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## **WISCONSIN SUPREME COURT ADOPTS ALL SUMS ALLOCATION AND FINDS MULTIPLE OCCURENCES IN ASBESTOS COVERAGE CASE**

*By Jerold Oshinsky, Jennifer A. Brennan and Matthew T. Carluzzo*

Holders of commercial general liability (“CGL”) insurance policies – particularly those facing “long-tail” liabilities such as asbestos or environmental contamination – achieved a major triumph in Wisconsin last week. The Wisconsin Supreme Court held that an “all sums” allocation, as opposed to a “pro rata” approach, should be applied to asbestos bodily injury claims to require an insurer to fully defend and indemnify each claim up to the policy limits. *Plastics Engineering Co. v. Liberty Mutual Insurance Co.*, No. 2008AP333-CQ, 2009 WL 212079 (Wis. Jan. 29, 2009). The Court also held that each plaintiff’s exposure to an asbestos-containing product constitutes a separate “occurrence” under the policy, thereby entitling the insured to the policy’s full per-occurrence limit for each individual claim. The ruling will shape future insurance coverage disputes in Wisconsin and broaden the scope of insurance coverage available to companies dealing with product liability lawsuits and environmental cleanup. Plastics Engineering Company (“Plenco”) manufactured molding compounds that contained asbestos from approximately 1950 to 1983 and was named in hundreds of lawsuits alleging injury from asbestos exposure. Plenco sought coverage from its primary and excess insurer, Liberty Mutual Insurance Company (“Liberty Mutual”). Liberty Mutual initially paid Plenco’s asbestos liabilities under a reservation of rights, but in 2005 attempted to limit payment to what it considered its “pro rata” share of defense and indemnity costs, contending that Plenco was required to contribute its own money for periods where Liberty Mutual did not issue coverage. Liberty Mutual also argued that Plenco’s manufacture and sale of asbestos containing products constituted a single occurrence,” whereas Plenco contended that each individual’s exposure to asbestos was a separate occurrence. Plenco argued that Liberty

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Mutual's policy interpretation would reduce coverage from \$43 million to \$10 million and therefore sued Liberty Mutual in the United States District Court for the Eastern District of Wisconsin. On appeal, the Court of Appeals for the Seventh Circuit certified several coverage-related questions to the Wisconsin Supreme Court. In response to the question of whether Wisconsin courts would adopt an "all sums" or "pro rata" approach to allocate injuries that span multiple, successive policy years, the Wisconsin Supreme Court majority opinion sided with Plenco and adopted an "all sums" outcome. The Court acknowledged that Wisconsin courts have adopted a "continuous trigger" theory in cases involving exposure to substances over multiple policy periods whereby all policies in place between the dates of exposure and manifestation of injury bear responsibility. Relying on the plain language of the policy – which stated that Liberty Mutual will "pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages" – the Court held that Liberty Mutual was obligated to fully defend and to indemnify for "all sums" Plenco becomes legally obligated to pay up to the policy limits, and that Liberty Mutual was not entitled to contribution from Plenco for periods during which Plenco carried no insurance.

The Wisconsin Supreme Court also considered what constitutes an "occurrence" in an insurance policy where the alleged injuries are sustained by multiple individuals at varying geographical locations and over many years. Liberty Mutual, in a further effort to limit its coverage obligations to a single per-occurrence limit for each policy it issued, argued that Plenco's manufacture and sale of asbestos-containing products constituted a single occurrence regardless of the number of people injured. The Court held, based on the plain language of the policy's definition of "occurrence" and on Wisconsin courts' adoption of the "cause theory," that each individual's repeated and continuous exposure to asbestos constitutes a separate occurrence.

Concurring and dissenting opinions were filed, and the dispute now returns to the Seventh Circuit for final decision in consideration of the Supreme Court's rulings.