

California Supreme Court Finds Full Coverage For Long-Tail Environmental Liabilities

by Rene L. Siemens and Robert L. Wallan

New decision makes each insurer responsible for loss if any part occurred during policy period, and bars allocation of damage to the insured.

On August 9, 2012, the California Supreme Court ruled in favor of policyholders in a long-awaited decision addressing insurance coverage for long-tail environmental liabilities. The Court unanimously held that (1) a general liability insurer must pay the entirety of the insured's liability for a covered loss, up to its policy limit, if any part of a long-tail injury occurs during the policy period, even if most of the ongoing damage occurs outside the policy period (this is known as the "all sums rule"); (2) the insured is entitled to collect the combined limits of all successive years of insurance policies that it purchased while a continuing injury was unfolding (known as the "stacking rule"); and (3) the insured does not have to pay for any part of the loss as long as it had applicable insurance, even if it was uninsured for many years while the covered damage continued (known as the "no allocation to the insured rule"). The Supreme Court expressly rejected the trial court's ruling limiting coverage to a single year, and also rejected the insurers' alternative effort to pro rate coverage so that an insurer's liability would be limited based on the number of years on the risk versus the total number of years damage took place.

The lawsuit arose out of the decades-old cleanup of the Stringfellow acid pits, a Riverside County quarry the State had long used to dump toxic waste. The supposedly impermeable quarry leaked, and two major rainstorms allowed contaminants to escape. Based on a federal court order, the State faced liability approaching \$700 million for cleanup costs. The State had general liability insurance (CGL) for many years while the pits were being used and contamination migrated from them, but was also self-insured for some of those years. The State's coverage limits in any one year were dwarfed by the total exposure.

The insurers sought rulings that (1) the State could only collect a single year's worth of its policy limits (known as the "anti-stacking rule"); (2) no insurer could be made to pay more than a "pro rata" percentage of the total liability based on its relative "time on the risk" (i.e., the percentage of time its policy was in effect compared with the many decades during which the contamination migrated); and (3) conversely, the insured should bear a huge percentage of the loss to reflect the fact that it had gone uninsured during much of the relevant time period.

The California Supreme Court decisively rejected each of the insurers' positions as being inconsistent with the policy language, public policy, and common sense.

The “all sums” rule had been settled in earlier California Court of Appeal decisions, but the insurance industry had urged the Supreme Court to adopt the “pro rata” rule followed in a number of other jurisdictions. The insurers also hoped the Supreme Court would follow an earlier appellate court decision, *FMC Corp. v. Plaisted & Companies*, 61 Cal. App. 4th 1132 (1998), which had rejected stacking on “public policy” grounds. The Supreme Court rejected the insurers’ arguments on both counts, finding that there is nothing unfair in enforcing the policy language to allow an insured to obtain coverage from all of its policies where the loss spans a number of years.

The Supreme Court pointed out that for future policies, the stacking issue might be addressed via drafting, although California courts have generally declined to enforce anti-stacking provision in insurance policies or have interpreted them narrowly. For existing coverage, the decision impacts billions of dollars of claims, and represents a decisive victory for policyholders. *State of California v Continental Insurance Company, et al.*, S170560 (August 9, 2012).

Mr. Siemens served as counsel for Amicus Curiae Aerojet-General Corporation and Whitaker Corporation supporting the policyholder appellant in the Continental Insurance appeal. Mr. Wallan co-chairs the firm’s Insurance Recovery & Advisory practice specialty group.

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