

WHEN COVERED AND UNCOVERED DAMAGES ARE INDIVISIBLE, THE CARRIER MUST PAY

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On March 9, 2009, the California Supreme Court decided California v. Allstate¹ ("*Stringfellow*"), an environmental coverage case with major implications for all coverage cases involving damages caused by covered and non-covered occurrences. In a major victory for policyholders, the Court determined that when damages result from multiple causes, some covered and some not, and where the damages are indivisible, all damages are covered unless the insurers can prove the correct allocation.

The History of the Stringfellow Acid Pits

In the 1950's the State of California constructed the Stringfellow Acid Pits as a hazardous waste disposal site. Although the site was originally thought safe from leakage, pollutants seeped into the ground water through fractured rock and around a barrier dam. In addition, and of significance, the pits overflowed twice; first in 1969 after a rainstorm of around twenty inches (statistically expected to occur no more than once every fifty years), and again in 1978 following extraordinarily heavy rains (which were so severe the area was declared a disaster area).

In 1998, the California Federal District Court held the State 100% liable for the costs of remediating contaminated land and ground water around the pits. The State expected those remediation costs to exceed \$500,000,000.

¹ California v. Allstate Ins. Co., 45 Cal. 4th 1008, 90 Cal. Rptr. 3d 1 (2009)

The State's Coverage Action

The State sought coverage from several insurers under commercial general liability policies containing pollution exclusions with the "sudden and accidental" exception.² The insurers denied coverage and the State filed a declaratory judgment action. Although the case contains an interesting opinion regarding pollution exclusions,³ a major focus of the case and this analysis is whether the State could recover indemnity from the insurers for the cost of the clean-up when it could not differentiate the damage caused by seepage (not covered because of the pollution exclusion) from the damage caused by the rain events (covered because of the sudden and accidental exception to the pollution exclusion). The California Supreme Court held that when the damages caused by the covered and non-covered causes cannot be allocated by the insured, the insurer is not relieved from its duty to indemnify⁴.

Implication of Stringfellow

Although *Stringfellow* is an environmental coverage action, the implications extend to many other issues of coverage under liability policies.⁵ For example, consider a completed operations construction defect case brought by an owner against a contractor where water intrusion into a building was caused by defects in a roof negligently installed by a subcontractor (covered under completed operations), leakage

² Three of the four policies had a version of the pollution exclusion which contained an absolute pollution exclusion for pollutants discharged into a "watercourse."

³ The California Supreme Court determined that there were issues of fact that should be tried as to whether any of the pollution exclusions were applicable.

⁴ The insurer could still offer evidence that the damages were divisible, but it had the burden of proof as to this issue.

⁵ In addition to the import of the decision, the California Supreme Court's use of tort principals to determine coverage under a commercial general liability policy has significant future ramifications.

around windows installed by a subcontractor (covered under completed operations) and defects in the installation of the exterior EIFS (not covered under the EIFS exclusion). Under *Stringfellow*, when the damages caused by the water intrusion are indivisible and cannot be allocated to the three causes, the contractor's insurer must cover the entire claim, even though one cause was clearly excluded from coverage. Also, consider whether the carriers for the roofing and window subcontractors providing the contractor additional insured coverage need to pay for all of the damages because the contractor cannot determine the amount of damages caused by the actions of each of the named insured subcontractors.

Conclusion

In any situation where an insured is faced with liability for damages caused by covered and non-covered causes, keep *Stringfellow* in mind when formulating your strategy for negotiating with the insurer.