1-1-1991

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INSURANCE COVERAGE CONCERNS IN CALIFORNIA CONTINUOUS PROPERTY LOSS CASES AFTER PRUDENTIAL-LMI

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I. INTRODUCTION

Presently, one of the more unsettled areas in the law of insurance coverage in California is that of continuous loss. The term "continuous loss" refers to damage which occurs over an extended period of time and, therefore, often during the effective periods of several successive insurance policies. Although this phenomenon typically involves damage caused by a force of nature, such as soil subsidence or dry rot, it can also be man-made; e.g., by industrial pollutants slowly leaching through the insureds' land into adjoining land or the water table.¹

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¹ Some courts and commentators have used the phrase "continuous loss" when dealing with bodily injury claims such as asbestosis or silicosis. Whether or not the phrase is properly applied to bodily injury cases, this article is limited to an examination of those California cases dealing with continuous property losses.
In a typical continuous loss case, discovery reveals that the damage itself\(^2\) "started" many years before it was "discovered" by the insured or the claimant. If the property was covered by several successive insurance policies, the question often arises as to which, if any, of those successive policies is at risk for the claim. If several insurance companies are involved, each carrier will point to the other, claiming that its policy is not liable for the loss, and the insured or the claimant will typically make every effort to keep as many of the insurers in the case as possible in order to promote settlement.

The purpose of this article is to discuss the evolution of California insurance coverage cases involving continuous losses for both first- and third-party property damage claims. In the first-party context, the California Supreme Court's recent *Prudential-LMI Commercial Insurance v. Superior Court*\(^3\) decision settled the majority of the questions which had arisen. Because policy considerations for the first- and third-party claims overlap but are not identical, it is the authors' opinion that the rules of *Prudential-LMI*\(^4\) may not be directly applied to third-party cases.

The evolution of continuing loss theories in California has not followed an orderly progression. Nevertheless, after discussing general policy considerations involved in both first- and third-party cases (e.g., the loss-in-progress rule), this article will discuss the more recent and significant court of appeal decisions in the order in which they were published. The next section of this article provides a detailed discussion of the California Supreme Court's recent *Prudential-LMI Commercial Insurance v. Superior Court*\(^5\) decision and its impact on both first- and third-party coverage cases. Finally, this article will discuss how the court may rule in a continuous loss case arising from a third-party property damage claim.

### II. THE LOSS-IN-PROGRESS RULE

One consideration underlying all of the cases addressing the issue of continuous loss is the impact of the

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2. *E.g.*, foundation damage caused by soil subsidence.
4. *Id.*
5. *Id.*
“loss-in-progress” rule. This rule provides that where a form of damage or loss is already in progress or is “certain,” a carrier insuring the premises thereafter is not liable for the loss. The rule applies even if the loss is caused by an occurrence which would have been covered under the subsequent policy, had it occurred within that policy period.

The rationale for the loss-in-progress rule is that insurance carriers are only expected to provide insurance for contingent or unexpected events. As a matter of public policy, one should not be able to incur a loss and then purchase insurance to cover that loss. Otherwise, one could wait until he or she had an accident before purchasing insurance.

California Insurance Code section 22 provides: “Insurance is a contract whereby one undertakes to indemnify another against loss, damage, or liability arising from a contingent or unknown event.” California Insurance Code section 250 further provides: “Except as provided in this article, 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, subject to the provisions of this code.” Thus, if the loss actually began prior to the specific policy period in question, and if that loss is no longer contingent or unknown, the loss cannot be covered under a policy of insurance which becomes effective at a subsequent date.

III. THE EVOLUTION OF CONTINUOUS LOSS THEORIES: FIRST- AND THIRD-PARTY CASES

A. The Snapp and Sabella Decisions

The first case to discuss continuous property losses in the first-party context was *Snapp v. State Farm Fire & Casualty Co.* Snapp involved coverage for damage to a residence built on a landfill. Because of the instability of the fill, exacerbated by subsequent rains, a landslide occurred damaging the foundation of the house. The loss “materialized” and became “ascer-

tainable" during State Farm's policy period and continued after the policy term had expired.9

State Farm first argued that because the initial instability of the fill made the resulting earth movement "inevitable," the loss was not a "fortuitous event" and, therefore, was not covered pursuant to the loss-in-progress rule.10 The court disagreed, holding that even if the loss was "inevitable," that did not alter the fact that, at the time the insurance contract was entered into, the loss was still a contingency or a risk that might not occur within the effective dates of the policy in question.11

State Farm next asserted that even assuming it was responsible for the loss, its duty became "terminable" on the date its policy expired. The court again disagreed, holding:

Once the contingent event insured against has occurred during the period covered, the liability of the carrier becomes contractual rather than potential only, and the sole issue remaining is the extent of its obligation, and it is immaterial that this may not be fully ascertained at the end of the policy period.12

The court concluded that the date of "materialization" of a loss determines which carrier must provide indemnity for a loss suffered by the insured, and the carrier insuring the risk at the time the damage is first "discovered" is liable for the entire loss.13

In Sabella v. Wisler,14 the California Supreme Court affirmed the Snapp rule in another case involving losses caused by uncompacted fill and defective workmanship in the construction of the insureds' residence. The Sabella court simply held that the loss was covered because it was a contingency at the time the parties entered into the policy.15

In sum, the Sabella and Snapp decisions held that in the first-party context, the insurer on the risk when the damage "materialized" must indemnify the insured for his entire loss,

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9. Id. at 831, 24 Cal. Rptr. at 46.
10. Id. at 830, 24 Cal. Rptr. at 45.
11. Id., 24 Cal. Rptr. at 45-46.
12. Id. at 832, 24 Cal. Rptr. at 46 (citations omitted).
13. Id. at 831-32, 24 Cal. Rptr. at 46.
15. Id. at 34, 377 P.2d at 897, 27 Cal. Rptr. at 697.
even if property damage takes place in prior or subsequent policy periods.

B. California Union

The first California case to discuss coverage for continuous property losses in the third-party context was California Union Insurance Co. v. Landmark Insurance Co. This decision spawned more controversies than it settled.

California Union involved a gradual leak of water from a swimming pool which caused damage to adjoining property. The parties stipulated that the pool began to leak in June of 1979, and that the pool crack was the sole cause of the property damage. Damage to the adjoining property was caused between July 1979 and November 1980. Landmark provided insurance from July 1978 to July 1980. Cal Union provided insurance from July 1980 to July 1981.

