Case No. S170560

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

STATE OF CALIFORNIA,
Plaintiff, Cross-Defendant and Appellant,
v.
CONTINENTAL INSURANCE COMPANY, et al.,
Defendants, Cross-Complainants and Appellants;

EMPLOYERS INSURANCE OF WAUSAU,
Defendant, Cross-Complainant and Respondent

From an Opinion of the Court of Appeal, Fourth Appellate District,
Division Two, Case No. Civil E041425

From a Decision of the Riverside County Superior Court, Case No. CIV-239784
(Consolidated With RIC-381555), The Honorable E. Michael Kaiser, Judge

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ANSWER TO PETITION FOR REVIEW

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INTRODUCTION

Appellant State of California opposes the petition for review filed in this action by petitioners Continental Insurance, Yosemite Insurance Company, Stonebridge Life Insurance Company and Employers Insurance of Wausau.

Petitioners seek review of two issues decided by the Court of Appeal. The first is the court's "all sums" ruling, which held that, when a policyholder is liable for continuous damage spanning multiple policy periods, each insurance company on the risk during the entire period of damage is obligated to pay "all sums" of the policyholder's property damage liability (up to the policy limits), not just for the specific, incremental damage occurring during each individual policy period. Review is unwarranted because the "all sums" doctrine is already the settled law in this state, as fully developed in the course of two prior California Supreme Court decisions and the unanimous decisions of several courts of appeal. Hence, review is not "necessary to settle an important question of law" as petitioners claim. Moreover, petitioners' contention is contrary to the express language of their policies, which they repeatedly mischaracterize in their petition.

Although petitioners dedicate the vast majority of their petition to their attempt to overturn California's "all sums" doctrine, in the last few pages, they also seek review of the Court of Appeal's holding that, when long-term continuous damage is covered by policies issued during multiple years, the policyholder is entitled to be fully indemnified up to the combined (or "stacked") limits of all applicable liability policies. Petitioners observe that the Court of Appeal's "stacking" ruling conflicts with the prior "anti-stacking" holding of *FMC Corp. v. Plaisted & Co.* (1998) 61 Cal.App.4th 1132 and assert that review is necessary to "secure uniformity of decision."

The opinion below does in fact disagree with the reasoning of *FMC* which it finds to be flawed and unpersuasive. However, this is not the sort of established, persistent conflict that warrants this Court's review but rather a transitional conflict that will likely be resolved in the lower courts. The first appellate decision (*FMC*) provides only a cursory discussion of the issue while the second decision (from the court below) conducts a comprehensive examination, analyzing points which the first opinion failed even to consider and carefully refuting each basis for the prior court's contrary conclusion. The conflict will probably mend itself as subsequent trial and appellate court decisions align themselves with the better-reasoned authority. Of course, if instead the conflict persists, the Court could always resolve it in a future case.

Because neither the "all sums" nor "stacking" issues merits Supreme Court consideration, petitioners' request for review should be denied.

I. REVIEW OF THE "ALL SUMS" DOCTRINE IS NOT NECESSARY TO RESOLVE AN IMPORTANT ISSUE OF LAW

A. Review Is Unwarranted Because the "All Sums" Doctrine Is the Settled Rule In California.

The Court of Appeal held that under the "all sums" doctrine, when continuous property damage spans multiple policy periods, each liability insurer on the risk during the damage period is obligated to pay "all sums" of the policyholder's property damage liability, up to its policy limits. Petitioners, in contrast, insist that each policy's coverage should be limited to the specific damage occurring during its policy period. Petitioners ask this Court to grant review of the "all sums" doctrine, asserting that "review is necessary to settle an important question of law." (Rule 8.500(b)(1).)

Review is unwarranted. The "all sums" doctrine already has been fully articulated, developed and settled in this state in the course of two Supreme Court opinions and at least a half-dozen decisions from the California courts of appeal which, as the court below noted, "have *unanimously* . . . followed the all-sums approach." (Slip Op., at pp. 12-16.) Conversely, such courts have *rejected* petitioners' contention that each policy covers only that part of the continuous damage that occurs during the policy period.

Indeed, as this Court observed in *Aerojet-General Corp. v. Transport Indem. Co.* (1997) 17 Cal.4th 38:

> In *Montrose Chemical Corp. v. Admiral Ins. Co.* [(1995)] 10 Cal.4th 645, we made the point plain. . . . In *Montrose*, we noted, and **reaffirmed, the "settled rule"** of the case law that "an insurer on the risk when continuous or progressively deteriorating [property] damage or [bodily] injury first manifests itself remains obligated to indemnify the insured for *the entirety of the ensuing damage or injury*." [Citation.] In *Armstrong World Industries, Inc. v. Aetna Casualty & Surety Co.* (1996) 45 Cal.App.4th 1, . . . [the Court of Appeal] explained: "[T]he event which triggers an insurance policy's coverage does not define the extent of the coverage. Although a policy is triggered only if [bodily injury or] property damage takes place 'during the policy period,' once a policy is triggered, the policy obligates the insurer to pay 'all sums' which the insured shall become liable to pay as damages for bodily injury or property damage. **The insurer is responsible for the full extent of the insured's liability . . . , not just for the part of the [injury or] damage that occurred during the policy period." In light of the foregoing, commentators have soundly stated: "Courts *reject* the argument that [an] insurer should only be responsible for [injury or] damage that took place during its policy period**. . . ."

