MUSICK PEELER

Insurance Notes

May 2013

## In This Issue



## Insurance Coverage Practice Group


Steven T. Adams
Alex H. Aharonian
Joelle A. Berle
Teresa Cho
Nathan D. Clark
R. Joseph De Briyn
Erin M. Donovan
Steven J. Elie
Susan J. Field
Stephen M. Green
Gilbert D. Jensen
Adam L. Johnson
Jennifer C. Kalvestran
Michael Klein
Jennifer M. Kokes
LouCinda Laughlin
Kathy K. Lee
Wayne B. Littlefield
Scott L. Macdonald
Lynn A. O'Leary
Cheryl A. Orr
Dana L. Stenvick
Lawrence A. Tabb
David A. Tartaglio
Adam M. Weg
Chad A. Westfall




# Court Finds That Policy Language Prohibits "Stacking" And Limits Primary Insurer's Liability To A Single Per Occurrence Limit

*By Erin M. Donovan*

On April 8, 2013, the California Court of Appeal issued its opinion in *Kaiser Cement & Gypsum Corporation v. Insurance Company of the State of Pennsylvania*, 215 Cal.App.4th 210 (2013), reconsidering its prior rulings regarding horizontal exhaustion and "stacking" of primary policy limits in *Kaiser Cement & Gypsum Corporation v. Insurance Company of the State of Pennsylvania,* 196 Cal.App.4th 140 (2011) (*Kaiser Cement*) in light of the California Supreme Court's decision in *State of California v. Continental Ins. Co.*, 55 Cal.4th 186 (2012) (*State of California*). Although the Court gave lip service to affirming the rules of "horizontal exhaustion" and "stacking" in continuing injury cases, the Court concluded that the primary insurer was not obligated to pay multiple primary limits under the language of its policy.

Between 1947 and 1987, Kaiser Cement & Gypsum Corporation purchased primary liability policies from four insurers, including Truck Insurance Exchange. Truck issued consecutive primary policies from 1964 to 1983 with policy limits totaling $8.3 million for those nineteen years. Some of the Truck policies lacked aggregates. Kaiser also purchased excess insurance policies during these same years.

By 2004, more than 24,000 claimants had filed products liability suits against Kaiser alleging they had suffered bodily injury as a result of their exposure to Kaiser's asbestos-containing products. For purposes of this litigation, Kaiser selected the Truck primary policy in effect in 1974 (the 1974 primary policy), which had a $500,000 per occurrence limit and no aggregate limit, to respond initially to all claims that alleged asbestos exposure in that year. Thus, the issue in this case became which policies were responsible to indemnify Kaiser for asbestos claims that exceeded the 1974 primary policy's $500,000 per occurrence limit – the other Truck primary policies (and other primary insurers) or the first layer excess policy over the 1974 primary policy issued by Insurance Company of the State of California (ICSOP). Essentially, the question before the Court was: Was the insured required to "stack" the limits of its primary insurance before any excess insurer had a duty to indemnify the insured?

In its earlier opinion in June 2011, the Court of Appeal held that Truck's maximum liability for an asbestos bodily injury claim was a single policy limit of $500,000 per occurrence. Thus, the Court of Appeal decided that once Truck contributed $500,000 per occurrence, its obligation to Kaiser ceased and the limits of the other primary policies issued by Truck were not "stacked." ICSOP and Kaiser petitioned the Supreme Court to review that opinion. The Supreme Court granted the petition, but deferred decision pending its disposition of another coverage suit brought by the State of California over the Stringfellow Acid Pits.

On September 19, 2012, the Supreme Court issued that decision, as modified, in *State of California v. Continental Ins. Co.*, 55 Cal.4th 186 (2012). The Supreme Court held that the "all

*(Continued on page 2)*

(Continued from page 1)

sums" language in CGL policies' insuring agreements did not limit indemnity in continuous damage cases to damage that took place during the policy period. Rather, each policy was required to pay for the entire damage, up to its policy limits, if any of the continuous damage took place during the policy period. The Court further concluded that where the limit of one policy was insufficient to cover the entire damage, the insured was permitted to "stack" other policies and recover up to the limits of those policies as well (the all-sums-with-stacking rule), unless the policies had anti-stacking language.

