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California Allows Policyholders to "Stack" Insurance Coverage

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Last Thursday, the California Supreme Court effectively increased the amount of insurance available to businesses for latent injury claims. In a unanimous decision in *State of California v. Continental Ins. Co. et al.*, S170506 (Cal. Aug. 9, 2012) ("*Continental*"), the court held that policyholders facing losses arising from continuous or progressively deteriorating property damage occurring throughout several years may aggregate, or "stack," 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. The ruling is an important one. Not only does it settle the much litigated question of stacking under California law, but it has implications that reach beyond the specific factual context in which the case arose.

Typically, only the insurance policies in force during the year in which the event giving rise to the property damage occurs are available to respond to the loss. Once the limits of those policies are exhausted, any remaining costs arising from the loss must be borne by the policyholder. Determining which policies must respond to the loss is relatively straightforward, even if the insured has in force multiple, consecutive policies, issued by different insurance carriers, over the several years it may take the insured to recover from the loss. But this determination has been anything but straightforward when there isn't a single, unambiguous cause of the property damage, and the damage takes place slowly over years – or decades. Such was the case in *Continental*.

The California Supreme Court's Decision

In *Continental*, the State of California designed and operated an industrial waste disposal facility from the 1950s to 1970s, commonly referred to as the Stringfellow Acid Pits, east of Los Angeles. Industrial waste placed at the site leaked into the underlying groundwater aquifer and surrounding environment, resulting in a plume of industrial waste that, over the years, extended for miles. The state was held liable for all past and future cleanup costs, with remediation costs estimated at as much as $700 million.

The state sued its insurers seeking indemnity for its losses arising from the environmental contamination under multiple policies that provided coverage from 1964 to 1972. The trial court ruled that the state had to choose a *single* policy period for coverage for the entire loss and could recover no more than the limits of insurance available under the policies in effect at the time the loss occurred. In other words, the state was not permitted to "stack" the policy limits of all of the policies in place during the years when the waste leaked from the facility and spread throughout the environment. As such, the most the state could recover was $48 million. Having already obtained $120 million in settling with a number of insurers, the state was not entitled to any additional recovery according to the trial court, despite having obtained a favorable jury verdict on its claim for breach of the insurance policies.

The California Court of Appeal for the Fourth District reversed the trial court's "no stacking" ruling, creating a split of authority between it and the Sixth District, which several years earlier held that an insured could not stack its policies. The California Supreme Court resolved the conflict, siding with the Fourth District.

The *Continental* court began its analysis by noting the unique problems presented by coverage disputes involving "long-tail" injuries such as environmental damage. A "long-tail" injury, according to the court, is characterized by "a series of indivisible injuries attributable to continuing events without a single unambiguous cause" that produce continuous or progressively deteriorating damage over a long period of time. Further, it was "virtually impossible" for an insured to prove what specific damage occurred during any given period of time. As such, an insured would likely be unable to recover any insurance for long-tail claims if it were required to make such a showing.

The California Supreme Court, applying the reasoning set forth in two of its prior decisions, held that a first-party property policy promising to pay "all sums" for property damage occurring during the policy period that results from an "accident or continuous or repeated exposure to conditions" provides indemnity coverage for the *entirety* of the ensuing damage or injury, up to the policy limits. All that is required to trigger coverage under the policy is that some of the damage occur while the policy was "on the loss." The trial court in *Continental* had applied this "all sums" rule, but in disallowing stacking and limiting the State of California to a single policy period for coverage for the entire loss, it left the state "vastly uncovered for a significant portion of the loss." Nothing in the policies at issue, however, prohibited stacking. To the contrary, the policy language permitted it, according to the *Continental* court. In light of this, and the various equitable and pragmatic advantages of an "all-sums-with-stacking" rule, the court concluded that allocation of indemnity costs should be determined with stacking.

Implications

The holding of *Continental* is arguably limited to insurance policies that include the "all sums" language contained in the policies at issue in that case, as well as to policies that do not include anti-stacking provisions. Nevertheless, its impact will be felt well beyond the context of first-party policies and disputes involving property damage arising from environmental contamination. The nature of "long-tail" injuries, and the evidentiary and equitable issues they present, were driving forces behind the *Continental* court's decision. Such injuries are not unique to environmental damage cases. Property damage and bodily injury claims arising in a variety of contexts such as construction defects, asbestos, silicosis, viral infections or other personal injuries resulting from "defective" biological products and medical implants are also plainly implicated.

Continental's "all-sums-with stacking" rule may also potentially apply to coverage disputes arising in less obvious contexts in which the loss results from "indivisible injuries attributable to continuing events without a single unambiguous cause." These may include claims involving employment discrimination and sexual harassment as well as sexual abuse of the type reported recently in the news. So while *Continental* has finally settled several questions frequently litigated under California law, its application to a variety of contexts is likely to be vigorously litigated in the years to come.