

ALERT

DISPUTES / INSURANCE LITIGATION

January 2002 Number 1

Indiana Supreme Court Issues Opinion In *Allstate Insurance Company v. Dana Corporation*

In a closely-watched coverage action, the Indiana Supreme Court has made six rulings likely to substantially impact on insurers. The Court held that:

- (i) environmental contamination of groundwater is not “property damage” under policies that define that term to exclude property owned by the policyholder, because the policyholder owned the groundwater;
- (ii) the “owned property exclusion” is ambiguous and does not bar coverage for the costs of remediating contaminated groundwater on a policyholder’s land;
- (iii) “personal injury” coverage does not apply to the environmental claims at issue;
- (iv) all policies in force during the time property damage takes place are triggered;
- (v) a policyholder may assign all of its loss to any triggered policy under the “all sums” language; and
- (vi) an insurer may be held liable for property damage that took place after its policy period, so long as a covered “occurrence” took place in its policy period.

Allstate Ins. Co. v. Dana Corp., 2001 WL 1641236 (Ind., filed 12/20/01).

The court also ruled on a number of additional issues that are fact-sensitive and, as discussed below, will have limited application beyond the context of the *Dana* litigation.

Background

Dana Corporation, an auto parts manufacturer, sought coverage from its primary and excess insurance carriers for environmental liabilities at 63 of its facilities, located in 19 states. In a previous ruling by the Indiana Court of Appeals, it was determined that Indiana law governed the contracts for insurance between Dana and its insurers. *See, Hartford Acc. & Indem. Co. v. Dana Corp.*, 690 N.E.2d 285, 288 (Ind. Ct. App. 1997). After that ruling, Dana settled with all of its insurers, except Allstate.

Dana subsequently obtained a judgment of approximately \$4.5 million against Allstate as to one of the sites at issue, the Old Forge Site. Although liability at the remaining sites remained adjudicated, the trial court certified the \$4.5 million judgment for appeal to the Court of Appeals, which reversed in part and affirmed in part. *See, Allstate Ins. Co. v. Dana Corp.*, 737 N.E.2d 1177 (Ind. Ct. App. 2000). The Indiana Supreme Court in turn affirmed in part and reversed in part the Court of Appeals decision.

The Supreme Court's Opinion

• Liability For Damage To Groundwater On Owned Property

Three of the five Allstate contracts defined “property damage” as “loss of or direct damage to or destruction of tangible property (*other than property owned by an Insured*) which results in an Occurrence during the policy period.” *Dana*, 2001 WL 1641235 at *2 (emphasis added). The court held that if ground water on the policyholder’s land is owned by the policyholder, then the three policies with the quoted language do not provide coverage for environmental clean up costs. *Id.* at *3. The court then reaffirmed a prior Supreme Court decision, reversed an earlier Court of Appeals decision, and held that under Indiana law, groundwater is owned by the landowner. *Id.* Accordingly, to the extent that the policyholder sought coverage for the cost of remediating ground water on its own property, the policies did not provide coverage because “property owned by the Insured” was excluded from the definition of “property damage.”

The court further held, however, that the “necessary corollary” to that ruling is that if groundwater has percolated beyond the confines of the policyholder’s property, it no longer belongs to the policyholder. The policies would provide coverage to the extent that off-site migration caused damage to property, including groundwater, not owned by the policyholder. *Id.*

Two of the five policies at issue did not exclude property owned by Dana from the definition of “property damage.” *Id.* at *3-4. Those policies did, however, contain an exclusion for “property damage to ... property owned by any insured.” *Id.* at *3. Allstate contended that the exclusion barred coverage for costs imposed on Dana to clean up contamination at its owned sites. The Supreme Court disagreed.

Relying on a federal district court opinion from Idaho, the court distinguished coverage for damage to the policyholder’s property from coverage for the policyholder’s liability to third parties resulting from that damage. *Id.* at *3. According to the court, Dana was not asserting a claim intended to restore its land for Dana’s benefit, but rather the claim was based upon Dana’s liability to a governmental entity for the clean up. The court thus reversed the trial court’s ruling as to these two policies, and granted Dana partial summary judgment holding that the “owned property” exclusion did not bar coverage.

• Personal Injury Coverage

The trial court had held that the terms “wrongful eviction” and “invasion of rights of privacy” were ambiguous, and that Dana’s environmental liabilities fell within those categories of “personal injury” coverage. *Id.* at *4. The Court of Appeals reversed the trial court’s determination that Dana’s liabilities were within the “wrongful eviction” prong of the personal injury coverage, but affirmed the trial court’s determination that these liabilities were within the “invasion of rights of privacy” prong.

The Supreme Court affirmed the Court of Appeals, holding that “eviction depends upon a relationship between the evictor and evictee of landlord and tenant, and requires a dispossession of property.” *Id.* The personal injury coverage for “wrongful eviction” did not, therefore, extend to environmental clean up costs, except where a tenant was compelled to vacate property because of environmental property damage. Here, there was no such showing, and accordingly there was no coverage under the “wrongful eviction” provision of the personal injury coverage.