The source of the damage was actually discovered following an inspection of the pool in October of 1980 during the Cal Union policy period. At trial, the two insurance companies contested liability for the damage which occurred between October 1980 and November 1980. Landmark had undertaken repairs prior to July of 1980, and apparently repaired the damage to the slopes of the adjoining property, but did not repair the source of the damage, the pool. Landmark contended that this damage constituted a separate "occurrence" within the terms of the Cal Union policy and, thus, was Cal Union's responsibility. Cal Union argued that the damage was a continuation of the "occurrence" which began during the period of coverage provided by the Landmark policies and, thus, was the responsibility of Landmark.

The trial court held that each manifestation of damage should be treated as a separate "occurrence" under the policies, thereby rejecting Cal Union's argument that incidents of manifestation which are attributable to the same underlying cause are merely manifestations of the same continuous occur-

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17. Id. at 468, 193 Cal. Rptr. at 464.
18. Id. at 467, 193 Cal. Rptr. at 463.
19. Id. at 467-69, 193 Cal. Rptr. at 463-64.
20. Id. at 468, 193 Cal. Rptr. at 464.
21. Id.
rence. 22 The Court of Appeal, however, pointed out that this ruling "seems to fly in the face of . . . language in both policies." 23

On appeal, both parties relied on Remmer v. Glens Falls Indemnity Co. 24 for the proposition that the occurrence of an accident is the time when the complaining party is actually damaged, rather than the time when the wrongful act was committed. 25 A distinction is that a claimant is not deemed to be "damaged," for purposes of first-party coverage until the loss is discovered. Thus, while the damaging event may have occurred and the damage may be manifest, the Remmer court held that until the insured discovers the loss, the insured is not deemed to be damaged under the policy. 26

The California Union court found Remmer v. Glens Falls inapposite. The court stated that the case involved a "continuous active force at work between the parameters of those [policies’ effective] dates." 27 Therefore, the court held, the damage fell within the coverage provisions of both policies—the policy on the risk when the damage was first discovered and the policy in effect when further damage was sustained and its cause was discovered.

The California Union court stated that there was ample authority for the proposition that the first carrier’s responsibility may continue even after the term of the policy has expired. 28 For example, Snapp involved a standard-form fire insurance policy, which included coverage for earth movement. 29 The earth movement began during the policy period and continued after expiration of the policy period. The Cali-

22. Id. at 469, 193 Cal. Rptr. at 465.
23. Id.
26. Remmer v. Glens Falls Indemnity Co., 140 Cal. App. 2d at 88, 295 P.2d at 22. This analysis may not necessarily be applied in the third-party context. In a third-party case, the insured (for example, a contractor) does not suffer an actual loss, or receive notice of the defect, until a claim is filed against the insured. This policy consideration is discussed in greater detail in the penultimate section of this article. See infra notes 100-22 and accompanying text.
28. Id. at 474, 193 Cal. Rptr. at 468.
29. Id. at 475, 193 Cal. Rptr. at 468.
California Union court allowed coverage to continue after the policy had expired stating that:

[I]n a one occurrence case involving continuous, progressive and deteriorating damage, the carrier in whose policy period the damage first becomes apparent remains on the risk until the damage is finally and totally complete, notwithstanding a policy provision which purports to limit the coverage solely to those accidents/occurrences within the time parameters of the stated policy term.\(^{30}\)

Having reached the conclusion that Landmark could not escape responsibility for the pool leakage, the court felt it would be “unjust” to allow Cal Union to escape liability. The court pointed out that “[w]hile it is true that the force producing the damage was already in motion when Cal Union came on the risk, that damage-causing force continued and further substantial corrective procedures were necessary.”\(^{31}\)

The court cited the Gruol Construction Co. v. Insurance Co. of North America\(^{32}\) decision with approval. Gruol involved a claim for continuous loss due to dry rot which occurred over several successive policy periods. The court held that the damage, while continuing for several years, constituted but a single injury. Nevertheless, the court also held all of the carriers on the risk and that the burden of apportionment of the damage was on the carriers.\(^{33}\)

The California Union court also discussed two products liability cases, Insurance Co. of North America v. Forty-Eight Insulations\(^{34}\) and Keene Corp. v. Insurance Co. of North America.\(^{35}\) These cases held that an insurer, once liable for a continuous loss under a policy, will not be able to escape liability for future losses from the same occurrence by a mere refusal to renew the policy.\(^{36}\) The insurer is responsible for all damage to the insured property caused by a covered peril which occurs within the policy period.

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30. Id. at 476, 193 Cal. Rptr. at 469.
34. 633 F.2d 1212 (6th Cir. 1980).
The California Union court may have failed to recognize the importance of the precedent it was setting. No prior continuous property loss case in California had held that damage caused by the insured could be manifest, yet the insured could, thereafter, obtain a second insurance policy which would also provide coverage for the same damage. The ruling became troublesome for both the judiciary and practitioners from its inception.

C. Home v. Landmark (I and II)

The next major first-party case to discuss continuous loss issues was Home Insurance Co. v. Landmark Insurance Co. 37 Home and Landmark were successive insurers of the Hotel Del Coronado. Home was on the risk from September 1, 1980 to October 1, 1981. Landmark insured the hotel for all relevant periods following October 1, 1981.

Construction of the hotel was completed in February of 1973. In December of 1980, concrete on the exterior of the building along with certain of the room balconies began to manifest deterioration in the form of concrete chipping, cracking or "spalling." After October 1, 1981, other room balconies began to visibly manifest deterioration in the same manner. The deterioration continued until December of 1983. 38

The parties agreed the loss was caused by defects in the design and construction of the concrete exterior of the building and concrete room balconies. Improper reinforcement with steel, coupled with other chemical components of the balconies, reacted with sea air and spray to cause damage. The balconies continuously and progressively deteriorated from the date of installation, sometime before 1973. 39

The hotel filed first-party claims against both insurers. The insurers settled in November of 1984 for $385,000. Home contributed $285,000 and Landmark contributed $100,000. Home then filed an action for declaratory relief, and Landmark cross-complained. The trial court awarded Landmark

39. Id.
$100,000, holding Home liable for all of the damages.\footnote{40} Home appealed.

The court of appeal began its discussion by reviewing \textit{Snapp}.\footnote{41} The \textit{Home} court cited the following language with approval:

Once the contingent event insured against has occurred during the period covered, the liability of the carrier becomes \textit{contractual} rather than \textit{potential} only, and the sole issue remaining is the extent of its obligation, and it is immaterial that this may not be fully ascertained at the end of the policy period.\footnote{42}

The \textit{Home} court also cited \textit{Remmer}\footnote{43} for the proposition that the time of the occurrence of an accident within an \textit{indemnity} policy is not the time the wrongful act was committed, but the time when the complaining party was damaged. The question in \textit{Remmer} then became whether a "manifestation" or "exposure" rule was to be used to determine which policies were at risk for the loss.\footnote{44}

Home argued the responsibility should be \textit{apportioned} between Home and Landmark based on an exposure theory such as the one used in asbestos cases and relied on by the \textit{California Union} court. In essence, Home argued that indemnity must be apportioned between both carriers based on the amount of time each insurer was on the risk; i.e., based on each insurer's "exposure." The \textit{Home} court found the exposure theory unpersuasive for two reasons.

