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POLICYHOLDERS IN ENVIRONMENTAL CLEANUP ACTIONS ARE POTENTIALLY ENTITLED TO MULTIPLE POLICY LIMITS; MULTIPLE CAUSES OF LOSS ARE NOT A BASIS TO DENY COVERAGE

A policyholder defending against a lawsuit for environmental cleanup costs often faces hurdles in obtaining insurance coverage for defense and indemnity of the lawsuit. Many newer policies, for example, contain the so-called "absolute" pollution exclusion, which is designed to bar recovery for cleanup costs. Older policies without this exclusion potentially provide coverage for cleanup actions, because such actions typically allege contamination over the course of years or even decades. Although insurers take the position that these older policies exclude coverage for the effects of gradual pollution, they do provide coverage for cleanup of pollution caused by "sudden and accidental" releases. However, insurers often deny coverage for damage caused by such releases where there has also been a slow release of contaminants from the same site. Moreover, even if a policyholder could establish damage spanning several policy years, prior cases held that the policyholder could recover under only one policy year, despite having paid premiums for protection for a number of years. But the ruling in a recent California Supreme Court case, *State of California v. Allstate Ins. Co.*, 2009 WL 579415 (Cal. March 9, 2009), now makes clear that policyholders can recover from insurers even if property damage is caused by both sudden and gradual releases of pollutants. The Supreme Court is also reviewing a recent Court of Appeal case, *State of California v. Continental Ins. Co.*, 88 Cal. Rptr. 3d 288 (January 5, 2009), which held that policyholders in environmental cleanup actions may recover under all policies in place during the years the damage was caused.

In both *Allstate* and *Continental*, the courts relied upon a California Supreme Court precedent from the early 1970s, one that deserves its own mention. The salient facts are as follows: Wayne Partridge was driving around with his friends, shooting at jackrabbits out the window of his truck, using his modified, hair-trigger .357 Magnum. When his truck hit a bump in the road, Partridge accidentally shot one of his passengers in the arm. The California Supreme Court

held that in responding to his passenger's lawsuit, Partridge was entitled to "stack" coverage from both his automobile insurance policy and his homeowner's insurance policy. *State Farm Mut. Auto. Ins. Co. v. Partridge*, 10 Cal. 3d 94, 101–07 (1973). It also held that an exclusion in the homeowner's policy for liability arising out of use of an automobile did not preclude coverage, because Partridge's negligent modification of his gun (a covered cause of loss) was one of the proximate causes of the injury. *Id*. at 105 n.11. These two holdings underpin the holdings in *Continental* and *Allstate*, as discussed below.

SUPREME COURT TO REVIEW WHETHER POLICYHOLDERS GET COVERAGE FOR EACH YEAR THEY BOUGHT IT

A company that is sued for environmental cleanup costs for alleged pollution spanning a number of years often has a different set of insurance policies (consisting of a primary policy and any excess or umbrella policies on top of the primary) in place for each of those years. Under California law, each successive insurance policy is potentially liable to pay indemnity to the policyholder, up to the entire loss, but capped by the policy limit. *Aerojet-General Corp. v. Transp. Indem. Co.*, 17 Cal. 4th 38, 57 n.10 (1997). The amount of cleanup costs, however, often exceeds the limits of the primary policy in place for any one policy year. A prior Court of Appeal case held that a policyholder in such a situation had to choose just one of its policy years and was then limited to the indemnity limits of the primary and excess policies in place for that year. The insurance policies in question, like most general liability policies, contain a limit of liability "per occurrence." Because long-term contamination is treated in California as a single, multiyear occurrence, the court held that a policyholder should be limited by this language to the per-occurrence liability limit of just one policy year. *FMC Corp. v. Plaisted & Cos.*, 61 Cal. App. 4th 1132, 1189 (1998). The court held that "stacking" of policy limits from more than one of the triggered policy years was not allowed, because it would afford the policyholder more coverage for a single occurrence than it had paid for. The court noted that although the policies in question contained no "anti-stacking" provision, the court could engage in "judicial intervention" to prevent it. *Id.* Thus, after paying premiums each year, for a certain amount of coverage each year, policyholders were not able to receive the benefit of those premiums for more than one of those years.

