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

STATE OF CALIFORNIA'S ANSWER BRIEF ON THE MERITS

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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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TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

CALIFORNIA CASES

OUT OF STATE CASES

STATUTES

OTHER AUTHORITIES

I. COUNTERSTATEMENT OF ISSUES FOR REVIEW

The State of California ("the State") disputes the argumentative Statement of Issues for Review presented in the petitioning insurance companies' Opening Brief. This Court has stated the issues in its online Case Summary[1] as follows:

> (1) When continuous property damage occurs during the periods of several successive liability policies, is each insurer liable for all damage both during and outside its period up to the amount of the insurer's policy limits?
>
> (2) If so, is the "stacking" of limits – i.e., obtaining the limits of successive policies - permitted?

The State concurs with the Court's articulation of the issues, with one important exception. Even if this Court holds that an insurer's liability for continuous property damage is limited to the insured's liability for property damage during (but not outside) the policy period, stacking of coverages – i.e., obtaining the limits of successive policies – is still permissible. Hence, the State would articulate the second issue as "Is the "stacking" of limits – i.e., obtaining the limits of successive policies - permitted?"

II. INTRODUCTION

This is the second appeal to this Court in this action, in which the State seeks liability insurance for damages awarded against it for environmental contamination emanating from the Stringfellow Class I Hazardous Waste containment facility in Riverside County. The first

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[1] http://appellatecases.courtinfo.ca.gov/search/case/mainCaseScreen.cfm?dist=0&doc_id=1902238&doc_no=S170560

appeal, recently resolved in favor of the State in *State of California v. Allstate Ins. Co., et al.* (2009) 45 Cal.4th 1008 (*State v. Allstate*), stemmed from the trial court's erroneous entry of summary judgment denying coverage on insurance policies in effect from 1976 to 1978 which contain pollution exclusions.[2]

The insurance companies bringing the present appeal (the "Insurers")[3] seek this Court's intervention to avoid the promises expressly stated in their liability insurance policies. The policies were issued in successive policy periods over a span of many years, and in each policy, the insurance company promised that once coverage was triggered by an "occurrence" during the policy period, it would pay "all sums" of the State's liability for property damage up to the policy's stated limit. The Court of Appeal, in *State of California v. Continental Insurance Company et al.* (2009) 170 Cal.App.4th 160 (*State v. Continental*), has directed that the Insurers perform this promise.

The Insurers ask this Court to reverse these rulings and drastically limit the promised coverage. First, they ask that the promised payment of "all sums" of liability be reduced to an artificially allocated pro

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2 This Court concluded that summary judgment on the pollution exclusions was improper and remanded for further proceedings, holding (among other things) that the exclusions did not defeat coverage in light of the concurring covered and uncovered causes which contributed to the property damage for which the State became liable. (*Id.* at p. 1037.)

3 The Insurers bringing the present appeal are Continental Insurance Company, Continental Casualty Company, Yosemite Insurance Company, Stonebridge Life Insurance Company and Employers Insurance of Wausau.

rata share. Alternatively, they ask that the recovery be reduced to the total policy limits available in a single period.

However, this case involves underlying liability for damage from continuous or repeated exposure to conditions, with a policyholder – the State – which sought to shift the risk of such liability to Insurers through the regular and repeated purchase of occurrence-based liability insurance policies in successive policy periods. In each separate policy, each Insurer promised to pay up to its own respective limit if such damage continued through its policy period. Accordingly, it is especially fitting and consistent with reasonable expectations for the Court to enforce each Insurer's separate promise to indemnify "all sums" of the policyholder's liability, with each required to pay up to the full limit for which it calculated and collected a separate premium.

In short, the decision of the Court of Appeal should be affirmed. Any other result not only would ignore the plain language of the policies, but would effectively overrule many decisions of this Court and lower California courts.[4] The Insurers have given no valid reason for overturning the Court of Appeal and awarding them a windfall at the expense of the State, other California policyholders, and the settled precedent of this State.

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[4] The significant precedents that would fall if the Court accepted the Insurers' position in the present appeal include *Montrose Chemical Corp. v. Admiral Ins. Co.* (1995) 10 Cal.4th 645, *Armstrong World Indus. v. Aetna Cas. & Sur. Co.* (1996) 45 Cal.App.4th 1 and *Aerojet-General Corp. v. Transport Indemn. Co.* (1997) 17 Cal.4th 38.

III. FACTUAL AND PROCEDURAL HISTORY

The Court is familiar with the factual history of the Stringfellow facility, as set out in the *State v. Allstate* decision. (See 45 Cal.4th at pp. 1014 – 1017.) The *State v. Allstate* appeal focused on only certain of the later policies issued to the State, as to which summary judgment had erroneously been entered based on pollution exclusions prior to trial on the policies at issue in the present appeal. Accordingly, additional detail on the underlying action, the insurance policies, and the insurance litigation giving rise to this appeal is presented below.

A. The Underlying Action

In 1983, the United States and the State filed suit in federal court against the owner of the site and companies that disposed of wastes therein, alleging they were liable for contamination at and emanating from the site. The defendants counterclaimed against the State. (*United States v. Stringfellow*, No. CV 83-2501, 1998 U.S. Dist. LEXIS 21497, at *1, 9 (C.D.Cal. Sept. 11, 1998).) In September 1998, the federal court held the State liable for negligence in investigating, choosing, designing and supervising the construction of the site, in delaying and failing to remedy conditions at the site, and for breach of mandatory duty, creating and maintaining a nuisance, and maintaining public property in a dangerous condition. The State was held 100% liable for past and future remediation costs (*id.* at pp. 48-52), which the State expects to exceed $500 million in present day value. (35AA 8983, RT 1070-1072, 3519.)

B. The Policies

The policies at issue in this appeal are consecutive excess comprehensive general liability (CGL) policies in effect from 1964 to 1976. With substantially the same policy language, these policies shared the following general features.[5]

1. "All Sums" Promise

With minor variations not relevant herein, in Coverage B (Property Damage Liability) of each policy, each insurance company promised "[t]o 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 . . . because of injury to or destruction of property . . . ." (See, e.g., 39AA 10149, 10173.)

2. "Each Occurrence" Limits Of Liability

This "all sums" promise was subject to a "Limits of Liability" clause providing that the insurance company's limit of liability under the policy would be:

> $[Amount] ULTIMATE NET LOSS EACH OCCURRENCE EXCESS OF $[Amount] ULTIMATE NET LOSS EACH OCCURRENCE (HEREINAFTER CALLED "THE INSURED'S RETENTION")

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[5] Stipulated copies of the Insurers' policies appear at 39AA 10144-10209 (CNA companies), 38AA 9838 - 39AA 10052 (Employers Insurance of Wausau), 46AA 11658-11694 (Horace Mann), and 39AA 10076-10091 (Yosemite). Stipulated copies of the State's other insurance policies appear at 1AA 32 – 6AA 1485, 38AA 9701-9837, 39AA 10053-10075, 39AA 10092-10143, 39AA 10210 - 40AA 10347, 43AA 10936-10963, and 43AA 10993-11024.

(See, e.g., 39AA 10151, 10175.) The Limits of Liability clause further provided that:

> The words "ultimate net loss" shall be understood to mean the amount payable in settlement of the liability of the Insured . . . after making deductions for all recoveries and for other valid and collectible insurances excepting however policy/ies in respect of the Insured's retention . . . .

(Id.)

3. "Occurrence" Definition

The policies defined "occurrence" as "an accident or a continuous or repeated exposure to conditions which result in injury to persons or damage to property during the policy period . . . ." (*Id.*)

C. The Coverage Actions

The State filed two actions to obtain the benefits of its liability insurance, the first, in September 1993, against five insurance companies (1AA 1) which now have settled with the State, and the second, in October 2002, against the State's remaining insurance companies. (28AA 7271.) The trial court consolidated the two actions, with the insurance companies in the second action agreeing to be bound by the court's earlier rulings in the first action. (RT 487-489; 517-518, 520, 551.)

Prior to the jury trial, which constituted Phase III of the phased trial proceedings, the court issued several rulings which severely limited the amount of coverage under the State's policies. On March 5, 2004, the court ruled on stacking, holding that the State could not "stack" or obtain the combined benefits of each of the applicable policies the State purchased during all policy periods but, instead, was limited to the coverage purchased in a single period to be selected by the State. (34AA 8732-8733.)

The jury trial on the policies without pollution exclusions commenced on March 28, 2005. The trial concluded on May 16, 2005, when the jury rendered a special verdict unanimously finding that Insurers breached their policies and rejecting all of their coverage defenses, including concealment and "willful acts" under Insurance Code Section 533. (47AA 12035.) After the verdict, the court ruled on a setoff issue, holding that the State's right to recover further must be reduced by credits for settlements paid by the State's other insurance companies. The court held that because the State recovered $120 million in settlements, which exceeded the artificial $48 million limit imposed by the court, the State thereby forfeited its entire recovery from Insurers.[6] Hence, the trial court issued a judgment awarding "$0 dollars." (49AA 12505-12507.)

The State appealed from that trial judgment, and all but one of the affected insurance companies cross-appealed as to certain issues. The Court of Appeal, Fourth Appellate District, Division Two, reversed the judgment. (*State v. Continental, supra.*)

As to the two issues on which the Insurers now seek this Court's review, the Court of Appeal held that (1) the trial court had correctly ruled that each liability insurance policy, subject to its policy limit, covered "all sums" of the State's liability for property damage, including property damage that occurred before or after the policy period

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[6] The State appealed from the trial court's setoff ruling because policyholders should be made whole before any setoff is allowed to reduce recovery from non-settling insurance companies, and because such setoffs are inconsistent with the public policy favoring settlement, among other reasons. The Court of Appeal concluded that in light of its reversal of the no-stacking ruling, the State's challenge to the setoff ruling was moot. (*State v. Continental*, 170 Cal.App.4th at pp. 200-202.)

(170 Cal.App.4th at p. 178), and (2) the trial court had erred by limiting the recovery to no more than the total policy limits for any one policy period, and to the contrary, the State was entitled to "stack" the limits of all applicable policies during all applicable policy periods (*id.* at p. 193).

IV. STANDARD OF REVIEW

Interpretation of an insurance policy is a question of law and is thus reviewed de novo. (*TRB Investments, Inc. v. Fireman's Fund Ins. Co.* (2006) 40 Cal.4th 19, 30; *MacKinnon v. Truck Ins. Exch.* (2003) 31 Cal.4th 635, 641.)

The standards for construction of insurance policies are well established. Under California's plain meaning rule, the "rules governing policy interpretation require us to look first to the language of the contract in order to ascertain its plain meaning or the meaning a layperson would apply to it." (*Waller v. Truck Ins. Exch.* (1995) 11 Cal.4th 1, 18.) However, words in the policy cannot be construed in isolation. Rather, "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." (Civ. Code § 1641; see also *Bay Cities Paving & Grading, Inc. v. Lawyers Mut. Ins. Co.* (1993) 5 Cal.4th 854, 867 [each term must be interpreted in context and with regard to its intended function and the structure of the policy as a whole].)

If the plain meaning falls short due to unclear or conflicting policy language, "[a]ny ambiguous terms are resolved in the insureds' favor." (*E.M.M.I., Inc. v. Zurich American Ins. Co.* (2004) 32 Cal.4th 465, 471.) California courts have long held that uncertainty as to "the amount of liability" constitutes ambiguity which must be construed in favor of the coverage:

> If the insurer uses language which is uncertain any reasonable doubt will be resolved against it; if the doubt relates to [the] extent or fact of coverage, whether as to peril insured against . . ., the amount of liability . . ., or the person or persons protected . . ., the language will be understood in its most inclusive sense, for the benefit of the insured.

(Continental Cas. Co. v. Phoenix Constr. Co. (1956) 46 Cal.2d 423, 437-438; see generally Croskey et al., Cal. Prac. Guide: Insurance Litigation, § 4:260 (2006).) As this Court recently reaffirmed in *Haynes v. Farmers Ins. Exch.* (2004) 32 Cal.4th 1198, 1202, to be enforceable, any limitation or reduction of policy limits must be "conspicuous, plain and clear . . . ."

V. ARGUMENT

A. THE COURT OF APPEAL'S "ALL SUMS" RULING SHOULD BE AFFIRMED, BASED ON THE EXPRESS LANGUAGE OF THE POLICY AND LAW OF THIS COURT.

Both the plain language of the State's insurance policies and the settled precedent of this Court require affirmance of the Court of Appeal's decision on the "all sums" issue. In their Opening Brief on the Merits urging reversal (the "Opening Brief" or "OB"), the Insurers misstate the Court of Appeal's analysis and distort the language of the policy. The Insurers also omit a substantial body of conflicting authority in a misleading one-sided survey of other courts' caselaw on the "all sums" issue.

1. The Plain Language Of The Policies Requires Insurers To Pay "All Sums."

The Insurers argue that holding them liable to the State for all sums "improperly rewrites the State's policies." (OB at p. 24.) In the language of psychology, this argument presents a classic case of projection.

For example, the Insurers contend that "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." (OB at p.12.) Yet the policies nowhere state that "damages are payable only for the property damage that takes place during the policy period." Conversely, the insurers claim that "'[a]ll sums' as to indemnity has no contractual support . . ." (OB at p. 18; see also OB at p. 22), yet the policy language expressly promises that the Insurers shall "*pay on behalf of the Insured*," i.e., indemnify, "*all sums* which the Insured shall become obligated to pay by reason of liability imposed by law, . . . for damages . . . because of injury to or destruction of property . . . ." (39AA 10149, §1 at p. 1, italics added.)

Contrary to the Insurers' revisionist rewriting, liability for all sums is based upon the express language of the policies, the very first section of which is an insuring agreement in which the Insurers promise:

> I. COVERAGE A - PERSONAL LIABILITY
> . . .
> COVERAGE B - PROPERTY DAMAGE LIABILITY
>
> 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, . . . because of injury to or destruction of property . . . .

(39AA 10149, §1 at p. 1, italics added.) This grant of coverage does not limit the policies' promise to pay "all sums" of the policyholder's liability

solely to sums or damage "during the policy period," as the Insurers argue. (See, e.g., OB at p. 20; see generally OB at pp. 18-24.)

In interpreting insurance policies, "[t]he courts look first to the language of the contract." (*Waller, supra*, 11 Cal.4th at p. 18.) As this Court has explained, "[i]nsurance policies are contracts and, therefore, are governed in the first instance by the rules of construction applicable to contracts. Under statutory rules of contract interpretation, the mutual intention of the parties at the time the contract is formed governs its interpretation. [Citation.] *Such intent is to be inferred, if possible, solely from the written provisions of the contract.* [Citation.]" (*Montrose, supra*, 10 Cal.4th at p. 666, italics added.)

Applying these principles to insurance policies that promise to pay "all sums," this Court and the lower courts which follow it repeatedly have held that each insurance company that sold a policy triggered by an ongoing occurrence or multiple occurrences is in fact individually liable up to its policy limits for the policyholder's entire loss. More than a decade ago, this Court rejected the argument which the Insurers continue to assert, i.e. that coverage is restricted to only the precise damage allocable to a particular policy period:

> 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 Indus. v. Aetna Cas. & Sur. 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." (*Id.* at p. 105.) 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 . . . ." (Croskey et al., Cal. Practice Guide: Insurance Litigation 2, *supra*, 8:73.10, p. 8-19, italics in original.)

(*Aerojet-General Corp. v. Transport Indemn. Co.* (1997) 17 Cal.4th 38, 57, fn. 10, underscoring added.)

In the proceedings below, the Court of Appeal rejected the Insurers' argument that an "all sums" ruling is inconsistent with the policy language. (*State v. Continental*, *supra*, 170 Cal.App.4th at p. 178.) The State's policies, as noted above, promise that the insurance companies will "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, . . . because of injury to or destruction of property . . . ." The policy language in *Montrose* and *Aerojet* is similar. (See *Montrose, supra*, 10 Cal.4th at p. 656 [agreement to "pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of . . . bodily injury, or . . . property damage to which this insurance applies, caused by an occurrence . . . ."]; *Aerojet*, *supra*, 17 Cal.4th at p. 81 [the "standard CGL policy defines the insurer's indemnity obligation as the duty to pay 'all sums that the insured becomes legally obligated to pay as damages' as a result of personal injury or property damage"].)

Accordingly, consistent with well-settled California law, the Insurers individually must honor their policies' express promise to pay all sums of the State's liability for property damage at the Stringfellow site. As one commentator expressed in a discussion of the Court of Appeal's decision under review:

> The 'all sums' rule's underlying purpose is to ensure the policyholder receives the full benefit of its bargain with the insurance company by shifting to the insurer transaction costs associated with allocating a continuous, progressive loss among multiple triggered policies.

(John K. Dimugno, California Appellate Court Permits "Stacking" of Limits of Successive Liability Policies Triggered By Continuous Loss: *State of California v. Continental Insurance Co.*, 169 Cal.App.4th 1114 (4th Dist. 2009), 31 Ins. Lit. Rptr. 45 at p. 47.)

2. The Court of Appeal's "All Sums" Ruling Is Consistent With California Law.

California law regarding the Insurers' liability for covered losses under their triggered policies renders those insurance companies liable for all losses incurred by the policyholder up to their independent policy limits, irrespective of the separate issues of apportionment and allocation between the insurance companies.

> The insurance policies obligate the insurers to pay on behalf of a policyholder "all sums" that the policyholder becomes legally obligated to pay as damages because of bodily injury during the policy period. We interpret this language to mean that *once coverage is triggered, the insurer's obligation to the policyholder is to cover the policyholder's liability "in full" up to the policy limits.*

(*Armstrong, supra*, 45 Cal.App.4th at p. 57, italics added.)

The *FMC* Court of Appeal confirmed that the "all sums" obligation is both sound and applies to the duty to indemnify:

> The [insurance company] defendants' citations to several cases, from this and other jurisdictions, which analyze a variety of policy language, do not dissuade us from our conclusions that the . . . analysis of "all sums" in *Armstrong World Industries* was sound and that the trial court properly adopted *Armstrong World Industries'* analysis.

(*FMC Corp. v. Plaisted & Cos.* (1988) 61 Cal.App. 1132, 1186-87 [insurance company had duty to indemnify policyholder for underlying liabilities for continuous bodily injury and property damage resulting from disposal of hazardous waste].)

