Case No. S170560

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.

APPLICATION OF CERTAIN LONDON MARKET INSURERS FOR LEAVE TO FILE PROPOSED *AMICUS CURIAE* BRIEF; *AMICUS CURIAE* BRIEF IN SUPPORT OF DEFENDANT INSURERS CONTINENTAL INSURANCE COMPANY *ET AL.*

From an Opinion of the Court of Appeal, Fourth Appellate District,
Division Two, Case No. E041425

From a Decision of the Riverside Superior Court, Case No. 239784,
Consolidated with No. RIC-381555, The Honorable E. Michael Kaiser, Judge

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REQUEST TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF INSURERS

Pursuant to Rule 8.520(f) of the California Rules of Court, certain Underwriters at Lloyd's, London and certain London Market insurance companies ("London Market Insurers") request leave to file the attached proposed *amicus curiae* brief in support of the defendant and respondent insurers Continental Insurance Company, Employers Insurance of Wausau, Yosemite Insurance Company, and Stonebridge Life Insurance Company.

The proposed *amicus curiae* brief discusses the two issues presented for review in this case, concerning the "all sums" approach to allocation and the stacking of policy limits. The brief addresses the insurance policy language in question, the rules of contract interpretation, and whether the insured's "all sums" and "stacking" positions are a reasonable construction of the parties' contracts. The brief also addresses California decisions and decisions from other jurisdictions touching on the issues raised here.

London Market Insurers are interested in this matter because they subscribed to numerous insurance policies issued to corporations that are located in or have brought suit in California, and such policies contain language that is similar to the policy wording at issue in this case. As an example, certain of the London Market Insurers are parties in the pending litigation entitled *Truck Insurance Exchange v. Kaiser Cement & Gypsum Corp., et al.,* Los Angeles County Superior Court Case No. BC 249550. Certain London Market Insurers were formerly parties in the case below, and were dismissed from the case after reaching a settlement with the State.

London Market Insurers are well-versed in the issues presented, and have briefed these issues in the lower courts in this case and

in earlier cases. In addition, counsel for London Market Insurers have participated in briefing in prior cases addressed in the Court of Appeal's Opinion below and other cases addressing the issues presented in this case, including *Aerojet-General Corp. v. Transport Indemnity Co.* (1997) 17 Cal.4th 38; *Alpha-Therapeutic Corp. v. Transport Indemnity Co.,* Case No. No. S099962; *FMC Corp. v. Plaisted & Companies* (1998) 61 Cal.App.4th 1132, and *Armstrong World Industries, Inc. v. Aetna Cas. & Sur. Co.* (1996) 45 Cal.App.4th 1.

London Market Insurers believe that this proposed *amicus curiae* brief can provide the Court with helpful analysis on the issues presented, and believe there is a need for additional argument on the issues specified above, beyond the discussion presented in the briefing by the parties. For these reasons, London Market Insurers respectfully request permission to file the attached *amicus curiae* brief.

No current party in this case, or counsel for any current party in this case, authored the proposed *amicus curiae* brief or any part of the brief. No person or entity other than London Market Insurers paid any money to fund the preparation or submission of this brief.

Dated: September 4, 2009

Respectfully submitted,
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I. INTRODUCTION

In its Opinion below, the Fourth District, Division Two, addressed an insurance claim involving the ongoing discharge of pollutants at the Stringfellow Acid Pits. The Court of Appeal concluded it was bound by this Court's prior decisions to rule that once a liability policy is triggered by covered injury during the policy period, that policy has a duty to indemnify "all sums" the insured is legally obligated to pay as damages for harm caused by the covered occurrence, including harm taking place before and after the policy period.[1]

Other appellate decisions have also cited this Court's statements in *Aerojet-General Corp. v. Transport Indemnity Company* (1997) 17 Cal.4th 38, 56-57 ("*Aerojet*"), or *Montrose Chemical Corp. v. Admiral Ins. Co.* (1995) 10 Cal.4th 645, 686 ("*Montrose*"), as providing for an "all sums" rule in the indemnity context. But the issues presented in *Aerojet* and *Montrose* concerned the duty to defend, not the duty to indemnify. (*Aerojet, supra,* 17 Cal.4th at 45; *Montrose, supra,* 10 Cal.4th at 654.) As this Court has held, different analyses apply in considering the separate defense and indemnity obligations in a policy. (*Aerojet, supra,* 17 Cal.4th at 59; *Palmer v. Truck Insurance Exchange* (1999) 21 Cal.4th 1109, 1120; *Buss v. Superior Court* (1997) 16 Cal.4th 35, 45-46.)

The Court should reject "all sums" allocation in the indemnity context. The "all sums" approach conflicts with the insurance policy language at issue, which limits coverage to property damage within the policy period. And the "all sums" approach violates the rules of contract

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[1] The term "trigger of coverage" in the third-party liability context refers to the circumstances required to give rise to an insurer's duty to indemnify. A policy is "triggered" when covered injury takes place.

interpretation by stripping the meaning from policy wording limiting coverage to property damage within the policy term.

Moreover, an "all sums" interpretation is unreasonable. It holds an insurer that issued a single triggered policy liable for all damage occurring over time – such that an insured who bought insurance for one year might obtain the same recovery as another insured who purchased insurance for many years. Further, the "all sums" approach makes an insurer's liability for a covered loss dependent on factors that the insurer cannot evaluate in underwriting a policy, such as whether coverage exists under other insurers' policies in different years. That is not a reasonable interpretation of the policies.

For these reasons, the Court should hold that "all sums" allocation does not apply to a liability insurer's duty to indemnify. Rather, each policy should only be liable to pay for liability imposed due to covered damage during its respective policy period. This pro rata approach is compelled both by the policy language and the rules of contract interpretation.

If the Court rejects "all sums," the stacking issue does not need to be resolved in this case. Where each policy is interpreted only to cover property damage during its own policy period – as the policy language provides – there is no overlapping coverage to stack under policies in effect during consecutive periods, and each policy only pays for covered damage that happened in its own policy period.

But if the Court adopts "all sums" in the indemnify context, the Court should reject the Court of Appeal's conclusion that insureds can stack the limits of multiple years' policies under an "all sums" approach. Combining "all sums" with "stacking" is contrary to the policy language and is an unreasonable construction of the policies.

II. THE COURT SHOULD REJECT "ALL SUMS"

A. The Policy Language Does Not Permit An "All Sums" Approach.

The "all sums" approach contradicts the policy language limiting coverage for property damage to harm during the policy period.

Insurance policy language must be construed in context of the entire policy read together as a whole. (*Foster-Gardner, Inc. v. National Union Fire Insurance Co.* (1998) 18 Cal.4th 857, 868, *quoting Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1265.) Policies must be interpreted so that each word and phrase is given independent effect and no terms are rendered meaningless or redundant. (Civil Code § 1641; *see Shell Oil Co. v. Winterthur Swiss Ins. Co.* (1993) 12 Cal.App.4th 715, 753.) The "all sums" approach cannot be applied to the policy language without violating these rules.

1. The Policies Limit Coverage to Property Damage During the Policy Period.

Each policy at issue contains the same pertinent language. The insuring agreement with respect to bodily injury provides that the insurers agree:

> To pay on behalf of the Insured all sums which the Insured shall become obligated to pay by reason of liability imposed by law ... for damages: ... Because of Bodily Injury, Sickness or Disease, including Death at any time resulting therefrom, sustained by any person or persons....

With respect to property damage, the insuring agreement provides:

> To pay on behalf of the Insured all sums which the Insured shall become obligated to pay by reason of liability imposed by law ... for damages, including consequential damages, because of injury to or destruction of property, including the loss of use thereof.

(*See, e.g.*, Appellants' Appendix ("AA"), vol. 39, pp. 10149, 10173; emphasis added.)

The Limits of Liability clause provides that coverage is only provided in respect of "occurrences." (*See* the Court of Appeal's Slip Opinion ("Slip Opinion") at 8; *see also* AA, vol. 39, pp. 10151, 10175, 10189.) The policies define "occurrence" as follows:

> "Occurrence" means an accident or a continuous or repeated exposure to conditions which result in injury to persons or damage to property during the policy period....

(Slip Opinion at 8; emphasis added.) And the "Policy Period Territory" clause provides:

> This policy applies only to occurrences which take place during the policy period commencing [date specified] and ending [date specified]....

(*See, e.g.*, Appellants' Appendix ("AA"), vol. 39, pp. 10149, 10173, 10187; emphasis added.)

