



Important Summary Judgment Issued in Favor of Thomson Inc. Related to Personal Injury Coverage: *Thomson, Inc. v. XL Ins. Am., Inc.*, 49D07-0807-PL-30746

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The Marion Superior Court has granted an important summary judgment in favor of policyholder Thomson Inc. and against Thomson's insurer, XL. The decision applies "personal injury" coverage commonly found in commercial general liability policies to provide over \$10 million in defense and indemnity coverage for environmental remediation. It also holds that the difference between the language in the "personal injury" coverage section and that in the "bodily injury" and "property damage" coverage means that the personal injury coverage does not mandate so-called "pro rata" allocation of indemnity costs. Instead, policyholders can recover *all* of their indemnity costs – up to policy limits – if any of the personal injury for which the policyholder is liable occurred during the policy period.

Thomson's subsidiary, Thomson Consumer Electronics Television Taiwan Limited ("TCETVT") owned a factory in Taiwan from about 1970 until 1992. In the mid-1990s, Taiwan authorities discovered the presence of chlorinated solvents in the soil and groundwater at the former factory site. In 2000, the Taiwan legislature passed the Soil and Groundwater Remediation Act, which imposed CERCLA-style retroactive liability on former owners such as TCETVT. In 2002, Taiwan authorities required TCETVT to remediate the groundwater at its former factory site. TCETVT complied with the 2002 Order, and turned to its liability insurers to defend and indemnify it.

TCETVT's insurers denied coverage. After years of litigation, during which the Indiana Court of Appeals rejected XL's assertion that the contamination was a "known loss" (*Thomson Inc. v. XL Ins. Am., Inc.*, 22 N.E.3d 809 (Ind. Ct. App. 2014) ("*Thomson I*"), TCETVT requested that the trial court hold that XL was liable for all post-notice defense and indemnity costs. TCETVT requested coverage under the "personal injury" provision in a single XL policy.

XL claimed that personal injury coverage did not apply. The court rejected this claim, pointing to numerous Indiana trial and appellate level decisions – many of them litigated by PSRB – holding that personal injury coverage *does* apply to losses caused by environmental harm. One such case, *Thomson Inc. v. Ins. Co.*, 11 N.E.3d 982, 1012-13 (Ind. Ct. App. 2014) ("*Thomson I*"), involved the very same XL policy at issue in this case.

XL also claimed that, even if personal injury coverage did apply, the holding in *Thomson I* that the language of the bodily injury coverage in XL's policies required that the personal injury indemnity coverage be pro rated. Under a pro rata system, only a portion of the indemnity losses suffered by TCETVT would be covered under any one policy. The court rejected this claim as well. It based its decision on the fact that the policy language the *Thomson I* court relied on to impose pro rata allocation under the bodily injury and property damage coverage did not appear in the personal injury coverage section. First, the court noted that "unless policy language expressly mandates pro rata allocation, joint and several allocation will prevail, where the policyholder can choose which triggered policies will indemnify it." *Allstate Ins. Co. v. Dana Corp.*, 759 N.E.2d



1049, 1057-58 (Ind. 2001)...*Eli Lilly & Co. v. Home Ins. Co.*, 653 F. Supp. 1, 10 (D.D.C. 1984).” Slip Op. at 5.

Next, the court examined the language in the two different coverage sections. It noted that *Thomson I*

[F]ocused on the bodily injury coverage’s conditions that it “applies” only if “(1) The ‘bodily injury’...is caused by an ‘occurrence’...and (2) The ‘bodily injury’...occurs during the policy period.”...In bodily injury coverage (Coverage A), *both* the wrongful act (the “occurrence”) *and* the resulting “bodily injury” must take place during the policy period

By contrast, the personal injury coverage (Coverage B) states that it applies “to ‘personal and advertising injury’ caused by an offense arising out of your business but only if the offense was committed...during the policy period.”...**The key difference is that while bodily injury is only covered to the extent both the “occurrence” and the resulting “bodily injury” take place in the policy period, personal injury is covered even if only the “offense” takes place in the policy period.**

(Slip Op. at 5-6) (*italics in original, bold added*). This difference means that the personal injury language does not clearly mandate pro rata allocation. Instead, the policyholder can allocate all of its personal injury loss to whichever policies it chooses, up to policy limits.

This is a significant victory for policyholders, particularly in long-tail claims, where the injury continues over multiple years and policy periods. Under pro rata indemnity allocation, part of the indemnity obligation is allocated over many or all of those years, even if the policyholder does not have coverage for them for some reason (such as lost policies, other claims or settlements in those other years, policies that do not cover the specific loss, or insolvent insurers). Thus, pro rata allocation can limit the available coverage, sometimes significantly. A joint and several allocation allows the policyholder to place the loss in years in which it has the most coverage. This is not unfair to the insurers, who limited their liability not by setting forth any particular allocation scheme, but by setting limits on the amount they will pay under the policy.

Thomson and TCETVT are represented in this case by George M. Plews and Sean M. Hirschten. If you have any questions, please feel free to contact them.