

by Ashley B. Jordan

THE LANGUAGE OF LOSS

Anti-Montrose provisions may significantly impact commercial general liability coverage, especially construction defect and products liability claims

Sometimes called known loss, “anti-Montrose” provisions are typically found in an insurance policy’s insuring agreement and aim to collapse coverage for a continuing/progressive injury/damage into a single policy year. These provisions have been included since the 2001 revision of the Insurance Services Office (ISO) standard policy, (form CG 00 01).¹ (See “Anti-Montrose Provisions” sidebar on page 26.)

The California Supreme Court’s seminal decision in *Montrose Chemical Corporation v. Admiral Insurance Company*² was the impetus for the crafting of the language. In *Montrose*, the issue was whether a commercial general liability (CGL) carrier was obligated to defend lawsuits alleging continuous and progressive damage and injury resulting from hazardous chemicals the insured manufactured before and during the policy period at issue. The California Supreme Court answered the question in the affirmative, ruling that with respect to successive third-party liability policies, “bodily injury and property damage that is continuous or progressively deteriorating throughout several policy periods is potentially covered by all policies in effect during those periods.”³ In other words, the court ruled the “continuous injury” trigger applies to third-party liability cases

involving continuous or progressively deteriorating losses.

The court also determined, “with respect to the ‘loss-in-progress’ rule codified in Insurance Code sections 22 and 250,”⁴ knowledge of prior or progressive bodily injury or property damage would not defeat coverage under a CGL policy “as long as there remains uncertainty about damage or injury that may occur during the policy period and the imposition of liability upon the insured, and no legal obligation to pay third party claims has been established.”⁵ The court emphasized the requirement in Insurance Code Sections 22 and 250 that the loss be “unknown” or “contingent” is stated in the disjunctive. Accordingly, the court interpreted Sections 22 and 250 to mean that “all that is required to establish an insurable risk is that there be *some* contingency.”⁶ The court continued: “Even where subsequent damage might be deemed inevitable, such inevitability does not alter the fact that at the time the contract of insurance was entered into, the event was only a *contingency* or *risk* that might or might not occur within the term of the policy.”⁷ Thus, so long as liability was uncertain, a policyholder would be able to claim coverage under successive policies—multiplying the total amount of

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available coverage.

The 2001 ISO revisions sought to limit *Montrose* by collapsing coverage for a continuous/progressive injury/damage into a single policy year, thus shielding the insurer from claims against successive policies.

Recent Cases

California courts have and continue to address the implications of anti-Montrose language in unpublished opinions and district court orders. These decisions offer guidance as to how the courts are analyzing these provisions in the context of carriers' defense and indemnity obligations. In *St. Paul Fire & Marine Insurance Company v. Insurance Company of the State of Pennsylvania*,⁸ the Insurance Company of the State of Pennsylvania (ICSP) sought reimbursement from other carriers for its payment toward settlement of a construction defect action. The ICSP moved for summary judgment against Zurich American Insurance Company, arguing Zurich wrongly contributed toward settlement under its 2006-2007 policy, which carried a \$1 million limit, rather than its 2012-2013 policy, which carried a \$2 million limit. Zurich's policies covered the time period 2006 to 2014. The parties did not dispute that the insured's negligent actions as a housing project subcontractor caused continuous/progressively deteriorating property damage during the entire

2006-2014 time frame.

The 2012-2013 Zurich policy contained the standard ISO anti-Montrose provision.⁹ (See Anti-Montrose Provisions sidebar below.) The insured was held liable in the underlying action for having caused interior damage to the bathrooms caused by improper installation of green board¹⁰ and exterior damage caused by improper stucco installation. The ICSP claimed the insured did not have knowledge of the exterior damage until after the inception of the 2012-2013 Zurich policy.

