

WWM WINS MAJOR PRO RATA ALLOCATION RULING IN MISSOURI POLLUTION COVERAGE ACTION

BOB ARNOLD, PETER DANIELS AND GARRY GLASS SECURE PRO RATA ALLOCATION IN MISSOURI POLLUTION COVERAGE ACTION

Granting a motion filed by Walker Wilcox Matousek, Missouri Circuit Judge Thea Sherry has ruled that pollution losses should be allocated *pro rata* under Illinois and Missouri law. The case involved three separate lines of insurance issued to predecessors of policyholder, Mallinckrodt. Mallinckrodt sought insurance under all of these policies for environmental claims at over twenty different sites throughout the United States.

The court began its analysis with choice of law, observing that it was unnecessary to decide which state's law applied if there was no actual conflict among the possible choices. The parties agreed that Missouri and Illinois were potentially applicable, so the court examined the laws of those states. Turning to Illinois first, the court focused on two cases: *Outboard Marine Corp. v. Liberty Mutual Ins. Co.*, 283 Ill.App.3d 630 (2nd Dist. 1996) and *Zurich v. Raymark Indus, Inc.*, 514 N.E.2d 150 (Ill. 1987).

Distinguishing *Zurich*, the court noted that the coverage triggers for the asbestos claims at issue were not necessarily continuing. Unlike the present case, *Zurich* did not involve continuing damages incapable of temporal definition. Instead, the court found that the present case was substantially similar to *Outboard Marine*, which applied *pro rata* allocation to environmental losses.

For these reasons, the court found that Illinois would apply *pro rata* allocation to the present case.

Turning to Missouri law, the court indicated that Missouri cases have not considered this issue in this precise context. It then addressed three cases deemed most applicable, *Continental Casualty Co. v. Medical Protective Co.*, 859 S.W.2d 789 (1993); *Nationwide Insurance Co. v. Central Missouri Electric Cooperative, Inc.*, 278 F.3d 742 (2001) and *Monsanto Co. v. C.E. Heath Compensation and Liability Ins. Co.*, 652 A.2d 30 (1994) ("CMEC"). In *Continental Casualty*, the Missouri Supreme Court applied *pro rata* allocation to dental claims. Later, the Eighth Circuit followed *Continental Casualty* to allocate long term damage to a dairy operation in *CMEC*.

On the other hand, the Delaware Supreme Court reached the opposite conclusion in *Monsanto*. However, the court noted that no court, including *Nationwide*, has cited to or relied on *Monsanto*. Accordingly, the court elected to follow the "better reasoning" of the Missouri Supreme Court and the Eighth Circuit in *Continental Casualty* and *CMEC*.

The motion was argued by Bob Arnold on behalf of London Market Insurers. Bob Arnold, Peter Daniels and Garry Glass collaborated on the brief. A copy of the court's ruling is attached here (PDF).