Filed 1/25/07

CERTIFIED FOR PARTIAL PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

STATE OF CALIFORNIA, Plaintiff, v. UNDERWRITERS AT LLOYD'S LONDON et al., Defendants.	E037627 (Super.Ct.No. CIV239784) **ORDER DENYING PETITION FOR REHEARING AND MODIFYING OPINION** [NO CHANGE IN JUDGMENT]
STATE OF CALIFORNIA, Plaintiff and Appellant, v. ALLSTATE INSURANCE COMPANY et al., Defendants and Respondents.	(Super.Ct.No. RIC381555)

Respondents' petition for rehearing is denied. The opinion filed on December 28, 2006, and modified on January 12, 2007, is further modified as follows:

1. On page 4, the first full paragraph, which begins with the words "The State designed," in the first sentence after the words "eight feet high," insert the words "at the downstream (southern) boundary of the site" so that the sentence reads:

> The State designed the site, which included a concrete barrier dam eight feet high at the downstream (southern) boundary of the site, diversion channels, and ponds.

2. On page 4, immediately after subheading B, "*Discharges of Pollutants from the Site*," delete the entire first paragraph and replace it with the following:

> 1. *Subsurface discharges*
>
> According to a report prepared by an expert for the State, by 1960 contaminants exited the subsurface of the site around the east and west ends of the concrete barrier and through the fractured bedrock underneath the barrier. From the moment the contaminants left the site, the soils and groundwater became contaminated progressively farther downstream of the site due to the continuous motion of the groundwater to the southwest. Through at least the late 1980's, the plume of contamination was moving progressively farther from the site. As of the date of the report, July 2004, damage to the soils and groundwater downgradient of the site was ongoing.
>
> 2. *1969 discharge*
>
> For purposes of the summary judgment motion from which this appeal arises, the parties agreed to the following facts. According to rainfall records, it rained heavily in January and February of 1969, with nearly seven inches of rainfall in January and eight inches in February. Not later than March 17, 1969, a once-in-50-year rainstorm of some 20 inches inundated the site, causing the contaminants at the site to overflow into the surrounding environment, including the City of Glen Avon.

3. On page 5, immediately preceding the first paragraph, which begins with the words "By the beginning of the 1978-1979 rainy season," add the following subheading:

3. *1978 discharges*

4. On page 6, the first two paragraphs under subheading D, "*The Policies*" are rewritten as one paragraph, as follows:

> After the site was closed, but before the 1978 discharges, the State purchased comprehensive general liability excess insurance policies from Insurers. The terms of the policies varied, but together they provided coverage from September 1976 to May 1978. Although the policies were purchased after the site ceased operations, Insurers have not argued for purposes of summary judgment or this appeal that there is no coverage for that reason. While the language of the policies varied, Allstate's, Century's, and Westport's were in the same form and said essentially the same thing. For convenience, in this opinion we will quote the policy issued by Allstate's predecessor, which is sufficiently representative of the other two policies for our purposes.

5. Starting on page 6 and continuing on page 7, the first sentence of the third paragraph under subheading D, "*The Policies*," is rewritten as follows:

> The coverage clause of the policy obligates the insurer "[t]o pay on behalf of the Insured all sums which the Insured shall become obligated to pay by reason of liability imposed by law, including Chapter 1681 of the State of California Statutes of 1963, or liability assumed by contract, insofar as the State may legally do so, for damages, including consequential damages, because of direct damage to or destruction of tangible property (other than property owned by the Insured), including the loss of use thereof, which results in an Occurrence during the policy period."

6. On page 7, the first full paragraph, which begins with the words "The policy," in the second sentence delete the words "which was added to the standard CGL policy in 1970" so that the sentence reads:

> The exclusion states that the policy does not apply to damage "arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land or the atmosphere, *but this exclusion does not apply if such discharge, dispersal[,] release or escape is sudden and accidental*."

7. On page 4, in footnote 4, replace "CGL" with the words "general liability."

8. At the end of the paragraph starting on page 7 and continuing on page 8, which paragraph begins with the words "Finally, the policy contains," add the following sentence:

> The watercourse exclusion is set forth in a separate paragraph and does not contain the exception for sudden and accidental discharges.

