

Supreme Court of Utah Addresses Allocation of Defense Costs Among Insurers

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In a question certified by the United States Court of Appeals for the Tenth Circuit, the Supreme Court of Utah in *The Ohio Casualty Ins. Co. v. Unigard Ins. Co.*, 2102 Utah LEXIS 1 (Utah Jan. 6, 2012) recently addressed the issue of whether allocation among successive insurers is determined by the insurers' respective "other insurance" clauses or by a time-on-the-risk methodology.

The insured, Cloud Nine, had general liability coverage from Ohio Casualty for a one-year period, and then from Unigard for the next three years. Cloud Nine was sued for an alleged advertising injury which allegedly took place during the last three months of the Ohio Casualty policy, continued throughout the entire period of the Unigard policy, and extended into a period of time in which Cloud Nine was not insured. Ohio Casualty denied coverage and commenced a declaratory action in which Unigard eventually was a party. The Utah federal district court held that Ohio Casualty indeed had a duty to defend Cloud Nine and that defense costs must be shared equally with Unigard as a result of their policies' respective "other insurance" clauses. Ohio Casualty appealed the question of allocation to the Tenth Circuit, which in turn certified the question to the Supreme Court of Utah.

Ohio Casualty argued on appeal that pursuant to the decision by the Supreme Court of Utah in *Sharon Steel Corp v. Aetna Casualty & Surety Co.*, 931 P.2d 127 (Utah 1997), defense costs should be allocated based on a time-on-the risk methodology, and that Cloud Nine should be allocated a percentage of defense costs for its uninsured period. Unigard, on the other hand, argued that allocation should be determined by the policies' other insurance clauses, both of which stated that in the event of other insurance, the policies provide primary coverage on an equal shares basis.

The court rejected Unigard's argument, concluding that "other insurance" clauses do not apply to successive insurers, but only to concurrent insurers. As such, the court explained, the matter was governed by its prior holding in *Sharon Steel*, which applied a time-on-the-risk methodology in the context of an environmental claim, rather than an equal shares methodology. In explaining the basis for its prior holding, the court noted that such an allocation scheme "was the most equitable because it fairly related both to the time each insurer spent on the risk and the degree of risk each insurer contracted to assume." Thus, while the court agreed with Unigard that Ohio Casualty had an absolute duty to defend Cloud Nine, it noted that the "duty to defend and the apportionment of defense costs between two insurers that have an equal duty to defend are distinct issues." As such, the court concluded that defense costs should be apportioned based on time-on-the risk, subject to policy limits.

The court did, however, reject Ohio Casualty's argument that Cloud Nine should be made to participate in its own defense. The basis for the court's reasoning was that both Ohio Casualty and Unigard, pursuant to their respective policies, assumed complete control over Cloud Nine's defense. As a result, the court concluded, "it would be inequitable to apportion any defense costs to an insured who has no power to select counsel or negotiate rates and no voice in deciding whether to settle the suit." Thus, the court held that defense costs would be divided between Ohio Casualty and Unigard based on their respective times on the risk and that "the portion of defense costs attributable to

periods during which the insured lacked coverage” would be divided among the two insurers “in the same proportions.”