned policies containing non-cumulation provisions. *Id.* (citing *Viking Pump*, 27 N.Y.3d. at 251).

58. Finally, the Supreme Court further rejected the manufacturer's argument that the policies at issue contained a continuing coverage provision that

[14] As one court has explained, a non-cumulation clause "presuppose[es] that two policies may be called upon to indemnify the insured for the same loss or occurrence," meaning that said policy language is inconsistent with a pro rata allocation which by "legal fiction . . . treat[s] continuous and indivisible injuries as distinct in each policy period as a result of the 'during the policy period' limitation[.]" *Viking Pump*, 27 N.Y.3d at 261.

had the effect of requiring all sums allocation. That provision—which was virtually identical to the Continuing Coverage provision relied upon by Plaintiffs here—stated that " '[b]odily injury' . . . which occurs during the policy period . . . includes any continuation, change or resumption of that 'bodily injury' . . . after the end of the policy period." *Id.* at 417 n.15. In addressing that provision, the Supreme Court stated the following:

> [The manufacturer] similarly misinterprets the "continuing coverage" provisions it points to in [the insurer's] policies. The language [the manufacturer] emphasizes describes [the insurer's] obligations for a continuous injury. Even assuming the health effects of benzene exposure can be described in this manner, which [the insurer] disputes, the provision does not suggest that [the insurer] agrees to assume responsibility for all liabilities from any policy period. This language "simply sets forth the unremarkable proposition . . . [that] the policy in place when the injury occurs will cover all consequential damages, even those taking place after the policy period." As such, the non-cumulation and continuing coverage provisions that [the insured] points to do not counsel against pro rata allocation in the context of this case.

Id. at 417 (internal citation omitted). Thus, the Supreme Court concluded that based on its review of the continuing coverage provision "we are not convinced that [the insurers] contemplated the possibility that they would be liable for 'all sums' arising from liabilities that occurred during any policy period." *Id.* at 416.

59. Faced with the fact that the Supreme Court's analysis in *Radiator Specialty* is inconsistent with their argument, Plaintiffs contend that the analysis in that case is inapplicable to the present action due to differences between the recurrent nuisance injury here as opposed to the benzene exposure injury in *Radiator Specialty*. The Court disagrees.

60. Although certain aspects of the Supreme Court's decision focus on the unique characteristics of benzene-related injury, acceptance of Plaintiffs' argument would require the Court to ignore key portions of the Supreme Court's analysis that are more broadly applicable. Although the Supreme Court was addressing indemnity allocation in the context of liability stemming from benzene exposure, the scope of its analysis extends beyond the specific facts of that case. Critically, the Supreme Court clearly stated that "the modern trend is to apply pro rata allocation when limiting language like 'during the policy period' exists, even when the policy contains a reference to paying 'all sums' arising out of certain liabilities." *Id*. at 413. The Supreme Court then proceeded to address the indemnity allocation issue based on its review of policy language that is virtually identical to the key policy provisions existing in the present case. The Supreme Court gave effect to the "during the policy period" limitation contained in the insurers' policies and dismissed the notion that a continuing coverage provision that is essentially a word-for-word copy of the Continuing Coverage provision here mandated a different result—holding that the latter provision "simply sets forth the unremarkable proposition that the policy in place when the injury occurs will cover all consequential damages, even those taking place after the policy period." *See id*. at 417 (cleaned up).

61. Plaintiffs nevertheless contend that the Supreme Court's analysis "did not decide or explain how it would apply Continuing Coverage Provisions in a continuous injury case . . . ." (ECF No. 735, at p. 15.) However, this argument is incorrect. It ignores the above-quoted portion of the Supreme Court's opinion

expressly stating that the virtually identical continuing coverage provision there simply meant that "the policy in place when the injury occurs will cover all consequential damages, even those taking place after the policy period . . . *[e]ven assuming the health effects of benzene exposure can be described [as resulting in a continuous injury]*." *Radiator Specialty*, 383 N.C. at 417 (emphasis added).[15]

62. To be sure, the Supreme Court acknowledged that a different result would exist in cases in which—as in *Duke Energy* and *In re Viking Pump*—the applicable policies contained non-cumulation provisions. *See id.* at 415–16. Here, however, the policies at issue (as in *Radiator Specialty*) lack any such non-cumulation provisions.

63. The Court has carefully considered the remaining arguments asserted by Plaintiffs and finds them to be similarly lacking in merit.

64. Plaintiffs contend, in the alternative, that these policy provisions are ambiguous and therefore should be interpreted in their favor. But Plaintiffs have failed to persuasively show how any such ambiguity actually exists.[16] Indeed, their argument ignores the fact that the Supreme Court's indemnity allocation analysis in *Radiator Specialty* interpreted policy provisions containing virtually identical language without making any finding of ambiguity.

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[15] This same logic would apply equally to the type of recurrent injuries at issue in the present case.

[16] Although Plaintiffs contend that the existence of such an ambiguity is demonstrated by the differing interpretations offered by Certain Insurers and the XL Defendants as to the effect of the Continuing Coverage provision, the mere fact that those insurers have asserted arguments seeking to minimize their own exposure hardly suffices to establish an ambiguity.