The court denied the ICSP's motion, finding a triable issue of material fact as to whether the insured was "aware by any other means" (subsection d(3) of the anti-Montrose provision) of the exterior property damage prior to the 2012-2013 Zurich policy. The court stated there was record evidence supporting both carriers' positions:

On the one hand, the communications from [the project's general contractor] to [the insured] only discussed an investigation into "potential exterior defects" and did not provide knowledge specifically of any property damage. On the other hand, although the Court doubts that notice of "potential exterior defects" constitutes knowledge of property damage, [the insured's] responses to interrogatories specifically state that "[The insured] became aware of allega-

tions of negligent work and related alleged damages at the Project, including the exteriors, at least by March 26, 2012."...This interrogatory indicates that the notice from the [project owner] in March [2012] made [the insured] aware of "damages," and the Court cannot foreclose that possibility.¹¹

In *Ameron International Corporation, et al. v. American Home Assurance Company*,¹² an insured sued its carrier, American Home Assurance Company (AHAC), to recover defense costs incurred. American Home Assurance Company refused to defend its insured against a lawsuit alleging that failure of paint supplied by the insured and affixed to onshore and offshore facilities in a natural gas production project corroded the underlying steel structure and pipelines. Arguing the insured was aware of the property damage prior to policy inception, AHAC claimed its CGL policy's anti-Montrose provision¹³ precluded a defense. The underlying lawsuit alleged three categories of damage: 1) paint failure at the project, 2) damage to the underlying steel at the offshore facilities, and 3) damage to the underlying steel at the onshore facilities. The parties filed cross-motions for summary judgment on the duty to defend.

The district court entered summary judgment in the carrier's favor, ruling the anti-Montrose provision precluded a defense because: 1) the evidence showed that certain of the insured's employees had been notified of paint system failures throughout the project before policy inception,¹⁴ and 2) the damage at the onshore facilities was a continuation, change, or resumption of the coating failures at the offshore facilities, which the insured knew of prior to policy inception.¹⁵ The insured appealed.

The Ninth Circuit reversed and granted summary judgment to the insured on the defense issue. As to the corrosion at the onshore facilities and pipelines, the court concluded there was potential coverage despite the anti-Montrose provision and thus a defense was owed. The court ruled there was an issue of fact as to whether the insured had pre-policy knowledge of the corrosion to the underlying steel at the onshore facilities and pipelines:

Although [AHAC] has presented some evidence that the [insured] had pre-policy knowledge of corrosion and damage to the underlying steel at the onshore facilities and pipelines, none of this evidence is "conclusive[.]"...Additionally, several key [insured] employees testified that they did not have knowledge of corrosion or other damage to the underlying

Anti-Montrose Provisions¹

b. This insurance applies to "bodily injury" and "property damage" only if:

(3) Prior to the policy period, no insured listed under Paragraph 1. of Section II—Who is An Insured and no "employee" authorized by you to give or receive notice of an "occurrence" or claim, knew that the "bodily injury" or "property damage" had occurred, in whole or in part. If such a listed insured or authorized "employee" knew, prior to the policy period, that the "bodily injury" or "property damage" occurred, then any continuation, change or resumption of such "bodily injury" or "property damage" during or after the policy period will be deemed to have been known prior to the policy period.

c. "Bodily injury" or "property damage" which occurs during the policy period and was not, prior to the policy period, known to have occurred by any insured listed under Paragraph 1. Of Section II – Who Is An Insured or any "employee" authorized by you to give or receive notice of an "occurrence" or claim, includes any continuation, change or resumption of that "bodily injury" or "property damage" after the end of the policy period.

d. "Bodily injury" or "property damage" will be deemed to have been known to have occurred at the earliest time when any insured listed under Paragraph 1. of Section II – Who is An Insured or any "employee" authorized by you to give or receive notice of an "occurrence" or claim:

- (1) Reports all, or any part, of the "bodily injury" or "property damage" to us or any other insurer;
- (2) Receives a written or verbal demand or claim for damages because of the "bodily injury" or "property damage"; or
- (3) Becomes aware by any other means that "bodily injury" or "property damage" has occurred or begun to occur.²

¹ Some carriers are using language similar, but not identical, to this ISO wording to limit coverage for continuous/progressive injuries/damages.

² See Commercial Gen. Liability Coverage Form CG 00 01 10 01, §1, 1.b.(3), 1.c.-d.

