Supreme Court No. S170560

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

STATE OF CALIFORNIA,
Plaintiff, Cross-Defendant and Appellant

vs.

CONTINENTAL INSURANCE COMPANY et al.,
Defendants, Cross-Complainants and Appellants;

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

OPENING BRIEF ON THE MERITS

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. 239784
(Consolidated with Case No. RIC-381555)
The Hon. E. Michael Kaiser, Judge

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TO THE HONORABLE CHIEF JUSTICE RONALD M. GEORGE AND THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT

Petitioners Continental Insurance Company, Continental Casualty Company, Yosemite Insurance Company, Stonebridge Life Insurance Company and Employers Insurance of Wausau, (collectively "Insurers") hereby submit their Opening Brief on the Merits.

I. ISSUES FOR REVIEW

1. Where gradual harm triggers several insurance policies, each of which covers property damage during the policy period, does it impermissibly rewrite the policies to hold that each insurer must pay for all property damage both during and outside the policy period?
2. Did the Court of Appeal improperly allow the insured to "stack" the limits of all policies triggered by a single occurrence, directly conflicting with the Sixth District's decision in *FMC Corporation v. Plaisted & Company*, 61 Cal.App.4th 1132, 1188 (1998)?

II. INTRODUCTION

The plain language of the insurance policies at issue limits coverage to damages because of property damage that takes place during the policy period. Despite that plain language, the Court of Appeal determined that once a policy is triggered by continuous damage, it must pay "all sums" for the insured's liability, not just damages because of property damage during the policy period. Thus, it held that when there is a continuing loss spanning multiple policy periods, each

insurer that covered any period is liable for the loss [up to the policy limits] including for property damage that occurred **before** or **after** the policy period. (Slip Op. at 19-20.) The Court of Appeal failed to undertake any independent analysis of the policy language or the issue. Rather, it concluded that this Court's decisions in *Montrose Chemical Corporation v. Admiral Insurance Company*, 10 Cal.4th 645 (1995) and *Aerojet-General Corporation v. Transport Indemnity Company*, 17 Cal.4th 38 (1997) foreclosed any other result, even though those cases solely addressed the duty to defend, not the duty to indemnify at issue here.

Insurers contend that the court below erred in extending the "all sums" approach to the duty to indemnify, wrongly applying this Court's analysis concerning the duty to defend in *Montrose* and *Aerojet.*

Fundamentally, the "all sums" approach as to the duty to indemnify conflicts with the policy language at issue, which expressly limits coverage to property damage occurring during the policy period. The policies provide they will pay all sums for damages because of property damage **during the policy period**. They do not provide that they will pay all sums for damages because of property damage during **and outside** the policy period. The "all sums" result improperly replaces the policy terms limiting coverage to damages because of property damage during the policy period with "damages because of property damage during and at any time before and after the policy period." The "all sums" ruling violates the rules of contract interpretation by reading terms in isolation, rendering policy terms meaningless and by rewriting the contracts.

Having adopted an "all sums" approach contrary to the policy language, the Court of Appeal compounded the error in concluding that the State could "stack" all the per occurrence limits of all the policies issued over time to cover an occurrence. The Court of Appeal reached its decision allowing stacking primarily by concluding that there is no policy language forbidding stacking, and therefore, stacking is permitted. But the Court of Appeal's reasoning is circular. The "property damage during the policy period" requirement **is** the policy language that precludes stacking here. The Court of Appeal's "all sums" approach reads that requirement out of the policies. If the policies are enforced as written, as is required under the rules of contract construction, each policy would only pay for the property damage that took place during that policy's term. The issue of stacking of limits would not arise.

Therefore, Insurers request that the Court first address the "all sums" issue, reverse the Court of Appeal's decision and find that each insurer is only responsible for the damage because of the property damage taking place during its policy period. The Court would then not need to address the stacking issue as being moot.

If the Court does not reverse the Court of Appeal's "all sums" ruling, Insurers request that the Court reverse the Court of Appeal's stacking decision. The combination of "all sums" and stacking strains the policy language beyond all recognition and bears no resemblance to the mutual intention of the parties at the time of contracting. Indeed, a fundamental and defining element of liability

insurance - - the requirement that what an insurer pays be tied to the event that "triggers" its policy - - is transformed into each insurer paying for its own and every other insurer's triggering event, exactly contrary to the policy language.

III. STATEMENT OF THE CASE

A. Background

The State selected, designed and constructed the Stringfellow Acid Pits as a Class I hazardous dump site. The site operated from 1956 through 1972, during which time the State directed more than 30,000,000 gallons of liquid industrial wastes to unlined ponds at the site. (Slip Op. at 6.)[1] The site was closed in 1972 when groundwater contamination was found. (Slip Op. at 6.) In subsequent Federal Court proceedings, the State was found liable for the cost of remedying the contamination. (Slip Op. at 6-7; *United States of America v. J. B. Stringfellow, Jr., et al.* (1995 WL 450856).)

In this coverage action, the State seeks to establish indemnity coverage for its costs in remediating the contamination arising from the Stringfellow Acid Pits. (Slip Op. at 3.) The duty to defend is not at issue.

At various times, the trial court made numerous rulings on legal issues, only two of which ("all sums" and no stacking) are the subject of this review.

[1] "Slip Op." refers to the Court of Appeal's January 5, 2009 Opinion, as modified on January 15, 2009 and January 28, 2009.

By the end of trial, the State had settled with all insurers except the Insurers here. The State had collected in excess of $120 million in settlements. (Slip Op. at 4, 48AA 12068, *et seq.*)[2]

In post-trial proceedings, and based on its earlier decision that the State could not stack limits, the trial court determined that the most the State could recover from insurers was $48 million, and that it had already recovered more than that amount from settling insurers. (Slip Op. at 4, 49AA 12505-06.) Therefore, the Court entered final judgment on June 27, 2006 for no damages. (Slip Op. at 4, 49AA 12503.)

The parties in the coverage action stipulated that property damage at the Stringfellow site was continuous beginning in 1957. (47AA 12024.) The continuous property damage arose from a single "occurrence." (Slip Op. at 48-49.)

B. The Trial Court's Rulings As Relevant Here

The trial court determined that if there is any property damage during a particular policy term, that policy is responsible for all the insured's liability for property damage, even for property damage that did not take place during the policy period. ("all sums" ruling). The trial court relied on *Aerojet-General Corporation v. Transport Indemnity Company*, 17 Cal.4th 38 (1997) for this ruling. (Slip. Op. at 9-10; 34AA 8732.)

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[2] "AA" refers to the Appellant's Appendix in the Court of Appeal proceedings.

The trial court also determined that the State could not stack the consecutive per occurrence limits of all the policies in effect during which property damage took place. Rather, it concluded that the State could recover the full limits of the policies in effect during the period the State selected from among the triggered policy periods. (Slip. Op. at 9-10; 34AA 8732.) ("stacking" ruling.) The trial court relied on *FMC Corporation v. Plaisted & Company*, 61 Cal.App. 4th 1132 (1998), which had rejected a similar attempt to stack per occurrence limits in the context of continuous property damage arising from contamination.

C. The Court Of Appeal Opinion

The Court of Appeal affirmed the trial court's decision on "all sums" concluding that "all sums" in the indemnity context is a done deal in California, citing *Montrose* and *Aerojet*. (Slip op. at 19-20.) The Court of Appeal reversed the trial court's decision on stacking, disagreeing with *FMC* and finding that the State was allowed to stack the per occurrence limits of each policy for the one continuous occurrence at issue. (Slip Op. at 20, 43.)

This Court granted review of the "all sums" and "stacking" issues on March 18, 2009.

D. The Policies

Continental Insurance Company, Continental Casualty Company, Yosemite Insurance Company and Employers Insurance Company of Wausau issued excess policies to the State during the period September 1970 through September 1975.

Stonebridge Life Insurance Company is alleged to have issued an excess policy for the period September 1964 through September 1966.

The policies were drafted by the State and/or the State's broker. (Slip Op. at 8; 6AA 1672-1673.)

Each policy issued contains the same language relevant here:

1. 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, including consequential damages, because of injury to or destruction of property, including the loss of use thereof." (Slip. Op. at 8; *e.g.,* 39AA 10149, 10173, 10187.)

2. 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… ." (Slip. Op. at 8; *e.g.,* 39AA 10151, 10175, 10189.)

3. Limits of Liability: "The limit of Underwriters' liability shall be as stated below, subject to all the terms of this policy having reference thereto:

Coverage A Coverage B Combined	Personal Liability and Property Damage Liability	$_____ Part of $_____ Ultimate Net Loss Each Occurrence Excess of $_____ Ultimate Net Loss Each Occurrence (hereinafter called 'The Insured's Retention')." (Slip. Op. at 8; *e.g.*, 39AA 10151, 10175, 10189.)

4. Policy Period Territory: "This policy applies only to occurrences which take place during the policy period commencing [ ] and ending [ ]… ." (*e.g.* 39AA10149, 10173, 10187.)

The State did not purchase liability insurance before 1963 or after 1978. (6AA 1671-1673.)

