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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 BRIEF ON THE MERITS

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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STATUTES

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

Petitioners Continental Insurance Company, Continental Casualty Company, Yosemite Insurance Company, Stonebridge Life Insurance Company and Employers Insurance of Wausau, (collectively "Insurers") hereby submit their Reply Brief on the Merits.

I. INTRODUCTION

The State's Answer Brief abandons the long-standing rules of contract construction and ignores the most basic and well-accepted analytical framework normally applicable.

The State urges the Court to accept the State's position on "all sums" by relying primarily on two arguments:

1. The property damage during the policy period requirement is not part of the insuring agreement and therefore does not relate to or impact the interpretation of the "all sums" language; and

2. The property damage during the policy period language merely "triggers" the policy, but does not affect the scope of coverage - - what the policy pays once triggered.

The State's arguments require reading the policy terms in isolation, not in harmony and not with each provision helping to interpret the other. The State's arguments render policy terms meaningless and rewrite the contracts. No court reasonably could say that there is indemnity coverage for the State's liability for

property damage that occurred before and after the policy period, given the policy language here, which plainly limits the basic scope of coverage to property damage occurring during the policy period. Yet, the State's "all sums" position yields that very result. Under the "all sums" approach, the Insurers become liable for property damage taking place when they were not on the risk - - in this case, for damages because of property damage that occurred ten years before the policies were issued and for damages for property damage that happened years and decades after the policies expired.

The sine qua non of these policies is the nexus between the trigger for coverage under the policies and what the policies pay - - the only reasonable interpretation is that "all sums" refers to the damages because of the property damage that occurred during the policy period. It simply makes no sense to conclude that a policy issued in 1970, triggered because of property damage at that time, would pay for damage because of property damage that happened 20 years later, or damages because of property damage that had already taken place ten years before. The language of the policies as a whole does not obligate the insurers to pay any and all sums regardless of the relevant policy period and regardless of when the property damage happened.

Moreover, stacking of limits is nothing more than a further torturing of the policy language. Stacking requires each policy to pay "all sums," so that each policy pays for every other policy's property damage - - exactly contrary to the basic premise and agreement in the policies that each policy only pays for

property damage that happens during the policy period. If the Court applies the policies as written, the issue of stacking never arises.

II. "ALL SUMS" ARGUMENTS

A. The Policies Express The Complete Thought That They Only Pay All Sums Because Of Property Damage During The Policy Period

The State's main premise is that the insuring provisions do not limit the promise to pay to "all sums" solely for damage because of property damage during the policy period. The State claims that the "during the policy period" language does not appear in the insuring agreement and is not "logically or grammatically related to the 'all sums' language in the insuring agreement." (Answer Brief at 18.) The State's arguments for "all sums" flow from this fundamental premise. The premise is false.

The State ignores well-established rules of contract construction and California law. The policy language must be read in context, as a whole, with each clause helping to interpret the others, in harmony, giving effect to each part so as not to render any part redundant or surplusage. *Palmer v. Truck Insurance Exchange,* 21 Cal.4th 1109, 1115 (1999); *Foster-Gardner, Inc. v. National Union Fire Insurance Company*, 18 Cal.4th 857, 868 (1998); Civil Code § 1641. The State's argument conflicts with those rules of contract interpretation and depends on reading the policy provisions in isolation and in a disconnected way.

Here, the policies' declarations pages state that coverage for property damage liability is subject to a limit for "each occurrence." [*See, e.g.* 39AA 10172.] The limits of liability provisions provide that property damage liability is for ultimate net loss "each occurrence." [*See e.g.* 39AA 10175.] The policies define occurrence as an "accident or a continuous or repeated exposure to conditions which result in injury to persons or damage to property **during the policy period**… ."(Emphasis added.) [*e.g.* 39AA 10175.] The policy period provisions specify that the policies apply "only to occurrences which take place **during the policy period**." (Emphasis added.) [e.*g.* 39AA 10175.] The policy period provision is explicitly part of the insuring agreements. [*e.g. Id.*]

Thus, the policies pay "each occurrence." "Occurrence" is definitionally limited to "damage to property during the policy period." Additionally, the "occurrence" must "take place during the policy period." The policy only pays (as relevant here) for "damages…because of injury to or destruction of property." [*i.e.*, property damage.] *Id.* When the policies are read as a whole 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." Applying the well-established rules of contract construction, 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. The policies' declarations, definitions, limits of liability and policy period provisions form part of the basic scope of coverage and

are incorporated into the coverage agreement, whether or not they physically appear within the "insuring agreement."[1]

As the Court held previously, "it 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. *See Aydin Corporation v. First State Insurance Company,* 18 Cal.4th 1183, 1191 (1998) (holding that even language in an exclusion can state a requirement of coverage and fall within the insured's burden of proof); *Helfand v. National Union Fire Insurance Company*, 10 Cal.App.4th 869, 886-887 (1992) (holding that as a matter of proper contract interpretation, a policy's scope of coverage was determined by reading the limit of liability provisions together with the policy's insuring agreement); *Fidelity & Deposit Company of Maryland v. Charter Oak Insurance Company*, 66 Cal.App.4th 1080, 1086 (1998), *review denied*, (holding that a policy's declarations state part of the scope of coverage); *FMC Corporation v. Plaisted & Company*, 61 Cal.App.4th 1132, 1157, 1159 (1998) (policy's definition of occurrence in definitions section, not located in insuring agreement, stated part of policy's basic coverage requirements).

The State's proposition that "during the policy period" is not connected to "all sums" depends on reading each provision in isolation, reading each provision

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[1] The State essentially concedes this point by acknowledging that the "trigger" of coverage under the policies is property damage during the policy period, notwithstanding that the "during the policy period" requirement is not physically located in the insuring agreement.

out of context and not reading the policy as a whole with "each clause helping to interpret the other."[2]

B. The State's "Trigger versus Scope" Argument Ignores The Policy Language

The State claims that the "property damage during the policy period" requirement only applies to trigger the policy, but once triggered, the policy must pay all sums for all damage irrespective of whether the damage is because of property damage during the policy period. The State merely asserts the proposition without analysis, as do the cases it cites in support of its position; but in doing so it rewrites the contracts to say "insurers will pay all sums for damage

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[2] The State asserts that reading the policy language as insurers suggest (in harmony) would transform the policy into a "claims made policy." (Answer Brief at 33.) The assertion is preposterous. Insurers' point is that the policies are occurrence-based, and define occurrence to require property damage during the policy period, as part of the basic scope of coverage. Moreover, the State's reference to platitudes that ambiguous terms are construed in favor of coverage and uncertainty in the amount of liability is construed in favor of coverage (Answer Brief at 8) has no relevance here. There is no ambiguity or uncertainty. Applying the well-established rules of contract construction yields only one reasonable interpretation.

