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Indiana Supreme Court Hears Oral Argument On Significant Allocation Issue

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Does an insurance carrier have to pay 100 percent of a settlement or judgment resolving a latent injury claim, or can it get away with paying just a fraction of the total cost? That is the issue currently under consideration by the Indiana Supreme Court.

On April 2, 2015, in *Thomson, Inc. v. Ins. Co. of N. Am.*, Case No. 49A05-1109-PL-470, the Indiana Supreme Court heard oral argument on an oft-disputed issue between carriers and policyholders over how indemnity costs are to be allocated in long-tail lawsuits alleging latent injuries incurred over numerous years or decades (for example, environmental or toxic tort suits). The outcome of this dispute could have a profound impact on the scope of the coverage available to policyholders for these types of long-tail liabilities, and could result in the policyholder being required to pay a significant portion of those otherwise-insured liabilities. It appeared that this issue had been settled nearly 15 years ago by the Indiana Supreme Court's opinion in *Allstate Ins. Co. v. Dana Corp.*, 759 N.E.2d 1049 (Ind. 2001).

In *Dana*, the Court held that each carrier that insured a policyholder during the entire latent injury period was responsible for the entire liability (known as "joint and several" allocation), based on standard language in CGL policies in the mid-1980s and earlier, which promised to pay "all sums" the policyholder becomes obligated to pay as covered damages. The Indiana Supreme Court rejected the carriers' argument that each carrier was responsible only for the

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portion of the liability allocable to that carrier's policy period (known as "pro rata" allocation). Carriers are fighting to avoid that settled precedent, however. They have asserted that the change of one word in the coverage promise in the mid-1980s – a change from a promise to pay "all" sums to a promise to pay "those" sums – means that decades of settled law should be ignored.

In *Thomson*, the issue the Indiana Supreme Court is considering is whether the change from "all sums" to "those sums" supports continued application of joint and several allocation, or compels application of pro rata allocation. The differences in the two approaches are stark: Under the joint and several approach, the policyholder may recover the entirety of the liability from any or all of its carriers, without itself having to contribute to the liability for self-insured or uninsured periods, or for older periods where there is no evidence of insurance. Under the pro rata approach, however, the policyholder could be responsible for the percentage of liability allocable to such self-insured or uninsured periods, with each carrier responsible only for the percentage of liability allocable to its own policy period. The Indiana Supreme Court is considering whether to accept transfer of the case. If the Court accepts transfer and issues an opinion, it could have a significant impact on the scope of coverage available for long-tail claims under approximately the last 30 years of CGL policies in Indiana.

Policyholders in states that have not yet decided this issue likewise can anticipate that their carriers will try to avoid settled law and assert that a single word change allows them to severely restrict the coverage they must provide under their policies. We will keep an eye on this one for you.