IV. ARGUMENT

A. This Court Should Reject The Court Of Appeal's "All Sums" Decision

1. *Montrose* and *Aerojet* Did Not Decide The Issue Under Review Here

The Court of Appeal held that "each of the Insurers covered the total amount of the State's liability for property damage (subject to their respective limits), including property damage that actually occurred before or after their policy periods." (Slip Op. at 20.)

Without doing any independent analysis, the Court of Appeal summarized the result it believed flowed from this Court's decisions in *Montrose* and *Aerojet:*

> [W]hen 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. The insurer's remedy is to seek contribution from any other insurers that are also on the risk.
>
> The Insurers' arguments to the contrary founder on the fact that we must follow the California Supreme Court's lead. (Slip Op. at 19.)

But, in *Montrose*, this Court only addressed whether general liability policies "obligate Admiral to **defend** Montrose in lawsuits seeking damages for continuous or progressively deteriorating bodily injury and property damage that

occurred during the successive policy periods." *Montrose, supra*, 10 Cal.4th at 645, emphasis added. The Court held that each policy was potentially triggered because part of the ongoing damage allegedly happened during each policy period, creating a potential for coverage that gave rise to a duty to defend under each policy. *Id.* at 689. In deciding the duty to defend question, the Court was careful to explain that it was not addressing the extent of the indemnity obligation or whether each policy required to provide a defense must also indemnify the insured for property damage that did not happen during its policy period:

> In this case we address the issue reserved in *Prudential-LMI*. Specifically, we must determine whether four comprehensive general liability (CGL) policies issued by defendant and respondent Admiral Insurance Company (Admiral) to plaintiff and appellant Montrose Chemical Corporation of California (Montrose) obligate Admiral to defend Montrose in lawsuits seeking damages for continuous or progressively deteriorating bodily injury and property damage that occurred during the successive policy periods. *Montrose, supra*, 10 Cal.4th at 654.
>
> * * *
>
> It must be borne in mind that Admiral's duty to defend Montrose is all that is directly at issue in this proceeding. The obligation to indemnify must be distinguished from the duty to defend. *Id.* at 659 n. 9.

Although *Montrose* adopted a continuous injury "trigger" for claims of continuous or progressive damage or injury (*Id.* at 685, 689), it did not determine the actual indemnity obligation due, once a policy is triggered. ("we do not purport to reach the merits of whether coverage...can ultimately be established...or reach the merits of any affirmative defenses to coverage... .") *Id.* at 694.[3]

Moreover, the Court's discussion of the "trigger of coverage" leading to its conclusion to adopt a continuous trigger, is inconsistent with an "all sums" approach for indemnity. Based on its review of the policy language, the Court stated:

> We find no ambiguity in this language; it clearly and explicitly provides that the occurrence of bodily injury or property damage during the policy period is the operative event that triggers coverage. *Id* at 668.

Next, the Court emphasized the critical role that the limitation of "property damage during the policy period" plays in defining the scope of coverage. In discussing the standard form language at issue, the Court observed that the drafters:

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[3] The Court described the phrase "trigger of coverage" as a term of convenience to describe what must happen during the policy period to activate coverage. *Id.* at 655, n.2.

contemplated that the policy would afford liability coverage for all property damage or injury occurring during the policy period resulting from an accident, or from injurious exposure to conditions. Nothing in the policy language purports to exclude damage or injury of a continuous or progressively deteriorating nature, as long as it occurs **during the policy period**. Nor is there any basis for inferring that an *insured's* understanding and reasonable expectations regarding the **scope of coverage** for damage or injury occasioned during the effective period of an occurrence-based CGL policy would have been otherwise. *Id.* at 673; emphasis in bold added.

Furthermore, in *Montrose,* the Court expressly rejected the view that each insurer is jointly and severally liable where damage occurs over multiple policy periods, specifically disapproving *California Union Insurance Company v. Landmark Insurance Company*, 145 Cal.App.3d 462 (1983):

> We do not endorse that aspect of the *California Union* court's holding that both insurers in that case were *jointly and severally liable* for the full amount of damage occurring during the successive policy periods.
>
> Allocation 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 681, n. 19 (citations omitted).

Yet, as discussed in Section IV.A.3. below, "all sums" does result in joint and several liability. And, one of the "express terms" of the policies is that damages are payable only for the property damage that takes place during the policy period.

Lastly, in discussing why the "loss in progress" rule did not apply, the Court in *Montrose* acknowledged that the insurers' general liability policies "did not purport to cover damage or injury that occurred prior to the time those policies went into effect, and only covered those bodily injuries and damages (or continuing bodily injuries and damages resulting from 'continuous or repeated exposure to conditions') *that might occur in the future during the policy periods... .*" *Id.* at 691.

Thus, *Montrose* supports Insurers' point that the duty to indemnify extends only to property damage during the policy period, not to damage that occurs before the policy incepts or after it expires.

Likewise in *Aerojet*, the Court made plain that it was not deciding indemnity issues:

The issues to be resolved are whether, under standard comprehensive or commercial general liability insurance policies, site investigation expenses may constitute defense costs that the

insurer must incur in fulfilling its duty to defend, and whether, under such policies, defense costs may be allocated to the insured. *Aerojet, supra,* 17 Cal.4th at 55-56.

The Court explained that the duty to defend is broader than the duty to indemnify, and that different analyses apply in determining whether costs are properly included within these distinct duties: "It is plain that the insurer's duty to defend is broader than its duty to indemnify...It extends beyond claims that are actually covered to those that are merely potentially so... ." *Id.* at 59. In *Aerojet,* the Court determined that, because an insurer must pay all defense costs for a claim that is at least potentially covered, the duty to defend under a triggered policy extends to the entire defense where at least part of the potentially covered damage happened during the policy period. *Id.* at 68-76.

In contrast, the insurer only "has a duty to indemnify the insured for those sums that the insured becomes legally obligated to pay as damages for a covered claim." *Id.* at 56. The duty to indemnify extends only to "harm proved within coverage." *Certain Underwriters at Lloyds of London v. Superior Court (Powerine Oil Company)*, 24 Cal.4th 945, 950 (2001); *Palmer v. Truck Insurance*, 21 Cal.4th 1109, 1120 (1999) ("While an insurer has a duty to defend suits which potentially seek covered damages, it has a duty to indemnify only where a judgment has been entered on a theory which is actually (not potentially) covered by the policy"); *Buss v. Superior Court*, 16 Cal.4th 35, 45-46 (1997) (the duty to indemnify runs to claims that are actually covered in light of facts proved, while

the duty to defend encompasses claims that are merely potentially covered in light of facts alleged); *Montrose, supra*, 10 Cal.4th at 659, fn.9. ("Although an insurer may have a duty to defend, it ultimately may have no obligation to indemnify, either because no damages were awarded in the underlying action against the insured, or because the actual judgment was for damages not covered under the policy.")

Yet, the important distinction between the duty to defend and the duty to indemnify is not addressed in the Court of Appeal's Opinion or by other Courts of Appeal that have extended *Montrose* and *Aerojet* to the indemnity context. Essentially, the Courts of Appeal improperly extended the "all sums" approach applicable in the context of defense to the duty to indemnify based on this Court's decisions in *Montrose* and *Aerojet*, even though the indemnity issue was not presented or decided in those cases. *See, Armstrong World Industries, Inc. v. Aetna Casualty & Surety Company*, 45 Cal.App.4th 1, 49-50 (1996); *FMC, supra,* 61 Cal.App.4th at 1181, 1187, *Stonewall Insurance Company v. City of Palos Verdes Estates*, 46 Cal.App.4th 1810, 1835-1836 (1996) (extent of liability that triggered insurers bear was not resolved in *Montrose* because the issue "was only whether there was potential coverage under the policy issued by that one insurer."); *Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc.,* 78 Cal.App.4th 847, 897-899 (2000) (referring to the "liable in full" language in *Montrose* as dicta "that has shaped subsequent Court of Appeal decisions.")

Those Courts and the Court of Appeal in this case misplaced reliance on *Montrose* and *Aerojet* in extending "all sums" to the indemnity context. As Justice Chin stated in *Aerojet,* concurring and dissenting:

> Nowhere does *Montrose* require an insurer to *indemnify* or *reimburse* an insured for a monetary loss incurred outside the policy period. To do so would extend coverage beyond the CGL policy scope, hold insurers to joint and several liability and result in a windfall to the insured. *Aerojet, supra,* 17 Cal.4th at 90, citing *Montrose, supra,* 10 Cal.4th at 673.