First, the court pointed out that the asbestos cases such as \textit{Insurance Co. of North America v. Forty-Eight Insulations}\footnote{45} were distinguishable in that the judiciary viewed each deposit of scar tissue as a separate occurrence of bodily injury in a continuing tort.\footnote{46} The court noted that "[c]ommon sense tells us that

\begin{itemize}
\item \textit{Id.} at 1392, 253 Cal. Rptr. at 279.
\item \textit{Id.} at 1392-93, 253 Cal. Rptr. at 280.
\item \textit{Id.} at 1392-93, 253 Cal. Rptr. at 280 (quoting \textit{Snapp} v. State Farm Fire & Casualty Co., 206 Cal. App. 2d 827, 832, 24 Cal. Rptr. 44, 46 (1962)) (emphasis added).
\item \textit{See id.} at 89, 295 P.2d at 22.
\item 635 F.2d 1212 (6th Cir. 1980).
\end{itemize}
property damage cases, even those involving continuous damage such as the one before us, differ from asbestos cases where injury is immediate, cumulative and exacerbated by repeated exposure.\textsuperscript{47}

The court also pointed out that Home’s arguments would violate the loss-in-progress rule. Holding an insurer liable for damage manifested in another insurer’s policy period would be contrary to the requirement that an insurance company insure only against contingent and unknown risks. If the damage manifested before the Landmark policy came on the risk, as a matter of public policy, ensuing damages would be uninsurable. The \textit{Home} court ruled that the cracking represented a mere manifestation of the same, single occurrence and that the cracking occurred during the earlier policy period. Therefore, the later manifestations were not “contingent” or “unknown,” but were to have been expected.

An issue alluded to, but not fully discussed by the court, was whether the trial court had erred in inferring that the spalling in 1980 was sufficient “to put a reasonable person on notice of a possible defect in the structure.”\textsuperscript{48} Home cited \textit{United States Fidelity & Guar. Co. v. American Ins. Co.},\textsuperscript{49} for the “reasonable person” test\textsuperscript{50} but refused to adopt this standard.\textsuperscript{51}

The court granted rehearing to the \textit{Landmark} litigants ten months later in order to discuss the continuous loss issues further.\textsuperscript{52} The court began this second discussion by noting that “[t]hese facts do not allow us to consider the interesting question whether it is possible for the insured to have a covered loss \textit{when the loss is not reasonably observable} by the insured during the period of the policy under which the insured seeks payment.”\textsuperscript{53}

\begin{itemize}
\item \textsuperscript{47} Id. at 1395, 253 Cal. Rptr. at 281.
\item \textsuperscript{48} Id. at 1396, 253 Cal. Rptr. at 282.
\item \textsuperscript{49} 169 Ind. App. 1, 345 N.E.2d 267 (1976).
\item \textsuperscript{50} Id. at 8, 345 N.E.2d at 272.
\item \textsuperscript{53} Id. at 1992, 253 Cal. Rptr. at 279-80 (emphasis added).
\end{itemize}
The Home II court continued its discussion by citing numerous cases (including California Union, Snapp, and Harman) for the proposition that, in property damage cases, "manifestation" routinely refers to the period of time when the damage first "becomes apparent." This point was not mentioned in the earlier decision. Because of the facts of the case, the court would not consider whether the date of manifestation might differ from the date of discovery. In this case, the date of manifestation and discovery was the same.

Relying on Snapp and Remmer, the Home II court held that the date of manifestation determined which carrier must provide indemnity for a loss. Since the time of the occurrence of an accident, within the meaning of an indemnity policy, is not the time the wrongful act was committed, but rather the time when the complaining party was actually damaged, the carrier on the risk at the time the damage occurred is responsible for the entire loss.

The court noted that one of the reasons for granting rehearing was to resolve the question of whether the rules applicable to third-party cases are equally applicable to first-party claims. The court held that there was "no meaningful difference," as the parties themselves had agreed. The Home II court then went on to again hold: "[A]s between two first-party insurers, one of which is on the risk on the date of the first manifestation of property damage, and the other on the risk after the date of the first manifestation of damage, the first insurer must pay the entire claim."

The Home II court again attacked the rationale relied on in California Union and added a new point. The court expressed concern that the California Union court had "misapplied three pre-manifestation cases to hold a post-manifestation carrier jointly and severally liable," referring to Keene.
Forty-Eight Insulations, and Gruol. The Home II court reaffirmed their earlier decision by ruling that California Union was not controlling.

The court next discussed the policy considerations behind its decision. The court stated that its new holding would promote certainty in the insurance industry and would allow insurers to gauge premiums with greater accuracy. This would, in turn, reduce costs for consumers. This language later was quoted with approval by the supreme court in Prudential-LMI.

The court again refused to discuss in detail Home's argument that the trial court erred in inferring that spalling sufficient to put a reasonable person on notice of a possible defective structure, had occurred in December 1980. The Home II court concluded, as it had in its earlier decision, that the stipulated statement of facts was intended by Home to include the inference that the December 1980 deterioration was severe enough to alert a reasonable person.

