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California Court of Appeal Revisits Anti-Stacking Rule

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On January 5, 2009, California's Court of Appeal for the Fourth Appellate District overturned a 2004 trial court's "no-stacking" decision, which held that the State of California, as a policyholder in a case of continuous injury due to pollution, could not stack the limits of multiple policies over an entire period of damage. Specifically, the Fourth District's decision in State v. Continental Insurance Cos., No. E041425, 2009 WL 18696 ("Stringfellow"), held that "absent antistacking provisions . . . standard policy language permits stacking. Id. at *16. The Stringfellow decision expressly rejected an earlier Sixth District "anti-stacking" decision, FMC Corp. v. Plaisted & Cos., 61 Cal. App. 4th 1132 (6th Dist. 1998), calling the reasoning in that decision "flawed and unconvincing." Stringfellow, 2009 WL 18696, at *1.

The Stringfellow coverage case arises from claims brought by the State of California seeking to recover on insurance policies for the costs of remediating long-term contamination at the Stringfellow hazardous waste facility near Glen Avalon, California. The State began its supervision of the site in 1956. The damage occurred between 1963 and 1978. This fifteen-year period was divided into seven different (although continuous) insurance policy periods. The trial court, following an "all-sums" approach, held that a triggered policy was required to cover the State's liability in full up to the policy limits, but the trial court would not permit the State to "stack" policy limits, meaning that the State could not recover under policies covering different periods. Instead, pursuant to the "anti-stacking" rule in FMC, the State could only recover under a single policy period.

ALL-SUMS RULE

The "all-sums" rule states that every insurer that issued a liability policy for any period during which a continuous loss occurred is liable for "the full extent of the loss up to the policy's limits." Armstrong World Indus., Inc. v. Aetna Cas. & Surety Co., 45 Cal. App. 4th 1, 49 (1st Dist. 1996). The insurers in Stringfellow argued that "'[t]he majority of jurisdictions that have considered this issue have rejected the 'all sums' approach in the indemnity context.'" Stringfellow, 2009 WL 18696, at *9. Relying on precedent dealing with the duty to defend, see Aerojet-Gen. Corp. v. Trans. Indem. Co., 17 Cal. 4th 38, 56–57 (1997), the Stringfellow Court rejected the insurers' argument and concluded that the "trial court correctly ruled that each of the Insurers covered the total amount of the State's liability for property damage (subject to their respective policy limits), including property damage that actually occurred before or after their policy periods. Stringfellow, 2009 WL 18696 at *9.

ANTI-STACKING RULE

"Stacking" refers to stacking of policy limits. That is, "the ability of the insured, when covered by more than one insurance policy, to obtain benefits from a second policy on the same claim when recovery from the first policy would alone be inadequate." Id. (citations and quotation marks omitted). Stacking is most often used to refer to the stacking of policy limits across different policy periods. When the loss incurred is greater than the limits of any one applicable policy, the insured will seek to stack the policy limits across the policy periods. Id. at *10.

The trial court in the Stringfellow case considered itself bound by the "anti-stacking" rule set forth in FMC. In FMC, the Court of Appeal stated that "'stacking' . . . has been criticized as affording the insured substantially more coverage, for liability attributable to any particular single occurrence, than the insured bargained or paid for," and concluded that where "there is no anti-stacking provision [in the insurance policy], there is precedent . . . for judicial intervention." 61 Cal. App. 4th at 1189. The Stringfellow Court disagreed and held that the trial court erred by applying FMC and ruling that the State could not recover more than the total policy limits in effect for any one policy period. Stringfellow, 2009 WL 18696 at *16. The Fourth District reasoned that "standard policy language does provide for stacking, and therefore that is exactly what the insured has bargained and paid for." Id. The Stringfellow Court was critical of the remedy in FMC, holding that it is inconsistent to allow the insured to choose any one policy period (i.e., the one with the highest limits) and to recover up to the limits in effect for that one period, and at the same time permit an insurer (who paid up to its policy limits) to receive contribution from all the other insurers. In the end, that insurer would not wind up paying its full policy limits. Id. at *17.

The Court of Appeal concluded: "[W]e find all antistacking arguments and authorities unpersuasive. Based on the policy language, and also based on a consistent line of authority in California that allows stacking in other multiple coverage situations, . . . the State was entitled to stack the policy limits of all applicable policies across all applicable policy periods." Id. at *20.

IMPLICATIONS OF STRINGFELLOW

Whether a policyholder may stack the applicable policy limits can significantly affect the amount of the policyholder's eventual recovery. This decision from the Fourth District stands at odds with the FMC decision from 1998 and calls into question the correct allocation rule in California. Given the split between the Fourth and Sixth Districts, the California Supreme Court may grant review of this Stringfellow decision as it did in April 2007 when it granted review of the Court of Appeal's January 2007 ruling reversing the trial court's entry of summary judgement in favor of other insurers involved in the case. *See* State v. Underwriters at Lloyd's London, 146 Cal. App. 4th 851 (4th Dist. 2006), review granted, 156 P.3d 1014 (Cal. 2007). Oral argument in that appeal is scheduled for January 8.

For more information please contact:

Barry R. Ostrager
(212) 455-2655
bostrager@stblaw.com

Chet A. Kronenberg
(310) 407-7557
ckronenberg@stblaw.com

Seth A. Ribner
(310) 407-7510
sribner@stblaw.com

Michael D. Kibler
(310) 407-7515
mkibler@stblaw.com