Aerojet does not dictate an "all sums" result in the indemnity context. In fact, *Aerojet* allowed allocation to the insured, even in the duty to defend context. The Court emphasized the analytical framework applicable to its decision that defense costs may be allocated to the insured in a "mixed" action, in which one of the claims is covered, and one is not:

> [I]n an action wherein none of the claims is even potentially covered because it does not even possibly embrace any triggering harm of the specified sort **within the policy period** caused by an included occurrence, the insurer does not have a duty to defend. (*Buss v. Superior Court, supra*, 16 Cal.4th at p. 47.) 'This freedom is implied in the policy's language. It rests on the fact that the insurer has not been paid premiums by the insured for a defense. This "rule" too "is grounded in basic principles of contract law." [Citation.] As stated,

the duty to defend is contractual. "The insurer has not contracted to pay defense costs" for claims that are not even potentially covered.' (*Ibid.*)

It follows that, in a 'mixed' action, in which at least one of the claims is at least potentially covered and at least one of the claims is not, the insurer does not have a duty to defend the action in its entirety *arising out of contract*: It 'has a duty to defend as to the claim[] that [is] at least potentially covered, having been paid premiums by the insured therefor, but does not have a duty to defend as to [the claim] that [is] not, having not been paid therefor.' (*Buss v. Superior Court, supra,* 16 Cal.4th at pp. 47-48.) *Id.* at 59; emphasis in bold added.

The Court then determined that there was an implied prophylactic duty to defend the entire claim on the basis that:

the insurer has a duty to defend the entire 'mixed' action *imposed by law in support of the policy:* 'To defend meaningfully, [it] must defend immediately. [Citation.] To defend immediately, it must defend entirely.' (*Buss v. Superior Court, supra*, 16 Cal.4th at pp. 48-49.) *Id.* at 59-60.

The Court applied that analytical framework in the context of the "mixed" claim at issue involving continuous property damage. The Court found that some parts of the claim were potentially covered because there could be triggering harm within the policy period,

> and at least one of the parts was not even potentially covered because it did not even possibly embrace any triggering harm of the specified sort **within the policy period** caused by an included occurrence. Nevertheless, each [insurer] had a duty, prophylactic although not contractual, to defend all the parts. *Id.* at 70, emphasis added.

Significantly, the Court held that, notwithstanding the prophylactic duty to defend, insurers could thereafter allocate defense costs to the insured:

> [E]ach insurer may allocate defense costs to Aerojet for any part of the single broad 'mixed' claim presented in the governmental and private actions that was not even potentially covered because it did not even possibly embrace any triggering harm of the specified sort **within its policy period or periods** caused by an included occurrence. For example, on the requisite proof, it may allocate defense costs for a part involving acts or omissions that may possibly have caused bodily injury or property damage-whether continuous or progressively deteriorating, on the one side, or

discrete, on the other side-only after its policy or policies expired.

Id. at 71, emphasis added.

Thus, even in the broader duty to defend context, insurers are not ultimately responsible for defense costs relating to all damage outside the policy period. Because defense is provided only prophylactically as to claims of injury or damage outside the policy period, insurers may recover the defense costs associated therewith. In the narrower context of the duty to indemnify, in which actual coverage is the touchstone, there is no basis to provide the insured "prophylactic indemnity" for injury outside the policy period. "All sums" as to indemnity has no contractual support and the analytical approach used by the Court in *Aerojet* is inconsistent with that result.

2. "All Sums" In The Indemnity Context Is Inconsistent With The Policy Language

The distinction between the duty to defend and the duty to indemnify is an important one here. As discussed below, **actual** coverage under the policies at issue, as opposed to a potential for coverage, is limited to all sums for damages because of property damage during the policy period - - not all sums if **any** property damage happens during the policy period, or all sums for damages because of property damage during **and outside** the policy period.

Insurance policy language must be construed in the context of the entire policy read together as a whole. *La Jolla Beach and Tennis Club, Inc. v. Industrial Indemnity Company*, 9 Cal.4th 27, 37-38 (1995). Policies must be

interpreted so that each word is given independent meaning and no terms are read out or made redundant. *Id.*; Civil Code section 1641 ("The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other.").

The "all sums" approach cannot be applied to the policy language at issue without violating these fundamental rules of contract construction. The policies at issue provide in relevant part:

> 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.
>
> * * *
>
> This policy applies only to occurrences which take place **during the policy period**...
>
> '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**... .
>
> Likewise, limits of liability are stated, "each occurrence." (*e.g.,* 39AA 10149, 10151). (Emphasis added)

Taken together and read in harmony, these policy provisions cannot be construed to cover all property damage that takes place outside the policy period simply because some property damage resulted during the policy period. The

policies specify that they cover only those sums that the State is obligated to pay as damages for property damage during the policy period. The requirement of property damage during the policy period qualifies the "all sums" language otherwise provided for in the policies. *See* Section IV.A.5, below. The Court of Appeal's approach to indemnity obligations under these policies would nullify the plain meaning of the policy language, which is limited to damages because of property damage during the policy period. "All sums" cannot be reconciled with the "actually covered" standard applicable to the duty to indemnify.

Padilla Construction Company v. Transportation Insurance Company, 150 Cal.App.4th 984 (2007) is illustrative. It emphasized the distinction between the duty to defend and the duty to indemnify and supports Insurers' position that the policies only pay for damage connected to the property damage during the policy period. In *Padilla*, a primary insurer sought to compel an umbrella insurer covering a different policy period to drop down and participate in defense when another primary insurer vertically underlying the umbrella insurer exhausted limits. *Id.* at 989-991. The primary insurer's theory was that it did not cover liability for property damage outside its policy period and that as a result of the other primary insurer's exhaustion, there was no "other insurance" for property damage during the umbrella insurer's policy period, requiring it to drop down. *Id.* at 995-996. In rejecting the primary insurer's argument, the Court of Appeal explained:

No court could, in good conscience given the unambiguous language of the Stage 4 Primary Insurer's 'policy period' language, say there was even potential coverage for the insured's liability for property damage that occurred in the period 1995 through 1996 (the Stage 1 Umbrella Insurer's period), or, for that matter, any property damage that occurred prior to March 1, 2001.

[T]here is a core flaw in the [primary insurer's] logic. It confuses the obligation of the Stage 4 Primary Insurer to indemnify - - **which is indeed limited only to that increment of harm *after* March 1, 2001 [**Stage 4 Primary Insurer's policy period] - - with the obligation of the Stage 4 Primary Insurer to defend a suit that *includes* an increment of harm after March 1, 2001. If the Stage 4 Primary Insurer had any defense duty *at all* to defend the underlying lawsuit against the insured - - say, because of the potential for coverage raised by post-March 1, 2001 damage - - then it had a duty to defend the *entirety* of that underlying lawsuit, including that portion of the underlying lawsuit asserting claims for damage occurring *before* March 1, 2001. As the Supreme Court explained in *Buss v. Superior Court,* an insurer must defend an entire action when there is at least one claim that is potentially covered-including the balance of the

action which may press claims that are not even potentially covered.

Id. at 996, emphasis in bold added, internal citation omitted.

Padilla crystallizes the important difference between the duty to defend and the duty to indemnify here. In the indemnity context, only the actual "increment of harm" during the policy period is indemnified, even though a defense was due for the entire claim involving damage during and outside the policy.[4] In short, the policies do not provide indemnity coverage for "all sums," but for all sums for damages because of the property damage during the policy period.

It requires an impermissible strained and disharmonious reading to conclude that the policies pay "all sums" for property damage outside the policy period. In order to reach the conclusion the Court of Appeal does, the policies would have to be rewritten to provide that they pay all sums for damages because of property damage during **and at any time before and after the policy period**. But, adding those words to or subtracting the words "damages because of property damage during the policy period," from the contracts violates this Court's basic tenet that courts may not rewrite contracts for any reason - - the parties' rights and obligations are governed by the contract language the parties agreed to. *Rosen v. State Farm General Insurance Company*, 30 Cal.4th 1070, 1077-1078 (2003);

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[4] *Cf.* Justice Baxter's concurring opinion in *Montrose* on whether the policy language was susceptible to the insured's interpretation:

"What matters is that the coverage language can *plausibly* be read, as Montrose suggests, to mean that each *increment* of harm, whether to person or property, which 'occurs' during a particular policy period is covered by the policy then in effect." 10 Cal.4th at 695.

Powerine, supra, 24 Cal.4th at 967. (Contract language cannot be rewritten for any reason.) Here, the contracts between the State and the Insurers provide that only damages because of property damage during the policy period are covered.

The fact that the State's policies only cover property damage that occurred during the policy period is further illustrated by a specific exception to the "during the policy period" requirement. While the "occurrence" wording limits coverage to property damage or bodily injury during the policy period, Paragraph I of the insuring agreement further provides that coverage extends to "Death at any time" resulting from covered bodily injury, sickness or disease. The insuring agreement states that the Insurers must pay "all sums" for the State's "damages":

> Because of Bodily Injury, Sickness or Disease, **including Death at any time resulting therefrom**, sustained by any person or persons ... [*e.g.*, 39AA 10149]. (Emphasis added)

Thus, the policies extend coverage to all death - - whether it occurs during or after the policy period - - so long as the bodily injury, sickness or disease that resulted in the death, took place during the policy period. The policies provide no equivalent extension of coverage for "property damage at any time." Rather, the policies limit coverage to property damage that occurs during the policy period.

