

BINDING AUTHORITY

Insurance Coverage Decisions: Issued Today - Impact Tomorrow



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California Supreme Court Issues Long-Awaited Allocation Decision: Adopts The “One Giant ‘Uber Policy’” Approach

What do you call it when parties in California can get together and settle a trigger and allocation case? A Montruce.

That didn't happen in *State of California v. Continental Insurance Company*. So today the Supreme Court of California handed down one of the most eagerly-awaited insurance coverage decision in the country.

In March 2009 the California high court agreed to hear *State of California v. Continental Insurance Company* – addressing allocation in the context of a long-tail environmental claim. The court issued its decision today – 3 ½ years later. Throughout this long period of waiting I sometimes wondered if the court just forgot about it – like I did to take the trash out two weeks ago. Don't ask. I'm still dealing with the consequences. Three and a half years -- that's a long time. You could have started law school, graduated, taken the bar exam, learned if you passed and made a court appearance during that period.

In any event, at issue was coverage for the State of California for liability that it incurred in connection with the clean-up of the Stringfellow Acid Pits site in California. *Continental* at 3. In particular, the issue before the court was how to allocate losses among liability insurers that covered the State from 1964 to 1976. *Id.* at 2. All agreed that the property damage caused by the site took place continuously throughout the defendant insurers' multiple consecutive policy periods from 1964 to 1976. *Id.* at 4. The insurers also conceded that it was impossible to prove precisely what property damage occurred during any specific policy period. *Id.* at 10-11.

In other words, it's a continuous trigger case. But the issue before the court was not trigger. It was the companion to trigger of coverage – Once it is determined that multiple consecutive policies are obligated to provide coverage, because of the continuous trigger,

how do you allocate the loss between all of the insurers that issued policies during this continuous trigger period?

Following a review of California's allocation jurisprudence, and a survey of the country nationally on the issue, the Supreme Court rejected pro-rata allocation and adopted "all sums." The court held:

We therefore conclude that the policies at issue obligate the insurers to pay all sums for property damage attributable to the Stringfellow site, up to their policy limits, if applicable, as long as some of the continuous property damage occurred while each policy was "on the loss." The coverage extends to the entirety of the ensuing damage or injury (*Montrose, supra*, 10 Cal. 4th at p. 686), and best reflects the insurers' indemnity obligation under the respective policies, the insured's expectations, and the true character of the damages that flow from a long-tail injury.

Id. at 14.

The court next turned to another related issue – while the insured can recover the entire continuous injury loss from any one triggered policy, up to its policy limits, what happens if the loss exceeds the limit of a single policy – as it often will in the situation of a large environmental claim. The Supreme Court addressed this by adopting "All-sums-with stacking," which creates what the court called "one giant 'uber policy.'"

The all-sums-with-stacking indemnity principle properly incorporates the *Montrose* continuous injury trigger of coverage rule and the *Aerojet* all sums rule, and "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. Instead of treating a long-tail injury as though it occurred in one policy period, this approach treats all the triggered insurance as though it were purchased in one policy period. The [insured] has access to far more insurance than it would ever be entitled to within any one period." (Bratspies, *supra*, 1999 B.Y.U. L.Rev. at p. 1245.) The all-sums-with-stacking rule means that the insured has immediate access to the insurance it purchased. It does not put the insured in the position of receiving less coverage than it bought. It also acknowledges the uniquely progressive nature of long-tail injuries that cause progressive damage throughout *multiple* policy periods.

Id. at 15 (emphasis in original).

The court explained the rationale for its decision as follows:

An all-sums-with-stacking rule has numerous advantages. It resolves the question of insurance coverage as equitably as possible, given the immeasurable aspects of a long-tail injury. It also comports with the parties' reasonable expectations, in that the insurer reasonably expects to pay for property damage occurring during a long-tail loss it covered, but only up to its policy limits, while the insured reasonably expects indemnification for the time periods in which it purchased insurance coverage. All-sums-with-stacking coverage allocation ascertains each insurer's liability with a comparatively uncomplicated calculation that looks at the long-tail injury as a whole rather than

artificially breaking it into distinct periods of injury. As the Court of Appeal recognized, if an occurrence is continuous across two or more policy periods, the insured has paid two or more premiums and can recover up to the combined total of the policy limits. There is nothing unfair or unexpected in allowing stacking in a continuous long-tail loss. *Id.* at 16-17.

There is more to the decision and those involved in the area of coverage will of course study the opinion in more detail than I've provided.

A copy of *State of California v. Continental Insurance Company* can be accessed here:

<http://www.courts.ca.gov/opinions/documents/S170560.PDF>

Please let me know if you have any questions.

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