



INSURANCE CARRIER MUST PAY WHEN DAMAGES ARE INDIVISIBLE

California Supreme Court's use of tort principles carries ramifications

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Last year, the California Supreme Court decided *California v. Allstate* (known as *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.

Acid Pit History

In the 1950s, 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 20 inches (statistically expected to occur no more than once every 50 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 percent liable for the costs of remediating contaminated land and ground water around the pits. The state expected those remediation costs to exceed \$500 million.



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

The insurers denied coverage and the state filed a declaratory judgment action. The case contains an interesting opinion regarding pollution exclusions.

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. 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 dam-

age 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).

In analyzing the insurer's liability, the Court drew from well-established tort principles such as fault, proximate cause and duty.

Although the coverage obligations were based in contract, the Court reasoned, the scope of third-party liability

insurance depends on tort law and covers a broader spectrum of risks. Further, under California tort law, a set of injuries for which the damages are indivisible is treated the same as a single injury: The tortfeasor is liable for the entirety of the damages.

With this background in mind, the California Supreme Court ultimately concluded that when the insurer has promised to indemnify the insured for all "sums which the Insured shall become obligated to pay ... for damages ... because of" non-excluded property damage, coverage necessarily turns on whether the damages for which the insured became liable resulted, pursuant to tort law, from covered causes.

In short, although the insured has the initial burden of demonstrating that one or more covered events render it liable for the damages being sought, the inability to divide damage does not relieve the insured from liability and should not, correspondingly, relieve the insurer. Thus, 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 indemnify.

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

Stringfellow's Implications

Although *Stringfellow* is an environmental coverage action, the decision is equally applicable to any number of factual scenarios and coverage issues under liability policies.

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 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.

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

Conclusion

In any situation where an insured is faced with liability for damages caused by covered and non-covered causes, *Stringfellow* confirms that third-party liability coverage is obligated to indemnify those costs. ■