Strafford Publications Teleconference

California's Landmark Insurance Ruling in the Stringfellow Litigation:

Indemnification Strategies in Continuing Property Damage and Personal Injury Claims

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All-Sums Rule

(Robert Horkovich, William Baron)

A. *State of California v. Continental Ins. Co., et al.,* 169 Cal. 4th 1114 (January 5, 2009).

All-Sums Rule

(Robert Horkovich)

In its “all-sums” ruling, the trial court had ruled in favor of the State:

“[O]nce coverage for…continuous…damage…is triggered under a liability policy, the insurer is required to pay for all sums (up to the policy limits) of the insured’s liability – not just liability specifically allocable to damage during the policy period.”

All-Sums Rule

(Robert Horkovich)

Insuring Agreement:

"To pay on behalf of the Insured all sums which the Insured shall become obligated to pay by reason of liability imposed by law…for damages…because of injury to or destruction of property, including loss of use thereof."

All-Sums Rule

(Robert Horkovich)

"It is a settled rule that an insurer on the risk when continuous or progressively deteriorating damage or injury first manifests itself remains obligated to indemnify the insured for the *entirety* of the ensuing damage or injury."

Montrose Chem. Co. v. Admiral Ins. Co., 10 Cal.4th 645, 686 (1995) (emphasis added).

All-Sums Rule

(Robert Horkovich)

[E]very insurer that issued a liability policy for any period during which a continuous loss occurred was liable for "the full extent of the loss up to the policy's limits…."

Armstrong World Industries, Inc. v. Aetna Casualty & Surety Co., 45 Cal.App.4th 1, 49 (1996).

All-Sums Rule

(Robert Horkovich)

"…the duty to indemnify 'is triggered if specified harm is caused by an included occurrence, so long as at least some such harm results within the policy period…. *It extends to all specified harm caused by an included occurrence, even if some such harm results beyond the policy period*….'"

Aerojet-General Corp. v. Transport Indemnity Co., 17 Cal.4th 38, 57-58 (1997) (emphasis added).

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All-Sums Rule

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"The all-sums approach, however, is not *literally* joint and several liability…. The insurers are not jointly liable on each other's policies; rather, each insurer is severally liable on its own policy."

Slip. Op. at 18. (emphasis in original).

All-Sums Rule

(Robert Horkovich)

"To summarize, then, in California, when there is a continuous loss spanning multiple policy periods, *any* insurer that covered *any* policy period is liable for the *entire* loss, up to the limits of its policy."

Slip. Op. at 19 (emphasis in original).

All-Sums Rule

(Robert Horkovich)

B. Implications of the ruling

Each insurance company is wholly responsible for the whole loss imposed upon the policyholder up to its policy limits. The exposure of each insurance company is not limited to just the dollar liability presented only by that amount of property damage taking place during the policy period.

All-Sums Rule

(Robert Horkovich)

C. Other Jurisdictions That Have Adopted "All-Sums":

- Washington: *American Nat'l Fire Ins. Co. v. B & L Trucking & Constr. Co.*, 951 P.2d 250, 256-257 (1998). See also *Groul Constr. Co. v. Ins. Co. of N. America*, 11 Wn.App. 632, 524 P.2d 427 (1974).
- Oregon: *Cascade Corp. v. American Home Assur. Co.*, 135 P.3d 450, 455-56 (2006).
- Pennsylvania: *J.H. France Refractories Co. v. Allstate Ins. Co.*, 626 A.2d 502, 507-508 (1993).

All-Sums Rule

(Robert Horkovich)

C. Other Jurisdictions That Have Adopted "All-Sums":

- Delaware: *Monsanto Co. v. C.E. Heath*, 652 A.2d 30, 35 (1994).
- Ohio: *Goodyear Tire & Rubber Co. v. Aetna Cas. & Sur. Co.*, 769 N.E.2d 835, 841 (2002).
- Illinois: *Zurich Ins. Co. v. Raymark Indus., Inc.*, 514 N.E.2d 150, 165 (1987).
- Massachusetts: *Rubenstein v. Royal Ins. Co. of Am.*, 694 N.E.2d 381 (1998), aff'd, 708 N.E.2d 639 (1999).

