



Insurance Coverage **ALERT**

The California Supreme Court Upholds Continuous Trigger for Indemnity Claims and Extends the "All Sums" and "Stacking" Approach Where Continuous Property Damage Occurs During Periods of Several Successive Policies

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In *The State of California v. Continental Insurance Company*, No. S170560 (filed August 9, 2012), the Court considered complex questions of policy interpretation in connection with ongoing environmental damage and a federal court-ordered cleanup of the State of California's Stringfellow Acid Pits waste site. The site was an industrial waste disposal facility that the State designed and operated from 1956 to 1972 when it was closed after the State discovered groundwater contamination caused by the industrial wastes disposed at the site. In 1998, a federal court found the State liable for all past and future cleanup costs. Claiming that the cleanup costs could reach \$700 million, the State filed an action against its insurers who issued one or more excess commercial general liability (CGL) policies to the State between 1964 and 1976, seeking indemnification for its liability in the federal action.

The pertinent language in each policy at issue was essentially identical. Under the "Insuring Agreement," the insurers agreed "[t]o pay on behalf of the Insured all sums which the Insured shall become obligated to pay by reason of liability imposed by law...for damages...because of injury to or destruction of property, including loss of use thereof." "Occurrence" was defined as "an accident or a continuous or repeated exposure to conditions which resulted in...damage to property during the policy period..." "Ultimate net loss" meant "the amount payable in settlement of the liability of the Insured arising only from the hazards covered by this policy after making deductions for all recoveries and for other valid and collectible insurances..." All parties stipulated that the property damage took place continuously throughout the insurers' multiple consecutive policy periods from 1964 to 1976.

The trial court held that while every insurer on the risk during the period of the continuous property damage was potentially liable for the entire property damage up to its policy limits, the anti-stacking rule limited the State's recovery to only one policy period. The trial court concluded that the state had to choose a single policy period for the entire loss and that it "could recover only up to the specific single policy limit in effect at the time the loss occurred." The Court of Appeal agreed, in part, noting that each insurer whose policy was triggered was liable for the entire loss, including loss for property damage occurring outside the policy period. However, the Court of Appeal rejected the trial court's ruling that prohibited the state from stacking the total policy limits in effect for any one policy period.

The Supreme Court affirmed the Court of Appeal's ruling. The Court concluded that the "continuous injury trigger of coverage" applied to the insurers' indemnity obligations, "so long as the insurers



insured the subject property at some point in time during the loss itself." 2012 DJDAR at 11033. According to the Court, "[t]he fact that all policies were covering the risk at some point during the property loss is enough to trigger the insurers' indemnity obligation." *Id.* at 11036.

The Court further concluded that the policies obligated the insurers to pay all sums for property damage attributable to the Stringfellow site, up to their policy limits, as long as some of the continuous property damage occurred when each policy was "on the loss." *Id.* at 11037. The Court rejected the insurers' argument that a pro rata approach allocating loss to a particular policy "proportionate[ly] to the damage suffered during that policy period" should apply. Although the Court noted that the insurers' pro rata approach "would be more fair and equitable compared to the all sums allocation," the Court found itself "constrained by the language of the applicable policies here...which supports adoption of the all sums coverage principles..." *Id.* at 11037.

Finally, the Court addressed the insurers' "anti-stacking" argument. The Court defined "stacking" as the "stacking of policy limits across multiple policy periods that were on a particular risk." *Id.* at 11037. Rejecting the anti-stacking principle, the Court observed that "[t]he all-sums-with-stacking indemnity principle incorporates the *Montrose* continuous injury trigger of coverage and the *Aerojet* all sums rule, and 'effectively stacks the insurance coverage from different policy periods to form one giant 'uber-policy' with a coverage limit equal to the sum of all purchased insurance policies. Instead of treating a long-tail injury as though it occurred in one policy period, this approach treats all the triggered insurance as though it were purchased in one policy period.'" *Id.* at 11037 (citation omitted). The Court expressly noted that the "most significant caveat" to the all-sums-with-stacking indemnity allocation is that an insurer may avoid stacking by specifically including an anti-stacking provision in its policy. The Court further noted that contracting parties can write into their policies limitations on indemnity, equitable pro rata coverage allocations rules and prohibitions on stacking. *Id.* at 11038.

Practice Note

The California Supreme Court concluded that stacking of policy limits across multiple policy periods is permitted "absent anti-stacking provisions, statutes that forbid stacking, or judicial intervention." 2012 DJDAR at 11038. The Court also expressly noted that an insurer may avoid stacking by specifically including an "antistacking" provision in the policy. *Id.* at 11038. Insurers seeking to avoid the "all-sums-with-stacking" application should therefore include express anti-stacking provisions in their policies.

An example of anti-stacking language is as follows:

"If the same occurrence gives rise to personal injury, property damage or advertising injury or damage which occurs partly outside and partly within any annual period of this policy, then each occurrence limit and the applicable aggregate limit or limits of this policy shall be reduced by the amount of each payment made by any other insurer for that occurrence."

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