The Supreme Court then remanded the *Kaiser Cement* case with directions to reconsider it in light of the *State of California* decision. On remand, Kaiser and Truck argued that ICSOP's first-level excess policy issued in 1974 (the 1974 excess policy) was responsible for claims over the $500,000 per occurrence limit of the 1974 primary policy.[1] ICSOP countered that all primary insurance must first be exhausted and that the limits of those policies must be "stacked" before any excess insurer had a duty to indemnify Kaiser for asbestos bodily injury claims.

As in its prior decision, the Court of Appeal acknowledged the general rule of "horizontal exhaustion," holding that all available and collectible primary insurance coverage in effect during the continuous injury must be exhausted before the ICSOP's 1974 excess policy attached.

Then, the Court of Appeal turned to the issue of "stacking" and addressed which of the other nineteen years of primary policies issued by Truck must be exhausted. Following the Supreme Court's instruction in *State of California* that the starting point for any "stacking" analysis is the relevant policy language, the Court of Appeal noted in the 1974 primary policy, Truck agreed "[t]o pay on behalf of the insured *all sums* which the insured shall become obligated to pay, as damages . . . because of . . . personal injury, sickness, disease, including death [and] injury to or destruction of property." [Emphasis added.] However, the "limit of liability" section of the policy limited Truck's liability for personal injury to $500,000 "*Per Occurrence*." The policy also stated under "Policy Period, Territory, Limits" that:

> The limit of liability stated in this policy as applicable "per occurrence" is the limit of liability of the company's liability for each occurrence.
>
> There is no limit to the number of occurrences for which claims may be made hereunder, *the limit of the Company's liability as respects any occurrence involving one or combination of the hazards or perils insured against shall not exceed the per occurrence limit designated in the Declarations*. [Italics in original.]

Based on the language, which is similar to that present in many primary policies, the Court of Appeal held that Truck's *liability* was limited to the $500,000 per occurrence limit of that single policy, and thus, Kaiser could not "stack" the liability limits of Truck's primary policies.

The Court observed that the language in the 1974 Truck primary policy was "facially inconsistent with permitting Kaiser to recover from Truck more than the occurrence limit for a single occurrence" and distinguished it from the language that resulted in the all-sums-with-stacking holding in *State of California*. The Court also noted that the 1974 primary policy did not say that the per occurrence limit is the limit of the company's *annual* liability for any occurrence or that the per occurrence limit is the limit of the company's liability *under the policy* as in *State of California*. The Court observed that "[r]ather, it says that the per occurrence limit is the limit of *the company's liability*." [Italics in original.] Thus, the Court concluded: "We presume, as we must, that the parties intended this language to mean what it plainly says – that for any single occurrence, Truck is liable up to the per occurrence limit and no more."

---

[1] Since Truck's primary policies had deductibles per occurrence and ICSOP's excess policies had no deductibles, Kaiser aligned with Truck and argued that ICSOP was responsible for the excess-of-limit claims.

(Continued on page 3)

(Continued from page 2)

In so holding, the Court rejected ICSOP's argument that this language was "standard policy language" that was interpreted in *State of California,* noting that the CGL policy at issue in *State of California* referred to the insurer's liability "under this policy." The Court explained that the "problem with [ICSOP's argument] is that [*State of California*] did not hold that all standard policy language permits stacking – it simply held that the standard policy language at issue permitted stacking." The Court also rejected ICSOP's argument that the language of the other Truck primary policies should be considered because, according to the Court of Appeal, ICSOP failed to raise this argument in the trial court or in its appellate briefs.