The Courts of Appeal's opinions in *Armstrong* and *FMC* are consistent with this Court's adoption of a continuous trigger for continuous and progressive property damage claims in *Aerojet*, *supra*, 17 Cal.4th at p. 57, fn. 10 as well as *Montrose*, *supra*, 10 Cal.4th at p. 685. As discussed more fully below, nothing in this Court's analysis in *Aerojet* or *Montrose* depends upon the duty to defend context, as the Insurers contend. (OB at pp. 8-14.) Indeed, this Court's interpretation of the policy language applies equally to the duty to indemnify.

3. The "All Sums" Ruling Does Not Impermissibly Impose Joint And Several Liability.

The Insurers assert that in *Montrose*, the Supreme Court rejected the view that multiple insurance companies are "jointly and severally liable" to a policyholder when damage spans multiple policy periods. (OB at p. 11 [citing *Montrose*, 10 Cal.4th at p. 681, fn. 19].) They contend that adoption of the "all sums" doctrine is contrary to *Montrose* in this regard.

The Insurers clearly misunderstand the import of this Court's "joint and several" discussion in *Montrose*. The Court 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.)

In other words, under the terms of their respective contracts, each insurance company is obligated to cover 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.) However, the fact that each insurer has a co-extensive duty to cover the policyholder's liability in *full* does not mean the insurers are "jointly and severally" liable. To the contrary, as this Court held in *Aerojet*, each insurer's duty is "separate and independent from the others." (*Id.*, at p. 70, original italics.)[7]

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[7] As the Supreme Court recently explained in *Dart Indus., Inc. v. Commercial Union Ins. Co.* (2002) 28 Cal.4th 1059, 1080:

> [I]t is clear that the obligation of successive primary insurers to cover a continuously manifesting injury is a separate issue from the obligations of the insurers to each other. As one Court of Appeal explained: "[A]pportionment among multiple insurers must be distinguished from apportionment between an insurer and its insured. When multiple policies are triggered on a single claim, the insurers' liability is apportioned pursuant to the 'other insurance' clauses of the policies [citation] or under the equitable doctrine of contribution [citations]. That apportionment, however, has no bearing upon the insurers' obligations to the policyholder. [Citation.] A pro rata allocation among

Footnote continued

The Insurers protest that the Court of Appeal's response to their "joint and several" argument was "too facile." (OB at p. 27.) The Court of Appeal wrote that:

> The all-sums approach, however, is not *literally* joint and several liability. Admittedly, the outcome is much the same as if it were; hence, it is sometimes loosely referred to as such. Nevertheless, it is not. The insurers are not jointly liable on each other's policies; rather, each insurer is severally liable on its own policy. (See *Rohr Industries, Inc. v. First State Ins. Co.* (1997) 59 Cal.App.4th 1480, 1489 . . . [insurers are, at most, serial obligors on separate contracts, not co-obligors on a contract debt]; *Topa Ins. Co. v. Fireman's Fund Ins. Companies* (1995) 39 Cal.App.4th 1331, 1339-1340, . . . [same]; *Hartford Accident & Indemnity Co. v. Superior Court* (1995) 37 Cal.App.4th 1174, 1181 . . . [same].)
>
> In *Aerojet-General*, the Supreme Court explained that this was all that it meant by footnote 19 in *Montrose*: "In *Montrose*, we also made plain that 'successive' insurers 'on the risk when continuous or progressively deteriorating [property] damage or [bodily] injury first manifests itself' are *separately and independently* 'obligated to indemnify the insured': '[W]here successive . . . policies have been purchased, bodily injury and property damage that is continuing or progressively deteriorating throughout more than one policy period is potentially covered by all policies in effect during those periods.' [Citation.] The successive insurers are not 'jointly and severally liable.' [Citation.]" (*Aerojet-General . . ., supra*, 17 Cal.4th at p. 57, fn. 10, . . . italics added, quoting *Montrose*, *supra*, 10 Cal.4th at pp. 686-687 & 681, fn. 19.)

> insurers 'does not reduce their respective obligations to their insured.' [Citation.] The insurers' contractual obligation to the policyholder is to cover the full extent of the policyholder's liability (up to the policy limits)."

(*State v. Continental*, *supra*, 170 Cal.App.4th at pp. 177 – 178.) This response comports with both the Supreme Court's explanation and the express policy language.

If anything is "too facile," it is the Insurers' bootstrapped argument that the Court of Appeal had "no justification for ignoring the policy language and granting coverage that was not provided in the first instance." (OB at p 27.) The Insurers simply assume the conclusion that their restrictive interpretation of the "all sums" insuring agreement governs. They ignore the fact that even under the contrary (and correct) interpretation of the policy adopted by the Court of Appeal below and this Court in *Aerojet* and *Montrose*, each insurance company's liability remains limited by the express terms and policy limits stated in its policy.

The Insurers also ignore the fact that the State itself was subject to joint and several liability for cleaning up the Stringfellow site. (See *United States v. Stringfellow,* 1995 WL 450856, at *1 (C.D.Cal. Jan. 24, 1995); see generally *State v. Montrose Chemical Corp.* (9th Cir. 1997) 104 F.3d 1507, 1518, fn. 9 [noting strict, joint and several liability under Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") § 107(a), 42 U.S.C. § 9607(a)].) As discussed more fully below (see *infra* at pp. 33-35), in its recent *State v. Allstate* decision this Court recognized that long-standing principles of joint and several liability in the environmental context subject a policyholder to full liability for remediation based on a cause covered by a liability insurance policy, even if non-covered causes also contribute to the contamination. (See *State v. Allstate*, 45 Cal.4th at pp. 1031-1032.)

Accordingly, the Insurers' promise to pay "all sums" of the State's liability for damages, when the policy is triggered by an occurrence during the policy period, extends to the full underlying liability imposed on

the policyholder, even if that underlying liability is imposed under the strict, joint and several rules of modern environmental liability. The Court of Appeal simply has ruled that each Insurer must perform that promise under its own liability insurance policy. It has not suggested, and its opinion cannot reasonably be read to imply, that any Insurer is jointly or severally liable for any other Insurer's promise under any other Insurer's policy.

4. The Insurers Confuse Trigger Of Coverage With Their Payment Obligation.

Unable to dispute the plain language of the promise to pay "all sums" in section I of the policies, the Insurers instead rely upon the triggering language in section III of the policies, entitled "Policy Period, Territory," which states that "[t]his policy applies only to occurrences which take place during the policy period . . . ." (39AA 10149, § III at p. 1; see OB at p. 19). The Insurers also rely upon the definition of "occurrence" appearing later in the policy, which states that "'[o]ccurrence' 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 . . . ." (39AA 10151, Definition 4 at p. 3; see OB at p. 19).

However, this language does not appear in and is not logically or grammatically related to the "all sums" language in the insuring agreement. Rather, the phrase "during the policy period" is found in separate sections setting out the policy period and definition of "occurrence," which together establish the policy's trigger of coverage. Neither the term "occurrence" nor the phrase "during the policy period" appears in the insuring agreement itself. (See 39AA 10149, § 1, Coverage B at p. 1.)

This Court already has defined "trigger of coverage" and clarified the important distinction between the trigger of coverage, on the one hand, and the extent or scope of an insurance company's liability, on the other. In *Montrose*, *supra*, the Court initially explained the need for definition and provided it, as follows:

> In the third party liability insurance context, "trigger of coverage" has been used by insureds and insurers alike to denote the circumstances that activate the insurer's defense and indemnity obligations under the policy . . . . The word "trigger" is not found in the CGL policies themselves, nor does the Insurance Code enumerate or define "trigger of coverage." Instead, "trigger of coverage" is a term of convenience used to describe that which, under the specific terms of an insurance policy, must happen in the policy period in order for the potential of coverage to arise. The issue is largely one of timing-what must take place within the policy's effective dates for the potential of coverage to be "triggered"?

(*Montrose, supra*, 10 Cal.4th at p. 655, fn. 2.) Later, in *Aerojet*, the Court confirmed that trigger and scope of liability are separate concepts:

> 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 p. 686 [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 [same].)

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

The Insurers ignore this distinction and try to limit the scope of their liability by conflating the trigger of coverage and insuring agreement components of their insurance policies. The Insurers try to distinguish *Armstrong*, *FMC*, and *Stonewall Ins. Co. v. City of Palos*

Verdes Estates (1996) 46 Cal.App.4th 1810, as relying on a "false assumption" that "the distinction between trigger and scope of coverage dictates an 'all sums' result." (OB at p. 32). They contend that "[t]he requirement of property damage during the policy period qualifies the 'all sums' language otherwise provided for in the policies" (OB at p. 20), but as explained above, it does not. Neither the term "occurrence" nor the phrase "during the policy period" appears in the agreement in which the insurance company promises to pay "all sums" of the policyholder's liability.

Such attempts to blur these separate concepts have been considered and rejected:

> 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 Corp. v. Plaisted & Cos.* (1998) 61 Cal.App.4th 1132, 1184, italics added.) Indeed, as noted by a treatise relied upon by the Insurers themselves, "[t]here is a growing trend for courts to consider the issue of allocation of liability among triggered policies as distinct from what constitutes the trigger of coverage." (Ostrager & Newman, *Handbook on*

Insurance Coverage Disputes (14th Ed. 2008) §9.04, p. 690; see also OB at pp. 52-53 [citing Ostrager & Newman (9th Ed. 1998)].)[8]

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." (*FMC, supra*, 61 Cal.App.4th at p. 1185; see also *Stonelight Tile, Inc., et al. v. California Ins. Guar. Assn.* (2007) 150 Cal.App.4th 19, 36 ["When a continuous loss is covered by multiple policies, the insured may elect to seek indemnity under a single policy with adequate policy limits. If that policy covers 'all sums' for which the insured is liable, as most CGL policies do, that insurer may be held liable for the entire loss. [Citations.] The insurer called upon to pay the loss may seek contribution from the other insurers on the risk. [Citations.]"]; *Stonewall, supra*, 46 Cal.App.4th at p. 1855 [once coverage is triggered, the policy language requires the insurance company to indemnify the insured for "all sums" of the insured's liability, not just for damage during the policy period]; *Shade Foods, Inc. v. Innovative Products Sales & Mktg., Inc.* (2000) 78 Cal.App.4th 847, 897 [each successive insurance company is individually liable for the entire loss even though continuing or progressively deteriorating damage extends over several policy periods].)

In short, the cases confirm that even though the occurrence definition requires that damage occur during the policy period, once that

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[8] It bears noting that the authors of this treatise are pre-eminent practitioners representing insurance companies (not policyholders) in coverage disputes. (See Ostrager & Newman, *Handbook on Insurance Coverage Disputes* (14th Ed. 2008), Acknowledgment p. xxxv; http://www.stblaw.com/ bios/BOstrager.htm; http://www.duanemorris.com/ attorneys/thomasrnewman.html.)

requirement is satisfied, coverage is triggered and the insurance company's duty to pay is governed by the insuring agreement. That agreement requires the insurance company to pay "all sums" of the policyholder's liability, and contains no "during the policy period" limitation.

Thus, it is misleading for the Insurers to allege that "[t]he policies specify that they cover only those sums that the state is obligated to pay as damages for property damage during the policy period." (OB at pp. 19-20.) Likewise deceiving is the Insurers' contention that the insurance policies provide that "only damages because of property damage during the policy period are covered." (OB at p. 23.)

Selectively combining separate sections of the policies and deleting key phrases to match their reinterpretation of the insuring obligation, as the Insurers attempt, is not a legitimate reading of the policy as a whole but rather, an impermissible attempt to rewrite the original language. Accurately paraphrased, the policies provide that the Insurers will pay "all sums" *which the State shall become liable for damages because of property damage, once the policy is triggered by property damage that takes place* during the policy period.

5. The "All Sums" Promise Is Not Affected By The Distinction Between The Duty To Defend And The Duty To Indemnify.

Lacking any authority for the rejection of "all sums," the Insurers seek to further obfuscate the policy language by arguing that the duty to indemnify "extends only to 'harm proved within coverage'" (OB at p. 13), and that prior California cases concerning "all sums" allocation need not be followed because they concern the duty to defend, not the duty to indemnify. The Insurers then make the dubious argument that "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." (OB at p. 14.)[9]

To the contrary, the Court of Appeal expressly and persuasively addressed this very point:

> Admittedly, *Aerojet-General*, like *Montrose*, involved the duty to defend. The Insurers therefore argue that this language was dictum. But not so. The precise issue in *Aerojet-General* was whether the insurer could make the insured pay any part of the costs of defense. (*Aerojet-General . . ., supra*, 17 Cal.4th at pp. 45, 51, 55-56 . . .) The court reasoned that the insurer would be liable to *indemnify* the insured against all claims that resulted from some "triggering harm" during the policy period, even if the claims arose after the policy period. (*Id.* at pp. 59-60, 68-69 . . . .) The court therefore held that the insurer was liable to *defend* the insured, unless it could prove that those claims did *not* result from some triggering harm during the policy period. (*Id.* at p. 71 . . . .) It added: "[T]he insurers assume that their contractual duty to defend is limited to only that part of a 'mixed' claim that comes within a policy period because specified harm may possibly have been caused by an included occurrence therein. They are wrong. As explained above, the duty to defend embraces all the parts of such a claim in which some such harm may possibly have *resulted, whether within the policy period or beyond.*" (*Ibid.*, italics added; see also *id.* at p. 74, ...) Thus, the all-sums approach to the duty to indemnify was crucial to the court's holding regarding the duty to defend.

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[9] Despite arguing that the *Montrose* decision only addressed the duty to defend, the Insurers rely upon and quote portions of the *Montrose* decision discussing the duty to indemnify. (Compare OB at pp. 8-10 with OB at pp. 11-12.)

(*State v. Continental, supra*, 170 Cal.App.4th at p. 176 [original italics; underscoring added].)

Thus, as the Court of Appeal observed, nothing in the Supreme Court's analysis in *Aerojet* or *Montrose* is dependent upon the duty to defend context, as the Insurers claim. Indeed, this Court's interpretation of the policy language in *Aerojet* and *Montrose* applies equally to the duty to indemnify.

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 the Insurers' policies contain no defense agreement, the all sums language can *only* apply to the duty to indemnify.

The Insurers rely upon comments regarding *Montrose* made by Justice Chin in his concurring and dissenting opinion in *Aerojet* for the proposition that the Supreme Court has not explicitly adopted all sums in the context of the duty to indemnify. (OB at p. 15.) As a preliminary matter, the majority in *Aerojet* specifically acknowledged and rejected the minority opinion in *Montrose*. (*Aerojet, supra*, 17 Cal.4th at p. 57, fn. 10 ["[T]he contrary premise on which Justice Chin rests his concurring and dissenting opinion collapses as without support"].)

Apart from the *Aerojet* court's explicit rejection of the *Montrose* minority, the *Montrose* decision itself clearly addresses the role of indemnification outside the policy period:

> We have noted the settled rule that an insurer on the risk when continuous or progressively deteriorating damage or injury first manifests itself remains

> obligated to *indemnify the insured for the entirety of the ensuing damage or injury*. And we have reviewed the rationale of *California Union* . . . and the decisions cited and relied on therein, which, together with the weight of more recent authorities, . . . conclude that where successive CGL policies have been purchased, bodily injury and property damage that is continuing or progressively deteriorating throughout more than one policy period is potentially covered by all policies in effect during those periods.

(*Montrose, supra*, 10 Cal.4th at p. 686, italics added, citation and footnote omitted); *Stonewall, supra*, 46 Cal.App.4th 1810, 1835 [confirming its rejection of the argument that *Montrose* was limited to the duty to defend]; see also *Aerojet, supra*, 17 Cal.4th at p. 75 [recognizing *Montrose*'s "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"].)

6. "All Sums" of Liability Are Payable Under These Liability Insurance Policies, Not Just Damages Limited To Property Damage During The Policy Period.

The Insurers also erroneously cite *Montrose*, *supra*, 10 Cal.4th at p. 691, for the proposition 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. (OB at p. 12.) The cited section of *Montrose* did not discuss, and was entirely unrelated to, the "all sums" doctrine presented in this appeal. Instead, it dealt with the "loss in progress" (or "known loss") doctrine derived from Insurance Code sections 22 and 250. (*Id.* at pp. 689-693.) Under that doctrine, a loss is not an "insurable risk" and therefore is not covered if the policyholder knew that the loss was in progress before the policy incepted. This doctrine has extremely limited application to liability insurance policies.

As the *Montrose* Court held, because a liability policy protects the policyholder against *liability*, coverage is barred under the "known loss" doctrine only if there was a *known liability* at the time the policy incepted. The Court concluded that, in a continuous damage case, "as long as there remains uncertainty about damage or injury that may occur during the policy period and the imposition of liability upon the insured, and no legal obligation to pay third party claims has been established, there is a potentially insurable risk" and the "known loss" doctrine does not preclude coverage. (*Id.* at p. 693.) The "known loss" rule has no conceivable application to the "all sums" doctrine presented in this appeal. To the contrary, *Montrose* accepts that occurrence- based liability policies require coverage for continuing damage. (*Id.* at p. 691 [acknowledging that the liability policies "covered those bodily injuries and damages (or continuing bodily injuries and damages resulting from 'continuous or repeated exposure to conditions') . . ."].)

7. The Insurers' "Death At Any Time" Argument Has No Application Here.

The Insurers contend that the scope of their property damage coverage is not controlled by the express "Property Damage" insuring agreement (Coverage B) but, instead, is implicitly governed by the "death at any time" clause in the separate *"Bodily Injury"* insuring agreement (Coverage A(1)). (OB at pp. 23-24.) The Insurers argue that, because of its "death at any time" clause, the Bodily Injury coverage extends beyond the confines of the policy period, but urge that because the "Property Damage" coverage does not contain a "death at any time" clause (or its equivalent), it cannot provide coverage for continuous damage which extends beyond the policy period. Instead, they argue, the court must narrowly construe "all sums" in the property damage insuring agreement as limiting the Insurers' liability to property damage occurring within the policy period. To hold

otherwise, the Insurers quip, would make "death at any time" a "dead appendage." (OB at p. 24.)

The Insurers note that the Court of Appeal ignored their "death at any time" argument and that it also was not addressed in *Aerojet, Montrose, FMC* or *Armstrong*. (OB at p. 24, fn. 5.) This merely reflects that the argument is implausible and unpersuasive.

