

Calif.'s \$14M Interest Award On Cleanup Coverage Upheld

By Jeff Sistrunk

Law360, Los Angeles (September 29, 2017, 6:36 PM EDT) -- A California appellate court Friday upheld a lower court's holding that a pair of CNA Financial Corp. insurers must pay the state nearly \$14 million in prejudgment interest, in a dispute over coverage for cleanup costs at a toxic waste site in Riverside County.

In the latest ruling in the long-running suit over California's potentially \$700 million cleanup effort, a three-judge appellate panel in Riverside left intact Judge Sharon Waters' decision that CNA units Continental Insurance Co. and Continental Casualty Co. — which are collectively referred to as Continental in the panel's opinion — are on the hook for the whopping interest award on top of a \$12 million insurance payment to the state.

Among other things, the panel found that the lower court had set the proper start date for calculating prejudgment interest and had applied the correct method for determining when Continental's policies were triggered.

Continental is the last insurer standing in the sprawling coverage dispute, which was initiated by California back in 1993 and once involved scores of carriers. The coverage litigation accelerated following a federal court's September 1998 ruling that had the effect of making California 100 percent liable for environmental contamination at the Stringfellow waste site in Riverside County.

According to Friday's opinion, between 1970 and 1976, Continental issued three policies to the state with total limits of \$12 million. In two of the policy periods, California was required to pay a deductible of \$16 million before Continental's coverage kicked in; in the third, the state had to pay a \$25 million deductible before the insurer's policy was reached, the opinion said.

California and Continental disputed at what point the insurer's policies were triggered. The state asserted that each policy was triggered immediately upon the exhaustion of the applicable deductible in the specified policy period, in what is known as vertical exhaustion. Continental, meanwhile, argued that the state had to fulfill all deductibles across every implicated policy period before its coverage would kick in — a method known as horizontal exhaustion.

In October 2014, Judge Waters found that vertical exhaustion applied. Four months later, California and Continental stipulated that the insurer would pay its full \$12 million policy limit, leaving only the issue of prejudgment interest. Following a trial, Judge Waters ruled that the state was entitled to mandatory

prejudgment interest at an annual rate of 7 percent, dating back to the September 1998 ruling — a sum that totaled about \$13.9 million.

Continental challenged Judge Waters' decision on multiple grounds on appeal. For one, the insurer argued, the judge's ruling on interest was based on the erroneous conclusion that vertical exhaustion applies. In reality, Continental said, the case should be governed by horizontal exhaustion, which would require California to pay much more in deductibles before the insurer's policies would be triggered.

The appellate panel found Friday that Continental's argument in favor of horizontal exhaustion is baseless, given that each policy states that it will be excess to California's retention for that specific policy period, "but not for any other policy period."

"The 'limits of liability' clause seems plain enough: Continental's liability attaches upon an 'ultimate net loss' that is in excess of the specified (\$16 or \$25 million) retention," Judge Manuel A. Ramirez wrote for the panel. "This would seem to be the very definition of vertical exhaustion."

The panel also rejected Continental's contention that the trial court erred by failing to offset its liability by \$160 million in settlements that the state previously received from other insurers and parties identified as being potentially responsible for the Stringfellow cleanup. According to the panel, Continental's arguments fail because California's liability for the cleanup has already greatly exceeded \$160 million and is projected to continue to balloon.

"Continental failed to show that the State had been made whole," Judge Ramirez wrote. "Thus, the state is entitled to every dollar from any settlement or similar recovery and to \$12 million from Continental, unless and until Continental can show that the state's uncompensated loss has been reduced below \$12 million."

The high-profile coverage dispute has pushed the California Supreme Court to weigh in on crucial issues in "long-tail" claims involving property damage and injuries that occur gradually across several policy periods.

In one **landmark decision**, the state's high court ruled in 2012 that policyholders can force carriers to cover damages occurring outside their policy period and also stack coverage limits from policies spanning multiple years to maximize recovery.

A representative of the California attorney general's office did not immediately respond to a request for comment, nor did an attorney for Continental.

Judges Manuel A. Ramirez, Art W. McKinster and Marsha G. Slough sat on the panel for the Fourth Appellate District.

California is represented by its attorney general's office, Robert Horkovich of Anderson Kill PC, Roger W. Simpson of the Law Offices of Roger W. Simpson, and Daniel Schultz of the Law Offices of Daniel Schultz.

Continental is represented by Steven M. Crane and Barbara S. Hodous of Berkes Crane Robinson & Seal LLP.

The case is California v. The Continental Insurance Co. et al., case number E064518, in the Court of Appeal of the State of California, Fourth Appellate District.

--Editing by Edrienne Su.

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