

California Insurance Law Coverage Newsletter for Attorneys

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Concurrent causation relating to CGL policies; 2009 Supreme Court Opinion

In general: Third party liability policies; concurrent causation

The insured under a third party liability policy has the burden of proving a covered act or event was a substantial cause of the injury or property damage for which the insured is liable, and this burden extends to showing the causal act or event was within an exception to a policy exclusion when the insurer has shown the exclusion applicable. In addition, when the damages for which the insured is liable relate to distinct, divisible injuries or items of property damage, the insured has the burden of proving which of those are attributable to causes within the exclusion's exception, for only the corresponding portion of the damages constitutes "sums which the Insured shall become obligated to pay ... for damages ... because of" nonexcluded property damage. [*State of California v. Allstate Insurance* (2009) 45 Cal.4th 1008, 1036-1037, 90 Cal.Rptr.3d 1]

When damages relate to distinct, divisible injuries

If an insured proves that multiple acts or events have concurred in causing a single injury or an indivisible amount of property damage, such that one or more of the covered causes would have rendered the insured liable in tort for the entirety of the damages, the insured's inability to allocate the damages by cause does not excuse the insurer from its duty to indemnify. The insurer, of course, may counter the insured's evidence of indivisibility with its own evidence that the damages are divisible and that only a limited portion of them resulted from covered events. [*State of California v. Allstate*

Insurance (2009) 45 Cal.4th 1008, 1036-1037, 90 Cal.Rptr.3d 1, (State released contaminated water; pollution exclusion provided coverage for sudden and accidental escaping of contaminants; *State could not separate out the cost of remediating sudden and accidental releases from gradual seepage of pollution*; summary judgment for insurers REVERSED.)]

OBSERVATION: *State of California v. Allstate Insurance* disapproved of *Golden Eagle Refinery Co. v. Associated Internat. Ins. Co.* (2001) 85 Cal.App.4th 1300, 102 Cal.Rptr.2d 834 and *Lockheed Martin Corp. v. Continental Ins. Co.* (2005) 134 Cal.App.4th 187, 35 Cal.Rptr.3d 799. See *State v. Allstate Insurance*, supra, 45 Cal.4th 1008, 1036.

OBSERVATION: The above rule does not apply in cases in which it is determined in the third party action that the insured's covered actions subject the insured to liability for the whole of the damages such as where there are multiple tortfeasors including the insured who are jointly and severally liable. [*State of California v. Allstate Insurance* (2009) 45 Cal.4th 1008, 1037, fn. 13]

When damages are indivisible; liability for entire damage

Under California tort law, a set of injuries for which damages are indivisible is treated the same as a single injury. The tortfeasor is liable for the entirety of the damages. [*State of California v. Allstate Insurance* (2009) 45 Cal.4th 1008, 1033-1034, 90 Cal.Rptr.3d 1]

Rule applies to third party liability insurance

When an insurer promises to indemnify the insured for 'all sums' (see this section, supra) which the insured shall become obligated to pay ... for damages ... because of damage caused to property owned by a third party, the right to coverage in the third party liability insurance context draws on traditional tort concepts of fault, proximate cause and duty. [*State of California v. Allstate Insurance* (2009) 45 Cal.4th 1008, 1035, 90 Cal.Rptr.3d 1, discussing *Garvey v. State Farm* (1989) 48 Cal.3d 395, 407, 257 Cal.Rptr. 292] When damages cannot be apportioned between two tortfeasors or between tortious and nontortious causes, a tortfeasor whose acts have been a substantial factor in causing the damages is legally responsible for the whole. [*State of California v. Allstate Insurance* (2009) 45 Cal.4th 1008, 1036, 90 Cal.Rptr.3d 1, disapproving *Golden Eagle Refinery Co. v. Associated Internat. Ins.* (2001) 85 Cal.App.4th 1300, 102 Cal.Rptr.2d 834]

OBSERVATION: Since 1973 when the Supreme court announced its opinion in *State Farm Mut. v. Partridge* (1973) 10 Cal.3d 94, based upon a unique set of facts (combination of discharging a weapon during use of an automobile) the liability insurers have attempted relentlessly to either marginalize *Partridge* or limit its scope. The insurers thought they were successful when the Court of Appeal rendered its opinion in *Golden Eagle Refinery v. Associated Internat. Ins.* (2001) 85 Cal.App.4th 1300, 102 Cal.Rptr.2d 834. To the shock and dismay of liability insurers *State of California v. Allstate* affirmed *State Farm v. Partridge* and disapproved *Golden Eagle Refinery v. Associated Internat. Ins.*, and its companion case *Lockheed Martin v. Continental Ins.* (2005) 134 Cal.App.4th 187. *State of California*, supra, 45 Cal.4th 1008, 1036.

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Watch for the upcoming announcement for a unique seminar entitled: **CALIFORNIA LIABILITY INSURANCE LAW - PARTICIPATION SEMINAR.** 6 hour MCLE seminar date projected to be in January 2010

California's first liability insurance coverage PARTICIPATION seminar where the seminar discussions will be based upon insurance questions submitted in advance by enrollees and relate to enrollee's pending case in the trial court or on appeal.

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Each seminar enrollee will be provided with a scholarly legal syllabus relating to a liability insurance policy

The 2009 Two-Volume Edition of CALIFORNIA INSURANCE LAW DICTIONARY AND DESK REFERENCE (15th Edition of the Dictionary - 4000 pages) authored by Attorney Cornblum is now available through Thomson West. To order this text call Thomson West at 1-800-344-5008.