MCLE Test No. 272

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1. "Anti-Montrose" language is usually found in the "Conditions" section of an insurance policy.
True.
False.
2. Anti-Montrose provisions have been included in commercial general liability insurance policies since the 2001 revision of the Insurance Services Office standard policy (form CG 00 01).
True.
False.
3. Anti-Montrose language was drafted in response to the California Supreme Court's decision in *Montrose Manufacturing Corporation v. Liberty Insurance Co.*
True.
False.
4. In *Montrose*, the court ruled that with respect to successive third-party liability policies, bodily injury and property damage that is continuous or progressively deteriorating throughout several policy periods is potentially covered by all policies in effect during those periods.
True.
False.
5. In *St. Paul Fire & Marine Insurance Co. v. Insurance Co. of the State of Pennsylvania, et al.*, the court found a triable issue of material fact as to whether the insured was "aware by any other means" of the exterior property damage prior to the 2012-2013 Zurich policy.
True.
False.
6. In *Ameron International Corporation, et al. v. American Home Assurance Co.*, the Ninth Circuit concluded the anti-Montrose provision precluded a defense.
True.
False.
7. In *State v. Continental Insurance Co., et al.*, the court determined the insured could "stack" its policies.
True.
False.
8. In *St. Paul Fire*, the court ruled an anti-stacking provision did not preclude the insured from stacking successive commercial general liability policies to cover continuing/progressive property damage.
True.
False.
9. In *Atain Specialty Insurance Co. v. Sierra Pacific Management Co., et al.*, the court determined the commercial general liability policies' plain language prohibited stacking.
True.
False.
10. Continuous or progressive injury and damage exclusions preclude coverage for all previously occurring bodily injury/property damage known to the insured.
True.
False.
11. In *Saarman Construction, Ltd. v. Ironshore Specialty Insurance Co.*, the court granted the carrier's motion

for summary judgment, ruling paragraph 1 of the continuous or progressive injury and damage exclusion precluded potential coverage and, in turn, the carrier's defense obligation.

- True.
False.
12. *American Zurich Insurance Co., et al. v. Ironshore Specialty Insurance Co.* involved an action in which defending carriers alleged a nondefending commercial general liability carrier wrongly refused to defend their mutual insureds against construction defect lawsuits based on a continuous or progressive injury and damage exclusion.
True.
False.
 13. When interpreting an insurance policy in California, the ordinary rules of contractual interpretation apply.
True.
False.
 14. In California, a policy provision will be considered ambiguous when it is capable of two or more constructions, both of which are reasonable.
True.
False.
 15. California law dictates that coverage provisions are interpreted narrowly so as to afford the greatest possible protection to the insurer.
True.
False.
 16. In California, the duty to defend is excused only when the third-party complaint cannot by any conceivable theory raise a single issue that could bring it within the policy coverage.
True.
False.
 17. Under California law, insurers are not obligated to defend the entire action if the action includes uncovered and potentially covered claims.
True.
False.
 18. To determine whether an insurer owes a duty to defend, California courts will compare the allegations of the complaint with the terms of the policy.
True.
False.
 19. California law dictates that allegations in the complaint are liberally construed toward potential coverage.
True.
False.
 20. Any doubt as to whether the facts establish the existence of the defense duty must be resolved in the insurance company's favor.
True.
False.



THE LANGUAGE OF LOSS

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13. True False
14. True False
15. True False
16. True False
17. True False
18. True False
19. True False
20. True False

steel at the onshore facilities until after the policy's inception. This testimony alone creates an issue of fact about the [insured's] knowledge.¹⁶

It further ruled that an issue of fact remained regarding whether the corrosion to the underlying steel at the onshore facilities and pipelines was a "continuation, change or resumption" of the known corrosion to the offshore facilities (pre-policy inception):¹⁷

[AHAC] argues that "continuation, change, or resumption" refers to the same type or same cause of damage, regardless of how widespread or physically separated that damage is. Under this definition, [AHAC] argues that the later corrosion at the onshore facilities and pipelines qualifies as a "continuation, change, or resumption" of the offshore property damage because the same paint continued to fail in the same ways giving rise to the same type of damage. However, even assuming that [AHAC's] interpretation of the policy is correct, there are issues of fact as to whether the corrosion at the various locations shared a common cause.¹⁸

In sum, because it was possible the damage to the underlying steel at the onshore facilities and pipelines was neither known to the insured pre-policy inception nor a "continuation, change or resumption" of the known offshore facility damage, the anti-Montrose provision did not preclude AHAC's duty to defend.