This exception for "death at any time" highlights the impropriety of an "all sums" interpretation as to these policies. An "all sums" interpretation would render the policy language regarding "[d]eath at any time" wholly superfluous. Under the "all sums" approach, the policies would cover all damage or injury

outside the policy period relating to a covered occurrence, as long as some harm resulted during the policy period. In that event, there would be no need for a provision expressly extending coverage to death "at any time." The words "at any time" in the insuring agreement would be left without any meaning. But that interpretation would violate the basic rule of contract interpretation that each term in a contract must be given independent meaning and effect. *See* Civil Code § 1641; *Powerine, supra*, 24 Cal.4th at 963-64. *La Jolla Beach and Tennis Club, supra*, 9 Cal.4th at 37.[5] Such a construction is impermissible, in that it would render the "[d]eath at any time" language "a dead appendage to the policy." *Titan Corporation v. Aetna Casualty & Surety Company*, 22 Cal.App.4th 457, 474 (1994) (where the Court of Appeal rejected an interpretation of an insurance policy which would render any of its terms a nullity).

Given the particular policy language at issue here, each policy in this case can only be required to indemnify the State for damages resulting from property damage that happened during the specific term of that policy. An "all sums" ruling improperly rewrites the State's policies.

3. The "All Sums" Approach is Objectively Unreasonable And Creates Joint And Several Liability

Another fundamental rule of contract construction is that an insurance policy will not be given a meaning that is objectively unreasonable. *See, e.g.,*

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[5] Significantly, *Aerojet, Montrose, FMC* and *Armstrong* did not address the "Death at any time" policy language. The Court of Appeal here ignored it.

Bank of the West v. Superior Court, 2 Cal.4th 1254, 1265 (1992). The "all sums" interpretation violates this rule because it unreasonably requires an insurer that issued a single triggered policy to pay all damage occurring over time, despite the explicit terms of the policy to the contrary and although the insurer only received premiums for the risk of harm during the policy period. Thus, under "all sums" in a continuous harm situation, if any property damage happens during the policy period, the Court of Appeals' approach requires a policy issued in 1970 to pay for property damage that happened in 1980 - - contrary to what the parties intended when they limited coverage to property damage during the policy period. The State could not reasonably expect a policy covering damage only in 1970 would pay for property damage that took place in 1960 and that took place in 1980. It is not reasonable to expect coverage for exactly the opposite of what the policies make explicit. As the Supreme Court of New Hampshire explained:

> '[W]e doubt that [the insured EnergyNorth] could have had a reasonable expectation that each single policy would indemnify [it] for liability related to property damage occurring due to events taking place years before and years after the term of each policy.' Nor could EnergyNorth have had a reasonable expectation that it would be exempt from liability for injuries that occurred during any period in which EnergyNorth was uninsured or underinsured.
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> *EnergyNorth Natural Gas, Inc. v. Certain Underwriters at Lloyds,* 934 A.2d 517, 526 (N.H. 2007), citations omitted.

Simply, there is no provision of coverage for property damage occurring outside the policy period. The Connecticut Supreme Court similarly found:

> Neither the insurers nor the insured could reasonably have expected that the insurers would be liable for losses occurring in periods outside their respective policy coverage periods. *Security Insurance Company of Hartford v. Lumberman's Casualty Company*, 826 A.2d 107, 121 (Conn. 2003).

The Colorado Supreme Court observed:

> [T]here is no logic to support the notion that one single insurance policy among 20 or 30 years worth of policies could be expected to be held liable for the entire period. Nor is it reasonable to expect that a single-year policy would be liable, for example, if the insured carried no insurance at all for the other years covered by the occurrence. *Public Service Company of Colorado v. Wallis & Companies*, 986 P.2d 924, 940 (Colo. 1999).

The California appellate decisions in *FMC* and *Armstrong* justify their "all sums" approach in the face of the inescapable fact that "all sums" is, in effect, joint and several liability - - a concept *Montrose* explicitly rejected - - by pointing out that an insurer saddled with all of an insured's loss as a result of "all sums" would have contribution rights against other insurers whose policies were also triggered. *FMC, supra,* 61 Cal.App.4th at 1185; *Armstrong, supra*, 45 Cal.App.4th at 55.

Indeed, the Court of Appeal in this case stated that although the "all sums" approach is not "literally" joint and several liability, "[a]dmittedly, the outcome is much the same as if it were[.]" (Slip Op. at 18.) It left insurers with the "remedy...to seek contribution from any other insurers that are also on the risk." (Slip Op. at 19.) The response is too facile and the "remedy" is no justification for ignoring the policy language and granting coverage that was not provided in the first instance.. Many scenarios exist in which an insurer required to pay "all sums" for damage occurring outside its policy period may not have contribution rights against other insurers. For example, deliberate decisions not to purchase insurance, exhaustion of limits, the presence of applicable exclusions, self-insured retentions and the insolvency of other carriers would all preclude contribution, leaving the insurer responsible for property damage it never agreed to cover.

Moreover, contribution rights, even if enforceable generally, cannot account fully for a sharing of damages for all property damage that occurred outside a particular insurer's policy period. Contribution rights would not account for property damage that occurred during periods of no insurance or self insurance. That fact has dramatic results here because the State only purchased insurance from 1963-1978. The State chose not to insure for the first six years the Stringfellow site operated, as well as for the decades after 1978 during which continuous property damage took place.

The policies expressly limit coverage to property damage occurring during the policy period, and *Montrose* has already rejected joint and several liability. Yet "all sums" makes an insurer jointly and severally liable for property damage outside the policy period, depending on whether the insured purchased insurance in other periods, on the policy terms of such other policies and on the solvency of those other insurers.

Thus, in reality "all sums" does create joint and several liability and therefore cannot peacefully coexist with *Montrose's* rejection of joint and several liability. In short, the "all sums" approach to indemnity is not only inconsistent with the policy language, but also is objectively unreasonable.[6]

4. Courts Across The Country Have Found That Each Policy Only Contracts To Pay For Harm Within The Policy Period, And Not For Damage Taking Place Outside The Policy

Eleven state high courts[7] and the United States Court of Appeal for the Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth and Eleventh Circuits[8] have rejected "all sums." So have numerous intermediate appellate courts.[9]

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[6] Indeed, the assertion that contribution rights are a panacea for the joint and several liability that results from "all sums" is further undermined by the Court of Appeal's other holding allowing stacking. Since stacking could require every insurer to pay "all sums," then no insurer who paid "all sums" here could seek contribution from any other insurer who paid "all sums" here.

[7] *See, Public Service Company of Colorado v. Wallis & Companies,* 986 P.2d 924, 939 (Colo. 1999) (rejecting "all sums" as an unreasonable interpretation of the policy); (*Security Insurance Company of Hartford v. Lumberman's Mutual*

Casualty Company, 826 A.2d 107 (Conn. 2003) (rejecting "all sums" in favor of pro rata allocation); *Atchison, Topeka & Santa Fe Railway Company v. Insurance Company*, 71 P.3d 1097, 1134 (Kan. 2003) (joint and several liability clearly contradicts stated terms of the policy indemnifying against injury during the policy period.); *Aetna Casualty & Surety Company v. Commonwealth of Kentucky, 179 S.W.3d 830, 842* (Ky. 2005), as modified on rehearing (2006) (affirming decision pro-rating damage); *Southern Silica of Louisiana, Inc. v. Louisiana Insurance Guarantee Association*, 979 So.2d 460 (La. 2008) (applying pro rata allocation to silicosis claims); *Domtar, Inc. v. Niagara Fire Insurance Company,* 563 N.W.2d 724, 732 (Minn. 1997) (finding liability under each policy according to the time each policy was on the risk and absolving insurers of liability for costs allocated outside of their policy periods, explaining that "all sums" is inconsistent with an "actual injury" trigger), citing *Northern States Power v. Fidelity & Casualty Company of New York,* 523 N.W.2d 657 (Minn. 1994); *EnergyNorth Natural Gas, Inc. v. Certain Underwriters at Lloyds*, 934 A.2d 517 (N.H. 2007) (rejecting "all sums" as insured could not have a reasonable expectation that a single policy would indemnify it for property damage years before and years after the policy term); *Carter-Wallace v. Admiral Insurance Company,* 712 A.2d 1116, 1123-1125 (N.J. 1998) (specifically rejecting an "all sums" joint and several approach), citing *Owens-Illinois, Inc. v. United Insurance Company,* 650 A.2d 974, 995 (N.J. 1994); *Consolidated Edison Company of New York v. Allstate Insurance Company,* 774 N.E.2d 687, 695 (N.Y. 2002) (rejecting "all sums" as inconsistent with policy language requiring occurrence during the policy period, not outside that period); *Sharon Steel Corporation v. Aetna Casualty & Surety Company,* 931 P.2d 127, 140-142 (Utah 1997) (rejecting "all sums"); *Towns v. Northern Security Insurance Company*, 964 A.2d 1150, 1167 (Vt. 2008) ("all sums" improper because it would make insurer liable for damage when it was not on the risk.) *But see J. H. France Refractories Company v. Allstate Insurance Company*, 626 A.2d 502 (Pa. 1993); *B&L Trucking & Construction Company v. Northern Insurance Company*, 951 P.2d 250 (Wash. 1998); *Plastics Engineering Company v. Liberty Mutual Insurance Company*, 759 N.W.2d 613 (Wisc. 2009) (adopting "all sums" approach).

