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Ninth Circuit Holds That Policies Covering Environmental Claims Do Not Have Aggregate Limits

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In the case of *County of San Bernardino v. Insurance Company of the State of Pennsylvania*, the Ninth Circuit recently addressed the issue of whether general liability policies issued in the 1960s and 1970s included aggregate limits for claims arising under the premises-operations coverage in CGL policies. The difference between the policyholder's interpretation of the policies' limits clauses and the insurer's interpretation was worth hundreds of millions of dollars in exposure for the insurer. The Court closely examined the policy language and extrinsic evidence from both the insurance industry's drafting history and the parties before concluding that the policies were ambiguous. The Court construed that ambiguity in favor of the policyholder and ruled that aggregate limits did not apply to the claims at issue. The Court's decision underscores the importance of carefully examining a policy's limits, especially for older policies written before 1986 when the insurance industry revised the standard-form CGL policy to state the aggregate limits apply not only to products liability claims but to premises-operations claims as well. Decades of insurance industry drafting history confirms, as the policyholder's submissions in this case indicate, that the industry well understood that operations claims like the environmental waste-disposal claims at issue here typically were not subject to aggregate limits.

Case Background

Chino Airport, which is owned by the County of San Bernardino, was the site of industrial waste dumping related to weapons production starting in World War II through the 1980s. In 1990, the California Regional Water Quality Control Board ordered the County to clean up the site. The County incurred, and continues to incur, significant costs in doing so. The County sought coverage from its insurers, including Insurance Company of the State of Pennsylvania ("ISOP").

ISOP issued three umbrella policies to the County, each with three-year terms, covering the years 1966 to 1975. The policies stated that ISOP was:

> liable . . . only up to a further sum as stated in Item 2(a) of the Declarations in all in respect of each occurrence - subject to a limit as stated in Item 2(b) of the Declarations in the aggregate for each annual period during the currency of this Policy, separately in respect of Products Liability and in respect of Personal Injury (fatal or non-fatal) by Occupational Disease sustained by any employees of the Assured.

Item 2(a) of the Declarations provided that the policies each had a limit of $9 million for "each occurrence." Item 2(b) stated that the policies had a limit of $9 million "in the aggregate for each annual period where applicable."

The parties disputed whether the aggregate limit applied to property damage liability claims. ISOP contended that the $9 million annual aggregate limit applied and therefore it was liable only for $9 million per year. ISOP argued that the language quoted above created three separate annual aggregate limits: (1) $9 million for personal injury resulting from occupational disease, (2) $9 million for products liability, and (3) $9 million for all other claims, including those alleging liability for property damage. It explained that "separately in respect of" meant that claims for products liability and personal injury resulting from occupational disease were subject to their own aggregate limit, in addition to the general one. Under ISOP's reading of the policies, its liability was capped at $9 million per year — $81 million across nine years.

In contrast, the County contended that the aggregate limit was not "applicable" to the property damage claims, and ISOP was liable for $9 million per occurrence regardless of the number of occurrences. The County argued that the statement that the aggregate limit applied "where applicable" meant that it only applied to the specified coverages of personal injury and products liability. Under the County's reading, ISOP had unlimited liability for property damage claims. The number of occurrences issue remains in dispute and is not addressed in the Court's opinion, but the County contended there could be six occurrences per year, which would make ISOP's liability as high as $486 million over nine years ($9 million x 6 occurrences x 9 years).

The Court's Decision

Although the Ninth Circuit found that both parties' readings of the policies' aggregate limit clauses were "plausible," it concluded that neither reading was "obvious nor compelling." The Court held that the policies were ambiguous as to whether or not the aggregate limit applied to property damage claims. The Court applied the generally accepted rule of insurance-policy interpretation (and contract construction generally) that a contract term is ambiguous if it is subject to two or more reasonable interpretations of the terms.

Having found the limits provision ambiguous, the Court considered extrinsic evidence of the parties' intent. First, the County presented expert testimony that many policies issued before 1986 did not include aggregate limits, but the Court stated that this had no bearing on the policies at issue. Second, the County presented internal ISOP documents that showed that at least some ISOP employees believed that the policies had no aggregate limits for property damage claims. The Court noted that "[w]e need not explore the weight of this evidence. At the very least, what they [the internal ISOP documents] demonstrate is that reasonable people—including employees at ICSOP—could read these policies as the County has." The Court found that the evidence reinforced its conclusion that the policies were ambiguous.

Since the extrinsic evidence did not shed any light on the meaning of the policies, the Court concluded that the policies must be construed against the drafter and in favor of the policyholder. The Court thus held that the policies did not apply an aggregate limit for property damage claims.

Analysis

The dispute between the County of San Bernardino and its insurer highlights the stakes for long- tail insurance claims, such as for environmental claims and products liability claims. These claims can often be worth hundreds of millions of dollars and implicate many policy years. Therefore, the available limits are critically important and determinative of the amount the policyholder will pay compared to its insurer.

Policyholders facing large claims should carefully review their policies to determine how the limits should be (or can be) read. When liabilities span many policy years, triggering many policy periods, it is crucial to analyze the applicable policy language, for each policy year, and each policy; as well as the related extrinsic evidence. While the County's

three ISOP policies all contained identical language, that is often not the case and different policy years will offer different coverage, both in terms of amount and scope of coverage. When one policy has low limits or an applicable exclusion, the policyholder can look to other policy years.

Closely examining policy drafting history is particularly important for older policies. The County presented evidence regarding the insurance industry's drafting history of aggregate limits for CGL forms, in particular prior to the industry's 1986 revision of the standard form policy. The County's evidence demonstrates that insurance-industry organizations charged with drafting and obtaining the regulatory approval of the standard-form CGL policy considered this issue for years, understanding that standard-form CGL policies drafted prior to 1986 applied aggregate limits only to products-liability claims and not those claims (like environmental property-damage claims) that fall under the policies' premises-operations coverage. Policyholders facing long-tail claims that date back over 40 years should seek to take advantage of this to minimize their exposure.

More generally, the Ninth Circuit's decision reinforces the blackletter law that ambiguity exists when there are two or more reasonable interpretations of the policy language at issue, and that ambiguities must be construed in favor of coverage and against the policy drafter. This is a powerful tool for policyholders that allows them to fight back against insurer denials.

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