Restrictive Endorsements

The insurance industry has also drafted noncumulation of liability/anti-stacking endorsements in an effort to limit the effect of *Montrose*, by restricting liability for continuing/progressive injuries/damages to the limits of one policy. Differently manuscripted versions of these endorsements have appeared in CGL policies.¹⁹ One such version provides:

If the same occurrence gives rise to... property damage...which occurs partly before and partly within any annual period of this policy, the limit of liability of this policy shall be reduced by the amount of each payment made by [the carrier] with respect to such occurrence, either under a previous policy or policies of which this is a replacement, or under this policy with respect to previous annual periods thereof.²⁰

Another states:

Regardless of the number of insured persons, injured persons, claims, claimants or policies involved, our

total liability under Business Liability Protection coverage for damages resulting from one loss will not exceed the limit of liability for Coverage X shown on the declarations page. All bodily injury, personal injury and property damage resulting from one accident or from continuous or repeated exposure to the same general conditions is considered the result of one loss.²¹

In *State v. Continental Insurance Company*,²² the California Supreme Court addressed whether excess carriers were obligated to indemnify for an action holding the insured liable for continuous and progressive damage. The damage stemmed from the insured's operation of a hazardous waste site and spanned numerous successive policy periods.

The court determined that each carrier was required to indemnify for all the damage, subject to its policy limits, as long as some of the continuous/progressive damage occurred during its policy period (the "all sums" principle). The court also concluded the insured could "stack" its policies—i.e., include "the insurance coverage from different policy periods to form one giant 'uber-policy' with a coverage limit equal to the sum of all purchased insurance policies"²³—because the policies did not contain anti-stacking language. In other words, each policy was required to respond to the claim (up to its limits) and upon exhaustion of one carrier's limits, indemnity could be sought from the other carriers. The court emphasized that "standard policy language *permits* stacking" but noted "an insurer may avoid stacking by specifically including an 'antistacking' provision in its policy."²⁴

Several California federal courts recently grappled with these provisions. In *St. Paul Fire*, the court concluded that an anti-stacking provision precluded the insured from stacking its successive CGL policies to cover continuing/progressive property damage. The provision stated in relevant part:

11. Two or More Coverage Forms or Policies Issued by Us

If this Coverage Form and any other Coverage Form or policy issued to you by us or any company affiliated with us apply to the same "occurrence," the maximum Limit of Insurance under all the Coverage Forms or policies shall not exceed the highest applicable Limit of Insurance under any one Coverage Form or policy and only that limit shall apply to that occurrence....²⁵

The court ruled that because the policies with the highest limits within the series

afforded \$2 million limits, the aggregate limit for all the policies within the series, per the anti-stacking provision, would be \$2 million.

In *Atain Specialty Insurance Company v. Sierra Pacific Management Company*,²⁶ California Capital Insurance Company (CCIC) sought a declaration that coverage under its successive CGL policies was limited to \$1 million per an alleged anti-stacking provision. Since CCIC paid \$1.9 million to settle a lawsuit involving a continuous/progressive bodily injury, the carrier also sought \$900,000 in reimbursement from its insureds. Each of the six policies afforded \$1 million per occurrence and \$2 million aggregate limits. The parties disputed whether the following section in the policies constituted an anti-stacking provision:

D. Liability and Medical Expenses Limits of Insurance

....

2. The most we will pay for the sum of all damages because of all:

a. "Bodily injury," "property damage" and medical expenses arising out of any one "occurrence"...is the Liability and Medical Expenses limit shown in the Declarations.²⁷

That section also stated "the limits of this policy apply separately to each consecutive annual period and to any remaining period of less than 12 months."²⁸

The court granted the insureds' motion for summary judgment against CCIC, reasoning the policies' plain language did not prohibit stacking:

True, each policy states that its per-occurrence coverage is capped at \$1 million, but the policies do not state that the per-occurrence limit applies across policy periods. Just the opposite: as the [insureds] point out, each policy refers to its per-occurrence limit on an annual basis. For example, each policy states "the limits of this policy apply separately to each consecutive annual period." That language makes plain that the policy limits "apply separately" to each policy period. That is precisely the point of stacking.²⁹

The court stated even if the policies were ambiguous, the insureds still prevailed per California principles of insurance policy interpretation; the carrier failed to clearly prohibit stacking. The court concluded the insureds could stack their limits, and that the amount of the settlement thus did not exceed their coverage.

CP Exclusions

Commercial General Liability carriers are also including manuscript continuous or



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November 17, 2014

Jack Trimarco & Associates
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Dear Mr. Trimarco:

In the winter of 2010, an environmental disaster occurred off the west coast of the island of Oahu in the State of Hawaii. Heavy rainfall caused millions of gallons of contaminated water—including toxic soil, trash and human medical waste—to pour from the Waimanalo Gulch Sanitary Landfill into the ocean waters. Federal officials launched an investigation into the landfill's operator, Waste Management of Hawaii ("WMH"). The U.S. Attorney's Office alleged there was a conspiracy between members of the WMH and its environmental consulting firm to submit false information to regulators about the adequacy of the landfill's storm water management system.

