

Client Alert

Latham & Watkins

Environment, Land & Resources Department

California Supreme Court Expands Coverage for “Long-Tail” Bodily Injury and Property Losses

Following a multiyear battle in the appellate courts, the California Supreme Court recently issued a landmark decision in *State of California v. Continental Insurance Co., et al.*, which should significantly expand policyholders’ rights to pursue coverage for “long-tail” bodily injury and property losses under historic CGL policies.

By way of background, the case stems from contamination at an industrial waste disposal site in Riverside County, formerly owned by J.B. Stringfellow, Jr. (the Stringfellow Site). In the 1950’s, the State negligently designed and supervised the construction of a hazardous waste disposal facility at the Stringfellow Site. The failed design resulted in significant contamination of the soil, groundwater and surface water surrounding the Site, for which the State was found liable. The State’s insurance carriers refused to indemnify these liabilities totaling more than \$700 million.

In the State’s lawsuit against its insurers, the trial court found that each insurer was liable up to its policy limits. However, relying on an outlier Court of Appeal decision (*FMC Corp. v. Plaisted & Cos.* (1998)), the court held that the State could only recover from one group of primary and excess policies in force during a single policy period, thereby preventing the State from “stacking” decades of coverage triggered by the progressive property damage. The State appealed the stacking issue to the Court of Appeal. A team of Latham attorneys coordinated closely with the State’s coverage counsel and submitted an amicus brief urging the Court of Appeal to reverse the trial court’s ruling on the stacking issue. The Court of Appeal then reversed the trial court’s decision, and the insurers appealed to the Supreme Court.

The Supreme Court accepted review of the following two issues:

- (1) “When continuous property damage occurs during the periods of several successive liability policies, is each insurer liable for all damage both during and outside its period up to the amount of the insurer’s policy limits?”; and
- (2) “If so, is the “stacking” of limits — i.e., obtaining the limits of successive policies — permitted?”

“The Supreme Court’s decision cements two very important principles for progressive losses spanning multiple policy periods ... which should significantly expand policyholders’ rights to pursue coverage for ‘long-tail’ bodily injury and property losses under historic CGL policies.”

Latham again supported the appeal effort by submitting an amicus curiae brief, arguing that the policyholder should be allowed to call upon any triggered policy as it saw fit, and stack many successive years of primary and excess coverage to fund long-tail liabilities.

This effort is likely to provide huge dividends for policyholders. The Supreme Court's decision cements two very important principles for progressive losses spanning multiple policy periods. First, the Court extended the "all sums" allocation rule (developed in the Supreme Court's seminal decisions regarding the duty to defend, *Montrose Chemical Corp. v. Admiral Ins. Co.*(1995) and *Aerojet-General Corp. v. Transport Indem. Co.* (1997)) to the indemnity context, holding that an insurer with a policy in force during a continuous loss is obligated to pay for "all sums" resulting from the loss, up to the full extent of its policy limits, even if some of the damage occurred before or after the insurer's policy period. In so doing, the Court rejected the "pro rata" approach advanced by the insurers (and employed in some jurisdictions), in which each insurer is only liable for a proportion of the total liability under the fiction that this approximates the amount of property damage that occurred during their policy period. Although policyholders have long contended that the "all sums" rule applies with equal force to both an insurer's duty to defend and duty to indemnify, the Supreme Court's ruling puts that issue to rest.

Second, the Court rejected *FMC* and held that in a continuous loss scenario spanning multiple years of coverage (for which the policyholder paid multiple years of premiums), the policyholder is entitled to "stack" successive years of coverage if necessary to satisfy its liability. Discussing this "all-sums-allocation-with-stacking approach," the Court equated the policyholder's interest to holding "one giant 'uber policy' with a coverage limit equal to the sum of all purchased insurance policies." This aspect of the decision should enhance policyholders' ability to obtain coverage for progressive damage occurring over many years. In the past, excess insurers with coverage triggered by a continuous loss spanning many years have been resistant to settle such claims, often insisting that under the *FMC* "one policy period" rule, their policy would not be implicated (particularly if it provided less total coverage than another policy period). The Court's ruling ends this debate by declaring that a policyholder should be entitled to the full limits of *any* triggered primary or excess policy, and should not be limited to choosing one policy period to address long-tail losses.

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