(*Aerojet, supra,* 17 Cal.4th at p. 57, fn. 10, bolding added, citing Croskey et al., Cal. Practice Guide: Insurance Litigation 2, *supra*, ¶ 8:73.10, p. 8-19, italics in original.)

California courts which have applied the "all sums" doctrine in continuous loss cases include not only *Aerojet*, *Montrose*, *Armstrong* and the court below, but also *Stonelight Tile, Inc. v. California Ins. Guarantee Assn.* (2007) 150 Cal.App.4th 19, 37; *Shade Foods v. Innovative Products Sales & Mktg., Inc.* (2000) 78 Cal.App.4th 847, 897; *FMC Corp. v. Plaisted & Co.* (1998) 61 Cal.App.4th 1132, 1182-1187; *County of San Bernardino v. Pacific Indem. Co.* (1997) 56 Cal.App.4th 666, 681-682, 691, fn. 20; and *Stonewall Ins. Co. v. City of Palos Verdes Estates* (1996) 46 Cal.App.4th 1810, 1854-1855. In contrast, petitioners identify not a *single* California case which has accepted their argument that liability coverage is confined to the specific portion of the damage that occurred during the policy period.

Because the "all sums" doctrine already constitutes the "settled rule" of this state and there is no conflicting California authority, further Supreme Court review is not "necessary to secure uniformity of decision or to settle an important question of law" under Rule 8.500(b)(1).

1. *Montrose* and *Aerojet* Are Settled Supreme Court Authority on the "All Sums" Issue

In an attempt to portray the "all sums" doctrine as unsettled in this state, petitioners first try to diminish this Court's pronouncements concerning the rule. Although petitioners "acknowledge that *Montrose* and *Aerojet* discuss 'all sums' in relation to indemnity" (Petition, at p. 11), they suggest that neither decision is valid authority on the issue because, in both cases, the ultimate issue presented to the Court was the duty to defend, not the duty to indemnify.

However, as the *Stonewall* court observed in rejecting a similar argument:

> It is true that *Montrose* involved a dispute arising at an earlier stage of the third party litigation, namely, a dispute as to whether a particular carrier had a *duty to defend* its insured against the third party's claims. A duty to defend of course can arise where there is merely a *potential for coverage*. In the cases at bar the issue is whether there is a duty to indemnify; and the test of whether there is a duty to indemnify is whether there is *actual coverage*, not merely a potential for coverage. [¶] However, the *Montrose* court in effect decided the actual coverage question in this case in the course of determining whether there was a potential for coverage in that case. Even though the *Montrose* case only involved the issue of the duty to defend, **the *Montrose* opinion stated what criteria were to be used in determining whether there was actual coverage because the determination of whether there was a duty to defend necessarily involves whether there was a *potential* for actual coverage**.

(*Stonewall, supra*, 46 Cal.App.4th 1810, 1835, italics in original, bolding added.) Similarly, the court below in the present case rejected the argument that *Aerojet* merely was dictum as to whether the "all sums" rule governs the duty to indemnify, stating "the all-sums approach to the duty to indemnify was crucial to the [*Aerojet*] court's holding regarding the duty to defend." (Slip Op., at p. 17.)

Moreover, in *Aerojet*, the Supreme Court majority clearly viewed the *Montrose* decision as governing authority with respect to the duty to indemnify. There, one of the justices filed a concurring and dissenting opinion opining that "[t]he majority's reasoning effectively requires an insurer to indemnify a loss occurring outside the policy period as long as the policy covered the loss at some point in time. This is the opposite of what *Montrose* requires." (*Aerojet, supra*, 17 Cal.4th at pp. 89-90, concurring and dissenting opinion of Justice Chin.) The majority opinion expressly rejected that justice's separate view, stating that *Montrose* "made the point plain" that an insurer on the risk during part of a continuous loss is liable for the *entirety* of the ensuing

damage or injury. (*Id.*, 17 Cal.4th at p. 57, fn. 10; see also, *id.*, at p. 75, citing *Montrose* for the proposition that "although the *trigger* of the duty to indemnify is limited to the policy period, the *extent* of the duty to indemnify is not.")

Finally, petitioners' contention that the "all sums" doctrine applies only to the duty to defend and not to the duty to indemnify is also nonsensical because the "all sums" language *uniformly* appears in a liability policy's *indemnity* agreement, not the defense agreement, and is thus directly applicable to the duty to indemnify. (See, e.g., *Montrose, supra,* 10 Cal.4th at p. 684, fn. 21; *CDM Investors v. Travelers Cas. and Sur. Co.* (2006) 139 Cal.App.4th 1251, 1257-58.) In the present case, where petitioners' policies contained *no* defense agreement, the "all sums" language can *only* apply to the duty to indemnify.