9. On page 8, in the second full paragraph, which begins with the words "The parties stipulated," immediately following the last sentence, which reads, "Therefore, we are unable to determine what, if any, effect the terms of the underlying policy might have on the coverage provided by the Columbia policy," add footnote 5 as follows:

> [5] Insurers claim the Columbia policy "follows form to the same language as do the other policies," and that "the policy stipulation simply did not physically attach the underlying language." This court, of course, is limited to the record on appeal. Insurers did not move to admit the missing language as evidence on appeal. (Cal. Rules of Court, former rule 22(c) (see now rule 8.252(c)).)

This change will necessitate renumbering the remaining footnotes.

10. On page 8, in the first sentence of the third full paragraph, which begins with the words "The second difference," insert the words "paragraph setting forth the" between the words "separate" and "watercourse," so the sentence reads:

> The second difference between the standard policy and the Columbia policy is that the Columbia policy does not contain a separate paragraph setting forth the watercourse exclusion.

11. On page 11, the eighth paragraph, which reads "We conclude:," is rewritten to read:

> We conclude, solely for purposes of the summary judgment motion from which this appeal arises:

12. On page 11, the last paragraph on the page, which begins with the words "(2) The 1969 discharge," is rewritten to read:

> (2) There is evidence from which a reasonable trier of fact could find the 1969 discharge was "sudden and accidental" but insufficient evidence to support such a finding as to the other discharges.

13. On page 11, at the end of the last paragraph (as modified in No. 12 above), insert footnote 6 as follows:

> [6] Insurers state that in a 2005 trial in this case involving other insurers, the State stipulated that the 1969 overflow did not constitute an occurrence under the policies. The stipulation is not in the record on appeal and Insurers have not asked that this court take judicial notice of it. We express no opinion concerning what effect, if any, the stipulation might have on remand.

This change will necessitate renumbering the remaining footnotes.

14. The first paragraph on page 12, which begins with the words, "(3) The watercourse exclusion," is modified to read:

> (3) There was evidence from which a reasonable trier of fact could conclude the watercourse exclusion does not apply.

15. In the second paragraph on page 12, which begins with the words "(4) The State is not required," substitute the words "any covered liability" for the words "its covered liability" so that the sentence reads:

> (4) The State is not required to allocate its damages to obtain indemnity for any covered liability.

16. On page 27, immediately following the third full paragraph, which begins with the words, "Here, in contrast," the following new paragraphs are added:

> Insurers argue that application of the pollution exclusion is not controlled by the basis of the insured's liability, but rather by whether coverage is sought for property damage arising from a discharge to land. If so, the pollution exclusion bars coverage unless the discharge is sudden and accidental. According to Insurers, here there is no dispute that the property damage arose out of discharges to land that were not sudden and accidental.
>
> Insurers' argument begs the question by assuming that if wastes intentionally deposited into a disposal site later escape the site and cause injury to adjacent property, the damage "arose out of" *only* the initial deposit and not the later event that actually caused the wastes to escape. Nothing in the pollution exclusion or elsewhere in the policy compels that interpretation. The exclusion says the policy does not apply to "Property Damage arising out of the discharge, dispersal, release or escape" of pollutants "into or upon land or the atmosphere," but the exclusion "does not apply if such discharge, dispersal[,] release or escape is sudden and accidental." The phrase "arising out of" is not defined.

> "'California courts have consistently given a broad interpretation to the terms "arising out of" or "arising from" in various kinds of insurance provisions.'" (*Medill v. Westport Ins. Corp.* (2006) 143 Cal.App.4th 819, 830.) This language "'broadly links a factual situation with the event creating liability,'" and "'"requires [the court] to examine the conduct underlying the . . . lawsuit, instead of the legal theories attached to the conduct."' [Citation.]" (*Ibid*.) Here, the "'event creating liability'" and the "'"conduct underlying the . . . lawsuit"'" was the escape of the wastes from the site, not the deposit of the wastes into the site. It is not, as Insurers claim, undisputed that the escape of the wastes from the site was not sudden and accidental.
>
> Furthermore, even if the phrase "arising out of" reasonably could be construed to refer either to the initial deposit or the later escape, as an exclusionary provision, the pollution exclusion would have to be interpreted against Insurers. (*TRB Investments, Inc. v. Fireman's Fund Ins. Co.* (2006) 40 Cal.4th 19, 27.) Therefore, even if the property damage "arose out of" both sudden and accidental discharges and discharges that were not sudden and accidental, the policy would have to be construed to afford coverage for the damage.