I represented an employee of the environmental consulting firm hired by WMH to perform construction quality assurance. During the investigation, all evidence pointed to the fact that my client was innocent of any wrongdoing. Nevertheless, the Assistant U.S. Attorney insisted that my client pass a polygraph, or else risk being indicted as a participant in the criminal conspiracy.

In 2012, you conducted a polygraph examination of my client, unequivocally establishing that no deception was indicated. The Assistant U.S. Attorney then demanded that my client pass a polygraph examination administered by FBI agents in Honolulu. The FBI alleged my client failed their polygraph examination, but you responded with a thorough and compelling critique demonstrating how the FBI's polygraph examination was deficient and should be disregarded.

Last year, I was notified by the U.S. Attorney's Office of the District of Hawaii that their office would not seek an indictment of my client, nor would any charges against him be pursued. I believe your carefully and competently constructed polygraph examination and critique of the FBI's polygraph results played a central role in our advocacy that prosecution should be declined in my client's case.

Sincerely,

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progressive injury and damage exclusions (CP Exclusions)³⁰ in their policies to counter the effect of *Montrose*, for example:

This insurance does not apply to any damages because of or related to “bodily injury,” “property damage,” or “personal and advertising injury”:

- (1) which first existed, or alleged to have first existed, prior to the inception date of this policy; or
- (2) which are, or are alleged to be, in the process of taking place prior to the inception date of this policy, even if the actual or alleged “bodily injury,” “property damage,” or “personal and advertising injury” continues during this policy period; or
- (3) which were caused, or are alleged to have been caused, by the same condition which resulted in “bodily injury,” “property damage,” or “personal and advertising injury” which first existed prior to the inception date of this policy.

We shall have no duty to defend any insured against any loss, claim, “suit,” or other proceeding alleging damages arising out of or related to “bodily injury,” “property damage,” or “personal and advertising injury” to which this endorsement applies.

This exclusion, unlike the anti-Montrose/known loss language, excludes all previously occurring bodily injury or property damage or both regardless of the insured’s knowledge. It thus may operate to severely limit or eliminate coverage traditionally afforded by CGL policies, as only a single policy would respond to a single injury or instance of damage.

Two recent California federal decisions illustrate the sweeping effect these exclusions may have on coverage. *Saarman Construction, Ltd. v. Ironshore Specialty Insurance Company*³¹ involved an action by an insured against its CGL carrier, claiming the carrier wrongly refused to defend it against a construction defect lawsuit based on the policy’s CP Exclusion. The CGL policy covered the time period June 30, 2010 to June 30, 2011 and contained the following CP Exclusion:

This insurance does not apply to any “bodily injury” or “property damage”:

1. which first existed, or is alleged to have first existed, prior to the inception of this policy. “Property damage” from “your work,” or the work of any additional insured, performed prior to policy inception will be deemed to have first existed prior to the policy inception, unless such

“property damage” is sudden and accidental and takes place within the policy period [sic]; or

2. which was, or is alleged to have been, in the process of taking place prior to the inception date of this policy, even if such “bodily injury” or “property damage” continued during this policy period; or

3. which is, or is alleged to be, of the same general nature or type as a condition, circumstance or construction defect which resulted in “bodily injury” or “property damage” prior to the inception date of this policy.³²

The court granted the carrier’s motion for summary judgment, ruling that paragraph one of the CP Exclusion precluded potential coverage and, in turn, the carrier’s defense obligation. The court reasoned that because the insured did not dispute that it finished its work by 2007, or at the latest several years before the policy inception, the CP Exclusion “automatically deems that damage to have first existed prior to the policy inception” and precluded a defense.³³

The court rejected the insured’s argument that the CP Exclusion was unenforceable because it rendered the policy ambiguous as to trigger of coverage, reasoning the endorsement containing the CP Exclusion clearly and unambiguously modified the policy. The court also rejected the insured’s argument that the CP Exclusion was unenforceable because it was an undisclosed exclusion of completed operations coverage. It concluded the CP Exclusion did not render completed operations coverage illusory and the carrier properly warned the insured via language in the policy that the CP Exclusion modified completed operations coverage.