When these policy terms are read together in context, the policy cannot be construed to mean that if coverage is triggered by property damage during the policy period, the policy then covers all damage outside the policy period. That interpretation ignores the dual "during the policy period" requirements set out in the "occurrence" definition and "Policy Period Territory" clause.

The "occurrence" definition provides that the policy is triggered by "an accident or a continuous or repeated exposure to conditions which result in injury to persons or damage to property during the policy period...." (Slip Op. at 8.) The Policy Period Territory clause further provides that, where the policy is triggered, the "policy applies only to occurrences which take place during the policy period...." (AA, vol. 39, p. 10149; emphasis added.) Read together, these provisions require that the

policy only pays for liability resulting from property damage during the policy period.

The Massachusetts Supreme Court recently addressed similar policy language, holding that this wording means the coverage only applies to the portion of property damage that takes place during the policy period:

> The "Policy Period, Territory" provision in that policy provides that "[t]his policy applies only to *occurrences* which happen *during the policy period*" (emphasis added). The policy defines an "occurrence," with respect to property damage, as "a continuous or repeated exposure to conditions which unexpectedly and unintentionally causes *injury to or destruction of property during the policy period*" (emphasis added). In other words, that policy applies only to injury to or destruction of property taking place during the policy period.

(*Boston Gas Co. v. Century Indem. Co., et al.* (Mass. 2009) 454 Mass. 337, 358; 910 N.E.2d 290, 306-307.) This Court should also reject "all sums" and hold that each policy only provides insurance for covered property damage taking place during its own policy period.

2. An Exception for Bodily Injury Coverage Illustrates that Property Damage Coverage Only Applies to Harm During the Policy Period.

The intent of the language limiting coverage to harm during the policy period is illustrated by an exception to this limitation. The policy language expressly adds coverage for "Death at any time" resulting from bodily injury during the policy period. (AA, vol. 39, p. 10149.) There is no equivalent exception for property damage outside the policy period. Rather, property damage must occur during the policy period to be covered.

This exception proves the rule. An "all sums" interpretation would render the policy language regarding death "at any time" wholly superfluous. Under the "all sums" approach, the policy would be

considered to cover *all* damage or injury outside the policy period relating to a covered occurrence, as long as some harm resulted during the policy period. In that event, there would be no need for words extending coverage to death "at any time."

Applying the "all sums" approach to the State's policies would improperly rewrite the contract language to provide insurance for "damage to property during and outside the policy period," and to extend coverage to "Death and other bodily injury and property damage at any time." But as this Court holds, California courts "'do not rewrite any provision of any contract, [including an insurance policy], for any purpose.'" (*Rosen v. State Farm General Ins. Co.* (2003) 30 Cal.4th 1070, 1073 (bracketed words in original); *Aerojet, supra,* 17 Cal.4th at 75-76.)

3. The California Rules of Contract Interpretation Preclude the "All Sums" Approach.

The "all sums" view adopted by the Court of Appeal writes the "Policy Period Territory" clause out of the policies, and renders the words "during the policy period" in that clause redundant with the phrase "during the policy period" in the "occurrence" definition. Indeed, the opinion below did not even mention the Policy Period Territory clause. (*See, e.g.,* Slip Opinion at 8.) Moreover, the "all sums" approach strips the meaning from the words adding coverage for death "at any time."

Because an "all sums" interpretation would make policy terms redundant and meaningless, the rules of contract interpretation preclude the "all sums" approach under this policy language.

Civil Code section 1641 requires that each word and phrase in a contract must be given independent effect. Although the policies state that the insurers agree to pay "all sums which the Insured shall become obligated to pay by reason of liability imposed by law," that provision is subject to various other coverage requirements, including the requirements

that covered occurrences and resulting property damage must both take place "during the policy period." These other requirements surrounding the "all sums" wording cannot be ignored. As this Court has held, the term "damages" in a policy's insuring agreement does "not constitute a redundancy to a 'sum that the insured becomes legally obligated to pay,' but a limitation thereof." (*Certain Underwriters at Lloyd's of London v. Superior Court* (2001) 24 Cal.4th 945, 963-964 ("*Powerine*").) So too, the words "during the policy period" limit the sums that the policies cover. The "all sums" argument is incorrect because it emphasizes the words "all sums" out of context from the remaining contract language. (*Cf. Bank of the West, supra,* 2 Cal. 4th at 1265 ("'language in a contract must be construed in the context of that instrument as a whole'"); emphasis and citations omitted.)

Civil Code section 1641 provides that "[t]he whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other." Under Section 1641, if one party's interpretation gives effect to each term in the insurance contract, and the other party's interpretation renders words in the contract meaningless or redundant, courts adopt the meaning that gives effect to all the words in the policy. As Justice Corrigan wrote in *Union Oil Co. v. International Ins. Co.* (1995) 37 Cal.App.4th 930, 935, "an interpretation that gives effect to every clause is preferred over one that would render other policy terms meaningless," citing *New York Life Ins. Co. v. Hollender* (1951) 38 Cal.2d 73, 81-82). (*See also Titan Corp. v. Aetna Cas. & Sur. Co.* (1994) 22 Cal.App.4th 457, 474 ("Importantly, we should interpret contractual language in a manner which gives force and effect to every clause rather than to one which renders clauses nugatory.").)

Only the insurers' interpretation of the policies gives meaning to all the policy terms. By contrast, according to the "all sums" view

advocated by the State, the policies would cover all harm "at any time" – as long as some injury took place during the policy period – whether or not the policies contained the "occurrence" definition, the "Policy Period Territory" provision, or the clause extending coverage to death at any time. Under the State's argument, the policies would mean the same thing with or without these terms.

Because the insurers' interpretation gives effect to the dual "during the policy period" requirement set out in the policies, and gives effect to the words "at any time" in the bodily injury coverage – while an "all sums" interpretation would make these policy terms redundant – the rules of contract interpretation require the insurers' construction. (Civil Code section 1641.)

In light of this rule of construction set out in Civil Code section 1641, the State cannot rely on the rule that contracts may be construed against the drafter. This so-called rule of *contra proferentem* ("against the one who proffers") is found in Civil Code section 1654, which provides: "In cases of uncertainty not removed by the preceding rules, the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist." (Emphasis added.) As Section 1654 states, however, this is a rule of last resort, which is used only where a dispute is not resolved by the prior rules of contract interpretation.

Even if the State's policy wording were ambiguous – which it is not – the rule of *contra proferentem* would never be reached here, because the "all sums" argument is defeated by the prior rule of construction stated in Civil Code section 1641, which requires that each term in the contracts must be given meaning. (*See Bank of the West, supra,* 2 Cal. 4th at 1264-65 (rejecting an insured's effort to apply *contra proferentem* "too early in the interpretive process," and instead applying the

rule that "'language in a contract must be construed in the context of that instrument as a whole'"); emphasis omitted.)

To apply an "all sums" result to the insurers' policies – which only provide coverage for harm during the policy period – would require a legal fiction that the entirety of a multi-year, continuous loss happened during the period of one policy. This Court should reject the fiction of "all sums." Each of the State's policies only provides insurance for that part of a covered loss that resulted during its own policy period.[2]

B. The "All Sums" View Is an Unreasonable Construction of the Policy Wording.

The "all sums" approach is not a reasonable interpretation of the insurance contracts. As one commentator has noted, applying the "all sums" interpretation to standard occurrence policy language would amount to the same result as if a court – in interpreting a contract in which the promisor agreed to purchase "all widgets manufactured by the promisee

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[2] As set out above, the rule of *contra proferentem* does not apply here. But if it did apply, the policies should be construed against the State, because the State drafted the policies. (Slip Opinion at 7.) (*See Garcia v. Truck Ins. Exchange* (1984) 36 Cal.3d 426, 438 (*contra* insurer rules are not applicable where the policy was negotiated by sophisticated insured enjoying substantial bargaining power vis-a-vis the insurer); *Fireman's Fund Ins. Co. v. Fibreboard Corp.* (1986) 182 Cal. App.3d 462, 468 (where an insured prepared the policy, "to the extent that any ambiguity exists, ordinarily it would be interpreted *against* [the insured], the party who caused the uncertainty to exist") (emphasis in original).)

