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CONSTRUCTION DEFECTS AND INSURANCE: *POLICYHOLDER AND INSURER PERSPECTIVES*

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CONSTRUCTION DEFECTS AND INSURANCE: *POLICYHOLDER AND INSURER PERSPECTIVES*

by Aaron Booth, Esq., Robert Closson, Esq., Ian Corzine, Esq. , Greg Dillion, Esq., Charlie Henderson, Joseph Oliva, Esq., Alexander Polsky, Esq., Neil Selman, Esq., Bruce Wick

I. INTRODUCTION

A. Understanding Perspectives in Construction Defect Litigation

As litigation professionals, we are trained to consider others' perspectives before drawing conclusions or taking action. Most times in our work life, we do. However, on occasion we forget. This may be especially true in the context of construction defect litigation, where unique perspectives abound. A claims adjuster may deny a general contractor defense tender because the subcontractor was unequivocally not at fault. A developer's attorney may accept representation of subcontractors under WRAP policy provisions and simultaneously maintain indemnity cross-actions against them. Under each of these scenarios, the litigation professional has forgotten to take account of others' perspectives and may face negative consequences.

Following this section, you will find discussion of law applicable to five topics of particular interest this past year. Time was taken to incorporate the perspectives of both policyholders and insurers in each of the topic discussions. The first section tackles the topic of CGL policies' "supplementary payments" provisions. The law applicable to "stacking" of deductibles and self-insured retentions is addressed next. The third section touches on "stacking" again, but of a different insurance provision -- policy limits. A significant subject matter departure is evident in section four, where the ethical obligations of construction defect attorneys are detailed. Finally, in section five, we discuss coverage obligations imposed by indemnity agreements. Following each section, we include a chart setting forth key questions relating to each of the topics. Room was left in these charts to allow you to note the perspectives of policyholders and insurance carriers on each of the issues.

We hope that these materials will assist you in remembering to take stock of the unique perspectives of your clients or adversaries on construction defect topics relevant today. Who knows? Maybe your review of the following will allow you to avoid unwelcome results accompanying single-mindedness in construction defect litigation.

II. SUPPLEMENTARY PAYMENTS PROVISION

A. Definition

Most CGL policies include a "supplementary payments" provision. This clause generally obligates insurers to pay the following types of expenses in addition to defense and indemnity costs:

- Insurer's own claim-related expenses;
- Expenses related to bail and attachment release bonds;
- Investigation expenses incurred by the insured at the insurer's request;
- Court costs awarded against the insured; and
- Pre-judgment and post-judgment interest.

The last sentence of most supplementary payments provisions reminds the insured that amounts incurred pursuant to the provision do not reduce applicable policy limits.

B. History of Supplementary Payments Provisions

1. Previous Versions of Provision

a) CG0001 10/93

The CG0001 10/93 version of the supplementary payments provision provides:

We will pay, with respect to any claim or "suit" we defend:

1. All expenses we incur.

2. Up to $250 for cost of bail bonds required because of accidents or traffic law violations arising out of the use of any vehicle to which the Bodily Injury Liability Coverage applies. We do not have to furnish these bonds.

3. The cost of bonds to release attachments, but only for bond amounts within the applicable limit of insurance. We do not have to furnish these bonds.

4. All reasonable expenses incurred by the insured at our request to assist us in the investigation or defense of the claim or "suit," including actual loss of earnings up to $100 a day because of time off from work.

5. All costs taxed against the insured in the "suit."

6. Prejudgment interest awarded against the insured on that part of the judgment we pay. If we make an offer to pay the applicable limit of

insurance, we will not pay any prejudgment interest based on that period of time after the offer.

7. All interest on the full amount of any judgment that accrues after entry of the judgment and before we have paid, offered to pay, or deposited in court the part of the judgment that is within the applicable limit of insurance.

These payments will not reduce the limits of insurance.

Note an inconsistency above. The trigger for a supplementary payments obligation is an insurer's ***defense*** of a claim or suit. However, section four appears to require insurers to pay expenses incurred during the investigation phase, as well.

b) CG0001 01/96 (In Relevant Part)[1]

The next version of the supplementary payments provision states:

We will pay, with respect to any claim we investigate or settle, or any "suit" against an insured we defend:

1. All expenses we incur.

2. Up to $250 for cost of bail bonds required because of accidents or traffic law violations arising out of the use of any vehicle to which the Bodily Injury Liability Coverage applies. We do not have to furnish these bonds.

3. The cost of bonds to release attachments, but only for bond amounts within the applicable limit of insurance. We do not have to furnish these bonds.

4. All reasonable expenses incurred by the insured at our request to assist us in the investigation or defense of the claim or "suit," including actual loss of earnings up to $250 a day because of time off from work.

5. All costs taxed against the insured in the "suit."

6. Prejudgment interest awarded against the insured on that part of the judgment we pay. If we make an offer to pay the applicable limit of insurance, we will not pay any prejudgment interest based on that period of time after the offer.

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[1] Note that the CG0001 07/98, CG0001 10/01, and CG0001 12/04 versions include the CG001 01/96 language verbatim. The ISO authors merely changed the numbering of the paragraphs.

7. All interest on the full amount of any judgment that accrues after entry of the judgment and before we have paid, offered to pay, or deposited in court the part of the judgment that is within the applicable limit of insurance.

These payments will not reduce the limits of insurance.

If you compare the CG0001 10/93 supplementary payments version with the CG0001 01/96 version and later versions, you will note that the authors extended insurers' supplementary payment duty to claim investigations, not just claims against which an insurer defends.

2. Current Provision

a) CG0001 12/07 (In Relevant Part)

The most current version of the supplementary payments provision is CG0001 12/07. It provides:

1. We will pay, with respect to any claim we investigate or settle, or any "suit" against an insured we defend:

a. All expenses we incur.

b. Up to $250 for cost of bail bonds required because of accidents or traffic law violations arising out of the use of any vehicle to which the Bodily Injury Liability Coverage applies. We do not have to furnish these bonds.

c. The cost of bonds to release attachments, but only for bond amounts within the applicable limit of insurance. We do not have to furnish these bonds.

d. All reasonable expenses incurred by the insured at our request to assist us in the investigation or defense of the claim or "suit," including actual loss of earnings up to $250 a day because of time off from work.

e. All court costs taxed against the insured in the "suit." ***However, these payments do not include attorneys' fees or attorneys' expenses taxed against the insured.***

f. Prejudgment interest awarded against the insured on that part of the judgment we pay. If we make an offer to pay the applicable limit of insurance, we will not pay any prejudgment interest based on that period of time after the offer.

g. All interest on the full amount of any judgment that accrues after entry of the judgment and before we have paid, offered to pay, or deposited in court the part of the judgment that is within the applicable limit of insurance.

These payments will not reduce the limits of insurance.

(emphasis added).

In comparison with the preceding provisions, you will observe that the authors of the current version have reduced supplementary payments coverage by excluding attorney fee awards from the provision's definition of "costs." Section (e)'s language was added to avoid the consequences of the holding in *Ins. Co. of No. Amer. v. Nat'l. Amer. Ins. Co.*, 37 Cal. App. 4th 195, 206-07 (Cal. Ct. App. 4th 1995) and later cases, discussed below.

C. Law Applicable to Supplementary Payments Provision

California leads the way on cases concerning the supplementary payments provision. Out-of-state decisions on this clause are limited and include rationales varying substantially from California decisions. However, after review of the following, it will be apparent that the states' appellate courts uniformly agree that supplementary payments provisions drafted before CG0001 12/07 do not "mean what they say."

1. California

a) *Cutler-Orosi Unified Sch. Dist. v. Tulare Cty.*

In *Cutler-Orosi Unified Sch. Dist. v. Tulare Cty. Sch. Dist. Liability/Property Self Ins. Auth.*, 31 Cal. App. 4th 617 (Cal. Ct. App. 5th 1995), voting rights actions were filed against three school districts. In their complaints, claimants requested declaratory and injunctive relief, an award of attorney fees, and "such other additional relief at law or equity[.]" The districts tendered their defense to their insurer, Industrial Indemnity. The insurer refused to defend the districts. The districts sued Industrial for breach of contract and declaratory relief, and all parties moved for summary judgment. The trial court denied the districts' motion, but granted the motion of Industrial. The key issue on appeal was whether claimant's causes of action were potentially covered.

The districts argued that the costs of injunctive relief fell within the liability policies' definition of "damages." The Court seemed to acknowledge that the term was ambiguous in this context. However, it held that since the Voting Rights Act did not afford a remedy even remotely related to the plain meaning of "damages," viz. "money recovered by a party in compensation for loss or detriment suffered by virtue of a the wrongful acts of another," an objectively reasonable insured would not expect injunction-related costs to be covered.

The Court also addressed the districts' contention that claimants' request for attorney fees triggered coverage. It noted that the Voting Rights Act permitted the trial court to award attorney fees "as a part of the costs." It also acknowledged that the Industrial policies contained supplementary payment provisions, obligating the insurer to pay all costs taxed against the insured. The Court concluded, however, that these were insufficient bases to rest an argument that an attorney fee award could be included in the policies' definition of "damages." It reasoned that construing an attorney fee award as "damages," would render the supplementary payment provisions meaningless. As a secondary ground for affirmance of the trial court's ruling, the Court held that attorney fees are not comparable to "damages" because they do "not compensate the plaintiff for the injury that first brought him into court."

b) *Pritchard v. Liberty Mut. Ins. Co.*

In *Pritchard v. Liberty Mut. Ins. Co.*, 84 Cal. App. 4th 890 (Cal. Ct. App. 4th 2000), Charles Pritchard operated a failing yogurt company. He borrowed money from an egg farmer, named Edward Minni. In exchange for increasing the loan balance, Pritchard agreed to make Minni a 50% shareholder and appoint Minni and his associate, William Evans, to the board of directors. Thereafter, Pritchard purportedly excluded Minni and Evans from company management and otherwise defrauded them. Minni and Evans sued Pritchard for various causes of action, including defamation.