[8] *Olin Corporation v. Insurance Company of North America*, 221 F.3d 307, 323-326 (2d Cir. 2000) (rejecting the "all sums" approach as improperly "shoehorning all damages into one policy period," a process that is "intuitively suspect"); *Chemical Leaman Tank Lines, Inc. v. Aetna Casualty & Surety Company*, 177 F.3d 210, 229-231 (3d Cir. 1999) (New Jersey law) (rejecting joint and several "all sums" allocation among insurers); *Spartan Petroleum Company v. Federated Mutual Insurance Company*, 162 F.3d 805, 810-811 (4th Cir. 1998) (South Carolina law) (allowing recovery only for the injury during the policy period and allocating liability to the insured for any periods of the progressive damage during which it was self-insured); *In Re: Wallace & Gale Company*, 385 F.3d 820, 832-

For example, in a case concerning insurance coverage for environmental cleanup of contamination which occurred over multiple policy periods, the Colorado Supreme Court explained the reasoning behind its decision to reject the "all sums" approach:

> 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

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833 (4th Cir. 2004) ("all sums" language must be read in concert with other language that limits liability for damage that occurs during policy period.); *Gulf Chemical & Metallurgical Corporation v. Associated Metals & Minerals Corporation*, 1 F.3d 365, 371-73 (5th Cir. 1993) (applying pro rata allocation); *Insurance Company of North America v. Forty-Eight Insulations, Inc.*, 633 F.2d 1212 (6th Cir. 1980) (same); *Sybron Transition Corporation v. Security Insurance of Hartford*, 258 F.3d 595 (7th Cir. 2001) (applying pro rata allocation, expressly rejecting "all sums"); *Nationwide Insurance Company v. Central Missouri Electric Cooperative, Inc.*, 278 F.3d 742 (8th Cir. 2001) (Missouri law), ("insurance coverage restricted to an occurrence during the policy period 'limit[s] an insurance policy to injuries arising during the policy period and...exclude(s) from coverage injuries which occur subsequent to that period, even though the injuries may have been caused by acts done while the policy was in effect.'"), quoting *Universal Reinsurance Corporation v. Greenleaf*, 824 S.W.2d 80, 84 (Mo.App. 1992); *Commercial Union Insurance Company v. Sepco Corporation*, 918 F.2d 920 (11th Cir. 1990). (applying pro rata allocation.)

[9] *See, e.g., Arco Industries Corporation v. American Motorists Insurance Company*, 594 N.W.2d 61, 69 (Mich.App. 1998) ("we must reject any method of allocation that would require [the insurer] to provide coverage on a joint and several or "all sums" basis, since that method would require [the insurer] to indemnify [the insured] for damage occurring outside the policy period."); *Outboard Marine Corporation v. Liberty Mutual Insurance Company*, 283 Ill.App.3d 630, 642-643 (1996) (noting insurers' indemnity obligations are limited to property damage during the policy period); *Mayor & City Counsel of Baltimore v. Utica Mutual Insurance Company*, 802 A.2d 1070, 1102 (Md. Ct. Spec. App. 2002) ("all sums" does not mean all sums whatsoever; must be read in conjunction with "property damage during policy period" language).

> pollution caused by events over a period of decades, including events that happened both before and after the policy period....
>
> As many courts have commented, the ["all sums"] method followed by the trial court creates a false equivalence between an insured who has purchased insurance coverage continuously for many years and an insured who has purchased only one year of insurance coverage....[citations omitted and paragraph break added.] *Public Service Company of Colorado, supra,* 986 P.2d at 939.

Likewise, in *Consolidated Edison, supra*, 774 N.E.2d 687 (2002), the highest court in New York addressed the same issue on facts comparable to the facts in the present case. For more than 100 years, Consolidated Edison ("Con Ed") or its corporate predecessors operated a gas plant which caused contamination. After Con Ed entered an agreement with the Department of Environmental Conservation to clean up the site, Con Ed sued 24 insurers who had issued liability policies from 1936 to 1986, demanding defense and indemnity for Con Ed's liability for environmental damages arising from the contamination. For many of the years of the property damage, Con Ed had a self-insured retention rather than primary policies. Con Ed argued it should be able to allocate all of its liability to any one of its insurers, at its choosing ("all sums").

The New York court rejected "all sums" as being inconsistent "with the language of the policies providing indemnification for 'all sums' of liability that resulted from an accident or an occurrence '**during the policy period**' [citing *Olin*

Corporation v. INA, 221 F.3d 307, 323]." *Consolidated Edison, supra*, 774 N.E.2d at 695 (emphasis in original). The Court went on to explain:

> Most fundamentally, the policies provide indemnification for liability incurred as a result of an accident or occurrence during the policy period, not outside that period [citation]. [The policyholder's] singular focus on "all sums" would read this important qualification out of the policies. 774 N.E.2d at 695.

5. *Armstrong, FMC* And *Stonewall* Are Wrong On The "All Sums" Issue

The Court of Appeal references *Armstrong, FMC* and *Stonewall* in support of its "all sums" decision. Insurers recognize that those cases reject pro rata allocation in favor of "all sums." However, those cases rely on two false assumptions: (1) that the Court in *Montrose* had decided in favor of "all sums" as to indemnity; and (2) that the distinction between trigger and scope of coverage dictates an "all sums" result. Insurers explained in Section IV.A.1. why the first assumption is wrong. The second assumption is equally erroneous. *Armstrong* stated its reliance on the distinction between the trigger and scope of coverage in this way:

> The insurers have confused the trigger of coverage and the scope of coverage. As we have explained...the event which triggers an insurance policy's coverage does not define the extent of the coverage. Although a policy is triggered only if 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 (up to the policy limits), not just for the part of the damage that occurred during the policy period. *Armstrong, supra,* 45 Cal.App.4th at 105.

FMC stated that its "review satisfied us that the *Armstrong World Industries* analysis is sound" and then repeated it. *FMC, supra,* 61 Cal.App.4th at 1184.[10]

Both cases invoke the trigger/scope distinction to explain the result, but the trigger versus scope mantra presupposes the outcome and ignores the actual policy language. The policy language properly read as a whole addresses **both** trigger **and** scope of coverage, not just trigger as *Armstrong* and *FMC* improperly conclude. The policies' basic grant of coverage requires that (1) property damage must occur during the policy period [trigger] and (2) that the policies do not pay expansively for all sums the insured may owe once any property damage happens, but only all sums for property damage **because of** property damage during the policy period [scope]. *Armstrong* and *FMC*'s interpretation simply ignores the requirement that all sums for damages is qualified by "**because of**" property

[10] *Stonewall* adds nothing to the analysis. It simply relies on *Montrose* and *Armstrong*. 46 Cal.App.4th at 1855.

damage during the policy period. The phrase serves both as a trigger of coverage and as a limitation on "all sums."

Nothing in the policy language suggests the phrase only relates to "trigger." "All sums" is only one phrase within the broader provisions and cannot be read in isolation. *Producers Dairy Delivery Company v. Sentry Insurance Company*, 41 Cal.3d 903, 916 n. 7 (1986); s*ee also, Mayor & City Council of Baltimore, supra,* 802 A.2d at 1102 ("We are persuaded that the 'all sums' language of the standard CGL policy must be read in concert with other language that limits a policy's liability for damage or loss that occurs during the policy's period..."); *Outboard Marine, supra*, 670 N.E.2d at 748-49 ("While the insurers agreed to indemnify [the policyholder] for 'all sums,' it had to be for sums incurred during the policy period.").

Courts that have relied on the artificial "trigger versus scope of coverage" mantra have ignored the dual function of "property damage during the policy period." Thus, *Armstrong* and *FMC* artificially used the concepts of trigger and scope of coverage to truncate the policy terms rather than read them together in harmony. Aside from violating basic rules of contract construction, this approach ignores that there is no policy language that serves as the trigger for property damage outside the policy period. The phrase "property damage" during the policy period cannot be merely a trigger of coverage, because under that logic, during any period in which the State had no insurance (prior to 1963 and after

1978), there would be no trigger language and therefore no coverage. Yet "all sums" yields exactly the opposite result.

Courts that have rejected the "all sums" approach have refused to be misled by the trigger versus scope fallacy. *See, e.g., Consolidated Edison, supra*, 774 N.E.2d at 695 ("all sums" is inconsistent with policy language and singular focus on "all sums" would read the important qualifications of occurrence during the policy period out of the policies); *EnergyNorth Natural Gas, Inc. v. Certain Underwriters at Lloyds*, 934 A.2d 517 (H.H. 2007) (insured could not have a reasonable expectation that policy would indemnify for property damage before and after policy term); *Public Service Company, supra,* 986 P.2d 924, 939-940 (policy provisions cannot be read to mean that a policy must pay for the total amount of pollution including from events that happened before and after the policy period); *Arco Industries, supra,* 594 N.W.2d at 69-70 (intent of drafters of policy language [similar to that at issue here] was to provide coverage for the policy period only, which intent precludes imposition of "all sums" or joint and several liability).