17. On page 27, the first word of the last paragraph, "Moreover," is deleted, so that the sentence begins with the word "The."

18. On page 30, the first full paragraph, which begins with the words "In contrast," is rewritten to read:

> Here, in contrast, Insurers themselves assert that the 1969 discharge occurred because on March 17, 1969, the ponds "'topped out'" after the rains had filled them, causing the contaminants at the site to overflow into the surrounding environment. A reasonable trier of fact could find on this evidence that the overflow was a "discharge, dispersal[,] release or escape" that was "sudden and accidental," making the pollution exclusion by its terms inapplicable.

19. On page 30, in the last paragraph, which begins with the words "A dike washout," those words are replaced with the words "An overflow," so that the first sentence reads:

> An overflow, like a levee break, is reasonably viewed as a "sudden" event.

20. On page 32, the last paragraph, which begins with the words, "Here, it is not disputed," the first sentence is rewritten to read:

> Here, it is not disputed for purposes of summary judgment and this appeal that the 1969 storm of some 20 inches was a once-in-50-year event.

21. On page 32, the last paragraph, which begins with the words "Here, it is not disputed," the third sentence is rewritten to read:

> In any ordinary, reasonable sense of the word "expected," there is at least a triable issue whether the State should have expected that the site would overflow and cause the 1969 discharge.

22. On page 33, the second paragraph, which begins with the words "While Insurers are correct," is deleted and replaced with the following paragraph:

> While Insurers are correct that the 1969 discharge would not have occurred *but for* the routine dumping, it is simply unrealistic to claim the discharge "arose" only out of the dumping, and not out of the overflow. As we have noted, the phrase "arising out of" is given a "broad interpretation." (*Medill v. Westport Ins. Corp.*, *supra*, 143 Cal.App.4th at p. 830.)

23. On page 34, the second full paragraph, which begins with the words, "In sum," the last sentence is rewritten to read:

> We therefore conclude summary judgment on the basis that the policies did not cover the 1969 discharge was improper.

24. On page 38, immediately following the second full paragraph, which begins with the words, "However, neither the maps," and before the last paragraph, which begins with the words "In addition," the following paragraphs are inserted:

> Insurers argue that a "watercourse" includes not only a creek but also the entire channel through which it flows and the ground where water usually flows, even when there is no water. They cite decisions involving riparian rights. Assuming, without deciding, that those decisions are relevant in applying the watercourse exclusion, we note the California Supreme Court has defined "watercourse" for purposes of riparian rights as follows: " . . . 'A watercourse is defined as a natural stream of water usually flowing in a definite channel, having a bed and sides, or banks, and discharging itself into some other stream or body of water.'" (*Chowchilla Farms Inc. v. Martin* (1933) 219 Cal. 1, 16.)
>
> The record in this case did not show that water usually flowed in the entirety of Pyrite Channel, over all of the land into which the 1969 discharge deposited contaminants, or that the channel discharged into some other stream or body of water. Hence, there was at least a factual issue whether the 1969 discharge was confined to a watercourse.

25. Immediately following the last sentence of the last newly added paragraph set out in modification 24 above, which sentence reads, "Hence, there was at least a factual issue whether the 1969 discharge was confined to a watercourse," insert footnote 12 as follows:

> [12] Insurers also cite this court's decision in *Ortega Rock Quarry v. Golden Eagle Ins. Corp.* (2006) 141

> Cal.App.4th 969. They provide no internal page citation, so it is unclear what part of the decision they claim is relevant here. In any event, *Ortega Rock Quarry* did not involve the watercourse exclusion or the definition of "watercourse." The case involved an "absolute" pollution exclusion, and the issues pertaining to the application of the exclusion were whether the language of the exclusion was ambiguous as to the definition of "pollutant" and whether dirt and rocks deposited into a creek were "pollutants." (*Id*. at pp. 979-980.) We do not see how the decision has any relevance here.