*American Zurich Insurance Company, et al. v. Ironshore Specialty Insurance Company*³⁴ involved an action by defending CGL carriers against a non-defending CGL carrier, Ironshore Specialty Insurance Company (Ironshore). The defending carriers alleged Ironshore wrongly refused to defend their mutual insureds (Matt’s Roofing and Sherman Loehr) against construction defect lawsuits based on a CP Exclusion in the Ironshore policies.³⁵ The Ironshore policies issued to Matt’s Roofing covered the time period January 1, 2009 to January 1, 2011; the policy issued to Loehr covered the time period October 31, 2009 to October 31, 2010.

The court granted Ironshore’s motion for summary judgment, concluding that the CP Exclusion precluded a defense as to all but one of the lawsuits.³⁶ As to the

lawsuits against Matt’s Roofing, the court concluded: 1) paragraph one of the CP Exclusion precluded a defense as to several lawsuits filed before the policy inception date, since those plaintiffs, by filing when they did, were aware of the alleged defect/damage pre-policy inception; and 2) paragraphs one and/or two of the CP Exclusion precluded a defense as to other lawsuits in which the complaints alleged that the defect existed at the time the homes were completed and/or purchased (pre-policy inception) and continued to cause damage until the plaintiffs performed repairs, and there were no allegations of “sudden and accidental” damage. As to the lawsuits against Loehr, the court determined paragraphs one and/or two of the CP Exclusion precluded a defense since it was alleged that Loehr completed its work pre-policy inception (thus the defect existed at the time the work was completed and/or the homes purchased) and there were no allegations of “sudden and accidental” damage.

Policyholder Defenses

Although specific defenses will depend on the precise policy language and facts at issue, policyholders have several generally applicable defenses at their disposal.

Each continuing/progressive injury/damage component is analyzed separately. First, such language is unlikely to preclude coverage unless the carrier can demonstrate that the insured was aware of the specific injury/damage for which coverage is being claimed prior to the policy’s inception date.³⁷ Second, it is the type of injury/damage that matters—the injuries/damages at issue should be treated separately for purposes of analyzing these provisions under successive policies. In other words, while each injury/damage component may be continuing or progressive in nature, each continuing/progressive injury/damage component should be analyzed separately—the policies require only that each continuing/progressive injury/damage component must commence during one of the policy periods.

If there is a single series of continuing/progressive injuries/damages, the insured can argue the injuries/damages do not share the same cause. California courts have determined “[f]or property damage to be a ‘continuation, change or resumption’ of earlier property damage,...the earlier and later property damage must ‘share the same cause.’”³⁸

California principles of insurance policy interpretation dictate the language is inapplicable. In California, when interpreting an insurance policy “the ordinary rules of

contractual interpretation apply.”³⁹ “The fundamental goal of contractual interpretation is to give effect to the mutual intention of the parties.”⁴⁰ “Such intent is to be inferred, if possible, solely from the written provisions of the contract.”⁴¹ “If contractual language is clear and explicit, it governs.”⁴² “A policy provision will be considered ambiguous when it is capable of two or more constructions, both of which are reasonable.”⁴³ If the court finds that a policy provision is ambiguous, it will interpret it “against the party who caused the uncertainty (i.e., the insurer) in order to protect the insured’s reasonable expectation of coverage.”⁴⁴

Coverage provisions are “interpreted broadly so as to afford the greatest possible protection to the insured, [whereas]...exclusionary clauses are interpreted narrowly against the insurer.”⁴⁵ “Provisions that purport to exclude coverage or substantially limit liability must be set forth in plain, clear and conspicuous language.”⁴⁶

The language does not preclude a carrier’s duty to defend. Such provisions may not preclude a carrier’s defense obligation, given the broad nature of the duty under California law and the likelihood that most pleadings will not eliminate the possibility that the insured was unaware of the specific injury and/or damage at the time the policy inception.

California law requires an insurer to defend its insured against claims that create even a potential for indemnity.⁴⁷ The duty to defend is excused only when “the third party complaint can by no conceivable theory raise a single issue which could bring it within the policy coverage.”⁴⁸ Insurers must defend the entire action if there is any potentially covered claim.⁴⁹ “The determination as to whether the insurer owes a duty to defend usually is made in the first instance by comparing the allegations of the complaint with the terms of the policy.”⁵⁰ Extrinsic evidence may defeat the duty to defend only if “such evidence presents undisputed facts which conclusively eliminate a potential for liability.”⁵¹ The allegations in the complaint are “liberally construed” toward potential coverage.⁵² “Any doubt as to whether the facts establish the existence of the defense duty must be resolved in the insured’s favor.”⁵³

Risk Management

In the more than two decades since the California Supreme Court’s decision in *Montrose*, the cycle continues: policyholders employ various defenses to avoid application of anti-Montrose and similar language. And when the courts side with policyholders, the insurance industry reacts

by drafting new language intended to null the effects of those decisions.

