



Policyholders Score Major Environmental Coverage Victory From California Supreme Court

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On March 9, 2009, the California Supreme Court unanimously lowered the boom on several arguments that liability insurers had advanced to deny insurance to California policyholders. Although the case arises from the State's efforts to obtain insurance coverage for \$500 million of cleanup costs resulting at the infamous Stringfellow acid pits, the Court's ruling in *State of California v. Allstate Insurance Company* will have applicability to policyholders and environmental releases throughout the state.

Most importantly, the Supreme Court decided that a policyholder does not forfeit coverage where an "indivisible" environmental injury results from both covered and uncovered causes. Reversing a lower court precedent that had imposed onerous proof burdens on policyholders, the court held that the insurer must indemnify the insured for **all** of the resultant damage, so long as the policyholder shows that "an appreciable amount" of damage was caused by a covered event. Therefore, if an appreciable amount of environmental contamination was caused by a covered "sudden and accidental" spill (thus triggering coverage under the qualified pollution exclusion); the insurer must pay for the entire clean up, even if some of the harm resulted from uncovered gradual or intentional releases.

This outcome is based on tort, not contract, concepts—because the insurance policy indemnifies the insured for tort damages. To limit its indemnity obligation, the insurer must bear the burden to prove that some portion of the damage is attributable to uncovered (and thus, uninsured) events.

A second important holding involved the question of damage that is "intended or expected," which is excluded from insurance coverage. In this case an unexpected 50-year series of storms in 1968 caused an overflow of pollutants from the acid pits—which was held to be accidental (more on that below). The State instituted remedial measures. But, in 1978, another 50-year storm developed and the State **deliberately**

released waste waters to avoid a greater calamity. The insurers contended that the State's conduct was intentional as a matter of law and thus the release was uninsured. The Supreme Court rejected that position, finding that an issue of fact was raised.

The court cited a famous 1921 New York case to hold that "just as 'danger invites rescue,' so the evident threat of property damage (arising by hypothesis from a covered cause) leads naturally to acts, whether by the insured or others, to prevent or mitigate the damage." Such preventive measures are salutary, said the Court, and yield benefit even to the insurers, for they would be liable for greater damages if the preventive measures had not been taken. This rule should apply regardless of whether the would-be preventive measures were successful or not. Moreover, because preventive measures in the environmental context can be extremely expensive; this ruling will provide substantial protection to policyholders who take measures to ameliorate their exposure to environmental claims.

The Court's third major holding clarified that the pollution exclusion is "ambiguous as to its exact scope of application." This issue arose because the insurers contended that the triggering event was *the placement* of the waste in the Stringfellow site which proved to be permeable and insecure, rather than its release in heavy storms many years later during the insurers' coverage term. The court ruled that placing the substances into a confinement, "imperfect though it was," did not itself cause the spreading of chemical wastes. Rather, the operative releases—and thus the "occurrences" that triggered coverage—were the subsequent discharges from the ponds, due to separate, accidental causes. If the insurers had been successful in their argument that the placement was the critical event, that would surely have been an intentional, and thus excluded, set of events.

For California policyholders, and especially those facing significant environmental liabilities, the court's decision provides a means to obtain policy benefits to fund cleanup activities.