

WISCONSIN SUPREME COURT RULES ON NUMBER OF OCCURRENCES, ALLOCATION

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Answering questions certified by the U.S. Court of Appeals for the 7th Circuit, the Wisconsin Supreme Court has recently issued an opinion addressing the issues of number of occurrences and allocation. *Plastics Engineering Company v. Liberty Mutual Insurance Company*, 2009 WI 13, 759 N.W.2d 613 (2009). The court held that each claimants' repeated exposure to asbestos-containing products is a separate occurrence. The court also rejected a pro-rata allocation, holding that an insurer must fully defend the lawsuit in its entirety and pay for all sums, subject to the policy limits, that the insured is obligated to pay because of asbestos-related injury.

From approximately 1950 until 1983, Plastics Engineering Company ("Plenco") manufactured and sold certain compounds that incorporated asbestos. Plenco has been named in numerous lawsuits alleging bodily injury or wrongful death allegedly related to exposure to Plenco's asbestos-containing products. The Court noted that the claimants' exposures allegedly occurred at different times and at different locations.

Liberty Mutual issued various primary and umbrella policies to Plenco. The primary policies were in effect from February 9, 1968 through January 1, 1989. The Liberty Mutual umbrella policies were in effect from May 8, 1970, through January 1, 1984, and January 1, 1986, through January 1, 1988. Primary policies beginning January 1, 1989, and excess policies beginning January 1, 1988, contained asbestos exclusions. It appears that Plenco had no insurance coverage for product liability prior to 1968.

Plenco filed an action in the United States District Court for the Eastern District of Wisconsin seeking to resolve disputes regarding Liberty Mutual's obligations with respect to the asbestos claims. The first dispute related to the number of occurrences. Plenco asserted that each person exposed to asbestos-containing products constituted a separate occurrence, while Liberty Mutual argued that all of the asbestos claims arose out of one occurrence. The second issue related to allocation. Liberty Mutual argued that it was only responsible for its pro rata share of Plenco's liability for asbestos-related injuries. Plenco argued that if any Liberty Mutual policy was triggered by an asbestos claim, then Liberty Mutual would be responsible for the entire claim up to its policy limits regardless of whether uninsured policy periods were also triggered. The district court ruled in favor of Plenco on

both of these issues and Liberty Mutual appealed to the 7th Circuit. The 7th Circuit certified certain questions to the Wisconsin Supreme Court.

In addressing number of occurrences, the Wisconsin Supreme Court first addressed what constitutes an occurrence under the policy. The policy defines the term “Occurrence” as an “accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage, neither expected nor intended from the standpoint of the insured.” The court noted that the claimants were allegedly injured by continuous or repeated exposure to asbestos fibers from Plenco’s products. Without exposure, no bodily injury could take place. The court concluded that exposure to asbestos falls within an exposure to conditions, as referenced in the policy.

Liberty Mutual argued that it was the manufacture and sale of asbestos-containing products without warning that constitutes an occurrence. In support, Liberty cited language in the limits of liability provision, providing that all bodily injury and property damage arising out of continuous or repeated exposure to substantially the same general conditions shall be considered as arising out of one occurrence. The court disagreed. It held that the limits of liability provision functioned to limit an individual claimant’s repeated and continuous exposure to asbestos-containing products as being just one occurrence.

Turning to the number of occurrences, the court first noted that Wisconsin has adopted the “cause theory” to determine how many occurrences have taken place. Under the cause theory, where a single, uninterrupted cause results in all of the injuries and damage, there is only one occurrence. If the cause is interrupted or replaced by another cause, the chain of causation is broken and there has been more than one occurrence. The court concluded that, in this case, each individual claimants’ injuries stemmed from the continuous and repeated exposure to asbestos-containing products. Thus, under the policy language and the cause theory, the court held that each claimants’ repeated exposure was one occurrence.

The court next addressed the issue of allocation. Plenco argued that Liberty Mutual must fully defend the lawsuits and indemnify all sums, up to the policy limits, for any claim that triggers its policy. Liberty Mutual argued that it need not defend or indemnify for that portion of any injury that takes place outside of the policy period. Liberty argued that it would only be responsible for its pro rata share of the damages, based upon the years that it provided coverage relative to the years where there was no coverage.

The court began by noting that Wisconsin has adopted a “continuous trigger” theory in determining which policies are triggered by a claim. The court further noted that, once a policy is triggered, the policy requires Liberty Mutual to pay on behalf of the insured all sums, which the insured shall become legally obligated to pay as damages because of bodily injury caused by an occurrence. The court stated that Liberty Mutual’s policy contained no language that limits its obligation to paying only a pro rata share of the damages. In fact, the policy obligates Liberty Mutual to pay for injuries that occurs partly before and partly within the policy. The court further stated that, given the definition of occurrence which includes “continuous or repeated exposure”, Liberty Mutual contemplated a long-lasting bodily occurrence that could give rise to bodily injury over an extended period of time, but failed to specifically include a pro rata clause. Liberty Mutual argued that the policy only required it to pay for “bodily injury”, which is defined as bodily injury which “occurs during the policy period.” Liberty Mutual argued that bodily injury outside of the policy period was not covered. However, the court stated that bodily injury during the policy is what triggers the policy. The definition of “bodily injury” is not a limitation of liability.

The Wisconsin Supreme Court ultimately ruled that each claimant suffering bodily injury as a result of exposure to asbestos products constitutes a separate occurrence. In addition, any policy that is triggered by an asbestos claim is responsible for paying all sums that the insured is legally obligated to pay as a result of that claim. The matter was subsequently sent back to the United States Court of Appeals for the 7th Circuit. The 7th Circuit entered an unpublished order affirming the ruling of the trial court on the basis of the Wisconsin Supreme Court's decision.

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