65. Plaintiffs' attempt to rely on a so-called "Aggregation Provision" in the policies fares no better. That provision states as follows:

> All "bodily injury," "property damage" and "covered pollution cost or expense" resulting from continuous or repeated exposure to substantially the same conditions will be considered as resulting from one "accident[.]"

(*E.g.*, ECF No. 515.1, at p. 19.)

66. However, Plaintiffs offer no valid argument as to why this provision mandates the application of all sums allocation. Instead, as the wording suggests, this provision relates to the entirely separate issue of how the policy term "accident" should be defined—an issue that bears no relevance to the indemnity allocation issue raised in the present Motion.

67. Accordingly, Certain Insurers' Amended Motion for Partial Summary Judgment on the Issue of Indemnity Allocation is **GRANTED** on the issue of whether pro rata allocation is the appropriate indemnity allocation method in this case.

B. XL Defendants' Motion for Summary Judgment

68. The XL Defendants' Motion for Summary Judgment contains two related arguments. First, the XL Defendants contend that the XL Specialty policy provides no coverage in this case because the allocation method they urge the Court to adopt would result in a determination that all excess coverage would be provided by Zurich. Second, they argue that XLIA likewise faces no liability because—by virtue of that allocation method—the XLIA policy is "too far down" in the tower of excess coverage to be triggered. Both arguments lack merit.

1. XL Specialty Policy

69. The XL Defendants' Motion regarding the issue of indemnity allocation in this case is based on a different argument than that asserted by Plaintiffs, although—like Plaintiffs' argument—it rests on an expansive interpretation of the Continuing Coverage provision contained in Zurich's policies.

70. XL Specialty argues, in a nutshell, that it has no liability in this case because the application of Zurich's Continuing Coverage provision means that the indemnity liability of the excess insurers should be based *exclusively* on the coverage that existed for the first two policy periods triggered by the Underlying Lawsuits.[17] Conveniently for XL Specialty, it only provided coverage for the 2014–15 policy year, meaning that, under such a telescoping approach, Zurich (as the lead excess insurer for policy years 2010–12) would be *solely* responsible for all excess coverage obligations in this case and XL Specialty would get off scot-free.

71. XL Specialty bases this argument on the Continuing Coverage provision in Zurich's policies, claiming that because the nuisance injuries at issue began during the first two years the Zurich policies were in effect, all such injuries that occurred over the remaining years at issue were due to a "continuation, change, or resumption" of those earlier injuries such that Zurich is responsible for all of them. (*E.g.,* ECF No. 515.11 at p. 37.)

72. The Court need not spend much time on this argument. Simply put, neither *Radiator Specialty* nor any other decision from North Carolina's appellate

[17] The Court adopts the term utilized by Plaintiffs to describe this approach—that is, "telescoping."

courts have ever recognized this type of telescoping theory. Moreover, the XL Defendants' argument is flatly inconsistent with the Court's analysis earlier in this Opinion granting Certain Insurers' Motion for Summary Judgment based on the Court's accompanying interpretation as to the limited effect of the Continuing Coverage provision in Zurich's policies.[18]

73. Finally, the Court observes that XL Specialty's argument is anything but equitable. It would result in XL Specialty having received a premium payment from Plaintiffs for the 2014–15 policy period yet avoiding any liability at all despite the fact that nuisance injuries occurred during its policy period. As such, XL Specialty's argument fails on both legal and equitable grounds.

2. XLIA Policies

74. With regard to XLIA, the XL Defendants argue as follows: "Given the allocation of any covered settlement amounts to the first two policy years—the 2010-11 and 2011-12 policy years—there can be nothing for XLIA to pay. . . . [E]ven if coverage were to exist for the entire settlement amount . . . neither the portion of the settlement that would be allocated to the 2010-2011 policy period nor the portion that would be allocated to the 2011-2012 policy period would be enough to reach the XLIA layer of coverage." (ECF No. 713, at pp. 19–20.)

75. Thus, XLIA's argument—like XL Specialty's—is premised on the Court's acceptance of the telescoping approach to indemnity allocation in this case.

[18] Indeed, the adoption of XL Specialty's argument would expose Zurich to coverage obligations that it did not agree to assume in its insurance contracts with Plaintiffs.

Because the Court has rejected that approach, the XL Defendants' Amended Motion for Summary Judgment on Indemnity Allocation Issues is **DENIED**.

CONCLUSION

THEREFORE, IT IS ORDERED as follows:

1. Certain Insurers' Amended Motion for Partial Summary Judgment on the Issue of Indemnity Allocation is **GRANTED** on the issue of whether pro rata allocation is the appropriate indemnity allocation method in this case.
2. The XL Defendants' Amended Motion for Summary Judgment on Indemnity Allocation Issues is **DENIED**.

SO ORDERED, this the 7th day of August, 2023.

/s/ Mark A. Davis
Mark A. Davis
Special Superior Court Judge for
Complex Business Cases