Pritchard tendered his defense to the yogurt company's liability carriers, Liberty, AETNA, and Standard. Liberty and AETNA agreed to defend Pritchard with a reservation of rights. The case was tried to a jury. Minni and Evans obtained judgment in their favor for an amount exceeding $1.5 million. They were also jointly awarded costs of $235,000. A substantial portion of the cost award was made pursuant to a contractual attorney fee provision. Pritchard paid Minni and Evans in excess of $1.33 million out of his own funds and waived appellate rights to settle the case.

Thereafter, Pritchard sued his carriers for breach of contract and bad faith inter alia. He obtained summary adjudication of a declaratory relief cause of action against Liberty. The trial court ruled that Liberty was obligated to defend through trial - not just through the close of evidence at trial. However, it rejected

Pritchard's contention that he was entitled to be reimbursed by the carriers for the cost award. Apparently, the trial court impliedly held that the carriers owed no duty to indemnify, and thus, had no corresponding duty to pay the cost award.

Liberty appealed the trial court's judgment on a host of grounds. The Court of Appeal affirmed the trial court's decision with respect to the extent of Liberty's duty to defend Pritchard. But, it found error with the trial court's determination that Liberty did not owe costs awarded against Pritchard in the underlying action. The Court cited *Ins. Co. of No. Amer. v. Nat'l. Amer. Ins. Co.*, 37 Cal. App. 4th 195, 206-07 (Cal. Ct. App. 4th 1995) for the proposition that costs awarded against an insured by virtue of an attorney fee provision were part of the supplementary payment section of the policy. It reviewed the supplemental payments provision of Liberty's policy and held that payment of "costs" was a "function of the insurer's defense obligation, not its indemnity obligation."[2]

c) *San Diego Housing Comm. v. Indust. Indem. Co.*

San Diego Housing Comm. v. Indust. Indem. Co., 95 Cal. App. 4th 669 (Cal. Ct. App. 4th 2002) involved a dispute that arose from Housing's retainer of general contractor, JBR, to construct a low income housing project on its land in San Diego. Approximately five years after the project's completion, substantial construction defects manifested. Housing sued JBR. JBR tendered to its carrier, Industrial Indemnity. The carrier denied coverage on the ground that JBR had canceled the policy. Housing obtained a default judgment against JBR in the amount of $1.2 million, inclusive of attorney fees and costs.

Housing then brought a Cal. Ins. Code § 11580(b)(2) action against Industrial Indemnity, as a judgment creditor of the carrier. It alleged Industrial Indemnity had breached its duty to defend JBR, and as such, was entitled to recover the entire judgment against the carrier, including the attorney fees and cost award. Although trial and appellate proceedings were complex, the trial court came to agree with Housing and held that a majority of the judgment was recoverable. It explained that Industrial Indemnity "may not benefit by its breach of duty to defend [JBR] to the detriment of its insured against whom a judgment has been rendered."

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[2] Note that the applicability of an express indemnity provision does change the analysis. If Minni and Evans had been sued by other shareholders and they asserted in the litigation that Pritchard owed them contractual defense and indemnification duties, recoverability of the attorney fee award would likely have required analysis of the CGL policy's contractual liability exclusion. *See Golden Eagle Ins. Co. v. Ins. Co. of the West*, 99 Cal. App. 4th 837, 846 (Cal. Ct. App. 4th 2002) (holding GC's attorney fees incurred in suit by homeowners were sums the insured subcontractor was obligated to pay as "damages" and were not excluded by the CGL's contractual liability provision). *Compare with* Carter Mudge, *Saving for a Rainy Day*, Orange County Lawyer, May 2005 at 41 (stating "[t]he net effect of Golden Eagle is to indicate that in cases where there is a written indemnity agreement and no prevailing party clause, the attorneys' fees and costs incurred by the indemnitee in defending the action should be assessed against the indemnitor as an item of damages, thus depleting the indemnitee's aggregate policy limits"). Note that the presence of a prevailing party attorney fee clause is irrelevant and technically, contractual liability and supplementary payments sources of coverage are not comparable.

The Court of Appeal reversed this decision. It held that, pursuant to *Pritchard*, cost payment under the supplementary payments provision was a component of the duty to defend. Section 11580 claimants have no right to enforce an insurer's defense duty, absent assignment. Therefore, they cannot recover their costs under the supplementary payments provision.

d) *Combs v. State Farm Fire & Cas. Co.*

Using methodical statutory construction, the Court of Appeal in *Combs v. State Farm Fire & Cas. Co., 143 Cal. App. 4th 1338 (Cal. Ct. App. 1st 2006)* avoided deciding the larger question equally applicable in the next case discussed, *Golden Eagle Ins. Corp. v. Cen-Fed, Ltd.*, 148 Cal. App. 4th 976 (Cal. Ct. App. 2d 2007), viz. whether supplementary payment obligations survive a court determination of no coverage. In the underlying case, a district court determined Combs was a racist apartment complex manager, entered judgment in favor of plaintiff Fair Housing of Marin, and ordered Combs to pay Fair Housing over $500,000 in attorney fees. Combs' liability carrier, State Farm, defended him through the proceedings with a reservation of rights. He demanded State Farm pay the judgment. State Farm refused, and Combs filed a breach of contract case.

Following cross-motions for summary judgment, the trial court entered judgment in State Farm's favor on the ground that California Insurance Code § 533 precluded coverage. This judgment was affirmed. The Court of Appeal noted that § 533 prohibits coverage for any "loss" caused by the insured's willful misconduct. It held that the definition of "loss" could include an attorney fee award. The Court then enunciated its broad conclusion that, ultimately, Combs' "willful misconduct" (i.e., intentional racial discrimination) did cause a "loss" (i.e., an attorney fee award). Therefore, the Court held, notwithstanding its contractual agreement to pay supplementary payments in litigation it defended, State Farm was barred from making these payments by § 533. It also observed that "[p]ermitting the wrongdoer to insure against [attorney fee awards] would, no less than permitting the wrongdoer to be indemnified for the damages he or she must pay as a result of willful misconduct, undercut the public policy behind section 533 and permit the offender to avoid what may be a significant consequence of the wrongdoing."

e) *Golden Eagle Ins. Corp. v. Cen-Fed, Ltd.*

In *Golden Eagle Ins. Corp. v. Cen-Fed, Ltd.*, 148 Cal. App. 4th 976 (Cal. Ct. App. 2d 2007), Cen-Fed leased commercial property from WMB. WMB sued Cen-Fed for breach of lease provisions requiring regular maintenance of the property. Cen-Fed tendered its defense to Golden Eagle. The carrier accepted the tender with a reservation of rights and filed a declaratory relief action against Cen-Fed. A $500,000 judgment was in entered in favor of WMB in the underlying action. It was also awarded its costs of suit, including attorney fees, pursuant to a lease provision.

Golden Eagle moved for summary judgment in its declaratory relief action. The trial court granted the motion and held that the carrier had no duty to defend or indemnify Cen-Fed. However, it also decided that Golden Eagle was liable for the attorney fee and cost award because the supplementary payments provision provided that, when an insurer did defend, it was automatically liable for items falling within the provision despite a court's determination that no defense duty was owed.

Relying mostly on public policy, the Court of Appeal reversed. It stated "[t]he trial court's literal application of the supplementary payments clause to a case where no defense duty ever existed undermines the well settled policy of encouraging insurers to step forward and provide a defense even in those cases of doubtful or disputed coverage." The Court held that the supplementary payments provision "must necessarily be read as applying ***only*** to those cases where the insurer actually owed a duty to defend." (emphasis in original).

f) *Employers Mut. Cas. Co. v. Philadelphia Indem. Ins.*

The Court of Appeal in *Employers Mut. Cas. Co. v. Philadelphia Indem. Ins. Co.*, 169 Cal. App. 4th 340 (Cal. Ct. App. 2d 2008) addressed the issue of whether the phrase "costs taxed" in the supplementary payments provision encompassed attorney fees paid in a settlement. After consulting the "good ole" Merrian-Webster Collegiate Dictionary, the Court interpreted the phrase broadly and decided that it referred to "any levy of an assessment." It also stated that its decision was in harmony with the public policy of encouraging insured and insurer settlements.

2. Other State Law Comparison

a) *Polygon Northwest Co. v. Amer. Nat'l Fire Ins. Co.*

Polygon Northwest Co. v. Amer. Nat'l Fire Ins. Co., 143 Wash. App. 753 (Wash. Ct. App. Div. 1 2008) concerned a homeowners' construction defect action against builder Polygon Northwest. Polygon tendered its defense to its numerous primary and excess carriers. Several primary carriers assumed Polygon's defense. Following mediation, Polygon's primary carriers settled the case for payment of $6.3 million in damages and $1.5 in homeowners' attorney fees. Great American, a Polygon excess carrier, refused to contribute to the settlement. In an appeal of the trial court's judgment in subsequent coverage litigation, the Washington Court of Appeal interpreted the insuring clause in the excess policy to obligate a Great American indemnity contribution. The Court also addressed the argument of primary carrier, Assurance, that it should not be responsible for contributing to payment of the attorney fee award. Assurance argued that the award was more properly characterized as "damages" for which Great American should be liable because of primary policy limit exhaustion. The Court decided the issue as a matter of current Washington legal community parlance. It held that supplementary payment provision "costs" did not include attorney fee awards made pursuant to statute.

b) *Bd. of Cty. Commissioners v. Guarantee Ins. Co.*

In *Bd. of Cty. Commissioners v. Guarantee Ins. Co.*, 90 F.R.D. 405 (D. Colo. 1981), Price instituted a declaratory and injunctive relief action against the Board of County Commissioners pursuant to the federal Civil Rights Act. The Board's liability carrier, Guarantee, defended. Price prevailed in the litigation and obtained the requested equitable relief and a $26,000 attorney fee award. Guarantee refused to pay the award. The Board then sued Guarantee for breach of contract. Cross-motions for summary judgment were filed. The district court decided in Guarantee's favor. It held that, since Guarantee's policy did not cover the equitable relief adjudged, the supplementary payments provision of policy was inapplicable. Note that the district court's decision mirrors that made 16 years later in *Golden Eagle*.