In any event, contrary to the State's assertion, (Answer Brief at 30) these policies were drafted by the State and its brokers, and thus, cannot be construed against insurers. [6AA 1672-1673.] *AIU Insurance Company v. Superior Court*, 51 Cal.3d 807, 823 (1990) ("where it is clear that an insurance policy was actually negotiated and jointly drafted, we need not go so far in protecting the insured from ambiguous or highly technical drafting."); *Garcia v. Truck Insurance Exchange*, 36 Cal.3d 426, 438 (1984) (contra-insurer rules are not applicable where the policy was negotiated by sophisticated insured enjoying substantial bargaining power vis-à-vis the insurer); *Fireman's Fund Insurance Company v. Fibreboard Corporation*, 182 Cal.App.3d 462, 467-468 (1986) (contra proferentem is unnecessary where "two large corporate entities, represented by specialized insurance brokers or risk managers, negotiated terms of the insurance contracts").

because of property damage that happens at any time if any damage happens during the policy period." Of course, that is not what the policies provide.

The State virtually ignores Insurers' discussion as to why the "trigger versus scope" position is fallacious. As Insurers explain, the State's view again ignores the basic rules of contract construction and artificially restricts the "during the policy period" requirement to "trigger" only. (See Opening Brief at 33-36.) The policy language, read as a whole, not in a strained way, plainly provides that the "during the policy period" requirement serves both to trigger the policy and define what the policy pays as to that property damage. Indeed, the property damage during the policy period requirement defines the essence of the policy. The policy pays for damages connected to the property damage that invokes the policy, not for damages for some other property damage - - not for property damage that does not implicate the policy. The State's position reads the "occurrence" definition and the policy period provision out of the policies.

Just last week, the Massachusetts Supreme Judicial Court unanimously rejected the "joint and several" approach as inconsistent with the policy language. The Court in *Boston Gas Company v. Century Indemnity Company*, __N.E.2d__, 2009, 2009 WL 218467 (Supreme Judicial Court No. 11246, July 24, 2009), answering questions certified to it by the First Circuit Court of Appeals, held that liability should be prorated over the period of continuous property damage. It determined that the "during the policy period" language limits the promise to pay:

> This [during the policy period] limitation makes sense: property damage during the policy period triggers the Century policies, which then respond by providing coverage for liability attributable to the amount of property damage occurring during the policy period.
>
> (2009 WL 218467 at 11.)

The Court rejected the insured's argument, finding that it "ignores a fundamental principle of insurance contract interpretation by placing undue emphasis" on one phrase:

> Boston Gas's reading of the policies overlooks the limitation that the phrase "during the policy period" places on the scope of coverage, See *id.* at 224 ('joint and several allocation is not consistent with the language of the policies providing indemnification for ["ultimate net loss"] … that resulted from an accident or occurrence "during the policy period" '), citing *Consolidated Edison Co. of N.Y. v. Allstate Ins. Co.*, 98 N.Y.2d 208, 222, 224 (2002) (policyholder's 'singular focus on "all sums" ' would read out policy's limitation of coverage to liability caused by occurrences happening during policy period).
>
> *Id.* at 12.

The broad significance of the policy period requirement is illustrated in *Cooper Companies, Inc. v. Transcontinental Insurance Company*, 31 Cal.App.4th 1094 (1995). In *Cooper*, the insured sought coverage for the breast implant-related liability of two entities acquired after the policy period, but involving

injury during the policy period. The policies provided coverage for entities "now existing or hereinafter acquired." There was no explicit limitation that the after-acquired entity be acquired during the policy period. The Court of Appeal observed that "construing a contract to confer a right in perpetuity is clearly disfavored." *Id.* at 1103. Applying the rules of contract construction and "common sense," the Court held that "the only reasonable interpretation of the policy...is one that extends coverage only for the activities of acquisitions made during the policy period." *Id.* at 1106. The Court relied on the general policy period requirement:

> [T]he insurance policies in question obviously contain a finite policy period. In these occurrence policies, this period serves both to circumscribe the time in which an insurable event may occur and to provide a time for auditing for purposes of fixing premiums. *Id.* at 1107.

The Court concluded that even in the absence of an explicit temporal limitation, "a reasonable insured would conclude that the language is limited by the policy period." *Id.* at 1108.

Similarly, the Court in *Armstrong World Industries, Inc. v. Aetna Casualty & Surety Company*, 45 Cal.App.4th 1, 79-80 (1996) reached the same conclusion. The Court in *Armstrong* emphasized that the well-recognized policy interpretation rules precluded reading the word "hereinafter" to mean any time in the indefinite future. The policy read as a whole required the word to be construed in

conjunction with the policy period, which "is an essential element of a liability insurance contract," because the liability policy "has a finite duration." *Id.* at 86.

Seen in this light, the State's position simply makes no sense. Why would anyone reasonably think that a policy whose basic function is to pay for property damage during the policy period, should pay for property damage that did not happen during the policy period - - the exact opposite of the policy's essential element? Why would anyone reasonably conclude that a policy in 1970 triggered by property damage in 1970 pays for property damage that did not happen until 20 years later? As the Massachusetts high court in *Boston Gas* put it:

> Further, we doubt that an objectively reasonable insured reading the relevant policy language would expect coverage for liability from property damage occurring outside the policy period. Read as a whole, neither Century policy expressly makes or implies a promise to pay one hundred percent of Boston Gas's liability for multi-year pollution damage occurring decades before or after the policy period. No reasonable policyholder could have expected that a single one-year policy would cover all losses caused by toxic industrial wastes released into the environment over the course of several decades. Any reasonable insured purchasing a series of occurrence-based policies would have understood that each policy covered it only for property damage occurring during the policy year. (2009 WL 218467 at 14.)

Yet, under "all sums" and the State's "trigger versus scope" position, an insurer would be liable for property damage that took place when it was not on the risk. But, if a 1970 policy is not triggered by property damage that happened in 1990, why would it pay for damage that takes place in 1990, just because some other damage happened in 1970? The "all sums" position improperly severs the essential connection between the property damage, the damages payable because of that property damage and the policy period limitation.

C. The State Has No Answer For Insurers' Point That "All Sums" In The Indemnity Context Is Contrary To Montrose's Proscription Against Joint And Several Liability

Insurers explained in their opening brief that *Montrose* had rejected the view that each insurer is jointly and severally liable where damage occurs over multiple policy periods. Insurers pointed out that the Court of Appeal below and *FMC* and *Armstrong* relied on the existence of insurers' contribution rights to avoid the fact that "all sums" was, in effect, joint and several liability.

Insurers described how theoretical contribution rights do not suffice to prevent joint and several liability where an insurer is required to pay "all sums" for damage occurring outside the policy period, since there are numerous situations as to which an insurer may not be able to obtain contribution. Examples include: deliberate decisions not to purchase insurance or to "self-insure," exhaustion of other insurers' limits, the presence of applicable exclusions in other insurers' policies and insolvency of other insurers. Each of these scenarios would leave the

insurer saddled with "all sums" liability responsible for property damage on a joint and several basis, contrary to *Montrose*.