2. <u>The Unanimous Decisions of the California Courts of Appeal Also Establish That "All Sums" Is Settled Law</u>

Nor would it be necessary for this Court to grant review even if it had not already resolved the "all sums" issue in two of its prior decisions. As petitioners concede, several California Courts of Appeal directly have held that the "all sums" doctrine governs the duty to indemnify (Petition, at pp. 5-6), and no countervailing authority exists. Such decisions did not merely follow *Montrose* or *Aerojet* as binding authority, but also examined the issue in light of the language of standard form liability insurance policies, the nature of the policyholder's substantive liability, general principles of California law, and case law from both this and other jurisdictions. (See, e.g., *Armstrong, supra,* 45 Cal.App.4th at pp. 56-58 and 104-107; *Shade Foods, supra,* 78 Cal.App.4th at pp. 896-898; *FMC, supra,* 61 Cal.App.4th at pp. 1182-1187; *Stonewall,*

supra, 46 Cal.App.4th at pp. 1854-1855.)

Thus, whether *Montrose* and *Aerojet* are viewed as binding authority, persuasive dicta, or as mere commentary which formed part of the backdrop for the development and establishment of the "all sums" doctrine by the California courts of appeal, the result remains the same: The "all sums" doctrine constitutes the "settled law" of this state in evaluating an insurer's duty to indemnify in a continuous damage case. Accordingly, this Court need not grant review of the issue in this case.

B. The Plain Language of the Policies Requires Petitioners to Pay "All Sums" of the Policyholder's Property Damage Liability

Petitioners also err in asserting that under the plain language of their policies, each insurance company's liability is limited to that portion of the continuous damage which occurred during its policy period. In so arguing, petitioners repeatedly misstate their policy language and improperly attempt to "cut and paste" language from different sections of their policies. In the process, petitioners confuse the vital distinction between the event which *triggers* coverage under the policies (damage during the policy period) and the *scope* of the coverage grant ("all sums") once the policy is triggered.

1. Petitioners Repeatedly Misstate the Language of Their Policies

In at least eight instances in their Petition, petitioners contort the language of their policies in an attempt to avoid the "all sums" rule. Specifically, petitioners repeatedly state that their policies expressly limit

coverage to "all sums for damages because of property damage *during the policy period*." (See, e.g, Petition, at pp. 1, 6, 14, 15, 17, 18, 20, 28, italics added.)

Repetition of this misstatement does not make it true, but rather merely reinforces the invalidity of petitioners' argument. As they briefly concede, the actual language of the insuring agreement for "property damage" liability, which appears in Section I of the policies, simply promises:

> 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, including consequential damages, because of injury to or destruction of property, including the loss of use thereof.

(Petition, at p. 10; quoting Slip. Op. at p. 8; 39AA 10149, 10173, 10187.)

Nowhere do the insurance policies limit this "all sums" promise to damages because of property damage "during the policy period," as petitioners incessantly and inaccurately assert. Instead, these insurance policies broadly promise to pay "all sums" of the policyholder's liability for injury to or destruction of property.

2. Petitioners Confuse Trigger of Coverage With The Scope of Their Payment Obligation

Unable to alter the plain language of their "Property Damage" insuring agreement, petitioners instead rely upon the triggering language in Section III of their insurance policies, entitled "Policy Period, Territory," which states that "[t]his policy applies only to occurrences which take place during the policy period . . . .," and the attendant definition of "occurrence." (Petition, at p. 10.)

However, this "during the policy period" language does not appear in Section I, where the insurance companies promise to pay "all sums." Rather, it appears in separate sections addressing the policy period and the definition of "occurrence."

The Supreme Court has made crystal clear the significance of this very distinction between the trigger of the insurance policy and the extent of an insurance company's liability to its policyholder:

> In a word, although the *trigger* of the duty to defend is limited to the policy period, the *extent* of the duty to defend is not. (Cf. *Montrose Chemical Corp. v. Admiral Ins. Co., supra*, 10 Cal. 4th at 686, 42 Cal. Rptr. 2d 324, 913, P.2d 878 [holding that, although the *trigger* of the duty to indemnify is limited to the policy period, the *extent* of the duty to indemnify is not]; *Armstrong World Industries, Inc. v. Aetna Casualty & Surety Co., supra,* 45 Cal. App. 4th at p 105, 52 Cal. Rptr. 2d 690 [same].)

(*Aerojet, supra,* 17 Cal.4th at p. 75, italics in original.)