D. The Appellate Court's Prudential-LMI And Fire Insurance Exchange Decisions

The same appellate court that handed down the Home II decision again addressed the issue of continuing loss less than one year later in Prudential-LMI Commercial Insurance v. Superior Court. Prudential was one of three insurers on the risk for the insureds' property. The insured residence had been built in the early 1970's. In November of 1985, the insureds discovered a crack in the foundation and slab floor. They filed a claim with Prudential in December of 1985. The claim was denied. More than a year and a half later, the

67. Id.
69. Id. at 394, 260 Cal. Rptr. at 86.
insureds filed suit against Prudential and other insurers of the residence.\textsuperscript{70}

Prudential's motion for summary judgment argued the action was barred by the standard "one-year suit provision"\textsuperscript{71} in the policy. That provision provided that: "No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity unless all the requirements of this policy shall have been complied with, and unless commenced within 12 months next after inception of the loss."\textsuperscript{72}

The insureds claimed they should not be required to comply with the aforementioned provision because the claimed loss could not have been reasonably discovered within the policy period. In other words, the inception of the loss had not yet taken place. After the trial court denied summary judgment, the court of appeal granted Prudential's petition for alternative writ.\textsuperscript{73}

The Prudential-LMI court stated it would limit its discussion to the question of timeliness of the claim and suit, and would not discuss whether or not the claim was covered under the Prudential policy.\textsuperscript{74} The court quickly concluded that, although the claim was made without "unnecessary delay" as required by the policy, the lawsuit was not timely in that it was not filed within one year of the inception of the loss.\textsuperscript{75} However, the court held that such a determination did not render the petition moot because the issues presented were of statewide importance and there was little consistency in the trial courts in their rulings on these issues.\textsuperscript{76}

The court expressed concern over a literal interpretation of the policy which required the insureds to make their claim "without unnecessary delay," and any action to be filed within one year "after inception of the loss."\textsuperscript{77} The court determined that a literal reading of such a clause would require insureds to file a claim even in instances where they were ignorant of the damage. The court held that on these facts, a "delayed discov-

\textsuperscript{70} Id. at 395, 260 Cal. Rptr. at 87.
\textsuperscript{71} Id.
\textsuperscript{72} Id.; see also Cal. Ins. Code § 2071 (West 1972).
\textsuperscript{73} Prudential-LMI, 224 Cal. App. 3d at 396, 260 Cal. Rptr. at 88.
\textsuperscript{74} Id. at 397, 260 Cal. Rptr. at 88.
\textsuperscript{75} Id.
\textsuperscript{76} Id.
\textsuperscript{77} Id.
A rule must be applied to the policy clause. This standard would be discussed in depth later by the California Supreme Court.

The Prudential-LMI court then addressed the issue of the timeliness of the insured's claims, discussing the point at which the limitations period began to run. In support of its ruling, the court cited Zurn Engineers v. Eagle Star Insurance Co. The Zurn court held that if "the right to sue upon an insurance policy is postponed by action that must be taken by the insured as a prerequisite to suit, the limitation period does not commence to run until the insured has an opportunity to comply with the conditions precedent to litigation." The Prudential-LMI court also noted that, although the language in Zurn was very broad, the court in that case limited its ruling to the facts in the case.

The Prudential-LMI court concluded that the type of progressive property loss alleged in the instant case was different from the usual type of damage for which a first-party policy was designed. Accordingly, the reasons for strictly enforcing notice of loss and one-year suit provisions were not "squarely" applicable. Thus, the date at which "appreciable" damage is detected initiates the running of the contractual limitations period. Otherwise, the merits of such coverage disputes could never be litigated.

This certainly makes sense in the ordinary situation where a distinct and specific injury has occurred, but has lain dormant. However, such a rule may be questioned in cases such as Prudential-LMI, where there is a continuing and steady deterioration of the property. Equating the time the injury is suffered with the time the injury is discovered enables courts to readily assign liability under the policies, but such assignments may not necessarily be equitable. An example of this inequity would be where carrier A is on risk for the first ten years of a structure's existence, at which time carrier B commences cov-

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78. Id., 260 Cal. Rptr. at 99.
82. Id.
verage. If subsidence begins in year five, but discovery occurs in year eleven, under the above rule carrier B would be liable for all six years of damage, despite only being on the risk for one year. The California Supreme Court later approved this inequity when it considered Prudential-LMI.83

On the day the appellate court decided Prudential-LMI, it also filed Fire Insurance Exchange v. Superior Court.84 In the Fire Insurance Exchange case (later depublished by the California Supreme Court), the insured discovered her home had been damaged in December of 1984, when she noticed the rafters in her attic had become separated from the bridgeboard. In February and May of 1985, she discovered cracks in the slab, floor, wall, and ceiling of the house. Nevertheless, the insured failed to file a claim until January of 1986. After Fire Insurance Exchange (FIE) denied the claim, the insured filed a bad faith action. As in Prudential-LMI, the insurer sought summary judgment.85

Relying on its holding in Prudential-LMI, the court stated that the issue at bar was when, under a reasonable person standard, the “inception of the loss” took place.86 The court stated that:

Applying a reasonableness standard to these facts, we conclude the December 1984 damage was unusual and severe enough to start a contractual limitations period running. [The insured’s] observation of this language gave her the specialized knowledge she needed to place her under a duty to investigate her rights under the policy. These objective facts, not her receipt . . . of the Fireman’s Fund rejection . . . control the application of the limitations period.87

E. Recent One-Year Suit Provision Cases

Several recent court of appeal opinions have discussed the distinct, yet related issues surrounding the so called one-year suit provision. In order to provide a complete understanding

85. Id., 260 Cal. Rptr. at 300.
86. Id. at 43, 260 Cal. Rptr. at 304.
87. Id.
of the policies behind the supreme court's Prudential-LMI, the following analysis is provided.

In Magnolia Square Homeowners Association v. Safeco Insurance Co. of America,88 Safeco brought a declaratory relief action against the Magnolia Square Homeowners Association (the HOA) seeking a judicial declaration that it had no duty to indemnify the HOA for first-party losses in its condominium complex. The court of appeal held that the trial court properly granted summary judgment for the insurer on the basis of the one-year limitations provision. Taking judicial notice of a complaint filed in a separate action by the HOA against the developer, the court found that the HOA had notice of the claimed defects at the time of filing that complaint and, thus, affirmed summary judgment. Even under an application of the rule that a cause of action accrues when the plaintiff discovers, or should have discovered, all facts essential to the cause of action, the court held the action was barred because the HOA could have discovered both the damage and its cause through the exercise of reasonable diligence by the time the complaint in the other action was filed.89

In Love v. Fire Insurance Exchange,90 the insureds noticed cracks in the foundation of their building and other related settlement problems. They then hired a geotechnical engineering firm to inspect their home. The firm advised them that the damage was related to earth movement and the negligence of the home's builders.91

The insureds filed a claim for these damages which was rejected by Fire Insurance Exchange. Almost five years later, the insureds resubmitted their claim. Fire Insurance Exchange again denied coverage. The insureds filed suit for breach of contract and the trial court granted Fire Insurance Exchange's motion for summary judgment.92

The Love court held the insureds' suit on the policy was time barred due to the fact that the geotechnical firm had notified them that their home was suffering from subsidence problems, caused by third-party negligence, almost seven years be-

89. Id. at 1059-60, 271 Cal. Rptr. at 7.
91. Id. at 1141, 271 Cal. Rptr. at 248.
92. Id. at 1142, 271 Cal. Rptr. at 248.
before the suit was initiated. Citing Lawrence v. Western Mutual Insurance Co., the court held that the one-year statute of limitations began running when the insureds knew, or should have known, the facts essential to their claim, not the legal basis therefore.