The Court of Appeal suggested that the policies should be interpreted against the insurers because the State drafted the policies by "incorporating standard policy language originally drafted by insurance industry representatives." (Slip Op., p. 27, and 27 fn. 8.) Yet the State chose the policy wording by selecting particular clauses to incorporate in its policies and omitting standard wording often found in other policies. This combination of policy terms resulted from the State's choice of provisions. Because the State chose the policy wording, *contra* insurer rules of interpretation could not apply here.

during June 1995" – decided that the phrase "all widgets" obliges the promisor to buy all the promisee's widgets in perpetuity from the beginning of time to eternity. (B. Telles, Long Term Division, Calif. Law Bus. at 34 (October 21, 1996).) The "all sums" result arbitrarily replaces the contract terms limiting coverage for property damage "during the policy period" with the words "at any time," without justification. As this Court recognized in *Montrose,* there is an "arbitrariness, from the carrier's perspective, [in] telescoping all damage in a continuing injury case into a single policy period." (*Montrose, supra,* 10 Cal.4th at 688.)

The "all sums" approach is contrary to reason. It unfairly holds an insurer that issued a single triggered policy liable for all damage occurring at any time, although the insurer only received premiums for the risk of harm during the policy period. That result makes it impossible for an insurer to make rational underwriting decisions based on an assessment of the risk that property damage might occur during the policy period, because the premium charged would have to take into account the entire risk of loss for all time, rather than the risk of damage during the policy period under consideration. As one court noted:

> This [pay in full] approach could easily be extremely unfair to an insurer who was on the risk for a day but who then is burdened with the entire loss incurred over several years. Certainly such a formulation cannot help correlate risks insured with premiums charged.

(*Uniroyal Inc. v. Home Ins. Co.* (E.D.N.Y. 1988) 707 F. Supp. 1368, 1392.)

The Massachusetts Supreme Court recently agreed that liability policy wording is not reasonably susceptible to the "all sums" approach. (*Boston Gas, supra,* 454 Mass. at 362-363.) The *Boston Gas* court held: "[W]e doubt that an objectively reasonable insured reading the relevant policy language would expect coverage for liability from property

damage occurring outside 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." (*Id.*)

Likewise rejecting the "all sums" approach, the Colorado Supreme Court aptly stated the reasoning behind such decisions:

> As many courts have commented, the ["all sums"] method followed by the trial court creates a false equivalence between an insured who has purchased insurance coverage continuously for many years and an insured who has purchased only one year of insurance coverage....

(*Public Service Company of Colorado v. Wallis & Companies* (Colo. 1999) 986 P.2d 924, 939.)

As these courts explained, it is not reasonable to conclude that an insured that bought insurance in one year would be entitled to the same coverage for a 30-year continuous loss as an insured that paid premiums to purchase insurance in each of those years. As the Court of Appeal observed, in a case involving after-acquired liability, it is "not credible" that an insurer "would write coverage ... which would last in perpetuity, and ... for which the insurer would have no opportunity to assess risks and collect premiums." (*Cooper Cos. v. Transcontinental Ins. Co.* (1995) 31 Cal.App.4th 1094, 1109, fn.13, *review den.*) The same point was made in *A.C. Label Co. v. Transamerica Ins. Co.* (1996) 48 Cal.App.4th 1188, 1194-1195, which held in a different context that it works an "injustice" to permit an insured to obtain coverage where "the insurer's ability to assess risks would be seriously undermined."

In short, the "all sums" argument defies the reality of insurance underwriting, because it permits an insured to obtain coverage for harm resulting after the insurer's policy period expired, although the

insurers had no opportunity to assess the risks presented by the insured in years after the policy period expired – and the insurers had no ability to charge premium based on such post-expiration risks. (*Olin Corp. v. Insurance Co. of North America* (2nd Cir. 2000) 221 F.3d 307, 323 (pro rata allocation properly requires "an insured to absorb the losses for periods when it self-insured and can prevent it from benefitting from coverage for injuries that took place when it was paying no premiums").)

The "all sums" approach defies reasonableness in another respect. Under an "all sums" interpretation, while each triggered policy is held liable for the entirety of a continuing loss, the various insurers are held to have equitable contribution rights against one another. Yet the contribution rights of any one insurer regarding a particular loss would depend on whether other insurers' policies cover the loss. That question would in turn depend on a number of factors that cannot be addressed in underwriting a policy. These factors include, for example, whether the insured purchased insurance after the policy period at issue, whether subsequent policies added exclusions barring insurance for risks covered under earlier policies, whether the insured could find all its policies years later when claims arise, and whether the other insurers remained solvent. The risk that an insurer might become insolvent – or that the insured would lose its policies over time – would be shifted from the policyholder to its other insurers, because under "all sums" the policyholder could recover in full from a solvent insurer, which could not obtain contribution from those other insurers. It is objectively unreasonable to construe the policies to provide that the underwriters' exposure depends on variables that cannot be assessed during the underwriting process, but which instead depend on contracts the insured makes with other insurers.

This point is illustrated by two hypothetical claims, involving a continuous loss in which pollution damage took place over 10 years. In

both hypotheticals, the insured bought a series of one-year policies from different insurers, with each policy having annual policy limits of $10 million. In both hypotheticals, the insured incurred $10 million in liability for its ten continuous years of pollution.

In the first hypothetical, the insured purchases ten one-year policies, each policy covers the loss, and each insurer is solvent. The insured seeks recovery only from the insurer who issued the policy in year three. Under the "all sums" approach, if the insured obtained $10 million in insurance recovery from the year 3 insurer, that insurer could obtain contribution of $1 million from each of the other nine insurers.

By contrast, in the second hypothetical, the year 3 insurer is the only solvent insurer whose policy covers the loss. The policies in effect during years 1 and 2 were lost over time, and cannot be established. The insured decided to "self-insure" in years 4 and 5, and did not buy insurance during those years. The insurers that issued policies in years 6 and 7 later became insolvent, and cannot pay contribution. And the insured bought policies during years 9 and 10 that include pollution exclusions and bar coverage for the loss. In this example, the "all sums" approach would require the year 3 insurer to pay the entire $10 million loss, with no recovery from other insurers. That is, under the "all sums" approach, the year 3 insurer's obligation increases ten-fold from the first to the second hypothetical, only because the insured lost other policies, the insured decided not to buy insurance in certain years, the insured bought insurance from companies that later became insolvent, and the insured subsequently bought policies that contain different terms. But the year 3 insurer could not assess any of those factors at time it issued its policy and set the premiums to be paid, and had no part in the insured's purchase of policies from other insurers.

In short, the "all sums" approach is objectively unreasonable because it makes an insurer's liability for a covered loss dependent on the terms of the insured's other policies, on whether the insured purchased coverage in other policy periods, and on other insurers' financial stability. It is not reasonable to conclude that insurers construed the policy terms to mean that their obligations could increase tenfold as in this hypothetical – or possibly more, depending on the case – due to circumstances that the underwriter could not evaluate during the negotiations for the policy.

Rather, the only objectively reasonable interpretation of this policy language is that each triggered policy only covers property damage "during the policy period." Under the pro rata approach, the insured is properly responsible for liability due to property damage during years in which the insured did not maintain applicable insurance. (*See Boston Gas, supra,* 454 Mass. at 364, quoting *Olin, supra,* 221 F.3d at 323 (holding that the insured rightly bears the risk that its other insurers are unable to pay contribution, stating "[t]here is logic in having the risk of such defalcation fall on the insured, which purchased the defaulting insurer's policy, rather than on another insurer which was a stranger to the selection process).)

Thus, the "all sums" view is contrary to the policy wording and is unreasonable in application. As this Court held in a different context, "even if this language were, in fact, unclear in this regard, there is simply no basis to speculate that [the insured] had objectively reasonable expectations – or indeed any expectations whatsoever – that the words extended so far." (*See Powerine, supra,* 24 Cal.4th at 974.)

C. The "All Sums" Approach Creates Needless Litigation.

The "all sums" approach is also unreasonable because it creates extensive, needless ancillary litigation regarding allocation of insurers' liability.

Under the "all sums" view, each insurer whose policies are triggered by a continuous loss is held responsible to the insured for the entire loss (up to the policy limits). The question then becomes how the loss is allocated among the respective insurers. (*See Armstrong World Industries, Inc. v. Aetna Cas. & Sur. Co.* (1996) 45 Cal.App.4th 1, 52.) In *Signal Companies v. Harbor Ins. Co.* (1980) 27 Cal.3d 359, 369, this Court declined to impose a single method of allocating losses between insurers, stating that varying equitable considerations may arise in different cases. And indeed, the courts have adopted a number of different allocation methods. (*See Stonewall, supra,* 46 Cal.App.4th at 1861-1862 (describing six allocation methods adopted by different courts, and noting that yet other allocation methods are possible).)