All-Sums Rule

(Robert Horkovich)

C. Other Jurisdictions That Have Adopted "All-Sums":

- Texas: *Union Pac. Res. Co. v. Continental Ins. Co.* (Tex.Dist.Ct. Dec. 17, 1998), No. 249-23-98, reprinted in 13 Mealey's Ins. Litig. Rep. No. 11, Section A (Jan. 19, 1999).
- Arkansas: *Murphy Oil USA, Inc. v. United States Fid. & Guar. Co.* (Ark.Cir.Ct. Feb. 21, 1995) No. 91-439-2, reprinted in 9 Mealey's Ins. Litig. Rep. No. 19, Section I (Mar. 21, 1995).

All-Sums Rule

(Robert Horkovich)

Memorandum of Meeting of Discussion Group Asbestosis – April 21, 1977

"The majority also contended that each carrier on risk during any part of that period could be fully responsible for the cost of defense and loss."

All-Sums Rule

(William Baron)

D. The Insurers' View:

1. The California Supreme Court has not decided how indemnity should be allocated in a continuing loss context.

- *Armstrong* and *Aerojet* addressed the duty to defend, and statements in those opinions regarding the duty to indemnify were *dicta*.
- Later California appellate decisions addressing the duty to defend extended "all sums" to indemnity, in reliance on *Montrose* and *Aerojet*, although the indemnity issue was not presented or decided in those cases.

All-Sums Rule

(William Baron)

2. "All-sums" in the indemnity context is inconsistent with the policy language.

- Occurrence Definition: "'Occurrence' means an accident or a continuous or repeated exposure to conditions which result in injury to persons or damage to property during the policy period...."
- Policy Period Territory: "This policy applies only to occurrences which take place during the policy period commencing _____ and ending _____."

All-Sums Rule

(William Baron)

3. The "all sums" approach is contrary to the California rules of contract interpretation.
   - The "all sums" approach rewrites the insurance contracts – replacing policy terms limiting coverage to property damage "during the policy period" with property damage "during and before and after the policy period."
   - The "all sums" approach deprives policy terms of meaning, contrary to the rule that each term in a contract must be given independent meaning and effect. (Civil Code § 1641.)

All-Sums Rule

(William Baron)

4. The “all-sums” approach is objectively unreasonable.

- “All sums” unreasonably requires an insurer to pay all damage occurring over time (subject to other policy terms and Insurance Code § 533), despite policy language limiting coverage to risk of harm during the policy period.
- “All sums” unreasonably requires insurers to pay for damage that took place in periods in which the insured did not buy insurance or its policies exclude coverage.

All-Sums Rule

(William Baron)

5. Numerous courts across the country have rejected "all-sums" as unreasonable:

   - "We do not believe that these policy provisions can reasonably be read to mean that one single-year policy out of dozens of triggered policies must indemnify the insured's liability for the total amount of pollution caused by events over a period of decades, including events that happened both before and after the policy period…." (*Public Service Company of Colorado v. Wallis & Companies* 986 P.2d 924, 939 (Colo. 1999).)

All-Sums Rule

(William Baron)

6. Other jurisdictions rejecting "all-sums":

- Colorado: *Public Service Co. of Colorado v. Wallis and Companies*, 986 P.2d 924 (1999).
- New York: *Consolidated Edison Co. of New York v. Allstate Ins. Co.*, 774 N.E.2d 687 (2002).
- Connecticut: *Security Ins. Co. of Hartford v. Lumberman's Mutual Cas. Co.*, 826 A.2d 107 (2003).
- New Jersey: *Carter-Wallace v. Admiral Ins. Co.*, 712 A.2d 1116 (1998).

All-Sums Rule

(William Baron)

Other jurisdictions rejecting "all-sums":

- Minnesota: *Domtar, Inc. v. Niagra Fire Ins. Co.*, 563 N.W.2d 724 (1997).
- Utah: *Sharon Steel Corp. v. Aetna Cas. & Sur. Co.*, 931 P.2d 127 (1997).
- Idaho: *Empire Fire & Marine Ins. Co. v. N. Pacific Ins. Co.*, 905 P.2d 1025 (1995).
- New Hampshire: *Energy N. Natural Gas, Inc. v. Certain Underwriters at Lloyds*, 934 A.2d 517 (2007).

