Case ALERT

Appellate Court Stacks Policies in $700,000,000 Continuing Damage Claim

State of California v. Continental Insurance Company, et al
(January 2009) 169 Cal.App.4th 1114

This is an extremely important case decided by the California Fourth Appellate District wherein the court holds that where there is bodily harm or property damage that is continuous through a number of insurance policy periods that any single policy can become liable for the entire sum of damages restricted only by the insurance limits of each individual policy. Furthermore, the court ruled that the policies and their limits could be "stacked" with the result that they become cumulative or, in essence, a stack of coverage.

Mr. Stringfellow (the court refers to him as the "hapless" Mr. Stringfellow) owned a quarry site in Riverside County. In 1955, a state geologist inspected the site and determined, for a variety of reasons, that it was amenable as a safe location for the placement of industrial wastes that would not result in a threat of pollution. Construction by the state proceeded immediately thereafter and eventually more than 30 million gallons of hazardous industrial waste were deposited at the site. Subsequently, on several occasions, heavy rains caused an overflow of the contaminants and ground water in the area was adversely affected. In September of 1998 (after the site had been closed in 1983), a Federal Court held that the State had been negligent and was liable for the clean up costs which were projected to total up to $700,000,000.

The original action by the State was filed against its insurers in 1993 and after several rulings, consolidated with a second lawsuit (the one underlying this appeal) that was filed in September of 2002. The trial court ruled that each one of the defendant insurers was (up to the limits of its policy) individually liable for the total sum of the continuing loss but did not permit a stacking of those policies which prevented the State from collecting the total sum of all of the policy limits. Instead, the court ruled that the State could choose any one of the policy periods and collect solely against the carriers for that period which, at the most, would have amounted to $48 million. The trial court also ruled that there was only one occurrence.

With those initial rulings, the matter went to a jury in March of 2005 and the jurors concluded that the insurers had breached their respective policies. However, the trial court ruled that the insurers were entitled to an offset of the $120 million settlement (arrived with some insurers during trial) which when compared to the $48 million verdict, permitted under the court's ruling, resulted in a recovery at this trial of zero dollars. All parties appealed the rulings. The State held to its position that since the property damage was continuous across multiple policy periods that it was entitled to have its policies stacked so that all of the policy limits would be added together for a recovery. The insurers, expectedly, responded that their individual policies should cover only damage attributable to their time on the risk as opposed to the total time of the continuing loss and that the State should not be able to recover beyond the policy limits in effect for more than one policy period.

Both sides cited *Montrose Chemical Corp. v. Admiral Ins. Co.* (1995) 10 Cal.App.4th 645 in support of their positions and there is also discussion of *Aerojet-General Corp. v. Transport Indemnity Co.* (1997) 17 Cal.4th 38, but the appellate court notes that both of those earlier decisions revolved around the duty to defend. Nevertheless, it points out that there is "continuous injury trigger of coverage" language in *Montrose* that states: "An insurer on the risk when continuous or progressively deteriorated damage or injury first manifests itself remains obligated to indemnify the insured for the entirety of the ensuing damage or injury." Sustaining the trial court's

ruling that each policy is liable for the total sum of damages, this court concludes "when there is a continuous loss spanning multiple policy periods, any insurer that covered any policy period is liable for the entire loss, up to the limits of its policy. The insurer's remedy is to seek contribution from any other insurers that are also on the risk."

The court then reversed the trial court's decision on stacking of the policies and rejects a portion of the decision in *FMC Corp. v. Plaisted & Companies* (1998) 61 Cal.App.4th 1132 wherein the *FMC* court ruled against stacking because it felt that it afforded the insured more coverage than it had paid for. However, this court points out that the insured, each year, paid a premium for coverage within that year and, therefore, even if there is a stacking of the policies it still results in the application of individual policies that the insured paid for each year. Furthermore, it opined that standard policy language permits this "bargained" for stacking and suggests that under certain facts that deductables/SIR's may also be stacked.

There are several other discussions and rulings in this case that are interesting. First of all, the court rules that there was one occurrence here even though the State pointed out that several of its acts occurred at different times (i.e., the initial engineering investigation, the building of a retainment wall, etc.) and therefore it should be entitled to several occurrence limits within each policy. This court states that the term "occurrence" is not "when the wrongful act(s) was committed but when the complaining party was actually damaged." Here, it notes that the damage did not occur until the Stringfellow site was filled with toxic waste (the "single occurrence") and the continuous leakage occurred. The court concludes "hence, there can be multiple contributing conditions, yet only a single occurrence." Another issue raised was whether or not there should be a set-off under the doctrine of mitigation of damages or mitigation of loss, but this court rules that California does not recognize this doctrine outside of the first party context unless willful acts are involved. Finally, the court considers Evidence Code §1331 which codifies the concept of the "ancient document" exception to the hearsay rule and concludes that the facts did not support the application of this hearsay exception in the State's effort to prove the existence of a lost policy.

In conclusion, this court rules that several acts that concur in causing continuing damages can combine to produce a single "occurrence" and all of the applicable policies throughout the tenure of the continuing damages will be held to be on the risk, up to their policy limits, for the total damages that occurred during, after, and even before their policy period. Furthermore, those policy limits can be stacked up to the sum of the total damages.

Frank Pagliaro is a partner in the Redwood City office of Ropers Majeski Kohn & Bentley whose practice includes defense of design professionals and contractors as well as products liability and toxic tort claims. He is a member of both the California and New York Bars and can be reached at fpagliaro@rmkb.com or by phone 650.364.8200

Save the Date

Mark your calendar for our upcoming Insurance and Casualty Litigation Seminar: 2008-2009 The Year In Review

Wednesday, May 6, 2009 - San Francisco
The Palace Hotel
2 New Montgomery Street
San Francisco, CA 94105

Friday, May 8, 2009 - Sacramento
Radisson Hotel
500 Leisure Lane
Sacramento, CA 95815

Wednesday, May 13, 2009 - New York
The Harvard Club of NY
27 West 44th Street
New York, NY 10036

Thursday, May 14, 2009 - Hartford
The Simsbury Inn
397 Hopmeadow Street
Hartford, CT 06070

Tuesday, May 19, 2009 - Orange County
The Westin South Coast Plaza
686 Anton Blvd.
Costa Mesa, CA 92626

Wednesday, May 20, 2009 - Los Angeles
The Jonathan Club
545 South Figueroa Street
Los Angeles, CA 90071