The number of competing methods for allocating "all sums" liability among insurers has spawned repeated litigation on the issue. The diversity of competing allocation methods applied by the courts – combined with the vastly different outcomes that can result from the various theories – practically guarantees that questions concerning allocation will be re-litigated in each insurance case involving continuing harm over multiple policy periods.

By contrast, where "all sums" is rejected, such secondary litigation regarding allocation is not required, because each policy pays only for the pro rata portion of a covered loss that happened during its policy period. (*See, e.g., Public Service Co. of Colorado, supra*, 986 P.2d at 941, 941 fn. 17.) Under the pro rata interpretation, there typically is no overlapping coverage to apportion among the insurers in a second litigation. Rather, each triggered policy simply pays for the pro rata share of the overall harm that happened in its own policy period, subject to the policy terms, conditions, exclusions and limits.

Courts have considered the needless litigation on allocation issues resulting from "all sums" as a basis for rejecting the "all sums" interpretation of the policy wording. For example, the New Hampshire Supreme Court concluded that the joint and several "all sums" approach is "improvident" because:

> It "does not solve the allocation problem; it merely postpones it." ... This method "divides the case into two separate suits: in the first suit, the insured selects and sues one of the triggered insurers; in the second suit, the selected insurer then sues other triggered insurers for contribution." ... In this way ... the joint and several method does not decrease litigation costs, does not give courts guidance as to how to allocate liability, and requires insurers to "factor the costs of uncertain liability into their premiums." (Citations omitted.)

(*EnergyNorth Natural Gas, Inc. v. Certain Underwriters at Lloyds* (N.H. 2007) 156 N.H. 333; 934 A.2d 517, 527, quoting Comment, Allocating Progressive Injury Liability Among Successive Insurance Policies, 64 U. Chi. L. Rev. 257, 271 (1997).) Citing this discussion, the Massachusetts Supreme Court recently held that "adopting pro rata allocation is not only consistent with the policy language at issue here, but it also serves important public policy objectives." (*Boston Gas, supra,* 454 Mass. at 364.) The Massachusetts court concluded that – in additional to being compelled by the policy language – "the pro rata allocation method promotes judicial efficiency, engenders stability and predictability in the insurance market, provides incentive for responsible commercial behavior, and produces an equitable result." (*Id.* at 366.)

D. Courts in Other Jurisdictions Have Increasingly Rejected "All Sums."

The majority of state Supreme Courts that have considered this issue have rejected the "all sums" approach, by a twelve to six margin, and this trend is growing. The list of state high courts rejecting the "all sums" argument includes Massachusetts, New York, New Jersey, Connecticut, Vermont, New Hampshire, Kentucky, Minnesota, Louisiana, Kansas, Colorado, and Utah:

- *Boston Gas, supra*, (Mass. 2009) 454 Mass. at 358 (the "policy applies only to injury to or destruction of property taking place during the policy period").

- *Towns v. Northern Sec. Ins. Co.* (Vt. 2008) 964 A.2d 1150, 1167 (allocating coverage based on years on the risk, and assigning the insured responsibility for damage in years where it had no applicable insurance).

- *Southern Silica of Louisiana, Inc. v. Louisiana Ins. Guaranty Assoc.* (La. 2008) 979 So.2d 460, 468 (finding the available insurance "is the pro rata share of each insurer for each year that insurer was on the risk").

- *EnergyNorth Natural Gas, supra,* (N.H. 2007) 934 A.2d at 526 ("'we doubt that [the insured] could have had a reasonable expectation that each single policy would indemnify [it] for liability related to property damage occurring due to events taking place years before and years after the term of each policy.' ... Nor could [the insured] have had a reasonable expectation that it would be exempt from liability for injuries that occurred during any period in which [the insured] was uninsured or underinsured.") (Citations omitted.)

- *Security Ins. Co. of Hartford v. Lumbermens Mutual Casualty Co.* (Conn. 2003) 826 A.2d 107, 121 ("we cannot torture the insurance policy language in order to provide [the insured] with uninterrupted insurance coverage where there was none").

- *Atchison, Topeka & Santa Fe Railway Co. v. Stonewall Insurance Co.* (Kan. 2003) 71 P.3d 1097, 1134 ("the concept of joint and several liability is not consistent with the term 'all sums' in the policies. It also clearly contradicts the fundamental insurance agreement to indemnify the insured for injuries during a specified policy period.")

- *Aetna Cas. & Sur. Co. v. Commonwealth of Kentucky* (Ky. 2003) 179 S.W.3d 830, 842 (affirming the lower courts' rulings pro rating damage over the policy periods at issue).

- *Consolidated Edison Co. v. Allstate Ins. Co.* (N.Y. 2002) 98 N.Y.2d 208, 224 (rejecting joint-and-several allocation, and holding that covered liability (if any) was correctly pro-rated over all policy periods and uninsured years in question).

- *Public Service Company of Colorado, supra,* (Colo. 1999) 986 P.2d at 939 ("We do not believe that these policy provisions can reasonably be read to mean that one single-year policy out of dozens of triggered policies must indemnify the insured's liability for the total amount of pollution caused by events over a period of decades, including events that happened both before and after the policy period....").

- *Carter-Wallace v. Admiral Ins. Co.* (N.J. 1998) 712 A.2d 1116, 1123-1125 (rejecting an "all sums" joint and several approach).

- *Domtar, Inc. v. Niagara Fire Insurance Company* (Minn. 1997) 563 N.W.2d 724, 732 (finding liability under each policy according to the time each policy was on the risk), *citing Northern States Power v. Fidelity & Casualty Co. of N.Y.* (Minn. 1994) 523 N.W.2d 657.

- *Sharon Steel Corporation v. Aetna Casualty & Surety Co.* (Utah 1997) 931 P.2d 127, 140-142 (rejecting "all sums" even in the defense context).

Other courts have adopted the "all sums" approach, including the Supreme Courts of Pennsylvania, Delaware, Indiana, Ohio, Wisconsin, and Washington.[3] But most state Supreme Courts to address the issue have rejected "all sums," and – as reflected in the parties' briefs – the majority of federal Circuits have done so as well.

E. Earlier California Appellate Decisions Erred by Applying "All Sums" in the Indemnity Context Based on this Court's Decisions addressing the Duty to Defend.

In its decision below, the Court of Appeal did not analyze the policy language at issue, concluding it was bound by this Court's prior holdings in *Aerojet* and *Montrose* to apply "all sums" to the duty to indemnify. (Slip. Opinion at 16-17.) Yet this Court has never decided this issue in the indemnity context.

Rather, *Aerojet* and *Montrose* adopted an "all sums" approach in the duty to defend context. (*Aerojet, supra,* 17 Cal.4th at 58-59; *see also Montrose, supra,* 10 Cal.4th at 686.) *Montrose* stated that all policies potentially triggered by a continuous loss may have a duty to defend against resulting liability. (*Montrose, supra,* 10 Cal.4th at 689.) *Aerojet* held that where potentially-covered damage may have resulted during an insurer's policy period, that insurer must defend the insured as to the entire

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[3] *See J.H. France Refractories Co. v. Allstate Ins. Co.* (Pa. 1993) 626 A.2d 502, 507-509; *American Nat. Fire Ins. Co. v. B & L Trucking and Const. Co., Inc.* (Wash. 1998) 951 P.2d 250, 253-257; *Plastics Engineering Co. v. Liberty Mutual Ins. Co.* (Wis. 2009) 759 N.W.2d 613, 620; *Hercules Inc. v. AIU Ins. Co.* (Del. 2001) 784 A.2d 481, 491; *Allstate Ins. Co. v. Dana Corp.* (Ind. 2001) 759 N.E.2d 1049, 1057-1058.

The Ohio Supreme Court adopted an "all sums" holding in *Goodyear Tire & Rubber Co. v. Aetna Cas. & Sur. Co.* (Ohio 2002) 769 N.E.2d 835, 841, but that issue is again before the Ohio Supreme Court in a pending case, on grant of review in *Pennsylvania General Ins. Co. v. Park-Ohio Industries, Inc.,* Case No. 2009-0104.

potentially-covered claim, even if other potentially-covered damage may have resulted in other policy periods. (*Aerojet, supra,* 17 Cal.4th at 58-59.)

