

Horizontal Exhaustion Analyzed by California Court in Continuous Damage Case

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On June 3, 2011, the California Court of Appeal for the Second Appellate District issued a decision in [Kaiser Cement and Gypsum Corp. v. Insurance Company of the State of Pennsylvania](#) that should be of interest to insureds, primary insurers and excess insurers as to the issues of horizontal exhaustion and stacking of liability insurance policies.

The underlying dispute involved coverage obligations for thousands of asbestos bodily injury claims brought against Kaiser.

In a previous decision, the appellate court held that asbestos bodily injury claims should be treated as multiple occurrences under the primary policies issued to Kaiser by Truck Insurance Exchange, rather than one single occurrence for multiple claimants. The primary policies all had non-aggregating per-occurrence limits, meaning the policies potentially could be on the hook for the total per-occurrence limit for each occurrence

The present appeal addressed the situation as to whether, when an asbestos bodily injury claim exceeded the primary coverage issued by Truck in a particular year, the excess coverage issued by Insurance Company of the State of Pennsylvania (“ICSOP”) was triggered to provide indemnification to Kaiser.

Because the case involved asbestos bodily injury, which continues to cause injury over time, even with a single claimant, a claim could trigger coverage in multiple policy years. ICSOP argued that the insured had to exhaust all underlying primary policies for all years in which coverage was triggered. Both Kaiser and Truck argued that the ICSOP excess policy was triggered upon exhaustion of the single \$500,000 per occurrence limit.

The *Kaiser* court issued three holdings in its decision:

First, it held that the excess insurer ICSOP was entitled to horizontally exhaust all underlying primary insurance that was collectible and valid, and not just those policies directly underneath its excess policy. It advised that this ruling was consistent with prior California law addressing the issue of horizontal exhaustion.

The second holding, however, concluded that ICSOP was not able to “stack” the individual limits of the Truck primary policies. The court did not base this holding on judicially imposed anti-stacking principles, but rather concluded that under the particular language of the Truck policies, Truck could only be liable as a company for one per-occurrence limit for each occurrence.

Specifically, the court cited the language in the insuring agreement stating that,

the Company's liability as respects to one occurrence . . . shall not exceed the per occurrence limit designated in the Declarations." (Italics added.)

Thus, the court permitted horizontal exhaustion in principle but held that there was no valid and collectible insurance to horizontally exhaust in this case since Kaiser was only entitled to one per-occurrence limit for Truck as a whole for claims that exceeded the \$500,000 per occurrence limit in the implicated Truck policy.

The final holding by the court was that the summary judgment that had been issued by the trial court in favor of Kaiser had to be reversed because, on the present record, the appellate court could not determine if there was primary coverage issued to Kaiser by other insurers (outside of Truck) whose primary policies still needed to be exhausted under the court's horizontal exhaustion ruling.

For excess insurers, this case affirms the obligation that horizontal exhaustion of all primary insurance is still the rule in the continuous occurrence context.

The anti-stacking ruling also should have a fairly limited scope -- it would only apply to situations in which there is a single insurer providing coverage under all triggered primary policies.

And, above all, the case requires a careful review of the specific policy language found in each primary and excess policy at issue.