D. The Perspectives: Supplementary Payments

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III. DEDUCTIBLES, SIRs, SIPs, ""STACKING"

Application of deductibles and self-insured retentions ("SIRs") is the frequent topic of court decisions around the country. These insurance provisions are so common because they work. They give the insured a stake in the liability, and consequently, provide him incentive to avoid losses in the future. Scott C. Turner, *Insurance Coverage of Construction Disputes*, § 4:6 (2008). Nonetheless, when several policies with multiple deductibles or SIRs are involved in a continuous loss case, courts often experience tension balancing the constructs of interpreting policy provisions according to their plain meaning and advancing the reasonable expectations of the parties. The following discusses California law applicable to deductibles and SIRs, and their second cousin, the self insurance program ("SIP"). It touches on out-of-state law, as well, and examines the concept of "stacking" deductibles and SIRs.

A. Deductibles

1. Definition

Generally, a "deductible" is the amount the insured must pay before the insurer is obligated to indemnify for a covered loss. D.W. Duke, *California Insurance Issues and Forms*, § 8:50.20 (1st Ed. 2003). Unless otherwise stated, deductibles have no bearing on an insurer's duty to defend. They merely reduce an insurer's indemnification obligation.

2. Deductibles Affecting Policy Limits

The deductible amount is usually set forth in a policy endorsement. Careful review of this endorsement is required, however, because specific clauses may impact the amount of indemnity available. In the past, deductible provisions commonly made no reference to policy limits. They would provide: "DEDUCTIBLE(S) PER OCCURRENCE: This policy contains various deductibles. Each deductible is per occurrence. Your deductibles are as follows[.]" At present, however, deductibles usually reduce policy limits by the amount of the deductible. Sample language of a deductible reducing coverage is: "Our obligation under the Bodily Injury Liability and Property Damage Liability Coverages to pay damages on your behalf applies only to the amount of damages in excess of any deductible amounts stated in the Schedule above as applicable to such coverages." A comparison of the two deductible types is below:

Deductible Type	Ded. Amount	Indemnity Amount	Total Limits
Not Reducing Coverage	$10,000	$1,000,000	$1,010,000
Reducing Coverage	$10,000	$1,000,000	$1,000,000

3. Application of Deductibles

Policies also differ with respect to the number of deductibles that apply to a situation. Most often, deductibles are collectible on either a "per occurrence" or "per claim" basis. When a deductible is "per occurrence," the insured is responsible for one payment each time the insurer is called upon to discharge an indemnity obligation to specific claimants. *See EOTT Energy Corp. v. Storebrand Intern'tl. Ins. Co.*, 45 Cal. App. 4th 565, 576-77 (Cal. Ct. App. 2d 1996) (holding that a series of related acts, attributable to a single cause, may be treated as having been caused by one occurrence"). *See also Safeco Ins. Co. v. Fireman's Fund Ins. Co.*, 148 Cal. App. 4th 620, 633 (Cal. Ct. App. 2d 2007) (holding that "[w]hen all injuries emanate from a common source … , there is only a single occurrence for purposes of policy coverage. It is irrelevant that there are multiple injuries or injuries of different magnitudes, or that the injuries extend over a period of time"). On the other hand, when a deductible is "per claim," separate claims result in separate deductibles. *See Beaumont-Gribin Manag't. Co. v. Cal. Union Ins. Co.*, 63 Cal. App. 3d 617, 623-25 (Cal. Ct. App. 2d 1976) (discussing the definition of "claim" in a deductible provision). This is true even though the claims arise out of the same "occurrence."

B. Self-Insured Retentions ("SIRs")

1. Definition

A self-insured retention or "SIR" is an amount that must be paid before the insurer has ***any*** duties under the policy. *Vons Cos., Inc. v. United States Fire Ins. Co.*, 78 Cal. App. 4th 52, 63-64 (Cal. Ct. App. 2d 2000); *General Star Indemnity Co. v. Sup. Ct.*, 47 Cal. App.

4th 1586, 1594 (Cal. Ct. App. 2d 1996). See also Scott C. Turner, *Insurance Coverage of Construction Disputes*, § 4:6 (2008) (discussing SIRs). The following is a SIR:

> The insurer shall be liable only for the amount of Loss arising from a claim which is in excess of the retention amount stated in the Declarations Page. The retention amount (a) shall apply only to 'occurrences' under this policy; and (b) shall apply separately to each such 'occurrence'; and (c) shall include all amounts under the Supplementary Payments section of the policy. The Insured's bankruptcy, insolvency or inability to pay the retention amount shall not increase the Insurer's obligations under this policy.

2. Retention Discharge

The language of the SIR controls how it may be satisfied. Some provisions require the insured to pay the retention out of his own pocket. *See Vons Cos., Inc. v. United States Fire Ins. Co.*, 78 Cal. App. 4th at 63 n.4 (quoting a SIR stating "[i]n the event there is any other insurance, whether or not collectible, applicable to an 'occurrence', claim or suit within the Retention Amount, you will continue to be responsible for the full Retention Amount before the Limits of Insurance under this policy apply"). Some are silent on the issue. However, in the absence of contrary policy language, any money source, including a contractor's other insurers or jointly and severally liable co-defendant's carriers, may satisfy a SIR. *Id.* at 63-64.

3. SIRs with Aggregation Feature

The Court in *General Star Indemnity Co. v. Sup. Ct.*, 47 Cal. App. 4th 1586, 1594 (Cal. Ct. App. 2d 1996) succinctly describe a SIR with aggregation:

> An aggregation feature is for the benefit of the insured. Without an aggregation feature, the SIR amount applies anew to each claim. The insured must exhaust that amount separately, over and over again as many times as there are claims. Before the insurer has any obligation on any single claim, the SIR must be exhausted for that claim. If, by contrast, there is an aggregation provision, payments made by the insured may be aggregated until the aggregate limit is exhausted. Thereafter, the insurance will cover any additional claims from dollar one. Additionally -- in the SIR endorsement form here under consideration -- when an aggregate limit is exhausted, all provisions of the SIR endorsement become 'void' and 'all terms and conditions of the policy are reinstated to their full force and effect.' Thus the typical duty to defend would be 'reinstated' if the policy contained an aggregation feature which was exhausted.

4. Defense Costs

As noted earlier, an insured with a SIR must pay his own defense costs until the retention is exhausted. An exception to this rule occurs when the insured settles the claim for an amount exceeding the SIR. In this case, the insurer must reimburse the insured for a pro rata share of defense costs. *General Star Indemnity Co.*, 47 Cal. App. 4th at 1590-91.

a) Insurer Must Indemnify for Judgment Even if SIR Not Exhausted

In *Executive Risk Indem., Inc. v. Jones*, 2009 WL 418072 (Cal. Ct. App. 1st 2009), Stars Holding was a company providing clients investment advice. Jones was a client of Stars and sued the company for faulty investments and financial planning. Stars had a $10 million professional liability policy issued by Executive Risk. The policy had a $250,000 SIR and did not require Executive Risk to reimburse Stars for defense and indemnity costs until after the SIR was exhausted. Stars was bankrupt, notified Executive Risk of this fact, and repeatedly requested a defense. Executive Risk refused.

An arbitrator awarded Jones over $22 million. This award was subsequently confirmed and judgment was entered against Stars. Executive Risk commenced a declaratory relief action. It soon moved for summary adjudication, arguing it was not bound by the judgment because it did not participate in the arbitration. The trial court was persuaded by the argument, but the Court of Appeal disagreed. Before entering its reversal order, the Court announced the "black letter" holding that:

> [W]hen an insurer (1) is duly notified of the underlying claim against its insured; and (2) is given a full opportunity to protect its interests, the resulting judgment -- if obtained without fraud or collusion -- is binding against the insurer in any later coverage litigation on the claim involving its insured. This rule applies regardless of whether the insurer has a contractual duty to defend, or whether or not its refusal to participate in the underlying proceedings is legally justified.

Id. at 16.

The Court suggested that if Executive Risk wanted to avoid the risk of a large verdict, it should have defended with a reservation of rights or intervened.

C. Self-Insurance Programs ("SIPs")

1. Pure Self-Insurance

Under law, an insurer is a "person who undertakes to indemnify another[.]" Cal. Ins. Code § 23. A person who agrees to indemnify himself is not an insurer -- he is self-insured, a.k.a uninsured or "bare" with reserves. *Aerojet-General Corp. v. Transport Indem. Co.*, 17 Cal. 4th 38, 72 n.20 (Cal. 1997). Often, to avoid exorbitant premiums, entities or groups of entities create a self-insurance program. These programs usually provide for claims handling, primary reserves, and excess insurance.

However, even though a self-insured undertakes many of the same functions as a regulated insurer, it is not an "insurer." *See Truck Ins. Exchange v. Amoco Corp.*, 35 Cal. App. 4th 814, 823 (Cal. Ct. App. 2d 1995) (holding that performance of insurance-related functions does not transform a party into an "insurer"). It is not subject to the same equitable duties regulated insurers owe each other. "Although insurers may be required to make an equitable contribution to defense costs ***among themselves***, that is all: An insured is not required to make such a contribution ***together*** with insurers." *Aerojet-General Corp. v. Transport Indem. Co.*, 17 Cal. 4th at 72 (emphasis in original). "Equitable contribution applies only between insurers, and only in the absence of contract. It therefore has no place between insurer and insured, which have contracted the one with the other. Neither does it have any place between an insurer and an uninsured or 'self insured' party." *Id.* (citations omitted).

2. "Fronting"

Often, an entity wants to self-insure, but cannot because of applicable statutes and regulations. To get around these laws, it approaches an insurance company and works out a "fronting" arrangement. *See Union Oil Co. v. Intern'l Ins. Co.*, 37 Cal. App. 4th 930, 933 n. 2 (Cal. Ct. App. 1st 1995) (describing a "fronting" arrangement). The entity offers to pay a reduced premium for a primary policy with a defense duty, "dollar one" coverage, and a large deductible (usually, $250,000 or higher). It also agrees to enter into a separate agreement, secured by collateral or a letter of credit, in which the entity promises indemnify the insurer for defense and indemnity obligations applicable to any covered "occurrence." Under this arrangement, the insurer only has liability if the insured defaults on the indemnification agreement. When multiple insurers are on the risk, a "fronting" policy is akin to a regular insurance policy with a large deductible.

