Insurance Coverage For Long Tail Injuries In California

By: Peter S. Bauman, Esq.

http://commercialcounselor.com/

The California Supreme Court recently ruled, in a case involving environmental damage at a State controlled waste site, that multiple insurers, who provided coverage to the State at different periods between 1964-1976, are each responsible up to policy limits for long tail injuries, and that allocating liability based on damage caused during each separate policy period is not feasible or necessary. [*State of California v. Continental Ins. Co. 8/9/12]*

In the *Continental* case, the Supreme Court "rejected the insurers' contention that they could not be liable for property damage occurring outside their respective policy periods." The Court did so based on the "all sums" language in their commercial general liability (CGL) policies.

Under the "all sums" language, the insurers agreed in such policies "[t]o pay on behalf of the Insured all sums which the Insured shall become obligated to pay by reason of liability imposed by law…for damages… because of injury to or destruction of property, including loss of use thereof."

The court noted that the coverage provided "does not limit the policies' promise . . . solely to sums or damage during the policy period."

The Court further held that the policy limits of the various insurers from 1964-1976 should be "stacked" because "[i]t is often 'virtually impossible' for an insured to prove what specific damage occurred during each of the multiple consecutive policy periods in a progressive property damage case."

The Court reasoned that "[a]ll-sums-with-stacking coverage . . . looks at the long-tail injury as a whole rather than artificially breaking it into distinct periods of injury."

The *Continental* decision is vital for corporations and governments managing risk and facing liability for long tail injuries based on environmental or other factors. Such defendants, or potential defendants, must investigate all policies that were in effect from the date on which coverage for a long term continuous injury is first triggered, so they can seek indemnity from all insurers up to policy limits.

Crucial in such an investigation is an examination of the language in each insurance policy to confirm that "all sums" coverage exists and no anti-stacking provisions are included that may limit recovery.

As the Supreme court noted:

"[C]ontracting 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."

One critic of the quote directly above scoffs at the very notion that insurance policies state an agreement of the parties, since "almost all insurance policy language is written by insurance association committees and put in policies that are assembled in boilerplate form and handed out to the policy buyers, usually well after the policy term has actually begun."

This argument, that the parties have not reached agreement on these terms, is available to defendants in future cases to attack anti-stacking and other limiting provisions. But a thorough defense should begin by examining all relevant insurance policies as noted above.

Link to original article: http://commercialcounselor.com/insurance-coverage-for-long-tail-injuries-in-california/