The State's response is that "all sums" is not joint and several liability because each insurer is separately liable to pay only the full extent of liability under the terms of the contract. The State's position is circular. It starts with the false premise that each insurer must pay for property damage outside the policy period. Even the Court of Appeal concluded that "all sums" is, in effect, joint and several: Although the "all sums" approach is not "literally" joint and several liability, "[a]dmittedly, the outcome is much the same as if it were [.]" (Slip Op. at 18.) Neither the State, the Court of Appeal here, nor *Armstrong* or *FMC*, addresses the Insurers' point - - whether an insurer is jointly and severally liable contrary to *Montrose* should not depend on whether the insured purchased insurance in other periods, whether it was prescient in selecting insurers who are solvent or the policy terms of such other policies. And here, the impact is significant. The State chose not to insure from 1956-1962 and from 1979 forward. [6AA 1671-1673.]

For those advocating an "all sums" allocation, the purported reason that "all sums" does not violate Montrose's proscription against joint and several liability is the availability of contribution rights. But as demonstrated above, there are many reasons why contribution may be unavailable. Moreover, contribution rights against other insurers, even if enforceable generally, cannot account fully for a

sharing of damages for all property damage that occurred outside all insurers' policy periods, as here, from 1957-1962 and after 1978.

Thus, in reality "all sums" does create the joint and several liability that *Montrose* rejected.[3]

D. The State Glosses Over The Important Distinction Between The Duty To Defend And The Duty To Indemnify

In their Opening Brief, the Insurers emphasized that this Court's different analytical framework regarding the duty to defend and the duty to indemnify had a critical bearing on the "all sums" issue. (Opening Brief at 13-18.)

In summary, while the duty to defend is based on the mere potential for coverage, insurers have a duty to indemnify only for "those sums that the insured becomes legally obligated to pay as damages for a covered claim." *Aerojet-General Corporation v. Transport Indemnity Company*, 17 Cal.4th 38, 56 (1997). (*See,* Opening Brief at 13-14.)

Thus, while several insurers may have a duty to defend a continuing injury case because there is a potential that injury happened during each policy period, an insurer would only have a duty to indemnify if injury actually occurred during the policy period. Furthermore, an insurer would have no duty even to defend a case in which there was no potential that injury took place during the policy period.

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[3] It is important to note that stacking of policy limits as urged by the State also creates joint and several liability - - under the State's view, each policy is responsible for all limits. *Montrose's* prohibition of joint and several liability is an additional reason why stacking of limits should be rejected, if the Court upholds the lower court's decision on "all sums."

The Court in *Buss v. Superior Court*, 16 Cal.4th 35 (1997) explained that there is only a prophylactic duty to defend against a claim of injury that occurred outside the policy period if some injury took place during the policy period. And, importantly, insurers may recover the defense costs associated with the injury outside the policy period because there was never a contractual duty to pay those. *Id.* at 71. If an insurer is not even potentially liable for damage outside the policy period, *a fortiori*, it can have no duty to indemnify against liability for those damages. Likewise, if the insurer can obtain reimbursement for defense costs associated with damage outside the policy period because payment of those is only a prophylactic duty, and the duty to indemnify is based on actual coverage, there can be no basis to require indemnification, prophylactically or otherwise, for damage outside the policy period. In fact, the State's "all sums" position turns defense and indemnity topsy-turvy by making indemnity coverage broader than defense.

Insurers cited *Padilla Construction Company v. Transportation Insurance Company*, 150 Cal.App.4th 984 (2007) as an example of how the difference between the duty to defend and indemnify is applied. (Opening Brief at 20-22.) Thus, although the primary insurer in *Padilla* had a duty to defend the entire claim, (eliminating any duty of an excess carrier to drop down and defend as to that period during which an underlying insurer had exhausted), the primary insurer had a duty to indemnify only for the "increment of harm" occurring during the policy period. 150 Cal.App.4th at 796.

The State utterly ignores *Buss, Padilla*, the important distinctions between defense and indemnity and this Court's prior analysis of those differences. Rather, the State merely quotes the Court of Appeal's conclusion that "all sums" was crucial to the duty to defend analysis in *Aerojet*. (Answer Brief at 23.) That is no answer at all. The Court of Appeal's conclusion is misplaced for two reasons. First, the extent of coverage ("all sums" versus pro rata) was not "crucial" to this Court's decision in *Aerojet* that there was a potential for coverage because at least some triggering harm may have occurred during the policy period. That conclusion simply relied on the Court's decision in *Montrose* regarding continuous injury/trigger. Second, the assertion that "all sums" was crucial to the holding regarding the duty to defend is inconsistent with the analysis employed by the Court in *Aerojet* and *Buss* as discussed above.

In short, the State has no meaningful response to Insurers' explanation that, under this Court's reasoning, the difference between the duty to defend and the duty to indemnify is of critical importance here.

E. The State's Reliance On Snippets From *Montrose* and *Aerojet* Is Misplaced

The State relies in particular on footnote 10 in *Aerojet.* But most of footnote 10 is simply an observation as to what the Court of Appeal in *Armstrong World Industries, Inc. v. Aetna Casualty & Surety Company* [45 Cal.App.4th 1 (1996)] had concluded and what a California Practice Guide had stated "in light of the foregoing." *Aerojet, supra*, 17 Cal.4th at 57-58, footnote 10. Footnote 10 also

quotes *Montrose's* statement that where "successive...policies have been purchased, bodily injury and property damage that is continuing or progressively deteriorating throughout more than one policy period is **potentially** covered by all policies in effect during those periods." *Id.,* emphasis added. That quotation references the potentiality standard relevant to the duty to defend, not the duty to indemnify.

Likewise, the State relies on a quotation from footnote 10, which in turn quotes *Montrose,* that "the settled rule" of case law is that "an insurer on the risk when continuous or progressively deteriorating [property] damage or [bodily] injury first manifests itself remains obligated to indemnify the insured *for the entirety of the ensuing damage or injury.*" *Montrose Chemical Corporation v. Admiral Insurance Company*, 10 Cal.4th 645, 686 (1995). The State refers to similar language at page 75 of *Aerojet*. Neither of these references supports the proposition that an insurer must pay for damage because of property damage outside the policy period. Those passages make plain that all damages that **do** flow from the property damage that **does** occur during the policy period are covered. Thus, all damages flowing from the "triggering" property damage are covered, but damages from non-triggering property damage are not.

Montrose and *Aerojet* do not support the different contention that if any property damage happens during the policy period, then the insurer must pay for damage that did not flow from that property damage - - damage that was because of property damage outside the policy period. Here, the property damage began

by 1957, when the State had no insurance. Indeed, under the State's interpretation of *Montrose* and *Aerojet*, the State would be responsible for "the entirety of the ensuing damage or injury."