Although the issues decided in *Montrose* and *Aerojet* only involved the duty to defend, statements in both decisions refer to an "all sums" approach with respect to indemnity as well. (*Montrose, supra,* 10 Cal.4th at 686; *Aerojet, supra*, 17 Cal.4th at 56-57, *see also* 57 fn. 10.) But as the dissent in *Aerojet* pointed out, *Montrose* also contains contrary language, stating that standard occurrence based liability policies are only intended to cover damage or injury that occurs during the policy period. (*Aerojet, supra,* 17 Cal.4th at 89-90, dissenting opinion of Justice Chin, joined by Justice Baxter, citing *Montrose, supra*, 10 Cal.4th at 673.) In any event, the indemnity issue was not before the Court in either case.

In *Montrose,* the Court only addressed whether four general liability policies "obligate Admiral to *defend* Montrose in lawsuits seeking damages for continuous or progressively deteriorating bodily injury and property damage that occurred during the successive policy periods." (*Montrose, supra,* 10 Cal.4th at 654; emphasis added.) The Court held that each policy was potentially triggered because part of the ongoing loss allegedly resulted during each policy period, and that the potential for coverage could give rise to a duty to defend under each policy. (*Id.* at 689.) In deciding that question, it was not necessary to determine the *extent* of each triggered policy's indemnity obligation, or whether each triggered policy covered injury during other policy periods. The "all sums" issue was not implicated in the indemnity context.

The *Aerojet* Court addressed two issues. (*Aerojet, supra,* 17 Cal.4th at 45.) The first question was whether certain site investigation costs may constitute defense or indemnity costs, which has no bearing here. The second question was "whether *defense* costs may be allocated to the

insured." (*Id.*; emphasis added.) Like the issue raised in *Montrose*, the second question in *Aerojet* only concerned the duty to defend.

And the *Aerojet* court's analysis of the issue focused on considerations unique to the duty to defend. (*Id.* at 68-76.) *Aerojet* explains that the duty to defend is broader than the duty to indemnify, and that different analyses apply in determining whether costs are properly included within these distinct duties. (*Id.* at 59 ("It is plain that the insurer's duty to defend is broader than its duty to indemnify.... It extends beyond claims that are actually covered to those that are merely potentially so....").)[4] Moreover, *Aerojet* notes that an insurer must advance all defense costs that can be allocated to a claim that is potentially covered only in part. (*Id.* at 59, citing *Buss v. Superior Court* (1997) 16 Cal.4th 35, 48-49, which held that if a complaint alleges any potentially covered claim, the insurer must advance costs of defending the insured against the entire suit, including claims that are not potentially covered, subject to a right of reimbursement of costs for defense of claims that are not potentially covered (*Buss, supra*, 16 Cal.4th at 49-53).) The *Aerojet* court reasoned that because an insurer must advance all defense costs that can be allocated to a claim that is at least in part potentially-covered, the duty to defend under a triggered policy extends to the entire defense where at least part of the potentially-covered damage happened during the policy period. (*Id.* at 60, 68-76.)

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[4] See *also Palmer, supra,* 21 Cal.4th at 1120 ("While an insurer has a duty to defend suits which potentially seek covered damages, it has a duty to indemnify only where a judgment has been entered on a theory which is *actually* (not potentially) covered by the policy."), emphasis in original); *Buss, supra,* 16 Cal.4th at 45-46 (the duty to indemnify runs to claims that are actually covered in light of facts proved, while the duty to defend encompasses claims that are merely potentially covered in light of facts alleged).

Such considerations do not apply to the duty to indemnify, however, which extends only to "harm proved within coverage." (*Powerine, supra,* 24 Cal.4th at 950; *compare Palmer, supra,* 21 Cal.4th at 1120; *Buss, supra,* 16 Cal.4th at 45-46.) In short, *Aerojet* and *Montrose* did not decide the indemnity issues presented here.

Later Court of Appeal decisions applied the "all sums" approach in the indemnity context, but those opinions suggest the lower courts felt bound by statements in *Montrose* or *Aerojet*. (*See Armstrong, supra,* 45 Cal.App.4th at 49-50, quoting *Montrose*, *supra*, 10 Cal.4th at 686; *Stonewall, supra,* 46 Cal.App.4th at 1854-1855 ("we find the answer to [the 'all sums' question] in *Montrose*'s analysis"); *FMC, supra,* 61 Cal.App.4th at 1181-1187 (discussing *Montrose*, *Aerojet* and *Armstrong*).)

The lower courts' reliance on *Montrose* and *Aerojet* as authority for extending "all sums" to the indemnity context was inapt. As Justice Chin stated in the dissent in *Aerojet*: "Nowhere does *Montrose* require an insurer to *indemnify* or *reimburse* an insured for a monetary loss incurred outside the policy period." (*Aerojet*, *supra,* 17 Cal.4th at 90, dissenting opinion of Justice Chin, joined by Justice Baxter, citing *Montrose, supra*, 10 Cal.4th at 673; emphasis in original.) When the policy language is examined and the rules of contract interpretation are applied, "all sums" should be rejected.

F. This Court's Decision in *State of California v. Allstate* Does Not Support "All Sums."

The State claims that its "all sums" argument is supported by this Court's decision in *State of California v. Allstate Ins. Co.* (2009) 45 Cal.4th 1008 ("*State of California I*"). (Answer Brief on the Merits at 33-35.) But that claim fails.

First, as demonstrated in the excerpt recited by the State, the Court's prior decision considered harm resulting from "an excluded cause

of property damage," where the "excluded risk is a concurrent proximate cause." (Answer Brief at 33, citing *State of California I, supra,* 45 Cal.4th at 1031-1032.) That is, the earlier case involved the effect of a policy exclusion on coverage (*i.e.,* the pollution exclusion). By contract, this case does not address the effect of an exclusion, but concerns the scope of the policy's basic coverage grant.

This Court recently emphasized the importance of this distinction. (*See Delgado v. Interinsurance Exchange of the Automobile Club of Southern California* (2009) 47 Cal.4th 302, 313.) In *Delgado,* the insured argued that intentional acts committed in self-defense could amount to an "accident," citing the Court's decision in *Gray v. Zurich Insurance Co.* (1966) 65 Cal.2d 263, 266. (*Delgado, supra,* 47 Cal.4th at 312-313.) The Court rejected the insured's argument, stating: "That reliance is misplaced. *Gray* and the cases that have cited it pertained to the question of unreasonable use of force or unreasonable self-defense in the context of an insurance policy's *exclusionary* clauses, not as here in the context of a policy's *coverage* clause." (*Id.* at 313; emphasis in original.) As this Court explained in *Delgado,* different rules apply in addressing a policy's insuring provisions and its exclusions: "'[A]lthough exclusions are construed narrowly and must be proven by the insurer, the burden is on the insured to bring the claim within the basic scope of coverage, and (unlike exclusions) courts will not indulge in a forced construction of the policy's insuring clause to bring a claim within the policy's coverage.'" (*Delgado, supra,* 47 Cal.4th at 313, quoting *Waller, supra,* 11 Cal.4th at 16.)

Unlike the gradual pollution damage in *State of California I,* property damage outside the policy period is not an excluded risk. Rather, such damage is not covered by the policies' insurance provisions. Accordingly, the concurrent causation ruling in that case does not apply here. Rather, the State can only obtain coverage for harm proven within the

policies' grant of coverage. (*Waller, supra,* 11 Cal.4th at 16; *Weil v. Federal Kemper Kife Assur. Co.* (1994) 7 Cal.4th 125, 148.)

Second, the insured's reliance on *State of California I* fails for another reason. The State argues that under "'long-standing principles of joint and several liability,' applicable in CERCLA as well as common-law torts," the insurers should be liable for indivisible property damage resulting in all years – although the policies refer only to liability because of "property damage during the policy period." (Answer Brief at 34-35.) Yet the United States Supreme Court recently explained that CERCLA liability is only joint and several where the damage is indivisible, and the Court held that continuous pollution damage is properly divisible by pro rata allocation based on the number of years at issue. (*Burlington-Northern & Santa Fe Railway v. United States* (2009) 129 S.Ct. 1870, 1880-1883.)

In *Burlington-Northern,* the Supreme Court noted the general tort principle that "[w]hen two or more causes produce a single, indivisible harm, 'courts have refused to make an arbitrary apportionment for its own sake, and each of the causes is charged with responsibility for the entire harm." (*Id.* at 1881, quoting the Restatement (Second) of Torts § 433A, Comment i, p. 440 (1963-1964).) By contrast, the court held that pollution liability is properly divisible where "a reasonable basis for apportionment exists." (*Burlington-Northern, supra,* 129 S.Ct. at 1881.)

