Supreme Court No. S170560

Supreme Court Copy

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

STATE OF CALIFORNIA,
Plaintiff, Cross-Defendant and Appellant

vs.

CONTINENTAL INSURANCE COMPANY et al.,
Defendants, Cross-Complainants and Appellants;

EMPLOYERS INSURANCE OF WAUSAU,
Defendant, Cross-Complainant and Respondent

REPLY IN SUPPORT OF PETITION FOR REVIEW

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

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TO THE HONORABLE CHIEF JUSTICE RONALD M. GEORGE AND THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT

Petitioners Continental Insurance Company as successor in interest to the policy issued by Harbor Insurance Company and Continental Casualty for itself and as successor by merger to CNA Casualty Company of California, Yosemite Insurance Company, Employers Insurance of Wausau and Stonebridge Life Insurance Company (collectively "Insurers" or "Petitioners") hereby submit their reply in support of the Petition for Review and in response to the State of California's ("State") Answer to Petition.

In the Petition for Review, Insurers demonstrated that the two issues presented are appropriate for review under both prongs of Rules of Court 8.500(b)(1) since the review would settle important issues of law ("all sums" as applied in the indemnity context in continuing injury cases) and because the Court of Appeal opinion below directly conflicts with an opinion of another Court of Appeal, in *FMC Corporation v. Plaisted & Company*, 61 Cal.App.4th 1132 (1998) ("stacking"). The State's Answer to the Petition for Review, although arguing against review, in fact highlights why review here is necessary and proper.

I. THE STATE'S ANSWER DEMONSTRATES THAT THE APPLICATION OF THE "ALL SUMS" LANGUAGE FOR INDEMNITY PURPOSES IS AN IMPORTANT QUESTION OF LAW THAT IS UNSETTLED BY THE CALIFORNIA SUPREME COURT

The State acknowledges, as it must, that the issue presented to the Supreme Court in both *Montrose Chemical Corp. v. Admiral Insurance Company,* 10 Cal.4th 645 (1995) and *Aerojet-General Corp. v. Transport Indemnity Company,* 17 Cal.4th 38 (1997), was the duty to defend - - not the duty to indemnify. Answer at 4. Because those two cases were duty to defend cases, the issue of the application of "all sums" language in an indemnity-only situation, such as here, has never been fully briefed or presented to the Court for decision. "It is axiomatic, of course, that a decision does not stand for a proposition not considered by the court." *People v. Harris*, 47 Cal.3d 1047, 1071 (1989); *Agnew v. State Board of Equalization*, 21 Cal.4th 310, 332 (1999).

The obligations of an insurer with regard to the duty to indemnify are vastly different than the nature of an insurer's defense obligation. As a result, the all sums issue is subject to a different analysis in the indemnity context.

Moreover, as the State points out in its Answer at page 6, the State's insurance policies do not contain an obligation to defend. The State argues that since the policies in this case have no defense duty, the " 'all sums' language can only apply to the duty to indemnify." Answer at 6. But the fact that the State's

policies have no defense duty only bolsters the need for review by this Court. *Montrose* and *Aerojet* examined the duty to defend only. Here, the policies have no duty to defend. The application of "all sums" in an indemnity-only context is an important question of law that has not been settled by the Supreme Court. It merits review.

The State's Answer exemplifies in another way why a full briefing on the merits before the Supreme Court is necessary, rather than indirectly relying on the analysis in *Montrose* and *Aerojet* where the issue was very different. The State has responded to many of the Insurers' substantive arguments set forth in the Petition as to why "all sums" should be rejected. For instance, the State responded to the Insurers' discussion that the Court of Appeal in *Armstrong World Industries, Inc. v. Aetna Casualty & Surety Co.*, 45 Cal.App.4th 1 (1996) was based on an erroneous distinction between the "trigger" of coverage and the "scope" of coverage. The State also responded to the Insurers' discussion as to whether the "all sums" approach violates the proscription in *Montrose* against imposing joint and several liability on insurers in continuing injury cases. These are examples of arguments to be developed and presented to the Supreme Court so that the Court has a full opportunity to hear, consider and settle the question - - an opportunity that was never presented in the duty to defend context of *Montrose* and *Aerojet.*[1]

[1] The State also accuses the Insurers of misquoting the policy language. But the Insurers do not claim that all the policy language that supports the pro rata approach is located in one location in the policy. Instead, the Insurers explain that, as this Court has often held, policy provisions must be read together as a whole,

Furthermore, the State's Answer to the Petition cites to several intermediate appellate decisions in California relating to the application of the "all sums" language in an indemnity context as well as to cases from other jurisdictions (Answer at 14) which decided the issue differently than the many cases cited by Insurers in the Petition for hearing (Petition at 23 et seq.). The State's reference to such a large number of conflicting cases further highlights the rampant national debate of this issue across the country - - an issue the California Supreme Court has yet to directly address.