The vice in extending a discussion on a point that was not directly before the Court as if it were a holding is illustrated by the following additional passage from *Aerojet.* In this part of the opinion, the Court addresses an insurer's right to recover defense costs from the insured when the insurer has defended part of a claim not potentially covered:

> [E]ach insurer may allocate defense costs to Aerojet for any part of the single broad "mixed" claim presented in the governmental and private actions that was not even potentially covered because it did not even possibly embrace any triggering harm of the specified sort within its policy period or periods caused by an included occurrence. For example, on the requisite proof, it may allocate defense costs for a part involving acts or omissions that may possibly have caused bodily injury or property damage-whether continuous or progressively deteriorating, on the one side, or discrete, on the other side-only after its policy or policies expired. On same proof, it may also allocate defense costs for a part involving acts or omissions that may possibly have caused bodily injury or property damage-specifically, discrete bodily injury or property damage-only before its policy or policies incepted. (Cf. *Montrose Chemical Corp. v.*

Admiral Ins. Co., supra, 10 Cal.4th at p. 691 [implying that there is no coverage under a comprehensive general liability policy as to acts or omissions that caused specified, discrete harm only before the policy incepted].) *Aerojet, supra*, 17 Cal.3d. at 71, internal citation omitted.

The quoted passage from *Aerojet* is inconsistent with the notion that once triggered, a policy must pay "all sums" for all property damage. Thus, as discussed in Section II.D. above, even in the broader duty to defend context, insurers are not ultimately responsible for defense costs relating to all damage outside the policy period. Because defense is provided only prophylactically as to claims of injury or damage outside the policy period, insurers may recover the defense costs associated therewith. In the narrower context of the duty to indemnify, in which actual coverage is the touchstone, there would be no coverage in the first instance "involving acts or omissions that [ ] have caused bodily injury or property damage - - whether continuous or progressively deteriorating, on the one side, or discrete on the other side - - only after [the] policy or policies expired."[4]

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[4] *Dart Industries, Inc. v. Commercial Union Insurance Company*, 28 Cal.4th 1059, 1080 (2002) [Answer Brief at 15] is not on point. The discussion in *Dart* that the State relies on involved an analysis of the application of incompatible "other insurance" clauses.

F. The State Misperceives The "Death At Any Time" Point

The State claims Insurers contended that the scope of property damage coverage is not controlled by the property damage provisions, but implicitly governed by the "death at any time" clause in the bodily injury coverage grant. (Answer Brief at 26.) That is not Insurers' position; rather, Insurers' point is that, in reading the policy as a whole, with each clause helping to interpret the others, the "death at any time" clause provides insight into the property damage coverage grant. The fact that the policy explicitly states that bodily injury coverage is extended to include death whether it occurs during or after the policy period (as long as bodily injury, sickness or disease that resulted in the death took place during the policy period), is instructive.

There is no equivalent extension of coverage for property damage "at any time." The State counters that "death at any time" merely makes clear that bodily injury, sickness or disease includes "death." (Answer Brief at 27.) But, if that is all the "death at any time" clause did, there would be no need to include the phrase "at any time." The provision would read "bodily injury, sickness or disease, including death." Again, the State's interpretation simply reads out of the policy any meaning as to the phrase "at any time." The "at any time" language added to death distinguishes it from the property damage coverage, which is limited to all sums for damages because of property damage during the policy period, not property damage "at any time."

G. The State Mischaracterizes Insurers' Argument As Based On Fairness

The State argues that the Insurers rely on notions of "fairness" and suffer "post-underwriting regrets." (Answer Brief at 29.) The State misconstrues Insurers' position. Insurers do not rely on fairness or post-policy underwriting. Rather, Insurers rely on the plain language of the policies and application of long-standing principles of contract interpretation established by this Court. Insurers' position is that reading the policy language in context, as a whole, in harmony and with each clause helping to interpret the other, (as opposed to the State's isolationist, disconnected and disharmonious approach) results in only one reasonable conclusion - - the policies do not pay for the obverse of what they say. It is not objectively reasonable to expect coverage for property damage outside the policy period when the policies provide coverage only for property damage during the policy period. Even the State, and even in difficult economic times, cannot rewrite the contracts. *Rosen v. State Farm General Insurance Company*, 30 Cal.4th 1070, 1077-1078 (2003).[5]

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[5] In its discussion regarding objectively reasonable expectations, the State suggests that new types of statutory liability such as CERCLA liability were within its reasonable expectation because the policies are "comprehensive. The argument is not on point. (Answer Brief at 28-29.) The issue here is not whether CERCLA liability is covered in the first instance. Moreover, the policies are not "comprehensive." They are "excess third-party liability" policies. Furthermore, labels do not change what the contracts actually provide. *See, Fresno Economy Import Used Cars, Inc. v. United States Fidelity & Guaranty Company, Inc.*, 76 Cal.App.3d 272, 279-280 (1977).

H. *State v. Allstate* Has No Relevance To The Issues Here

The State contends that this Court's decision in *State of California v. Allstate Insurance Company*, 45 Cal.4th 1008 (2009) is "directly related" to the "all sums" issue. (Answer Brief at 33-35.) The State argues that under CERCLA, its liability was joint and several and it therefore would have full liability for property damage during any one insurer's policy period. The State cites this Court's ruling in *State v. Allstate*, that where the insured can establish that a covered cause was a substantial factor in causing damage and that damage was indivisible from a concurrently caused excluded risk, the burden shifts to insurers to show how much damage resulted from the excluded cause. The State argues that decision applies where property damage occurred before, during and after the policy period, so that the entirety of the damage is covered by any one policy.

State v. Allstate does not apply here for a number of reasons. First, the issue in *State v. Allstate* involved the interplay between covered risk and excluded risk. Here, there is no exclusion involved. Rather, the basic scope of coverage is at issue. The policies only provide coverage in the first instance for property damage during the policy period. Property damage that occurs outside the policy period is not an excluded risk; it simply is not covered.

Second, in *State v. Allstate*, the Court addressed application of concurrent cause in the context of the pollution exclusion. Here, by definition, property damage in different periods does not involve concurrent cause. The State's proposition to treat property damage outside the policy period as an exclusion

subject to concurrent cause would improperly relieve it of its burden to bring its claim within the basic scope of coverage. *Waller v. Truck Insurance Exchange*, 11 Cal.4th 1, 16 (1995); *Weil v. Federal Kemper Life Assurance Company*, 7 Cal.4th 125, 148 (1994). That burden includes proving the extent of property damage. *See, e.g.*, *Shell Oil Company v. Winterther Swiss Insurance Company*, 12 Cal.App.4th 715, 756-758 (1993).

Third, the Court's conclusion in *State v. Allstate* depends on the insured's initial showing that damage between the covered cause and the excluded cause is indivisible. 45 Cal.4th at 1036-1037. There is no excluded cause involved here and the State has presented nothing regarding indivisibility.