Although "death at any time" is alive and well,[10] that "bodily injury" clause is irrelevant to the "all sums" issue, particularly in cases involving property damage coverage. The purpose of the clause is simply to clarify that under the "bodily injury" coverage, "Bodily Injury, Sickness or Disease" includes resulting death, no matter when it occurs.[11] It thereby removed an ambiguity in the case law as to whether resulting death is included within "bodily injury" coverage. (Compare *Mid-Century Ins. Co. v. Hauck* (1973) 35 Cal.App.3d 293, 296 ["when a policy excludes 'bodily injuries,' a death resulting therefrom is not so excluded unless specifically stated"] with *California State Auto. Assn. Inter-Ins. Bureau v. Antonelli* (1979) 94 Cal.App.3d 113, 118 ["[a]lthough 'bodily injury' may have a commonly understood meaning that does not include 'death,' [the policy] unequivocally defines 'bodily injury' so that it includes 'death'"].)

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10 "Most CGL policies define bodily injury as 'bodily injury, sickness or disease sustained by any person which occurs during the policy period, including death at any time resulting therefrom.'" (*Holmes' Appleman on Insurance* 2d, § 129.1 at pp. 24-25.)

11 For example, if an auto accident victim lies in a coma for a year following his injury and then dies, this language confirms that "bodily injury" coverage will cover not only the victim's "bodily injury" claim, but also his survivors' "wrongful death" claims, even though death occurred after the policy expired. (*Aetna Cas. & Sur. Co. v. Superior Court* (1980) 114 Cal.App.3d 49, 52, 55-56.)

The clause has played no role in the development of the "all sums" doctrine - even as to bodily injury coverage. Although the policies in *Montrose* contained a "death at any time" clause (*Montrose, supra,* 10 Cal.4th at p. 668, fn. 12), the Supreme Court did not rely on it in concluding that, where continuous bodily injury or property damage spans multiple policy periods, each insurer is liable for the entire injury. In comparison, although *Armstrong* did not mention a "death at any time" clause (*Armstrong*, *supra,* 45 Cal.App.4th at p. 39), it also concluded that, once a policy is triggered by continuous injury or damage, the insurer must pay "all sums" of the policyholder's bodily injury or property damage liability, and not just for injury or damage occurring during the policy period. (*Id.* at p. 105.) Hence, the presence or absence of a "death at any time" clause is irrelevant to an insurer's "all sums" liability. Instead, such liability arises out of the insurer's *express* agreement to pay "all sums" of the policyholder's liability.

8. The "All Sums" Approach Is Objectively Reasonable And Reflects The Parties' Intent When The Policies Were Sold.

The Insurers seek to rewrite the policies because they now perceive the end result to be "objectively unreasonable." (OB at p. 24.) Even if controlling California authority were disregarded, the Insurers fail to offer valid grounds to independently reject the application of all sums on the basis of public policy or equity.

(a) The Scope of the Insurers' "All Sums" Obligation Reflects Their Assumption Of The Risk Of Unforeseen Expansion In Policyholder's Substantive Liabilities.

When the Insurers sold policies promising payment for "all sums" caused by an occurrence, they assumed the risk and must carry the

burden of their promises. One of the risks they assumed is that their policies might be called upon to cover liability, like the State's liability under CERCLA for the Stringfellow cleanup, under theories or in amounts which were not known at the time the policies were issued but come about under subsequent legislation. (See *AIU Ins. Co. v. Superior Court* (1990) 51 Cal.3d 807, 822, fn. 8 ["Although our focus is the expectations of the insured at the time the policy is made, this emphasis does not preclude coverage of forms of liability – such as those at issue here – created after the formation of the policy. Because the policies in question here are 'comprehensive,' it was within the insured's reasonable expectation that new types of statutory liability would be covered, as long as they were within the ambit of the language used in the coverage provision."].)

(b) "Fairness" Is Found In The Policy Language Itself, Not In Post-Underwriting Regrets.

This Court has considered and rejected such notions of fairness and justice in deciding these issues, concluding that "the pertinent policies provide what they provide" and the parties are "free to contract as they pleased." "They thereby established what was 'fair' and 'just' inter se." (*Aerojet, supra*, 17 Cal.4th at pp. 75-76.) The Court further noted that it was "in accord with decisions that have resisted temptation" to rewrite the policies to avoid the consequences of the "all sums" language including cases such as *Armstrong*. (*Aerojet, supra*, 17 Cal.4th at p. 75, fn. 26.)

The Insurers rely upon the basic proposition that once several insurance companies have been found liable to indemnify their policyholder for continuing property damage, damage is allocated by the principles of law and the terms of the policies. "All sums" liability to the policyholder, as established above however, is required by California law and the language of the policies themselves. Indeed, it is only after

assuming obligations to insure "all sums" of the policyholder's liability that the precise method of allocating the loss among the insurance companies is even at issue.

The Insurers further complain that the Court of Appeal was "too facile" in addressing the fairness issue by noting that insurance companies could, among other things, seek contribution from other insurance companies that are also on the risk. (OB at p. 27.) As a preliminary matter, none of the Insurers is being asked to pay any more than the limits of its own insurance policy, which the jury found had been breached. Under the Court of Appeal's decision, no Insurer would have to pay the State's entire liability or the policy limits of any other insurance company's policies; their liability remains capped by the policy limits to which the Insurers themselves agreed.

More fundamentally, the Insurers drafted their policies to pay "all sums," and they should remain liable to pay what they promised despite their belated and belabored regrets. Ignoring their own policy language, the Insurers now ask this Court to rewrite the policies because they are "objectively unreasonable." (OB at p 24.) For example, they argue that "contribution rights . . . cannot account fully for a sharing of damages that occurred outside a particular insured's policy period." (OB at p. 27.)

However, the Insurers cannot be required to indemnify their policyholder's damages unless their policies are triggered by property damage that occurred during their policy period. Even then, they need only pay up to the policy limits they bargained for. No grave injustice would result by applying the policy language the way it was 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].)

Finally, the only authority Insurers cite to support their argument that "all sums" allocation should be rejected as "objectively unreasonable" is *Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1265. (See OB at pp. 24-25.) In their ensuing argument of unfairness, the Insurers focus on their own beliefs, distort the policy language, and complain that if the courts enforce their express promise to pay "all sums" of the policyholders' liability, they charged inadequate premiums and might not be fully protected by contribution from other insurance companies.

Bank of the West does not support this argument. To the contrary, in that case the Court confirmed that

> If contractual language is clear and explicit, it governs. [Citation.] On the other hand, "[i]f the terms of a promise are in any respect ambiguous or uncertain, it must be interpreted in the sense in which the promisor believed, at the time of making it, that the promisee understood it." [Citations.] This rule, as applied to a promise of coverage in an insurance policy, protects not the subjective beliefs of the insurer but, rather, "the objectively reasonable expectations *of the insured.*" [Citation.]

(*Bank of the West*, 2 Cal.4th at pp. 1264-1265, italics added.) Hence, the Insurers' litany of woe is irrelevant and unpersuasive; the policyholder's reasonable expectation prevails over the insurance company's subjective perception of unfairness.

(c) The Only "Unreasonable" Policy Interpretation Is the Insurers', Not the Court of Appeal's.

The only unreasonable interpretation of the "all sums" language in this appeal is the one patched together by the Insurers. Without any authority, they seek to modify a stand-alone phrase ("all sums") in an indemnity-only liability policy with a phrase not only in a different section of the policy, but in a completely separate part of the policy. The phrase "all sums" appears in section I of the "Insuring Agreements" whereas the language "damage to property during the policy period" exists only outside of the "Insuring Agreements" as paragraph 4 "Definition - Occurrence." (39AA 10151.) Although the insuring clause contains the word "damages," the insuring clause does *not* include the word "occurrence." Shoehorning language from the occurrence definition into the payment obligation should be rejected where the insuring language, as is the case here, is clear on its face.

The Insurers' interpretation would transform their occurrence-based insurance into more limited "claims made" coverage, which this Court rejected in *Aerojet*:

> If specified harm may possibly have been caused by an included occurrence and may possibly have resulted, at least in part, within the policy period, it perdures to all points of time at which some such harm may possibly have resulted thereafter.

(*Aerojet, supra*, 17 Cal.4th at p. 74.) In a footnote, the Court then explained:

> *The result might be different if the standard comprehensive or commercial general liability insurance policy were a kind of "claims made" policy.* (See *Montrose Chemical Corp. v. Admiral Ins. Co., supra,* 10 Cal.4th at pp. 688-689.) Under a policy of

> this sort, "the insurer generally is responsible for loss resulting from claims made during the policy period" - and only for loss resulting from claims made during the policy period - "no matter when the liability-generating event took place." (*Helfand v. National Union Fire Ins. Co.* (1992) 10 Cal.App.4th 869, 885, fn. 8 [13 Cal.Rptr.2d 295].) The standard policy, however, is not such. (See *Montrose Chemical Corp. v. Admiral Ins. Co., supra,* 10 Cal.4th at pp. 688-689.) Neither is any of Aerojet's policies pertinent here.

(*Id.* fn. 24, italics added.)

9. The All Sums Rule Is Consistent With This Court's Concurrent Causation Analysis in *State v. Allstate.*

The Court recognized in its recent *State v. Allstate* decision that under applicable principles of liability, releases of pollutants during a particular policy period which constitute "substantial factors in causing the contamination" result in full liability for the general pollution damage:

> The 1969 and 1978 releases would have rendered the State fully liable for the contamination of soils and groundwater below the Stringfellow site, without consideration of the subsurface leakage, if they were substantial factors in causing the contamination. [Citations.] The summary judgment record demonstrates, at the least, a triable issue on this point. That subsurface leakage from the site, an excluded cause of property damage, also contributed to the contamination is insufficient to defeat coverage under *Partridge*'s holding that liability coverage exists "whenever an insured risk constitutes a proximate cause of an accident, even if an excluded risk is a concurrent proximate cause. [Citation.]"

(*State v. Allstate,* 45 Cal.4th at pp. 1031-1032, fn. omitted.) The Court continued:

> The State's negligence in failing to take adequate measures to prevent overflow of the ponds in heavy rains would, under long-standing principles of joint and several liability, subject it to full liability for remediation of the downgradient contamination even if subsurface leakage also contributed to that property damage. [Citation.] . . . In those circumstances, the full damages assessed in the federal action would be "sums which the Insured . . . [became] obligated to pay . . . for damages . . . because of" property damage, and hence within Insurers' contractual indemnity obligation. Nothing in the policies indicates Insurers are relieved of that obligation because, in reality, the State was *also* responsible for an excluded cause of the property damage.

(*Id.* at p. 1031, original italics.)

The "included v. excluded cause" analysis in the pollution exclusion context is directly relevant to the "property damage during or outside the policy period" analysis in the "all sums" context. Under the same "long-standing principles of joint and several liability," applicable in CERCLA as well as common-law torts, environmental property damage during each particular policy period covered by one of the Insurers subjected the State to full liability for remediation of the entire Stringfellow site, even if earlier or later property damage also contributed to the contamination of the site. The Court reasoned in *State v. Allstate* that "where the damages caused by covered and excluded events appear indivisible, the entirety of the federal court damages are, in the policies' terms, 'sums which the Insured . . . [became] obligated to pay . . . for damages . . . because of' nonexcluded property damage." (*Id.* at p. 1034 [citing *State Farm Mut. Auto Ins. Co. v. Partridge* (1973) 10 Cal.3d 94].) By the same reasoning, where damages caused by property damage during the policy period, on the one hand, and before or after it, on the other, are

indivisible, "the entirety of the federal court damages" are, in the policy terms, "all sums which the Insured shall become liable to pay . . . for damages . . . because of" property damage during the policy period.

10. California's "All Sums" Law Is Consistent With Many Other Jurisdictions.

The Insurers' argument that an "all sums" liability is objectively unreasonable is refuted by the many jurisdictions that have successfully applied all sums liability without a windfall to the policyholder, provided promised policy limits to pay for cleanup of the environment, and fulfilled the purpose of insurance policies to pay claims up to their policy limits, but no more. The rule adopted by this Court in *Aerojet*, *Montrose* and other cases, and followed by numerous California Courts of Appeal, 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 insurance company obligation in standard form liability insurance policies to pay "all sums" that the policyholder faces in liabilities means exactly what it says.

In *B & L Trucking*, the Washington Supreme Court ruled as follows:

> 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 many other courts, including this Court, was the first case 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, supra*, 667 F.2d at p. 1048; see also *Cascade Corp. v. American Home Assur. Co.* (Or. 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 Refractories Co. v. Allstate Ins. Co.* (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, affd. (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).)

To the extent some jurisdictions have applied a limitation upon the insurance companies' liability to its policyholder – as opposed to the separate issue of apportionment among insurance companies – for whatever reasons, those cases directly contradict this Court. In such instances, those foreign courts ignore the important distinctions made by this Court in *Montrose* and *Aerojet* between the trigger of the policy, the liability to the policyholder, and the apportionment among fellow insurance companies.

Cases cited by the Insurers in their argument that occurrence policies only pay for that portion of the liability taking place during the policy period have been considered and rejected by this Court. (See, e.g., *Aerojet, supra*, 17 Cal.4th at pp. 75-76, fn. 27.) 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.'" (*Id.*) Observers have expanded on the criticism of pro rata allocation as burdensome, unpredictable, and outside the norm of insurance policy interpretation.[12]

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[12] (See, e.g., Christopher R. Hermann, Joan P. Snyder & Paul S. Logan, The Unanswered Question of Environmental Insurance Allocation in Oregon, 39 Willamette L. Rev. 1131 (Summer 2003).) For example, allocation in New Jersey under the pro rata rule of *Owens-Illinois*, further complicated by *Carter-Wallace v. Admiral Ins. Co.* (N.J. 1998) 712 A.2d 1116, has been criticized as unnecessarily complicated, unpredictable, and inconsistent with fundamental principles of insurance policy interpretation. (See Gregg W. Mackuse, Modern Insurance Coverage Allocation Theories: A Return to Fundamentals (Or Where Have You Gone Keene?), 15-13 Mealey's Litig. Rep. Ins. 11 (February 6, 2001) [noting that "[t]he pro rata theory becomes even more complicated when issues arise involving excess insurance," and that the "all

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The *Owens-Illinois* Court did not rely upon policy language, but rather admitted that it was "unable to find the answer to allocation in the language of the policies" and instead created its own 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, numerous other jurisdictions upholding the "all sums" rule demonstrate 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, affd. 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"].)

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

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sums" allocation rule "is more consistent with over 100 years of authority governing interpretation of insurance policies."]; Thomas M. Jones & Jon D. Hurwitz, An Introduction to Insurance Allocation Issues in Multiple-Trigger Cases, 10 Vill. Envtl. L.J. 25 (1999) [noting that even *Owens-Illinois* itself acknowledged the "many complexities encumber[ing] the solution that we suggest," potentially requiring a special master "skilled in the economics of insurance" to determine proper allocation]; Richard Lane White, Will Insurance Allocation Ever Be Simple in New Jersey? Comparing *Owens-Illinois* and *Carter-Wallace*, 10 Environmental Claims Journal 4 (Summer 1998) at p. 71 [stating that "*Carter-Wallace* allocation is inconsistent with basic insurance principles" and noting that "[t]he *Owens-Illinois* approach has received criticism from those who claim it is difficult to implement; . . . its most stinging criticism may have come down from the California Supreme Court [in *Aerojet*]"].)

York Court of Appeals acknowledged that its improvised approach "[c]learly . . . is not the last word on proration." (*Id.* 774 N.E.2d at p. 695.)

The foreign cases applying some form of pro rata allocation expressly admit that they disregard explicit policy language that is inconsistent with their ultimate allocation approach. See *Benjamin Moore & Co. v. Aetna Cas. & Sur. Co.* (N.J. 2004) 843 A.2d 1094, 1102-03; *Spaulding Composites Co. v. Aetna Cas. & Sur. Co.* (N.J. 2003) 819 A.2d 410, 419-20; *Consolidated Edison Co. of N.Y., Inc. v. Allstate Ins. Co.* (N.Y. 2002) 774 N.E.2d 687, 695; *Owens-Illinois*, *supra*, 650 A.2d at p. 993, et seq.)

The Insurers seek reversal based on a one-sided survey of case law from courts across the country, citing only three cases which are consistent with California's "all sums" allocation approach. (OB at pp. 28-29, fn. 7; see generally OB at pp. 28-32.) This presentation is unpersuasive and ignores an express admonition from the Court of Appeal, which noted:

> The Insurers proceed to cite out-of-state cases rejecting the all-sums approach. However, they do not tell us how many out-of-state cases *accept* it. Thus, they fail to support their assertion that a "majority of jurisdictions" reject it. In 2004, one journal article reported that "states making the all-sums determination are currently in the majority." (Smith, *Environmental Cleanup and the Interpretation of Comprehensive General Liability Insurance Policies: A Lesson from the Oregon Legislature* (2004) 31 J. Legis. 217, 219.)

(*State v. Continental, supra*, 170 Cal.App.4th at p. 178, fn. 4, original italics.) Other articles – and courts – have acknowledged that "all sums" is the approach applied by a majority of jurisdictions.[13]

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[13] (See *Emhart Indus., Inc. v. Home Ins. Co.* (D.R.I. 2007) 515 F.Supp.2d 228, 255-56 [finding in an indemnity context that "all sums" "appears to be in line with *the majority of other jurisdictions that have considered the question*, although the issue is far from settled", italics added]; Cassandra C. Shivers, Allocation 101: The General Approaches to the Distribution of Insurance Coverage Among Multiple Insurers, *American Bar Association Section of Litigation* (2005) ["The all sums approach is considered the *majority rule of allocation*", italics added]; Christopher R. Hermann, Joan P. Snyder & Paul S. Logan, The Unanswered Question of Environmental Insurance Allocation in Oregon, 39 Willamette L. Rev. 1131 (Summer 2003) [citing *Goodyear Tire & Rubber Co. v. Aetna Cas. & Sur. Co.* (Ohio 2002) 769 N.E.2d 835, 841 and *Am. Natl. Fire Ins. Co. v. B & L Trucking & Constr. Co., Inc.* (Wash. 1998) 951 P.2d 250, 256, as "naming all sums the majority rule"]; Paul Rose & Rajesh Bagga, The Law of Allocation – Who's Winning the Battle Anyway, 12 Coverage 1, *American Bar Association Section of Litigation* (July / August 2002) [citing the Delaware Supreme Court's acknowledgement of "all sums" as the majority rule in *Hercules, Inc. v. AIU Ins. Co.* (Del. 2001) 784 A.2d 481, 490, and concluding that "[a] majority of the jurisdictions nationally that have addressed the "horizontal allocation" or "pick and choose" ["all sums"] issue have held in favor of policyholders, recognizing their right to assign their claims to the triggered policy or policies of their choice"].)