D. No "Stacking" of Deductibles & SIRs

1. Definition

When a loss progresses through multiple policy periods and an insured makes a claim under a single policy with adequate coverage limits (i.e., *Armstrong* Election), California law prohibits the insurer from "stacking" deductibles or SIRs unless otherwise provided in the policy. *California Pacific Homes, Inc. v. Scottsdale Ins. Co.*, 70 Cal. App. 4th 1187, 1195 (Cal. Ct. App. 1st 1999). The insurer may not use the deductibles of other triggered primary policies to reduce its indemnity obligation. *Id.* The insurer may not refuse to defend and indemnify on the ground that the SIRs of other triggered primary policies have not been satisfied. *Id.*; *Montgomery Ward & Company, Inc. v. Imperial Cas. & Indem. Co.*, 81 Cal. App. 4th 356, 366 (Cal. Ct. App. 2d 2000). "The insurer that pays the loss is entitled to whatever deductible or SIR is provided in its policy. But unless the policy clearly provides otherwise, it cannot "stack" the deductibles or SIRs under the other policies whose coverage is 'triggered' by the continuing injury." Hon. H. Walter Croskey, Hon. Rex Heeseman & Susan M. Popik, *California Practice guide: Insurance Litigation*, § 8:132 (Rutter 2008); *California Pacific Homes, Inc.*, 70 Cal. App. 4th at 1195.

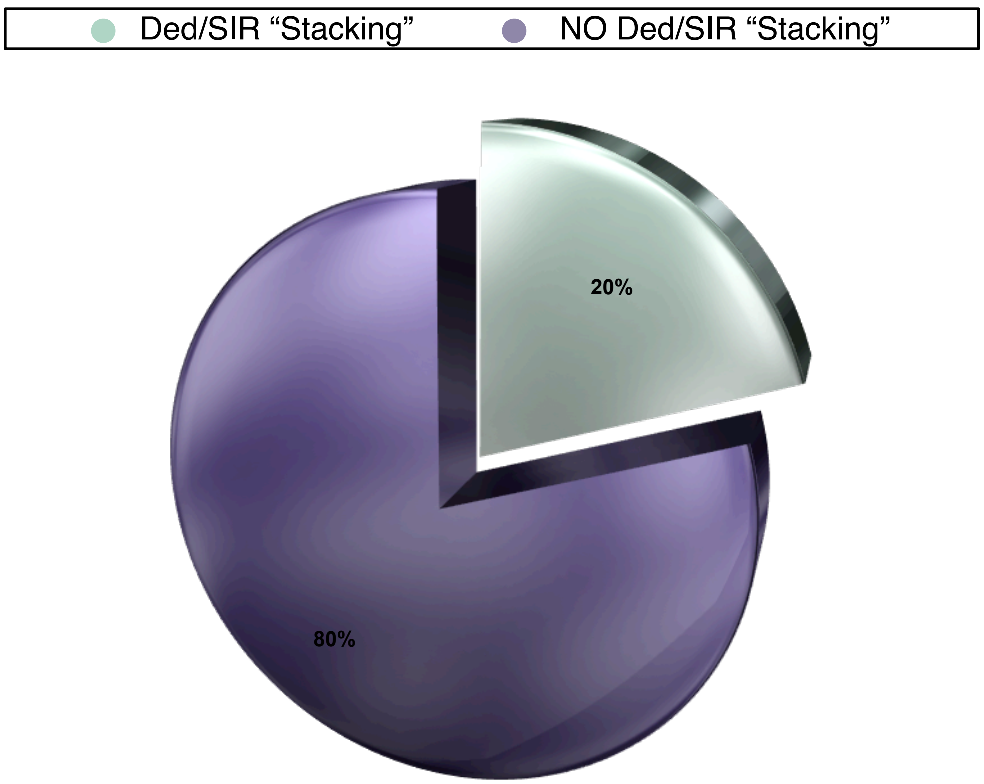
The prohibition against "stacking" was cemented in California law by the *Cal. Pacific Homes, Inc.* case. It involved plaintiff California Pacific Homes ("CPH"), who constructed and sold condominiums between 1983-1986. Its insurers during those years provided policies with $250,000 "per occurrence" SIRs. CPH was sued for defects in the condominiums. It defended and eventually settled the lawsuit for $1,975,000. CPH requested proportional indemnity payments from co-carriers, Scottsdale and National Casualty. The co-carriers agreed to contribute a smaller portion than was sought because they claimed CPH was required to exhaust the SIRs for all applicable policies before indemnity was due.

CPH sued the co-carriers and moved for summary judgment during the litigation. The trial court granted the motion and held that the cause of the defective condominiums constituted a single "occurrence," and pursuant to applicable policy language, that one "occurrence" was subject to a single $250,000 SIR. Defendants appealed. The appellate court isolated the difference between a policy's coverage and the applicability of a SIR. It explained that merely because a continuous loss triggers coverage of multiple policies does not mean that a continuous loss triggers the applicability of multiple SIRs. Once an "occurrence" took place, the appellate court ruled, one SIR was triggered and the insurer with this SIR was liable for the insured's entire loss, subject to policy limits. Like in the discussion of deductibles above, the Court decided that after discharge of indemnity obligations, it was up to the carriers to seek contribution from other carriers on the risk. The appellate court affirmed.

2. State Law Comparison

a) The Majority Rule is NO Deductible / SIR "Stacking"

As is evident below, most states prohibit deductible or SIR "stacking."[3]



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[3] *California Pacific Homes, Inc. v. Scottsdale Ins. Co.*, 70 Cal. App. 4th 1187, 1195 (Cal. Ct. App. 1st 1999); *PECO Energy Co. v. Boden*, 64 F. 3d 852, 857 (3d Cir. 1995) (applying Pennsylvania law); *Lafarge Corp. v. Hartford Cas. Ins. Co.*, 61 F. 3d 389, 401 (5th Cir. 1995) (applying Texas law); *Detrex Chemical Industries, Inc. v. Employers Ins. of Wausau*, 746 F. Supp. 1310, 1325-26 (N.D. Ohio 1990). *Compare Uniroyal, Inc. v. Home Ins. Co.*, 707 F. Supp. 1368, 1393 (E.D.N.Y. 1988) (holding that "stacking" deductibles comports with the reasonable expectations of the parties).

E. The Perspectives: "Stacking" of Deductibles / SIRs

1	Should A Contractor Party In A Construction Defect Action With Several Applicable Primary Policies Ever Tender To More Than One Carrier?	
Policyholder:		
Insurer:		
2	Can Construction Defects Present In Multiple Phases Of A Large Residential Project Realistically Be Construed As Giving Rise To A Single "Occurrence"?	
Policyholder:		
Insurer:		
3	Does "Stacking" Deductibles / SIRs Actually Comport with CGL Policy Provisions?	
Policyholder:		
Insurer:		
4	Does Advancement of Public Policy Favor "Stacking" Deductibles / SIRs Because It Encourages Insureds to Avoid Liabilities?	
Policyholder:		
Insurer:		

IV. COVERAGE AVAILABLE IN CONTINUOUS LOSS CASES: "STACKING" POLICY LIMITS

A. Single "Occurrence" in Continuous Loss Cases

In order to be covered, "property damage" must have been caused by an "occurrence." Most CGL policies define "occurrence" as an "accident, including continuous or repeated exposure to substantially the same general harmful conditions." *See San Diego Housing. Comm'n v. Industrial Indem. Co.*, 95 Cal. App. 4th 669, 676 n.5 (Cal. Ct. App. 4th 2002). An "occurrence" is not the existence of a harm. It is an event or events relevant to coverage taking place within the policy period. *FMC Corp. v. Plaisted & Cos.*, 61 Cal. App. 4th 1132, 1150 (Cal. Ct. App. 6th 1998).

If an "occurrence" causes *discrete* and *confined* property damage during a given policy period, only co-insurers with policies applicable during that period can be held liable. However, most construction defect cases involve continuous and / or progressively deteriorating losses, which cause property damage to occur over multiple policy periods. In these cases, where damages accrue during successive policy periods, all insurance policies in effect during those periods are triggered. *Montrose Chem. Corp. of Calif. v. Admiral Ins. Co.*, 10 Cal. 4th 645, 689 (Cal. 1995). Coverage is not limited to the policy in effect at the time of the precipitating event or condition. It is not eliminated once the damage becomes manifest.

The timing of the "accident" causing "property damage" is largely irrelevant in establishing coverage - the "accident" can take place before, during, or after the policy period. *Id.* at 675. Further, because CGL policies provide that insurers are liable for "all sums" caused by an "occurrence," each triggered policy's liability is not limited to the damages taking place during the applicable period. *Aeorjet General Corp. v. Transport Indem. Co.*, 17 Cal. 4th 38, 56-57 (Cal. 1997).

B. "Stacking" Policy Limits

> Stacking policy limits means that when more than one policy is triggered by an "occurrence," each policy can be called upon to respond to the claim up to the full limits of the policy. Under the concept of stacking . . . the limits of every policy triggered by an 'occurrence' are added together to determine the amount of coverage available for the particular claim. Thus, for example, if an insured could establish that each of four consecutive $10 million policies were triggered by a particular claim, the insured could recover $40 million for a single occurrence, rather than the $10 million available under any single policy.

FMC Corp., 61 Cal. App. 4th at 1188.

C. To "Stack" or Not to "Stack," That Is the Question

1. *FMC Corp. v. Plaisted & Cos.*

The facts of this case are rooted in the determination that FMC Corporation was liable under CERCLA for reimbursement of government agencies for many millions spent remediating toxic contamination of soil. FMC requested investigation, defense, and indemnity from its several primary and excess carriers. Dissatisfied with the responses, FMC filed a declaratory relief action against the insurers. Because of the complexity of the issues and the large number of sites and parties involved, FMC's action was adjudicated in eight separate trials. During the fifth through eighth trials, the trial court decided that policy limit stacking was prohibited and only one policy's limits could apply to the single "occurrence."

On appeal, FMC attacked this ruling and argued that appellate decisions "make abundantly clear that any implied 'anti-stacking' rule is contrary to California law." *FMC Corp.*, 61 Cal. App. 4th at 1188. The *FMC* Court disagreed. It embraced the rationale of the extra-jurisdictional case, *Keene Corp. v. Ins. Co. of North America*, 667 F. 2d 1034, 1049 (Wash. D.C. Cir. 1981). Integral to the *Keene* court's decision was its observation that "[t]o the extent possible, we have tried to construe the policies in such a way that the insurers' contractual obligations for asbestos-related diseases are the same as their obligations for other injuries." In conformance with *Keene*, the *FMC* Court moved past the express wording of the insurers' policies and determined "judicial intervention" was necessary to fairly adjudicate the issue. The Court held that FMC could not "stack" the policy limits of the insurers. It was required to specify one triggered policy to cover the loss.

