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State v. Continental Insurance Company

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***State v. Continental Insurance Company*, 281 P.3d 1000 (Cal. 2012).**

John M. Newman

ABSTRACT

The California Supreme Court affirmed the court of appeals and adopted an "all-sums-with-stacking" indemnity principle in the context of a large hazardous waste site cleanup. The court employed this principle because of the plain language of the policies at issue, the expectations of parties to the insurance contracts, and because of the complexity of "long-tail" environmental injuries. The court held the "all-sums" indemnity provisions applied to continuous injuries both beginning when coverage applied and continuing after policy expiration, as well as beginning prior to coverage but continuing into a new policy period. Further, the court supported stacking of multiple insurers' policies within any single policy period because doing so affords long-tail insureds increased protection through coverage they have already purchased. The court deemed the adopted principle fair because insurers can expect to indemnify insureds while on the risk in a particular situation, and are free to include contractual terms avoiding all-sums coverage and prohibiting stacking. Given similar factual circumstances and equivalent state insurance statutory schemes, the court's reasoning in this case may prove relevant in jurisdictions other than California.

I. INTRODUCTION

In *State v. Continental Insurance Company*,[1] the California Supreme Court affirmed the court of appeal's ruling regarding insurance coverage for the State's liability at the Stringfellow Acid Pits waste depository. In 1998, a federal court held the State responsible for the waste site and ordered cleanup.[2] The State sought indemnity from those insurers who provided coverage during the years in which the injury occurred.[3] Reversing the trial court in part, the court of appeal held the injury was continuous

[1] 281 P.3d 1000 (Cal. 2012).
[2] *Continental Insurance*, 281 P.3d at 1003-1004.
[3] *Id*. at 1004-1005.

through each policy period within a stipulated range of dates. The court also held policies from each insurer and each policy period could be stacked and exhausted to their respective limits.[4] Affirming the court of appeal, the California Supreme Court held this "all-sums-with-stacking" indemnity principle best comported with the plain language of the policies at issue, the expectations of parties to the insurance contracts, and complex "long-tail" environmental injuries.[5]

II. FACTUAL AND PROCEDURAL BACKGROUND

This appeal arose out of the federal court-ordered remediation of California's Stringfellow Acid Pits industrial waste site.[6] The site, a rock quarry located in Riverside County, received more than 30 million gallons of industrial waste between 1956 and 1972.[7] However, the State of California erroneously deemed the quarry suitable for use as a depository: shallow groundwater and canyon-floor bedrock fractures permitted waste to escape and heavy rain events in 1969 and 1978 overburdened the concrete dam enclosing the site.[8] In particular, the 1978 event compelled state officials to purposely release contaminants, resulting in a widespread waste plume.[9]

A federal court found the State negligent as to site choice and design in 1998 and held the State liable for all past and future cleanup costs associated with Stringfellow.[10] Even before this finding, the State sought indemnity for its estimated $700 million liability from several of its insurers and filed suit in 1993 accordingly.[11] Each of the insurers involved in the suit issued excess commercial general liability ("CGL") policies to the State in the operative years between 1964 and 1976.[12] Prior to and after

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[4] *Id*. at 1005.
[5] *Id*. at 1009-1012.
[6] *Id*. at 1003-1004.
[7] *Continental Insurance*, 281 P.3d at 1004.
[8] *Id*.
[9] *Id*.
[10] *Id*.
[11] *Id*.
[12] *Id*. at 1003.

these dates the site was uninsured.[13] Of the terms of the various policies, the following language was virtually identical:

> Insurers agreed to 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.[14]

Further, the policies placed limits on liability relative to each occurrence, and defined "occurrence" as "an accident or continuous or repeated exposure to conditions which result in . . . damage to property during the policy period."[15]

Following a 1999 bench ruling interpreting policy language and a 2002 ruling against holding the State liable for failing to mitigate the insurers' damages, the State filed a second suit asserting similar claims against additional insurers.[16] The 1993 and 2002 suits were consolidated and all defendant insurers agreed to the stipulation that the State's – their insured's – negligence occurred throughout multiple policy periods from 1964 to 1976."[17] The trial court held that each insurer was liable to the limits of their respective policies for the loss associated with the Stringfellow site in light of the policies' all sums language.[18] However, the court held that the State could not "stack" policies to recover either the limits of consecutive policies under any one insurer or the limits of all policies under all insurers from the chosen single policy period.[19] Rather, the State had to choose a particular policy period from the years 1964 to 1976 and could only recover to the limits of a single policy in effect during that period.[20]