The Insurers cherry-pick pro-rata cases from other jurisdictions, ignoring at least 16 states which have adopted the "all sums" approach[14] (as opposed to the 14 state court decisions cited by Petitioners

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[14] (See *Murphy Oil USA, Inc. v. U.S. 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); *Montrose Chem. Corp. v. Admiral Ins. Co.* (1995) 10 Cal.4th 645; *Aerojet-General Corp. v. Transport Indem. Co.* (1997) 17 Cal.4th 38; *Armstrong World Indus. v. Aetna Cas. & Sur. Co.* (1996) 45 Cal.App.4th 1; *FMC Corp. v. Plaisted & Cos.* (1998) 61 Cal.App.4th 1132; *Stonewall Ins. Co. v. City of Palos Verdes Estates* (1996) 46 Cal.App.4th 1810; *Reichhold Chems., Inc. v. Hartford Accident & Indem. Co.* (Conn. 2000) 750 A.2d 1051 [applying Washington law]; *Hercules, Inc. v. AIU Ins. Co.* (Del. 2001) 784 A.2d 481; *Monsanto Co. v. C.E. Heath Compensation & Liab. Ins. Co.* (Del. 1994) 652 A.2d 30 [applying Missouri law]; *Keene Corp. v. Ins. Co. of N. Am.* (D.C. Cir. 1981) 667 F.2d 1034, cert. denied (1982) 455 U.S. 1007; *Zurich Ins. Co. v. Raymark Indus., Inc.* (Ill. 1987) 514 N.E.2d 150; *Benoy Motor Sales, Inc. v. Universal Underwriters Ins. Co.* (Ill. App. 1997) 679 N.E.2d 414; *Zurich Ins. Co. v. Northbrook Excess & Surplus Ins. Co.* (Ill. App. 1986) 494 N.E.2d 634, affd. (Ill. 1987) 514 N.E.2d 150; *Allstate Ins. Co. v. Dana Corp.* (Ind. 2001) 759 N.E.2d 1049; *Chicago Bridge & Iron Co. v. Certain Underwriters at Lloyd's, London* (Mass. App. 2003) 797 N.E.2d 434, review denied (Mass. 2004) 803 N.E.2d 332 [applying Illinois law]; *Rubenstein v. Royal Ins. Co. of Am.* (Mass. App. 1998) 694 N.E.2d 381, affd. (Mass. 1999) 708 N.E.2d 639; *Polaroid Corp. v. Travelers Indem. Co.*, No. 88-5208 (Mass. Dist. Ct. Jan. 2, 1992), affd. on other grounds (Mass. 1993) 610 N.E.2d 912; *In re W.R. Grace & Co. Asbestos Property Damage Claims*, Liquidation No. 1895-1916 (Mo. Cir. Ct. Apr. 13, 1998) (Transit Cas. Co. in Receivership, Cause No. CV 185-1286CC); *Transit Cas. Co. in Receivership v. Purex Indus. Inc.*, No. CV 696-3CC (Mo. Cir. Ct. June 11, 1996) (Transit Cas. Co. in Receivership, Cause No. CV 185-1206CC); *Viacom, Inc. v. Transit Cas. Co. in Receivership* (Mo. 2004) 138 S.W.3d 723 (*en banc*; *per curiam*) [applying Pennsylvania law]; *Goodyear Tire & Rubber Co. v. Aetna Cas. & Sur. Co.* (Ohio 2002) 769 N.E.2d 835; *Owens-Corning Fiberglass Corp. v. American Centennial Ins. Co.* (Ohio Ct. Com. Pleas 1995) 660 N.E.2d 770; *Cascade Corp. v. American Home Assurance Co.* (Or. Ct. App. 2006) 135 P.3d 450; *J.H. France Refractories Co. v.*

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allegedly rejecting "all sums").[15] In addition, of the eight United States Courts of Appeals that Petitioners allege have rejected "all sums," there are conflicting,[16] or distinguishing,[17] decisions in at least six of the Circuits,

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Allstate Ins. Co. (Pa. 1993) 626 A.2d 502; *Emhart Industries, Inc. v. Home Ins. Co.* (D. R.I. 2007) 515 F.Supp.2d 228; *Texas Prop. & Cas. Ins. Guar. Ass'n v. Southwest Aggregates, Inc.* (Tex. Ct. App. 1998) 982 S.W.2d 600; *CNA Lloyd's of Tex. v. St. Paul Ins. Co.* (Tex. Ct. App. 1995) 902 S.W.2d 657; *Highlands Ins. Co. v. Temple-Inland, Inc.* (Tex. Dist. Ct. Aug. 4, 1999) No. 98-42939, reprinted in 13 Mealey's Ins. Litig. Rep. No. 40, Section H (Aug. 24, 1999); *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); *Bristol-Myers Squibb Co. v. AIU Ins. Co.*, No. 0145672 (Tex. Dist. Ct. May 3, 1996), reprinted in 10 Mealey's Ins. Litig. Rep. No. 26, Section B (May 14, 1996); *C.E. Thurston & Sons, Inc. v. Chicago Ins. Co.*, No. 2:97cv1034 (E.D.Va. Oct. 1 & 2, 1998), reprinted in Mealey's Publications Document #03-981020-012 (Nov. 2, 1998) [applying Virginia law]; *Am. Nat'l Fire Ins. Co. v. B & L Trucking & Constr. Co., Inc.* (Wash. 1998) 951 P.2d 250; *Weyerhaeuser Co. v. Commercial Union Ins. Co.* (Wash. 2000) 15 P.3d 115; *Aluminum Co. of Am. v. Accident & Cas. Ins. Co.* (Wash. 2000) 998 P.2d 856 [applying Pennsylvania law]; *Wheeling Pittsburgh Corp. v. American Ins. Co.*, No. 93-C-340 2003 WL 23652106, at *1 (W. Va. Cir. Ct. Oct. 28, 2003); *Plastics Engineering Co. v. Liberty Mutual Ins. Co.* (Wis. 2009) 759 N.W.2d 613; *Society of Ins. v. Town of Franklin* (Wis. Ct. App. 2000) 607 N.W.2d 342, review granted (Wis. 2000) 616 N.W.2d 114.)

15 It is telling to note that the Insurers have abandoned their hyperbolic argument to the Court of Appeal, where they claimed that the "majority of jurisdictions" rejected "all sums." (2007 WL 4969097 at *23.) In their brief to this Court, the Insurers merely contend that "Courts Across the Country Have Found [Against "All Sums"]." (OB at p. 28.)

16 Specifically, the Second, Third, Sixth, and Seventh Circuit decisions cited by the Insurers are inconsistent with other decisions from the same Circuits. (See *In re Prudential Lines, Inc.* (2d Cir. 1998) 158 F.3d 65; *Koppers Co. v. Aetna Cas. & Sur. Co.* (3d Cir. 1996) 98 F.3d 1440; *ACandS, Inc. v. Aetna Cas. & Sur. Co.* (3d Cir. 1985)

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and the First, Tenth, and D.C. Circuits are squarely in favor of the "all sums" approach.[18] Furthermore, the most recent state and federal decisions on this issue have come down in favor of the "all sums" approach, continuing the trend in this direction. (*Plastics Engineering Co. v. Liberty Mutual Ins. Co.* (Wis. 2009) 759 N.W.2d 613; see also *Emhart Indus., Inc. v. Century Indemnity Co.* (1st Cir. 2009) 559 F.3d 57.)

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764 F.2d 968; *Ray Indus., Inc. v. Liberty Mutual Ins. Co.* (6th Cir. 1992) 974 F.2d 754, abrogated on other grounds by *Michigan Millers Mut. Ins. Co. v. Bronson Plating Co.* (Mich. 1994) 519 N.W.2d 864; *Sta-Rite Indus., Inc. v. Allstate Ins. Co.* (7th Cir. 1996) 96 F.3d 281.)

17 Specifically, the Fifth, Sixth, and Eleventh Circuit decisions cited by the Insurers have been either criticized for relying on incorrect reasoning, contradicted by subsequent state cases from the jurisdictions whose law the circuit courts attempted to predict, or have no value as precedent because the Court did not actually review the lower court's allocation decision. (See *B & L Trucking*, 951 P.2d at 255 and *Aerojet*, 17 Cal.4th at 75 [generally explaining that the Fifth Circuit's reasoning in *Porter v. American Optical Corp.* (5th Cir. 1981) 641 F.2d 1128, cert denied, 454 U.S. 1109 (that the issues of trigger and allocation are interdependent) is incorrect]; *Southwest Aggregates*, 982 S.W.2d at 607 [holding that "Texas has adopted the *Keene* approach," in contrast to the Fifth Circuit's prediction in *Gulf Chemical & Mettallurgical Corp. v. Associated Metals & Mineral Corp.* (5th Cir. 1993) 1 F.3d 365, that Texas would apply pro rata allocation]; *Goodyear*, 769 N.E.2d 835, rejecting the Sixth Circuit's prediction in *Lincoln Electric Co. v. St. Paul Fire & Marine Ins. Co.* (6th Cir. 2000) 210 F.3d 672 [that Ohio would apply pro rata allocation]; *Commercial Union Ins. Co. v. Sepco Corp.* (11th Cir. 1990) 918 F.2d 920 [which did not involve review of the trial court's allocation decision, or even of the relevant insurance policies, and thus provides little, if any, support for the pro rata approach].)

18 (*Keene Corp. v. Ins. Co. of N. Am.* (D.C. Cir. 1981) 667 F.2d 1034, cert. denied (1982) 455 U.S. 1007; *Emhart Industries, Inc. v. Century Indemnity Co.* (1st Cir. 2009) 559 F.3d 57; *TPLC, Inc. v. United Nat'l Ins. Co.* (10th Cir. 1995) 44 F.3d 1484.)

B. THE COURT OF APPEAL CORRECTLY HELD THAT A POLICYHOLDER MAY "STACK" THE LIMITS OF ITS LIABILITY POLICIES.

The State and the Insurers stipulated that property damage occurred continuously throughout all of the relevant policy periods (*State v. Continental, supra*, 170 Cal.App.4th at p. 172.) In pretrial proceedings, the State filed a motion for a ruling that, because it had been held liable for continuous property spanning multiple policy periods, it was entitled to indemnity up to the combined limits of all policies in effect during those periods. In contrast, the Insurers argued that the State could not "stack" its policy limits but, instead, was limited to the coverage purchased during a single policy period. (*Id.*) The trial court, while acknowledging that the State had made a "strong argument that the insured's ability to combine or 'stack' coverages and policies is a widely accepted concept fully consistent with the language of the subject policies" (34AA 8732, 8734), ruled in the Insurers' favor, explaining that "it appears that the court is bound by the [anti-stacking] holding in *FMC Corp. v. Plaisted & Cos.* (1998) 61 Cal.App.4th 1132, which seems to be the case most fully on point." (*State v. Continental, supra*, 170 Cal.App.4th at p. 173.)

The Court of Appeal reversed. It concluded that under the plain meaning of the policies, a policyholder is entitled to recover against *each* insurance company up to its policy limit and that no policy language plainly *forbids* stacking. (*Id.* at pp. 182-183.) Moreover, California law permits stacking in other instances of multiple coverage, and the Insurers had offered no meaningful reason for a different rule when policies span multiple periods. (*Id.* at pp. 183-184.) The court rejected *FMC's* anti-stacking holding, observing that *FMC* disregarded the policy language entirely and instead engaged in "judicial intervention" to prevent policyholders from obtaining multiple limits, despite the Supreme Court's

repeated declarations that courts cannot rewrite insurance policies for any reason, including general purposes of public policy. (*State v. Continental, supra,* at pp. 187-190.) The Court concluded that "the reasoning in *FMC* is flawed, and as a result, *FMC's* holding is outside the mainstream of California case law" and did not preclude the State's recovery up to the combined limits of all applicable policies for which it paid premiums. (*State v. Continental, supra*, at pp. 183, 193.)

In their opening brief, the Insurers assert that the "real vice" is the "all sums" doctrine, which results in an "unwarranted expansion of policy rights" (OB at pp. 45, 49) by requiring each insurer to pay all sums of the insured's property damage liability, rather than just a pro rata share based upon the amount of time covered by each policy. But should this Court affirm the "all sums" doctrine, the Insurers urge the Court not to "compound the unreasonable results" of that rule by allowing the policyholder to "stack" the limits of all policies providing coverage during the damage period. (OB at p. 45.) Instead, they assert, a policyholder's liability coverage for multi-year damage should be restricted to the limits purchased during only a single policy period.

But as will be seen, the Court of Appeal firmly based its "stacking" ruling upon both the policy language and the overwhelming weight of California law. This Court should, therefore, affirm it.

1. Introduction to Stacking

In their competing trial court motions, the State sought a ruling it was entitled to recover up to the combined limits of its policies, while the Insurers sought a ruling that the State cannot "stack" its policies.

The two concepts involve the same issue. As this Court has observed, "stacking" is "insurance jargon" used "to refer to the 'ability of

the insured, when covered by more than one insurance policy, to obtain benefits from a second policy on the same claim when recovery from the first policy would alone be inadequate' to compensate for the actual damages suffered. [Citation.]" (*Wagner v. State Farm Mut. Auto. Ins. Co.* (1985) 40 Cal.3d 460, 463, fn. 2.)[19] The term "stacking" is not found in the liability policies themselves and should not be misunderstood as a doctrine to be automatically invoked by a court to determine coverage. Instead, it is a mere term of convenience used to denote whether a policyholder is entitled to recover the limits of multiple insurance policies, if necessary to fully cover his loss or liability. (*Cf. Montrose, supra*, 10 Cal.4th at p. 655, fn. 2 [the phrase "trigger of coverage" is a term of convenience not found in liability policies and should not be misunderstood as a doctrine to be automatically invoked to establish coverage].)

As the Court of Appeal observed, "[S]tacking issues can arise almost any time multiple policies cover a single loss." (*State v. Continental, supra*, 170 Cal.App.4th at p. 179.) California law is replete with cases in which a policyholder is covered by multiple liability policies. For example, a policyholder may buy one policy covering him as a "named insured" yet, through no action of his own, also may be covered under another's policy as an "additional insured."[20] Multiple policies also may

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19 See, also, *Country Mut. Ins. Co. v. White* (Or. App. 2007) 157 P.3d 1212, 1214, fn. 2; *State Farm Mut. Auto. Ins. Co. v. Richardson* (S.C. 1993) 437 S.E.2d 43, 44, fn. 1 ["'Stacking' is an insured's recovery of damages under more than one policy in succession until all damages are satisfied or until the total limits of all policies have been exhausted"].)

20 (See, e.g., *Hartford Accident & Indem. Co. v. Sequoia Ins. Co.* (1989) 211 Cal.App.3d 1285 [driver of borrowed vehicle covered by four policies: his own primary and excess auto policies and similar policies purchased by the vehicle owner]; *Ins. Co. of N. Am. v.*

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apply if injury arises out of two or more separately-insured instrumentalities (such as a tractor-trailer)[21] or if injury results from two or more separately-insured causes.[22] Even if loss results from a single cause, the policyholder may be covered by two or more types of liability coverage.[23]

More importantly here, multiple policies also may apply – and stacking issues may therefor arise – whenever long-term injury or damage spans multiple policy periods. As this Court held in *Montrose, supra*, "bodily injuries and property damage that are continuous or

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Liberty Mut. Ins. Co. (1982) 128 Cal.App.3d 297 [clothing manufacturer sued when clothing caught fire was covered by own policy and another issued to cloth supplier]; *Olympic Ins. Co. v. Employers Surplus Lines Ins. Co.* (1981) 126 Cal.App.3d 593 [insured covered for airplane accident by policies issued to insured and parent corporation].)

21 (See, e.g., *Mission Ins. Co. v. Hartford Ins. Co.* (1984) 155 Cal.App.3d 1199 [tractor-trailer accident covered by policies issued on both tractor and trailer]; *Pacific Employers Ins. Co. v. Maryland Cas. Co.* (1966) 65 Cal.2d 318 [trucker covered by three policies for accident occurring while using a forklift to unload materials from a truck at a plant: one covering the truck, another the forklift and a third covering accidents occurring at the plant].)

22 (See, e.g., *State Farm Mut. Auto. Ins. Co. v. Partridge* (1973) 10 Cal.3d 94 [shooting accident arose from two causes: policyholder negligently filing down trigger of gun (covered by homeowner's policy) and negligently driving off-road with the gun in his vehicle (covered by auto policy)].)

23 (See, e.g., *Owens Pacific Marine, Inc. v. Ins. Co. of N. Am.* (1970) 12 Cal.App.3d 661 [boat seller's liability for damage resulting from defective installation covered by both a "Ship Repairer's" policy and a "Multiple Liability" policy]; *North River Ins. Co. v. Am. Home Assur. Co.* (1989) 210 Cal.App.3d 108 [liability covered by "occurrence" and later "claims made" policies].)

progressively deteriorating throughout successive policy periods are covered by all policies in effect during those periods." (*Id.*, 10 Cal.4th at p. 675 [adopting "continuous trigger" theory]; see also *Aerojet, supra*, 17 Cal.4th at p. 57, fn. 10 [reaffirming *Montrose* in case involving coverage for long-term environmental contamination]; *Fireman's Fund Ins. Co. v. Maryland Cas. Co.* (1998) 65 Cal.App.4th 1279 [several successive one-year policies covered long-term construction defect loss]; *American Cyanamid Co. v. American Home Assur. Co.* (1994) 30 Cal.App.4th 969, 979-980 [three successive "occurrence" policies covered policyholder's "advertising injury" liability; policyholder's negligence occurred in first policy period while injury occurred in two later policy periods].)

Of course, stacking is not implicated in every case in which multiple policies apply. After all, if the entire loss is within the limits of a single policy, the insured can obtain full coverage without resorting to additional policies. But whenever a loss exceeds the limits of any single policy, the policyholder will seek to combine or "stack" the limits of other applicable policies to achieve a full recovery for the covered loss. (*State v. Continental, supra*, 170 Cal.App.4th at p. 179.)

2. The Plain Policy Language Entitles the State to Combine or "Stack" Its Limits to Obtain Full Coverage For Its Liability.

In determining whether the State was entitled to combine or "stack" the limits of its insurance policies, the Court of Appeal correctly turned first to the language of the policies. (*Waller v. Truck Ins. Exch.* (1995) 11 Cal.4th 1, 18 ["[t]he rules governing policy interpretation require us to look first to the language of the contract in order to ascertain its plain meaning or the meaning a layperson would ordinarily attach to it"]; *State v. Continental, supra*, 170 Cal.App.4th at p. 181.)

(a) Each of the State's Policies Promised to Pay All Sums of the State's Liability, Up To That Policy's Limits.

