Ohio Supreme Court Case May Impact Significantly Coverage Case Settlements

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Ohio long has permitted wide latitude to parties in structuring and timing settlements of their insurance coverage cases, and this flexibility has served well the interests of policyholders, insurers, and Ohio's courts. Currently before the Supreme Court of Ohio, however, is a case that may as a practical matter alter significantly the abilities of parties in coverage cases to settle in ways that best suit their individual interests and best serve the state's interest in the orderly administration of justice. The decision in that case, *Lincoln Electric Company v. Travelers Casualty and Surety Company, et al.*, Supreme Court of Ohio Case No. 2013-1088, is one that Ohio's insurance coverage practitioners should await with great interest.

In *Lincoln Electric*, the Supreme Court of Ohio accepted for review the following question certified by the United States District Court for the Northern District of Ohio: "May an insured who has accrued indemnity and defense costs arising from progressive injuries, and who settles resultant claims against primary insurer(s) on a pro rata allocation basis among various primary insurance policies, employ an 'all sums' method to aggregate unreimbursed losses and thereby reach the attachment point(s) of one or more excess insurance policies?"

The *Lincoln Electric* case involves a policyholder with long-tail bodily injury coverage claims arising from alleged exposure by persons to the policyholder's welding products. The underlying welding product claims span many policy years. The policyholder settled with its primary insurer for less than the total limits of all policies issued by that insurer for all implicated years, and the policyholder now seeks to recover from its excess insurers for unreimbursed portions of these claims that reach and penetrate into the policyholder's excess policies.

The certified question is a complex one, which implicates four long-standing doctrines of Ohio insurance coverage law: (1) Ohio's law of "trigger," which provides that all policies on the risk from the date of an underlying claimant's first exposure to allegedly harmful substances through the date of manifestation of injury or disease are implicated by the claim (see, *e.g.*, *Goodyear Tire & Rubber Co. v. Aetna Cas. & Sur. Co.*, 95 Ohio St.3d 512, 2002-Ohio-2842, 769 N.E.2d 835); (2) Ohio's law of "allocation," which provides that the policyholder may allocate its insurance claim to any triggered policy, each of which provides coverage up to its stated limits for "all sums" the policyholder is legally obligated to pay (see, *e.g.*, *Pennsylvania Gen. Ins. Co. v. Park-Ohio Industries*, 126 Ohio St.3d 98, 2010-Ohio-2745, 930 N.E.2d 800); (3) Ohio's law regarding "drop-down" liability, which provides that an excess insurer is not required to "drop down" to pay claims that do not reach its stated attachment point but must pay covered claims that reach its attachment point, regardless of whether a directly underlying insurer has paid its full limits (see, *e.g.*, *Wurth v. Ideal Mut. Ins. Co.*, 34 Ohio App.3d 325, 518 N.E.2d 607 (12th Dist.1987)); and (4) Ohio's law of contribution, which provides that a selected paying insurer has certain equitable rights of contribution against other triggered insurers (see, *e.g.*, *Goodyear*, *supra*).

In regard to complex coverage cases, such as environmental or asbestos cases, these four doctrines have operated in concert to permit policyholders to settle with their insurers at various times before or during coverage actions, often on varying bases that have suited the particular circumstances of the settling parties, without effecting a forfeiture of any coverage by the policyholders and without causing any undue disadvantage to any insurers, regardless of whether they settle. Because complex coverage cases typically would take many years to proceed through trial and subsequent appeals, typically causing the parties considerable expense and costing the courts considerable resources, the beneficial effects of these doctrines, which permit and promote settlements of such cases, have been inestimable.

Correspondingly, the practical and public policy implications of the Supreme Court of Ohio's consideration of the certified question are potentially profound. The insurers in the case have contended, in effect, that by settling with its primary insurer, which issued policies spanning many years, the policyholder has elected to allocate its claim horizontally among multiple triggered years, which is akin to a pro-rata allocation approach and contrary to Ohio's "all sums" law, which was articulated by the Supreme Court of Ohio in *Goodyear* and recently re-affirmed by that Court in *Park-Ohio*. In the view of the insurers in *Lincoln Electric*, the policyholder has, in effect, forfeited its right to avail itself of Ohio's "all sums" law and has, instead, relegated itself to recover from the excess insurers only those amounts that would be available to the policyholder under a *pro rata* allocation approach.

Depending upon the facts of the particular case, such a rule of law could significantly diminish or even eliminate a policyholder's potential recovery under excess policies. Primary insurers, like all other litigants, typically settle only if there is a benefit to them in doing so. That benefit usually includes a discount from the cumulative primary policy limits in all triggered years. Until now, policyholders who settle with

their primary insurers for an amount less than a targeted overlying excess insurer's attachment point become self-insured for the gap and have to absorb as a "self-insured" amount the differential between the settlement payment and the excess insurer's attachment point. If this principle is expanded, as Lincoln Electric's insurers advocate, so that a policyholder settling a claim triggering multiple primary policies is required to absorb as a self-insured amount the difference between the settlement payment and the cumulative limits of all settled primary policies — instead of having to absorb as under current law only the difference between the settlement amount and the attachment point of a particular targeted excess insurer — then policyholders that settle with primary insurers will risk *de facto* forfeiture of excess coverage. In cases in which policyholders have many years of primary coverage and primary insurers that are unwilling to settle for amounts close to the cumulative limits of all of their policies — a common situation — policyholders effectively will be precluded from settling with their primary insurers.

The permutations, variations, and nuances of this public policy conundrum are numerous, particularly in regard to large long-tail claims and complex coverage programs that span decades and provide coverage reaching into the hundreds of millions of dollars per year. Depending upon the Supreme Court of Ohio's decision in *Lincoln Electric*, the methods employed by policyholders and insurers alike and embraced by courts throughout Ohio to manage and resolve complex insurance coverage cases may have to change considerably. The default outcome of a trial against all insurers that proceeds for weeks or months following years of litigation, which is a type of trial previously seen only rarely in Ohio, may become the standard course for such cases.

Briefing in the *Lincoln Electric* case is scheduled to conclude in the first quarter of 2014, which makes possible and perhaps likely a decision being issued in the case before the end of the year. That decision may determine whether parties in complex coverage cases may continue to settle such cases as parties traditionally have done, with the policyholder settling with each insurer at the time and on the basis that best suits that insurer, or whether the parties may have no effective choice in many cases but to refrain from settling and instead proceed through trial.

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Both regularly represent policyholders in complex insurance recovery matters, and both have been certified by the Ohio State Bar Association as Specialists in Insurance Coverage Law. Mr. Rose and Ms. Marks represent more than 20 trade organizations and companies which have appeared as amici curiae in support of the policyholder in the Lincoln Electric case.