Case Alert

California Federal Court Allows Policy Stacking to Cover Continuous Injury

The Eastern District of California recently decided that California law supports combining the limits of consecutive policies if the occurrence is a continuous injury spanning consecutive policy years. This practice is referred to as "stacking." Stacking allows a policyholder, if there is a covered injury spanning the course of multiple consecutive policy years, to stack policy limits to create one large policy limit. Many jurisdictions look unfavorably at the practice, opting to cap the policyholder at one policy limit instead.

In *Atain Specialty Ins. Co. v. Sierra Pacific Management Co.,*[1] the underlying suit resulted from a woman living in an apartment complex where pigeons had roosted around the HVAC unit on the roof. This caused miniscule feather and fecal particulate to enter the HVAC system. After several years of exposure, she was diagnosed with "pigeon breeder's disease," a hypersensitivity pneumonitis associated with the inhalation of pigeon feathers and droppings.

The underlying plaintiff sued the building's owner (insured by California Capital Ins. Co.) and management company (insured by Atain Specialty Ins. Co.). California Capital settled the suit for $1.9M on behalf of both the owner and the management company and then sought contribution from Atain.

There were two issues to be decided in the case. First, the court looked at whether the California Capital policies in force during the timeframe in question could be stacked, such that the policyholder was entitled to the limits of every year implicated during the course of the continuous injury. Second, the court considered the effect of a clause purporting to make the Atain policy excess to other insurance available for claims arising out of the management of property.

Stacking

The court explained that:

> [c]ontinuous injury cases like [the underlying case] often involve a single occurrence that stretches across multiple policy periods. In those cases, per-occurrence policy limits sometimes "stop[] short of satisfying the coverage responsibilities of the policies" and leave the insured vastly under-protected. Policy limits may be '"stacked" to avoid that outcome. In this context, stacking means combining policy limits of each policy period to "form one giant 'uber-policy with a coverage limit equal to the sum of all purchased insurance policies.'" [2]

Additionally, the court noted that "California law favors stacking in continuous-injury cases," that "standard policy language permits policies to be stacked," and that "a pro-stacking rule vindicates the parties' reasonable expectations regarding indemnification and liability."

Although the court acknowledged that insurers can avoid stacking by including clear anti-stacking language in their policies, it was not persuaded by California Capital's contention that it had done so. The policy stated that "the most we will pay for the sum of all damages because of all …. 'Bodily injury' …. is the liability and medical expenses limit shown in the declarations." While California Capital argued that this meant it did not need to pay more than a single policy limit, as shown in the declarations, the court pointed out that "[i]n each policy, that section also states 'the limits of this policy apply separately to each consecutive annual period and to any remaining period of less than 12 months.'"

Ultimately, the court determined that "each policy refers to its per-occurrence limit on an annual basis …. That language makes plain that the policy limits 'apply separately' to each policy period. That is precisely the point of stacking. Even assuming the policies are ambiguous, the [policyholders] prevail since, 'provisions which purport to exclude coverage or substantially limit liability must be set forth in plain, clear, and conspicuous language.' If the policies do not clearly allow stacking, neither do they clearly prohibit it." [3]

Excess Clauses

The court also considered whether a provision in the Atain policy operated to make the Atain policy excess to the California Capital policy. Atain's policy contained a Real Estate Property Managed endorsement, which stated that:

> [w]ith respect to your liability arising out of your management of property for which you are acting as real estate manager, this insurance is excess over any other valid and collectible insurance available to you.

Atain argued that this language made its coverage excess to California Capital's. California Capital relied on its own excess clause for the position that the conflicting clauses should be ignored and the loss prorated between the policies. Atain cited *Hartford Cas. Ins. Co. v. Travelers Indem. Co.*[4] for the proposition that the "courts do not override the policy language of excess clauses when they are narrowly drafted" and that "excess clauses do not necessarily conflict simply because they appear initially to be at odds."

The court explained that "the Real Estate Property Managed endorsement is an excess clause in the spirit of *Hartford*. It is not tantamount to an escape clause as California Capital asserts. Rather, it converts Atain's coverage to excess in one particular scenario, when liability arises out of [the management company]'s property management activities." The court found that the "policies do not actually conflict. By their terms, both the Atain policies and the California Capital policies are primary, unless a predicate condition converts the policies to excess. In the Atain policies, that predicate condition is a set of factual circumstances leading the insured to face a particular type of liability: 'liability arising out of [the management company]'s management of property. In the California Capital policies, that predicate condition is the availability of 'other insurance covering the same loss or damage.'" Here, the predicate condition of the Atain policy was met, converting it to excess; therefore, the predicate condition for the California Capital policy could not be met, because the Atain policy was no longer available at the primary level.

Conclusion

Stacking is a very pro-policyholder practice that is becoming increasingly infrequent, especially as insurers tighten down on anti-stacking language in their policies. It is an especially valuable doctrine in environmental insurance cases, where pollution can cause continuous injuries that sometimes span many decades.

The second holding in this case is also significant for policyholders. Excess clauses are frequently litigated in the context of additional insured coverage, and the application of excess clauses is an unsettled area of California coverage law. SDV is monitoring another decision we expect to come soon from the California Supreme Court regarding similar excess clause issues certified by the Second Circuit, and will provide an update on the impact of that case once it is decided.

For more information about this case and how it affects policyholders, contact William S. Bennett at wsb@sdvlaw.com or 203-287-2136.

1. No. 2:14-cv-00609-TLN-DB (E.D. Cal. Nov. 4, 2016).
2. Citing State of Cal. v. Cont'l Ins. Co., 55 Cal. App. 4th 186 (2012).
3. Citing Thompson v. Occidental Life Ins. Co., 9 Cal. 3d 904 (1973).
4. 110 Cal. App. 4th 710 (2003).

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