Policyholder and corporate counsel should be aware of these provisions and their potential implications, as they may significantly impact coverage available for a given injury/damage. Policyholders associated with various industries are routinely impacted, as carriers frequently cite these provisions to deny coverage for a spectrum of claims—especially construction defect and products liability claims. Counsel should consider advising his or her clients to consult their brokers regarding removing or restricting, to the extent possible, this language. ■

¹ See SCOTT C. TURNER, INSURANCE COVERAGE OF CONSTRUCTION DISPUTES §6:50 (2d ed. 2016) [hereinafter TURNER].

² *Montrose Chem. Corp. v. Admiral Ins. Co.*, 10 Cal. 4th 645 (Cal. 1995).

³ *Id.* at 655.

⁴ The common law doctrine/rule known as the Known Loss Rule, Known Risk Rule, Loss-in-Progress Rule, or Fortuity Doctrine flows from the principle that insurance covers only contingent and unknown events. California has codified this doctrine/rule. See INS. CODE §§22, 250. A comprehensive discussion of the history and status of this doctrine/rule is beyond the scope of this article.

⁵ *Montrose*, 10 Cal. 4th at 655.

⁶ *Id.* at 690 (emphasis in original).

⁷ *Id.* (emphasis in original).

⁸ *St. Paul Fire & Marine Ins. Co. v. Insurance Co. of the State of Pa.*, No. 15-CV-02744-LHK, 2017 WL 897437 (N.D. Cal. Mar. 7, 2017).

⁹ See *id.* at *9-10.

¹⁰ ICSP conceded the insured had knowledge of the interior damage prior to the inception of the 2012-2013 Zurich policy.

¹¹ *St. Paul Fire*, 2017 WL 897437, at *12.

¹² *Ameron Int’l Corp., et al. v. American Home Assurance Co.*, 625 Fed. Appx. 803 (9th Cir. 2015).

¹³ The policy contained the standard ISO anti-Montrose provision. See Findings of Uncontroverted Facts & Conclusions of Law in Support of J. at ¶¶ 32-33, 36, *Ameron Int’l Corp. v. Am. Home Assurance Co.*, No. 12-cv-08582-R-VBK (C.D. Cal. June 5, 2013).

¹⁴ See *id.* at ¶¶ 5-7.

¹⁵ See *id.* at ¶ 8.

¹⁶ *Ameron*, 625 Fed. Appx. at 805.

¹⁷ The court determined the record conclusively showed the insured knew of the damage to the underlying steel at the offshore facilities before the policy inception.

¹⁸ *Ameron*, 625 Fed. Appx. at 805.

¹⁹ See TURNER, *supra* note 1, at §4:10. The ISO has yet to promulgate a standard noncumulation of liability/anti-stacking endorsement. See *id.*

²⁰ *Liberty Mut. Ins. Co. v. Black & Decker Corp.*, 383 F. Supp. 2d 200, 216 (D. Mass. 2004).

²¹ *Hiraldo ex rel. Hiraldo v. Allstate Ins. Co.*, 840 N.E. 2d 563, 564 (N.Y. 2005).

²² *State v. Continental Ins. Co., et al.*, 55 Cal. 4th 186 (Cal. 2012).

²³ *Id.* at 201.

²⁴ *Id.* at 201-02 (emphasis in original).

²⁵ *St. Paul Fire & Marine Ins. Co. v. Ins. Co. of the State of Pa.*, No. 15-CV-02744-LHK (N.D. Cal. Mar. 7, 2017). [Redacted Ex. 21 to Decl. of Matthew C. Lovell and Request for Judicial Notice in Support of ICSP’s Motion for Summary Judgment at 545.]

