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California Supreme Court Adopts "All-Sums-With Stacking" Rule Disapproves FMC Corp. v. Plaisted In The Process

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In a long-awaited decision, the California Supreme Court unanimously held that in cases of continuous or progressive property damage, each insurer, including excess insurers, on the risk at any point when damage occurred is liable for indemnity up to its policy limit if its policy contains "all sums" language. The is true regardless of whether some of the damage occurred before or after the policy period. *State of California v. Continental Ins. Co.*, California Supreme Court No. S170560 (August 9, 2012). The Court also held that an insured is entitled to stack policy limits across policy years in progressive loss cases absent anti-stacking language in the policy. In reaching this latter holding, the Court expressly disapproved of the Court of Appeal's decision in *FMC Corp. v. Plaisted & Companies*, 61 Cal. App. 4th 1132 (1998).

Background

The case arises from the decades-long Stringfellow Acid Pits saga. The State of California designed an industrial waste disposal facility in an abandoned quarry in 1956 which was owned and operated by the owners until it was closed in 1972. The State was uninsured before 1963 (when the California Tort Claims Act was enacted) and after 1978. In 1998 California was held all liable for all past and future cleanup costs, which the state estimated could reach $700 million. In the ensuing coverage suit, the State sought indemnity from its excess insurers whose policies covered the period between 1964 and 1976. This coverage suit was previously the subject of the California Supreme Court decision in *State of California v. Allstate Ins. Co.*, 45 Cal.4th 1008 (2009), in which the Court held that the State was entitled to full indemnity for indivisible injury concurrently caused by covered and exclude events, even though the State could not allocate the cause of the injury between the covered "sudden and accidental" discharges of pollutants and excluded gradual discharges of pollutants.This appeal arose out of the trial court ruling that each insurer was liable up to its policy limits based on the "all sums" language of the policies, but the trial court further held that the State could not "stack" policies to recover more than one policy's limit for covered occurrences, relying on *FMC Corp.*, 61 Cal.App.4th 1132. The Court of Appeal affirmed the trial court's "all sums" ruling, but reversed its "no stacking" ruling. The Court of Appeal found the no stacking analysis in *FMC Corp*. unpersuasive and "judicial intervention." The California Supreme Court affirmed the Court of Appeal's decision on both the "all sums" issue and the "stacking" issue.

"All Sums" Versus Pro- Rata

The California Supreme Court explained that the language of the policies at issue dictated its conclusion and that its holding was consistent with its prior decisions in *Montrose Chemical Corp. v. Admiral Ins. Co*., 10 Cal. 4th 645 (1995) and *Aerojet-General Corp. v. Transport Indem. Co*., 17 Cal. 4th 38 (1997), which were primarily concerned with the duty to defend. The Court began by reciting the standard rules of insurance contract interpretation. It observed that the *insuring agreement* of the policies at issue covered "all sums" the insured became obligated to pay because of injury to property and that the insuring agreement itself did not limit the indemnity obligation to property damage that took place during the policy period. Rather, the Court agreed with the State that because of the "during the policy period" clause in the policies' "occurrence" definition, it was "neither 'logically [n]or grammatically related to the 'all sums' language in the insuring agreement.'"

The Court rejected the insurers' argument that *pro-rata* allocation was more "fair and equitable," although it acknowledged some states have adopted various pro-rata allocation methods. The Court reiterated that it was "constrained by the language of the policies." The Court also pointedly noted that all pro-rata allocation methods assign liability to the insured for those years of a continuous loss that the insured chose not to purchase insurance. (As noted above, the State was uninsured before 1963 and after 1978). In the same vein, the Court also observed that in progressive

loss cases, it is virtually impossible to prove what amount of damage occurred in any particular year.

The Court also rejected the argument that liability among insurers whose policies are "triggered" is joint and several. Harkening back to *Aeroje*, 17 Cal. 4th 38, the Court explained that each triggered insurer is separately and independently obligated to indemnify the insured up to its policy limit.

In short, under an "all sums" policy, an insurer is obligated to indemnify its insured up to the policy limit "as long as *some* of the continuous property damage occurred" while the policy was on the risk.

The Stacking Holding

With respect to stacking of policy limits across multiple policy years, the Court adopted the reasoning of the Court of Appeal decision under review. The Court held that absent anti-stacking policy terms (or statutory prohibition of stacking), "standard policy language *permits* stacking." It observed that the "all-sums-with-stacking indemnity principle" is consistent with the continuous trigger rule adopted in *Montrose* and the "all sums" rule adopted in *Aerojet*. In the Court's view, treating all policies triggered by a continuous loss as "one giant 'uber-policy'" provides the insured with access to all the insurance it purchased, comports with reasonable expectations and simplifies resolution of coverage disputes involving long-tail claims.

The Decision's Significance

The Court's adoption of the "all-sums-with-stacking" principle is significant, but application of that principle remains subject to the actual policy terms at issue. Indeed, the Court concluded its opinion by stating that "in the future, contracting parties can write into their policies whatever language they agree upon, including limitations on indemnity, equitable pro rata coverage allocation rules, and prohibitions on stacking." Since 1986, the ISO standard insuring agreement for general liability policies has stated that the insurer will pay "*those* sums" that the insured is legally obligated to pay for covered losses. The California Supreme Court's decision does not address such policy language. Accordingly, insurers with "those sums" language can argue their indemnity obligations are limited to damage that actually occurred during the policy period. Similarly, the Court's stacking ruling explicitly rests on the absence of anti-stacking language in the policies at issue.

The Court's decision does not, in any direct way, address either "horizontal exhaustion" or allocation among insurers. While the *Continental* decision concerned excess policies, nothing in the decision changes the rule in California that all triggered primary policies must exhaust before any excess insurer is obligated to pay. *See, e.g. Community Redevelopment Agency of City of Los Angeles v. Aetna Cas. & Sur. Co.*, 50 Cal App. 4th 329 (1996). In *Continental*, it was apparent that the limits of all the insurers in the case would be exhausted to cover the State's liability. Consequently, the Court did not address allocation among insurers. The Court did, however, note in passing that when the entire loss is within limits of one policy, the paying insurer can seek contribution from other insurers on the risk. California case law does not require allocation among insurers based on a specific formula, but allocates in each case based on "equitable considerations." *Fireman's Fund Ins. Co. v. Maryland Cas. Co.*, 605 Cal.App.4th 1279, 1293 (1998).

In summary, the California Supreme Court's decision means that any insurer with "all sums" language who was on the risk at any point during a continuous or progressive loss is obligated to indemnify the insured up to its policy limit regardless of what quantum of damage may or may not have occurred during any particular policy period and regardless of whether the damage occurred before or after the policy period. In the long term, the impact of the Court's decision may be fairly limited since contemporary policies typically have materially different terms than the 1964-1976 policies before the Court. However, with respect to long-tail claims such as asbestos bodily injury and pollution claims, the change in language to "those sums" in 1986 coincided with the adoption of the asbestos exclusion and "absolute" pollution exclusion, so coverage for those kinds of claims under pre-1986 policies may be substantially affected by this ruling.

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:

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