Petitioners' argument confusing the trigger and scope components of liability insurance policies specifically was considered and rejected by the Court of Appeal in *FMC*:

> The crux of this argument is the [insurance company] defendants' theory that the reference in the policies' definition of "occurrence" to "property damage . . . during the policy period" limits the scope of coverage to the policy period. **The argument appears to disregard the distinction between *trigger* of coverage and *scope* of coverage.** The policies' "occurrence" definition, read with the insuring provisions, simply makes clear what must occur during the policy period in order for coverage to attach. Once coverage has attached – i.e., once it has been triggered – it will extend to all of the insured's liability for damages attributable to the same occurrence in and after the policy period.

(*FMC, supra,* 61 Cal.App.4th at p. 1184, italics in original, bolding added.)

The *FMC* court found that the liability policies' standard-form language was *unambiguous* and "leaves no room, in this respect, for speculation as to the parties' expectations." (*Id.* at p. 1185; see also *Stonewall, supra,* 46 Cal.App.4th at p. 1855 [once coverage is triggered, the policy language

requires the insurance company to indemnify the policyholder for "all sums" of the insured's liability, not just for damage during the policy period]; *Shade Foods, supra,* 78 Cal.App.4th at p. 897 [each successive insurance company is individually liable for the entire loss even though continuing or progressively deteriorating damage extends over several policy periods].)

The "occurrence" definition requires that some damage take place during the policy period, but once that requirement is satisfied, insurance coverage is triggered, and the scope of the insurance company's duty to pay is governed by the "Property Damage" insuring agreement. That agreement promises to pay "all sums" of the policyholder's liability with no "during the policy period" limitation.

Therefore, petitioners' reliance upon the "occurrence" definition is unavailing. Petitioners seek to mislead the Court in arguing that "[t]he policies specified that they cover only those sums which the State is obligated to pay as damages for property damage during the policy period" or that "[t]he requirement of property damage during the policy period qualifies the 'all sums' language." (Petition, at pp. 15-16.)

Accurately summarized, the insurance policies provide that they will pay "all sums" *which the insured shall become liable for damages because of property damage once an occurrence takes place* during the policy period. Petitioners cannot rewrite the policies by selectively combining separate sections of the insurance policies and deleting key phrases to support their desired interpretation of the insuring obligation.

C. The "All Sums" Doctrine Is Objectively Reasonable

Petitioners also argue that the "all sums" doctrine is objectively unreasonable because it requires insurance companies to pay for damage occurring over time "despite explicit terms of the policy to the contrary and

although the insurer only received premiums for the risk of harm during the policy period." (Petition, at pp. 17-18.) This argument fails because under the explicit terms of their policies, petitioners *did* promise to pay "all sums" of the State's property damage liability, not just for the specific portion of the damage occurring during their policy period. Requiring them to honor that promise – for which they charged and collected premiums they themselves set – is by no means unreasonable. As this Court stated in *Aerojet*:

> [T]he pertinent policies provide what they provide. [The insured] and the insurers were generally free to contract as they pleased. [Citation.] They evidently did so. They thereby established what was "fair" and "just" inter se. We may not rewrite what they themselves wrote.

(*Aerojet, supra*, 17 Cal.4th at p. 75.)

Moreover, petitioners' liability is not unlimited. First, it is limited by the policy limits set in their insurance policies. Second, no insurance company is obligated to pay for *any* of the State's liability unless property damage occurred during its policy period. No grave injustice results by applying the policy language as written: "We find no windfall for [the policyholder] in receiving the 'all sums' coverage for which it bargained and paid." (*FMC*, *supra*, 61 Cal.App.4th at p. 1187, citing *Aerojet*, *supra*, 17 Cal.4th at p. 38.)

D. The "All Sums" Doctrine Does Not Violate *Montrose*'s Rejection of "Joint and Several" Liability Among Insurance Companies

Petitioners also complain that, in *Montrose*, the Supreme Court expressly rejected the view that multiple insurance companies are "jointly and severally liable" to a policyholder when damage spans multiple policy periods. (Petition, at p. 18.) They contend that the "all sums" doctrine violates this rule.

Petitioners clearly misunderstand the import of the court's "joint and several" holding. *Montrose* explained that "[a]llocation of the cost of

indemnification once several insurers have been found liable to indemnify the insured for all or some portion of a continuing injury or progressively deteriorating property damage *requires application of principles of contract law to the express terms and limitations of the various policies of insurance on the risk.*" (*Montrose, supra,* 10 Cal.4th at p. 681, fn. 19, italics added.) In other words, inter-insurer apportionment is based upon the terms of their respective contracts, not upon a doctrine of joint and several liability. "That apportionment, however, has no bearing upon the insurers' obligations to the policyholder" (*Armstrong, supra,* 45 Cal.App.4th at p. 106), which extends to the *full extent* of the insured's liability and not just for the part of the damage that occurred during the policy period. (*Aerojet, supra*, 17 Cal.4th at p. 57.)

The court below clarified this distinction, concluding that "[t]he insurers are not jointly liable on each other's policies; rather, each insurer is severally liable on its own policy." (Slip Op., at p. 18.) In other words, the fact that each insurance company *separately* promised to pay "all sums" of the policyholder's liability in a continuous damage case, provided that some of the damage occurred during its particular policy period, does not make it "jointly and severally" liable with all other insurance companies which similarly promised to pay "all sums" of the policyholder's liability if continuous damage occurred in part during their own policy periods.

