

ALERT

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CALIFORNIA SUPREME COURT HOLDS: RELEASE "FROM" RATHER THAN "TO" DUMP SITE IS RELEVANT RELEASE FOR PURPOSES OF THE "SUDDEN AND ACCIDENTAL" POLLUTION EXCLUSION;

*Reaffirms Concurrent Causation Rule; and
Gives Insurer Burden of Proof on Indivisible Property Damage*

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In *State of California v. Allstate Ins. Co.*, ___ Cal.4th ___ (March 9, 2009), the California Supreme Court made three holdings that have a major impact on environmental coverage and liability coverage in general. The Court explicitly disapproved the Court of Appeal's decision in *Golden Eagle Refinery Co. v. Associated Intern'l Ins. Co.*, 85 Cal. App. 4th 1300 (2001) on burden of proof issues and limited the scope of the Court of Appeal's decision in *Standun, Inc. v. Fireman's Fund Ins. Co.*, 62 Cal. App. 4th 882 (1998). The Court also reaffirmed that the "concurrent causation" rule it adopted in *State Farm Mut. Auto Ins. Co. v. Partridge*, 10 Cal. 3d 94 (1973). The Court's opinion can be found at <http://www.courtinfo.ca.gov/opinions/documents/S149988.PDF>.

In this case, the underlying action resulted in a finding that the State of California was liable for remediation costs potentially exceeding \$500 million caused by discharge of hazardous wastes from the Stringfellow Acid Pits near Riverside, California. The Stringfellow Acid Pits was a designated hazardous waste site created by the State in the 1950's. More than 30 million gallons of hazardous materials were deposited there during its nearly 20-year operation. As early as 1960, the State was aware that chemicals from the site were seeping into the groundwater. There were also two overflows into a drainage ditch during floods in 1969 and 1978 which spread contamination into the nearby town of Glen Avon. The State additionally made several "controlled discharges" from the site. *Id.* at 4. The State sought coverage from four excess insurers. All of the policies at issue contained "sudden and accidental" exceptions to the pollution exclusions. Each of the insurers denied any obligation to indemnify the State for its liability.

Three main issues were before the California Supreme Court. First, the court considered what the relevant "discharge" is for purposes of the pollution exclusion's "sudden and accidental" exception. The second issue was a determination of the scope of coverage, or the allocation, for claims where there is both sudden discharges and uncovered gradual pollution through seepage into groundwater under the site. Finally, the court considered the insured's burden of proof regarding showing that a particular loss is covered.

The Court of Appeal had resolved the first issue by determining that "the release of the wastes *from the site* after they had been deposited there by other entities" was "the relevant discharge for purposes of determining whether the State's discharge of pollutants was "sudden and accidental." *Id.* at 7 (emphasis added.) In contrast, the insurers, relying on *Standun*, 62 Cal. App. 4th 882, argued that the relevant discharge was "the initial disposals of waste *into the unlined ponds.*" The Supreme Court agreed with the Court of Appeal and held that the relevant discharge is the release of pollutants *from* the site because "the focus of analysis must be on the particular discharge or discharges that gave rise to that property damage." The court distinguished *Standun* on the grounds that in that case the pollutants were deposited directly onto land or into water without any attempt at containment. In the case at bar, however, the Court noted that the wastes deposited at the Stringfellow disposal facility did not "behave as environmental pollutants until they [were] later released or discharged *from* the ponds." The Court therefore concluded that the pollution exclusion did not apply to the initial deposit of chemicals.

With respect to allocating covered pollution damage from excluded pollution damage, the State argued that the contamination from covered sudden and accidental events were so intermingled with noncovered releases that it could not differentiate the costs of remediation for covered losses from the costs of remediation for noncovered losses. The insurers argued that the State had the burden of proving the amount of covered loss and its admitted inability to do so precluded any obligation to indemnify in its entirety. The Supreme Court determined that the State was entitled to indemnity for any “sudden and accidental” releases it could show were a “substantial cause” of contamination which required remediation. The court held that there is liability coverage “whenever an insured risk constitutes a proximate cause of an accident, even if an excluded risk is a concurrent proximate cause.” Accordingly, though some damage was caused by gradual, non-accidental discharges, where sudden and accidental discharges caused concurrent damage, there is coverage.

Finally, regarding the State’s burden of proof on covered damages, the Supreme Court disapproved *Golden Eagle Refinery Co. v. Associated Intern’l. Ins. Co.* (2001) 85 Cal.App.4th 1300, and, by extension, *Lockheed Corp. v. Continental Ins. Co.*, 134 Cal. App. 4th 187 (2005). Those two cases had held that if

an insured cannot prove what portion of environmental property damage was caused by “sudden and accidental” releases, the insured is not entitled to any indemnity payments. The Supreme Court turned the *Golden Eagle*. on its head by holding that, where the insured asserts that the property damage was “indivisible” between covered and excluded discharges, so long as the covered discharges were a “substantial cause” of the indivisible damage, the burden of proof shifts to the insurers to show that the damage can in fact be allocated between covered and excluded discharges (which will be very difficult, if not impossible, in situations involving commingled pollution of soil or groundwater). The Supreme Court stated that “the fact that ‘[s]ubstantial cause’ may be sufficient to make a prima facie case in a tort action in order to support a joint and several judgment *does* imply that such tort law (substantial factor) causation is sufficient to create coverage *under a liability policy* when covered and excluded acts or events have concurred in causing injury or property damage.”

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