In May 2005, with the above policy language, mitigation, and liability rulings in place, a jury found the insurers had breached their respective policies, but that the State could recover no more than

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[13] *Continental Insurance*, 281 P.3d at 1003.
[14] *Id*. at 1004 (internal quotations omitted).
[15] *Id*.
[16] *Id*. at 1004-1005.
[17] *Id*. at 1005.
[18] *Continental Insurance*, 281 P.3d at 1005.
[19] *Id*.
[20] *Id*.

$48 million from all insurers combined.[21] Because the State had settled with several defendant insurers for $120 million to-date, the jury refused to award the State monetarily despite the judgment in its favor.[22] On appeal, the California Court of Appeal affirmed the trial court's "all sums" determination but reversed its anti-stacking ruling, holding that the State could recover the combined limits of all policies triggered and in-effect during the chosen policy period.[23] The defendant insurers filed the instant appeal thereafter.[24]

III. HOLDINGS AND ANALYSIS

A. "All sums" insurance policy provisions.

The California Supreme Court began its analysis by discussing insurance policy interpretive norms, then defined the nature of, and complications associated with, long-tail injury insurance claims.[25] Long-tail injuries, the court explained, are typical of "environmental damage and toxic exposure litigation," where claims are "characterized as a series of indivisible injuries attributable to continuing events without a single unambiguous 'cause'."[26] Such injuries create escalating, compound damage, and are rarely adequately addressed in CGL policies.[27] Because it is nearly impossible for an insured to determine the extent of long-tail damage attributable to particular policy periods, the issue of when "a continuous condition become[s] an 'occurrence' for the purposes of triggering insurance coverage" is critical to resolving insurer liability and insured exposure.[28]

The Court resolved this issue in the instant suit by applying its decisions in two prior cases involving an insurer's duty to defend.[29] In *Montrose*, the Court considered whether a single insurer

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[21] *Id*.
[22] *Id*.
[23] *Continental Insurance*, 281 P.3d at 1005.
[24] *Id*.
[25] *Id*. at 1005-1007.
[26] *Id*. at 1006.
[27] *Continental Insurance*, 281 P.3d at 1006-1007.
[28] *Id*. at 1007.
[29] *Id*. at 1007-1008 (citing *Montrose Chemical Corporation of California v. Admiral Insurance Company*, 913 P.2d 878 (Cal. 1995); space*Aerojet-General Corporation v. Transport Indemnity Company*, 948 P.2d 909 (Cal. 1997)).

among seven, whose policy covered the last four years of a 26-year coverage period, had a duty to defend suits alleging injuries from chemicals manufactured by its insured before and continuing through the coverage period.[30] Citing the relevant policy language, the *Montrose* Court held that ongoing circumstances trigger coverage as "occurrences" when "'property damage' results from a causative event consisting of '[an] accident or continuous and repeated exposure to conditions,'" so long as the damage occurs within the effective period of the triggered policy.[31] Essentially, because property damage occurred during the policy period, the fact that the cause of the damage manifested before the insurer's coverage began did not release the insurer from its duty to defend suits centered in that damage.

Conversely, in *Aerojet*, the Court considered whether an insurer was bound to defend claims arising after a policy expired when the cause of the injury began during the policy period.[32] The *Aerojet* Court proceeded from the "settled rule" that insurers must indemnify their insureds for the entirety of any injury which begins during an active policy period.[33] Further, the *Aerojet* court held that insurer's on the risk in this manner were responsible for "all claims involving the triggering damage," rejecting the notion that insureds could in any way be responsible for defending claims themselves.[34] The instant Court concluded that "as long as the property is insured at some point during the continuous damage period, the insurers' indemnity obligations persist until the loss is complete, or terminates."[35]

Applying the *Montrose* and *Aerojet* holdings to the instant suit, the Court held each of the defendant insurers responsible for the continuous Stringfellow Acid Pits loss up to the limits of each of their consecutive policy periods.[36] The Court noted the parties' stipulation to the fact that damage