Here, as in *Montrose*, the policyholder was sued for continuous and progressive property damage occurring over many years as a result of the escape of hazardous substances from the Stringfellow site in Riverside County. (See *Montrose, supra*, 10 Cal.4th at pp. 656-657 [considering Montrose Chemical Corporation's insurance coverage for liability arising in part from the same site].) The State seeks coverage under policies purchased from various insurance companies which collectively covered the period from 1964 to 1976.[24]

Each of the State's insurance policies is a separate contract. Each contains a "Property Damage" insuring agreement promising "[t]o 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 . . . because of injury to or destruction of property . . . ." Each contains its own policy limit, stated as a specified dollar amount of "ultimate net loss each occurrence." Each policy defines the term "occurrence," in turn, as "an accident or a continuous or repeated exposure to conditions which result in . . . damage to property during the policy period . . . ." (*State v. Continental, supra*, 170 Cal.App.4th at p. 171.)

Thus, each policy separately promises to cover all sums of the State's property damage liability, up to its own policy limit, as long as damage occurred during its policy period. (*Aerojet, supra*, 17 Cal.4th at p. 57 [successive insurers on the risk in a continuous damage case are separately and independently obligated to indemnify the policyholder].)

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[24] The State also purchased policies in 1963, 1976 and 1977, which are not at issue in this appeal.

Because the Insurers stipulated that continuous damage occurred throughout *all* of their policy periods (*State v. Continental, supra*, 170 Cal.App.4th at p. 171), under *Montrose*, the State is entitled to the coverage of each policy at issue in this appeal. (*Id.*, 10 Cal.4th at p. 675.)

(b) The Policies Contain No Provision Limiting Coverage To a Single Policy Period.

Moreover, none of the Insurers have identified *any* provision in its policy that reduces or eliminates coverage if other insurance in either the same or different policy periods covers the State's liability, or that would preclude the State from combining or "stacking" the limits of multiple policies if necessary to obtain full indemnity for its liability. Nor has any Insurer identified any provision which precludes the State from *collectively* recovering from its insurers more than the limits of any one policy period – as the Insurers seek to limit the State in this case.

Any such limitation must be stated clearly in the policy. "[A]lthough an insurance company can limit the coverage of a policy issued by it as long as its limitation conforms to the law and is not contrary to public policy, such a limitation must be expressed in the plain language of the insurance contract." (*Utah Prop. & Cas. Ins. Guar. Assn. v. United Servs. Auto. Assn.* (1991) 230 Cal.App.3d 1010, 1017.) "Provisions which purport to exclude coverage or substantially limit liability must be set forth in plain, clear and conspicuous language." (*Thompson v. Occidental Life Ins. Co.* (1973) 9 Cal.3d 904, 921.) "'If the insurer uses language which is uncertain any reasonable doubt will be resolved against it; if the doubt relates to the extent or fact of coverage, whether as to the peril insured against [citations], **the amount of liability** [citations] or the person or persons protected [citations], the language will be understood in its most inclusive sense, for the benefit of the insured.'" (*State Farm Mut. Auto.*

Ins. Co. v. Johnston (1973) 9 Cal.3d 270, 274, italics omitted, bolding added.)

These familiar rules apply to attempts to restrict the policy limits, as the Insurers seek here. For example, in *Haynes v. Farmers Ins. Exchange* (2004) 32 Cal.4th 1198, the limits of liability contained in an auto policy's declarations restricted coverage to $250,000 per person and $500,000 per occurrence. But when a permissive user caused an accident, the insurance company argued that two clauses – an "other insurance" clause and an endorsement – reduced the permissive user's limits to the statutory minimum of $15,000 per person and $30,000 per occurrence. The Supreme Court rejected the argument, stating:

> "[W]e begin with the fundamental principle that an insurer cannot escape its basic duty to insure by means of an exclusionary clause that is unclear. As we have declared time and again 'any exception to the performance of the basic underlying obligation must be so stated as clearly to apprise the insured of its effect.'" [Citation.] . . . [T]o be enforceable, any provision that takes away or limits coverage reasonably expected by an insured must be "conspicuous, plain and clear." [Citation.] Thus, any such limitation must be placed and printed so that it will attract the reader's attention. Such a provision also must be stated precisely and understandably, in words that are part of the working vocabulary of the average layperson. [Citations.] The burden of making coverage exceptions and limitations conspicuous, plain and clear rests with the insurer. [Citations.]

(*Haynes, supra*, 32 Cal.4th at p. 1204.) The Court held that neither the "other insurance" clause nor the endorsement was sufficiently conspicuous, plain and clear to reduce the limits granted in the declarations. (*Id.*, 32 Cal.4th at pp. 1205-1213.)

The State has an even stronger position than the prevailing policyholder in *Haynes*. While the insurance company in *Haynes* inserted two clauses in an attempt to reduce its policy limits, none of the Insurers here included any policy language purporting to reduce or eliminate the State's coverage based on the applicability of other insurance policies. To the contrary, each of the State's policies contains an express clause permitting coverage *in addition* to that provided by any other policies issued to the State.

(c) The Policies' "Other Insurance" Clause Expressly Allows Recovery Up to the Combined Limits Of All Applicable Policies.

"'Most insurance policies contain 'other insurance' clauses that attempt to limit the insurance company's liability to the extent that other insurance covers the same risk . . . . [Citation.]'" (*Carmel Develop. Co. v. RLI Ins. Co.* (2005) 126 Cal.App.4th 502, 509.) The "other insurance" clause in the State's policies provides:

> If the Insured has other valid and collectible insurance against a loss covered by this policy, the insurance extended by this policy shall be excess insurance only, and not primary or contributing.

(See, e.g., 39AA 10177.)

This "excess" other insurance clause expressly permits the State to recover the benefits of each policy in excess of, and thus in addition to, any coverage it may have under its other liability insurance policies. (See, e.g., *Commercial Union Assur. Cos. v. Safeway Stores, Inc.* (1980) 26 Cal.3d 912, 919 ["the object of the excess insurance policy is to provide *additional resources* should the insured's liability surpass a specified sum," italics added]; *Mission, supra*, 155 Cal.App.3d at p. 1207 [under an "excess" other insurance clause, the insurer is liable "to the extent

that the loss exceeds such other valid and collectible insurance"]; *Continental Cas. Co. v. Pacific Indem. Co.* (1982) 134 Cal.App.3d 389, 394-395 [in an "excess" policy the insurer is liable for any liability of the policyholder "over and above" the underlying insurance].)[25]

In an attempt to avoid the clear import of their excess "other insurance" clause, the Insurers argued below that such clauses do not apply to insurance purchased in other policy periods but, instead, apply only to concurrently-issued or temporally overlapping policies. (2007 WL 4963048 at *46.) However, the policy language offers no support for that argument. The clause, which simply refers to "other valid and collectible insurance," is general in nature – it is not limited to specifically-identified factual circumstances but instead broadly applies to any situation in which the policyholder's liability is covered by multiple policies. Moreover,

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[25] Notably, of the four common types of "other insurance" clauses, three permit the policyholder to recover up to the combined or "stacked" limits of all applicable policies, while the fourth is disfavored in California. Under an "equal shares" clause, "each insurance company contributes equal amounts until it has paid its applicable limit of insurance *or none of the loss remains*, whichever comes first." (See, e.g., *Century Sur. Co. v. United Pac. Ins. Co.* (2003) 109 Cal.App.4th 1246, 1252, italics added.) Similarly, under a "pro rata" other insurance clause, each insurer pays a prorated share of the insured's entire liability, calculated by dividing its policy limits by the *combined limits* of all available insurance. (See, e.g., *Grand Rent A Car Corp. v. 20th Century Ins. Co.* (1994) 25 Cal.App.4th 1242, 1248.) Both variants, like the "excess" other insurance clause, expressly permit coverage up to the combined limits of the policies. Although a fourth variant, commonly referred to as an "escape" clause, seeks to reduce or eliminate the policyholder's coverage if other insurance exists, California courts *disfavor* and invalidate "escape" clauses if they would leave the policyholder less than *fully* protected for its loss or liability. (See, e.g., *Dart Industries, supra*, 28 Cal.4th at p. 1080; *Continental Cas., supra*, 134 Cal.App.3d at pp. 396-397.)

California courts hold that an "other insurance" clause applies to cases involving long-term damage spanning multiple policy periods. (See, e.g., *Montrose, supra*, 10 Cal.4th at p. 665 [applying "other insurance" rules to long-term environmental loss covered by policies issued in multiple periods]; *Century Sur., supra*, 109 Cal.App.4th 1246 ["other insurance clause" principles applied to four successive insurance companies spanning a five-year period].)[26]

(d) The Absence Of A Noncumulation Clause In The Subject Policies And The Use Of An Extremely Limited Noncumulation Clause In Later Policies Further Demonstrates That The Subject Policies Were Not Intended To Preclude "Stacking" Of Limits.

As the *FMC* court noted, "Insurers sometimes include 'anti-stacking provisions in their policies to avoid just this kind of result." (*FMC, supra*, 61 Cal.App.4th at p. 1189.) For example, "prior insurance" clauses, which are expressly designed to prevent a policyholder from accumulating the limits of policies issued over multiple years, had existed for more than 150 years before the policies at issue in this case. (See, e.g., *Hastie & Patrick v. Depeyster & Charlton*, 1805 N.Y. Lexis 318, at *1, 14 (N.Y. Sup. Ct. Aug., 1805) [policy contained "the usual clause as to prior

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26 The Court of Appeal below cited *American Physicians Ins. Exchange v. Garcia* (Tex. 1994) 876 S.W.2d 842, 854 for the proposition that liability "policies do not explicitly provide a means of applying the limits of liability to injuries that are covered by multiple policies." (*State v. Continental, supra*, 170 Cal.App.4th at p. 183.) The State respectfully disagrees with that conclusion: most insurance policies, including the State's, contain "'other insurance' clauses or similar policy language decreeing the manner of apportionment of liability under multiple policies." (*Montrose, supra*, 10 Cal.4th at p. 665.)

insurance" by which coverage under the second policy would be reduced by that provided by any earlier policy]; *Germania Fire Ins. Co. v. Klewer* (1889) 129 Ill. 599, 609 ["prior insurance" clause rendered policy void if earlier insurance applied].)

Indeed, some of the policies issued to the State during the last two years of its insurance program contained an express "Noncumulation of Liability - Same Occurrence" clause which, *under very narrow circumstances*, restricted the cumulation of coverage in long-term damage cases if the *same company* issued *prior* policies. (See, e.g., 39AA 10043.)[27] But none of the policies at issue in this appeal contained such a clause. The fact that the Insurers chose to include a limited anti-stacking clause in some later policies, but in none of the policies at issue in this case, further demonstrates that the subject policies were not intended to preclude the State from stacking its limits. (See *Montrose, supra*, 10 Cal.4th at pp. 670-673 [drafting history and subsequent revisions to policy language is relevant in evaluating coverage].)

In sum, each of the State's policies promised to cover "all sums" of the State's liability. None of the policies contained any language which would reduce or eliminate coverage if the State is protected by other policies; to the contrary, each of the policies contained an "other insurance"

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27 The clause provided: "If the same Occurrence gives rise to Personal Injury or Property Damage that occurs partly before and partly within any one annual period, the limit of liability applicable to each such Occurrence and any aggregate limit of liability applicable to such injury or damage shall be reduced by the amount of all payments made by the Company with respect to such Occurrence, either under a previous policy or policies issued by the Company of which this is a replacement, or under this policy with respect to previous annual periods thereof." (See, e.g., 39AA 10043.)

clause which expressly permitted the State to recover the policy's limits in addition to those of any other valid and collectible insurance policies. And while the Insurers could have included a "prior insurance" or "noncumulation" clause to prevent the stacking of successive policies (as they did in later years), none of the Insurers included such a provision in the policies at issue herein. Accordingly, as the Court of Appeal properly concluded, the State's right to "stack" the limits of its policies "follows from the plain meaning of the policy language," and "[c]ertainly, it *cannot* be said that the policy language plainly *forbids* stacking." (*State v. Continental, supra*, 170 Cal.App.4th at p. 183.) Because any limitation on the amount of coverage must be stated in the policy in conspicuous, plain and clear language, the Insurers' contention that the State cannot combine or "stack" the coverage of its policies is contrary to the plain language of their policies.

3. California Law Permits Stacking of Limits When Multiple Policies Apply, Whether Issued In the Same or Different Policy Periods.

The Insurers' "anti-stacking" argument is also contrary to the great weight of authority in this state. California law also has long held that if multiple policies apply, the policyholder is covered up to their combined limits. For example, in *Athey v. Netherlands Ins. Co.* (1962) 200 Cal.App.2d 10, an auto renter was covered by both his own $50,000 policy and the lessor's $25,000 policy. The court held he could recover the $75,000 combined limits. (*Id.*, 200 Cal.App.2d at p. 13; see also *Lovy v. State Farm Ins. Co.* (1981) 117 Cal.App.3d 834, 869-870 [five insurance companies were obligated to indemnify the policyholder up to their combined limits].)

As this Court held in *Partridge*, policy limits also may be combined when multiple policies are triggered by multiple causes. There,

an accidental shooting resulted from two separate causes, the policyholder's negligence in filing down the trigger of a gun (covered by his homeowner's policy) and his negligent off-road driving (covered by his auto policy.) The policyholder had purchased both policies from the same insurance company, State Farm. This Court held that the policyholder was entitled to the limits of both policies:

> [I]n purchasing two separate insurance policies from State Farm, the insured obtained coverage for liabilities arising from different sources. Under the homeowner's policy, the insurer agreed to protect the insured against liability arising generally from non-auto-related risks; under the automobile policy the insurer guaranteed indemnity arising from auto-related risks. Since the injury and the insured's liability in the instant case resulted from both auto-related and non-auto-related causes, the insurer is liable under both policies.

(*Id.*, 10 Cal.3d at p. 106.)

The same rationale applies when the policyholder is protected by policies issued in different years. For example, in the present case, certain insurance companies agreed to cover the State's liability if continuous damage occurred during their 1964 policy period, while other insurance companies agreed to cover the State's liability if continuous damage occurred in their 1973 policy period. Once triggered, each policy covered "all sums" of the State's liability, not just for the damage occurring in its policy period. (*Aerojet, supra*, 17 Cal.4th at p. 57, fn. 10.) Because the State was held liable for continuous damage occurring throughout all of the policy periods, each of the Insurers must cover the State's liability, up to their combined limits.

This result should come as no surprise to the Insurers. As Justice Baxter observed in his concurring opinion in *Montrose*, in the

1960's, the insurance industry engaged in an "intense debate . . . about how to provide fair coverage for long-term 'exposure' injuries.'" (*Id.*, 10 Cal.4th at p. 695.) As a result of that debate:

> the drafters recognized that by defining a covered "occurrence" to include "*continuous or repeated* exposure to conditions" (italics added), and by making coverage dependent on the time at which injury or damage "occurs," they had created the possibility of coverage by multiple successive policies, **up to their combined policy limits**, for the various harms emanating over time from a single continuous exposure.

(*Id.*, 10 Cal.4th at p. 696, original italics, bolding added.)

(a) The "Horizontal Exhaustion" Doctrine Also Supports Stacking.

Stacking of limits is also consistent with California's "horizontal exhaustion" doctrine. (*State v. Continental, supra*, 170 Cal.App.4th at p. 184.) Under that doctrine, when multiple primary policies and one or more excess policies cover a policyholder, all primary limits ordinarily must be combined or "stacked" and exhausted before any of the excess insurers will be required to contribute to the loss. The rule has been applied when the policies in question were issued in the same policy period (see, e.g., *Oil Base, Inc. v. Transport Indem. Co.* (1956) 143 Cal.App.2d 453, 466-469; *McConnell v. Underwriters at Lloyds of London* (1961) 56 Cal.2d 637, 646) and in different policy periods (see, e.g., *Community Redevelopment Agency v. Aetna Cas. & Sur. Co.* (1996) 50 Cal.App.4th 329, 340 [in a continuous loss case, "*all* of the primary policies must exhaust before *any* excess will have coverage exposure," original

italics].)[28] Although the horizontal exhaustion doctrine technically governs only allocation among multiple insurance companies (*State v. Continental, supra*, 170 Cal.App.4th at p. 184), it demonstrates yet again that when multiple liability policies apply to a given loss, whether issued in the same or different policy periods, the policy limits can be combined or stacked to fully cover the policyholder's liability. (*Id.* [the horizontal exhaustion rule "necessarily implies that the insured, too, is entitled to stack the primary policies; otherwise, the primary policies would never be exhausted"].)

Notably, in the proceedings below, the Insurers *agreed* that the horizontal exhaustion doctrine permits the stacking of *primary policies*, but claimed it does not permit the stacking of *excess* policies such as their own. Instead, they asserted, once the primary limits throughout all policy periods have been stacked and paid (a result which obviously benefits the excess insurer), the policyholder must select a *single* excess policy period, thereby forfeiting the excess insurance it purchased in all other periods. (29AA 7571, fn. 1; 7624; 7646-7648.) Their argument was disingenuous because the State's insurers had argued in other cases that the horizontal exhaustion doctrine applies to both primary *and* excess insurers.[29] The

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28 (See also *Stonewall Ins. Co. v. City of Palos Verdes Estates* (1996) 46 Cal.App.4th 1810, 1852-1853; *Fireman's Fund, supra*, 65 Cal.App.4th at p. 1305; *Hartford Accident & Indem. Co. v. Superior Court* (1994) 23 Cal.App.4th 1774, 1779-1780.)

29 (See, e.g., *Dow Corning Corp. v. Continental Cas. Co.*, Nos. 200143-54, 1999 Mich.App. LEXIS 2920, at *1, 25-26 (Mich. Ct. App. Oct. 12, 1991) [in multi-year injury case, several of the State's insurance companies argued that under the "horizontal exhaustion" doctrine, higher-level excess policies are not required to pay "until all triggered primary *and lower-level excess policies* have been exhausted," emphasis added]; see also *Spaulding Composites Co. v. Aetna Cas. & Sur. Co.*, 819 A.2d 410, 417 (N.J. 2003); *Carter-Wallace, Inc. v. Admiral Ins. Co.*, 712 A.2d 1116, 1122; *North River*

Footnote continued

court of appeal rejected the Insurers' contention that excess policies cannot be stacked, stating that it saw "no meaningful difference" between the stacking of primary versus excess policies. (*State v. Continental, supra*, 170 Cal.App.4th at p. 184.)

(b) *Stonewall* Allowed Stacking of Limits Across Policy Periods.

