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Practice Group:

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The Ohio Supreme Court Misses a Supreme Opportunity to Comment on “All Sums”

By Kay M. Brady and Denise N. Yasinow

The long-awaited decision from the Supreme Court of Ohio in *Lincoln Electric Co. v. Travelers Casualty & Surety Co., et al.*, No. 2013-1088, will not be forthcoming. The Court would have addressed the issue of whether a policyholder’s settlement(s) with primary insurers can bind that policyholder into a particular allocation method. The case was argued before the Court on May 14, 2014, and those following the case have been awaiting a decision for months; however, the parties reached a settlement and, on December 24, 2014, the Court granted their joint motion to dismiss the appeal.

In *Lincoln Electric*, the policyholder sought a joint and several, or “all sums,” allocation of coverage under several umbrella insurance policies issued by St. Paul and Travelers. A prior settlement agreement between Lincoln Electric and St. Paul relating to St. Paul’s primary policies provided for the use of a pro rata-allocation approach. Travelers and St. Paul argued that because of the settlement agreement, Lincoln Electric forfeited its right to elect an “all sums” approach to aggregate its remaining losses and trigger excess coverage. The case had been before the Northern District of Ohio to be adjudicated under Ohio law; however, the Northern District certified the question to the Supreme Court of Ohio.

The Northern District referred the case to the high court because it perceived a conflict among courts applying Ohio law. In particular, the Northern District found conflict among the following cases: 1) *Goodyear Tire & Rubber Co. v. Aetna Casualty & Surety Co.*, 769 N.E.2d 835 (Ohio 2002); 2) *Goodrich Corp. v. Commercial Union Insurance Co.*, Nos. 23585, 23586, 2008 WL 2581579 (Ohio Ct. App. June 30, 2008); and 3) *GenCorp, Inc. v. AIU Insurance Co.*, 138 F. App’x 732 (6th Cir. 2005). In *Goodyear*, the Ohio Supreme Court adopted an “all sums” approach to allocation for long-tail property damage claims. In *Goodrich*, the Ohio Ninth District Court of Appeals allowed for “all sums” allocation even after a policyholder had settled with all of its primary insurers. However, in *GenCorp*, the Sixth Circuit, purporting to apply Ohio law, upheld the Northern District’s determination that a policyholder could forfeit its right to an “all sums” approach by settling on a pro rata basis with all its primary and umbrella insurers.

More specifically, in *GenCorp*, the policyholder sought insurance coverage for environmental property damage over multiple policy years. GenCorp settled with its primary and umbrella liability insurers and then attempted to reach its excess coverage by arguing that *Goodyear* allowed it to allocate its damages to a single policy year. The Northern District rejected GenCorp’s argument and reasoned that by settling with its primary and umbrella insurers, GenCorp chose to allocate its liability over the settled primary and umbrella policies and could not later attempt to reallocate its liability to one policy year, at least until the liability exceeds the available limits of the settled policies. The Sixth Circuit affirmed, approving of the district court’s determination “that by settling with its primary and umbrella insurers, GenCorp had made the choice to allocate its liability as broadly as possible, which meant

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that it had to demonstrate that its liabilities would exceed the cumulative limits of all the primary and umbrella policies before it could trigger the excess policies.” *Id.* at 734.

Some insurers have tried to use *GenCorp* to induce courts to stray from the Ohio Supreme Court’s pronouncement that “all sums” is the law in Ohio. A number of courts have already rejected such arguments. See, e.g., *Dana Cos., LLC v. Am. Emp’rs. Ins. Co.*, No. 49D14-1012-PL-053501, at *18-*19 (Ind. Super. Ct. May 8, 2013) (Slip op.) (“*GenCorp*, at best, is an outlier opinion that wrongly interprets the meaning of Ohio’s ‘all sums’ scope of coverage. To the extent *GenCorp* is inconsistent with that settled meaning, this Court holds that it misstates Ohio law and is of no persuasive value as to the law in Indiana.”); *Westport Ins. Corp. v. Appleton Papers Inc.*, 787 N.W.2d 894, 907 (Wis. Ct. App. 2010) (court rejected the insurers’ argument based on *Gencorp*, stating it “d[id] not find that case useful”).

In *Lincoln Electric*, the Ohio Supreme Court was poised to remedy the mischief caused by *GenCorp*. While the settlement and dismissal of the case has deprived the Court of rendering such a decision, Ohio is very much an “all sums” jurisdiction where *Goodyear* is the law of the land.

Authors:

Kay M. Brady

kay.brady@klgates.com

+1.412.355.6235

Denise N. Yasinow

denise.yasinow@klgates.com

+1.973.848.4036

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