This change will necessitate renumbering the remaining footnotes.

26. On page 40, the first full paragraph, which begins with the words "Finally, Insurers cite," is deleted in its entirety.

27. On page 49, the first full paragraph, which begins with the words, "Finally, as was made clear," in the last sentence the words "and in this case" are deleted so that the sentence reads:

> Where, as in *Partridge*, the damages are indivisible, the insured is liable for all the damages and hence is covered for the entire amount.

28. On page 57, the first two paragraphs, which begin with the words "Applying that same" and "To borrow *Partridge's*," are rewritten to read:

> Applying that same reasoning to the substantially similar policy language in this case would support the conclusion that the damages from the escape of contamination from the site likewise were covered. There is evidence from which a reasonable trier of fact could conclude the 1969 discharge was "neither expected nor intended . . . ." If it were proven that the 1969 discharge was a concurrent cause of indivisible damages for which the State was held liable, then under tort law principles the State's liability for that discharge would suffice, in itself, to render the State liable for all of the damages . In that event, all of the damages would be "sums which the Insured shall become

> obligated to pay by reason of liability imposed by law" under the insuring clauses of the policies.
>
> To borrow *Partridge*'s joint tortfeasor analogy, suppose that in this case the State's negligence caused the 1969 discharge, but another party's negligence caused the other discharges from the site and that all of the discharges contributed to an indivisible injury. Under *Partridge*, because the State would be jointly and severally liable for all of the resulting damage and not just the amount directly traceable to its own negligence, if the 1969 discharge were covered Insurers would be liable to indemnify the State against all of its joint and several liability. *Partridge* makes clear that the result is no different merely because all of the negligent conduct is committed by one tortfeasor instead of two.

29. On page 57, immediately following the second full paragraph as set forth in modification 28 above and preceding the paragraph beginning with the words "Insurers in the joint tortfeasor situation," the following three paragraphs are inserted:

> Insurers argue that a court should not apply the concurrent cause analysis until the insured satisfies its initial burden to "prove what damages resulted from the particular occurrence for which it seeks coverage, not simply 'all sums.'" Therefore, Insurers assert, the State must establish "how much of the damages it seeks coverage for was caused by the 1969 event."
>
> However, *Partridge* holds that to determine whether an injury was "caused" by a particular event for purposes of deciding whether the injury is covered, a court must ask whether the event was "a" cause of the injury. It is not necessary that the event be the only cause. Therefore, the concurrent cause analysis affects the coverage question, not just the question of what damages the insured has suffered as a proximate result of the breach of the insurance policy.
>
> Moreover, the policies in this case do not say that liability for damages is covered only if the damages *solely* "result from" or are *solely* "caused by" a particular event.

> Instead, they say that liability is covered if it is imposed "because of" property damage that "results in" an Occurrence. That the liability also may have been imposed partially "because of" property damage that does not result in an Occurrence does not preclude coverage. At least, that is one reasonable interpretation of the policy language. If there is a reasonable interpretation of an insurance policy that supports coverage, this court is, of course, required to adopt that interpretation. (*TRB Investments, Inc. v. Fireman's Fund Ins. Co.*, *supra*, 40 Cal.4th at p. 27.)

30. On page 58, in the first full paragraph, which begins with the words "As Insurers point out," the last three sentences, from the words "That was the case here" to the end of the paragraph, are deleted, and the following is inserted:

> There was evidence from which a reasonable trier of fact could conclude the 1969 discharge was a concurrent cause of the damage for which the State was held liable.