²⁶ *Atain Specialty Ins. Co. v. Sierra Pac. Mgmt. Co.*, No. 14-cv-00609-TLN-DB, 2016 WL 6568678 (E.D. Cal. Nov. 3, 2016). The appeal of this Order was pending in the Ninth Circuit Court of Appeal as of the date this article was prepared. See *Atain Specialty Ins. Co. v. Sierra Pac. Mgmt. Co.*, No. 16-17221 (9th Cir.).

²⁷ *Atain*, 2016 WL 6568678, at *4.

²⁸ *Id.*

²⁹ *Id.* at *5.

³⁰ Also sometimes called the Prior Incident(s) Exclusion, Prior Construction Defects Exclusion, Pre-Existing Injury or Damage Exclusion, Pre-Existing and Progressive Damage Exclusion, or Claims in Progress Exclusion.

³¹ *Saarman Constr., Ltd. v. Ironshore Specialty Ins. Co.*, No. 15-cv-03548-JST, 2017 WL 312343 (N.D. Cal. Jan. 31, 2017).

³² *Id.* at *2.

³³ *Id.* at *9. The insured did not contend the damage was “sudden and accidental.”

³⁴ *American Zurich Ins. Co., et al. v. Ironshore Specialty Ins. Co.*, No. 2:14-cv-00060-TLN-DB, 2016 WL 6441610 (E.D. Cal. Oct. 31, 2016).

³⁵ The policies contained the same CP Exclusion as that at issue in *Saarman*. See *Saarman*, 2017 WL 312343 at *3.

³⁶ The court denied the parties’ summary judgment motions as to one lawsuit because it did not have the operative complaint, and thus could not determine whether the plaintiffs alleged a “sudden and accidental” occurrence (that may have precluded application of the CP Exclusion).

³⁷ See, e.g., TURNER, *supra* note 1, at §6:50 (“One point that has been developed somewhat by the courts and commentators to have considered the Montrose Provision thus far is the requirement for enforcement of the provision that the insured be aware of the exact same property damage as that for which the insured later seeks coverage.”).

³⁸ *St. Paul Fire & Marine Ins. Co. v. Ins. Co. of the State of Pa.*, No. 15-CV-02744-LHK, 2017 WL 897437, at *10 (N.D. Cal. Mar. 7, 2017); see also *Jardine v. Maryland Cas. Co.*, Nos. 10-3335 SC, 10-3336 SC, 10-3318 SC, 10-3319 SC, 2011 WL 6778798, at *11 (N.D. Cal. Dec. 27, 2011), *aff’d*, 532 Fed. Appx. 662 (9th Cir. 2013) (concluding damage caused to front section of south wall was a continuation of damage sustained to rear section of south wall, as the same defective plaster treatment caused the damage to both wall sections).

³⁹ *Bank of the W. v. Superior Ct.*, 2 Cal. 4th 1254, 1264 (Cal. 1992).

⁴⁰ *Id.*

⁴¹ *AIU Ins. Co. v. Superior Ct.*, 51 Cal. 3d 807, 822 (Cal. 1990).

⁴² *Bank of the W.*, 2 Cal. 4th at 1264.

⁴³ *Foster-Gardner, Inc. v. Nat’l Union Fire Ins. Co.*, 18 Cal. 4th 857, 868 (Cal. 1998).

⁴⁴ *La Jolla Beach & Tennis Club, Inc. v. Industrial Indem. Co.*, 9 Cal. 4th 27, 37 (Cal. 1994).

⁴⁵ *MacKinnon v. Truck Ins. Exch.*, 31 Cal. 4th 635, 648 (Cal. 2003).

⁴⁶ *Thompson v. Occidental Life Ins. Co.*, 9 Cal. 3d 904, 921 (Cal. 1973) (citation omitted).

⁴⁷ See *Align Tech., Inc. v. Fed. Ins. Co.*, 673 F. Supp. 2d 957, 967 (N.D. Cal. 2009).

⁴⁸ *Montrose Chem. Corp. v. Superior Ct.*, 6 Cal. 4th 287, 300 (Cal. 1993).

⁴⁹ See *Horace Mann Ins. Co. v. Barbara B.*, 4 Cal. 4th 1076, 1081 (Cal. 1993).

⁵⁰ *Id.* at 1080.

⁵¹ *Montrose*, 6 Cal. 4th at 298-99.

⁵² *Church Mut. Ins. Co. v. U.S. Liab. Ins. Co.*, 347 F. Supp. 2d 880, 887 (S.D. Cal. 2004).

⁵³ *Montrose*, 6 Cal. 4th at 299-300.