

## **New Construction, Insurable Contingencies And Building Defects In 'Montrose'**

Thomas E. Miller, Los Angeles Daily Journal

**August 10, 1995** - Holding that the timing of an accident, event or conditions causing bodily injury or property damage is largely immaterial in triggering insurance coverage, the California Supreme Court has ruled in *Montrose Chemical Corp. v. Admiral Insurance Co.*, 95 Daily Journal D.A.R. 8733, to establish an insurable risk all that is required is "some" contingency.

Where the existence and extent of prospective damage remains uncertain and there is as yet no "legal obligation to pay", explained the Montrose Court, there is an insurable risk for which coverage may be sought under a third-party policy. As a result, California's "loss-in-progress" rule may no longer be invoked to challenge or eliminate an insurer's duty to defend potential liability claims, whether they are ultimately successful or not.

According to the Court, insurance is a "contract whereby someone undertakes to indemnify another against loss, damage or liability arising from a contingent or unknown event". California Insurance Code Section 250 provides 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". When a loss is "known or apparent" before a policy is issued, there is no coverage. This is the loss-in-progress rule.

Montrose Chemical had manufactured the pesticide dichloro-diphenyl-tichlorethane (DDT) from 1947 to 1982. In 1972, following the federal ban on domestic use of DDT, Montrose nevertheless continued production of the pesticide for export.

Beginning in 1960 and through 1986, Admiral Insurance, along with seven other carriers, intermittently insured Montrose with comprehensive general liability (CGL) policies. Then, in 1983 and 1986, Montrose was sued by the federal government and the state of California for continuous and successive manifestations of environmental damages from its disposal of toxic and hazardous wastes. Additionally, Montrose was joined as an indispensable party defendant to three other private suits.

Through pretrial motions, Admiral sought to defend the suits against Montrose by using California's "loss-in-progress" rule, contending that the causal connections and/or events that would trigger coverage under the policy's terms had occurred prior to the date any policies it had issued were in effect.

The trial court agreed, stating that under the prevailing "manifestation of loss" rule, insurance coverage is triggered when any damage is first discovered, and liability becomes the sole responsibility of the individual insurers providing coverage at the time. This ruling benefited Admiral since it was not the insurer at the time damage was discovered.

On appeal, the California Court of Appeal reversed the lower court, finding that despite the initial discovery of damages, the CGL policy's language nonetheless provided coverage for damages or injury occurring during the policy periods, as long as progressively (successively) manifesting damages resulted, at least potentially, from the property's repeated (sequential) exposure to injurious causal conditions.

When the case was presented to the California Supreme Court, Admiral argued that the Court of Appeal had mistaken its policy's coverage for that of a policy against contingent damages.

Under the loss-in-progress rule, Admiral reasoned, its policy's language insured against only those damages triggered by formerly contingent causes, and not the still contingent, unforeseeable extent of damages. Thus, where a continuing process of injury or damage has been revealed, the operative date when damages were first discovered defined whether or not an insurer owed a duty to defend its client.

The Court, however, disagreed and stressed that Admiral's insurance contract was designed to afford third-party liability protection for its client as against any "sums which the insured shall become legally obligated to pay as damages" because of bodily injury or property damage (caused by its client) that then successively manifests while the policy is still in effect.

In the context of third-party liability coverage, where there is uncertainty about the "imposition of liability" and/or where the amount of liability to be paid is yet to be established, concluded the Court, there remains a potentially insurable risk.

By distinguishing the scope of contingency inherent in all third-party insurance contracts, the Court's holding permits the application of progressive and continuous damage concepts not only to cases involving successive manifestations of environmental contamination, but also to parallel instances of continuous manifestations of damage in construction defect cases.

In construction defect situations, each component, whether actual buildings, the plumbing and drainage systems or subsystems servicing them, are integral parts of a larger whole. Common interest developments are a complex of mechanically integrated systems.

Since most injuries resulting from sub-standard materials or workmanship are latent, by the time the damage is discovered, each subcontractor's contribution is so commingled with other's work it is impossible to predict who is responsible or to apportion blame. This situation is further compounded by the sheer number of construction specialists that erect the final product.

As the Court recognized, proper analysis of the damage contingencies that may be sustained by third parties not in privity with the insured and its insurer must be based on a prospective outlook, not determined from hindsight.

In addition to the concurrent (commingled) causation typical of construction defect cases, *Montrose* serves to further reinforce the current state of California law that deems each building or infrastructural component a severable interest and already carrying a building completion date for when the statute of limitations commences.

Since the Court has found that the mere inevitability of prospective damages can no longer transform a contingent loss into one prohibited by the loss-in-progress rule, homeowner associations will be pleased that the finger-pointing and scapegoating, which usually occurs in negotiations among the numerous contractors and subcontractors, will give way to a much more enhanced process of global settlement among the various insurers whose policies are triggered by the damage.