The Supreme Court went on to consider whether the pollution damage at issue, which involved ongoing waste releases throughout a 13-year period, was indivisible. The Supreme Court affirmed the District Court's ruling that the case presented "a classic 'divisible in terms of degree' case, both as to the time period in which defendants' conduct occurred, and ownership existed, and as to the estimated maximum contribution of each party's activities that released hazardous substances that caused Site contamination." (*Id.* at 1882-1883.) Among other factors,

the Supreme Court found that the defendant railroads' liability for pollution should be apportioned based on the fact that "the Railroads had leased their parcel to [the polluter] for 13 years, which was only 45% of the time [the polluter] operated the Arvin facility." (*Id.*) In other words, the Court held that liability for ongoing pollution is divisible based on pro rata allocation over the annual periods at issue. (*Id.*)

Accordingly, this Court's concurrent causation holding in *State of California I* cannot apply to allocation of liability for property damage over the policy periods and other years at issue. The concurrent causation rule in that case only applies where a loss is indivisible. (*State of California I, supra,* 45 Cal.4th at 1036-1037.) But with pollution liability under CERCLA, the United States Supreme Court holds that liability is properly divisible on a pro rata approach based on annual periods. (*Burlington-Northern, supra,* 129 S.Ct. at 1881-1882.) In other words, liability for continuous pollution over multiple years is not indivisible for these purposes – but is divisible based on the number of years during which the pollution took place. (*Id.*)

Even under the State's argument that tort principles are relevant in applying its insurance contracts, the State's argument fails here.[5] As an insured's liability for pollution under CERCLA is divisible by year on a pro rata basis, coverage for an insured's pollution liability is properly apportioned based on pro rata allocation by year. That is, each policy only applies to the pro rata share of covered property that took place during its own policy period. This conclusion follows inexorably from the principles

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[5] Moreover, contractual obligations of insurers to an insured are separate and distinct from the tort liability of insureds to underlying claimants. (*Armstrong, supra,* 45 Cal.App.4th at 58.) As this Court has explained, CERCLA law does not control the interpretation of insurance contracts under state contract law. (*AIU v. Superior Court* (1990) 51 Cal.3d 807, 831.)

governing "the tort law source of the insured's liability." (*Cf. State of California I, supra,* 45 Cal.4th at 1031.)

G. Requested Ruling.

London Market Insurers respectfully submit that the Court should reject "all sums," and should rule that each policy is only liable to pay for covered harm that took place during its own policy period.

The Court should further rule that in cases of continuous pollution, where coverage for property damage liability is triggered under policies in effect during certain years, the insured's liability for its pollution should be allocated on a pro rata basis over all years during which property damage continued to take place, from the date that damage to third-party property first resulted until the date the insured's underlying liability for the pollution is established.[6]

Each insurer's indemnity obligation is properly limited to the share of liability allocated to covered damage taking place during that insurer's policy period. The liability allocated to each policy period is properly allocated among the policies in effect during that period. And the insured is responsible for the liability allocated to periods in which the insured does not have applicable insurance coverage. (*See, e.g.,* the Colorado Supreme Court's explanation of its pro rata allocation approach in *Public Service Company of Colorado, supra,* 986 P.2d at 941 and 941 fn. 17.)

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[6] In *Montrose, supra,* 10 Cal.4th at 692, the Court held that the risk of pollution is still insurable, and insurance is not barred by the known loss doctrine, until the insured's liability for its pollution is established. The allocation of the insured's liability should thus include all years up to the point that liability is determined and the risk was no longer insurable.

III. IF "ALL SUMS" DOES APPLY, THEN "ANTI-STACKING" SHOULD APPLY AS WELL

If the Court rejects "all sums," the stacking issue does not need to be resolved in this case. Where each policy is interpreted only to cover property damage during its own policy period – as the policy language provides – there is no overlapping coverage to stack under policies in effect during consecutive periods, and each policy only pays for covered damage that happened in its own policy period.

But if the Court adopts "all sums" with respect to the duty to indemnify, the Court should reject the Court of Appeal's conclusion that insureds can stack the limits of multiple years' policies under an "all sums" approach. In its discussion of stacking, the Court of Appeal addressed the policies' "occurrence" definition, but omitted any mention of other policy wording such as the "Policy Period Territory" provision. (*See, e.g.,* Slip. Op. at 25-26.) In short, the Court of Appeal disregarded policy language precluding coverage for damage outside the policy period and – having ignored that wording – tautologically concluded that stacking of excess limits across multiple periods is permitted. Combining "stacking" with "all sums" unreasonably permits the insured to recover more than it bargained or paid for. Courts have properly adopted anti-stacking to preclude the unreasonable outcomes that otherwise follow from the "all sums" approach.

A. If "All Sums" Applies, Combining "Stacking" With "All Sums" is Unreasonable.

The State's stacking argument not only ignores the policy terms limiting coverage to damage during the policy period, it also ignores the rule that courts will not interpret contracts to have a meaning that is objectively unreasonable. (*See, e.g., Bank of the West, supra,* 2 Cal. 4th at 1264-1265.) The *FMC* court properly rejected the insured's attempt to stack excess policy limits under the "all sums" approach, because a

construction of the policies to permit stacking is unreasonable and should not be adopted. (*FMC, supra,* 61 Cal.App.4th at 1188-1190.)

The *FMC* court correctly recognized that combining "all sums" with "stacking" would be unreasonable. (*FMC, supra,* 61 Cal.App.4th at 1188-1190.) Addressing the insured's claim that it was entitled to "stack" excess policy limits, the *FMC* court observed under the facts in question that "stacking" could allow FMC to recover $7 million for each occurrence – far more than the policies' stated limit of $1 million per occurrence. (*Id.* at 1188.) The *FMC* court objected to this inequitable result, noting:

> This kind of "stacking" of the limits of an insurer's policies for consecutive policy periods has been criticized as affording the insured substantially more coverage ... than the insured bargained or paid for.

(*Id.* at 1189, citations omitted.) In other words, *FMC* logically held that an insured can only recover the amount of one "per occurrence" policy limit for a loss involving one occurrence that continued over several policy periods. (Id. at 1191.)

In that holding, *FMC* followed the lead of other courts that recognized and tempered the unreasonable results that might follow once a court adopts the fiction that insurance policies cover property damage outside the policy period. For example, the Sixth Circuit found policies must implicitly preclude stacking of limits, or the insured would get "much more insurance than it paid for." (*Ins. Co. of North America v. Forty-Eight Insulations* (6th Cir. 1980) 633 F.2d 1212, 1226 fn. 28.) Another court noted that "stacking in this manner makes the aggregate limits and the separately negotiated premiums for each policy illusory by expanding coverage to the sum of both policies." (*Uniroyal, supra,* 707 F.Supp. at 1391-1392.) And the D.C. Circuit acknowledged the insurer's concern that

a pure "all sums" approach would "leave an insured equally off with one year of insurance coverage as it would be with several years of coverage." (*Keene Corp. v. Ins. Co. of North America* (D.C. Cir. 1981) 667 F.2d 1034, 1049.) As all these courts recognized, if an insured is allowed to recover for decades of damage from one policy, it is unreasonable to allow the insured to recover more than one "per occurrence" policy limit for a loss involving a single occurrence.

Thus, *FMC* held that an insured can only recover one set of "per occurrence" excess policy limits for a loss involving one occurrence over several policy periods. (*FMC, supra,* 61 Cal.App.4th at 1190.) By contrast, stacking would unreasonably permit the insured to recover multiple "per occurrence" policy limits for a single occurrence – as if there were multiple occurrences. As the *FMC* court held, allowing the insured to recover multiple "per occurrence" limits for one occurrence would provide "substantially more coverage" than the insured bargained or paid for. (*Id.* at 1189.)

In short, permitting an insured to stack its excess policy limits would compound the unreasonable results inherent in the "all sums" approach. "All sums" requires a legal fiction that the entirety of a continuous loss can be attributed to one policy period, such that any one triggered policy is responsible for the entire loss. "Stacking" adds another layer to the fiction, creating a double fiction: not only is the whole of an ongoing loss attributed to one policy period, but the entire continuous loss is simultaneously attributed to each policy period in effect while the loss progressed. That is, if "all sums" is combined with stacking, policies in effect during each period could be liable for the entire continuous loss at the insured's election (up to their policy limits), as if the entire loss happened during the first policy period, and as if the entire loss also happened during

the second policy period, and as if the entire loss also happened during each of the remaining policy periods.