E. California's "All Sums" Doctrine Is Consistent With Many Other Jurisdictions

In asserting that this Court should accept review and overturn California's "all sums" doctrine, petitioners cherry-pick certain cases in other jurisdictions which adopt a different approach and then baldly claim that the "majority" of jurisdictions have rejected the doctrine. However, as the court below observed, petitioners' claim to the "majority" position was unsupported

(and remains unsupported in their Petition) because they failed to identify how many out-of-state cases *accept* the doctrine. Moreover, a 2004 journal article reported that "states making the all-sums determination are currently in the majority." (Slip Op., at pp. 19-20, fn. 4, citing Smith, *Environmental Cleanup and the Interpretation of Comprehensive General Liability Insurance Policies: A Lesson from the Oregon Legislature* (2004) 31 J. Legis. 217, 219.)

Also, as this Court previously has recognized, California insurance law is not determined by a mere "show of hands" of decisions in other jurisdictions, particularly where such courts follow different rules of interpretation, exalt purported public policy rationale over express contractual terms, or otherwise are contrary to California law. As this Court stated in *Certain Underwriters at Lloyd's of London v. Superior Court* (2001) 24 Cal.4th 945, 964:

> We are not unaware, however, that yet other courts are contra. [Fn. omitted.] Neither are we unaware that such other courts are more numerous. Their number, however, adds nothing to their weight. If we look at their decisions in accordance with the framework of *Foster-Gardner* [*Inc. v. National Union Fire Ins. Co. of Pittsburgh, Pa.* (1998) 18 Cal.4th 857], we find their weight insubstantial.

The "all sums" rule adopted by the Supreme Court and courts of appeal in this state not only is based properly upon the plain language of the policies, but also is squarely in the company of many other of the highest courts in the country, including neighboring jurisdictions that have decided the issue. For example, in *American Nat'l Fire Ins. Co. v. B & L Trucking & Constr. Co.* (Wash. 1998) 951 P.2d 250, 256-257, the Washington Supreme Court held that the promise in standard form liability insurance policies to pay "all sums" of the policyholder's liability means exactly what it says. Specifically, the Washington Supreme Court stated:

> We hold that once a policy is triggered, the policy language requires [an] insurer to pay all sums for which the insured becomes legally obligated, up to the policy limits. Once coverage is triggered in one or more policy periods, those policies provide full coverage for all continuing damage, without any allocation between insurer and insured.

(*B & L Trucking & Constr. Co., supra*, 951 P.2d at p. 253.)

The seminal *Keene* decision relied upon by other courts, including the California Supreme Court, was the first to address the specific "all sums" language of standard-form liability insurance policies:

> Once triggered, each [Comprehensive General Liability insurance] policy covers [the insured's] liability. There is nothing in the policies that provides for a reduction of the insurer's liability if an injury occurs only in part during a policy period. As we interpret the policies, they cover [the insured's] entire liability once they are triggered. That interpretation is based on the terms of the policies themselves.

(*Keene v. Corp. v. Ins. Co. of N. Am.*, 667 F.2d 1034, at p. 1048; see also *Cascade Corp. v. American Home Assur. Co.* (Ore. Ct. App. 2006) 135 P.3d 450, 455-56 ["The trial court's decision was erroneous because it did not require [the insurance company] to pay [the policyholder]'s loss up to its policy limits. . . . [Allocation analysis] does not permit an insurer to pay less than the limits of the applicable policy, leaving the insured with a loss for which there is no coverage."]; *J.H. France, supra,* (Pa. 1993) 626 A.2d 502, 507-508; *Monsanto Co. v. C.E. Heath* (Del. 1994) 652 A.2d 30, 35; *Goodyear Tire & Rubber Co. v. Aetna Cas. & Sur. Co.*, (Ohio 2002) 769 N.E.2d 835, 841; *Zurich Ins. Co. v. Raymark Indus., Inc.* (Ill. 1987) 514 N.E.2d 150, 165; *Hercules, Inc. v. AIU Ins. Co.* (Del. 2001) 784 A.2d 481; *Rubenstein v. Royal Ins. Co. of Am.* (Mass.App. 1998) 694 N.E.2d 381, aff'd, (Mass. 1999) 708 N.E.2d 639; *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); *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).)

Most recently, Wisconsin joined the majority of states applying the "all sums" rule. See *Plastics Engineering Co. v. Liberty Mutual Ins. Co.*, Case No. 2008AP333-CQ (Wisconsin 1/29/09).

To the extent some jurisdictions, for whatever reasons, have limited the insurance companies' liability to their policyholders (as opposed to the separate issue of apportionment among insurance companies), those cases directly contradict California law. In such instances, the foreign courts ignore the distinction made by the Supreme Court in *Montrose* and *Aerojet* between the trigger of the policy, the liability to the policyholder, and the apportionment among fellow insurance companies.