The Supreme Court reversed the Court of Appeals’ conclusion that environmental damage fell within the coverage for “invasion of rights of privacy.” The Court of

Appeals found that term ambiguous, construed it against the insurer and found that the term provided coverage. The Supreme Court agreed that the term was “shadowy,” but held that “for ambiguity to confer coverage, the covered item must be somewhere in within the circle of ambiguity.” *Id.* at *5. The court then held that “even the outermost reaches of the term’s penumbra do not embrace a chemical transgression of the sort giving rise to Dana’s environmental liability.” *Id.*

• Coverage For “All Sums Caused By An Occurrence”

Allstate contended that it was obligated to indemnify Dana only for that portion of damages incurred in Allstate’s policy periods, and requested that the court impose a “proportional allocation scheme” among all triggered policies. *Id.* at *6. The court rejected Allstate’s contentions. The Allstate contracts provide that Allstate would pay “all sums which [Dana] shall be obligated to pay by reason of the liability ... imposed upon [Dana] by law ... for damages because of [personal injury or property damage] ... caused by an OCCURRENCE” The contracts defined “occurrence,” for purposes of liability for personal injury or property damage, as “an accident, event or happening including continuous or repeated exposure to conditions which results, during the policy period, in Personal Injury [or] Property Damage ... neither expected nor intended from the standpoint of the Insured.” The Court held that this language did not “limit[] Allstate’s responsibility to indemnification for liability derived solely for that portion of damages taking place within the policy period.” *Id.* Rather, the Court found, “once an accident or event resulting in Dana’s liability — an occurrence — takes place within the policy period, Allstate must indemnify Dana for ‘all sums’ that Dana must pay as a result of that occurrence, subject to the policy limits.” The court thus agreed with the Court of Appeals that whether or not the damaging effects of an occurrence continue beyond the end of the policy period,

if coverage is triggered by an occurrence, it is triggered for “all sums” related to that occurrence. *Id.*

• Aggregate Limits Of Primary Policies

Dana and Allstate also disputed whether the primary policies underlying Allstate’s excess policies contained aggregate limits of liability applicable to the property damage claims at issue. The primary policies contained aggregate limits for “property damage arising out of premises or operations rated on a remuneration basis.” *Id.* at *7. The trial court found that there were no aggregate limits, and the Court of Appeals affirmed. The Supreme Court reversed, finding that whether the policies were “rated on a remuneration basis” presented a genuine issue of fact, which precluded summary judgment.

• Trigger Of Coverage

Allstate also argued that the trial court erred in concluding that only one policy, the one covering the 1978 policy period, was triggered by the contamination at the Old Forge Site. The undisputed evidence established that contamination at that site resulted from the dumping of waste into a pit in 1978. Complaints about the site began early in 1979, and investigations revealed that most of the drums that were buried in the pits had broken open. Allstate’s expert testified that contamination continued into the 1980s. Based upon this evidence, Allstate argued that the 1979 policies were triggered.

The Supreme Court affirmed the Court of Appeals’ reversal of the trial court’s award of summary judgment to Dana on the question of whether the 1979 policies were triggered. The court concluded that Allstate’s evidence regarding the dates of disposal and property damage had created a genuine issue of fact precluding summary judgment for Dana. *Id.* at *9. In so ruling, the court held that “if contamination caused a covered occurrence in the

1978 policy period, and continued causing damage in the 1979 policy period, the contamination would trigger both policies.” *Id.* at *8. In so ruling, however, the court also held that Dana may elect to seek indemnity from any or all triggered policies. *Id.* at *9.

•Exhaustion of Underlying Limits For The Old Forge Site

Allstate and Dana stipulated that the damages at sites other than the Old Forge Site “are properly described as both personal injury and property damage losses.” *Id.* at *10.¹ Based in part on that stipulation, Allstate argued that Dana was required to exhaust the underlying limits for both personal injury and property damage before Allstate’s obligations would attach. In light of that unusual stipulation, the Supreme Court agreed with Allstate’s contentions that Allstate’s policies did not attach until both the property damage and personal injury limits in the underlying policies were exhausted. *Id.* at *10.

Significance

Dana is significant in a number of respects. Broadly speaking, it confirms that Indiana law is generally unfavorable for insurers. More particularly:

- The decision essentially eviscerates the “owned property” exclusion. Under *Dana*, to the extent a policyholder is seeking to recover costs incurred in complying with a government mandated environmental clean up of its own property, the “owned property” exclusion will not bar coverage.

- The decision imposes a version of joint and several liability on insurers, pursuant to the “all sums” language. Under this approach, insurers with contract language similar to Allstates may be liable for damage that took place outside of their policy periods. The court’s opinion does directly not address whether or to what extent insurers may recover from one another in a contribution action.

If you have any questions regarding this *Alert* or any other insurance coverage-related matter, please contact:

Walter J. Andrews

walter.andrews@shawpittman.com - 703.770.7642

Lon A. Berk

lon.berk@shawpittman.com - 703.770.7669

Paul E. Janaskie - 703.770.7654

paul.janaskie@shawpittman.com

Frank Winston, Jr.

frank.winston@shawpittman.com - 703.770.7672

John P. Malloy assisted with the preparation of this *Alert*.

1. Allstate entered into that stipulation subject to a reservation of its right to appeal the question of whether personal injury coverage applied. *Id.* at * 10, n.9.