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[30] *Id*. at 1007 (citing *Montrose*, 913 P.2d at 886-888).
[31] *Id*. at 1007-1008 (citing *Montrose*, 913 P.2d 886-888)(defining "property damage" as that which occurs during the policy period and "occurrence" as including repeated exposure leading to property damage)).
[32] *Continental Insurance*, 281 P.3d at 1008 (citing *Aerojet*, 948 P.2d at 929-931).
[33] *Id*. (citing *Aerojet*, 948 P.2d at 929-931).
[34] *Id*. (citing *Aerojet*, 948 P.2d at 929-931).
[35] *Id*.
[36] *Id*.

occurred at Stringfellow while each was on the risk, as well as their admission that pinpointing the timing of the damage was impossible.[37] Further, the Court specifically addressed three of defendants' notable arguments.[38] First, the Court refuted defendants' contention that they were jointly and severally liable for the Stringfellow injuries, instead concluding that each defendant was "separately and independently obligated to indemnify the insured."[39] Second, the Court denied the merit of a pro rata allocation of defendants' liability based on annual "shares" of the total loss multiplied by the respective number of years each individual insurer covered the insured.[40] The Court found such a scheme antithetical to the global notion of coverage embodied in "all sums" policy language.[41] Finally, the Court addressed defendants' argument that the policy phrases "all sums" and "during the policy period" necessarily precluded their liability for damage incurred before or after the effective dates of their respective policies.[42] The Court adopted the State's response that the phrase "during the policy period" was outside of the Insuring Agreement section of the policy and did not operate upon the "all sums" provision.[43] Ultimately, the Court held the insurers' "coverage extends to the entirety of the . . . damage [at Stringfellow], and best reflects the insurers' indemnity obligation . . . , the insured's expectations, and the true character of the damages that flow from a long-tail injury.[44]

B. "Stacking" multiple insurance policies.

The Court next considered the court of appeal's decision to permit stacking of multiple policies on the Stringfellow loss over the course of the long-tail injury.[45] The Court described stacking as aggregating "policy limits across multiple policy periods . . . on a particular risk . . . mean[ing] that when more than one policy is triggered by an occurrence, each policy can be called upon to respond to

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[37] *Continental Insurance*, 281 P.3d at 1008.
[38] *Id*. at 1008-1010.
[39] *Id*. at 1008-1009 (citing *Aerojet*, 948 P.2d at 943 n. 10).
[40] *Id*. at 1009.
[41] *Id*. at 1009-1010.
[42] *Continental Insurance*, 281 P.3d at 1010.
[43] *Id*.
[44] *Id*.
[45] *Id*. at 1010-1012.

the claim up to the full limits."[46] The instant court adopted the court of appeals' all-sums-with-stacking indemnity principle as consistent with its own jurisprudence, as well as with the expectations of insureds who secured policies over multiple periods and rightly understood they were covered for each.[47] Importantly, the court noted that, absent language in a policy or a statute specifically prohibiting stacking, the practice is permitted in standard insurance policies.[48] The court described the resource available to long-tail injury insureds via the all sums stacking principle as an "uber-policy" equivalent to purchasing all of the triggered policies in one policy period.[49] Ultimately, the Court affirmed the court of appeal's ruling on both the all-sums and stacking considerations.

IV. CONCLUSION

The California Supreme Court's ruling in *Continental Insurance* represents a strong and positive reinforcement of the court's environmental liability insurance jurisprudence. The court's holding relieves parties liable for long-tail environmental injuries by providing broad indemnity prospects in the face of substantial exposure. The outcome should not offend insurers, who collected premiums and purposely assumed that exposure in a given policy period or series of policy periods: insurers on the risk can reasonably expect to indemnify insureds during periods of coverage. The holding does hint at the court's deference for policy language though, and suggests that insurers displeased with the "all-sums-with-stacking" principle are free to attempt to contract around it. Given similar factual circumstances and equivalent state insurance statutory schemes, the court's reasoning in *Continental Insurance* may prove relevant in jurisdictions other than California.

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[46] *Id*. at 1010-1011 (citation omitted).
[47] *Continental Insurance*, 281 P.3d at 1011-1012.
[48] *Id*. at 1011.
[49] *Id*. (citation omitted)(emphasis added).