II. THE STATE'S ANSWER ALSO DEMONSTRATES THAT REVIEW IS NECESSARY TO SECURE UNIFORMITY OF DECISION IN THE FACE OF DIRECTLY CONFLICTING COURT OF APPEAL OPINIONS CONCERNING STACKING

The opinion of the Fourth District Court of Appeal below directly conflicts with the First District's opinion in *FMC Corporation v. Plaisted & Company*,

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each clause helping to interpret the other in harmony, giving effect to each part so as not to render any part redundant or surplusage. *Foster-Gardner, Inc. v. National Union Fire Insurance Company*, 18 Cal.4th 857, 868 (1998); Civil Code § 1641. Moreover, policies' definitions and limits sections and declarations page(s) are part of the policies' grant of coverage, whether or not they physically appear within the "insuring agreement." "[I]t is the function served by policy language, not the location of language in an insurance policy" that determines whether that language states a coverage requirement. *Aydin Corporation v. First State Insurance Company,* 18 Cal.4th 1183, 1191 (1998). When read together and in harmony, the full expression of the basic scope of coverage is to pay "all sums the insured shall become obligated to pay for legal liability for damages because of property damage during the policy period from an occurrence." That is, the policies do not specify that they will pay merely "all sums," but rather, all sums for damages because of property damage during the policy period.

supra, 61 Cal.App.4th 1132, as to whether "stacking" of excess policies in a continuing injury case is proper. The State acknowledges this direct conflict and that the Court of Appeal Opinion below directly criticized and rejected *FMC*'s analysis of the issue. Answer at 19-21. But the State's response to these diametrically opposed Court of Appeal opinions is that the "conflict with *FMC* is transitional and will likely resolve itself . . . ." *Id* at 21.

In the face of this direct conflict between two Courts of Appeal on an important issue which arises often, trial courts across the state need guidance from the Supreme Court. Otherwise, trial courts will be left to choose between the conflicting decisions. It is difficult to see how the conflict will resolve itself without this Court deciding the issue. That is why the Rules of Court direct that one of the bases for granting review is to secure uniformity of decision in the face of directly conflicting Court of Appeal opinions. Rules of Court 8.500(b)(1).

III. CONCLUSION

The State's Answer only illustrates why the two issues raised in the Petition warrant review. Both issues are unsettled and important questions that arise in virtually every case involving continuing or progressive injury. The national debate continues to rage. This Court's guidance will settle

these important issues for the California courts as well as the litigants.

Petitioners therefore respectfully request that review be granted.

DATED: March 16, 2009

Respectfully submitted,

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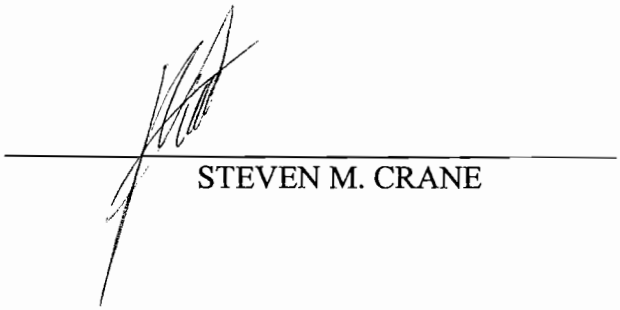
CERTIFICATION

Pursuant to California Rules of Court 8:504(d), I certify that this PETITION FOR REVIEW contains 1,071 words, not including the Tables of Contents and Authorities, attachments, the caption page, signature blocks or this Certification page.

Dated: March 16, 2009



STEVEN M. CRANE

PROOF OF SERVICE

STATE OF CALIFORNIA)
)ss
COUNTY OF LOS ANGELES)

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 515 S. Figueroa St., Suite 1500, Los Angeles, CA 90071.

On March 16, 2009, I served the foregoing document described as **REPLY IN SUPPORT OF PETITION FOR REVIEW** on the interested parties in this action by placing a copy thereof enclosed in a sealed envelope addressed as follows:

SEE ATTACHED SERVICE LIST

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☐ **(FEDERAL)** I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on March 16, 2009, at Los Angeles, California.

Sandy Gill
(Type or print name)

Sandy Gill
(Signature)

State of California v. Underwriters at Lloyds, London, etc., et al.
Court of Appeal - Case No. E041425
Riverside County Superior Court – Case No. 239784; consol. w/RIC 381555

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