2. *State v. Continental Ins. Co.*

Continental was another toxic contamination case. In the 1950's, the State of California designed and supervised construction of an industrial waste disposal site in Riverside County. In the ensuing 30 years of its operation, substantial ground water contamination occurred. In 1983, the United States and the State sued numerous private sector entities involved in operation of the site. Many of these entities cross-complained against the State, alleging negligent design and supervision. In 1998, the district court found the State liable for all past and future remediation costs, some $700 million.

In 2002, the State filed a declaratory relief action in state court against a number of excess insurers, who afforded liability coverage between 1967 - 1975. During these proceedings, the trial court determined that each of the insurers was potentially liable for the total amount of the loss, subject to their policy limits. "[I]t also ruled that the State could not recover the policy limits in effect for every policy period. Instead, the State had to choose one policy period, and it could recover only up to the policy limits of the policies in effect during that period (no-stacking ruling)." *State v. Continental Ins. Co.*, 88 Cal. Rptr. 3d 288, 296 (Cal. Ct. App. 4th 2009).

The State challenged the trial court's ruling on appeal. Before beginning the analysis, the Court of Appeal provided a thorough discussion of the definition, history, and effects of "stacking" policy limits. (*See* below Section D). Ironically, however, it grounded its ruling on a single observation. The Court recognized that California's treatment of a continuous loss as a single "occurrence" could cause some to argue that, with one "occurrence," only one policy is applicable. However, it also acknowledged that these arguments overlooked the point that the "per occurrence" limit of the insurers' policies governs each insurers' ***own policy, not the policies of all triggered insurers.*** "Thus, even though there is only one occurrence, the insured should be entitled to recover against each insurer up to the limits of that insurer's policy." *Continental Ins. Co.*, 88 Cal. Rptr. 3d at 305. Accordingly, "stacking" of policy limits is permitted in California.

D. Methods for Apportioning Continuous Loss Among Insurers

As referenced above, *Continental* delves deeply into the subject of "stacking" policy limits. The opinion also includes a enlightening hypothetical showing the considerable effects of employing multiple allocation methods, including "stacking." We include various portions of the discussion below:

> Take the following hypothetical (summarized in the table below): Polluter Corp. is held liable for $30 million in property damage, resulting from six years of continuous pollution. In year one, it was insured by Insurer A, subject to policy limits of $1 million per occurrence. In each of years two and three, it was insured by Insurer B, subject to policy limits of $10 million per occurrence. And in each of years four, five, and six, it was insured by Insurer C, subject to policy limits of $5 million per occurrence.

Id. at 303.

The table referenced above looked substantially similar to that below:

Year	Insurer	Limits	Time on Risk	All Sums w/ Stacking (Pro Rata by Limits)	All Sums w/o Stacking (Pro Rata by Limits)
1	A	$1,000,000	$1,000,000	$833,333	$277,778
Subtotal for A			$1,000,000	$833,333	$277,778
2	B	$10,000,000	$5,000,000	$8,333,333	$2,777,778
3	B	$10,000,000	$5,000,000	$8,333,333	$2,777,778
Subtotal for B			$10,000,000	$16,666,667	$5,555,556
4	C	$5,000,0000	$5,000,0000	$4,166,667	$1,388,889
5	C	$5,000,0000	$5,000,0000	$4,166,667	$1,388,889
6	C	$5,000,0000	$5,000,0000	$4,166,667	$1,388,889
Subtotal for C			$15,000,000	$12,500,000	$4,166,667
Grand Total			**$26,000,000**	**$30,000,000**	**$10,000,000**

Id. at 304.

To calculate the figures in the "Time on Risk" column, the Court obtained contribution percentages by dividing the total years of coverage by each insurers' years of coverage. Under this method, Insurer A would be allocated a $5 million share (16.67% X $30 million), Insurer B would allocated a $10 million share (33.33% X $30 million), and Insurer C would be allocated a $15 million share (50% X $30 million). However, Insurer

A's policy limits are $1,000,000, and it is not required to pay more than its policy limits. Thus, despite its larger share, Insurer is only liable for $1 million.

> In a jurisdiction that uses the all-sums approach and that also allows stacking, each insurer is potentially liable for the full $30 million. Insurer A's liability, however, is limited to $1 million; Insurer B's liability is limited to $20 million; and Insurer C's liability is limited to $15 million. Thus, Polluter Corp. can recover the full $30 million. This will be allocated among the insurers in accordance with their contribution rights. While the precise allocation may depend on the presence and the wording of any "other insurance" clauses in the policies, it is most likely to be pro rata, by policy limits. In that event, Insurer A will contribute 1/36 of the $30 million, or $833,333; Insurer B will contribute 20/36 of the $30 million, or $16,666,667; and Insurer C will contribute 15/36 of the $30 million, or $12,500,000.

Id. (citations omitted).

The Court calculated the above contribution percentages per insurer by adding up the limits of all applicable policies and dividing this number by each insurer's total limits.

> In a jurisdiction that uses the all-sums approach but prohibits stacking, however, Polluter Corp.'s recovery is limited to $10 million. Moreover, this amount will be allocated among the insurers in accordance with their contribution rights. Hence, no insurer will end up paying its own full policy limits.

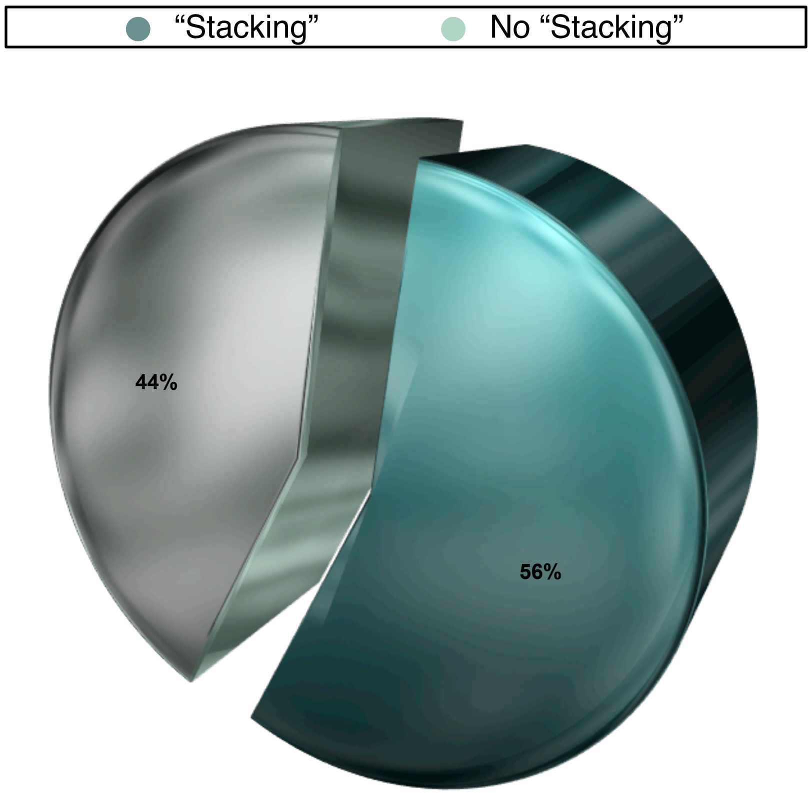
Id.

Note that the Court assumed Polluter Corp. made an *Armstrong* Election of either Year 2 or 3 of Insurer B's coverage. Also, the Court arrived at the contribution figures in the "All Sums w/o Stacking" column by using the same pro rata by policy limits allocation used in the preceding column. However, it substituted the $36 million in total coverage for the $10 million limit in the Year 2 or 3 policies.

The *Continential* table shows that the "all sums" with "stacking" method of apportioning costs of a continuous loss among insurers, substantially benefits the insured.

E. State Law Comparison

1. "Stacking"[4] vs. No "Stacking"[5]



[4] *Keene Corp. v. Ins. Co. of North America*, 667 F. 2d 1034, 1049 (Wash. D.C. Cir. 1981) (holding no stacking allowed); *Amer. Phys. Ins. Exchange v. Garcia*, 876 S.W. 2d 842, 854-55 (Tex. 1994) (holding no stacking allowed); *Great Lakes Dredge & Dock Co. v. City of Chicago*, 260 F. 3d 789, 796 (7th Cir. 2001) (applying Illinois law and holding no stacking allowed); *Sybron Transition Corp. v. Security Ins. of Hartford*, 258 F. 3d 595, 601-02 (7th Cir. 2001) (applying New York law and holding no stacking allowed); *Uniroyal, Inc. v. Home Ins. Co.*, 707 F. Supp. 1368, 1391-92 (E.D.N.Y. 1988) (holding that "stacking" policy limits "improperly divorces the coverage from the injuries triggering the coverage; it simply lumps all the injuries into one large pool. In addition, it fails to distinguish what portion of the $16 million would come from each policy if each were written by a different insurer. Finally, even with the same insurer on both policies, stacking in this manner makes the aggregate limits and the separately negotiated premiums for each policy illusory by expanding coverage to the sum of both policies."

[5] *Riley v. United Services Auto. Assoc.*, 161 Md. App. 573, 591-92 (Md. Ct. App. 2005) (holding stacking allowed); *United States Mineral Products Co. v. Amer. Ins. Co.*, 348 N.J. Super. 526, 549-50 (N.J. Sup. Ct., App. Div. 2002) (holding stacking allowed); *Society Ins. v. Town of Franklin*, 233 Wis. 2d 207, 215 (Wis. Ct. App. 2000) (holding stacking allowed); *State v. Continental Ins. Co.*, 88 Cal. Rptr. 3d 288, 296 (Cal. Ct. App. 4th 2009) (holding stacking allowed); *Empire Cas. Co. v. St. Paul Fire and Marine Ins. Co.*, 764 P. 2d 1191, 1197 (Colo. 1988) (appeared to permit stacking because multiple acts of negligence).

