

Client Alert

A report
for clients
and friends
of the Firm March 2009

Wisconsin Supreme Court Adopts All-Sums Allocation Approach

In a significant decision for commercial liability policyholders, the Wisconsin Supreme Court recently ruled that if a covered event triggers an insurance policy, the insurer must fully defend and indemnify the insured up to the policy limits, regardless of whether some of the triggering event occurred outside the policy period, and regardless of whether the loss spans uninsured periods. This “all sums” approach stands in stark contrast to the “pro rata allocation” approach, under which an insurance company is only responsible for that portion of damages that can be traced to the policy period.

The *Plastics Engineering Company v. Liberty Mutual Insurance Company* case required the Wisconsin state court to decide questions of law certified by the Seventh Circuit. The parties’ underlying insurance coverage dispute was filed in September 2004 in the Eastern District of Wisconsin. The plaintiff, Plastics Engineering Company (“Plenco”), sold products containing asbestos until approximately 1983, and is currently involved in asbestos-related litigation. It sought indemnity and defense from its insurer for the underlying litigation. From February 9, 1968 through January 1, 1989, Liberty Mutual Insurance Company (“Liberty Mutual”) issued Plenco primary general liability insurance policies. Between May 8, 1970 and January 1, 1984 as well as January 1, 1986 through January 1, 1988, Liberty Mutual also issued Plenco first layer excess liability policies. Those policies contained no asbestos exclusion. Based on these policies, through December 2005, Liberty Mutual paid approximately \$14.3 million in asbestos indemnity and defense costs for Plenco.

After Liberty Mutual indicated that it intended to stop providing a full defense and complete indemnity, Plenco filed suit against Liberty Mutual, seeking a declaratory judgment regarding Liberty Mutual’s duty to indemnify and defend Plenco in the asbestos-related litigation. In a counterclaim, Liberty Mutual sought a declaratory judgment limiting these responsibilities. Deciding cross-motions for summary judgment, the Eastern District of Wisconsin ruled, among other things, that Liberty Mutual must pay all sums resulting from a covered occurrence and is not entitled to pro rata allocation of its responsibility to indemnify and defend Plenco. On appeal, the Seventh Circuit determined that the question was unresolved under Wisconsin law and therefore certified the questions to the Wisconsin Supreme Court.

Acknowledging that courts have disagreed on whether to adopt the pro rata or the all sums approach, the Wisconsin Supreme Court analyzed the policy language at issue. Beginning with the question of indemnity, the court noted that the Liberty Mutual policy contemplated that an occurrence might be a long-lasting event. Despite this, the policy did not expressly limit the insurer’s obligation to a pro rata share. Policy language that might support the pro rata approach was ambiguous and, thus, construed against the insurer. The court also found that if coverage exists, the insurer must defend the entire suit. Ultimately, then, the court “conclude[d] that once this policy is triggered, Liberty Mutual must fully defend the lawsuit in its entirety and that under its policy, Liberty Mutual is responsible for ‘all sums,’ up to policy limits, whether the compensation is for damage that occurs ‘partly before and partly within the policy period.’”

Plastics v. Liberty Mutual also answered two other certified questions. The court held that each person's injury from exposure to asbestos results from continued and repeated exposure to asbestos-containing products. Each person's injury thus constitutes a single, separate occurrence under the Liberty Mutual policies. In addition, the court found that Wisconsin statute does not prohibit the non-cumulation provisions in Liberty Mutual policies, which limit an individual's recovery.

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