In Stanley v. Fire Insurance Exchange the court ruled that the one-year "suit on the policy" provision would be equitably tolled from the time the insured gave notice of the loss until the insurer formally acted upon that notice. Aside from discussing the one-year provision, the Stanley court also ruled that, in a first-party case, a policy which provides coverage for damages "which happen during the policy term" provides coverage for losses which in fact take place during the policy period, but which do not manifest themselves until some time after the policy is cancelled. Based on a strict construction of the insurance policy, the Stanley court held that even though the damages to the insured’s residence did not become apparent until 1985, the Fire Insurance Exchange policies in force between 1977 and 1982 provided coverage for the loss since the damages did, in fact, "happen" during that period of time.

The aforementioned decisions demonstrate that at least two distinct factors arise when analyzing a first-party continuous loss claim. Because of the loss-in-progress rule, the court must fix a date when the loss is no longer "contingent" and thereby determine which in a series of successive policies is the "last" policy on the risk. Second, because of the one-year suit on the policy provision, the court is required to determine "the inception of the loss" so as to establish when the one-year limitation period begins to run. These two factors inherently affect one another.

93. Id. at 1143-44, 271 Cal. Rptr. at 249-50.
95. Love, 221 Cal. App. 3d at 1143, 271 Cal. Rptr. at 249.
97. Id. at 841, 274 Cal. Rptr. at 167.
98. Id. at 840, 274 Cal. Rptr. at 167.
99. This relationship will be considered following discussion of the California Supreme Court's Prudential-LMI decision, infra notes 149-54 and accompanying text.
F. Recent Third-Party Continuous Loss Decisions

Three recent court of appeal decisions impact continuous property loss theories in the third-party context. In *Fireman's Fund Insurance Co. v. Aetna Casualty & Surety Co.*, the Fourth District again considered the issue of continuing loss, this time in the third-party context. Fireman's Fund insured a contractor, Nielsen, until October 1, 1985, after which Aetna was on the risk. Nielsen was hired by the U.S. Grant Hotel to perform structural repairs to the hotel in January 1984. Nielsen subcontracted with J.L. Studios to restore the exterior facade. J.L. applied a patching compound to the exterior surface, finishing its work in October 1984.

In June 1985, the hotel notified Nielsen that the facade was cracking and spalling. In August 1985, Nielsen was notified of deteriorating plaster. In April 1986, Nielsen learned that the patching compound used was suitable only for horizontal, not vertical, surfaces. Because J.L. had applied the compound to the vertical surface, it was likely that material would continue to deteriorate.

In August 1987, the hotel recovered a $354,192.91 arbitration award against Nielsen, which Fireman's Fund satisfied. In February 1988, Fireman's Fund brought suit against Aetna for equitable subrogation, contribution, and declaratory relief. The parties filed cross-motions for summary judgment based upon stipulated facts. The trial court entered judgment in favor of Aetna and the court of appeal affirmed.

On appeal, Fireman's Fund argued that *California Union v. Landmark Insurance* was controlling. In addition, Fireman's Fund argued that *Home Insurance* was inapplicable, because that case involved a first-party claim. The Aetna court held *California Union* inapplicable, noting:

The short answer to Fireman's Fund first contention is in *Home* this court considered and rejected *California Union Insurance Co. v. Landmark Insurance Co.* . . . Fireman's Fund offers no compelling reason why we should reexam-

101. Id. at 1624, 273 Cal. Rptr. 432.
102. Id. at 1625, 273 Cal. Rptr. 432.
ine our previous refusal to follow California Union and the asbestos cases it relies upon in this property damage case.104

The Aetna court then held that Home Insurance was applicable, despite the express limitations in its holding. The court noted "distinguishing facts should not lead to a different result unless such facts have legal significance."105

The Home II decision relied on the "loss-in-progress rule."106 The Fireman's Fund court noted: "Thus, to the extent Home’s rationale rests on the loss-in-progress rule, it, too, is fully applicable to a third-party claim."107 The court then discussed what limitations did exist with respect to the Home II holding:

[T]he critical limiting fact in Home is it is a case where the claimant has apparently been fully satisfied by insurance proceeds and the case involves allocating the loss between insurers. That fact is the critical one because it permitted the court to adopt a rule based more upon public policy considerations; there was no need to focus on the insurance policy language interpreted in light of the insured’s reasonable expectation of coverage.108

The court pointed out that the facts at bar were similar in that the insured's loss had been fully satisfied, and the instant action was solely between insurers seeking to allocate the loss. Thus, the court turned to the language of the policies, viewed through the eyes of the insurance industry.109

The court quoted from an "insurance industry commentator":

[I]t is intended that only one policy should apply to the physical injury to tangible property... and that is the policy in effect at the time the physical injury occurs. No matter how long thereafter the loss of use may extend,

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105. Id.
108. Id. at 1627-28, 273 Cal. Rptr. at 434.
109. "[W]here two insurers dispute the meaning of identical standard form policy language—the meaning attached to the provisions by the insurance industry is, at minimum, relevant." Id. at 1629, 273 Cal. Rptr. at 435.
only that one policy is meant to apply, and then only to
the extent of the 'each occurrence' limit . . . . The intent is
to relate coverage to only the one policy period in which
the onset of the condition happened.\textsuperscript{110}

Based on such considerations, the court rejected
Fireman’s assertion that the Aetna policy provided coverage
and also rejected Fireman’s contention that a “delayed discov-
ery” rule should be applied, which would have established
manifestation as occurring within the Aetna policy coverage
period. The court briefly discussed the policy reasons behind
the rule, and noted that “[t]hese policies . . . are not effectuat-
ed by applying the delayed discovery rule in this context.”\textsuperscript{111}
Accordingly, the judgment was affirmed for Aetna.

