



Weekly Law Resume

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WEEKLY LAW RESUME™

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Coverage - Pre-Existing Damage Exclusion

Pennsylvania General Ins. Co. v. American Safety Indemnity Co.
Court of Appeal, Fourth District (June 28, 2010)

After the *Montrose Chemical Corp. of California v. Admiral Ins. Co.* (1995) 10 Cal.4th 645, 669- 670 decision, insurance companies attempted to limit the effect of that decision to eliminate potential coverage for claims that arose prior to their policy period. This case concerns one of those attempts.

D.A. Whitacre Construction, Inc., a framing subcontractor, was insured under a Comprehensive General Liability policy issued by Pennsylvania General Insurance Company from 1998 through 2001. During that time, it performed work on a project for GAFCON Construction Company. Thereafter, Whitacre was insured by American Safety Indemnity Company from 2001 through 2002. Whitacre was sued for work done on the project. Whitacre tendered to both Pennsylvania General and ASIC. Pennsylvania General accepted the tender under a reservation of rights, and ultimately paid all defense and settlement costs. ASIC declined the tender. After the suit was settled, Pennsylvania General sued ASIC, seeking equitable contribution. The trial court granted ASIC's motion for summary judgment and Pennsylvania General appealed.

The Court of Appeal reversed. ASIC argued that its policy covered only damages caused by an occurrence during its policy term, and expressly excluded coverage for any loss that first manifested before the term of its policy. ASIC argued that the term "occurrence" referred to the conduct that caused the damage rather than the damage resulting from the conduct. The ASIC policy modified the term "occurrence" to include in its definition that property damage which commenced prior to the effective date of the insurance would be deemed to have occurred outside the term of the policy. There was also an endorsement to the policy that eliminated coverage for any occurrence which first occurred prior to the inception date of the policy.

The Court of Appeal stated California case law is clear that the time of an occurrence is when the complaining party was damaged. Looking at the ASIC definition of occurrence, the Court concluded it was susceptible to the interpretation that the damage still must take place during the policy period to create coverage. It did not clearly limit coverage to those claims in which the causal acts took place

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during the policy period.

The endorsement, in the Court's analysis, solidified this interpretation. It excluded from coverage damage that first happened before the inception date of the ASIC policy.

The Court felt this interpretation was consistent with existing California law. The Court stated the appropriate focus for an occurrence is when the damages caused by the negligent causal acts of the insured first commenced, not on when the insured commenced its work. Here, the summary judgment in favor of ASIC was based solely on the conclusion there was no potential for coverage, because Whitacre's causal acts happened before the inception of the ASIC policy. The trigger of coverage was when the damages caused by the negligent causal acts of the insured first commenced. There simply was no requirement in the policy that the work of the insured must have happened during the policy period.

In this case, it was disputed as to when the damages sought in the construction defect litigation first commenced. It was therefore error to grant summary judgment. The matter was reversed and remanded to the trial court.

COMMENT

This decision points out that efforts to limit the effect of Montrose must clearly and definitively spell out how the policy is changed. A failure to do so will result in the effort being of no effect.

For a copy of the complete decision see:

[HTTP://WWW.COURTINFO.CA.GOV/OPINIONS/DOCUMENTS/D054522.PDF](http://www.courtinfo.ca.gov/opinions/documents/D054522.pdf)

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