All-Sums Rule

(Robert Horkovich, William Baron)

E. Best practices

Stacking

(Roger Simpson, William Baron)

Introduction

- Meaning, origin and development of the term
- Use in long-term injury cases

Stacking

(Roger Simpson)

A. *State of California v. Continental*

- Back to basics: Read policy, apply rules of interpretation
- Compare: Other multiple coverage situations
- Court's rejection of "anti-stacking" rationales

Stacking

(Roger Simpson, William Baron)

B. Implications of the Ruling

- Stacking permitted absent enforceable limitation
- Deductibles/SIRs
- Comprehensive/multifaceted approach

Stacking

(William Baron)

C. The Insurers' View:

- Stacking is contrary to the policy language.
- "All sums" and stacking create an unreasonable result. (*FMC Corp. v. Plaisted and Companies* (1998) 61 Cal.App.4th 1132, 1188-1190.)

Stacking

(Roger Simpson, William Baron)

D. Court treatment in other jurisdictions

- All sums vs. prorata

Stacking

(Roger Simpson, William Baron)

D. Best Practices

Loss Mitigation

(Roger Simpson, William Baron)

A. *State of California v. Continental*

- Insurers' mitigation argument
- Court's ruling: Mitigation rules do not apply
  - Mitigation of damages
  - Mitigation of loss
- Antithetical to purpose of liability insurance

Loss Mitigation

(Roger Simpson)

B. Implications of the ruling

- Mitigation duty would require clear policy language

Loss Mitigation

(Roger Simpson, William Baron)

C. Court treatment in other jurisdictions

- Consistent with *State v. Continental*

Loss Mitigation

(Roger Simpson, William Baron)

D. Best practices

- Check the policy language
- Other arguments against mitigation duty

Annualization

(Robert Horkovich)

A. *State of California v. Continental*

- Premiums were payable annually.
- The underwriters had a right to review the policies annually and, based on their review, to increase the premium or to cancel the policies annually, on the anniversary dates.

Annualization

(Robert Horkovich)

- The underwriters on a policy would change on the anniversary date.
- The underwriters' internal documents referred to a one-year policy period.
- The underwriters obtained reinsurance on an annual basis.

Annualization

(Robert Horkovich)

Each policy stated a policy limit for "each occurrence."

The limits were not stated in terms of "per occurrence per year."

Annualization

(Robert Horkovich)

"[T]he policy limits provisions did not incorporate or refer to the annual provisions. The policy limits provisions themselves are not ambiguous…."

Slip. Op. at 53.

Annualization

(Robert Horkovich)

"Jefferson had issued one policy covering a three-year period. However, it had also issued three annual endorsements, each with its own 'Declarations' and each specifying a policy limit of $300,000 per occurrence."

Slip. Op. at 54 citing *Stonewall Ins. Co. v. Palos Verdes Estates*, 46 Cal.App.4th 1810 (1996).

Annualization

(William Baron)

"The policies ... provided: '[T]he limit of the company's liability *under this policy* shall not exceed the applicable amount [listed as the policy limit].'" (Slip Op. at 52-53.)

"Accordingly, each policy provided coverage, for any one occurrence, only up to its stated limits." (Slip. Op. at 53.)

Annualization

(William Baron)

B. Out of state cases rejecting annualization relied upon by the trial court:

- New Jersey: *Diamond Shamrock Chem. Co. v. Aetna Cas. & Sur. Co.*, 609 A.2d 440, 468-69 (1992).
- Delaware: *Hercules, Inc. v. AIU Ins. Co.*, 784 A.2d 481 (2001).
- Illinois: *Outboard Marine Corp. v. Liberty Mut. Ins. Co.*, 670 N.E.2d 740 (1990).

Annualization

(William Baron)

B. Out of state cases rejecting annualization relied upon by the trial court:

- D.C.: *CSX Transportation, Inc. v. Commercial Union Ins. Co.*, 82 F.3d 478 (1996).
- Louisiana (5th Circuit): *Society of the Roman Catholic Church of the Diocese of LaFayette and Lake Charles, Inc. v. Interstate Fire & Cas. Co.*, 26 F.3d 1359, 1366 (1994).

Annualization

(Robert Horkovich, William Baron)

C. Implications of the ruling

Annualization

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D. Best practices

Questions and Answers.

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