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CASENOTE

DO COMPREHENSIVE GENERAL LIABILITY INSURANCE POLICIES COVER BODILY INJURY AND PROPERTY DAMAGE CAUSED BY HAZARDOUS WASTE DISPOSAL? *Montrose Chemical Corporation of California v. Admiral Insurance Company*, 3 Cal. App. 4th 1511, 5 Cal. Rptr. 2d 358 (Cal. Ct. App., 2d Dist., Feb. 27, 1992)*

Steven L. Richie†

INTRODUCTION

On February 27, 1992, the California Court of Appeal, Second Appellate District, held that all bodily injuries and property damage, which are continuous and progressive throughout successive policy periods,¹ are covered by all comprehensive general liability (CGL) insurance policies in effect during those periods.² The case is the first opinion in California deciding the issue of which trigger of coverage³ should be used in cases involving third party⁴ insur-

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* On May 21, 1992 the California Supreme Court granted *certiorari* for this case by a 4 to 3 vote. Two subsequent California Appellate Court cases are expected to be heard at the same time. These are *Pines of La Jolla Homeowners Assn. v. Industrial Indemnity*, 7 Cal. Rptr. 2d 53 (Cal. Ct. App. 1992), which, unlike *Montrose*, decided in favor of the insurer, and *Stonewall Insurance Co. v. City of Palos Verdes Estates*, 92 C.D.O.S. 4209 (2nd Dist. May 15, 1992), which followed *Montrose* and held for the insured.

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1. Policy periods are generally one year long. Every year the insured must get a new policy and is free to choose a different insurance company.

2. *Montrose Chem. Corp. v. Admiral Ins. Co.*, 5 Cal. Rptr. 2d 358, 360 (Cal. Ct. App. 1992).

3. "Triggers of coverage" are tests that courts apply to determine whether a discharge of pollutants is covered by an insurance policy. A court determines whether a discharge constitutes an "occurrence," as defined in an insurance policy, and then it decides whether that discharge happened at a time covered by the policy, thus "triggering" the liability of the insurance company to the insured.

For instance, under the "manifestation of loss" trigger, coverage is triggered only for the policy in effect at the time when appreciable damage occurs and is or should be known to a reasonable insured.

Under the "continuous injury" trigger, for which *Montrose* argued and which the court adopted, the timing of the cause of the damage (the insured's negligent act) and the date the damage manifested are not relevant. It is only the effects of the discharge that matter. If

ance policies.⁵ In finding that coverage should be provided, the court adopted the "continuous injury" trigger,⁶ rather than the "manifestation of loss" trigger, for determining which CGL policies cover third party claims of property damage and bodily injury.⁷

Additionally, the court decided that an insured's knowledge of environmental contamination problems on a site does not preclude insurance coverage for third party claims arising from those problems.⁸ The court applied a strict application of the "known loss" doctrine.⁹

This case expands the liability of insurance companies under CGL policies for insureds' environmental problems.

BACKGROUND

Insurance company liability for environmental costs began when courts ruled that insureds were entitled to reimbursement of cleanup costs arising under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA).¹⁰ The Supreme Court of California held that cleanup costs constituted damages under the policy, and therefore were recoverable by an insured.¹¹ The Court also considered which policies provided coverage in the first party claim context and adopted the "manifestation

these effects are continuous or progressive over successive policy periods, coverage is triggered under all the policies in effect during those periods.

4. A third party policy provides coverage for liability of the insured to another. A CGL policy is a third party policy. A first party policy provides coverage for loss or damage sustained by the insured. Examples of first party policies would be fire, life, health or disability insurance. 5 Cal. Rptr. 2d at 363-4 n. 9.

5. *Insurance Companies Must Provide Broad Coverage for Damages Resulting From Hazardous Waste*, State Appellate Court Rules, PR Newswire Assn., Inc., Mar. 4, 1992, available in LEXIS, Environmental Library, Publications Directory [hereinafter PR Newswire].

6. The "continuous injury" trigger is sometimes referred to as the "triple trigger." This is because it is a combination of three more restrictive triggers. These are:

(1) The Exposure Trigger — Coverage is triggered at the time of the release of pollutants, regardless of the time of discovery.

(2) The Manifestation of Loss Trigger — Coverage is triggered at the time when appreciable damage occurs and is or should be known to a reasonable insured.

(3) The Discovery Trigger — Coverage is triggered when the injury is discovered.

7. 5 Cal. Rptr. 2d at 369.

8. *Id.* at 370.

9. This doctrine provides that when a loss is known or apparent to the insured before the issuance of an insurance policy, there is no coverage under that policy. *Id.* at 370.