"[T]he first California case in which the issue of stacking of limits across policy periods was squarely presented held that it is allowed." (*State v. Continental, supra*, 170 Cal.App.4th at p. 185 [citing *Stonewall, supra*, 46 Cal.App.4th 1810].) In *Stonewall*, the policyholder settled an action alleging that it negligently maintained a storm drain, causing continuous damage over multiple years. One of the insurers (Jefferson) provided coverage for a three-year period pursuant to three separate endorsements, each including a limit of $300,000 per occurrence and in the aggregate.

The trial court concluded that the policy covered three separate periods, with a $300,000 limit for each period, for a total of $900,000 in coverage. Jefferson appealed, arguing that because its policy provided $300,000 coverage per occurrence and all of the damage resulted

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Ins. Co. v. Ace Am. Reinsurance Co. (2d Cir. 2004) 361 F.3d 134, 139, fn. 6.) Insurance companies which covered the State and argued in those cases that horizontal exhaustion includes excess policies were Continental Casualty, Employers Insurance of Wausau, Lloyds, Aetna, Allstate, Commercial Union, Harbor, Highlands, International Surplus, Puritan, Unigard and four AIG insurance companies – American Home, Insurance Company of the State of Pennsylvania, Lexington and National Union. Several of these insurance companies have since settled with the State, but Continental Casualty and Employers Insurance of Wausau are among the Insurers before this Court.

from a single continuous "occurrence," its coverage for the full three-year period should be limited to a single $300,000 "occurrence" limit. The Court of Appeal rejected the argument, stating:

> Jefferson claims also that its policy language defining occurrence limits its exposure to $300,000. This language (like that in the other relevant policies) states that all damage arising from continuous and repeated exposure is deemed a single occurrence. This argument ignores two points: (1) the policy covers liability for occurrences within a policy period; and (2) the Jefferson policy covers three separate periods. Reading (as we must) the Jefferson policy in a fashion resolving ambiguities against it, the language on which Jefferson relies must be construed as referring to a single occurrence in a policy period. The Jefferson policy covering three policy periods, the policy language amounts to a $300,000 per period limitation--or, in the context of this case (involving a continuous trigger), a $900,000 limitation.

(*Stonewall, supra*, 46 Cal.App.4th at p. 1849.)

Similarly, the Court of Appeal below rejected the Insurers' argument that, because each policy contains a specified limit for "each occurrence," that the State should be limited to only *one policy's* "each occurrence" limit, no matter how many policies covered the occurrence. As the court cogently stated:

> [T]his overlooks the fact that the policy language only purports to limit *each particular insurer's* liability under *each particular policy*. Insurer A's policy provides that insurer A will not have to pay more than $X per occurrence; insurer B's policy provides that insurer B will not have to pay more than $Y per occurrence; and insurer C's policy provides that insurer C will not have to pay more than $Z per occurrence. Under the all-sums approach, each of these insurers is liable up to the amount of the entire loss as a result of an occurrence, subject only to its

> own policy limits. 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. [¶] We believe that this follows from the plain meaning of the policy language.

(*State v. Continental, supra*, 170 Cal.App.4th at pp. 182-183, original italics, fn. omitted.)

(c) The Court of Appeal Properly Declined to Follow *FMC*.

In the proceedings below, the trial court agreed that the State had made a "compelling" argument that stacking coverages is a widely accepted concept fully consistent with the policy terms and California's horizontal exhaustion doctrine, but ruled for the Insurers because it felt bound to follow the anti-stacking holding of *FMC*. (34AA 8732, 8734.) The Court of Appeal reversed, concluding that *FMC's* anti-stacking ruling was "based on reasoning that we find to be flawed and unconvincing" and, "as a result, *FMC's* holding is outside the mainstream of California case law." (*State v. Continental, supra,* 170 Cal.App.4th at pp. 169, 183.)

In *FMC*, the policyholder sought liability coverage for environmental contamination occurring over many years. (*Id.*, 61 Cal.App.4th at p. 1142.) One group of excess insurers, referred to as the London Insurers, had issued seven successive policies, each of which provided $1 million in coverage per occurrence. (*Id.* at pp. 1147-1148, 1188.)

In addressing the "stacking" issue, the *FMC* court noted that:

> "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 . . . ." [Citation.]

(*Id.*, at p. 1188.) The Court acknowledged that stacking could apply in the case because the London Insurers issued policies in successive policy periods and, under *Montrose*'s continuous injury trigger, a single occurrence can trigger coverage "in more than one, or all, of the policy periods." (*Id.*) Hence, "stacking" would allow the policyholder to aggregate the limits of all policies during the damage period. (*FMC, supra*, at pp. 1188-1189.)

Nevertheless, the *FMC* court held that the policyholder was not entitled to stack the policies. In so holding, the court did not consider either the policy language or California case authority which previously allowed policyholders to combine multiple policy limits.

Instead the court turned to out-of-state authorities, stating:

> 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, for liability attributable to any particular single occurrence, than the insured bargained or paid for. (Cf., e.g., *Ins. Co. N. Am. v. Forty-Eight Insulations, Inc.* (6th Cir. 1980) 633 F.2d 1212, 1226, fn. 28 [a variant of "stacking" "amounts to giving [the insured] much more insurance than it paid for"]; *Uniroyal, Inc. v. Home Ins. Co.* (E.D.N.Y. 1988) 707 F. Supp. 1368, 1392 ["stacking in this manner makes the aggregate limits and the separately negotiated premiums for each policy illusory by expanding coverage to the sum of both policies"].)
>
> Insurers sometimes include "anti-stacking" provisions in their policies to avoid just this kind of result. Where, 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.)

The *FMC* court summarily dismissed the recent *Stonewall* decision, stating: "*Stonewall* does not analyze the issue and appears to base its conclusion at least in part on a stipulation between the parties." (*FMC, supra*, at p. 1190.) The *FMC* court held that when a *single* occurrence triggers coverage in multiple policy periods, only the limits of a single policy period apply to that occurrence. The court allowed the policyholder to select the policy period in which the policy limits would be fixed. (*Id.* at p. 1191.)

(i) *FMC* Failed to Consider the Policy Language and Misapplied California Law.

The Insurers heavily rely upon *FMC* and ultimately ask this Court to adopt its anti-stacking holding. (OB at p. 55.) However, for several reasons, the court below correctly concluded that *FMC's* reasoning was "flawed and unconvincing" and that its holding was "outside the mainstream of California law." (*State v. Continental, supra*, 170 Cal.App.4th at p. 183.)

First,"[t]he proper initial focus for a court in resolving a question of insurance coverage is on the language of the insurance policy itself, rather than on judicially created 'general' rules that are not necessarily responsive to the policy language . . . ." (*Garriott Crop Dusting Co. v. Superior Court* (1990) 221 Cal.App.3d 783, 790.) Unlike *Stonewall*, which analyzed the policy and concluded that stacking was permitted, *FMC* not only "failed to identify any flaw in *Stonewall's* analysis of the policy language," it "disregarded the policy language entirely" (*State v. Continental, supra,* 170 Cal.App.4th at p. 187) and judicially created an anti-stacking rule that was devoid of any basis in the insurance policy.

Ironically, *FMC* did observe that some policies include specific anti-stacking provisions while the policies before it did not. (*FMC, supra*, 61 Cal.App.4th at p. 1189). But rather than draw the obvious conclusion – that absent a valid anti-stacking limitation, a policyholder is entitled to the benefits of each policy for which it paid a premium – the *FMC* court engaged in something it called "judicial intervention" to limit the policyholder to the coverage purchased during only a single policy period. (*Id.*) In so doing, *FMC* overlooked this Court's admonitions that "'[a]s we have declared time and again "any exception to the performance of the basic underlying obligation must be so stated as clearly to apprise the insured of its effect".'" (*Haynes, supra*, 32 Cal.4th at p. 1204) and that "'[i]f the insurer uses language which is uncertain any reasonable doubt will be resolved against it; if the doubt relates to the extent or fact of coverage, whether as to the peril insured against [citations], the **amount of liability** [citations] or the person or persons protected [citations], the language will be understood in its most inclusive sense, for the benefit of the insured.'" (*State Farm v. Johnston, supra*, 9 Cal.3d at p. 274, italics omitted, bolding added.)

The *FMC* court resorted to judicial intervention based on its belief that stacking would afford the policyholder substantially more coverage than it bargained for – a theme often repeated in the Insurers' Opening Brief. (*FMC, supra*, 61 Cal.App.4th at p. 1189; OB at pp. 42-43, 48-49, 51.) But as the Court of Appeal below noted, *FMC's* circular reasoning assumes the very point it intends to prove – that the policies do not permit stacking. In contrast, the Court below, which did examine the policy language, concluded:

> In our view, standard policy language *does* provide for stacking, and therefore that is exactly what the insured has bargained and paid for.

> If an occurrence happens entirely within one policy period, the insured has paid one premium and can recover up to one policy limit; however, if an occurrence is continuous across two policy periods, the insured has paid two premiums, and can recover up to the combined total of two policy limits. We see nothing unfair or unexpected in this.

(*State v. Continental, supra*, 170 Cal.App.4th at p. 188, original italics.)

The *FMC* court's "judicial intervention" was also motivated by its view that courts should construe policies so that the insurers' contractual obligations for long-term injuries are the same as their obligations for other injuries. (*FMC, supra*, 61 Cal.App.4th at p. 1189-1190 [citing *Keene, supra*, 667 F.2d at pp. 1049-1050]; see also *State v. Continental, supra*, 170 Cal.App.4th at pp. 187-188.) But as demonstrated above, in cases involving "ordinary" injuries (e.g., auto accidents), if multiple policies cover an accident or occurrence, California courts require insurance companies to indemnify their policyholders up to the combined limits of *all* applicable policies. (*Supra*, at pp. 52-54.) Hence, allowing recovery of combined limits in long-term damage cases would treat such cases in exactly the same manner as those involving other types of injuries. As the Court below stated:

> *FMC* failed to recognize that, in all other instances of multiple coverage, stacking is allowed. As a result, it failed to provide any principled basis for distinguishing stacking when there is multiple coverage for an occurrence spanning multiple policy periods from stacking when there is multiple coverage for any other reason. As already discussed, we do not perceive any relevant distinction.

(*State v. Continental, supra*, 170 Cal.App.4th at pp. 189-190.)

Finally, *FMC's* unprecedented finding that a court can resort to "judicial intervention" to limit coverage otherwise afforded by the

policies or, worse, to add limitations which contradict the policies' express terms, directly contravenes this Court's repeated admonition that a court may not rewrite any provision of any contract. (See, e.g., *Certain Underwriters at Lloyd's of London v. Superior Court* (2001) 24 Cal.4th, 945, 960; *Powerine Oil Co., Inc. v. Superior Court* (2005) 37 Cal.4th 377, 401; *State v. Continental, supra,* 170 Cal.App.4th at p. 191.) That *FMC* may have done so in the belief that allowing a policyholder to obtain the full limit of each policy is somehow "unfair" to the insurance companies who sold each policy is irrelevant. As this Court stated in *Aerojet*:

> Beneath the Court of Appeal's concern about "fairness" and "justice" is, apparently, a belief that, without an approach like the one it adopted, Aerojet might get a windfall from the insurers. This is not the case. We shall assume for argument's sake that Aerojet has enjoyed great good luck over against the insurers. But the pertinent policies provide what they provide. Aerojet 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. [Citation.] We must certainly resist the temptation to do so here simply in order to adjust for chance – for the benefits it has bestowed on one party without merit and for the burdens it has laid on others without desert. [Citations.] As a general matter at least, we do not add to, take away from, or otherwise modify a contract for "public policy considerations." [Citation.] . . . We shall therefore allow whatever "gains" and "losses" there may be to lie where they have fallen.

(*Aerojet, supra*, 17 Cal.4th at pp. 75-76, fns. omitted.)

(ii) The Insurers Err In Asserting that *FMC* Did Not Engage In Judicial Intervention But Merely "Implied" An Anti-Stacking Clause Into the Policy.

In an attempt to circumvent this Court's rule prohibiting courts from adding provisions to an insurance policy, the Insurers claim that FMC, in judicially intervening, did not improperly *add* an anti-stacking provision into the policy; instead, it *implied* an anti-stacking provision into the policy. (OB at p. 50.) The Insurers claim that "courts frequently imply provisions in contracts" and, when they do, it "renders an explicit policy provision . . . unnecessary." (OB at pp. 49-50 [citing *Buss v. Superior Court* (1997) 16 Cal.4th 35, 51-52 and *Certain Underwriters at Lloyd's of London v. Superior Court* (2001) 24 Cal.4th 945].)

Neither authority supports the Insurers' contention. In *Buss*, this Court held that when an insurance company pays defense expenses which it had *no contractual duty to pay*, it has a quasi-contractual right, implied by law (not implied in the policy), to seek reimbursement of such expenses from the policyholder. The right does not extend to defense costs which the insurance company contractually agreed to pay, as that was part of the bargain for which it received premiums. (*Buss, supra*, 16 Cal.4th at pp. 49-51.) Hence, *Buss* clearly establishes that courts may not create "implied by law" rights which relieve it of its contractual duty to pay. Here, of course, the Insurers attempt to do exactly that – they seek to entirely avoid their contractual obligation to pay on the ground that other insurers have paid some of the State's liability.

Certain Underwriters, in turn, merely held that an insurance company's express promise to indemnify the insured for "all sums that the insured is legally obligated to pay as damages" was, by its own terminology, implicitly limited to "money ordered by a court." (*Id.*, 24

Cal.4th at pp. 955, 969-970.) The Court then declined to rewrite the policy language to remove that limitation. (*Id.* at p. 967.) Here, however, the Insurers have not identified any policy language which expressly (or even implicitly) imposes an anti-stacking limitation; to the contrary, as discussed above, both the policy language and California law permit stacking. Hence, under *Powerine*, the *FMC* court was not authorized to "judicially intervene" to "imply" an anti-stacking limitation into the policy to eliminate coverage which the insurance company contractually agreed to pay.

In short, in concluding that a policyholder may not "stack" the limits of multiple policies in long-term damage cases, *FMC* disregarded the language of the policies, failed to apply fundamental rules of insurance policy interpretation, and overlooked California case law which permits stacking in all other instances (including the recent *Stonewall* decision which allowed stacking in long-term damage cases). Instead, it relied upon a self-created "judicial intervention" doctrine that violates this Court's repeated admonition that the courts of this state shall not add to, take away from, or otherwise modify a contract for public policy considerations. Accordingly, this Court should reject the Insurers' request that it adopt *FMC* as the law of this state so as to preclude California policyholders from combining or "stacking" the limits of multiple applicable policies when necessary to achieve full indemnity for a covered liability.

(d) The Insurers' Reliance Upon *California Pacific* Is Misplaced, While Their Citation to the *Armstrong* Trial Court Ruling Is Improper.

In their Opening Brief, the Insurers rely upon two other California cases in arguing that when a long-term loss is covered by successive policies, the policy limits cannot be "stacked." As the Insurers concede, in the first case, *California Pacific Homes v. Scottsdale Ins. Co.* (1999) 70 Cal.App.4th 1187, the issue was not stacking of policy limits, but stacking of the insured's self-insured retentions. (OB at p. 46.)

In *California Pacific*, two insurance companies issued five successive policies. Each policy individually promised to cover the policyholder for any liability exceeding $250,000 (the self-insured retention). The two insurance companies argued that, because the continuous damage at issue spanned five policy periods, they were entitled to "stack" the insured's self-insured retentions so that each policy would cover only liability exceeding $1.25 million, not $250,000 as each policy promised. (*Id.* at p. 1190.)

Unlike *FMC*, the *California Pacific* court resolved the issue based upon the specific policy language before it and standard rules of insurance policy construction. (*California Pacific, supra*, 70 Cal.App.4th at pp. 1191-1194.) The court concluded:

> The policy provides that "[t]he Company will pay [on] behalf of the Insured the ultimate net loss in excess of the retained limit hereinafter stated which the Insured shall become legally obligated to pay as damages . . . ."

> This language is completely consistent with the judgment of the trial court which found that "each of the Defendant Insurers is and was obligated to indemnify California Pacific Homes for that portion of the *Madrid II* settlement that exceeds a single retained limit of $ 250,000."

(*Id.* at p. 1193.) The court rejected the insurance company's request that it "analyze this problem as one of allocation between insurers (themselves as excess carriers and CPH as a primary insurer) rather than as a question of the interpretation of a CGL policy between them and their insured." (*Id.* at p. 1194; see also *Montgomery Ward & Co. v. Imperial Cas. & Indem. Co.* (2000) 81 Cal.App.4th 356, 364-367 [self-insured retentions are not "insurance" and thus are not subject to the "horizontal exhaustion" doctrine, under which all primary limits must be exhausted before any excess level policy will apply].)

In the present case, the Insurers focus upon a brief remark in *California Pacific* that "[t]he insurers are in the anomalous position of arguing for stacking of the retained limits. 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 p. 1194 [citing *FMC*]; see OB at 46.) However, because stacking of policy limits was not at issue in *California Pacific*, the court did not analyze that issue in light of the policy language or standard principles of insurance law. Nor can its passing comment be construed as adopting *FMC's* holding that courts may judicially intervene to prevent the stacking of policy limits when the policy language otherwise permits it.

The second additional California case which the Insurers rely upon in support of their anti-stacking argument is a brief comment in *Armstrong* that the *trial court* beneath it had rejected stacking. (OB at p. 46

[citing *Armstrong, supra*, 45 Cal.App.4th at p. 50, fn. 15].) However, as the appellate court in this action noted, the *Armstrong* trial court's anti-stacking ruling was neither challenged nor at issue in the appeal. (*State v. Continental, supra*, 170 Cal.App.4th at p. 185, fn. 9; see also *FMC, supra*, 61 Cal.App.4th at pp. 1190 and 1224 [rejecting the insurance companies' attempt to portray *Armstrong* as anti-stacking authority]). Nor have the Insurers submitted the *Armstrong* trial court's written opinion so that its reasoning could be evaluated by either the State or this Court. In any event, because a written trial court ruling has no precedential value (*Santa Ana Hospital Medical Center v. Belshe* (1997) 56 Cal.App.4th 819, 831), the Court should reject the Insurers' improper reliance upon *Armstrong's* brief reference to a trial court ruling to support their anti-stacking argument.

