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MAY 5, 2026 | PUBLICATION

Client Alert: In Their Own Words: How an Insurer's Internal Files and History of Commercial General Liability Form Support Finding of No Aggregate Limits on Legacy Environmental Claims

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In a recent decision, the United States Ninth Circuit Court of Appeals (Ninth Circuit) reversed a lower court summary judgement order, finding that the annual aggregate limits provision in three umbrella liability policies did not apply to property damage claims stemming from environmental cleanup at a San Bernardino County airport.

The case styled County of San Bernardino v. Insurance Company of the State of Pennsylvania stemmed from an insurance coverage dispute between the policyholder, the County of San Bernadino, and insurer, Insurance Company of the State of Pennsylvania, over costs the policyholder incurred while remediating environmental property damage at the Chino Airport.

The commercial general liability policies (CGLs) capped insurer liability by limiting liability per occurrence to $9 million and limiting the aggregate liability to $9 million, regardless of the number of occurrences "where applicable." The limit of liability section further provided that the aggregate applied "*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." The policyholder argued that the insurer was liable for up to $9 million per occurrence for an unlimited number of occurrences, interpreting this language as not applying to property damage claims. Conversely, the insurer argued its responsibility was capped at $9 million per year in the aggregate, interpreting the language as placing a $9 million cap on *all* covered claims.

In reaching its decision that the aggregate limit did not apply to property claims, the court relied upon foundational tenants of policy interpretation, specifically regarding ambiguity. Primarily, the court stated that the language as drafted was susceptible to two reasonable interpretations, which rendered it ambiguous. On one hand, the inclusion of the language "where applicable" necessarily implies that there are in fact certain instances where an aggregate limit is not applicable, including property damage claims. Well-established law surrounding the interpretation of policies dictates that courts must give effect to every word, avoiding interpretations that render a provision meaningless. On the other hand, the use of the word "separately" implied that products liability and occupational disease aggregates were separate from the general aggregate applied to all claims.

Given the ambiguity, the court was entitled to consider extrinsic evidence in determining the true meaning of the aggregate provision in the policies. The court considered the history of the standard form CGL, recognizing the significance of revisions taking place in 1943, 1947, 1955, 1966, 1973, and 1986. The first of the three policies in this case was issued in 1966. Notably, the history of these revisions demonstrates that aggregate limits were not the norm until 1986. Therefore, the lower court's decision, which was based primarily on the assumption that an insurer would never contract in such a manner as to open itself to potential unlimited liability, was built on a false premise. In fact, history shows just the opposite: insurers were less concerned with aggregate limits regarding property damage claims, as environmental liability litigation was virtually unforeseen at the time.

Next, the court looked at the insurer's own interpretation of the policies it drafted. Most importantly, internal memoranda from the insurer showed that it found no annual aggregate limit as applied to the claims. One such document stated:

"The insured, County of San Bernardino…tendered notice under three consecutive umbrella policies spanning nine years of coverage from 1966 through 1975. The policies have non-annualized per occurrence limits of $9M per policy term and Prior Insurance Non-Cumulation provisions. There are no applicable aggregate limits."

The insurer made similar statements to its own reinsurer, summarizing the claims as having "no general aggregate limit."

Ultimately, the Ninth Circuit concluded that the policies were genuinely ambiguous, construing in favor of the policyholder. The policyholder's favored interpretation resulted in a difference in potential recovery of tens of millions of dollars depending on the number of occurrences.

This case underscores the importance of discovery into insurer files, which are often argued as irrelevant by insurance companies. However, there is no better argument for the reasonableness of a policyholder's interpretation than an insurer's own internal files demonstrating accord with same. Claims files, underwriting documents, claims manuals, and reinsurance communications can all give valuable insight into how an insurer actually interprets its own policies, without the cover of the well-crafted arguments of its coverage lawyer.

Moreover, particularly regarding standardized forms like the CGL, the history of those forms' creation and the associated analysis of the contributing factors of the time can provide courts with critical context. Insurance companies often invite courts to view policies drafted in the early 1960s with a lens of this millennium. This defies logic and black letter law. Policyholders are entitled to the benefits purchased at the time of the contract's creation, not what an insurance company is willing to pay based on evolving environmental laws and regulations.

If you have questions or would like more information, please contact Meagan Cyrus.

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