That is objectively unreasonable. Only a portion of a continuous loss results during each policy period. The "stacking" argument would contradict the policy language providing that each policy only provides coverage during its own policy period, and would increase the coverage available under each policy beyond that which an objective insured could reasonably expect – and beyond what the State could actually expect in light of its policy language limiting coverage to the damage during each respective policy period. If the fiction of "all sums" is applied, the *FMC* court's anti-stacking holding properly tempers the unreasonable outcome that might otherwise follow from the "all sums" approach. (*FMC, supra,* 61 Cal.App.4th at 1190.)

B. The State's Various Arguments Do Not Justify Stacking of Policy Limits Under "All Sums."

1. The "Other Insurance" Clause Does Not Permit the Insured to Stack Limits.

The State argues that the policies' "other insurance" clause expressly permits stacking the limits of all applicable policies. (Answer Brief at 52.) But that is not what the "other insurance" clause says, and is not how the clause is applied. *Armstrong* demonstrates that the "other insurance" clause is compatible with the anti-stacking rule, and illustrates how the clause controls allocation after the anti-stacking is applied.

> The "other insurance" wording at issue provides that:
>
> 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 ...

(*See, e.g.,* AA at 10177.) This provision means that excess policies do not apply until underlying primary insurance is exhausted. Simply put, the

"other insurance" clauses do not address the issue of "stacking" of multiple excess policy limits, but rather reinforce the horizontal exhaustion rule applied by California courts.

The *Armstrong* decision addressed how "other insurance" clauses apply under an "all sums" approach, 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 under the "all sums" and "anti-stacking" principles, – after an insured picks a single policy period. (*Armstrong, supra,* 45 Cal.App.4th at 51-52, 105-106.)

The *Armstrong* court examined the purpose of "other insurance" clauses in the specific context of "all sums," "no-stacking," and subsequent allocation among insurers. The court held that each policy "triggered" by a continuous loss was responsible for the insured's liability, and noted that the insured was not entitled to "stack" limits. (*Armstrong, supra,* 45 Cal.App.4th at 49-50, 50 fn. 15.) The court explained that while the insured could at most recover "only one year's policy limits" for each loss, the insured was permitted to select the policy year obligated to pay the insured's claim. (*Id.* at 50, fn.15, citing *Keene*, *supra*, 667 F.2d at 1049-1050.)[7]

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[7] The *Armstrong* trial court, following the reasoning in *Keene*, had allowed the insured to pick the policy that would respond, but limited the insured to that single policy limit. While the insured in *Armstrong* did not challenge the trial court's anti-stacking ruling on appeal, the appellate court noted that the rejection of stacking "is supported by *Keene*." (*Armstrong, supra*, 45 Cal.App.4th at 49-50, fn. 15.) The Court of Appeal stated that the principle that successive policies cover single asbestos-related injuries "*does not require that (the insured) be entitled to 'stack' applicable policies' limits of liability. ... Therefore, we hold that only one policy's limits can apply to each injury.* (*Id.*; emphasis added, quoting *Keene, supra.*)

The *Armstrong* court further 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.) In this regard, the court noted that requiring one insurer to pay "all sums" does not mean that ultimately "a single insurer will be saddled with full liability for any injury." (*Id.* at 51.) Rather, the court found that the amount paid by one insurer under "all sums" and "anti-stacking" may then be re-apportioned among all the other triggered policies. (*Id.* at 51.) And the court added that apportionment among the various insurers may be accomplished by reference to the respective policies' "other insurance" clauses. (*Id.* at 51-53.)

But these "other insurance" clauses do not expand the insurers' individual or collective obligations to the insured, as the State suggests. Indeed, in further explaining the role of "other insurance" clauses, the *Armstrong* court added:

> As we have explained ... apportionment among multiple insurers must be distinguished from apportionment between an insurer and its insured. When multiple policies are triggered on a single claim, the insurers' liability is apportioned pursuant to the "other insurance" clauses of the policies [Citation], or under the equitable doctrine of contribution. [Citations.] *That apportionment, however, has no bearing upon the insurer's obligations to the policyholder.*

(*Id.* at 105-106; emphasis added; citations omitted.)

Thus, as *Armstrong* explains, "'other insurance' provisions provide a scheme" by which an insurer's liability is reapportioned – after the insured selects a single policy period under anti-stacking and after the policies in effect during that one period pay "all sums" for the insured's liability for the entire loss. (*Id.* at 51, 105.) *Armstrong* confirms that "other insurance" clauses do not bar the "anti-stacking" rule, but work together

with "all sums" and "anti-stacking" to apportion the insured's liability among the insurers that issued policies triggered by the loss.

2. The Absence of a "Noncumulation" Clause Does Not Support "Stacking" of the Policy Limits.

The State asserts that the "Noncumulation of Liability – Same Occurrence" clause, present in certain later policies (not at issue here), is an "anti-stacking" provision, and argues that the State is entitled to stack limits because the policies in question do not include that clause. (Answer Brief at 55.)

The *FMC* court addressed and rejected the same argument. There, the policies did not include an express "anti-stacking" provision. Even so, after acknowledging the absence of such "noncumulation" language in the policies, the court prohibited "stacking" of multiple excess policy limits – whether or not the policies included explicit "anti-stacking" provisions – because that outcome was unreasonable and not consistent with the policy wording. (*FMC*, *supra*, 61 Cal.App.4th at 1189.) *FMC*'s conclusion in this regard is consistent with the principles of contract interpretation adopted by this Court. As this Court holds, even where some policies issued by an insurer contain express exclusionary language, other policies lacking such express language may nevertheless implicitly provide the same restriction on coverage. (*See Powerine*, *supra*, 24 Cal.4th at 969-970, fn. 10.)

For example, in *Powerine*, the court held that an express limitation is not required where a policy impliedly limits coverage:

> That the provision imposing the duty to indemnify happens to be limited to money ordered by a court more impliedly than expressly is of no consequence. An implied limitation is sufficient; an express limitation is not necessary.

(*Id.* at 969-970.) Similarly, the Court in *Buss* held that insurance policies provide insurers with an implied right of reimbursement, whether or not the policy wording expressly states that right. (*Buss, supra,* 16 Cal.4th at 51-52.)

Moreover, in recognizing implied limitations on coverage, the *Powerine* court distinguished between a policy's insuring provisions and its exclusions. The Court held:

> Neither is it of any consequence that the provision imposing the duty to indemnify with its more implied than express limitation might be less "conspicuous, plain and clear" than it would have been with a more express than implied limitation. It is an exclusionary provision, however, that is said to require "conspicuousness," "plainness," and "clarity." The provision imposing the duty to indemnify is simply not such: It does not exclude anything or anyone from the scope of the duty to indemnify, but merely defines the duty's scope in the first place.

(*Powerine, supra*, 24 Cal.4th at 970; citations omitted; emphasis added.) As in *Powerine*, the policy terms at issue here are part of the policies' basic coverage grant, not exclusions.

Furthermore, the *Powerine* court specifically declined to compare the policy in question with other policies that contained an express limitation. (*Id.* at 969-970, 970 fn. 10.) The "anti-stacking" result implied by the *FMC* court is not affected by the fact that other policies may contain an express "anti-stacking" clause.

Accordingly, under rules of interpretation adopted by this Court, *FMC* rightly found that an anti-stacking limitation should be implied in policies' coverage provisions and policy limits, where – due to the "all sums" analysis – any other result would unreasonably allow the insured to recover more insurance that it bargained and paid for.

Moreover, the noncumulation clause was contained in the State's *later* policies, issued after the policies in effect here. (Answer Brief at 55.) Subsequent revisions made in later insurance policies are not admissible to construe policy language in effect before the revisions were made. (*McKee v. State Farm Fire & Cas. Co.* (1983) 145 Cal.App.3d 772, 777-778; *State Farm Fire & Cas. Co. v. Eddy* (1990) 218 Cal.App.3d 958, 972-973.) The reason for this rule is that insurers often revise policy language in response to insureds' assertions regarding earlier policy wording, and revisions in later policies thus cannot be taken to evidence the insurer's understanding of prior language. (*McKee, supra,* 145 Cal.App.3d at 777-778; *Eddy, supra,* 218 Cal.App.3d at 972-973.)

In sum, the State's assertion that the noncumulation clause in other policies permits "stacking" in these policies is just wrong. As the *FMC* court stated, "[the insured] accused the . . . [insurers] of asking us to rewrite their policies.... We are obliged to conclude that it is in fact [the insured] which seeks judicially to revise [its] policies...." (*FMC, supra,* 61 Cal.App.4th at 1201.)