The Fireman’s Fund decision finally raised a split of author-
ity as to whether a liability carrier coming on the risk after the
damage is manifest can be liable for the continuing losses
thereof. In direct opposition to the holding in California Un-
ion,\textsuperscript{112} the Fireman’s Fund decision applied the
“loss-in-progress” rule to third-party cases and held that an in-
surer whose policy is in effect when the damage is first discov-
ered, or becomes manifest, is liable for that loss and that subse-
quently insurers are not.\textsuperscript{113} This ruling is consistent with the
plain language of Insurance Code sections 22 and 250, which
specifically state that they apply to insurance coverage for “li-
ability” as well as “losses.”

The second recent decision dealing with third-party con-
tinuous loss issues is Chu v. Canadian Indemnity Co.\textsuperscript{114} In
conjunction with the third recent third-party decision, Garrriott
Crop Dusting Co. v. Superior Court,\textsuperscript{115} the scope of liability in-
surance coverage has been dramatically expanded.

In Chu, the insured developer sought insurance coverage
for liability arising out of the sale of defectively constructed
condominiums.\textsuperscript{116} The developer stipulated that he knew of

\begin{footnotes}
\textsuperscript{110.} Id. (quoting Tinker, Comprehensive General Liability Insurance Perspective and Overview, 25 \textsc{Fed’N of Ins. Couns. Q.} 217, 241-42 (1975)).
\textsuperscript{111.} Id. at 1629, 273 Cal. Rptr. at 435.
\textsuperscript{115.} 221 Cal. App. 3d 783, 270 Cal. Rptr. 678 (1990).
\end{footnotes}
certain construction defects prior to the issuance of the policy, and conceded that the insurer was not responsible for those problems. Nevertheless, the developer sought coverage for defects that first manifested themselves after the policy was issued. The trial court granted summary judgment for the insurer, reasoning that the second type of specified damages was merely a continuation of the damage which had manifested before the policy was issued. The court of appeal disagreed and reversed.

The court of appeal ruled that the developer would be entitled to coverage for any construction defects he negligently failed to discover before the policy was issued. The court ruled that knowledge of one defect is not the equivalent of a knowledge of another and, therefore, held that the finder of fact must analyze each defect separately to determine the developer's knowledge of that defect when he sold the condominiums. If the defect did not manifest itself before the policy was issued, the insurer must provide coverage. The court also ruled that the developer was entitled to coverage unless he "actually knew of the defect," and that even if the developer should have discovered the defect the loss-in-progress rule would not bar coverage.

In Garriott, the insured was sued for toxic contamination of adjacent property caused by the dumping of crop dusting chemicals over an extended period of time. During the time the contamination was taking place, the insured was covered under several successive liability insurance policies.

The insurer on the risk at the time the underlying third-party action was filed brought a separate action for declaratory relief. The insurer, whose policy covered the insured's property during the time the contamination was alleged to have first begun, moved for summary judgment. This motion was based upon the grounds that the owner of the adjacent property had suffered no damage during the first insurer's policy period since it did not purchase the adjacent land until several years after that policy expired. The trial court granted the motion but the court of appeal reversed.

117. Id. at 99, 274 Cal. Rptr. at 28.
118. Id.
The court began its analysis by recognizing that "[t]he proper initial focus for a court in resolving a question of insurance coverage is on the language of the insurance policy itself, rather than on judicially created 'general' rules that are not necessarily responsive to the policy language or facts of the dispute." The policies promised to provide third-party coverage for property damage caused by an "occurrence." The word "occurrence" was defined as "physical injury to or destruction of tangible property ... during the policy period." The court concluded:

[U]nder the terms of the insurance policies ... the event triggering coverage is one that causes "physical injury to or destruction of tangible property" during the policy period. Nowhere do the policies say to whom that property must belong, save that it must not belong to the insured. In other words, the policies themselves do not expressly require that the eventual claimant own the property at the time the property is damaged for coverage to ensue; they merely require that the damage, the "physical injury to ... tangible property," take place during the policy period. The question raised by the policy language is not when the [claimant] was damaged; it is, instead, when the property now owned by the [claimant] was damaged.

Focusing on the language of the policies themselves, the Garriott court filled the one remaining "gap" in the analysis of third-party continuous property loss cases. If viewed on a timeline, there are three "types" of insurers in third-party continuous loss cases: insurers on the risk while the damage is in fact taking place but which has not yet become manifest; insurers on the risk when the damage manifests itself; and insurers on the risk after the damage is manifest. Issues involving the second and third types of third-party insurers were discussed in the California Union and Fireman’s Fund v. Aetna decisions (ending in a split of authority). While the Garriott

120. Id. at 790, 270 Cal. Rptr. at 682 (citing Harbor Ins. Co. v. Central Nat’l Ins. Co., 165 Cal. App. 3d 1029, 1034-35, 211 Cal. Rptr. 902, 906 (1985)).
121. Id. at 783, 791, 270 Cal. Rptr. at 682 (1990) (emphasis added).
122. Id.
125. Garriott Crop Dusting Co. v. Superior Court, 221 Cal. App. 3d 86, 274
cision is unique in that the claimant did not own the property when the damage took place, the decision can be relied upon for the proposition that pre-manifestation insurers are liable for damage which occurs during their policy period.

IV. THE CALIFORNIA SUPREME COURT'S PRUDENTIAL-LMI DECISION

On November 1, 1990, the California Supreme Court settled most of the uncertainties in the first-party continuous loss arena when it rendered its decision in Prudential-LMI Commercial Insurance v. Superior Court.\(^{126}\) As previously discussed, the Prudential-LMI decision involved a first-party claim filed by homeowners against their insurer, Prudential, following the discovery of a crack in their foundation underneath a floor covering. The claim was filed in December 1985 and was denied by Prudential following an investigation which revealed that the cause of the damage was expansive soil. The homeowners filed suit in August 1987, prior to receiving notice of the denial of coverage.

Prudential moved for summary judgment, arguing there was no damage or evidence of cracking during its policy coverage period and that the suit was time barred since it was filed twenty months after the insureds filed their claim. Prudential's motion was denied and the company appealed.

The court of appeal directed the trial court to vacate its order denying the insurer's summary judgement motion and to enter another order granting the relief requested.\(^{127}\) Both parties petitioned the California Supreme Court for review, both petitions were granted.

The supreme court decision\(^{128}\) consisted of three basic holdings. First, the one-year suit provision begins to run on the date of inception of the loss, defined as that point in time when appreciable damage occurs and is, or should be, known to the insured, such that a reasonable insured would be aware that his notification duty under the policy has been trig-
Second, the limitation period is equitably tolled from the time the insured files a timely notice, pursuant to policy notice provisions, to the time the insurer formally denies the claim. Third, in a first-party property damage case, the carrier insuring the property at the time of manifestation of property damage is solely responsible for indemnification once coverage is found to exist. Of these three holdings, the third, and to a limited extent the first, are vitally important to the continuous loss issue.

