Continental Insurance: Insureds Strike Gold In California

Stephen A. Klein
HOLLINGSWORTH LLP

For two decades, courts have struggled with how to allocate long-tail environmental liabilities, asbestos claims and similar mass torts. The result has been a variety of insurance coverage triggered by such claims. The language of the standard commercial general liability (CGL) policy does not neatly answer the question. Some jurisdictions, seeking a seemingly “equitable” result, have adopted a “pro rata” allocation in which the policy is stacked over all triggering years – including years in which the policyholder has no coverage. Not surprisingly, this result generally is favored by insurers. A slightly different number of states, focused on staying true to the standard policy language, have adopted an “all sums” approach. Under such a policy, a policy could trigger binding liability well into the future. Thus, any policy that sustained an injury overlapping more than one policy period would be stacked – it could pay up to the policy limits for that injury. And such policies would pay “all sums” the policyholder is obligated to pay for property damage “during the policy period.”

The California Supreme Court disagreed. In an important decision handed down in August, the California Supreme Court redefined how and when an insurance policyholder could access the full limits of their policy for injuries occurring years after the policy year in which the injury occurred. The court’s decision, one financial consulting firm is advising insurers and reinsurers to “conduct a table pro rata coverage allocation rules, and prohibitions on stacking.”

But for most interested parties, the effect of the decision is clear: the availability of coverage under past policies far outweighs the potential curtailing of stacking in future coverage. Some of the most consequential long-tail claims, due to the long latency of pollution, asbestos and silicosis, generally have been excluded from CGL coverage for many years with the advent of policy exclusions. However, this decision has been identified as the most influential state supreme court in the nation – by a significant margin – based upon the rate by which its decisions are followed by courts in other states. California jurisprudence has been particularly influential in the field of insurance coverage – the California Supreme Court has been referred to as the “national clearinghouse” for insurance policy disputes with renewed vigor. But even for liabilities in other states, Continental Insurance: Insureds Strike Gold In California – and elsewhere. Both policies . . . [and] quantify their exposure in an allocation of $6 million of loss to each of those years.

But what share of the liability does each triggering policy pay? The language in the standard insuring agreement states that each policy will pay “all sums” for which the policyholder is legally liable. But the pro rata approach construes the insurer’s promise to pay “all sums” as modified by the language in the definition of “occurrence” requiring property damage “during the policy period.” That is, property damage during the policy period not only triggers the policy, it also defines the scope of what is covered – the insurer is not promised to pay any “all sums” policy for any property damage “during the policy period.” Recognizing the impossibility in most cases of tying contamination at a site many years after specific releases during previous policy periods, some courts utilize a simple pro rata allocation as a (very) rough approximation of the property damage occurring during a particular policy period – which courts believe is the most equitable method of ensuring that each policy pays no more than its proportionate share of the liability.

The “all sums” approach, which has long been the rule in California, rejects this analysis. As the Continental Insurance Court explained, the CGL policy requirement for property damage “during the policy period” appears in the definition of “occurrence,” not in the policy’s insuring agreement (the insurer’s basic promise of coverage). And thus is “neither logically nor grammatically related to the ‘all sums’ language in the insuring agreement.”

Continental Insurance Adoption

Though California clearly was in the “all sums” camp, the appellate courts in the state had diverged on the related question of whether a policyholder could stack the limits to receive “all sums” up to policy limits of multiple triggered policies. The rationale against stacking: permitting access to multiple policy limits to cover a single (albeit multi-year) occurrence supposedly would provide the policyholder with more coverage than it paid for.

The California Supreme Court disagreed. It found that the standard policy language permitting stacking was not in the policy’s insuring agreement (the insurer’s agreement to pay “all sums” up to policy limits). Hence, there is no obligation to require every triggered policy, in succession, to pay what it had individually promised in its insuring agreement – “all sums” up to policy limits. Hence, stacking. See id. (“The all-sums-with-stacking indemnity principle properly incorporates the Montrose continuous injury trigger and the ‘all sums’ scope.”)

The court also found that the equities favored stacking. Otherwise, the policyholder would not receive the full limits for which it paid, and insurers would obtain a unfairly advantaged benefit from the policyholder’s purchase of insurance. Add on the 20 years or more during which such injury or damage occurs. Hence, the court’s decision did not require that insurers “stack” – it simply required that insurers pay “all sums” for which the policyholder is legally liable. But the policyholders in those cases are not disadvantaged, the court reasoned. Rather, the court concluded that the policy language permits stacking and expressly disavowed the continuous injury trigger and the “all sums” scope. Applying these two rules, there is no need to require every triggered policy to pay what it individually promised in its insuring agreement – “all sums” up to policy limits. Hence, stacking.

The Impact – Significantly More Insureds Under Past Policies

Continental Insurance should have a substantial and far-reaching effect on the extent to which historic long-tail liabilities are covered. Not only does stacking increase, perhaps dramatically, the available limits in covered years, it does so without requiring the policyholder to assume a share of the insured’s losses for “triggered” years in which it is not required to purchase coverage (either because it did not purchase coverage or because its insurer was insolvent). Thus, the decision should result in more coverage in several years, a result that is not surprising when one considers the significant financial impact of the decision. The decision, one financial consulting firm is advising insurers and reinsurers to “conduct a table pro rata coverage allocation rules, and prohibitions on stacking.”

But for most interested parties, the effect of the decision is clear: the availability of coverage under past policies far outweighs the potential curtailing of stacking in future coverage. Some of the most consequential long-tail claims, due to the long latency of pollution, asbestos and silicosis, generally have been excluded from CGL coverage for many years with the advent of policy exclusions addressing those specific hazards; the ability to stack limits in new policies thus will have a limited impact. Without doubt, the real effect of the California Supreme Court’s ruling will be on the value of past coverage that companies purchased years ago. Indeed, in the wake of the decision, the financial consulting firm is advising insurers and reinsurers to “conduct an inventory of pre-1986 [CGL] and excess policies . . . [and] quantify their exposure and review their reserves for pending long-tail asbestos and environmental claims,” and correspondingly, advises that for policyholders, the decision may “potentially reduce corporate self-insured reserve exposure” for such claims.

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