31. On page 58, immediately following the new last sentence of the first full paragraph as added in modification 30 above, footnote 16 is added as follows:

> [16] Insurers assert that in the unpublished part of this opinion this court described the 1969 rain event as an "intervening cause," and that an intervening cause cannot be a concurrent cause. What we actually said was that the 1969 discharge could qualify as a sudden and accidental "intervening event" as the term was used in *Travelers Casualty & Surety Co. v. Superior Court*, *supra*, 63 Cal.App.4th at p. 1460, to mean an event after the initial discharge of waste into a site that causes appreciable damage over and above the routine dumping. (*Ibid*.) In contrast, an "intervening *cause*" is "a later cause of independent origin" that relieves the original tortfeasor of liability if the intervening cause and the resulting damage were not foreseeable. (*Ballard v. Uribe* (1986) 41 Cal.3d 564, 587.) The 1969 discharge was not an "intervening cause" with respect to the subsurface discharges around and under the dam, because it was not wholly "later" (the discharges overlapped in time) and was not "of independent origin" (the

State's negligence caused all of the discharges). Therefore, the earlier discharges and the 1969 discharge could be "concurrent causes" with respect to one another even though the 1969 discharge was an "intervening event" with respect to the original dumping.

This change will necessitate renumbering the remaining footnotes.

32. On page 58, the second full paragraph, which begins with the words "Insurers have not disputed," is deleted and replaced with the following seven paragraphs:

> The State's expert report from 2004 concluded that by 1960 contaminants exited the subsurface of the site around the east and west ends of the concrete barrier dam and through the fractured bedrock underneath the dam. The report stated that each of these three "flow pathways" leading to contaminant exit from the site -- east, west, and under the dam -- was separate from the others and resulted from different causes.
>
> However, the report also identified a "fourth path flow" that existed downstream of the site in the alluvium, weathered bedrock, and fractured bedrock. The report stated that once the contaminants exited the site through the three pathways already described, the contamination plume continued to migrate downgradient due to the continuous motion of the groundwater to the southwest. The plume contaminated both soils and groundwater farther downstream and extended several thousand feet downgradient of the site. Through at least the late 1980's, the plume was moving progressively farther from the site, and damage to the soils and groundwater downgradient of the site was still ongoing in 2004.
>
> The report further stated that a program of soil sampling conducted downstream of the site after the 1978 discharges indicated waste contaminated soils downgradient of the site and that "it is reasonable to expect that much of the soil contamination detected was from the 1969 event." The report went on to state: "Because the soils in the canyon

below the Site are permeable, it is probable that the 1969 flood contributed to downstream groundwater contamination in addition to soil contamination."

The author of the report, V. Stephen Reed, testified at a deposition that the soil contamination from the 1969 discharge was "part" of the contamination that was measured in the sampling program after the 1978 discharges, because "some" of the contaminated soil remained in "some places" during the time between the 1969 and 1978 discharges. Similarly, a report of January 1977 prepared by consulting engineers concluded that the abrupt appearance of higher contamination levels at a monitoring well in 1972 was most likely caused by continued leaching of contaminants deposited during the 1969 floods.

A reasonable trier of fact could conclude from the above evidence that contamination from the 1969 discharge entered and remained in the soil and groundwater at the same time that the subsurface leakage around and under the barrier dam and the 1978 discharges were occurring. Reed's conclusions that "some" of the contamination found in the sampling program after the 1978 discharges was caused by the 1969 discharge and that the 1969 discharge "contributed" to the downstream soil and groundwater contamination meant that the remainder of the contamination must have been caused by one of the other sources of contamination. Therefore, the 1969 discharge and the other discharges must have combined to cause the entirety of the contamination, or so, at least, a reasonable trier of fact could infer.

For this reason, Insurers' claim that the injury in this case was not indivisible is unfounded. In fact, Insurers effectively premised their allocation argument on the assumption that the injury was indivisible, because the thrust of the argument is that the State is required to, but cannot, divide the injury among the multiple causes that produced it. Similarly, Insurers supported their argument with *Golden Eagle*, in which the court found no coverage because the insured admitted its damages were "'indivisible.'" (*Golden Eagle, supra*, 85 Cal.App.4th at p. 1315.) If, as Insurers now argue, the injury was *not* indivisible, then their reliance on *Golden Eagle* was incorrect.