Fourth, the State persists in its incorrect assertion that its liability was joint and several and that any damage in 1970 would have resulted in its full liability irrespective of damage in other periods. That is simply not so. The State's liability was determined by way of a contribution suit based on the totality of its responsibility for the contamination. There is no basis to say that its liability would have been established at all, let alone as it was if its only contribution to the contamination was for the property damage that happened in 1970. Moreover, the United States Supreme Court recently confirmed that CERCLA liability is not joint and several if any reasonable allocation can be made. *Burlington Northern & Santa Fe Railway v. United States*, 129 S.Ct. 1870 (2009). Moreover, insurance coverage disputes are governed by contract law and interpretation of the policies, not by CERCLA law. *See, e.g., Foster-Gardner, supra,* 18 Cal.4th at 868, 888

(1998); *AIU Insurance Company v. Superior Court,* 51 Cal.34 807, 831 (1990) (parties' intent in entering policies could not possibly have been influenced by statutory language of CERCLA adopted many years after policies drafted.)

Under the State's view, all property damage that falls outside the basic scope of coverage is covered as long as there is any property damage during the policy period. That position simply rewrites the policies from coverage for property damage during the policy period to coverage for property damage at any time if any property damage happened during the policy period. It cynically seeks to capitalize on the narrow ruling in *State v. Allstate* and tries to force that square peg into this round hole.

I. The State's Argument That A Majority Of Jurisdictions Favors All Sums Is Misleading

Both sides to the dispute here can point to numerous decisions that support their respective positions. But the State's assertion that most states have ruled in favor of "all sums" in the indemnity context and that the trend is in that direction is deceptive.

For example, many of the cases the State cites are simply unpublished trial court decisions. Some only address "all sums" in the defense context. *e.g., Cascade Corporation v. American Home Assurance Company*, 135 P.2d 450 (Ore. App. 2006). Some do not address "all sums" at all. *e.g., Society Insurance v. Town of Franklin*, 607 N.W.2d 342 (Wis. Ct. App. 2000). Some apply different rules of contract construction than California does. *e.g., Hercules, Inc. v. AIU*

Insurance Company, 784 A.2d 481 (Del. 2001) (relying on equitable considerations to support "all sums" ruling.) Another case involved unique language regarding coverage for damage "partly before and partly within the policy period." *Plastics Engineering Company v. Liberty Mutual Insurance Company*, 759 N.W.2d 613, 618 (Wisc. 2009). And, Illinois, which the State counts in its favor, actually supports insurers' position under more recent cases. *e.g., Outboard Marine Corporation v. Liberty Mutual Insurance Company*, 283 Ill.App.3d 630 (1996).

As discussed above, just last week, the Massachusetts Supreme Judicial Court rejected "all sums" in favor of pro rata. Significantly, of the 18 State Supreme Courts that have addressed "all sums" in the indemnity context, 12 have rejected it.[6]

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[6] **Twelve Supreme Court cases applying "pro rata" approach to indemnity:**

Connecticut – *Security Insurance Company of Hartford v. Lumberman's Mutual Casualty Company*, 826 A.2d 107 (Conn. 2003) (involving broader duty to defend context); Colorado – *Public Service Company of Colorado v. Wallis & Companies*, 986 P.2d 924, 939 (Colo. 1999); Kansas – *Atchison, Topeka & Santa Fe Railway Company v. Stonewall Insurance Company*, 71 P.3d 1097, 1134 (Kan. 2003) ; Kentucky – *Aetna Casualty & Surety Company v. Commonwealth of Kentucky*, 179 S.W.3d 830, 842 (Ky. 2005); Louisiana – *Southern Silica of Louisiana, Inc. v. Louisiana Insurance Guarantee Association*, 979 So.2d 460 (La. 2008); Massachusetts - *Boston Gas Company v. Century Indemnity* Company, __N.E.2d__, 2009, 2009 WL 218467 (S.J.C. Mass. 10246 July 24, 2009); Minnesota – *Domtar, Inc. v. Niagra Fire Insurance Company*, 563 N.W.2d 724, 732 (Minn. 1997); New Hampshire – *EnergyNorth Natural Gas, Inc. v. Certain Underwriters at Lloyds*, 934 A.2d 517 (N.H. 2007); New Jersey – *Carter-Wallace v. Admiral Insurance Company*, 712 A.2d 1116, 1123-1125 (N.J. 1998); *Owens-Illinois, Inc. v. United Insurance Company*, 650 A.2d 974, 995 (N.J. 1994); New York – *Consolidated Edison Company of New York v. Allstate Insurance*

J. The State Does Not Dispute How Pro Rata Allocation Applies

Although the State argues that the Court should adopt "all sums" instead of pro rata allocation, it does not address or take issue with how pro rata allocation applies, as described by Insurers. (Opening Brief at 37, *et seq.*) If the policies are applied as written, each policy would only pay for damages because of the property damage during the policy period. In the case of progressive or continuous damage, unless a party proved otherwise, the damage would be spread equally over the entire period during which the property damage took place, including time periods during which the insured had no insurance (for whatever reason). Each insurer's share would be based on the time it was on the risk compared to the entire period during which the property damage took place. *See, e.g., Boston Gas, supra*, (finding policyholder responsible for its share as to any time it had no insurance) (2009 WL 218467 at 17-18.) That allocation method is

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Company, 774 N.E.2d 687, 695 (N.Y. 2002); Utah – *Sharon Steel Corporation v. Aetna Casualty & Surety Company*, 931 P.2d 127, 140-142 (Utah 1997); Vermont – *Towns v. Northern Security Insurance Company*, 964 A.2d 1150, 1167 (Vt. 2008)

<u>Six Supreme Court cases applying "all sums" to indemnity:</u>

Delaware – *Hercules, Inc. v. AIU Insurance Company*, 784 A.2d 481 (Del. 2001); Indiana – *Allstate Insurance Company v. Dana Corp.*, 759 N.E.2d 1049 (Ind. 2001); Ohio – *Goodyear Tire & Rubber Co. v. Aetna Casualty & Surety Co.*, 769 N.E.2d 835 (Ohio 2002); Pennsylvania – *J.H. France Refractories Company v. Allstate Insurance Company*, 626 A.2d 502 (Penn. 1993); Washington – *American National Fire Insurance Company v. B & L Trucking & Construction Company*, 951 P.2d 250 (Wash. 1998); Wisconsin – *Plastics Engineering Company v. Liberty Mutual Insurance Company*, 759 N.W.2d 613 (Wisc. 2009)

consistent with the continuous trigger of coverage under *Montrose* and the policy language that limits coverage only to property damage during the policy period. The State does not challenge that is how pro rata allocation works. Thus, if the Court rejects "all sums" and adopts pro rata allocation, there is no dispute as to how pro rata would apply here.