Furthermore, the position asserted by the State and adopted by the Court of Appeal, that once triggered, the policy pays "all sums" (including for property damage before and after the policy period) cannot be sustained in light of this Court's decision in *Powerine*. The Court in *Powerine* determined that the phrase "as damages" limited coverage to liability that was adjudicated in court. 24 Cal.4th at 945. Thus, notwithstanding that property damage may have happened

during the policy period, *i.e.* coverage was "triggered," the insurer was not obligated to pay "all sums." It was only required to pay "all sums" that the insured was legally obligated to pay "as damages." The Court did not isolate the policy language or simply stop its analysis at "all sums."

Powerine provides one example demonstrating that the policies do not pay "all sums," merely because property damage happened during the policy period. Another example is the limitation on "all sums" at issue here - - "all sums" must be "because of property damage during the policy period." Just as "damages" in the policies at issue constitutes a limitation on "all sums" under *Powerine,* so does the requirement of "property damage during the policy period." No other reading of the policies is semantically permissible.

In short, the State improperly leaps from the fact that several policies may be triggered in a continuous damage situation to its tortured and incomplete reading of the policy language that each policy triggered must pay "all sums" for all property damage whenever it happened. The policies plainly provide that "all sums" is circumscribed by damages because of property damage during the policy period. They do not provide coverage for damages because of property damage outside the policy period.

6. The Court Should Adopt A Pro Rata Approach To Allocation Of Indemnity For Damages That Cannot Be Allocated To Specific Policy Periods

If the policies are applied as written, as required by the rules of contract construction, each policy would be properly interpreted only to cover damages because of property damage during its policy period. Each insurer, then, would be responsible only for those damages allocable to the harm that occurred during its policy period. There would be no overlapping coverage and the issue of stacking would not arise.

Recognizing that in many progressive injury cases the insured can prove that some damage happened in each policy period but may be unable to prove the specific damage that occurred during each policy period, some courts have applied a presumption of continuous damage. Under this approach, if a court determines that there is continuous damage but the damage is unallocable to particular policy periods, the court presumes that an equal amount of damage occurs in each time period throughout the years of property damage. *See, e.g. Consolidated Edison, supra,* 774 N.E.2d at 695; *EnergyNorth, supra*, 934 A.2d at 526 (pro rata allocation consistent with occurrence-based continuous trigger rule)

This presumption is rebuttable. A party could show that the damages can in fact be allocated. This accommodation protects the insured where it would otherwise be unable to prove the specific damage during each policy period, but it should not create a windfall for the insured by providing coverage for damage that

falls outside of the policy period. The rationale for the "trigger" analysis as to continuous or progressive damage in *Montrose* leads to the conclusion that the loss must be evenly allocated on a pro rata basis across the years of property damage, including allocation to the insured for time periods during which it was uninsured for the loss. Courts in other jurisdictions have relied on this pro rata approach.

For example, *Olin Corporation v. Insurance Company of North America*, 221 F.3d 307 (2d Cir. 2000) involved insurance coverage for the insured's liability for continuing environmental damage. The insured contended the court should have applied a "joint and several" approach to allocation. Instead, the court adopted a pro rata allocation, noting that the policies apply only to property damage during the policy period. *Id.* at 323-24.

Although most courts which reject "all sums" do so based on the policy language, *Olin* gave additional reasons for rejecting "all sums:"

> [A]n insured purchases an insurance policy to indemnify it against injuries occurring within the policy period, not injuries occurring outside that period. *Id.* at 322;...[pro rata allocation rather than "all sums"] "avoids saddling one insurer with the full loss, the burden of bringing a subsequent contribution action [against other insurers who provided coverage to the insured for policy periods outside of the periods of the targeted insurer], and the risk that recovery in such an action will prove to be impossible because, for instance, the insurer of other triggered policies is unable to pay." *Id.* at 323.

The *Olin* court found that a pro rata allocation was necessary to prevent the insured from imposing liability on insurers for injuries that did not occur during the insurers' policy periods. *See, also Public Service Company of Colorado, supra,* 986 P.2d at 940 (pro rata apportionment in environmental contamination was appropriate when property damage continuous and indivisible.); *Consolidated Edison, supra,* 774 N.E.2d 687 (2002) (applying pro rata allocation among excess insurers and rejecting "all sums."); *Domtar, supra*, 563 N.W.2d at 732 (soil and groundwater contamination is a continuous process that should be distributed over the entire period of damage, with each insurer liable "for that period of time it was on the risk compared to the *entire* period during which damages occurred."); *Spartan Petroleum, supra*, 162 F.3d at 812 (holding that for any period of progressive damage when no insurer was on the risk, the insured should reasonably bear the loss, "otherwise [it] would be to make an insurer liable for damages that occurred when it was *not* on the risk"); *Stonewall Insurance Company v. Asbestos Claims Management Corporation*, 73 F.3d 1178, 1203 (2d Cir.1995) ("[P]roration-to-the insured is a sensible way to adjust the competing contentions of the parties in the context of continuous triggering of multiple policies over an extended span of years."); *Gulf Chemical, supra*, 1 F.3d at 372 (holding that the insured must bear its share of costs determined by the fraction of the time of injurious exposure in which it lacked coverage); *Towns, supra*, 964 A.2d at 1167 (proper to allocate indemnity over entire period of continuous damage, including to insured for uninsured years.)

Adoption of a pro rata time-on-the risk allocation comports with the policy limitation of only providing coverage for property damage taking place during the policy period, is consistent with the "continuous injury" approach in *Montrose*, eliminates the need for contribution suits among insurers, does not unfairly saddle one insurer with the whole loss with the attendant risk that it will be impossible to recover from other insurers and is consistent with the objectively reasonable expectations of the parties.

B. The Court Of Appeal Compounded Its Error By Deciding That The State Could Recover "All Sums" From Every Insurer By Allowing "Stacking" Of Limits

As discussed above, the Court of Appeal found that, not only does, for example, a 1970 policy pay for property damage that happened in 1980 if any damage happened during 1970, but also that **every** triggered insurer has to do the same - - each must pay "all sums." Each policy that had to pay "all sums" could be added together or "stacked" to make a "super occurrence" policy.[11]

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[11] As the court in *FMC described:*

> Stacking policy limits means that when more than one policy is triggered by an occurrence, each policy can be called upon to respond to the claim up to the full limits of the policy. Under the concept of stacking...the limits of every policy triggered by an "occurrence" are added together to determine the amount of coverage available for the particular claim. Thus, for example, if an insured could establish that each of four consecutive $10 million policies were triggered by a particular claim, the insured could recover $40 million for a single occurrence, rather than the $10 million available under any single policy. *FMC, supra*, 61 Cal.App.4th at 1188, citing *Ostrager and Newman Insurance,*

"Stacking" of limits combined with "all sums" stretches the policy language to the point that it bears no resemblance to what the parties contemplated at the time of contracting. *See, e.g., La Jolla Beach, supra*, 9 Cal.4th at 37 (fundamental goal of contract interpretation is to give effect to the mutual intention of the parties); Civil Code section 1636.

If the Court reverses the decision on "all sums" and determines that the policies are obligated to pay only for injury during the policy period, as required by the policies, there is no need to address the "stacking" issue. But, if the State is allowed to obtain coverage for damage outside the policy period, then its recovery should be limited to one set of per occurrence limits consistent with what the Court of Appeal in *FMC* determined. Otherwise, the windfall already resulting from "all sums" is magnified.

1. FMC Correctly Decided In The Context Of "All Sums" That The Insured May Not Stack Per Occurrence Limits

Recognizing the unreasonable results that might follow from its "all sums" decision, the *FMC* court properly ruled that the insured may not stack the limits of each policy triggered by continuous property damage; rather an insured was entitled to select a single policy period triggered by the occurrence.[12] "Anti-

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Coverage Disputes (9th Ed. 1998) Trigger and Scope of Coverage, Section 9.04[c], p. 464.

[12] Of course the insured could recover the limits of all policies at all layers of insurance during the targeted period (assuming coverage is otherwise proved).

stacking ensures that the insured does not obtain much more insurance than it paid for." *FMC, supra*, 61 Cal.App.4th at 1189.

FMC, like this case, involved the insured's attempt to obtain coverage from its excess insurers for continuous property damage arising from contamination. FMC Corporation, like the State here, sought to add the limits of all policies together to cover the damages for an occurrence at the contaminated site. The Court of Appeal rejected FMC*'s* position, finding that even though multiple consecutive policies were "triggered" because damage was continuous, FMC was only entitled to select a single policy period during the triggered years - - it could not stack the limits of all triggered policies horizontally over time.

The *FMC* court held that:

> only the policy limits of London umbrella and excess policies in effect as of July 1 in any one of the policy periods in which coverage is triggered for a single occurrence can apply to property damage attributable to that occurrence, but if coverage for that occurrence is triggered in more than one policy period FMC may select the policy period in which the limits are to be fixed. *FMC, supra,* 61 Cal.App.4th at 1190.

In other words, the insured may select the triggered period with the highest available excess policy limits, even if the period includes several layers of excess insurance, but its recovery for one occurrence cannot exceed that amount.

