Recent California Appellate Court Decision Provides New Hope For Insureds With Environmental Claims

On December 28, 2006, the Court of Appeal of the State of California, Fourth Appellate District, Division Two, issued a significant decision in *State of California v. Underwriters at Lloyd's London et al.*, ("*Lloyds*"). This case involved state claims for insurance coverage associated with the Stringfellow Superfund Site under general liability policies which contained standard sudden and accidental pollution exclusion clauses. First, the case reaffirmed a prior decision holding that the term "sudden" means "abrupt," although, at the same time, it held that even if the initial disposal of wastes was not "sudden," there would be coverage if the events which caused the releases from the site were "sudden." Second, and most significantly, the Court disagreed with other California appellate court decisions which held that unless an insured could apportion damages between covered causes of damage and uncovered causes, it was not entitled to coverage. Instead, it held that as long as a covered cause is a concurrent contributing cause to the damages sustained, the carrier is liable for the entire loss. This holding is extremely important in the environmental context because it means that as long as an insured can show that any event which caused a release is covered by a policy, that insurer is liable for the entire loss, even if there were other releases which caused damages which were not covered by the policy. A more detailed discussion follows.

The Court first, in an unpublished portion of the decision, reaffirmed prior California Appellate Court rulings that the term "sudden" in the "sudden and accidental" exception to the pollution exclusion, means "abrupt." Therefore, it held that the policies only covered "abrupt, not gradual pollution."

The State argued, however, that it was entitled to coverage nevertheless because there were two "abrupt" events that occurred in 1969 and 1978 when heavy rains caused contaminants to be released from the Site. The insurers argued that under *Standun, Inc. v. Fireman's Fund Ins. Co.*, 62 Cal. App. 4th 882 (1998), the State was not entitled to coverage. In that case, the Court held that where wastes were "deposited directly into a landfill, the relevant discharge of pollutants for purposes of the pollution exclusion is the initial release of the hazardous wastes into the landfill, not the subsequent release of pollutants from the landfill into the water, air and adjoining land."

However, the Court held that the State was not liable for dumping but for negligently selecting, designing and operating the site. Thus, its liability was not based, as in *Standun*, on the release of wastes into the site, but "on the releases of wastes *from* the site when, because of the State's negligence, the site failed to contain them properly." Therefore, the Court held that even if the initial depositing of wastes into the Stringfellow Site was not "sudden and accidental," the State would still be entitled to coverage "if the 1969 discharge and/or the 1978 discharges were 'sudden and accidental.'" The Court then held that while the 1969 discharge met these criteria, the 1978 discharge did not because the State should have expected releases to occur.

The Court then, in the published part of the decision, addressed the question of how to allocate coverage between covered and uncovered losses. The State admitted that it could not differentiate the work performed to remedy property damage caused by the escape of contaminants from

one release from those of another release and could not differentiate expenses it paid to remedy damages caused by one release from another release. The Insurers argued that under *Golden Eagle Refinery Co. v. Associated Internat. Ins. Co.* 85 Cal. App. 4th 1300 (2001) and *Lockheed Corp. v. Continental Ins. Co.*, 134 Cal. App. 4th 187 (2005), the State was required to apportion the damages and that since it could not do so; the carriers were not liable for any of the damages.

The Court disagreed. It noted that in *State Farm Mut. Auto. Ins. Co. v. Partridge*, 10 Cal. 3d 94 (1973), the California Supreme Court held the phrase "all sums which the Insured shall become legally obligated to pay as damages" means "all damages for which the insured would be liable in a tort action." Therefore, the *Lloyds* Court held that there was coverage as long as "an insured risk constitutes a concurrent proximate cause of the injuries," and held that the "insured is entitled to coverage even if the damages were partially caused by an uncovered risk." The Court noted that the 1969 discharge was covered, that it rendered the State jointly and severally liable for all of the resulting damage, not just the amount allocable to its own negligence, and therefore, that the insurers were liable to indemnify the State against all of its joint and several liability. It held that "the State is not required to allocate its liability based on the cause of the underlying damage, as long as a covered cause is a concurrent contributing cause. Since there was evidence that the 1969 discharge contributed to the damages for which the State was held liable, the State's liability was covered."

This latter holding is extremely important because it means that as long as an insured can show that any event which caused an environmental release is covered by a policy, the insurer is liable for the entire loss, even if there were other releases which were not covered by the policy. Thus, for example, if an insured had some policies which did not have pollution exclusion clauses and others which contained absolute pollution exclusions, the carriers which did not have exclusions may be held liable for the entire loss, even if releases also occurred during the policy periods in which there were absolute pollution exclusions.

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