III. STACKING ARGUMENTS

A. The State's Argument That There Is No Policy Language Precluding Stacking Depends On Rewriting The Contracts

The State's main argument in support of its position that each triggered policy should pay "all sums" up to its policy limits, *i.e.*, the policies' per occurrence limits can be stacked, is that there is no provision in the policies that precludes stacking. (Answer Brief at 50.) The State and the Court of Appeal conclude that in the absence of explicit language precluding stacking, stacking is allowed. According to the State, any contrary conclusion depends on improper judicial intervention requiring the policies to be rewritten. (Answer Brief at 64.)

But it is the Court of Appeal, at the State's urging, that has "judicially intervened" and it is the State that seeks to rewrite the contracts contrary to this Court's prohibition. As discussed in Section II, the insuring agreements properly read in context and as a whole, expressly provide that the policies only pay for the damage because of the property damage occurring during the policy period. Although each policy provides likewise, no policy provides for payment of

damages because of the property damage outside the policy period. As a result, the issue of stacking simply does not arise.[7]

The "during the policy period" language eliminates the stacking issue in the first instance. The existence of explicit language addressing stacking of limits is unnecessary, because if the explicit language limiting coverage to property damage during the policy period is enforced, stacking of limits is simply not presented. It is nothing more than bootstrapping to argue that there is no language preventing stacking after improperly having read that very language out of the policy. Yet the State's contention on stacking fundamentally depends on that sleight of hand. The occurrence definition, the limits of liability and the policy period provisions cannot be ignored so as to create an argument based on the absence of policy language.

B. The State's Other Arguments In Support Of Stacking Are A Series of Red Herrings

1. The "Other Insurance" Clause Does Not Support Stacking of Limits

The State engages in a lengthy discussion of the "other insurance" clause, claiming that this clause expressly permits coverage in excess of, and thus in addition to, other policies. (Answer Brief at 52.) The State concludes it is entitled

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[7] In passing, the State suggests that even if the Court rejects "all sums," stacking is relevant (Answer Brief at 92). The State's argument is based on its fallacious position on application of *State v. Allstate* and underlying CERCLA law. The State is wrong. See Section II.H. above.

to recover up to the combined limits of all its policies. But that is not what the "other insurance" clause provides, and the State cites no authority for the proposition that the "other insurance" clause supports stacking of limits.[8] Indeed, the "other insurance" clause, rather than allowing for stacking of limits, applies to prevent the State from recovering multiple times by making the policy excess of "other valid and collectible" insurance. The "other insurance" clause does not support the contention that limits should be stacked.

Indeed, unlike the cases cited by the State, the *Armstrong* court actually addressed how "other insurance" clauses are construed in situations involving multiple, successive policies and a continuous loss. In such a situation, "other insurance" clauses provide a mechanism by which the various insurers' liability can be apportioned - - after an insured picks a **single** policy period under the "all sums" and "anti-stacking" principles. *Armstrong, supra*, 45 Cal.App.4th at 51-52, 105-106.

The *Armstrong* court explained that **after** the insured selects a single policy year from which to recover, the "other insurance" clause may **then** come into play. *Id.* at 51-52. *Armstrong* confirms that "other insurance" clauses do not support stacking, but in fact work together with "all sums" and "anti-stacking" principles

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[8] The "other insurance" provision states:

> If the Insured has other valid and collectible insurance against a loss covered by this policy, the insurance extended by this policy shall be excess insurance only, and not primary or contributing… . [*e.g.*, 39AA 10153].

to apportion the liability among the insurers that issued policies triggered by the loss.

2. The Absence Of A "Noncumulation" Clause Does Not Mandate Stacking of Limits

The State contends that the inclusion of a "noncumulation" clause in policies not involved in this appeal shows that insurers knew how to restrict cumulation of limits, but chose not to include such a provision in the policies at issue. (Answer Brief at 54-55.) Contrary to the State's position, the absence of an anti-stacking provision does not give rise to stacking. *FMC, supra*, 61 Cal.App.4th at 1189.

The *FMC* court correctly determined that an anti-stacking limitation may be implied in the policies' coverage provisions and policy limits, where - - because of its "all sums" conclusion - - any other result would unreasonably allow the insured to recover more insurance than it bargained and paid for.

Furthermore, under California law, the fact that subsequent revisions were made in later insurance policies is not admissible to construe policy language in effect before the revisions were made. *McKee v. State Farm Fire & Casualty Company*, 145 Cal.App.3d 772, 777-778 (1983); *State Farm Fire & Casualty Company v. Eddy*, 218 Cal.App.3d 958, 972-973 (1990). The reason behind this rule is that insurers may revise policy language in response to insureds' "creative" arguments about earlier policy wording, and such revisions therefore cannot be taken as meaningful evidence of the insurer's understanding of the prior language.

McKee, supra, 145 Cal.App.3d at 777-778; *Eddy, supra*, 218 Cal.App.3d at 972-973. Accordingly, the addition of "noncumulation" clauses to the State's subsequent policies not at issue here cannot be used to interpret the meaning of prior policy language.

3. The Horizontal Exhaustion Rule Does Not Dictate Stacking Of Excess Limits

The State cites several cases which hold that all primary policies must be exhausted before any excess must pay. *See, e.g., Community Redevelopment Agency v. Aetna Casualty & Surety Company*, 50 Cal.App.4th 329, 337-340 (1996); *Stonewall Insurance Company v. City of Palos Verdes Estates,* 46 Cal.App.4th 1849, 1852-1853 (1996) ("horizontal exhaustion"). The State concludes this horizontal exhaustion rule supports its view that the policies per occurrence limits can be stacked to cover the occurrence at issue.

Those cases do not support stacking of limits. In *Community Redevelopment*, the issue was whether an excess insurer had to drop down and pay defense before all primary policies had exhausted. The case involved contribution claims among insurers seeking to reallocate defense costs. There was no discussion of stacking nor any determination that there was only one occurrence such that the per occurrence limits of several policies were stacked. Moreover, there was no issue of indemnity coverage involved.

The court in *FMC*, evaluating a similar argument that anti-stacking is contrary to *Community Redevelopment* and *Stonewall*, noted:

None of these cases is dispositive. *Community Redevelopment Agency* is essentially a duty-to-defend case which does not address stacking or anti-stacking. *Stonewall* does not analyze the issue and appears to base its conclusion at least in part on a stipulation between parties. *FMC, supra,* 61 Cal.App.4th at 1190.