This Court has considered and rejected foreign cases cited by petitioners supporting their argument that occurrence policies only pay for that portion of the liability taking place during the policy period. For example, in *Aerojet*, the Supreme Court rejected the approach of the New Jersey Supreme Court in *Owens-Illinois, Inc. v. United Ins. Co.* (N.J. 1994) 650 A.2d 974, because California courts "do not add to, take away from, or otherwise modify a contract for 'public policy considerations.'" (*Aerojet, supra*, 17 Cal.4th at pp. 75-76, fn. 27.)

The *Owens-Illinois* court did not rely upon policy language and admitted that it was "unable to find the answer to allocation in the language of the policies," creating an ad hoc solution based upon the court's own ideal of fairness and equity. (*Owens-Illinois*, *supra*, 650 A.2d at p. 993, et seq.) In contrast, looking to other jurisdictions weighing in favor of the application of liability to the policyholder for "all sums" demonstrates that the majority rule

in fact forbids insurance companies from limiting their liability to the policyholder unless the policy expressly allowed it. (See, e.g., *New Castle County v. Continental Cas. Co.* (D.Del. 1989) 725 F.Supp. 800 aff'd in relevant part, (3d Cir. 1991) 933 F.2d 1162 ["An insurance company's liability to an insured is contractual. The terms of the contract are not affected by prior or subsequent coverage"].)

Furthermore, like many courts employing pro rata allocation schemes, the *Owens-Illinois* court acknowledged that it was not attempting to find a "universal resolution." (*Id.* at p. 993.) Likewise, in *Consolidated Edison Co. of N.Y., Inc. v. Allstate Ins. Co.* (N.Y. 2002) 774 N.E.2d 687, the New York Court of Appeals admitted that pro rata allocation was "not explicitly mandated by the policies" and acknowledged that its improvised approach "[c]learly [] is not the last word on proration." (*Id.* 774 N.E.2d at p. 695.)

In contrast, California's adoption of "all sums" is based upon the explicit policy language. Accordingly, the "all sums" doctrine clearly should prevail over petitioners' attempt to override the policy language and limit their promised coverage based upon impermissible extra-contractual considerations.

In short, because the "all sums" doctrine is the settled law of this state, is fully in accordance with the language of petitioners' policies and is objectively reasonable, petitioners' request for review of the issue should be denied.

II. THE "STACKING" ISSUE DOES NOT WARRANT REVIEW

Although petitioners focus the vast majority of their attention on an attempt to overturn California's well-established "all sums" doctrine, in the last few pages of their petition, they briefly ask this Court to grant review of the Court of Appeal's "stacking" ruling. (Petition, at pp. 29-34.) In that

section of its opinion, the Court of Appeal held that when continuous damage is covered by liability policies issued over multiple years, the policyholder may recover the benefits of each applicable policy, up to their combined (or "stacked") policy limits. (Slip Op., at p. 43.) Petitioners, observing that this holding is contrary to the earlier "anti-stacking" ruling in *FMC Corp. v. Plaisted & Co.* (1998) 61 Cal.App.4th 1132, assert review is necessary "to secure uniformity of decision." (Rule 8.500(b)(1).)

A. Supreme Court Review Is Unnecessary Because Future Court of Appeal Decisions Likely Will Resolve Any Conflict Between *State of California* and *FMC*

However, not every conflict between appellate decisions warrants Supreme Court review. For example, where one appellate court reaches a conclusion based upon a cursory analysis, while a later court reaches the opposite conclusion after conducting a full-fledged examination of the issue, analyzing points which the prior court failed to consider and carefully refuting the earlier court's analysis, Supreme Court review often is unnecessary because, in all likelihood, later trial and appellate courts will align themselves with the better-reasoned authority without requiring Supreme Court intervention.

The present case presents a prime example of that proposition. In seeking review of the "stacking" issue, petitioners rely upon *FMC*, which effectively held that, where continuous damage spans multiple policy periods, a policyholder must select a *single* policy period from which to obtain liability coverage and forfeit all other insurance policies which cover its liability. In a brief discussion, the *FMC* court opined that if a policyholder were permitted to obtain coverage under all applicable policy periods for which it paid premiums, it would obtain much more coverage than it bargained for. (*FMC*,

supra, 61 Cal.App.4th at pp. 1188-1189.)

In so holding, the *FMC* court did not consider the actual policy language at issue or any of the standard rules of insurance policy interpretation (from California or elsewhere). Indeed, although *FMC* fleetingly acknowledged that insurers sometimes include an express "anti-stacking" provision to preclude a policyholder from receiving the benefits of coverages issued over multiple years, the court stated that "[w]here, as in this action, there is no anti-stacking provision, there is precedent, characteristically in asbestos cases, for judicial intervention." (*FMC*, *supra*, 61 Cal.App.4th at p. 1189.) However, none of the authorities *FMC* relied upon espoused any legal principle empowering courts to "judicially intervene" to eliminate coverage otherwise available under an insurance policy. (*Id.*, at pp. 1189-1190.)