4. The Insurers' Remaining Arguments Are Without Merit.

Lacking any basis in the policy language that would excuse them from providing the promised coverage, the Insurers next raise a panoply of arguments as to why, as a matter of principle, stacking should not be permitted. They contend that stacking would improperly: (1) compound the "unreasonable results" of California's "all sums" rule, (2) transform a single occurrence into multiple occurrences, (3) grant greater coverage for long-term injuries than instantaneous injuries, (4) create a "super policy" with limits equal to the combined limits of all policies and (5) provide far more coverage than a policyholder could reasonably expect. (OB at pp. 45, 47-48.) The Insurers also cite insurance industry commentators who suggest that stacking should be prohibited as a matter of public policy. None of these arguments have merit.

The Insurers first argue that stacking should be prohibited because, otherwise, it "would compound the unreasonable results of the 'all

sums' approach" (OB at p. 45), which the Insurers claim leads to an "unwarranted expansion of policy rights [by creating] coverage for property damage outside the policy period in contravention of the policy language." (*Id.* at p. 49.) However, as discussed in the first section of this brief, there is nothing unreasonable about the "all sums" doctrine, which not only is firmly rooted in the express "all sums" language of the Insurers' standard-form insuring agreements, but also repeatedly has been affirmed by California courts, including this Court's decision in *Aerojet, supra*, 17 Cal.4th at p. 57.

Nor does stacking transform a single occurrence into multiple occurrences, as the Insurers charge. (OB at pp. 45, 48.) If a single occurrence causes damage during the periods covered by multiple policies, then multiple policies will cover that "occurrence," with each paying up to its own "per occurrence" limit, if necessary to fully indemnify the policyholder: one occurrence, one limit from each policy that covered it.

The Insurers also err in asserting that stacking differentiates between instantaneous damage versus long-term damage. When instantaneous damage is covered by multiple policies, the policyholder is also entitled to combine or "stack" the policy limits. (See, e.g., *Partridge, supra*, 10 Cal.3d at p. 106 [an insurance company which issued two liability policies that covered a shooting incident was held liable up to the limits of both policies].) Again: one occurrence, one limit from each policy that covered it.[30]

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30 As the Court below stated (*State v. Continental, supra,* 170 Cal.App.4th at p. 184):

> The Insurers assert that cases involving multiple policies applicable to a single policy period "are not relevant,"

Footnote continued

Stacking also does not create a single "super policy" with a policy limit equal to the combined limits of all policies, as the Insurers charge. (See, e.g., OB at p. 48.) Each insurance company is separately liable only for its own policy limit(s); it is not jointly liable for any other insurance company's limit(s). (See, e.g., *Aerojet, supra*, 17 Cal.4th at p. 57 [successive insurers on the risk in a continuous damage case are separately and independently obligated to indemnify the policyholder; they are not "jointly and severally" liable].)

Nor does stacking provide more coverage than a policyholder would reasonably expect to receive, or require any insurer to pay more than it could reasonably expect to pay – its own policy limit. As cogently stated by the Court below: "if an occurrence is continuous across two policy periods, the insured has paid two premiums, and can recover up to the combined total of two limits. We see nothing unfair or unexpected about this." (*State v. Continental, supra*, 170 Cal.App.4th at p. 188; see also *Montrose, supra*, 10 Cal.4th at pp. 695-696, concurring opinion of Justice Baxter [the drafters of the standard form liability policy recognized that by defining "occurrence" to include continuous or repeated exposure to conditions, they had created the possibility of coverage by multiple successive policies, up to their combined policy limits].)

Indeed, stacking is particularly appropriate in cases involving long-term damage, where each successive insurer separately agrees to cover

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> because this case involves multiple policies applicable to multiple policy periods. We see a distinction, but not a meaningful one. In each instance, there is a single occurrence; in each instance, each insurer's liability is limited to a stated amount per occurrence. Even so, the insured is allowed to stack the limits of all the applicable policies.

the policyholder's liability arising out of "continuous or repeated exposure to conditions" if damage occurs during its policy period. The policies are thereby structured so that when long-term damage spans multiple policy periods (often resulting in much greater damage and liability), the policyholder's total coverage automatically increases as the damage continuously progresses over time and additional policies are triggered. In such instances, the policyholder would reasonably expect to receive the coverage promised in each successive policy for which he paid an additional premium.

Finally, the Insurers argue that, by prohibiting policyholders from stacking the limits of their liability policies, the Court could advance various public policy interests. According to the Insurers, such a prohibition would encourage policyholders to buy more insurance during each policy period, promote more accurate underwriting by insurance companies, reduce premiums by making future liabilities more predictable, and would give policyholders an incentive to discover continuing damage at an earlier date. (OB at pp. 52, 54.) In support of these "public policy" arguments, the Insurers cite several commentaries by authors who (not surprisingly) represent the insurance industry. (*Id.* at p. 54.) These public policy claims are not only self-serving and dubious, they are entirely irrelevant under California law. As this Court has repeatedly admonished, California courts may not rewrite an insurance policy for public policy purposes. Instead, "[t]he answer is to be found solely in the language of the policies, not in public policy considerations." (See, e.g., *Foster-Gardner, Inc. v. Nat'l Union Fire Ins. Co.* (1998) 18 Cal.4th 857, 888; *Powerine, supra*, 37 Cal.4th at p. 392; *Certain Underwriters, supra*, 24 Cal.4th at p. 960; *AIU, supra*, 51 Cal.3d at p. 818.)

5. Case Law In Other Jurisdictions Also Supports Stacking.

Although this Court should obviously decide the stacking issue based upon the policy language as interpreted by California law, a review of stacking law in other jurisdictions provides further support for the Court of Appeal's holding in favor of the State.

(a) "Stacking" Case Law, As Originally Employed and Developed, Also Required Insurers to Indemnify Policyholders Up To the Combined Limits of the Policies, Absent Express Policy Language To The Contrary.

The term "stacking" first was used in *Smith v. Pacific Auto. Ins. Co.* (Or. 1965) 400 P.2d 512. There, a policyholder recovered the limits of a policy covering the auto in which he was riding and sought to recover his remaining loss from his own insurance company. The insurance company argued it owed nothing because, under its "other insurance" clause, payments made by other insurance companies were subtracted from its limits, allowing it to escape liability.[31] As California

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[31] This form of "other insurance" clause is commonly referred to as an "excess-escape" clause. It purports to provide excess coverage *only* to the extent its policy limit exceeds the combined limits of all other policies. It reduces the policy limit dollar-for-dollar by other policies so the insurance company partly escapes (if its limit exceeds the combined limits of all other policies) or wholly escapes (if the combined limits of all other policies exceed its policy limit). (See, e.g., *Continental Cas., supra*, 134 Cal.App.3d at p. 393 ["[I]f the limit of liability of this policy is greater than the limit of liability provided by other insurance, this policy shall afford excess insurance over and above such 'other insurance' in an amount sufficient to give the insured . . . a total limit of liability equal to the limit of liability afforded by this policy"].) California courts *disfavor* and invalidate "escape" clauses if the policyholder would be less than *fully* protected. (*Dart, supra*, 28 Cal.4th at p. 1080 ["'[P]ublic

Footnote continued

courts would later hold, the Oregon Supreme Court rejected the insurance company's argument that the existence of another policy permitted it to avoid coverage, leaving the policyholder partially unreimbursed for his loss, and held that he could recover the combined limits of both policies. (*Id.*, 400 P.2d at p. 516.)

The insurance company in *Smith* objected that this gave the policyholder twice the coverage he would have had if he drove his own auto and only one policy applied. Using the term "stacking" for the first time in a published opinion, the court responded:

> This argument seems to be based upon an assumption that there is something offensive about "stacking" insurance benefits. [¶] The rule against multiple recovery was derived from fire-insurance cases. In the case of a loss by fire, the monetary loss is usually easily measured, and in certain instances it can be shown that the total damage suffered by the plaintiff was less than the combined insurance proceeds sought to be recovered. However, in the field of life and accident insurance, the damages to the person are not readily measured in money, and there is little likelihood either of fraud or profit through overinsurance . . . . In the case at bar, there is no reason to deny the insured the benefits for which he has contracted under his own insurance simply because he also has some incidental rights as a third-party beneficiary under another person's insurance.

(*Id.*, 400 P.2d at p. 515.)

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policy disfavors "escape" clauses, whereby coverage purports to evaporate in the presence of other insurance'"]; see also *Continental Cas., supra*, 134 Cal.App.3d at pp. 396-397 ["We conclude that plaintiff's escape clause cannot be given effect because the underlying primary policy does not *fully* protect the insured," italics added].)

Although courts across the country had long decided whether policyholders can combine multiple policy limits, after *Smith*, numerous cases considered the same issue using the term "stacking." In each case, the insurance companies argued a policyholder cannot "stack" multiple policy limits; instead, they urged that one or more insurance companies be relieved of its coverage obligation, even if that would leave the policyholder partially unprotected for the otherwise covered loss.

Importantly, in so arguing, the insurance companies invariably relied upon various "other insurance" clauses and other *express* policy terms – lacking in this case – which were specifically designed to limit or avoid liability when other insurance exists. Typical "anti-stacking" clauses included:

- "Excess-escape" "other insurance" clauses stating that coverage applies only to the extent the policy's limits exceed all other insurance (see, e.g., *Smith, supra*, 400 P.2d at p. 516);
- "Highest limit" "other insurance" clauses stating that if other insurance exists, the insured's damages will not exceed the highest limit of any one policy;[32]
- "Election" clauses stating that if the *same insurance company* issues other policies, the insured must elect a single policy under which that insurance company will provide coverage;[33]

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32 (See, e.g., *Werley v. United Servs. Auto. Assn.* (Alaska 1972) 498 P.2d 112, 114 ["if the insured has other similar insurance available to him and applicable to the accident, the damages shall be deemed not to exceed the higher of the applicable limits of liability of this insurance and such other insurance"].)

33 (See, e.g., *Ins. Co. of N. Am. v. Strothers* (1975) 70 Pa. D. & C.2d 429, 433 ["Other Insurance In This Company" clause provided that "If the Named Insured carries other automobile insurance *with this Company* covering a loss also covered by this policy, the Insured must elect which policy shall apply, and the Company shall be liable

Footnote continued

- "Limits of liability" clauses stating that the insurance company's liability will not be increased by the issuance of multiple policies by the *same* insurance company;[34] and

- Exclusions which, under narrowly defined circumstances, exclude coverage where other insurance exists.[35]

Unlike *FMC*, in determining whether stacking was permitted, such cases routinely applied ordinary principles of insurance policy construction.[36] Specifically, an insurance company's ability to preclude the "stacking" of its coverage with other insurance depended upon one or more of the following issues:

Does the policy contain an applicable anti-stacking clause? Under California law, limitations on the amount of coverage must

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under the policy so elected, but shall not be liable under any other such policy", italics added].)

34 (See, e.g., *United Servs. Auto. Assn. v. Smith* (Ala. App. 1976) 329 So. 2d 562, 563 ["Limit of Liability" clause stated that "the issuance to the same named insured of two or more policies with this endorsement, shall not operate to increase the limit of the company's liability per person beyond that stated in the Declarations"].)

35 (See, e.g., *Thurman v. Signal Ins. Co.* (Or. 1971) 491 P.2d 1002, 1004, 1006 [exclusion provided that "This policy does not apply under Part IV . . . to bodily injury of the insured while in or upon or while entering into or alighting from an automobile other than the owned automobile if the owner thereof has insurance similar to that provided in Part IV"; court held exclusion was an improper "escape" clause and therefor did not preclude "stacking"].)

36 (See, e.g., *State Farm Mut. Auto. Ins. Co. v. Scitzs* (Miss. 1981) 394 So. 2d 1371, 1372 ["Defendant's appeal presents the question of whether the medical coverage provisions of the three policies may be aggregated or 'stacked.' . . . States which have considered the question hold that the question must be determined by construing the provisions of the policies involved in accord with the accepted rules for construing insurance policies"].)

be expressly stated in the policy in conspicuous, plain and clear language. (*Haynes, supra*, 32 Cal.4th at p. 1204.) Similarly, courts addressing "stacking" held that, absent an express policy provision or statute barring stacking, a policyholder can recover the combined limits of its policies.[37] Even if the policy contained an anti-stacking clause – which the Insurers' policies do not – stacking was permitted if the clause did not apply to the particular facts.[38]

Is the clause unambiguous? To be enforceable, limitations of the policy limits must be unambiguous. (*Haynes, supra*, 32 Cal.4th at p. 1211.) Similarly, "stacking" cases held that anti-stacking clauses are ineffective unless they unambiguously apply to the facts of the case.[39]

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37 (See, e.g., *Jackson v. State Farm Mut. Auto. Ins. Co.* (S.C. 1986) 342 S.E.2d 603, 604 ["Stacking is generally permitted unless limited by statute or by a valid policy provision"); *State Farm Mut. Auto. Ins. Co. v. Smith* (Ark. 1987) 732 S.W.2d 137, 138 [stacking of three policies permitted because stacking was not prohibited by policy language].)

38 (See, e.g., *Woolston v. State Farm Mut. Ins. Co.* (W.D.Ark. 1969) 306 F.Supp 738, 741-742 ["stacking" permitted despite two "anti-stacking" clauses; first clause applied if policyholder is injured while occupying vehicle and policyholder was injured while a pedestrian; second clause was ambiguous and thus construed in policyholder's favor]; *Hampton v. State Farm Ins. Co.* (La. App. 1983) 433 So. 2d 884, 887 ["[T]he policies herein do not provide any restriction or limitation as respects stacking of separate policies. Thus, this court finds in favor of stacking absent any policy restriction which may preclude coverage under these circumstances"].)

39 (See, e.g., *Parker v. United Servs. Auto. Assocs.* (Wash. App. 1999) 984 P.2d 458, 459 ["To be enforceable, an anti-stacking provision must be unambiguous. Ambiguity can arise from the application of the anti-stacking clause to the particular facts"]; *Hartford Accident & Indem. Co. v. Bridges* (Miss. 1977) 350 So. 2d 1379, 1381-1382 [stacking permitted as anti-stacking clause was ambiguous].)

Also, courts often note that the use of unambiguous anti-stacking clauses in *other* policies show that had the insurance companies wanted to bar stacking, appropriate language was available.[40] Similarly, the fact that the State's insurance companies included a very narrow "anti-stacking" clause in their 1976-78 policies (*supra*, at pp. 54-56), but included no such clause in the earlier policies at issue in this appeal, demonstrates that they did not intend the earlier policies to preclude stacking.

Does the anti-stacking clause conflict with the "other insurance" clauses in other policies? Under California law, courts consistently ignore conflicting "other insurance" clauses which would leave the policyholder less than fully protected. (See, e.g., *Continental Cas., supra*, 134 Cal.App.3d at p. 397 [where two or more policies contain conflicting "excess" other insurance clauses (as in the present case), the policyholder's liability will be prorated by the amount of coverage afforded by the policies, up to their combined limits].) Similarly, many states invalidated "anti-stacking" clauses as conflicting with "other insurance" clauses in other policies.[41]

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40 (See, e.g., *Cameron Mut. Ins. Co. v. Madden* (Mo. 1976) 533 S.W.2d 538, 547; *Jeffries v. Stewart* (Ind. App. 1974) 309 N.E.2d 448, 453-454; see also *E.M.M.I., supra*, 32 Cal.4th at p. 473 [if insurance company intended to restrict its coverage, it should have used language clearly stating that purpose].)

41 (See, e.g., *Sloviaczek v. Estate of Puckett* (Idaho 1977) 565 P.2d 564, 568 [conflicting excess-escape clauses disregarded and stacking permitted; there was no injustice to the insurance companies as they all collected premiums and should bear concomitant responsibility]; *Mountel v. Hardware Dealers Mut. Fire Ins. Co.* (Ohio App. 1969) 269 N.E.2d 857, 859-861 [excess-escape and "highest limit" clauses unenforceable as they conflicted with "other insurance" clause in other policy; stacking permitted].)

Finally, after *Smith*, many states enacted statutes requiring auto policies to contain uninsured motorist coverage, with a few states either expressly prohibiting or allowing clauses designed to prevent policyholders from combining limits. In such instances, "stacking" generally was resolved by applying rules of *statutory* construction.[42] Although California statutory law now expressly prohibits "stacking" of uninsured motorist coverage, *no California statute prohibits stacking of the general liability coverages at issue here.* (Croskey, et al., Cal. Prac. Guide: Insurance Litigation (The Rutter Group 2006) 7:377, pp. 7A-120 to 7A-121.) As the Court of Appeal noted, "the very existence of this statutory exception demonstrates that in other situations, stacking is the rule." (*State v. Continental, supra*, 170 Cal.App.4th at p. 184.)

These "stacking" authorities are fully consistent with California law. They confirm that, absent express language which unambiguously applies, the existence of other insurance does not diminish a policy's coverage. Instead, the policyholder may combine or "stack" the

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42 (See, e.g., *Walton v. State Farm Mut. Auto. Ins. Co.* (Hawaii 1974) 518 P.2d 1399, 1401; *Nicholson v. Home Ins. Co.* (Wis. 1987) 405 N.W.2d 327, 336; *Keeble v. Allstate Ins. Co.* (E.D.Tenn. 1971) 342 F.Supp 963; see also *Country Mutual, supra*, 157 P.3d at p. 1216-1217 [rejecting anti-stacking provision in uninsured motorist coverage which does not track statutory framework].) When the State's policies were issued, California fell into the "permissive" camp: while Ins. Code section 11580.2(a)(1) required auto policies to offer uninsured motorist coverage, subsection (d) permitted such policies to limit coverage to the highest policy limit. (*Wagner, supra*, 40 Cal.3d at p. 463, fn. 2; see also *Continental Cas., supra*, 134 Cal.App.3d at p. 397, fn. 1 [an exception to the rule invalidating "escape" clauses exists when the escape clause is specifically authorized by statute].) Finally, in 1984, Ins. Code section 11580.2 (q) was added to statutorily bar stacking of uninsured motorist coverages.

limits of all applicable policies to obtain full protection against a covered loss. Because the State's policies contained no "anti-stacking" clause but, instead, expressly provided that coverage would be afforded in excess of all other insurances, the State clearly was entitled to combine or "stack" all applicable insurance policies to obtain full indemnification for its liability.

(b) Stacking In Long-Term Damage Cases

(i) *Forty-Eight* and *Keene*

The first published case to employ the term "stacking" in a long-term injury case was *Ins. Co. of N. Am. v. Forty-Eight Insulations, Inc.* (6th Cir. 1980) 633 F.2d 1212 (*Forty-Eight*), in which the policyholder sought liability insurance coverage for numerous bodily injury claims resulting from long-term exposure to asbestos. The Insurers cite *Forty-Eight* in support of their anti-stacking argument. (OB at p. 44.)