The court in *Stonewall* did not stack limits. *Stonewall* involved the obverse of stacking - - proration of a loss over a number of triggered policies. The policies were not stacked to pay the loss.[9]

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[9] The State also points to positions that some of its insurers have taken in other actions in Michigan and New Jersey - - claiming that the Insurers' positions are inconsistent. (Answer Brief at 59.) The State cites *Dow Corning Corporation v. Continental Casualty Company*, 1999 Mich.App. Lexis 2920, at *25-26; *Spaulding Composites Company v. Aetna Casualty & Surety Company*, 819 A.2d 410, 417 (N.J. 2003); *Carter-Wallace, Inc. v. Admiral Insurance Company*, 712 A.2d 1116, 1122 (N.J. 1998); and *North River Insurance Company v. ACE American Reinsurance Company*, 361 F.3d 134 (2nd Cir. 2004). In fact, the position taken by the insurers in those cases is not inconsistent. That is, the Insurers contend that each of the State's policies can only be liable for the share of damage that took place during its own policy period. The covered damage during each policy period should be attributed to that year's primary policy or self-insured retention first, to that year's first-layer excess policy second, and so on. And that is what the courts held in both Michigan and New Jersey. *Dow Corning, supra*, 1999 Mich.App. Lexis 2920, at *25-26; *Carter-Wallace, supra,* 712 A.2d at 1122. *North River* did not involve any insurer here and addressed the "follow the fortune" doctrine in a reinsurance dispute. Likewise, *Spaulding* was describing a position Commercial Union took in *Carter-Wallace*, but Commercial Union is not a party here.

4. The State Relies On Inapposite Cases For Its Proposition That California Law Allows Recovery From Multiple Policies

The State argues that multiple policies often apply to a loss and that California law allows recovery up to the combined policy limits. (Answer Brief at 56.) The State's reliance on the cases cited is misplaced.

For instance, in *Athey v. Netherlands Insurance Company*, 200 Cal.App.2d 10 (1962), cited by the State, a man rented a car and caused an accident. He was concurrently covered by his own insurance and the rental car company's insurance. The court looked to the "other insurance" clauses in the policies to determine that both policies were primary and were required to respond. *See also, Lovy v. State Farm Insurance Company*, 117 Cal.App.3d 834 (1981), which the State cites as supporting an insured's entitlement to "combined policy limits." In fact, *Lovy*, like *Athey*, involved sorting out overlapping policies, each of which covered the loss.

The State also relies on *State Farm Mutual Automobile Insurance Company v. Partridge*, 10 Cal.3d 94 (1973), in which the court addressed a situation where two separate causes had combined to result in a single accidental shooting. The *Partridge* court considered whether the shooting injuries were covered by the insured's homeowner's policy and also by the insured's automobile policy - - both issued for the same time period. *Id.* at 104-105. The issue in *Partridge* was whether a single injury was covered, where separate events combined to cause the

injury, and one cause of the injury was covered while the other cause was excluded. *Id.* at 104-105. The *Partridge* decision has nothing to do with whether an insured can "stack" excess liability policy limits where an ongoing loss continues during different policy periods.

Similarly, the State's reference to Justice Baxter's concurring opinion in *Montrose* misses the mark. (Answer Brief at 57-58, citing 10 Cal.4th 696.) The reference there is to the "possibility" of coverage, *i.e.*, the duty to defend, which is what *Montrose* addressed.

Likewise the State's citation to *Stonewall Insurance Company v. City of Palos Verdes Estates*, 46 Cal.App.4th 1810, 1849 (1996) in support of stacking is inapt. The discussion in *Stonewall* that the State (and the Court of Appeal) relies on deals with a separate issue - - whether the Jefferson policy limit was $300,000 or $900,000 based on whether the per occurrence limit was an annual limit or a per policy limit. That is not the issue here. Moreover, the *Stonewall* Court based its decision in part on a stipulation Jefferson entered that "Jefferson...provided coverage of $300,000 per occurrence per year as respects to property damage... ." 46 Cal.App.4th at 1849.

5. The State's Attack On Anti-Stacking Cases Is Misguided

The State criticizes *FMC* as "judicial intervention" contrary to the policy language and the rules of contract construction. (Answer Brief at 64, *et seq.*). The State contends *FMC*'s anti-stacking rule judicially creates limitations which are not "plain and conspicuous" in the policies. The State also argues that *FMC*

misconstrued and misplaced reliance on *Keene Corporation v. Insurance Company of North America*, 667 F.2d 1034 (D.C. Cir. 1981) and *Insurance Company of North America v. Forty-Eight Insulations*, 633 F.2d 1212 (6th Cir. 1980). The State's attack is misguided.

The anti-stacking rule is not judicial intervention. Rather, it is the natural consequence of the judicial intervention and unwarranted expansion of policy rights which results from an "all sums" ruling that creates coverage for property damage outside the policy period, in contravention of the policy language. Anti-stacking prevents an additional windfall by limiting an already improper expansion of coverage so that the insured does not get "much more insurance than it paid for." *FMC, supra*, 61 Cal.App.4th at 1189.

The State belittles the *Keene* case, cited by *FMC*, as contrary to California law and giving "short shrift" to the concept of "stacking." The succinctness of the discussion is not the issue. It is clear that *Keene* flatly rejected stacking in continuous injury "all sums" cases, and plainly articulated the reason for its rule.

Keene is parallel to *FMC*. The *Keene* court, like *FMC*, discussed the interplay of "all sums" and "stacking" in a case involving continuous damage (in *Keene*, a progressive disease) over multiple policy periods. The *Keene* court, like *FMC*, first held that "all sums" applied, *i.e.*, that a triggered policy is liable for all of the insured's damages up to its limits. *Keene, supra,* 667 F.2d at 1047-1050. The *Keene* court then turned to the question of whether the insured could "stack" all of the triggered policies' limits. *Id.*

The *Keene* court found that the policies implicitly reject "stacking" of limits, since the insured is "entitled to nothing more" than it bargained for - - and it only bargained for one limit. *Keene, supra*, 667 F.2d at 1049 ("we hold that only one policy's limits can apply to each injury.")

The State argues that the presence of "other insurance" clauses in its policies distinguishes this case from the policies at issue in *Keene.* (Answer Brief at 86-87.) In fact, *Keene* explicitly referenced "other insurance" as the method to apportion liability in that case. *Keene, supra*, 667 F.2d at 1049.

As discussed above, "other insurance" has nothing to do with stacking. "Other insurance" clauses serve to prevent the insured from recovering multiple times. "Other insurance" clauses do not provide that limits should be stacked as the State suggests; rather these clauses reduce what an insurer would otherwise pay *vis-à-vis* other insurers when they actually cover the same loss. *See Continental Casualty Company v. Pacific Indemnity*, 134 Cal.App.3d 389, 397 (1982).

The State also complains that *Keene* "failed to consider the enormous body of prior 'stacking' law which permitted coverage up to the combined limits." (Answer Brief at 88.) But the State cites to none of the alleged "enormous body of prior 'stacking law'" applied in the context of continuous damage, as is relevant here.