F. "Anti-Stacking" Provisions

Insurers include "anti-stacking" provisions in their policies in an attempt to avoid combining multiple sets of limits to a continuous loss. These clauses generally provide that only one policy limit applies to an "occurrence." They may also specify that all claims resulting from a single "occurrence" will be subject to one "each occurrence" limit.

The following is language from a sample "anti-stacking" endorsement:

> In consideration of the premium charged, it is hereby understood and agreed that:
>
> (1) If any Claim gives rise to coverage both under this Policy and under any Other Policy(ies) (as defined in Paragraph (2) below) issued by the Insurer or any of its affiliates, the maximum aggregate liability for any Loss (including Defense Costs) under this Policy and all such Other Policies combined on account of such Claim shall not exceed the largest single applicable limit of liability under any such policies. The Limits of Liability under this Policy shall be reduced, and may be exhausted, by payments under this Policy and/or payments under the Other Policy(ies).
>
> (2) For purposes of this endorsement, the term "Other Policy(ies)" shall mean the following:

Named Insured	Policy Names	Policy Numbers

> All other terms and conditions of this Policy remain unchanged.

Note that the above sample applies to only scheduled policies, and perhaps, only the scheduled policies of one insurer. A question remains about whether an "anti-stacking" provision that seeks to affect unscheduled policies of other insurers is valid.

G. "Continuous Contract" and Non-cumulation Clause

The *Continental* Court glossed over a potential means to avoid "stacking" of policy limits in the absence of an "anti-stacking" clause. At footnote 7, the Court stated:

> Wausau issued four policies, covering policy periods 1964-1967, 1967-1970, 1970-1973, and 1973-1976, respectively; ***two of these policies had the same policy number***. Nevertheless, Wausau does not argue that these policies

> were subject to just a single policy limit because they constituted only a single continuous contract that was repeatedly renewed. (*See generally A.B.S. Clothing Collection, Inc. v. Home Ins. Co.* (1995) 34 Cal.App.4th 1470, 41 Cal.Rptr.2d 166.) ***We deem any such contention forfeited.***

Continental Ins. Co., 88 Cal. Rptr. 3d at 305 n.7 (emphasis added).

As noted by the *Continental* Court, the key case on "continuous contracts" is *A.B.S. Clothing Collection, Inc.* This case involved an ABS employee, who embezzled over $1.4 million over a four-year span. During the thievery, Home had issued four $100,000 limit commercial crime policies to ABS. Once ABS discovered the embezzlement, it presented a claim to Home. The insurer promptly delivered to ABS a $100,000 check. ABS disputed Home's interpretation of its indemnity obligation and argued Home was liable up to $100,000 for each policy period that coverage was in effect.

A breach of contract and bad faith action ensued. The trial court granted Home's motion for summary judgment, agreeing that Home's construction of the policy language was correct as a matter of law. ABS appealed. The appellate court framed the issue presented as "whether the indemnity afforded is based on separate and distinct contracts for each year involved or is based on a single continuous contract of insurance which remains in effect until cancelled by one of the parties." *A.B.S. Clothing Collection, Inc.*, 34 Cal. App. 4th at 1476. It synthesized applicable case law and held that "courts will not limit the insurer's liability for losses incurred during successive years of its own coverage unless there is clear and unambiguous language showing the parties intended to enter into one continuous contract." *Id.* at 1478.

Home submitted that the "non-cumulation" clause in its policies was the clear language needed to prove the parties intended a "continuous contract." The clause provided: "Regardless of the number of years this insurance remains in force or the number of premiums paid, no Limit of Insurance cumulates from year to year or period to period." *Id.* at 1479. However, the Court was not persuaded. It noted that several prior decisions found "non-cumulation" clauses per se ambiguous. "While the clause might be construed to mean the insurer's liability is limited to a maximum aggregate amount, it can also reasonably be read to mean the limit of liability in one policy year cannot be carried over and added to the limit of liability in the succeeding policy year; nor can a loss in excess of the policy limit in one year be carried over and applied against the limit of liability in a succeeding year." *Id.* The perceived policy language ambiguity together with the observations that Home's policies had specific beginning and end dates, Home issued a separate policy document every year, and Home adduced no extrinsic evidence of the parties' intent to enter into a "continuous contract," led the Court to conclude that ABS was entitled to payment of up to policy limits for each policy year in which the embezzlement took place. The ABS. Court's decision remains the law today in California. *See Karen Kane, Inc. v. Reliance Ins. Co.*, 202 F. 3d 1180, 1183 (9th Cir. 2000) (holding "[w]e find A.B.S. to be a persuasive statement of California law").

H. The Perspectives: "Stacking" Policy Limits

1	Do You Subscribe to *FMC* or *Continental*? One "Occurrence," One Policy? If Insurers Cannot "Stack" SIRs, Why Can Insureds "Stack" Policy Limits?
Policyholder:	
Insurer:	
2	Since the Rationale of *Continental* Is Grounded in Contract Interpretation, Isn't the Insurers' Way Out of the "Stacking" Rule "Anti-Stacking" Clauses?
Policyholder:	
Insurer:	
3	Does the Analysis Change When Carriers on the Risk for a Continuous Loss Include Additional Insurers?
Policyholder:	
Insurer:	
4	In the absence of a "Anti-stacking" Provision, Should a Carrier with Multiple Triggered Policy Periods Argue "Continuous Contract" to Avoid "Stacking"?
Policyholder:	
Insurer:	
5	How Should "Non-cumulation" Clauses Be Worded to Avoid Their Rejection?*
Policyholder:	
Insurer:	
6	Does Allowing "Stacking" of Policy Limits Further Public Policy By Encouraging the Contractor Perform Properly for Fear of Financial Ruin?**
Policyholder:	
Insurer:	

**See Kavaney Realtor & Developer, Inc. v. Travelers Ins. Co.*, 501 N.W.2d 335 (N.D. 1993) (upholding "non-cumulation" clause providing "Regardless of the number of years this form shall be in force, the Traveler's total liability shall not be cumulative").

** *See A.B.S. Clothing Collection, Inc. v. Home Ins. Co.*, 34 Cal. App. 4th 1470, 1478 (Cal. Ct. App. 2d 1995) (noting in the context of a coverage determination concerning a crime insurance policy that finding the parties intended a "continuous contract" "encourages the employer to take steps to prevent losses through employee dishonesty and to promptly discover dishonesty if it occurs. Taking steps to reduce losses allows insurers to hold down insurance rates and, indirectly, reduces the cost of the employer's goods or services to the public").

V. CONSTRUCTION DEFECT ATTORNEY ETHICS

A. The "Triangular" Relationship

The rights and obligations of the insured, insurer, and their attorney is often described as a "triangular relationship." *State Farm Mut. Auto. Ins. Co. v. Federal Ins. Co.*, 72 Cal. App. 4th 1422, 1429 (Cal. Ct. App. 5th 1999). This relationship is a "coalition for a common purpose - a favorable disposition of the claim - with the attorney owing fiduciary duties to both clients." *Purdy v. Pacific Auto. Ins. Co.*, 157 Cal. App. 3d 59, 76 (Cal. Ct. App. 2d 1984). Courts acknowledge that a defense attorney's relationship with the carrier is most often stronger than with the insured. See *State Farm Mut. Auto. Ins. Co.*, 72 Cal. App. 4th at 1429. Surprisingly, they do not contend the relationship should be otherwise. *Id.*

B. Clients' Rights

Because both the insured and the insurer are the clients of defense counsel, each has mutual and exclusive rights pertaining to the defense. *Purdy*, 157 Cal. App. 3d at 76.

1. Right to Fire

Certainly, the insurer has the right to terminate an attorney's representation of an insured because it initially retained counsel. The insured also has the right to fire. Assertion of this right has consequences, however. The insured risks a denial of coverage based on the possible allegations that the insured failed to cooperate as required by the policy and / or wrongfully interfered with the insurer's contractual right to control the defense. *See Campbell v. Allstate Ins. Co.*, 60 Cal. 2d 303, 305-06 (Cal. 1963) (discussing breach of cooperation clause).

2. Right to Appoint In-House Counsel

Insurers may appoint in-house counsel to represent the interests of an insured if:

- the insured is given notice of counsel's status as an in-house attorney for the carrier;
- the in-house attorney exercises independent professional judgment in his representation of the insured;
- the insurer does not attempt to influence or interfere with the in-house attorney's professional judgment; and
- the in-house attorney does not participate in the investigation or determination of the insured's insurance coverage.

Gafcon, Inc. v. Ponsor & Assocs., 98 Cal. App. 4th 1388, 1406 (Cal. Ct. App. 4th 2002).

3. Right to *Cumis* Counsel

An insured has a right to a genuine defense by competent counsel. An insurer breaches an obligation to its insured when it provides defense counsel whose ability to represent the insured is compromised by a disqualifying conflict of interest. In such a case, the carrier must offer the insured independent counsel at the insurer's expense. *See* Civ. Code § 2860(a).

a) Conflicts Potentially Triggering *Cumis* Counsel

(1) Reservation of Rights Coupled With Control Of Issue Affecting Coverage Dispute

The mere fact that a carrier disputes coverage and is defending the underlying lawsuit on a "reservation of rights" basis does not compel appointment of independent counsel. *Dynamic Concepts, Inc. v. Truck Ins. Exch.*, 61 Cal. App. 4th 999, 1007 (Cal. Ct. App. 4th 1998). *Cumis* counsel is required, however, "where an insurer reserves its rights on a given issue and the outcome of that coverage issue can be controlled by counsel first retained by the insurer for the defense of the claim." Cal. Civ. Code § 2860(b).

(2) Covered and Non-covered Claims in Suit

A potential conflict of interest may exist when the complaint alleges both covered and non-covered causes of action. In such a case, the insured will want any judgment limited to covered claims, while the insurance company will be better off if judgment is entered on claims not covered under the policy.

