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KD Alert: California Supreme Court Upholds the "Uber-Policy" for Long-Tail Insurance Claims

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In a decision filed today (August 9, 2012), the California Supreme Court reaffirmed two of California's long standing rules with respect to long-tail insurance claims – the application of the "continuous injury" trigger and the "all sums" approach to allocation. Moreover, the Supreme Court ruled, in contravention of a prior Appellate holding, that an insured is entitled to stack insurance from multiple policy years to cover the full loss. The California Supreme Court handily calls this rule the "All-Sums-With-Stacking" rule.

In State of Cal. v. Continental Ins. Co., No. S170560 (Cal. Aug. 9, 2012), the State of California sought indemnity from multiple insurers in connection with a federal court-ordered cleanup of the State's Stringfellow Acid Pits waste site. The site was an industrial waste disposal facility that the State designed and operated from 1956 to 1972. Each insurer that was party to the lawsuit issued one or more excess commercial general liability (CGL) insurance policies to the State between 1964 and 1976. The site was uninsured before 1963, and after 1978. At issue in the appeal was the appropriate trigger of coverage for the insurers, and the appropriate allocation of indemnity amongst the triggered insurers.

The Supreme Court upheld California's continuous trigger rule, which provides that coverage is triggered when "property damage" results from a causative event consisting of "the accident" or "continuous and repeated exposure to conditions." As a result, if any alleged pollution or any resulting property damage from the alleged pollution occurred during a policy's policy period, such policy was triggered.

The Supreme Court further upheld California's "all sums" rule with respect to allocation of the indemnity amongst the triggered policies. The "all sums" rule provides that any policy can be held responsible for the indemnity of the entire loss, up to its policy limits. In doing so, the Supreme Court of California specifically rejected the "pro rata" approach, which has been adopted by other states, and which provides that an equal share of the amount of damage is assigned to each year over which the injury occurred, by dividing the number of years an insurer was "on the risk" by the total number of years that the progressive damage took place. The "all sums" approach adopted by the California Supreme Court, unlike the pro rata approach, does not allocate loss into the uninsured periods.

The California Supreme Court, in upholding the stacking rule, "disapproved" of the holding of by the California Court of Appeals in FMC Corporation v. Plaisted & Companies, 61 Cal. App. 4th 1132 (Cal. App. 6th Dist. 1998), which prevented an insured from stacking multiple consecutive policies in a case in which the insured had caused toxic contamination "over a period of many years." Instead, here, the Supreme Court expressly allowed for the stacking of multiple insurance policies over multiple years to compile sufficient limits to cover the entire loss. As the Supreme Court explained, allowing stacking "effectively stacks the insurance coverage from different policy periods to form one giant uber-policy with a coverage limit equal to the sum of all purchased insurance policies." State of Cal, No. S170560, 15, citation omitted. Essentially, this stacking approach treats all of the triggered insurance as though it were purchased in one single policy period.

Finally, the Supreme Court expressly upheld the insurer's ability to avoid stacking, through use of an "antistacking" endorsement.

As a result of this decision, carriers that issue policies to insureds in California that may be subject to long-tail claims, should seriously evaluate whether the apparently necessary anti-stacking language be included in those polices so as to avoid becoming part of a future "uber-policy."