The Court of Appeal in *Continental* disagreed with that rule, explicitly approving of stacking. The court held that the per-occurrence limit means what it says—that each policy provides coverage up to its own per-occurrence limit. 88 Cal. Rptr. 3d at 305. The court held that *FMC*'s restriction to one policy's limit "overlooks the fact that the policy language only purports to limit *each particular insurer's* liability under *each particular policy*." *Id.* at 305. In other situations, courts routinely allow stacking of limits from different policies. *Id.* at 310–11, citing *Partridge*, 10 Cal. 3d at 101–07. The *Continental* court gave two other reasons for its conclusion that *FMC* is "outside the mainstream of California law." *Id.* at 306. *First*, it held that an anti-stacking rule could result in a windfall for insurers, because after the policyholder is paid by the primary insurer it selects, that insurer can then seek contribution from the primary insurers that issued other triggered insurance policies: "[T]he insurers would benefit from the fact that the insured purchased multiple policies covering multiple periods. The insured, who made this prudent choice, would not." *Id.* at 310. *Second*, the *Continental* court found that *FMC*'s anti-stacking holding was inconsistent with established California Supreme Court precedent that courts cannot rewrite the provisions of an insurance policy. *Id.* at 311, citing *Powerine Oil Co., Inc. v. Super. Ct.*, 37 Cal. 4th 377, 401 (2005), and *Certain Underwriters at Lloyd's of London v. Super. Ct.*, 24 Cal. 4th 945, 960 (2001). The language of the standard liability policy at issue in both *FMC* and *Continental* did not preclude stacking of other policy limits, and the *Continental* court declined to rewrite the policy. *Continental*, 88 Cal. Rptr. 3d at 311.

The California Supreme Court has granted review of *Continental*—as expected, given that it conflicts with *FMC*. *Continental* offers a fairly detailed and compelling analysis, including an explanation of how its rule is consistent with a wide body of California precedent, while *FMC* is "outside the mainstream of California law," increasing the chances that the Supreme Court will uphold *Continental*.

CALIFORNIA SUPREME COURT HOLDS THAT WHERE THERE'S ONE COVERED CAUSE, IT'S ALL COVERED

Under state and federal environmental statutes, companies sued by government agencies for environmental cleanup costs in certain circumstances can be held jointly and severally liable for the entire cost of cleanup, especially in circumstances where many sources of contamination contribute to a commingled, indivisible plume of contaminants. But prior case law limited such companies' insurance coverage to only a portion of the damages. From 1970 to 1985, liability insurance policies commonly contained a so-called "qualified" pollution exclusion. These provisions sought to exclude coverage for losses caused by pollution, unless the polluting event was "sudden and accidental." A California Court of Appeal case from 2001 interpreted this clause as placing the burden on the policyholder to prove what portion of damages (typically cleanup costs) resulted from a sudden and accidental cause, where the damage was also caused by gradual pollution. *Golden Eagle Refinery Co. v. Associated Int'l Ins. Co.*, 85 Cal. App. 4th 1300 (2001). The *Golden Eagle* court adopted this "contract" standard of allocation, rejecting what it called a "tort" standard of finding coverage where a covered risk was a substantial cause of the property damage. Because attributing portions of commingled plumes to specific causes, for example, can be very difficult, insurers commonly served requests for an admission by the policyholder that it could not assign a particular portion of the property damage to a particular release. If the policyholder made that admission, the insurer then filed a summary judgment motion on the basis that the policyholder could not show a covered loss under *Golden Eagle*. If successful, the insurer owed nothing.

In *Allstate*, the California Supreme Court identified the disconnect—between the insurer's promise to pay all "sums which the Insured shall become obligated to pay … for damages … because of nonexcluded property damage," which necessarily involves use of a tort standard, and the *Golden Eagle* test, which applied a contract standard—as the "fundamental flaw" with the *Golden Eagle* approach: "In analyzing coverage under a liability policy, a 'tort approach' … is precisely what is called for[.]" 2009 WL 579415, *17, citing *Partridge*, 10 Cal. 3d at 102 (when multiple events "constitute concurrent proximate causes of an accident, the insurer is liable so long as one of the causes is covered by the policy."). Thus, the court held in *Allstate*:

> [I]f the insured proves that multiple acts or events have concurred in causing … an indivisible amount of property damage … such that one or more of the covered causes would have rendered the insured liable in tort for the entirety of the damages, the insured's inability to allocate the damages by cause does not excuse the insurer from its duty to indemnify.

Id. at *18.

Under *Allstate*, where a policyholder can show that a sudden and accidental release "contributed substantially" to causing indivisible property damage, the insurer must provide indemnity.

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