(3) Potential Conflict Where Co-defendant Insured By Same Insurer

Joint representation of co-defendants insured by the same insurer is acceptable as long as the interests of the insureds and insurer do not diverge. *Betts v. Allstate Ins. Co.*, 154 Cal. App. 3d 688, 716 (Cal. Ct. App. 4th 1984). Independent counsel for each insured is required, however, where joint representation could deprive either of fair representation. *See Hammett v. McIntyre*, 114 Cal. App. 2d 148, 157-158 (Cal. Ct. App. 2d 1952).

b) Selection of *Cumis* Counsel

The insured has the right to select its *Cumis* counsel. *Executive Aviation, Inc. v. National Ins. Underwriters*, 16 Cal. App. 3d 799, 810 (Cal. Ct. App. 1st 1971). However, the insurer has the right to insist on minimal qualifications for the independent counsel. Cal. Civ. Code § 2860(c).

c) Payment of *Cumis* Counsel

The insurer has an obligation to pay fees and costs incurred by the independent counsel selected by the insured. Cal. Civ. Code § 2860(a). This obligation is "limited to the rates which are actually paid by the insurer to attorneys retained by it in the ordinary course of business in the defense of similar actions in the community where the claim arose or is being defended." Cal. Civ. Code § 2860(c).

C. Attorney's Obligations

1. Duties to the Insured

a) Duty of Competent Representation

Notwithstanding their recognition that a defense attorney's relationship with insurers is often closer than that with insureds, courts agree that the attorney's primary duty is to further the best interests of the insured. Cal. Bus. & Prof. Code § 6068; CRPC 3-110; *Purdy*, 157 Cal. App. 3d at 76. Therefore, defense counsel must not allow insurer direction or litigation "guidelines" affect his or her independent professional judgment. Additionally, while the insurer has the right to "control" the defense, attorneys must allow the insured to make the key decisions pertaining to the defense strategy.

b) Duty to Disclose Settlement Offers

Defense counsel is also obligated to disclose all facts relevant to making an informed decision about settlement. CRPC 3-510; *Betts v. Allstate Ins. Co.*, 154 Cal. App. 3d 688, 717 (Cal. Ct. App. 4th 1984). If, after disclosure of these facts to both the insured and insurer, the insurer wants to settle and the insured does not, defense counsel cannot settle the case until he or she affords the insured the opportunity to hire new counsel at his or her own expense.

c) Duty of Confidentiality

An insurer-appointed attorney may not disclose confidential communications with the insured to anyone, including the insurer. Cal. Bus. & Prof. Code § 6068(e)(1); CRPC 3-100; *Amer. Mut. Liab. Ins. Co. v. Sup. Ct.*, 38 Cal. App. 3d 579, 592 (Cal. Ct. App. 3d 1974). Likewise, defense counsel cannot discuss with the insured her confidential communications with the insurer. *Id.*

Interestingly, defense counsel owes a corresponding duty not to disclose facts giving rise to a potential denial of coverage to the insurer. *Id.* at 592-93. ***This duty applies even if the insured lied to the insurer to create a potential for coverage.*** Cal. State Bar Form Opn. No. 1995-139; *Amer. Mut. Liab. Ins. Co.*, 38 Cal. App. 3d at 592.

2. Duties to the Primary Insurer

Defense counsel appointed to represent an insured owes the insurer duties of competent representation, confidentiality, communication, disclosure of settlement offers. *See Unigard Ins. Group v. O'Flaherty & Belgum*, 38 Cal. App. 4th 1229, 1235 (Cal. Ct. App. 2d 1995); *Betts v. Allstate Ins. Co.*, 154 Cal. App. 3d 688, 716 (Cal. Ct. App. 4th 1984); Cal. State Bar Form Opn. No. 1995-139. An insurer's remedy for neglectful counsel is a malpractice action. *See Gulf Ins. Co. v. Berger, Kahn, Shafton, Moss, Figler, Simon & Gladstone*, 79 Cal. App. 4th 114, 129 (Cal. Ct. App. 2d 2000).

3. Duties to Excess or Reinsurers

As a matter of law, defense counsel appointed by a primary carrier to represent the interests of an insured does not owe a duty to communicate, duty of loyalty, or any duty of care to the insured's excess carriers or the insurer's reinsurers. This is because no contractual privity exists between defense counsel and the excess or reinsurance carrier. However, as a matter of practicality, defense attorneys should, and routinely do, keep excess carriers and reinsurers abreast of significant developments in the litigation. Such communication protects the interests of both defense counsel's clients. The excess insurer or reinsurer cannot complain that its insured failed to cooperate with their coverage investigation. Additionally, these parties cannot defend against liability for a judgment outside of policy limits on the ground that they were never afforded a reasonable opportunity to settle the matter.

D. Conflicts of Interest

1. Issues Attendant the "Triangular" Relationship

California Rule of Professional Conduct ("CRPC") 3-310(C) governs an attorney's representation of more than one client in a matter. It provides in relevant part:

> (C) A member shall not, without the informed written consent of each client:
>
> (1) Accept representation of more than one client in a matter in which the interests of the clients potentially conflict; or
>
> (2) Accept or continue representation of more than one client in a matter in which the interests of the clients actually conflict[.]

CRPC 3-310(C)(1) and (2).

However, absent a coverage dispute, written consent from insured and insurer is unnecessary for two reasons:

> First, given the unusual, perhaps unique, interrelationship of insurer, insured and counsel, the contract of insurance itself, drafted by the insurer for its own benefit, provides more than adequate disclosure under rule 3-310(B)(3) to the insurer. Second, the "potential conflict" trigger of rule 3-310(C)(1) is never pulled because, as seen *infra*, when such a conflict manifests itself, case law resolves any potential conflict in that matter by mandating a resolution in favor of the represented insured and against the non-represented, non-party insurer. Put another way, case law instructs that ultimately, there can be no conflict between insurer and insured since, as discussed *infra*, the insured will always prevail where an issue is created between them. (*See* L.A. Cty. Bar Formal Opn. No. 464.) Thus, the notice to and waiver by the insured is superfluous.

Cal. State Bar Form Opn. No. 1995-139.

The above does not absolve defense counsel of the duty to obtain informed written consent from the insured, defend jointly with *Cumis* counsel, or entirely withdraw from the matter if an actual conflict of interest arises between the insured and the insurer. *Dynamic Concepts, Inc.*, 61 Cal. App. 4th at 1007; *San Diego Navy Federal Credit Union v. Cumis Ins. Society, Inc.*, 162 Cal. App. 3d 358, 375 (Cal. Ct. App. 4th 1984). Failure to disclose all facts pertaining to the conflict of interest to both the insured and insurer with

continued representation may lead to defense counsel's liability for civil damages and administrative penalties. *Lysick v. Walcom*, 258 Cal. App. 2d 136, 149 (Cal. Ct. App. 1st 1968); *Purdy*, 157 Cal. App. 3d at 77.

2. Representation of Multiple Insureds in Same Litigation

Representation of multiple insureds in the same litigation is permissible, so long as no conflict of interest exists. In this context, a conflict of interest occurs "whenever their common lawyer's representation of the one is rendered less effective by reason of his representation of the other." *Spindle v. Chubb Pacific Indemnity Group*, 89 Cal. App. 3d 706, 713 (Cal. Ct. App. 2d 1979). Under CRPC 3-310(C)(1), if facts develop during representation of the insureds that support the existence of a conflict of interest, defense counsel must obtain his clients' informed written consent. If he cannot obtain the consent and the circumstances give rise to a mere potential conflict[6], defense counsel should seek to have his other client separately represented. Cal. State Bar Form Opn. No. 1995-139. If the conflict is actual and no consent is given, then the attorney must withdraw from the matter. CRPC 3-310(C)(1).

3. Defending Insured in One Matter and Suing Him in the Next

California Rule of Professional Conduct 3-310(B)(2)(b) provides attorneys guidance when a situation develops in which an attorney previously represented one client in an action and is called upon to sue this client in another matter. It provides in relevant part:

> (B) A member shall not accept or continue representation of a client without providing written disclosure to the client where: . . .
>
> (2) The member knows or reasonably should know that: . . .
>
> (b) the previous relationship would substantially affect the member's representation[.]

CRPC 3-310(B)(2)(b).

The perceived harm of suing a former client in another matter is the threat to the duty of confidentiality owed the former client. To determine whether written disclosure was required, courts analyze whether a "substantial relationship" existed between subjects of the former and current representation and balance the competing interests of the former and current clients. *William H. Raley Co. v. Sup. Ct.*, 149 Cal. App. 3d 1042, 1048 (Cal. Ct. App. 4th 1983).

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[6] A "potential" conflict of interest occurs when the insureds' interests ***may*** diverge with respect to a specific issue. *Betts v. Allstate Ins. Co.*, 154 Cal. App. 3d 688, 716 (Cal. Ct. App. 4th 1984).

4. Remedying Conflicts of Interest

To remedy an attorney's conflict of interest, the client, or even possibly a non-party with personal stake in the motion, who is a party to the litigation, must move to disqualify or "recuse" the attorney. *William H. Raley Co.*, 149 Cal. App. 3d at 1048. *See Colyer v. Smith*, 50 F. Supp. 2d 966, 971-72 (C.D. Cal. 1999) (holding that a non-client party may move for disqualification). Non-party clients may obtain such relief by filing a separate injunctive relief action against the challenged lawyer. *Machado v. Sup. Ct.*, 148 Cal. App. 4th 875, 881 (Cal. Ct. App. 3d 2007). Disqualification is justified if the competing interests weigh in the movant's favor. *William H. Raley Co.*, 149 Cal. App. 3d at 1048.