In sharp contrast to *FMC*'s cursory "stacking" discussion, the court of appeal below conducted a comprehensive, 23-page examination of the stacking issue. The court cited the California Supreme Court's definition of "stacking" (which *FMC* overlooked) and discussed several common factual scenarios in which stacking routinely arises. (Slip Op. at pp. 20-21, citing *Wagner v. State Farm Mut. Auto. Ins. Co.* (1985) 40 Cal.3d 460, 463, fn. 2.) The court also carefully examined petitioners' policy language in light of California rules of insurance policy interpretation and demonstrated why, under the *plain meaning* of their policies, the State is entitled to the benefits of each applicable policy, up to their combined limits. The court also explained that, even if the policy language was ambiguous, the ambiguity must be broadly construed in favor of the policyholder, particularly when the insurance company is seeking to substantially limit coverage otherwise granted by the policy. As the court concluded: "Certainly it *cannot* be said that the policy language plainly *forbids* stacking." (*Id.*, at pp. 25-27, italics in original.)

The Court of Appeal further observed that multiple policies frequently apply to a given loss and that, in all other such instances, the insured is *entitled* to stack its limits, with a single statutory exception. (*Id.*, at p. 28, citing Insurance Code section 11580.2(q), applicable only to uninsured motorist policies.) Moreover, insurance companies themselves often stack the policyholder's limits – under California's "horizontal exhaustion" rule, excess insurance companies need not contribute to a loss until the limits of all applicable primary insurance policies have been "stacked" and exhausted, even when issued during different policy periods. (*Id.*, at pp. 28-29, citing *Community Redevelopment Agency v. Aetna Cas. & Sur. Co.* (1996) 50 Cal.App.4th 329, 339-344.) While petitioners had argued that a distinction should be drawn between the stacking of policies issued in a single policy period versus multiple policy periods, or between the stacking of primary versus excess policies, the court below found no meaningful distinction. (*Id.*, at pp. 29-30.) The court also cited several out-of-state authorities which have permitted stacking of coverage in long-term damage cases utilizing rules similar to those employed by California courts. (Slip Op., at p. 22, citing *Society Ins. v. Town of Franklin* (Wis.App. 2000) 233 Wis.2d 207, 216 [607 N.W.2d 342]; *J.H. France Refractories Co. v. Allstate Ins. Co.* (1993) 534 Pa. 29, 42 [626 A.2d 502]; *Cole v. Celotex Corp.* (La. 1992) 599 So.2d 1058, 1077-1080.)

Having thoroughly explained why stacking is permitted under both the policy language and California law, the court below next carefully examined the flaws in *FMC*'s analysis which led that court to devise an anti-stacking ruling that "is outside the mainstream of California case law." (Slip Op., at p. 28.) It noted that *FMC* not only "disregarded the policy language entirely," but implicitly acknowledged that, absent antistacking provisions or "judicial

intervention," standard policy language *permits* stacking. (*Id.*, at p. 34.) Moreover, in erroneously concluding that stacking would give policyholders substantially more coverage than they bargained for, the *FMC* court engaged in "circular reasoning" by simply assuming what it was attempting to prove – that liability policies do not permit stacking. But once policy terms were examined, the fallacy of the *FMC* court's reasoning was apparent: because the policy language *does* permit stacking, that is *exactly* what the policyholder has bargained and paid for. Nor did the court below find anything unfair about stacking in continuous damage cases – if an occurrence spans multiple policy periods for which the policyholder paid multiple premiums for multiple policy limits, then it is entirely reasonable for the policyholder to be fully indemnified up to the combined limits of each applicable policy for which it paid a premium. (*Id.*, at p. 35.)

The Court of Appeal also observed that *FMC*, having failed to recognize that "in all other instances of multiple coverage, stacking is allowed," similarly failed to provide any principled basis for prohibiting stacking when multiple policies cover damage occurring over multiple years. Finally, even if the contractual right to stack liability policies somehow could be viewed as providing a "windfall" to the policyholder or being "unfair" to the insurance company, the *FMC* court erred in holding that California courts can utilize "fairness" notions to "judicially intervene" and rewrite the policies to eliminate bargained-for coverage, as the Supreme Court has repeatedly held. (Slip Op., at pp. 38-39, citing *Certain Underwriters, supra,* 24 Cal.4th at p. 960; *Powerine Oil Co., Inc. v. Superior Court* (2005) 37 Cal.4th 377, 401;

Haynes v. Farmers Ins. Exch. (2004) 32 Cal.4th 1198, 1212, fn. 9; *Rosen v. State Farm General Ins. Co.* (2003) 30 Cal.4th 1070, 1073, 1077-1978.)