3. Cases Regarding Overlapping Coverage For The Same Loss Are Not Relevant Here.

The State cites a host of cases involving *overlapping* policies responding to a single loss in a single policy period. (Answer Brief at 46-47.) But this case involves a different situation, in which the State claims that *successive* policies should respond to an allegedly continuous loss. Those cited decisions do not apply in this case.

The State cites cases addressing various different situations that are inapt here. For example, the State cites cases where "an insured may buy one policy covering himself as a 'named insured' yet ... also be

covered under another's policy as an 'additional insured,'"[8] or where an injury results from "two or more separately-insured instrumentalities,"[9] where two "separately insured causes" produce an injury,[10] or where separate lines of coverage cover a loss.[11] (Answer Brief at 46-47.)[12]

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[8] *See, e.g., Hartford Acc. & Indem. Co. v. Sequoia Ins. Co.* (1989) 211 Cal.App.3d 1285 (permissive user of auto involved in roll-over accident covered under auto owner's policy and her father's auto policy); *Ins. Co. of North America v. Liberty Mut. Ins. Co.* (1982) 128 Cal.App.3d 297 (manufacturer of defective clothing item covered under its own policy, as well as the cloth supplier's policy); *Olympic Ins. Co. v. Employers Surplus Lines Ins. Co.* (1981) 126 Cal.App.3d 593 (party liable for mid-air collision covered under policies issued to both the parent company and that company's parent company).

[9] *Pacific Employers Ins. Co. v. Maryland Cas. Co.* (1966) 65 Cal.2d 318 (truck driver injured while rented forklift loaded goods from a plant into truck; overlapping coverage included policies issued to driver's employer, the plant and forklift rental company); *Mission Insurance Co. v. Hartford Ins. Co.* (1984) 155 Cal.App.3d 1199 (truck driver hauling trailer involved in accident; truck policy and trailer policy provided overlapping coverage; court looked to Ins. Code §11580.9 to determine the order in which policies had to respond).

[10] *State Farm Mutual Auto. Ins. Co. v. Partridge* (1973) 10 Cal.3d 94 (overlapping lines of homeowners and automobile coverage each held to cover a single loss.)

[11] *Owens Pacific Marine, Inc. v. Ins. Co. of North America* (1970) 12 Cal.App.3d 661 (insured obtained two different lines of policies, each of which concurrently covered a single loss.)

[12] Elsewhere, the State cites additional "overlapping" coverage cases, arguing erroneously that they provide support for its "pro-stacking" theory. (Answer Brief at 56.) In *Athey v. Netherlands Ins. Co.* (1962) 200 Cal.App.2d 10, cited by the State, a man rented a car and caused an accident. He was covered both by his own insurance and the rental car company's insurance, and the court concluded that both overlapping policies were primary and were required to respond. *See also, Lovy v. State Farm Insurance Co.* (1981) 117 Cal.App.3d 834, which the State cites as supporting an insured's entitlement to "combined policy limits," but which involved overlapping policies, each of which covered the loss.

In contrast to those cited decisions, this case does not involve overlapping coverage under concurrent policies for the same loss. These cases cited by the State are inapt here.

4. Horizontal Exhaustion of Primary Insurance Does Not Impact "Anti-Stacking" of Excess Policies.

The State cites cases requiring horizontal exhaustion of primary insurance limits. (Answer Brief at 58-60.) But those cases are irrelevant here, as the issue before the Court is whether the State can stack multiple excess limits. *FMC* distinguished cases precluding "stacking" of excess policy limits from cases requiring horizontal exhaustion of primary limits. (*See FMC, supra,* 61 Cal.App.4th at 1190.)

Under the principle of "horizontal exhaustion," all primary policies triggered by a single occurrence must be exhausted by payment of the primary policy limits before any excess policy can be implicated. (*See, e.g., Community Redevelopment Agency v. Aetna Cas. & Sur. Co.* (1996) 50 Cal.App.4th 329, 337-340; *Stonewall, supra,* 46 Cal.App.4th at 1849, 1852-1853.) Like the State here, the insured in *FMC* cited *Community Redevelopment* and *Stonewall* and argued that those decisions support "stacking" of policy limits. The *FMC* court rejected that argument, noting that the policies in *FMC* were excess policies, and distinguishing the horizontal exhaustion of primary limits from "stacking" of excess limits. (*FMC, supra,* 61 Cal.App.4th at 1143 (observing that "(e)xhaustion of FMC's primary coverage (*cf. Community Redevelopment, supra,* (citation omitted)) is not an issue on these appeals.").) As in *FMC,* this case does

not involve primary insurance, and horizontal exhaustion is not at issue here.[13]

IV. CONCLUSION

The real problem here is "all sums." The "all sums" approach not only contradicts the policy language, it has spawned needless litigation and conflicting results as courts attempt to apply an inherently unreasonable rule. The lower court adopted an "all sums" ruling in this case without examining or applying the policy language. For the reasons stated above, London Market Insurers respectfully ask the Court to reject "all sums" with respect to the duty to indemnify, and to rule that each policy is only liable to pay for covered harm that took place during its own policy period.

But if "all sums" is the law in the indemnity context, London Market Insurers ask the Court to adopt anti-stacking to ensure that policyholders do not obtain more insurance coverage than they for paid and that they could reasonably expect.

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[13] In its *amicus curiae* brief submitted in this case, Truck Insurance Exchange offers various complex hypotheticals regarding "stacking" and allocation among primary and excess insurers. (*See, e.g.,* Truck's *amicus curiae* brief at p. 11 fn. 9, pp. 24-25 fn. 25, p. 25 fn. 26, p. 39, pp. 39-40 fn. 32.) London Market Insurers believe Truck is seeking to prompt discussion on those issues by the Court in its opinion in this case, which Truck hopes to cite in asbestos bodily injury litigation in which it and London Market Insurers are involved – namely, *Truck Insurance Exchange v. Kaiser Cement & Gypsum Corp., et al.,* Los Angeles County Superior Court Case No. BC 249550. But allocation among primary and excess insurers is not before the Court in this case, and Truck's discussion of such issues is irrelevant here.

Nevertheless, Truck's hypotheticals illustrate the point that the "all sums" approach creates difficult allocation issues – and protracted litigation on such issues – that do not need to be resolved where liability is allocated on a pro rata basis over the years in question. (*See* pp. 14-16, above.)

Dated: September 4, 2009

Respectfully submitted,

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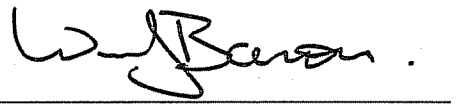
CERTIFICATION OF WORD COUNT

Pursuant to California Rule of Court 8.520(c)(1), I certify that, according to the word count feature of Microsoft Word, this *amicus curiae* brief contains approximately 11,493 words, not including the Tables of Contents and Authorities, proof of service, signature blocks or this certification page.

Dated: September 4, 2009



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DECLARATION OF SERVICE

I declare that I am, and was at the time of service hereinafter mentioned, at least 18 years of age and not a party to the above-entitled action. My business address is One Market, Spear Tower, Suite 2000, San Francisco, California 94105. I am a citizen of the United States and am employed in the City and County of San Francisco. On September 4, 2009, I caused to be served the following documents:

APPLICATION OF CERTAIN LONDON MARKET INSURERS FOR LEAVE TO FILE PROPOSED *AMICUS CURIAE* BRIEF; *AMICUS CURIAE* BRIEF IN SUPPORT OF DEFENDANT INSURERS CONTINENTAL INSURANCE COMPANY *ET AL*

Upon the parties as listed on the most recent service list in this action by placing true and correct copies thereof in sealed envelopes as follows:

FOR COLLECTION VIA HAND DELIVERY:

Clerk of the Court
California Supreme Court
Room 1295
350 McAllister Street
San Francisco, CA 94102

Original + 14 Copies

FOR COLLECTION VIA REGULAR MAIL:

The Honorable E. Michael Kaiser
Riverside Superior Court
4050 Main Street
Riverside, CA 92501-3703

Courtesy Copy

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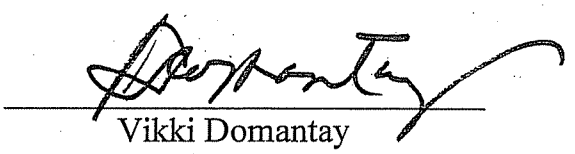
I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on September 4, 2009, at San Francisco, California.



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