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To Stack or Not to Stack? California Supreme Court Prepares to Resolve Split Among Appellate Courts

Amy Briggs and Erin Stagg

On March 18, 2009, the California Supreme Court granted review of an issue that is potentially worth billions of dollars to policyholders and insurers alike. Specifically, the Court will decide whether policyholders are entitled to "stack" (i.e., aggregate) the limits of policies triggered by a single occurrence that has caused damage over a period of time.

In January, the California Court of Appeal for the Fourth Appellate District held that an insured was entitled to stack limits across multiple policy periods. *See State of California v. Continental Ins. Co.*, 170 Cal. App. 4th 160 (2009). In doing so, the Fourth District expressly disagreed with the Sixth Appellate District's ruling of eleven years ago in *FMC Corp. v. Plaisted and Cos.*, 61 Cal. App. 4th 1132 (1998). In *FMC*, the court had rejected stacking of policy limits across policy periods on the ground that it afforded the policyholder more coverage than had been bargained or paid for. The California Supreme Court now appears ready to address this clear split in authority.

The background giving rise to the split in authority is as follows:

In *FMC*, the insured had caused toxic contamination over a period of many years at different sites across the United States. For a variety of reasons, the appellate court found that, for the most part, the contamination at each site had been caused by a single "occurrence." The *FMC* court held that the insured was not entitled to stack, noting that "stacking...has been criticized as affording the insured substantially more coverage, for liability attributable to any particular single occurrence, than the insured bargained or paid for." The *FMC*

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court thus took matters into its own hands and held that where the policies at issue contained no "anti-stacking" provisions, judicial intervention was warranted. Based on this reasoning, the court directed that where a single occurrence triggered more than one policy period, the insured should be permitted to select the *single* policy period in which the policy limits are to be fixed, thus allowing the insured to access the vertical layers of insurance in place during that policy period.

As in *FMC*, the insured in *Continental* – the State of California – sought coverage for liability arising out of long-term environmental contamination at the Stringfellow hazardous waste site. The trial court relied on *FMC* and ruled that the State was not entitled to stack and thus could recover for only one policy period. The appellate court, however, expressly disagreed with both the trial court and the *FMC* court. Based on standard policy language as well as a consistent line of authority in California permitting policyholders to access multiple policy limits, the *Continental* court held that the insured *could* stack the policy limits of all triggered policies across those policy periods.

"In our view, standard policy language *does* provide for stacking, and therefore that is *exactly* what the insured has bargained and paid for." Continuing, the *Continental* court noted that "[i]f an occurrence happens entirely within one policy period, the insured has paid one premium and can recover up to one policy limit; however, if an occurrence is continuous across two policy periods, the insured has paid two premiums, and can recover up to the combined total of two policy limits. We see nothing unfair or unexpected in this."

Finally, the court in *Continental* found that the *FMC* rule – by which a policyholder was allowed to select a single policy period out of all those that had been triggered – itself exposed the fallacy of an antistacking rule. "If the insured is entitled to choose, it necessarily follows that each of the policies involved affords coverage, up to the limits of that policy. There is no *contractual* basis, found in the policies themselves, for requiring the insured to forego recovery under any other applicable policies, up to the limits of those policies." The *Continental* court went on to note that *FMC* failed to recognize that in all other instances of multiple coverage, stacking is allowed. For example, when multiple policies apply during a single policy period, the insured is entitled to stack limits. Further, in some instances, an insured has been covered by both his automobile and homeowner's policies. The *Continental*

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court concluded that "even if stacking somehow resulted in a windfall to the insured or unfairness to the insurer, we would not be authorized to cure it through 'judicial intervention'."

The California Supreme Court now appears prepared to weigh in on stacking and resolve this conflict.

FOR ADDITIONAL INFORMATION ON THIS ISSUE, CONTACT:

Amy Briggs Ms. Briggs' complex business litigation practice focuses on insurance coverage and bad faith disputes. Ms. Briggs has represented numerous policyholders, including financial institutions, large real estate entities, public retirement systems throughout California, pharmaceutical and medical device manufacturers, and nonprofit organizations in coverage disputes. She has successfully litigated first- and third-party coverage and bad faith claims arising under commercial general liability, property, fiduciary liability, employers' liability, and D&O and E&O policies. She has appeared and argued before the California Court of Appeal on multiple occasions.

Erin Stagg Ms. Stagg focuses on general commercial litigation. In her first two years of practice, she has already been a member of two trial teams. The first matter, which was resolved on the steps of the courthouse, resulted in an extremely favorable settlement for the client. After a three-month trial, the second matter resulted in the largest jury award in the United States in 2008. In that case, ICO Global Communications (Holdings) Limited prevailed on its breach of contract, fraud, and tortious interference claims against The Boeing Company and its subsidiary, Boeing Satellite Systems International.

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