Accordingly, the Court remanded the matter to the trial court to determine (1) whether there are triable issues of fact regarding the exhaustion of primary policies issued by insurers other than Truck; (2) if not exhausted, whether those policies would "stack"[2]; (3) whether ICSOP's duty to indemnify Kaiser had attached; and (4) whether ICSOP had breached its insurance contracts with Kaiser.

Considering that the Court of Appeal reached a decision that was in substance identical to its decision before *State of California* and the Supreme Court's direction that it reconsider its prior decision, it seems likely that ICSOP will petition the Supreme Court for review of this decision on the ground that the Court of Appeal's ruling is contrary to the Supreme Court's decision in *State of California* and the all-sums-with-stacking rule. ISCOP has already filed a Petition for Rehearing requesting modification of certain inaccuracies in the Court's ruling. It is unclear whether ICSOP will be successful with either petition, as the Court of Appeal commented in its opinion that ICSOP had waived certain arguments and limited its holding to the language of the Truck 1974 primary policy. Nonetheless, it seems we have not heard the last word on the issues raised by *Kaiser Cement*.

---

## Vacancy Exclusion Barred Coverage For Vandalism Claim; Insurance Broker's Duty Was To Procure Insurance Requested By Client, Not What May Be Required By Lender

*By Steven T. Adams*

In *Travelers Property Casualty Company of America/Koram Insurance Center, Inc. v. Superior Court (Braum)* __ Cal.Rptr.3d __, 2013 WL 1638157 (2013), an investor (Braum) in the development of a 13-unit condominium complex sued the developer's insurer (Travelers) and insurance broker (Koram) for breach of contract and professional negligence, respectively, after the vandalism claim it made under the developer's policy was denied.

To start the project, the developer had obtained a construction loan from a bank, which required the developer to maintain builder's risk insurance on the property and to identify the bank and its successors and assigns as loss payees on the policy. The developer, with the help of its broker, obtained a construction policy. When the project was near completion, the developer defaulted on the construction loan. The developer formed a homeowner's association and represented to its broker that most of the condominium units had been sold (which was untrue). Based on that representation, the broker proposed replacing the builder's risk policy with a condominium policy issued to the homeowners association. The developer agreed, and the broker obtained from Travelers a condominium policy for the homeowners association. The investor (plaintiff) purchased the developer's loan from the bank, becoming the bank's successor and a loss payee.

---

[2] The Court of Appeal acknowledged that it did not consider whether Kaiser may stack the 1974 Truck primary policy and the policies issued by Kaiser's other insurers.

(Continued on page 4)

*(Continued from page 3)*

Shortly thereafter, the building was allegedly vandalized, giving rise to the investor's claim to Travelers under the condominium policy. Travelers denied the claim, in part, because the building had never been completed or occupied (as had been represented by the insured) and was therefore subject to the policy's "vacancy exclusion." The investor sued Travelers. Travelers moved for summary judgment. The trial court denied the motion. Travelers appealed.

The Court of Appeal reversed, finding: (1) the critical 60-day vacancy period plainly applied to bar coverage; and (2) the vacancy period need not have begun after inception of the policy. The Court emphasized the fact that the building was never completed and a certificate of occupancy was never issued.

As against the broker, the investor claimed that he was a successor to the bank and the broker thus owed the investor a duty to maintain insurance on the property that would have covered the vandalism loss. The Court of Appeal rejected the claim, noting that the broker obtained the insurance sought by its clients. The Court observed that "the broker owed no duty to *the investor* to provide any particular type of coverage to *the developer and the homeowners association*, its clients. If the developer breached its contract with the bank (and its assignee) by failing to maintain builder's risk insurance, the remedy of the investor, if any, is against the developer."

---

MUSICK PEELER

**Musick, Peeler & Garrett LLP**
One Wilshire Boulevard
624 S. Grand Avenue, Suite 2000
Los Angeles, California 90017

Phone: (213) 629-7600
Fax: (213) 624-1376
www.musickpeeler.com