The *Forty-Eight* court confined its "stacking" analysis to a footnote, undoubtedly because stacking was not at issue – the policyholder did not need combined limits to be fully indemnified. (*Ins. Co. of N. Am. v. Forty-Eight Insulations, Inc.* (E.D.Mich. 1978) 451 F.Supp. 1230, 1243, affd. (6th Cir. 1980) 633 F.2d 1212 ["Forty-Eight has stated on the record that it does not seek to stack coverages"].)[43] Rather, the issue was the trigger of coverage and the court observed:

> Appellants are correct that the exposure theory we adopt has problems with "stacking". From 1955 through 1977, Forty-Eight held twelve different

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[43] Ordinarily, stacking is a "moot point in asbestos cases where the claims usually cost each policyholder a sum well within individual insurance limits." (Oshinsky, *Comprehensive General Liability Insurance: Trigger and Scope of Coverage in Long-Term Exposure Cases*, 17 Forum 1035, 1036 (1982).)

> insurance policies issued by five different companies. Eleven of these policies had aggregate limits of from $300,000 to $500,000 per occurrence. The twelfth policy had an aggregate limit of $1,000,000. The combined aggregate limits of the twelve policies is $5.6 million.
>
> *The problem is that if the inhalation of each asbestos fiber is deemed to be a separate "bodily injury"*, this results in the "stacking" of liability coverage to produce coverage *that is many times $5.6 million. This amounts to giving Forty-Eight much more insurance than it paid for.* 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. The initial exposure to asbestos fibers in any given year triggers coverage. However, under the terms of the policies, additional exposure to asbestos fibers is treated as arising out of the same occurrence. Thus, *on its face, the liability of each insurer is limited to maximum amount "per occurrence" provided by each policy.* We have no problem with the district court's extending the policy language so that each insurer would face no more liability per claim than the maximum limit it wrote during any applicable year of coverage.

(*Forty-Eight, supra*, 633 F.2d at p. 1226, fn. 28, italics added.)

Thus, *Forty-Eight* expressly recognized that the policies required each insurance company to pay the limits of each policy up to their "combined aggregate limits." The court's hypothetical problem with stacking was that, if the *inhalation of each fiber* was deemed a separate "occurrence" (invoking a virtually infinite number of "per occurrence" policy limits), the policyholder would receive many times the $5.6 million

combined aggregate limits it paid for. But because the policyholder did not seek to "stack" its policies and did not object to the insurance company's anti-stacking position, the court agreed to "extend" the policy language to further limit each insurance company's liability to no more than its highest limit.[44] Because the policyholder did not object to or challenge this limitation, the court did not examine the policy language, ordinary rules of insurance policy construction, or any of the dozens of "stacking" cases that already were on the books. Nor did the *Forty-Eight* decision hold that courts are empowered to "judicially intervene" to override the policy terms and *limit* contractually-promised coverage, as *FMC* later held.

The State does not seek the sort of "stacking" which concerned the court in *Forty-Eight*. The State does not contend that the migration of each contaminant particle (equivalent to the inhalation of each asbestos fiber in *Forty-Eight*) is a separate occurrence entitling it to a virtually unlimited number of policy limits. The State seeks only what it is entitled to *under the policy*, no more, no less. But unlike the policyholder in *Forty-Eight*, the State objects to the Insurers' attempt to "extend" the policy terms to reduce their collective liability to the limits of a single policy period. Such a restriction would divest the State of its contractual rights under nearly all of its excess policies and leave it unprotected for most of its liability, contrary to both the policy terms and fundamental principles of California insurance law.

Forty-Eight's dicta, in turn, was the sole authority cited by the second foreign court to address "stacking" in a long-term injury case,

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[44] Notably, *Forty-Eight* applied a "highest limit from *each insurance company*" approach to stacking. Under that rule, none of the Insurers would escape liability as none paid *any* amount towards the State's liability, much less its highest limit.

Keene Corp. v. Ins. Co. of N. America (D.C. Cir. 1981) 667 F.2d 1034 (*Keene*). Like *Forty-Eight*, *Keene* also involved the trigger of coverage for liability insurance responding to injuries resulting from long-term exposure to asbestos. Both the Insurers and *FMC* also relied upon *Keene* for an anti-stacking rule.

Keene gave the stacking issue even shorter shrift than *Forty-Eight*. Its discussion was limited to a single paragraph of a 25-page decision:

> Not surprisingly, the policies do not explicitly provide a means of applying the limits of liability to injuries that are covered by multiple policies. Keene claims that it is entitled to full indemnity for each injury up to the sum of the limits provided by the applicable policies. We do not agree. 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 limits can apply to each injury. Keene may select the policy under which it is to be indemnified. Cf. Forty-Eight, supra, 633 F.2d at 1226 n.28.

(*Keene, supra*, 667 F.2d at pp. 1049-1050.)

For several reasons, *Keene's* refusal to allow recovery of the combined limits is factually distinguishable and directly contrary to both California law and the existing body of "stacking" law. First, *Keene* summarily held that "the policies [did] not explicitly provide a means of applying the limits of liability to injuries that are covered by multiple policies." (*Keene, supra*, 667 F.2d at p. 1049.) In contrast, the State's

policies expressly provide coverage in excess of all other insurance. (*Infra*, at pp. 47-48.)

Second, *Keene's* anti-stacking holding is contrary to California law. Without citing any authority, *Keene* relied upon stacking jargon and a nebulous and "implicit" "principle of indemnity" to limit coverage to only a single policy, thereby eliminating the policyholder's right to coverage under all of the other policies covering the loss. But in California, any reduction (much less elimination) of policy limits must be stated in "conspicuous, plain and clear" language. (*Haynes, supra*, 32 Cal.4th at p. 1202.) Further, California courts focus "on the language of the insurance policy itself, rather than on judicially created 'general' rules that are not necessarily responsive to the policy language . . . ." (*Garriott, supra*, 221 Cal.App.3d at p. 790.)

Third, *Keene's* avowed goal was 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." (*Id.*, 667 F.2d at p. 1049.) But as shown above, in cases involving "ordinary" injuries (e.g., auto accidents), California courts require insurance companies to indemnify up to the combined limits of all applicable policies. (*Supra*, at pp. 52-54.) Hence, allowing recovery of combined limits for continuous environmental damage would treat such cases in exactly the same manner as those involving other types of injury.

Fourth, unlike *Forty-Eight* which, without objection from the policyholder, restricted recovery to the highest limit from each insurance company (a ruling which in this case would require each Insurer to pay a full policy limit), *Keene* reduced the policyholder's coverage to a single policy from *all* insurance companies. Hence *Keene* diminished coverage far more than *Forty-Eight*, the sole case upon which it relied.

Finally, like *Forty-Eight*, *Keene* failed to consider the enormous body of prior "stacking" law which permitted coverage up to the combined limits. Instead, *Keene* relied solely upon *Forty-Eight*, where stacking was uncontested and mere dicta. Because *Keene* is factually distinguishable and contrary to California insurance law and prior stacking law, it also does not provide an appropriate basis for barring the State from recovering the benefits of each applicable policy.

(ii) Foreign Stacking Law After *Keene*

Keene constitutes the principal authority cited by most foreign decisions which reject "stacking" in continuous loss cases. Further, as a class, cases following *Keene* are similarly marked by the absence of any reasoned analysis of the policy language, the impact of "other insurance" principles or the effect of traditional rules of insurance contract interpretation. Instead, cases adopting *Keene's* "anti-stacking" rule routinely "jumped on the bandwagon" by uncritically citing *Keene* without performing any independent analysis.

For example, of the five initial cases which adopted *Keene's* "anti-stacking" rule, each was a federal district court decision which merely applied *Keene's* holding in a continuous loss case without conducting any independent review. Ironically, however, *in all five instances*, the district courts were predicting the law of other states *which subsequently ruled in favor of stacking*.

The first case to follow *Keene*, and one which the Insurers cite in support of their anti-stacking argument (OB at p. 53), was *Owens-Illinois, Inc. v. Aetna Cas. & Sur. Co.* (D.D.C. 1984) 597 F.Supp. 1515. That court decided coverage under Ohio law but, finding no Ohio cases on point, followed its own Circuit Court's *Keene* decision as a matter of stare decisis (*id.* at 1520-1521 and fn. 10). It held that the policyholder could not

stack multiple policies in a continuous loss case, but was limited to the coverage of a single policy. However, the Ohio Supreme Court later ruled in favor of stacking in *Goodyear Tire & Rubber Co. v. Aetna Cas. & Sur. Co.* (Ohio 2002) 769 N.E.2d 835, stating:

> For each site, Goodyear should be permitted to choose, from the pool of triggered primary policies, a single primary policy against which it desires to make a claim. *In the event that this policy does not cover Goodyear's entire claim, then Goodyear may pursue coverage under other primary or excess insurance policies.*

(*Id.*, at p. 841, italics added.)

Of the remaining four cases initially following *Keene*, three were governed by Pennsylvania law. Again, finding no Pennsylvania law on the stacking issue, each merely followed *Keene's* anti-stacking approach without independent review. (See *Chicago Ins. Co. v. Pacific Indem. Co.* (E.D.Pa. 1982) 566 F.Supp. 954, 957; *ACandS, Inc. v. Aetna Cas. & Sur. Co.* (E.D.Pa. 1983) 576 F.Supp. 936, 941-942, affd. in part, revd. in part (3d Circ. 1985) 764 F.2d 968; and *Air Prods. & Chems. v. Hartford Accid. & Indem. Co.* (E.D.Pa. 1989) 707 F.Supp. 762, 774.) However, like Ohio, the Pennsylvania Supreme Court later rejected *Keene's* anti-stacking rule in *J.H. France Refractories Co. v. Allstate Ins. Co.* (Pa. 1993) 626 A.2d 502, stating:

> In order to accord J.H. France the coverage promised by the insurance policies, J.H. France should be free to select the policy or policies under which it is to be indemnified. [¶] . . . [¶] *When the policy limits of a given insurer are exhausted, J.H. France is entitled to seek indemnification from any of the remaining insurers which was on the risk during the development of the disease.* Any policy in effect during the period from exposure through manifestation must indemnify the insured until its coverage is exhausted. We believe

> this resolution of the allocation of liability issue to be most consistent with the multiple-trigger theory of liability.

(*Id.*, 626 A.2d at pp. 508-509, italics added.)

Similarly, in the fifth case, *Eli Lilly and Co. v. Home Ins. Co.* (D.D.C. 1984) 653 F.Supp. 1, the district court, while recognizing its duty to "make an educated prediction of how an Indiana court would interpret coverage language in Lilly's policies" (*id.*, at p. 8), blindly adhered to *Keene*'s anti-stacking rule (*id.*, at p. 10), only to have the Indiana Supreme Court later conclude that where environmental damage spans multiple policy periods, the policyholder is entitled to recover each of the policy limits. (*Allstate Ins. Co. v. Dana Corp.* (Ind. 2001) 759 N.E.2d 1049, 1060-1061 ["If contamination caused a covered occurrence in the 1978 policy period, and continued causing damage in the 1979 policy period, that contamination would trigger both policies. [] . . . We agree . . . that Dana may elect to seek indemnity from any or all of the policies at risk as to any single occurrence"].)

In addition to the Supreme Courts of Pennsylvania, Ohio and Indiana, courts in Louisiana, Wisconsin, West Virginia, Washington and Maryland also have permitted policyholders to combine or stack the limits of multiple successive policies in long-term damage cases. (See, e.g., *Cole v. Celotex Corp.* (La. 1992) 599 So. 2d 1058, 1077-1080 [stacking permitted in long-term asbestos injury case]; *Society Ins. v. Town of Franklin* (Wis.App. 2000) 607 N.W.2d 342, 345-347 [stacking allowed in long-term environmental damage case; both the policy language and case law from Wisconsin and other jurisdictions supports stacking]; *Auber v. Jellen* (W.Va. 1996) 469 S.E.2d 104, 111-112 [policyholder entitled to stack two successive medical malpractice policies despite anti-stacking clause, which was ambiguous]; *American Nat'l Fire v. B & L Trucking*

(Wash. 1998) 951 P.2d 250, 256-257 [stacking permitted for environmental damage; "once a policy is triggered, the policy language requires 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"]; *United Servs. Auto. Assn. v. Riley* (Md. 2006) 899 A.2d 819, 832-835 [four policies were properly stacked for long-term exposure to lead-based paint; "successive policy limits may be cumulatively applied to a single loss, where the policies do not clearly provide otherwise"].)

As the Insurers note, in addition to *Keene*, some courts have rejected stacking of successive policies. (OB at pp. 44-45, 53.) In *Great Lakes Dredge & Dock Co. v. City of Chicago* (7th Cir. 2001) 260 F.3d 789, 793-794, a federal circuit court predicted the Illinois Supreme Court would hold that, where a single occurrence causes damage over multiple policy periods, the policyholder would be limited to only a single policy's "per occurrence" limit. (The Illinois Supreme Court has not yet addressed the issue.) The Insurers also cited three cases involving claims-made coverage for medical malpractice in which the courts did not allow stacking of successive policy limits for a single claim. (See *American Physicians, supra*, (Tex. 1994) 876 S.W.2d at pp. 853-855; *Gibbs v. Arnovit* (Mich. Ct. App. 1990) 452 N.W.2d 839, 840-841 and *Zipkin v. Freeman* (Mo. 1968) 437 S.W.2d 753, 763-764.) However, none of these cases indicated that the insurers had promised to pay "all sums" of the policyholder's liability, nor did they consider the impact of "all sums" coverage.

Finally, the insurers cite *Sybron Transition Corp. v. Security Ins. of Hartford* (7th Cir. 2001) 258 F.3d 595 as rejecting stacking. However, as the court of appeal below noted, the parties in *Sybron* agreed

that, under New York law, the successive insurers' liability had to be prorated based on time on the risk. As the court below observed, "[a]t most, *Sybron* stands for the banal proposition that stacking is not allowed in a pro rata jurisdiction. This sheds no light on the question before us – whether stacking is allowed in an all-sums jurisdiction." (*State v. Continental, supra*, 170 Cal.App.4th at p. 180, fn. 5.)

In sum, the acceptance of "stacking" by courts across this country is fully consistent with a policyholder's right to combine the limits of multiple liability policies, if necessary, to achieve full indemnity. Moreover, several states have specifically held that stacking is permissible when long-term damage is covered by policies issued in multiple policy periods. The State has demonstrated that a focus on the policy language and California law will lead this Court to conclude a policyholder is entitled to stack multiple policy limits; also, stacking is amply supported by the decisions in other states as well.

6. Stacking Would Be In Issue Even If Coverage Were Limited to "All Sums" of Liability for Property Damage During the Policy Period.

Finally, the Insurers assert that if this Court reverses the Court of Appeal's "all sums" decision and holds that each insurer is only obligated to pay "all sums" of the State's liability for property damage during its policy period, then the "stacking issue" would be moot and the Court need not address it. (OB at p. 3.)

However, not only would stacking apply in that instance, the Insurers' ultimate liability would be unchanged. As discussed *supra* at pages 33-35, under long-standing principles of joint and several liability applicable to CERCLA and common-law torts, environmental property

damage in any one policy period would render the State jointly and severally liable for the entire costs of remediating the contamination.

Thus, even if the Insurers' "all sums" argument were valid (which it is not), each Insurer, having agreed to pay "all sums" of the State's liability for damages because of property damage during its policy period, nevertheless would remain obligated to pay "all sums" of the State's joint and several liability for the entire cleanup costs, up to its policy limits. (See, e.g., *State v. Allstate*, *supra*, 45 Cal.4th at pp. 1031-1032.) Because all of the State's Insurers made that promise, the State still would be entitled to full coverage under each of their policies, up to their combined (or "stacked") policy limits.

VI. CONCLUSION

Writ large, the Insurers' argument is a plea for this Court to rescue them from the plain language of the policies which they sold, for which they collected premiums over many years and through several renewals, hoping never to pay substantial claims. Now that such claims have arisen, their post-loss underwriting regret should not substitute for the transfer of risk to which both sides freely agreed at the outset.

The Insurers first argue that this court and lesser courts have erred interpreting the standard "all sums" language common to comprehensive general liability policies to mean what it says, and they boldly offer as an alternative a "pro rata" form of allocation which is alien to the jurisprudence of this state and has proven unworkable when adopted elsewhere. As a fallback, Insurers argue that in the event this Court is unwilling to depart from longstanding precedent concerning all sums, it should adopt an anti-stacking rule as a necessary and corrective anodyne.

Both of the Insurers' arguments would require this Court to rewrite their policies. The invitation to do so is implied in the former and candidly naked in the latter.

Yet as noted above, this Court does not rewrite insurance policies to reallocate risk; hindsight, however rueful, is no substitute for the original bargain. "The pertinent policies provide what they provide" and the parties were "free to contract as they pleased". (*Aerojet*, *supra*, 17 Cal.4th at pp. 75-76.)

The Insurers' argument for pro-rata allocation perverts the contractual meaning of "all sums"; this Court should affirm that they should pay "all sums" of a policyholder's liability, as promised. Likewise, the Insurers should be required to pay the full limits of each applicable policy for continuing harm, as contemplated in the policy language. The Insurers charged and collected a separate premium for each policy sold in successive policy periods, and the Court of Appeal correctly concluded that absent any express provision to the contrary, the State is entitled to recover the full limit of coverage separately promised in each triggered policy. Such a result is no more nor no less than parties' bargain.

Accordingly, for all the reasons stated, the State respectfully urges this Court to affirm the Court of Appeal by holding (1) that each Insurer with a policy in effect while property damage occurred must fulfill its promise to pay "all sums" of the policyholder's liability up to each separate policy's full limit, and (2) that the State is entitled to indemnity up to the combined limits of all policies in effect while property damage continued.

DATED: June 5, 2009

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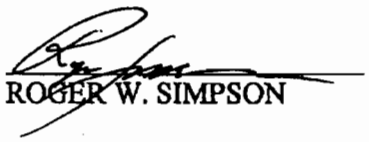
By 
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STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

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 June 5, 2009, I served the foregoing **STATE OF CALIFORNIA'S ANSWER BRIEF ON THE MERITS** on the interested parties in this action by placing a true copy thereof, enclosed in a sealed envelope, addressed as follows:

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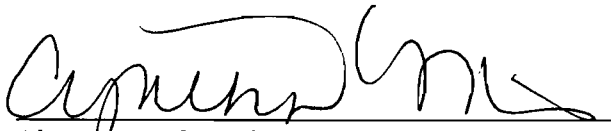

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