E. The Perspectives: Ethics of Construction Defect Attorney

1	Should Insureds Demand Appointment of *Cumis* Counsel for Almost Every Defense Tender with a Reservation of Rights?
Policyholder:	
Insurer:	
2	Can In-House Counsel Meaningfully Represent the Insured and Insurer, Given: (1) Heavy Workload; (2) Salary Status; and (3) Inevitable Bias Toward Insurer?
Policyholder:	
Insurer:	
3	Can an Insured Seek Disqualification of In-House Counsel and Comply with His Duties Under the Policy?
Policyholder:	
Insurer:	
4	What Does A Contractor (And Its Insurer) Do When the Firm that Represented It in Prior Litigation Is Now Suing Him in Current Litigation?
Policyholder:	
Insurer:	
5	What Does A Contractor (And Its Insurer) Do When He Believes His Interests Are Being Sacrificed by His Counsel's Joint Representation of Other Contractors in the Litigation?
Policyholder:	
Insurer:	

6	Is Developer's Counsel Who Represents Subcontractor WRAP Policy Insureds and Also Prosecutes Developer's Indemnity Cross-Action Against Those Same Subcontractors Complying with His Ethical Obligations?
Policyholder:	
Insurer:	
7	How Should WRAP Insurers Respond to the *Cumis* Demands of Subcontractor WRAP Policy Insureds?
Policyholder:	
Insurer:	
8	How Are Defense Counsel's Obligations Affected by the Presence of a "Burning Limits" Policy? Does the Insured's Interest in Preserving Limits for Indemnity Create an Actual Conflict of Interest Between the Insurer and Him? Between Defense Counsel and Him?
Policyholder:	
Insurer:	

VI. COVERAGE OF OBLIGATIONS IMPOSED BY INDEMNITY AGREEMENTS

A. "Contractual Liability" Exclusion

1. Definition

Most all CGL policies include a "contractual liability" exclusion. Lee R. Russ & Thomas F. Segalla, *Couch on Insurance*, § 129.31 (3d ed. 2008). This provision clarifies that the insurer may be responsible for damage the insured actually caused, but may not be responsible for the liability of another that the insured had accepted in a contract. Below is a sample provision from the CG0001 01/07 policy:

2. Exclusions

This insurance does not apply to: . . .

b. Contractual Liability

> "Bodily injury" or "property damage" for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for damages:
>
> (1) That the insured would have in the absence of the contract or agreement; or
>
> (2) Assumed in a contract or agreement that is an "insured contract," provided the "bodily injury" or "property damage" occurs subsequent to the execution of the contract or agreement. Solely for the purposes of liability assumed in an "insured contract," reasonable attorney fees and necessary litigation expenses incurred by or for a party other than an insured are deemed to be damages because of "bodily injury" or "property damage," provided:
>
> (a) Liability to such party for, or for the cost of, that party's defense has also been assumed in the same "insured contract"; and
>
> (b) Such attorney fees and litigation expenses are for defense of that party against a civil or alternative dispute resolution proceeding in which damages to which this insurance applies are alleged.
>
> Included within the policy definition of "insured contract" is the following:
>
> 9. "Insured contract" means: . . .
>
> That part of any other contract or agreement pertaining to your business (including an indemnification of a municipality in connection with work performed for a municipality) under which you assume the tort liability of another party to pay for "bodily injury" or "property damage" to a third person or organization. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement.

Reading the above provisions together may lead to the conclusion that the "contractual liability" exclusion actually increases, as opposed to decreases, coverage in situations applicable in most construction defect actions. The exceptions to the exclusion may provide coverage for liability a contractor assumes in an agreement to indemnify the owner or another contractor for claims arising out of allegations concerning the contractor performing defective work. *Golden Eagle Ins. Co. v. Ins. Co. of the West*, 99 Cal. App.4th 837, 847-48 (Cal. Ct. App. 4th 2002). However, they do not cover any business-related contract. It is important to remember that for "contractual liability" coverage to attach, the claim against the insured must constitute an "occurrence" that caused "property damage." *See Bernstein v. Consol. Amer. Ins.*, 37 Cal. App. 4th 763, 769 (Cal. Ct. App. 2d 1995) (discussing underlying allegation based solely on contract was not covered).

It is also significant that liability under the "contractual liability" provisions counts as "damages," and therefore, reduces an insured's indemnity limits. *Golden Eagle Ins. Co.*, 99 Cal. App.4th at 847. Also, liability for an indemnitee's defense costs does not fall within the insurer's defense obligation. *Id.* Furthermore, given the current CGL language, these defense costs are excluded in the "supplementary payments" provision.

2. Timing of Insurer's Obligation to Make Payments Pursuant to "Contractual Liability" Coverage

As referenced above, liability under the "contractual liability" exclusion usually has two components, depending on the language of the indemnity contract. The insurer may be called upon to pay the indemnitee's defense costs. It may be required to satisfy the indemnitee's liability for settlement or judgment. However, because of language in indemnity agreements providing for immediate obligations of the indemnitor, a question often arises concerning when the insurer is obligated to make payments pursuant to "contractual liability" coverage.

The best way to answer this questions is to review the policy. *See Bank of the West v. Sup. Ct.*, 2 Cal. 4th 1254, 1264 (Cal. 1992) (holding "[i]f contractual language is clear and explicit, it governs). The "contractual liability" exclusion expressly provides that payments made pursuant to it reduce indemnity limits. Section I(1)(a) states that the insurer "will pay those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies." It further reads that the insurer "will have the right and duty to defend the insured against any 'suit' seeking those damages." These terms presuppose that the damages to which the indemnity arrangement applies are payable by the insurer at the resolution of the suit against the insured. Thus, the Court in *Golden Eagle* was persuaded that, in the absence of relevant policy language, indemnitee defense costs were "damages" for which the insurer would ***reimburse*** under "contractual liability" coverage. *Golden Eagle Ins. Co.*, 99 Cal. App.4th 850.

3. Timing of Insured's Duty to Defend With Indemnity Contract

The question about the timing of an insured indemnitor's payment of indemnitee defense costs is entirely different from that discussed in the preceding section. But, both questions are similar in that their answers derive from the language of the policy.

After reviewing applicable policy provisions, the Supreme Court, in *Crawford v. Weather Shield Mfg., Inc.,* 44 Cal. 4th 541(Cal. 2008), answered the question with respect to indemnity contracts entered into before 1996. In its subcontract with developer J.M. Peters Co. ("JMP"), Weather Shield promised to "'to indemnify and save [JMP] harmless against all claims for damages . . . loss, . . . and/or theft . . . growing out of the execution of [Weather Shield's] work,' and (2) 'at [its] own expense to defend any suit or action brought against [JMP] founded upon the claim of such damage[,] . . . loss or theft.'" *Id.* at 547-48. The Supreme Court stated that this provision did not mean Weather Shield had an obligation to reimburse JMP its defense costs if it was proven negligent at the conclusion of the proceedings. *Id.* at 558. It held to the contrary - the provision meant what it said. Weather Shield had a duty to defend JMP upon JMP's demand, regardless of whether Weather Shield was ultimately determined to have no fault in the matter. *Id.* at 553-54. The Court did acknowledge that this "present" duty could terminate if, during the litigation, "all claims potentially subject to the contractual indemnity obligation were eliminated, or if the promisor otherwise conclusively established that the claims were not among those 'embraced by the indemnity.'" *Id.* at 558 n.7 (citations omitted).

Even though the concept of insurer indemnification of its subcontractor insureds is so entrenched in California construction litigation, the Supreme Court did not make any reference to issue discussed in the preceding section, viz. whether, depending on the indemnity provisions, the carrier of an indemnitor subcontractor has a duty to pay indemnitee defense costs upon tender. Unless future courts desire to vary policy terms, they are likely to hold that an insurer's possible indemnitee defense cost obligation is that of reimbursement, not payment upon tender.

The Supreme Court did make reference to the consequences of failing to comply with a present, contractual defense duty. Even if the contractual indemnity obligation is not triggered at judgment or settlement (i.e., the indemnitor subcontractor is determined not negligent), the indemnitee has claims against the indemnitor for: (1) recovery of its defense costs arising out of claims relating to the indemnitor's work; and (2) attorney fees and costs incurred to prosecute the cross-action against the indemnitor under any applicable attorney fee clause. *Id.* at 555.

Furthermore, while acknowledging the "sweeping" effect of its ruling, the Supreme Court appeared to be comforted by the fact that its holding could only apply to indemnity provisions in contracts for residential construction entered into before January 1, 2006. *See id.* at 566. It stated:

> These new laws, which apply to residential construction contracts entered after their effective dates, void any term in such a contract that obliges a subcontractor to indemnify certain other project participants, 'including the cost to defend,' against construction defect claims 'to the extent' the claims 'arise out of, pertain to, or relate to' the negligence of those other entities.

Id.

B. The Perspectives: Coverage and Indemnity Agreements

1	If the Subcontractor Indemnitor Has an Immediate Duty to Defend the General Contractor Indemnitee, Does This Duty Flow to the Subcontractor's Carrier(s)?	
Policyholder:		
Insurer:		
2	Does *Crawford* Impact Duties of Liability Insurers, as Opposed to Their Insureds, in Any Way? If So, What Are Its Effects?	
Policyholder:		
Insurer:		
3	When Faced with a Valid Tender for Defense Under an Indemnity Clause and in the Absence of an AIE, Should an Insurer Agree to Contribute to the Indemnitee's Defense to Avoid Later Liability for Potentially Higher Indemnitee Defense Costs and Indemnitee Cross-action Attorney Fees and Costs?	
Policyholder:		
Insurer:		
4	Is It Possible to Construe Any Portion of an Insurer's Liability Under the "Contractual Liability" Exclusion as a "Supplementary Payment"?*	
Policyholder:		
Insurer:		
5	Does the *Crawford* Holding Cause Earlier Exhaustion of Policies Due to Insurers' Payments Being Construed as "Supplementary Payments"?**	
Policyholder:		
Insurer:		
6	*Bramalea* Prohibits an Indemnitee Insurer from Suing Indemnitor Insurers for Equitable Subrogation. Consequently, Don't Express Indemnity Rights Belong to the Indemnitee Insurer?***	
Policyholder:		
Insurer:		

*Yes. If indemnitor has present duty to defend, and does not. At the conclusion of the litigation, the indemnitor sues for defense costs, inter alia, and wins. Additionally, an attorney fee provision is included in the subcontract, and the court awards the indemnitee attorney fees for prosecuting the cross-action.

**No, it will not. Even if indemnitee defense costs could be construed as being compensable under the “supplementary payments” provision, “supplementary payments” do not count towards indemnity limits.

***_Bramalea Calif., Inc. v. Reliable Interiors, Inc._, 119 Cal. App. 4th 468, 475 (Cal. Ct. App. 4th 2004). Yes. Additionally, the indemnitee insurer can sue the indemnitor carriers for equitable contribution. _Id._ at 475 n.5.

VII. CONCLUSION

Now you have had an opportunity to consider the diverse perspectives of policyholders and insurance carriers on five of today’s most provocative topics. Use knowledge of these perspectives to thrive your practice of construction defect litigation!