

California Supreme Court Issues Long-Awaited Decision In *Powerine Oil Co. V. Superior Court* (“*Powerine II*”)

August 31, 2005

On August 29, 2005, the California Supreme Court issued its long-awaited decision in *Powerine Oil Co. v. Superior Court* (S113295) (“*Powerine II*”). In unanimously holding that administratively imposed environmental response costs fall within the insuring agreement of standard umbrella/excess general liability policies, the court ameliorated the impact of its prior decision in *Certain Underwriters at Lloyd’s of London v. Superior Court*, 24 Cal. 4th 945 (2001) (*Powerine I*), which held that a primary insurer’s obligation to indemnify “damages” incurred by its insured extended only to “money ordered by a court.” Although at first blush the results reached in *Powerine I* and *Powerine II* appear diametrically opposed, the court’s decision reaffirms the proposition that insurance coverage questions hinge on specific policy language. The seeming dichotomy of the results in *Powerine I* and *Powerine II* flows from the material distinctions between the primary policy language at issue in *Powerine I* and the umbrella policy language addressed in *Powerine II*. See Horton and Cox, *The Powerine Paradox*, 24-Sep. L.A. Law. 41 (2001) (Anticipating *Powerine II*).

Most significantly, the insuring agreement construed in *Powerine II* explicitly afforded coverage for “damages and expenses” and included an expansive definition of those terms in an “ultimate net loss” provision, leading the *Powerine II* court to conclude that “the insuring language of the excess/umbrella policies here in question is broader than that of the standard primary CGL policy at issue in *Powerine I* and covers costs that the insured must expend in complying with an administrative agency’s pollution cleanup and abatement orders.” Slip Op. at 2. The court also pointed to the traditional “gap-filling” role umbrella policies are designed to fill, concluding that a reasonable policyholder “would have expected the policies to grant broader coverage than that provided by the primary insurance.” Slip Op. at 24. Significantly, in citing umbrella policies’ “drop-down” function, the court signaled that the policyholder will be able to access the coverage upon exhaustion of what are typically modest self-insured retentions.

The decision is apt to have a profound impact on California policyholders confronted with environmental liabilities. The Supreme Court’s decision in *Powerine I* left these policyholders with the Hobson’s choice of either complying with administrative directives on the pain of insurance forfeiture or forcing environmental litigation in the hope of preserving that coverage. *Powerine II* affords policyholders with standard umbrella coverage with the option of working cooperatively with environmental agencies while preserving the right to be reimbursed for clean-up costs. Obviously, whether or not environmental claims are ultimately covered will turn on the discrete policy language of each insured’s contract, as well as the insured’s compliance with the contract’s terms and conditions.

Powerine II, however, represents a significant victory for California policyholders and may substantially increase the resources available to them to address their environmental liabilities.

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