10. Scott D. Patterson & Paul M. Hummer, *An Ounce of Prevention: Comprehensive General Liability Insurance Coverage for 'Preventive' Expenses at Superfund Sites*, Env't Rep. (BNA), Apr. 12, 1991, at 2239.

11. *AIU Ins. Co. v. Superior Court*, 799 P.2d 1253 (Cal. 1990).

of loss" trigger.¹² The court did not rule on coverage in the third party claim context since that issue was not before them.¹³ The *Montrose* court resolves the issue of when liability arises in the context of third party environmental claims. The *Montrose* opinion does not address the applicability of pollution exclusion clauses,¹⁴ but a brief background on the issue is warranted.

Pollution exclusions are not absolute.¹⁵ Some courts have held that coverage is required, regardless of the pollution exclusion, where the bodily injury or property damage results from a discharge of pollutants that is "sudden and accidental."¹⁶ California courts have not directly addressed the applicability of the pollution

12. Prudential-LMI Ins. Co. v. Superior Ct., 798 P.2d 1230, 1247 (Cal. 1990).

13. *Id.* at 1246.

14. The standard CGL policy contains an exclusionary clause, known as the "pollution exclusion," which disclaims coverage "for bodily injury or property damage arising out of the discharge, dispersal, release or escape" of pollutants.

15. Wary of the potential exposure that they had from the classic pollution exclusion, the insurance industry created an "iron clad" pollution exclusion in 1986. Many policies now contain this exclusion, which typically provides:

This insurance does not apply to . . .

- (1) 'Bodily injury' or 'property damage' arising out of the actual, alleged, or threatened discharge, dispersal, release or escape of pollutants:
 - (a) At or from premises you own, rent or occupy;
 - (b) At or from any site or location used by or for you or other for the handling, storage, disposal, processing or treatment of waste;
 - (c) Which are at any time transported, handled, stored, treated, disposed of, or processed as waste by or for you or any person or organization for whom you may be legally responsible; or
 - (d) At or from any site or location on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations:
 - (i) if the pollutants are brought on or to the site or location in connection with such operations;
 - (ii) if the operations are to test for, monitor, clean up, remove, contain, treat, detoxify or neutralize the pollutants.
- (2) Any loss, cost or expense arising out of any governmental direction or request that you test for, monitor, clean up, remove, contain, treat, detoxify or neutralize pollutants. 'Pollutants' means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed. "Subparagraphs (a) and (d)(i) of paragraph (1) of this exclusion do not apply to 'bodily injury' or 'property damage' caused by heat, smoke or fumes from a hostile fire. As used in this exclusion, a hostile fire means one which becomes uncontrollable or breaks out from where it was intended to be.

16. *See, e.g.*, New Castle County v. Hartford Acc. & Indem. Co., 933 F.2d 1162, 1167 (3d Cir. 1991).

exclusion, but many contradictory opinions have been issued in other jurisdictions.¹⁷ For instance, some courts have interpreted "sudden and accidental" to mean "unexpected and unintended,"¹⁸ while others have interpreted the phrase more narrowly by adopting a temporal interpretation that requires the discharge to be abrupt.¹⁹

FACTS

Montrose is a defunct chemical company that manufactured DDT for use in pesticides from 1947 until 1982. Since 1960, seven different insurance companies had issued CGL policies to Montrose. The latest carrier, Admiral Insurance Company, issued four separate CGL policies to Montrose covering the period from October 13, 1982 to March 20, 1986. These policies obligate Admiral to "pay on behalf of [Montrose] all sums which [Montrose] shall become legally obligated to pay as damages because of . . . bodily injury, or . . . property damage to which this insurance applies, caused by an occurrence. . . ."²⁰ This is the language generally used in contemporary liability policies.²¹

There are five separate actions pending against Montrose. All five actions allege property damage, and one alleges bodily injuries, from sites where Montrose manufactured its DDT or disposed of its hazardous waste.²² There are two different sites involved, but all of the claims allege damage occurring from either 1947 or 1956 to the present.²³ Chemical use on the properties stopped in 1964 or 1965 on one site and in 1972 on the other. The damages were allegedly caused by the ongoing actions of chemicals released during periods prior to these dates.

Montrose requested a defense for these actions from its seven CGL carriers, including Admiral, and all but one agreed to defend

17. 11 MARK S. RHODES, *COUCH ON INSURANCE* § 44A:122 (1982 and Supp. 1991).

18. *See* Claussen v. Aetna Casualty & Sur. Co., 380 S.E.2d 686 (Ga. 1989).

19. *See* Lumbermens Mut. Casualty Co. v. Belleville Indus., 55 N.E.2d 568 (Ill. App. Ct. 1990).

20. *Supra* note 2 at 363. "Occurrence" is defined as "an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of Montrose." *Id.*

21. 11 MARK S. RHODES, *COUCH ON INSURANCE* § 44:285 (1982 and Supp. 1991).