Additionally, the State suggests that *FMC* should not have relied on *Forty-Eight Insulations,* asserting that the court in *Forty-Eight Insulations* allowed the

insured to recover the combined policy limits of multiple policies - - amounting to a total of $5.6 million per occurrence. (Answer Brief at 84.) But that is the exact **opposite** of the court's conclusion. In fact, the Sixth Circuit expressly agreed with the trial court's "anti-stacking" decision. *Forty-Eight Insulations, supra*, 633 F.2d at 1226, fn.28. The court stated that the insurers' liability is limited to the highest "per occurrence" limit stated in the policies, not the combined limits of the policies for each occurrence as the State claims:

> In any event, no insurer should be held liable in any one case to indemnify Forty-Eight for judgment liability for more than the highest single yearly limit in a policy that existed during the period of the claimant's exposure for which judgment was obtained. 451 F.Supp. at 1243. We agree with the district court. *Id.*

In an effort to distinguish *Forty-Eight Insulations*, the State asserts that this case does not involve the "migration of each contaminant particle (equivalent to the inhalation of each asbestos fiber)...." (Answer Brief at 85.) The State misses the point. *Forty-Eight Insulations*, like *FMC* and this case, involved a continuous injury that implicated multiple policies. While *Forty-Eight* involved a progressive disease, and *FMC* and this case involve progressive property damage, the result is the same - - the insured is only entitled to "the highest single yearly limit in a policy that existed during the period of the claimant's exposure... ."

6. The State's Detour Into Automobile Cases Is Irrelevant

The State discusses numerous out-of-state cases dealing with the term "stacking" in wholly different contexts than at issue here. The State's foreign authorities all involve automobile insurance policies. Four of the cases exclusively examine whether an insured may "stack" medical benefits or lost income benefits associated with different vehicles.[10]

The remainder of the out-of-state cases cited by the State address whether an insured may "stack" uninsured motorist coverage. These cases fall into two groups. One group involves cases where an individual was injured as a passenger in a vehicle, and sought to obtain coverage from the driver/owner's policy and under his own personal policy, both of which provided overlapping coverage for the loss.[11] In each of these cases, the issue was the claimant's entitlement to different uninsured policy benefits where multiple policies concurrently covered

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[10] *See USAA v. Smith*, 329 So.2d 562, 563-564 (Ala. App. 1976); *State Farm Mutual Automobile Insurance Company v. Scitzs*, 394 So.2d 1371, 1372 (Miss. 1981); *Hampton v. Thomas and State Farm Insurance Company*, 433 So.2d 884 (La. App. 1983); *State Farm Mutual Automobile Insurance Company v. Smith*, 732 S.W.2d 137, 137-138 (Ark. 1987).

[11] *See Smith v. Pacific Automobile Insurance Company*, 400 P.2d 512 (Or. 1965); *Werley v. USAA*, 498 P.2d 112 (Alaska 1972); *Thurman v. Signal Insurance Company*, 491 P.2d 1002 (Or. 1971); *Mountel v. Hardware Dealers Mutual Fire Insurance Company*, 269 N.E.2d 857 (Ohio App. 1969); *Walton v. State Farm Automobile Insurance Company*, 518 P.2d 1399 (Haw. 1974); *Keeble v. Allstate Insurance Company*, 342 F.Supp. 963 (E.D. Tenn. 1971); and *Sloviaczek v. Estate of Puckett*, 565 P.2d 564 (Id. 1977).

the loss. The second group of cases involves situations where an individual sought to obtain coverage provided to separate automobiles within the same family.[12]

Regardless of which of these categories a case falls into, and just like the State's "other insurance" cases, each of the automobile coverage cases cited by the State presents a situation involving overlapping or concurrent primary coverage for an accident that took place in a single policy period.

California, by statute, prohibits such "stacking." *See* Insurance Code section 11580.2(q). After its exhaustive recitation of out-of-state uninsured motorist coverage cases, the State acknowledges California's anti-stacking uninsured motorist coverage statute. However, the State then distances itself from uninsured motorists situations altogether, asserting that "no California statute prohibits stacking of the general liability policies at issue here." (Answer at 82.) In this respect, the State is correct. It does not matter how other states - - or California statutes - - treat the situation of overlapping uninsured motorist benefits. The State's entire discussion misses the mark.

Furthermore, the State's reliance on "other insurance" cases is misplaced. As discussed above, stacking and "other insurance" are not the same and cases

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[12] *See State Farm Mutual Automobile Insurance Company v. Richardson*, 437 S.E.2d 43 (S.C. 1993); *Insurance Company of North America v. Strothers*, 70 Pa. D. & C.2d 429 (1975); *Jackson v. State Farm Mutual Automobile Insurance Company*, 342 S.E.2d 603 (S.C. 1986); *Woolston v. State Farm Mutual Insurance Company*, 306 F.Supp. 738 (W.D. Ar. 1969); *Parker v. USAA*, 984 P.2d 458 (Wn. App. 1999); *Hartford Accident & Indemnity Company v. Bridges*, 350 So.2d 1379 (Miss. 1977); *Jeffries v. Stewart*, 309 N.E.2d 448 (Ind. App. 1974); *Nicholson v. Home Insurance Company*, 405 N.W.2d 327 (Wis. 1987); *Cameron Mutual Insurance Company v. Madden*, 533 S.W.2d 538 (Mo. 1976).

reconciling or rejecting as incompatible conflicting "other insurance" clauses have nothing to do with the issues here. None of these cases addresses the question of whether an insured is entitled to multiple successive excess policy limits where a continuous loss has been established.[13] The State's artificial grouping of these cases neatly into various rules of construction is diversionary at best. (Answer at 78, *et seq.*)

IV. CONCLUSION

The State's attempt to rewrite the policies to cover property damage outside the policy period should be rejected. The policy language, when read in harmony, provides only for payment of damages connected to property damage that occurred during the policy period. Thus, the Court should overturn the Court of

[13] *Cf.* the Court of Appeal's conclusion here in context of its stacking analysis, that long-term injury cases are different than, for example, a car accident case. (Slip Op. at 35.)

Appeal's decision on "all sums" and find in favor of pro rata allocation. The stacking issue becomes moot.

DATED: July 27, 2009

Respectfully submitted,

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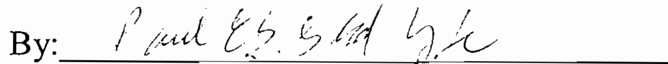

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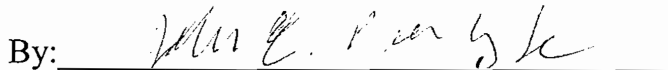

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CERTIFICATION

Pursuant to California Rules of Court 8:520(c)(1), I certify that this REPLY BRIEF ON THE MERITS contains 9,988 words, not including the Tables of Contents and Authorities, attachments, the caption page, signature blocks or this Certification page.

Dated: July 27, 2009

BARBARA S. HODOUS

65961.1

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 July 29, 2009, I served the foregoing document described as **REPLY BRIEF ON THE MERITS** on the interested parties in this action by placing a copy thereof enclosed in a sealed envelope addressed as follows:

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Executed on July 29, 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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