

## California Supreme Court Clarifies “Pollution Exclusion,” Finds Coverage for Mitigation Activities, and Reaffirms Doctrine of “Concurrent Causation”

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Earlier this month in a sweeping victory for policyholders, the California Supreme Court unanimously clarified several important issues on insurance coverage for environmental liabilities. *State of California v. Allstate Insurance Company and Lloyds*, \_\_ Cal. 4th \_\_, 2009 WL \_\_\_\_ (Mar. 9, 2009). Specifically, the court unanimously held:

1. Liabilities arising from the intentional disposal of hazardous waste into a landfill, followed by the unintentional release of pollutants into the soil and groundwater, are not necessarily excluded by the “sudden and accidental” pollution exclusion. For purposes of applying the standard pollution exclusion, it is the discharge *from* the landfill that potentially triggers coverage, not the discharge *into* the landfill.
2. A policyholder’s efforts to avoid a significant loss, when the loss is imminent but has not yet occurred, may be covered by standard liability policies. Coverage for mitigation efforts is particularly significant in environmental remediation activities.
3. Where indivisible environmental property damage flows from the confluence of covered and excluded causes there is coverage. It is incumbent upon insurers to demonstrate whether damages can be allocated between covered and noncovered events and, if so, the proper allocation of such damages. In so holding, the court explicitly disapproved a 2001 Court of Appeal decision that placed the allocation burden on the policyholder.

### Background Facts

It was undisputed that (i) the State of California negligently designed and constructed the Stringfellow Landfill; (ii) the State intentionally placed hazardous materials in the landfill; (iii) for years, pollutants gradually leached into soil and groundwater causing substantial property damage; and (iv) there were a number of significant “sudden and accidental” events that also resulted in the release of pollutants into the environment. The “sudden and accidental” events were a one-in-fifty-year rainstorm in 1969 that flooded the landfill, and a controlled release of contaminated water in 1978 that was necessary to avoid a potentially catastrophic failure of the landfill resulting from flooding. The State’s clean-up costs are estimated at \$500 million.

During discovery, the State acknowledged it could not allocate its environmental liabilities arising from the property damage between the “covered” events—the sudden and accidental releases—from the “noncovered” events—the gradual seepage. As a result, the trial court entered summary judgment in favor of the insurers on the grounds that (i) the intentional disposal of waste into the landfill could not be considered “sudden and accidental,” and (ii) the policyholder bore the burden of allocating its liabilities between covered and noncovered events. Because the State could not make such an allocation, there was no coverage. The Court of Appeal affirmed in part and reversed in part on appeal. The Supreme Court accepted review and reversed in part and affirmed in part.

### **Relevant Discharge for Application of Pollution Exclusion**

Clarifying prior appellate authority, the Supreme Court found that the relevant “discharge” for purposes of the pollution exclusion was the *unintentional* release *from* the landfill rather than the *intentional* release of hazardous waste *into* the landfill. Observing that “the focus of the analysis must be on the particular discharge or discharges that gave rise to that property damage” giving rise to liability, the court explained:

We conclude the initial deposit of wastes was not a polluting event subject to the policy exclusion (i.e., a ‘discharge, dispersal, release or escape’ of pollutants) and, even if it were, the State’s liability was based not on the initial deposit, but instead on the subsequent escape of chemicals from the Stringfellow ponds into the surrounding soils and groundwater, making that the relevant set of polluting events.

Slip op. at 12.

### **Coverage for Mitigative Steps to Prevent Damage**

In 1978, after heavy rains, the State intentionally released contaminated liquids from the landfill into the creek bed in order to avoid flooding. The Supreme Court reversed the Court of Appeal’s determination that liabilities arising from this discharge were excluded because they arose from “intentional” conduct. Noting that there was evidence that the admittedly intentional release in 1978 was undertaken in order to avoid a more significant flooding event, the court concluded that “to the extent conditions in March 1978 *threatened* a ‘sudden and accidental’ release of wastes from the Stringfellow site, the qualified pollution exclusion does not bar coverage for liability arising from the State’s intentional releases performed to prevent such a greater accidental release.” Slip Op. at 19. In so holding the court affirmatively embraced the common-sense proposition that an ounce of prevention is worth a pound of cure, observing that “according coverage in this situation ‘encourages a most salutary course of conduct,’ that is, the taking of measures to mitigate or prevent damage.” Slip Op. at 18. This important reaffirmation of coverage for mitigation efforts is particularly helpful in promoting full recovery for environmental remediations, which often require protective steps to avoid or stem the spread of pollution.

### **Allocation of Damage Resulting from Covered and Noncovered Events**

In perhaps its most significant ruling, the Supreme Court held that where appreciable property damage resulting from contamination arises from both “covered” and “noncovered” events, the burden is on the insurer—not the policyholder—to demonstrate what portion of the damage is

excluded. To the extent that damage is indivisible, the entire loss is covered. In this ruling, the court upheld the “concurrent causation” principles embraced by its decision in *State Farm Mut. Auto. Ins. Co. v. Partridge*, 10 Cal. 3d 94 (1973), and specifically disapproved of a contrary Court of Appeal decision in *Golden Eagle Refinery Co. v. Associated International Ins. Co.*, 85 Cal. App. 4th 1300 (2001).

Here, it was undisputed that the property damage resulted from both covered (sudden and accidental) and noncovered (gradual) releases of pollutants. The State admitted that it could not allocate what damage resulted from covered or noncovered events. As a result, the insurers argued that, under *Golden Eagle*, the policyholder bore the burden of demonstrating the portion of damage resulting from covered losses and, to the extent the insured could not distinguish the cause of the losses, it would lose coverage. The Supreme Court disagreed, finding that where a loss resulted from two concurrent causes—one covered and one not—the loss was covered unless the insurers could allocate the loss among covered and noncovered events. In pertinent part, the court held:

[I]f the insured proves that multiple acts or events have concurred in causing a single injury (as in *Partridge*) or an indivisible amount of property damage (as may be shown at trial here), such that one or more of the covered causes would have rendered the insured liable in tort for the entirety of the damages, the insured’s inability to allocate the damages by cause does not excuse the insurer from its duty to indemnify. The insurer, of course, may counter the insured’s evidence of indivisibility with its own evidence that the damages are divisible and that only a limited portion of them resulted from covered events.

Slip op. at 32–33.

Importantly, the court rejected the contrary decision reached in *Golden Eagle* in virtually identical circumstances:

We therefore disapprove [*Golden Eagle*] insofar as it holds an insured must not only show a covered cause contributed substantially to the damages for which the insured was held liable, but must also show how much of an indivisible amount of damages resulted from covered causes.

Slip op. at 32.

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In sum, the *State of California* decision provides important clarification on potential insurance coverage for environmental property damage under California law.

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