22. These actions consist of the following: 1) a cost reimbursement action for cleanup pursuant to CERCLA; 2) a natural resources damage action under CERCLA; 3) a private party toxic tort action for property damage and personal injuries; and 4) private actions for fraud and indemnity for the sale of a contaminated property. *Supra* note 2 at 360-2.

23. The two sites involved are the Stringfellow Acid Pits in Riverside County and the United Heckathorn site in Contra Costa County. *Id.* at 360-1.

subject to a reservations of rights.²⁴ In 1986, Montrose sued the carriers, seeking a declaration that they had a duty to both defend and indemnify in all five actions. In 1989, Admiral filed motions for summary judgment and summary adjudication of issues asking the court to find that it had no duty to defend. Admiral's motion for summary judgment was granted and this appeal followed.

DISCUSSION

Reasonable Expectations

Due to the "bewildering plethora of authority which has developed over the last few years"²⁵ the *Montrose* court could not look to other jurisdictions for help in deciding this issue.²⁶ For its analysis, the *Montrose* court applied the same factors that the California Supreme Court used in the *Prudential-LMI* case on first party policy coverage.

The *Prudential-LMI* court articulated three reasons for supporting application of the manifestation of loss rule in the first party context. First, "the reasonable expectations of the insureds are met because they look to their present carrier for coverage."²⁷ Second, "the underwriting practices of the insurer can be made predictable because the insurer is not liable for a loss once its contract with the insured ends, unless the manifestation of loss occurred during its contract term."²⁸ Third, since the insured is required under a standard first party policy to file suit against the insurer within twelve months after "inception of the loss," and since in that context "inception of the loss" means the date on which appreciable damage occurs and is or should be known to the insured, in effect the definition of "manifestation of loss" must be the same as the definition of "inception of the loss."²⁹ The key to *Montrose* is the distinction between first party and third party claims.³⁰ The court took the same three factors and applied them to the third party claim situation. Unlike the *Prudential LMI* case, the court held that the "continuous injury" trigger, rather than the "manifestation of loss" trigger, should apply.

24. The insurance companies reserved the right to deny their duty to provide a defense or indemnify Montrose in the event of liability at any time.

25. *Gottlieb v. Newark Ins. Co.*, 570 A.2d 443, 445 (N.J. Super. Ct. App. Div. 1990).

26. 5 Cal. Rptr. 2d at 363.

27. 798 P.2d at 1246.

28. *Id.*

29. *Id.* at 1236.

30. For definitions of first and third party policies, see *supra* note 4.

First, the court found in the third party context that it was reasonable for an insured to expect coverage under more than one policy for continuous and progressive bodily injuries and property damage.³¹ In this context, the insured will not receive a windfall, but all carriers will be required to pay their fair share of the liability as determined by policy language or the court applying equitable considerations.³²

Second, the court found that underwriting can never be predictable in third party claims, as opposed to first party claims where there will be a cap, such as the value of a building with fire insurance. The court explained, "Third party coverage differs substantially. At best, the insured makes an educated guess about its potential exposure to third parties. At worst, the insured's best guess falls far short of the mark. It is natural, therefore, for an insured to anticipate coverage under more than one policy."³³

Third, the court noted that the statute of limitations for third party policies is four years from the date of final judgement against the insured and that there is no "inception of loss" language in a standard CGL policy, so there is "no corollary need to apply the definition of 'loss' articulated in *Prudential-LMI*."³⁴

The court in *Montrose* did not end its analysis after applying the factors from *Prudential-LMI*. In its decision to adopt the "continuous injury" trigger in third party claims, the court also considered two additional factors from the insurance industry. First, it considered an alternative type of policy available from insurance companies which is referred to as a "claims made" policy. This type of policy was developed to limit a carrier's risk by restricting coverage to the single policy in effect at the time a claim was asserted against the insured. The court found that to adopt the "manifestation of loss" trigger for coverage would in effect convert the "occurrence" policy that *Montrose* had into a "claims made" policy.³⁵ The only way that a third party claim can manifest itself is when it is asserted against the insured.

The last factor the court considered was the information from the insurance industry related to the change in CGL policies from

31. In the first party context, based on insureds' reasonable expectations, there is no reason for an insured to look to more than one policy since the insured has usually purchased insurance in an amount sufficient to cover his maximum potential loss. *Supra* note 2 at 366.

32. The liability for the insurance companies will be joint and several unless the court, in its discretion, decides that a different apportionment would be more equitable. *Id.*

33. *Id.*

34. *Id.* at 367.