The *FMC* court recognized that "all sums" combined with "stacking" (which would result from the Court of Appeal Decision here) would be fundamentally unreasonable. *FMC, supra*, 61 Cal.App.4th at 1188-1190. Addressing FMC's claim that it was entitled to "stack" policy limits, the court observed that, under the facts in question, "stacking" would potentially allow *FMC* to recover $7 million for each occurrence - - far more than the policies' stated limit of $1 million per occurrence. *Id.* at 1188. The *FMC* court rejected this result, noting:

> This kind of "stacking" of the limits of an insurer's policies for consecutive policy periods has been criticized as affording the insured substantially more coverage...than the insured bargained or paid for. *Id.* at 1188-1189, citations omitted.

In support of its anti-stacking decision, *FMC* cited *Keene Corporation v. Insurance Company of North America,* 667 F.2d 1034, 1049 (D.C. Cir.1981) and *Insurance Company of North America v. Forty-Eight Insulations, Inc.* 633 F.2d 1212 at 1226 (6th Cir. 1980). In *Keene*, the D.C. Circuit adopted a continuous trigger, but held that the policyholder could not stack limits:

> The principle of indemnity implicit in the policies requires that successive policies cover single asbestos-related injuries. That principle, however, does not require that Keene be entitled to 'stack' applicable policies' limits of liability. To the extent possible, we have tried to construe the policies in such a way that the insurers'

contractual obligations for asbestos-related diseases are the same as their obligations for other injuries. Keene is entitled to nothing more. Therefore, we hold that only one policy's limit can apply to each injury. *Keene, supra,* 667 F.2d at 1049.

In *Forty-Eight Insulations* the Sixth Circuit also rejected the insured's attempt to stack limits, stating:

> The district court recognized the problem which stacking presented. The court stated: "In any event, no insurer should be held liable in any one case to indemnify Forty-Eight for judgment liability for more than the highest single yearly limit in a policy that existed during the period of the claimant's exposure for which judgment was obtained." 451 F.Supp. at 1243. We agree with the district court....*Forty-Eight Insulations, supra,* 633 F.2d at 1226, n.28.

Similarly, the Texas Supreme Court rejected stacking limits, observing:

> The consecutive policies, covering distinct policy periods, could not be "stacked" to multiply coverage for a single claim involving indivisible injury. . . . Simply because a "Claim Occurrence" extends throughout several policy periods does not raise the per-occurrence indemnity cap established in every policy. Even the jurisdiction embracing the broadest coverage trigger rule has held that multiple coverage does not permit an insured to "stack" the limits of multiple policies that do not overlap [citing *Keene*]....Although the triggering

> of multiple policies would provide multiple funding sources…it cannot lead to the conclusion that Garcia's total coverage for a 'continuing' Claim Occurrence somehow exceeds the 'Per Claim Occurrence' limit stated in every policy he purchased. *American Physicians Insurance Exchange v. Garcia*, 876 S.W.2d 842, 853-855 (Tex. 1994).

Thus, a continuous trigger coupled with an "all sums" allocation would mean that the State has the right to assign continuous property damage resulting from a single occurrence to any given policy to pay "all sums," but not the right to assign that property damage to **every** triggered policy. Stacking would result in the fiction that one occurrence is treated the same as many occurrences implicating many occurrence limits. The State could not have reasonably expected when it bought occurrence coverage in different policy periods that all of those policies could be "stacked" across policy periods to provide redundant coverage for the same occurrence. *See, e.g., Bank of the West v. Superior* Court, 2 Cal.4th 1265 (1992) (language in insurance policy must be interpreted" consistent with the insured's objectively reasonable expectations.")

The real vice is "all sums." But allowing the State to "stack" policy limits would compound the unreasonable results of the "all sums" approach, by requiring **every** insurer to pay for all property damage taking place before, during and after its policy periods. Such a result is objectively unreasonable.

2. Other California Cases Support *FMC*'s Anti-Stacking Rule

In *California Pacific Homes, Inc. v. Scottsdale Insurance Company,* 70 Cal.App.4th 1187 (1999), the First District relied on *FMC's* anti-stacking rule to reject an attempt by insurers to stack the self-insured retentions in successive policies triggered by a single, continuous occurrence. Although stacking policy limits was not at issue in *California Pacific Homes* (because the insured's loss did not exceed a single policy period's limits of liability), the court nonetheless relied on the reasoning of *FMC* in rejecting the stacking of self-insured retentions:

> Just as stacking of policies may have the result of providing far more coverage than an insured has purchased, so stacking of retained limits would have the effect of affording an insured far less coverage for occurrence-based claims than the insured has purchased. *Id.* at 1194 (citing *FMC)*

Similarly, the trial court in *Armstrong, supra,* rejected stacking: "In phase IV, the trial court qualified its 'in full' ["all sums"] ruling by concluding that only one policy's limits can apply to each [occurrence]… ." 45 Cal.App.4th at 50 n.15 (1996). Although the anti-stacking ruling was not challenged on appeal, the *Armstrong* court noted that it was supported by *Keene*, on which the *FMC* court relied. *Id.*

3. The Court Of Appeal's Criticism Of *FMC* Is Unwarranted

The Court of Appeal found that each policy required payment of "all sums" for occurrences, and that there was no policy language that forbade stacking. Therefore, the Court of Appeal reasoned, the policies permit stacking of limits. (Slip Op. at 26-27, 35.) The Court of Appeal also criticized *FMC's* contrary approach as impermissible judicial intervention that creates a windfall for insurers. (Slip Op. at 34, 36.)

The Court of Appeal's conclusion that there was no language preventing stacking was bootstrapping, because it had already read out of the policy the language that would result in no stacking. The "property damage during the policy period" requirement **is** the policy language that precludes stacking of limits here. Each policy is only responsible for damages because of property damage during that policy period. But, as the Court of Appeal acknowledged, the stacking issue arises only in the context of a court applying both continuous injury and "all sums." (Slip Op. at 22.)

The Court of Appeal's result depends on the false assumption that each policy, reviewed in isolation, is required to pay "all sums" once triggered, and that just because multiple policies are triggered, all policies triggered must pay their limits. As discussed above, the policies do not provide coverage for "all sums" without qualification. Moreover, the fact that a continuous injury may trigger multiple policies does not alter the total amount of insurance available to cover a

single occurrence. There is no reason or policy language that suggests the amount of liability for a single occurrence should not be the same irrespective of whether injury takes place over time or immediately. Thus, if there is one occurrence, as here, one occurrence limit should be available, not one occurrence limit over and over. If there is one occurrence, that occurrence does not multiply simply because property damage extends over a number of years. Stacking of limits provides the insured more coverage than it ever reasonably could have expected for one occurrence. Stacking creates a "super policy" with a coverage limit equal to the sum of the occurrence limits of all the policies the insured purchased over time, even though the insured never purchased any policy with such a limit.[13]

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[13] Cf., William R. Hickman & Mary R. DeYoung, Allocation of Environmental Cleanup Liability Between Successive Insurers, 17 N. Ky. L.Rev. 291, 301-302 (1990):

> The [Keene] court's concern was that the insurers' liability for a long-term exposure injury be the same as their obligations for other types of losses. This is a fundamental consideration if consistent results are to be achieved in the various contexts in which coverage issues can arise. For the insurance industry, consistency and predictability are crucial if risk, and therefore underwriting decisions, are to be accurately assessed. Theoretically, the amount of coverage available for an instantaneous occurrence should be the same as for a long-term exposure occurrence, since both are but a single insurable event. Allowing an insured to recover the sum of the coverages provided by successive insurers of a continuing occurrence (a "horizontal" allocation of the risk) would lead to the inconsistent result of allowing a larger recovery than in the case of an instantaneous occurrence.

The Court of Appeal rejected this analysis, simply asserting without explanation, "a continuous loss spanning two or more policy periods is fundamentally different from an instantaneous loss, such that it is appropriate to place a greater contractual obligation on the insurers." (Slip Op. at 35.)

Moreover, the anti-stacking rule is not judicial intervention. Rather, it is the natural consequence of the judicial intervention and unwarranted expansion of policy rights that results from an "all sums" ruling, which creates coverage for property damage outside the policy period in contravention of the policy language. Anti-stacking is properly implied in law in a continuous trigger/"all sums" situation to prevent an additional windfall by limiting an already improper expansion of coverage.

Courts frequently imply provisions in contracts. For example, in *Buss v. Superior Court*, 16 Cal.4th 32, 51-52 (1997), this Court found that an insurer's right of reimbursement for defense costs paid prophylactically as to claims not potentially covered is implied in law in order to prevent the insured from obtaining more than it bargained for. The fact that the right is implied in law renders an explicit policy provision providing the right unnecessary:

> Under the policy, the insurer does not have a duty to defend the insured as to the claims that are not even potentially covered. With regard to defense costs for these claims, the insurer has not been paid premiums by the insured. It did not bargain to bear these costs. To attempt to shift them would not upset the arrangement. The insurer therefore has a right of reimbursement that is **implied in law** as quasi-contractual, whether or not it has one that is implied in fact in the policy as contractual. *Buss, supra*, 16 Cal.3d at 50-51, emphasis added.