> Thus, if the 1969 discharge was covered, the situation in this case would be analogous to that in *Partridge*, with covered and uncovered causes acting concurrently to cause an injury that could not be allocated among them. In that event, a reasonable trier of fact could conclude that the amount for which the State was held liable represented the damage attributable to an indivisible injury resulting from several causes.

33. At the end of the sixth paragraph of inserted material set forth in modification 32 above, which begins with the words "For this reason, Insurers' claim," immediately following the sentence "If, as Insurers now argue, the injury was *not* indivisible, then their reliance on *Golden Eagle* was incorrect," footnote 17 is added as follows:

> **17** At trial, the State would have to prove its damages were indivisible to claim coverage under *Partridge*. Insurers would not be foreclosed from offering proof that in fact the damages were not indivisible. Our point is only that, for purposes of summary judgment, Insurers effectively assumed in their allocation argument that the damages could not be divided.

This change will necessitate renumbering the remaining footnotes.

34. At the end of the seventh paragraph of inserted material set forth in modification 32 above, which begins with the words "Thus, if the 1969 discharge," immediately following the sentence "In that event, a reasonable trier of fact could conclude that the amount for which the State was held liable represented the damage attributable to an indivisible injury resulting from several causes," footnote 18 is added as follows:

> [18] Insurers note that in answers to interrogatories the State said that the subsurface escape of contaminants to the east, west, and under the dam, and the 1969 and 1978 discharges, were five separate "occurrences." However, the State only said that the damage from the five sources of contamination "began" at different times and locations. The State also said that the damage from all five sources continued through the policy periods and that each of the five occurrences had "contributed to the plume of contaminants." Thus, the State did not foreclose the possibility that the five sources combined to produce an indivisible injury. Moreover, the answers were verified on July 15, 2004, two weeks before the date of the expert report, July 30, 2004, and presumably were made without the benefit of the report. At any rate, Insurers have not argued that the answers have preclusive effect here, and the effect, if any, of the answers should be determined on remand, as it depends on factual as well as legal determinations.

This change will necessitate renumbering the remaining footnotes.

35. On page 58, in the last paragraph, which begins with the words "That point," the following sentence is added as the new first sentence of the paragraph:

> The fact that not all of the damage occurred instantaneously as in *Partridge* should not affect the applicability of *Partridge* here.

36. On page 59, the first sentence of the last paragraph, which begins with the words "Insurers contend," is rewritten to read:

> Insurers contend, however, that *Partridge* should not apply because in *Partridge* there was no doubt that the *same* injury and the *totality* of that injury resulted from the concurrent causes, while here, the injury began before and continued after the covered event, and the State only claims the 1969 discharge caused part of the total injury.

37. On page 61, the first paragraph, which begins with the words "The policies in this case," in the second sentence the words "all of the" are replaced with the word "any" so that the sentence reads:

> Accordingly, any covered injury necessarily occurred after the 1969 discharge and therefore could have been contributed to by that discharge.

38. On page 61, the first paragraph, which begins with the words "The policies in this case," in the third sentence, the words "it was reasonable to expect that" are inserted between the words "concluded" and "much" so that the sentence reads:

> The State's expert, in fact, concluded it was reasonable to expect that much of the contamination after the 1978 discharge *was* from the 1969 discharge.

39. On page 61, in the first paragraph, everything from the third sentence, which begins with the words "For the same reason," to the end of the paragraph is deleted.

40. In the last sentence on page 61, continuing on page 62, which begins with the words "Since there is at least," insert the words "a reasonable trier of fact could conclude" between the words "*Partridge*" and "the State's" so that the sentence reads:

> Since there is at least evidence raising a reasonable inference that the 1969 discharge contributed to the damage for which the State was held liable, under *Partridge* a reasonable trier of fact could conclude the State's liability was covered.

41. On page 62, footnote 14 (as originally numbered) immediately preceding heading III, "DISPOSITION," is deleted in its entirety.

Except for this modification, the opinion remains unchanged. This modification does not effect a change in judgment.

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RICHLI
J.

We concur:

RAMIREZ
P.J.

HOLLENHORST
J.