On January 5, 2009, the intermediate California Court of Appeal for the Fourth Appellate District issued a published decision holding that the State of California is entitled to stack policy limits over multiple policy years for the costs of cleaning up the Stringfellow Acid Pits dump site near Riverside, California. The decision substantially increased the amount of excess coverage available to pay clean-up costs, which could exceed $700 million for the cash-strapped State of California. The decision rejects and criticizes the anti-stacking ruling of the Sixth Appellate District in FMC Corp. v. Plaisted & Cos., 61 Cal.App.4th 1162 (1998), which insurers have cited for the last 10 years.

The decision also rejects the insurers’ argument, based on the underlying federal court’s finding that the State negligently delayed remediation at the Stringfellow site, that the State’s delay violated a duty to the insurers to mitigate the damage for which the State sought coverage. The site could have been remediated for less than $500,000 in 1975, but the State now estimates the cost of remediation at over $700,000,000.

The State of California decision creates a conflict between two published intermediate California Court of Appeal decisions with respect to stacking of limits, which the California Supreme Court may review after the Court of Appeal decision becomes final on February 4, 2009. Supreme Court review is discretionary. If the case is accepted for review by the Supreme Court, the Court of Appeal decision is vacated and cannot be cited as precedent. If the Supreme Court does not accept review, the Supreme Court could “de-publish” the decision, which would mean it could not be cited as precedent. If the Supreme Court does not grant review or de-publish the decision, it will become California precedent binding on the California trial courts. However, where there is a conflict between published Court of Appeal decisions, the California trial courts are free to adopt either decision.

As a practical matter, the Supreme Court will not decide the fate of the State of California decision until late March or April, 2009. If the Supreme Court grants review, the case will probably be decided by the Supreme Court in 2011.

To discuss any questions you may have regarding the opinion discussed in this Alert, or how it may apply to your particular circumstances, please contact Charlie Wheeler (cwheeler@cozen.com or 619.685.1754) or John L. Williams (jlwilliams@cozen.com or 206.224.1288).