35. *Id.* at 367-8.

the term "accident" to the term "occurrence". Admiral argued to the court that Montrose's interpretation of the policy and application of the "continuous injury" trigger were unreasonable. The court looked at comments made by the Secretary of the National Bureau of Casualty Underwriters regarding the change in language. These comments indicated that coverage could be triggered under multiple policies for continuing injuries. The court thus held that Admiral cannot now deny that Montrose's interpretation is reasonable since it was predicted by the insurance industry.³⁶

Known Loss

Admiral responded that because of Montrose's knowledge of the environmental contamination problems at one of the sites, coverage should be denied.³⁷ The Santa Ana Regional Water Quality Control Board had declared the Stringfellow site to be a public nuisance in 1975³⁸ and the Environmental Protection Agency had notified Montrose that it considered Montrose a potentially responsible party for money expended for response activities at the site.³⁹ The court rejected Admiral's argument and decided that Montrose's knowledge was not sufficient to preclude coverage.⁴⁰ The court held that more specific knowledge would be required to invoke the "known loss" doctrine. Section 250 of the insurance policy provided that "any contingent or unknown event, whether past or future, which may damnify a person having an insurable interest or create a liability against him, may be insured against." The court relied on this language to determine that "all that is required is that there be some contingency and, however inevitable an event might be, an 'inevitable' event is still a contingency or risk within the meaning of" section 250.⁴¹

The court did emphasize that this holding did not mean that parties to a lawsuit could obtain insurance that would cover their present case. First, the court said its holding was "simply that where, as here, the insured is under no legal obligation to pay and

36. *Id.* at 368-9.

37. This argument is based on the "known loss" doctrine and the wording of the policy in question. For an explanation of the "known loss" doctrine, *see supra* note 9. Section 22 of the insurance policy in question defines "insurance" as a "contract whereby one undertakes to indemnify another against loss, damage, or liability arising from a contingent or unknown event."

38. 5 Cal. Rptr. 2d at 361.

39. *Id.* at 362.

40. *Id.* at 370-1.

41. *Id.* at 370.

no lawsuits were filed at the time the policies were purchased, there is an insurable risk."⁴² The court also provided that "[a]n insured must make all required disclosures at the time it applies for coverage and the fact that the 'known loss' rule does not defeat coverage has nothing to do with issues of fraudulent concealment."⁴³

EXPANDING LIABILITY FOR INSURANCE COMPANIES

Since the interpretation of the pollution exclusion that California adopts will possibly be quite narrow, *Montrose* is a great victory for policyholders, as it will greatly increase their chances for the recovery of damages for environmental claims. While the policy in effect at the time a loss manifests may have contained a pollution exclusion, all other policies in effect during the creation of the hazard will also be considered. Some policies will probably not contain the exclusion and will thus have to cover the policyholder's claim.⁴⁴ In fact, this scenario happened in *Montrose* where the court required that all of the CGL policies that Admiral had issued to Montrose were to be considered as potentially providing coverage.⁴⁵ Admiral only asserted the pollution exclusion as a defense for one of those four policies.⁴⁶

This ruling will also make insurance companies take the claims of their insureds more seriously. Insurance companies "had used the lack of a decisive legal ruling to deny coverage to many California companies confronted with lawsuits brought by environmental regulators and others."⁴⁷ Many will now be forced to defend and indemnify an insured that may have been denied coverage prior to this decision.

CONCLUSION

In many environmental contamination cases, the person responsible for the contamination is out of business or bankrupt. David Mulliken, attorney for Montrose, said, "This decision will release literally billions of dollars from insurance carrier coffers and

42. *Id.* at 371.

43. *Id.*

44. The insured will still have to prove that there was an occurrence during a policy period, which could be difficult for old policies. Also, insureds often throw away policies as they expire. If the insured does not have his original paperwork, the insurance company will not provide coverage.

45. 5 Cal. Rptr. 2d at 360.

46. *Id.* at 369.

47. Michael Parrish, *Insurers May Pay for More Toxic Cleanups*, L.A. TIMES, March 5, 1992, at D2.

allow a needed response to environmental claims.”⁴⁸ This is true in more ways than one. There will be more money available to reimburse the government when it performs the clean up and then brings a cost recovery action for its expenses. There will also be more money available for people injured by the contamination, either directly with personal injuries, or indirectly through property damages.

Insurance companies will now have to convert their CGL policies to include the “iron clad” pollution exclusion⁴⁹ to avoid liability for environmental claims. For now, though, many old policies issued by a company will still cover claims under *Montrose* and it will be a long time before they can all be forgotten. The resulting effect will be that insurance companies will raise their premiums and sell other forms of insurance, such as Environmental Impairment Liability or Property Policies, along with standard Comprehensive General Liability policies.

48. PR Newswire, *supra* note 5.

49. *See supra* note 15.