In sum, the conflict with *FMC* is transitional and will likely resolve itself without this Court's intervention. Given the disparity between the *FMC* court's cursory analysis of stacking and the comprehensive examination provided by the court below, in all likelihood, subsequent trial and appellate courts will follow the better-reasoned opinion. If instead the conflict persists, the Court may resolve it in a future case.[1]

B. Petitioners' Remaining Anti-Stacking Arguments Are Without Merit

In urging this Court to grant review of the "stacking" issue, petitioners raise several additional arguments, each of which is without merit.

First, petitioners revisit their contention that the Court of Appeal erred in holding that, in a continuous damage case, each liability policy covers "all sums" of the policyholder's liability, and contend that "stacking" compounds that error by requiring *every* insurer to satisfy that obligation. (Petition, at pp. 7, 29.) Petitioners' argument collapses because, as discussed above, the "all sums" doctrine fully accords with both the policy language and California law as established in two California Supreme Court decisions and the unanimous decisions of the Courts of Appeal.

Petitioners further argue that stacking creates a single, "'super occurrence' policy." (Petition, at p. 29.) However, that argument stands the Court of Appeal's decision on its head. The court never stated or implied that

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[1]As a caveat, should this Court decide to grant review of the "all sums" issue, it should also grant review of the "stacking" issue because, otherwise, *FMC*'s poorly-reasoned stacking analysis would remain unchallenged due to automatic depublication of the comprehensive opinion from the court below.

all policies purchased by an insured should be construed as a single, monolithic policy for which all insurers are jointly liable. To the contrary, the court emphasized that, "the insurers are not jointly liable on each other's policies; rather, each insurer is severally liable on its own policy" (Slip Op., at p. 18) and that the "stacking" issue must be evaluated by focusing on "*each particular insurer's* liability under *each particular policy*." (*Id.*, at p. 26, italics in original.) Indeed, it is the *petitioners* who are effectively attempting to treat all of their policies as a single all-inclusive policy, for which they are *collectively* liable only for the amount of coverage purchased by the State during a *single* policy period.

Finally, petitioners contend that "[s]tacking would result in the fiction that one occurrence is treated the same as many occurrences implicating many occurrence limits." (Petition, at p. 33.) However, "stacking" does nothing of the sort – when damage results from a single occurrence, the policyholder is entitled to only one "per occurrence" limit. But where *multiple* insurance companies have agreed to cover that occurrence (whether it took place during a single policy period or spanned multiple policy periods), the policyholder is entitled to the "single occurrence" limit of each applicable policy. (Slip Op., at p. 27 ["Thus, even though there is only one occurrence, the insured should be entitled to recover against each insurer up to the limits of that insurer's policy"].)

Accordingly, petitioners' remaining criticisms of stacking are equally without merit.

CONCLUSION

For the above reasons, the State of California respectfully requests that the Court *deny* the petition for review.

DATED: March 4, 2009

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CERTIFICATION OF WORD COUNT

Pursuant to California Rules of Court 8:504(d), I certify that the foregoing "ANSWER TO PETITION FOR REVIEW" contains 6,509 words, not including the Tables of Contents and Authorities, attachments, caption page, signature block, or this Certification page.

Dated: March 4, 2009

ROGER W. SIMPSON

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

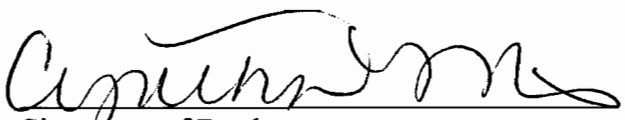
I, CYNTHIA MORRIS, am employed in the aforesaid County, State of California; I am over the age of 18 years and not a party to the within action; my business address is 300 South Grand Avenue, 24th Floor, Los Angeles, California 90071-3134.

On March 4, 2009, I served the foregoing **ANSWER TO PETITION FOR REHEARING** on the interested parties in this action by placing a true copy thereof, enclosed in a sealed envelope, addressed as follows:

{PLEASE SEE ATTACHED SERVICE LIST.}

X	**BY FIRST CLASS MAIL:** I placed such envelope for deposit in the U.S. Mail for service by the United States Postal Service, with first-class postage thereon fully prepaid. I am readily familiar with my employer's practice for the collection and processing of mail. Under that practice, envelopes would be deposited with the U.S. Postal Service that same day, with first class postage thereon fully prepaid, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after the date of deposit for mailing shown in this proof of service.
	BY FACSIMILE: I caused the document to be transmitted by a facsimile machine compliant with Rule 2.306 of the California Rules of Court to the offices of the addressees at the telephone numbers shown on the service list.
	BY HAND DELIVERY: I caused such envelope to be delivered by hand to the offices of the addressees.
	BY FEDERAL EXPRESS: I am readily familiar with my employer's practice for the collection and processing of FedEx packages. Under that practice, packages would be deposited with FedEx that same day, with overnight delivery charges thereon fully prepaid, in the ordinary course of business.
	(Federal Courts Only) I declare that I am employed in the office of a member of the court at whose direction this service was made.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this document was executed on March 4, 2009, at Los Angeles, California.



Signature of Declarant

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