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WISCONSIN SUPREME COURT RULES THAT EACH ASBESTOS CLAIMANT'S EXPOSURE CONSTITUTES A SEPARATE OCCURRENCE; ADOPTS "ALL SUMS" AND REJECTS PRO RATA ALLOCATION

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Wisconsin's highest court is the latest to weigh in on the obligations of liability insurers for underlying asbestos bodily injury claims. In *Plastics Engineering Co. v. Liberty Mutual Insurance Co.,* No. 2008AP333-CQ (Wis. Jan. 29, 2009), the Wisconsin Supreme Court held that each underlying claimant's repeated exposure to asbestos-containing products constitutes a separate occurrence, and insurers must fully defend and pay all sums up to policy limits. In so holding, the court expressly rejected a pro rata allocation.

The insured, Plenco, was a defendant in various bodily injury and wrongful death claims arising out of exposure to asbestos that took place in different times and places over the past 50 years. Plenco manufactured and sold asbestos-containing compounds from 1950 to 1983. Liberty Mutual issued primary liability insurance policies to Plenco from the late 1960s through 1989, a time during which many claimants alleged exposure to and injury from Plenco's asbestos-containing products.

Plenco instituted a declaratory judgment action in 2004 to determine Liberty Mutual's obligations under the various policies, and Liberty Mutual requested a declaration of its own for relief from certain defense and indemnity obligations. In October of 2006, the United States District Court for the Eastern District of Wisconsin issued a decision on each party's motions for summary judgment, ruling as follows: (1) each claimant's exposure constitutes a separate occurrence; (2) the policies' non-cumulation provisions limit each claimant's recovery; and (3) Liberty Mutual is obligated to pay all sums arising from an occurrence and is not entitled to pro rata contribution from Plenco. *Plastics Engineering Co. v. Liberty Mutual Insurance Co.,* 466 F. Supp. 2d 1071 (E.D. Wis. 2006). On appeal, the Seventh Circuit stayed the matter and certified all three issues to the Wisconsin Supreme Court.

Liberty Mutual argued that under Wisconsin's "cause" test, Plenco's manufacture and sale of asbestos-containing products without warning constituted one occurrence, regardless of the number of exposures and injuries. Liberty Mutual relied on the Limits of Liability provision, which provided that "all bodily injury and property damage arising out of continuous or repeated exposure to substantially the same general harmful conditions shall be considered as arising out of one occurrence." The court disagreed, holding that the Limits of Liability provision "functions to limit an individual claimant's repeated and continuous exposure . . . as being just one occurrence." The court further determined that under the "cause" theory, each individual's continuous or repeated exposure to asbestos should be treated as a separate occurrence. The law and policy language did not support Liberty Mutual's "manufacture and sale without warning" theory.

In Justice Abrahamson's concurring opinion, she explains,

> The instant case does not present one uninterrupted and continuing cause under Wisconsin law, as Liberty Mutual contends. There is no basis under the Wisconsin "cause" analysis for aggregating events widely separated in time, space and circumstances into one occurrence. Liberty Mutual's position sweeps too broadly, and the result it reaches challenges common sense.

On the allocation issue, Liberty Mutual advocated for a "pro rata" approach that would limit its obligations to a share of the damages based upon the years of Liberty Mutual's coverage relative to years when Plenco had no coverage in place. A majority of the court disagreed with the insurer's position. Wisconsin is a "continuous trigger" jurisdiction. Thus, once a policy is triggered, Liberty Mutual is required to "pay on behalf of the insured all sums . . . caused by an occurrence." The court did not find any support in the policy language for a pro

rata allocation. Indeed, the insuring agreement specifically includes the "all sums" language; the definition of occurrence contemplates "continuous or repeated exposure" across multiple policy years; and even the Limits of Liability provision confirmed Liberty Mutual's intent to pay for injury that occurs "partly before and partly within the policy period." The court further concluded that the "all sums" approach applies equally to the duty to defend.

Justice Gableman dissented on the allocation portion of the court's decision, observing that the policies obligated Liberty Mutual to defend suits only for bodily injury occurring during the policy period. For bodily injury occurring outside the policy term, Plenco is self-insured and should bear its own defense costs. The Justice noted that Liberty Mutual agreed to provide a full defense, and it would be both practical and reasonable to seek a pro rata setoff at the end of the litigation.

Finally, the court ruled that the Wisconsin statute prohibiting competing "other insurance" clauses from reducing the total amount of indemnification an insured may recover did not apply to bar operation of the policies' non-cumulation provisions. The court found that the statute's reference to "other insurance" meant that it only applied to concurrent, not successive policies.

It is important to note that *Plastics Engineering* only deals with a single insurer. If an insurer is unable to allocate defense and indemnity costs for periods of time where an insured failed to purchase insurance, what impact might this ruling have on an insurer's ability to seek contribution from those policy periods covered by different insurance companies? Justice Gableman noted in his dissent that the all sums approach would not affect an insurer's contribution rights against successive insurers. However, the majority decision certainly invites debate on the practical application of the "all sums" approach, given that it was decided in the context of a single insurer.

To discuss any questions you may have regarding the opinion discussed in this Alert, or how it may apply to your particular circumstances, please contact William P. Shelley (wshelley@cozen.com or 215.665.4142) or Joseph A. Arnold (jarnold@cozen.com or 215.665.2795).

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