The supreme court discussed the historical development of the one-year suit provision as set forth in Insurance Code section 2071, and again concluded that the statutory limitation was permissible. However, the court also held that the "inception of the loss" should not be equated with the occurrence of the physical event causing the loss, as this would put an undue burden upon the insured. If the one-year period began to run at the occurrence of the physical event of the damage, in order to avoid the one-year provision the insured would be required, in essence, to file suit on a yearly basis.

Additionally, the court cited Zurn Engineers v. Eagle Star Insurance Co. for the proposition that "if the right to sue upon an insurance policy is postponed by action that must be taken by the insured as a prerequisite to the suit, the limitation period does not commence to run until the insured has an opportunity to comply with the conditions precedent to litigation."

The court also commented on two first-party cases which held that a delayed discovery rule was appropriate to require an insured responsible for initiating a claim based on the date on which the insured could reasonably have concluded his property suffered a loss. Finally, the court held that incep-

129. Id. at 687, 798 P.2d at 1298, 274 Cal. Rptr. at 395.
130. Id. at 693, 798 P.2d at 1242, 274 Cal. Rptr. at 399.
131. Id. at 699, 798 P.2d at 1246-47, 274 Cal. Rptr. at 403-04.
132. Id.
134. Prudential-LMI Commercial Ins. v. Superior Court, 51 Cal. 3d at 685, 798 P.2d at 1237, 274 Cal. Rptr. at 394.
tion of the loss would be determined by reference to reasonable discovery of the loss and would not necessarily turn on the occurrence of the physical event causing the loss.\textsuperscript{136} The court limited this by holding that the insured is required to be diligent in the face of discovered facts in order to take advantage of the delayed discovery rule.\textsuperscript{137} Determining when appreciable damage has occurred, such that a reasonable insured would be on notice of a potentially insured loss, is a question for the trier of fact.

The court phrased the third issue very carefully: "We next examine allocation of indemnity between successive first-party property insurers when the loss is continuous and progressive throughout successive policy periods, but is not discovered until it becomes appreciable, for a reasonable insured to be aware that his notification duty under the policy has been triggered."\textsuperscript{138}

The court of appeal had observed, in dictum, that apportionment of damages between all insurers who insured the risk during the time of the development of the injury would be equitable. In doing so, the court had relied upon a line of cases applying the continuous exposure theory of loss allocation.

The supreme court traced the development of this theory, citing the \textit{Gruol v. Insurance Co. of North America},\textsuperscript{139} \textit{Insurance Co. of North America v. Forty-Eight Insulations},\textsuperscript{140} and \textit{Keene Corp. v. Insurance Co. of North America} cases,\textsuperscript{141} relied on by the court in \textit{California Union}. Prudential asked the court to adopt a "manifestation rule" of property damage, which would fix liability for first-party losses solely on the insurer whose policy was in force at the time the progressive damage manifested.

\textsuperscript{136} Prudential-LMI Commercial Ins. v. Superior Court, 51 Cal. 3d at 686, 798 P.2d at 1238, 274 Cal. Rptr. at 395.
\textsuperscript{137} \textit{Id.} at 687, 798 P.2d at 1238, 274 Cal. Rptr. at 395.
\textsuperscript{138} \textit{Id.} at 693, 798 P.2d at 1242, 274 Cal. Rptr. at 399.
\textsuperscript{140} 633 F.2d 1212 (6th Cir. 1980).
\textsuperscript{141} 667 F.2d 1034 (D.C. Cir. 1981).
The court adopted the rule requested by Prudential, citing Home,142 Snapp143 and Sabella144 with approval. The court noted the manifestation rule in the first-party context:

[P]romotes certainty in the insurance industry and allows insurers to gauge premiums with greater accuracy. Presumably this should reduce costs for consumers because insurers will be able to set aside proper reserves for well-defined coverages and avoid increasing such reserves to cover potential financial losses caused by uncertainty in the definition of coverage.145

The court, therefore, held that "in first-party progressive loss cases, when, as in the present case, the loss occurs over several policy periods and is not discovered until several years after it commences, the manifestation rule applies."146

The court also held the time of manifestation was the same as inception of the loss; i.e., "that point in time when appreciable damage occurs and is or should be known to the insured, such that a reasonable insured would be aware that his notification duty under the policy has been triggered."147

In addition to the court's stated rationale for its ruling, the decision also meets other relevant policy concerns. From a practical standpoint, by establishing a fixed point in time as the trigger of both coverage and the running of the one-year provision, the court prevented the one year provision from running before the insured could reasonably discover the loss. This prevents the insured from being required to file yearly lawsuits to protect his or her rights under the one-year provision.

However, the supreme court expressly refused to define the rules for third-party cases. The Prudential-LMI court repeatedly stated:

146. Id.
147. Id. at 699, 798 P.2d at 1247, 274 Cal. Rptr. at 404.
As we recognized in Garvey v. State Farm Fire & Casualty Co., there are substantial analytical differences between first-party property policies and third-party liability policies. Accordingly, we intimate no view as to the application of our decision in either the third-party liability or commercial liability (including toxic tort) context.148

V. Third-Party Continuous Loss Analysis

In light of the California Supreme Court's action (or inaction), there is presently no clear-cut rule for third-party liability cases. What should the rule be?

As set forth above, there are three areas, or types, of insurers in the third-party arena. There are insurers on the risk before the damage is manifest, insurers on the risk when the damage manifests, and insurers on the risk after the damage manifests.

First, the court should agree with the Aetna holding that post-manifestation carriers are not liable for the loss, even though the damage did occur during their policy periods. Such a ruling would be in harmony with the loss-in-progress rule and would promote all of the same policy considerations that exist in first-party cases.

The governing statutes themselves, Insurance Code sections 22 and 250, apply to both first- and third-party claims. The code sections not only refer to policies which provide coverage for "damage" or "losses," but also refer to policies which provide coverage for "liability." It should be noted that neither statute restricts the applicability of the loss-in-progress rule to events which are contingent from the standpoint of the insured. Rather, both statutes merely preclude coverage for non-contingent liabilities. The question then becomes whether or not the loss-in-progress rule should be applied, in third-party cases, when the insured has notice of the loss or when the loss first becomes manifest to the third-party claimant.