* * *

> That the insurer does not have a right of reimbursement express in the policy does not mean that it does not have one implied in law. Rather, that it has an implied-in-law right helps explain why it does not have an express-in-policy one. The former renders the latter unnecessary. *Id.* at 52, n.13.

In *Powerine*, the Court held that the term "damages" in a standard form liability policy means "money ordered by a court" in a lawsuit. *Id.* at 960-964. In reaching this conclusion, the Court found that an express limitation is not required where a policy impliedly limits coverage:

> The provision imposing the duty to indemnify impliedly links "damages" to a "suit," because it is in a "suit" that "damages" are fixed in their amount through such order....
>
> That the provision imposing the duty to indemnify happens to be limited to money ordered by a court more impliedly than expressly is of no consequence. An implied limitation is sufficient; an express limitation is not necessary. *Id.* at 969-970.

The same is true here. Thus, *FMC*'s statement that there is precedent for "judicial intervention" (61 Cal.App.4th at 1189) is not a reference to improperly adding words to the policy, as the State contends. Rather, *FMC* implied anti-stacking by law because the insured was not entitled to a windfall - - it was not

entitled to more than it bargained for. *FMC*'s conclusion is consistent with and supported by California law, as exemplified in *Buss* and *Powerine.*

An example is illustrative of why anti-stacking is implied by law in these circumstances. If the insured purchased a policy each year for ten years with a per occurrence limit of $1 million, it cannot reasonably expect that for any one occurrence, it can recover $10 million. It did not bargain for a $10 million per occurrence limit. Anti-stacking is a natural consequence of "all sums." The premise of "all sums" is that a triggered insurer has to pay an occurrence limit for all damage. Thus, if an insurer has to "pay in full" under all sums for all property damage from an occurrence, its occurrence limit is applicable. Simply because there is one occurrence that results in property damage over time, does not mean there is a different or separate occurrence giving rise to a separate occurrence limit in each policy period so as to create a giant scheme of coverage enhancement unique to continuous injury. There is not a new occurrence under each successive policy, but only a portion of the single continuing occurrence that falls within the policy period. Moreover, the Court of Appeal's observation that anti-stacking would grant insurers a windfall because a targeted insurer could seek contribution misses the point. The insured gets what it bargained for - - but not more than it bargained for. The fact that one insurer pays its per occurrence limit and seeks contribution from other triggered insurers does not create a windfall. Contribution simply equitably distributes the loss. The insured has paid a premium for coverage for occurrences during the policy period - - but it has not bargained to

stack the limits for an occurrence covered by another policy or to create a "super occurrence" policy.

There is an additional reason why this Court should not allow stacking of limits for a single continuous occurrence. Allowing stacking would provide negative incentives for insureds by rewarding them with greater coverage for not discovering continuing damage at an earlier date. The objective of encouraging insureds to discover environmental damages at the earliest possible time would be defeated because the amount of insurance would increase the longer the damage remained undiscovered. Cf., *Aydin Corporation v. Hartford Accident & Indemnity Company*, 18 Cal.4th 1183, 1194 (1998) (in placing burden of proof as to exception to pollution exclusion on insured, Supreme Court emphasized importance of providing the insured incentive to strive for early detection and prevention of pollution). Here, the result of stacking is even more pernicious. The State seeks to stack limits of policies issued after it knew the site was leaking, and even after the site was closed because of the contamination. (Slip Op. at 6; 9AA 2498-2501.)

4. Courts In Other Jurisdictions Preclude Stacking In Order To Temper The Unreasonable Results Flowing From The Fiction That Policies Cover Property Damage Outside The Policy Period

A leading insurance law treatise catalogues that the vast majority of jurisdictions to have considered the issue do not permit stacking. *See Barry R.*

Ostrager & Thomas R. Newman, Handbook on Insurance Coverage Disputes, Trigger and Scope of Coverage §9.04 [c]. (14th ed. 2008). *See,* e.g., *Great Lakes Dredge & Dock Company v. City of Chicago*, 260 F.3d 789, 793-794 (7th Cir. 2001) (Illinois law) ("[s]tacking is not an appropriate response to a single tort that spans multiple policy periods. . . . One occurrence, one policy."); *Sybron, supra,* 258 F.3d at 601, 602 ("What we have added to *Olin* is that even if knowledge of causation permits an insured to pick a policy, it may not pick more than one. . . . The fact that Security wrote another policy the next year would not justify treating one casualty as multiple occurrences just because the victim lived [another year]. . . . There is only one 'occurrence' no matter how many years the loss extends."); *Keene, supra*, 667 F.2d at 1049-1050 (principle of indemnity requiring successive policies to cover injuries "does not require that Keene be entitled to 'stack' applicable policies limits of liability"); *Owens-Illinois, Inc. v. Aetna Casualty & Surety Company,* 597 F.Supp. 1515, 1524 (D.D.C. 1984) (insured may not stack the policy limits where multiple policies apply to a given claim); *Gibbs v. Artnovit*, 452 N.W.2d 839, 840-841 (Mich. Ct. App. 1990) (per-occurrence limit of medical malpractice policy unambiguously limited coverage to per-occurrence limits of single policy period in case involving single occurrence spanning twenty years); *Zipkin v. Freeman*, 436 S.W.2d 753, 763-764 (Mo. 1968) (refusing to stack limits of three separate policies even though single course of malpractice extended through all three policy periods).

Other commentators agree that stacking of policy limits should not be allowed. *See, e.g.,* Rebecca M. Bratspies, Splitting the Baby: Apportioning Environmental Liability Among Triggered Insurance Policies, 1999 B.Y.U.L. Rev. 1215, 1245-47 (1999) (stacking "provides the policyholder with a troubling windfall" and creates a disincentive "to purchase sufficient insurance within any particular insurance period"); Michael G. Doherty, Comment, Allocating Progressive Injury Liability Among Successive Insurance Policies, 64 U.Chi.L. Rev. 257, 267-68, 274 (1997) (criticizing stacking because it increases premiums by making future liabilities unpredictable, and decreases incentives for insureds to discover and limit progressive injury damage); William R. Hickman & Mary R. DeYoung, Allocation of Environmental Cleanup Liability Between Successive Insurers, 17 N. Ky. L. Rev. 291, 301-303 (1990) (anti-stacking rule treats insurers' liability for long-term exposure the same as their obligations for other types of losses, thereby promoting accurate underwriting and avoiding inconsistent result of allowing a larger recovery for continuous occurrence than for an instantaneous occurrence; stacking improperly results in a single occurrence being treated as if it were multiple occurrences and creates disincentive for insured to discover continuing damage at earlier time).

In sum, if the State is allowed to claim coverage for damage outside the policy period under the "all sums" doctrine, then the State's recovery should be limited to one set of "per occurrence" policy limits for a single occurrence, as the

trial court ruled. *FMC, supra,* 61 Cal.App.4th at 1191. Otherwise, the windfall already resulting from "all sums" is magnified.

V. CONCLUSION

The Court of Appeal's decision adopting "all sums" for indemnity should be reversed in favor of pro-rata allocation. "All sums" cannot be sustained in light of the policy language at issue . If the Court rejects "all sums," it need not address the "stacking" issue. But, if the Court does not reverse the Court of Appeal on "all sums," Insurers ask the Court to apply the anti-stacking result in *FMC* to prevent the insured from obtaining coverage that bears no relation to what was mutually intended.

DATED: April 17, 2009

Respectfully submitted,

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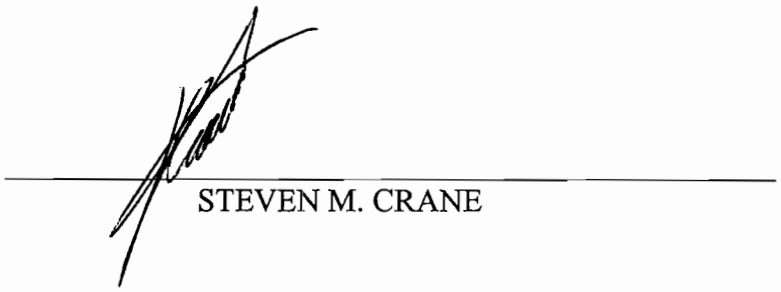
CERTIFICATION

Pursuant to California Rules of Court 8:520(c)(1), I certify that this OPENING BRIEF ON THE MERITS contains 13,560 words, not including the Tables of Contents and Authorities, attachments, the caption page, signature blocks or this Certification page.

Dated: April 17, 2009



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PROOF OF SERVICE

STATE OF CALIFORNIA)
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COUNTY OF LOS ANGELES)

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 515 S. Figueroa St., Suite 1500, Los Angeles, CA 90071.

On April 17, 2009, I served the foregoing document described as **OPENING BRIEF ON THE MERITS** on the interested parties in this action by placing a copy thereof enclosed in a sealed envelope addressed as follows:

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☒ **(STATE)** I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

☐ **(FEDERAL)** I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on April 17, 2009, at Los Angeles, California.

SANDY GILL
(Type or print name)

Sandy Gill
(Signature)

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Court of Appeal - Case No. E041425
Riverside County Superior Court – Case No. 239784; consol. w/RIC 381555

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