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COMMENTARY

On Equity Grounds, N.J. Should Endorse 'All-Sums' Coverage

By Charles Yuen

In a victory for California policyholders, their state Supreme Court unanimously recognized that all liability insurance policies triggered by continuing injury or damage will pay "all sums" the policies have long promised in their standard language.

The New Jersey Supreme Court should consider the same approach.

After *State v. Continental Insurance Company* (281 P.3d 1000 (Cal. 2012)), policyholders may now obtain the benefits of stacked insurance policy limits from different policies obtained over many years. Businesses facing claims from exposures in California, such as those posed by chemicals, food ingredients and contaminants, and minerals such as asbestos, stand to benefit.

The California court cited "precedent, principles of equity, and sound insurance policy interpretation" as favoring an all-sums approach to insurance indemnity allocation for the liability for successive or long-tail property damage.

Perhaps ironically, the court did not cite liability policy drafting history. Yet it could have done so. The court might well have mentioned that its ruling was consistent with the broad coverage anticipated and intended by many members of the industry policy-drafting committees.

Indeed, several of those respected drafters had publicized the expected results through articles and speeches. The industry published policy forms containing all-sums language on various occasions. In 1965, contemporaneous with a major set of revisions, the drafters and industry executives carefully explained the broad implications of the language.

The policy drafters explained that policyholders merited the complete coverage provided by the potential stacking of policy limits.

They sought to give the insurance industry the forms that would fill that need. Higher policy premiums would compensate carriers for the additional risk of having policies continuously triggered and their limits stacked.

The drafters anticipated that carriers along the risk could fairly share the costs of paying such stacked claims. But they would do so privately among themselves. They would negotiate, as gentlemen. They would spare the needy policyholder from the mechanics of the allocation.

They viewed coverage of the stacking-of-limits risk as an underwriting issue, not an issue requiring an exclusion of the possibility of such stacking. They thought policyholders, in general, would benefit by obtaining the potential for complete coverage. On the other hand, they believed, insurers would also benefit by collecting suitably enhanced premiums.

Many years after the drafters wrote all-sums coverage into standard policies, insurance companies began to deny it. Claims departments argued that each triggered policy should only pay a pro-rata fraction of the liability, not the all sums promised.

Several courts, trying to be equitable, accepted the carriers' denials. They rewrote the policies to include various types of implicit limitations on recovery, all of which the drafters had rejected. New Jersey's Supreme Court, in a series of decisions beginning with *Owens-Illinois, Inc. v. United Ins. Co.*, 138 N.J. 437 (1994), is one of these courts denying all-sums recovery.

These New Jersey allocation decisions have dragged policyholders into fact-intensive, litigation-oriented, complex, inefficient, time-consuming and expensive allocation-oriented processes.

At the outset of any long-tail claim, for example, carriers attempt to impose additional "shares" of liability upon the policyholder. Carriers deny the "all sums" language and argue that the policyholder is responsible for past years where the policyholder did not purchase much insurance, or for years corresponding to lost or destroyed insurance policies. These threats create negotiating leverage against policyholders. They typically continue throughout adjustment and case handling.

For what good reason should New Jersey policyholders and courts be burdened with all of these allocation problems? The unanimous decision in *State*

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v. Continental presents an ideal argument for the New Jersey Supreme Court to revisit the fairness of its allocation decisions at the next available opportunity. In honoring all-sums policy language, the California approach is simple, clean and direct. It provides an incentive for beneficial economic activity to take place because it allows businesses to spread more of their risk.

The result is fair to everyone. In *State v. Continental*, the California court reminds us that a clear denial would achieve a different result: "contracting parties can write into their policies whatever language they agree upon, including limitations on indemnity, equitable pro rata coverage allocation rules, and prohibitions on stacking."

The California result was amply anticipated by the drafters, who rejected such limitations. It is evidenced in the all-encompassing, all-sums policy language itself.

In light of decisions like *State v. Continental*, additional express contract limitations may eventually appear. Yet — as evidenced by the actions and the reasoning of the policy drafters — perhaps the industry will again endorse "stacked" coverage.

Therefore, it seems the New Jersey Supreme Court should reconsider the equity of its attempts to be equitable. It should reject its allocation methods, just as the insurance policy drafters did. New Jersey should follow *State v. Continental* and enforce the policies' all-sums coverage. ■