For example, an insured might dump toxic chemicals on his property during year one. During year two, his adjoining landowners' property might be damaged by diffusion of toxic chemicals from the insured's land into the claimant's land. The

148. Id. at 679, 798 P.2d at 1232, 274 Cal. Rptr. at 389 (citations omitted).
claimant might then discover the pollution during year three, yet fail to notify the insured until year five. If the insured was issued a policy by Company A during years one, two and three (the years when the dumping took place, the damage actually occurred, and when the damage became manifest to the claimant), and obtained a new policy from Company B during years four and five (the years when the damage had manifested to the claimant and during which the insured first became aware of the damage), the question would then become whether the loss-in-progress rule would preclude coverage under the policy issued by Company B.

The insured might argue that the loss-in-progress rule is inapplicable since he or she was not aware of the loss when he or she first applied for the policy and therefore, from the standpoint of the insured, the liability was "contingent or unknown." While persuasive at first blush, this argument is nonetheless flawed.

In the first-party context, the focus of the loss-in-progress rule is on the insured's knowledge of facts that would cause a reasonable insured to be aware that his notification duty under the policy has been triggered. It follows that since a first-party loss is incurred, by definition, by the insured himself or herself, the insured's knowledge should be the touchstone for application of the loss-in-progress rule. This same consideration may well require a directly opposite result in the third-party context.

In the third-party context, the claimant is in exclusive control of the property that is allegedly damaged. In fact, many insureds may visit subsequently damaged property only once—as in the case of a contractor performing certain work at a job site. A contractor might work on the claimant's property for a brief period of time, performing negligent acts that subsequently result in damage, and never return.

If the third-party claimant's knowledge is not made the touchstone for application of the loss-in-progress rule in the third-party context, it would discourage an injured claimant from notifying the insured of the damage and thereby exacerbate the cost of indemnity under the policy. For example, if a claimant notices patent construction defects in year one, the claimant could delay notifying the insured until the four-year statute of limitations had almost expired in order to provide three additional years of liability coverage for settlement of the
suit. Such a rule, therefore, would have the practical effect of contradicting the policy of promoting certainty in the insurance industry and reducing costs of insurance for consumers.\textsuperscript{149}

The proper analysis is found at footnote 5 of the \textit{Fireman's Fund Insurance Co. v. Aetna Casualty & Surety Co.} decision.\textsuperscript{150} There, the court stated that "[i]n the context of a liability policy, it is the damage which must be 'contingent or unknown,' and not the liability of the insured or cause of the damage."\textsuperscript{151}

Thus, in the example set forth above, only Company A is at risk for the loss since the claimant's damage was not contingent when policy B was purchased. The carrier on the risk when the damage is manifest to a reasonable claimant should be liable. The manifestation period should be defined as the point in time when appreciable damage occurs and is, or should be, known to the claimant, such that a reasonable claimant would be aware that he or she had suffered a loss. Since it is clear that all carriers on the risk when the damage first becomes manifest will be liable for the loss, the final question to be resolved is whether \textit{pre-manifestation} carriers should also be on the risk.

The standard liability policy provides coverage for "property damage" which takes place "during the policy period." The phrase "property damage" is typically defined as "physical injury to or destruction of tangible property." One approach would be to argue that since the policy provides coverage for physical injury to, or destruction of, tangible property which \textit{in fact occurs} during the life of the policy, there is no legal requirement that the damage be manifest for it to have "occurred." Stated another way, "actual occurrence of damage" and "manifestation of damage" may be different phenomena. \textit{Garriott} suggests that there is no requirement that the damage be manifest for it to have "occurred."\textsuperscript{152} If that approach is
adopted, pre-manifestation carriers may be responsible for damages which in fact occur while their policies are in effect.

There is a significant difference between first- and third-party coverages for purposes of continuous loss analysis. First-party policies are subject to a one year limitation provision while third-party policies are not. As explained above, in the first-party scenario, the supreme court limited the number of insurers at risk in order to prevent the insured from being forced to file yearly lawsuits in order to prevent them from being time barred. Put another way, if the one-year-limitation provision began to run when the damage actually occurred (pre-manifestation), then in order to avoid having the suit barred by the statute of limitations, the insured would be required to file a lawsuit before the expiration of the year following each successive policy. Since this problem is not present in the third-party context, there is no reason to apply the first-party rule in the third-party context.

In *American Star Insurance Co. v. American Employer's Insurance Co.*, the insured installed defective pipe during the first of five successive liability policy periods. The damage became manifest during policy year three and the damage was repaired after year five. The court of appeal held that both pre- and post-manifestation carriers were required to share in the loss, pro rata. In the post-manifestation analysis, the *American Star* court followed the rule of the *California Union* decision.

It should be noted that the California Supreme Court ordered the expansive coverage decision of *American Star* depublished. Although it is risky to assign motives to the supreme court when it depublishes decisions, such depublication could indicate disapproval of such an expansive coverage approach which results in dragging in pre-manifestation insurers.

VI. CONCLUSION

After the California Supreme Court decision in *Prudential-LMI*, questions involving "trigger of coverage" in

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155. Prudential-LMI Commercial Ins. v. Superior Court, 51 Cal. 3d 674, 798
first-party cases have been substantially resolved: only the insurer on the risk when the insured knows, or should know, that he has been appreciably damaged will be liable for the loss. Stated another way, only the insurer on the risk at the time of "manifestation" will provide coverage; pre-manifestation and post-manifestation carriers will not provide coverage in the first-party context.

The proper analysis for third-party cases, however, is still muddled. Cases such as Fireman's Fund v. Aetna suggest that first-party rules should equally apply in third-party cases. One advantage of such an approach is that manifestation tends to be a bright-line test, and this would create more certainty with respect to insurance coverage, although at the same time such a rule would generally result in less protection for the insured from third-party liability claims.

As set forth above, a pro-coverage argument is that both the carrier on the risk when manifestation occurs and the pre-manifestation carrier on the risk when damages in fact occur should provide insurance protection in the third-party liability case.

The disadvantage of this approach is that it removes the certainty that a manifestation test provides—a test which is finally bringing clarity to this muddled area of the law. In the absence of manifestation—a phenomenon which the claimant can see or should be able to see—old problems will continue to exist, namely, when does damage actually occur? This can be a fuzzy concept, involving a battle between geological and soils experts.

The California Supreme Court has studiously avoided stating what the rule should be in third-party liability cases. However, this is an issue which is of vital importance to litigants throughout the state. Therefore, it is expected that, if presented with the proper third-party case, the supreme court will finally clarify the coverage rules for continuous property damage cases in this heavily-litigated area.
