

The first time anyone heard of a “continuous trigger” decision was back in 1995 when the California Supreme Court issued its ruling in the *Montrose* case. This created a watershed moment for underwriters, claims adjusters, agents and insurance buyers alike. The result of this decision was the insertion of “known loss or damage” language into the insuring agreement of the General Liability policy, first by an endorsement in 1997 and subsequently included the next published ISO edition. There is a new decision by the California Supreme Court that will have an impact on the method of claim payments for continuous or repeated injury or damage. Clearly this is significant for construction defect and some products liability claims. Although these decisions are California jurisdiction, anytime there is a significant court decision anywhere in the country, form revisions and exclusions often follow. In order to discuss the latest decision, *State of California v. Continental Insurance Company*, it is appropriate to go back to that original decision and others that followed to have a contextual understanding of how these decisions have cumulatively affected coverage and claims and will continue to do so for quite some time.

Montrose Chemical Corp. v. Admiral Ins. Co. (1995) 10 Cal.4th 645, 655

Montrose was named as a Potentially Responsible Party in the EPA’s mandated clean-up of the Stringfellow Superfund Site in Riverside County, CA. When this PRP notification was received by Montrose, they notified their Environmental Impairment Liability carrier but not their General Liability carrier, Admiral. When litigation subsequently commenced against Montrose, not only by the Federal government for environmental damage, but other injury and damage claims by individual litigants, Montrose then turned to their insurance carrier, Admiral Insurance Company for defense. Admiral declined, stating that the manifestation of these losses occurred upon notification of the PRP status, which occurred during a time that Admiral was not Montrose’ insurance carrier. At that time, adjusters were using a “manifestation” trigger of a single liability policy to pay ongoing injury or damage claims. The judicial review of the policy obligations to defend an insured took almost a decade to complete. The 1995 decision by the California Supreme Court provided a strict interpretation of the policy language regarding the policies that are required to defend. The Montrose court applied a “continuous” trigger for continuous or progressively deteriorating injury or damage. This means that all insurers, beginning at the point a reasonable person believes that the injury or damage first began, all insurers during the subsequent injury or damage period and concluding when legal liability has been imposed.

To use a simple illustrative example: A water pipe is damaged during construction and over the next 6 years the property sustains water damage. It is first noticed by the property owner in 2010. Under the old claims guidelines, the 2010 policy was triggered. Under the “continuous” trigger, all of the policies from 2006 through 2010 are triggered. If the damage continues past 2010, all insurers will continue to be triggered until legal liability has been imposed.



This ruling left several coverage questions unaddressed:

1. Does this decision apply to damages?
2. Can the insured stack their limits of insurance over the entire continuous time period?
3. What happens if the insured has a time period for which they are not insured during the continuous injury or damage period?
4. How does this decision affect allocation of defense and damages among the various insurers on any given loss?
5. If the insured has both primary liability coverage as well as excess liability coverage, how does each policy respond?

Each of these questions have been subsequently addressed by either California Appellate Courts or by the California Supreme Court.

Armstrong World Industries, Inc. v. Aetna Casualty & Surety Co., supra, (1st Dist., Div. 1, 1996) 45 Cal.App.4th 1, 55-57, 52 Cal.Rptr.2d 690

This ruling held that insurers on the risk must pay the insured 100% of the insured's liability to third parties even though the insured was uninsured or self-insured for a portion of the time during which "occurrences" were occurring.

Stonewall Ins. Co. v. City of Palos Verdes Estates, (1996) 46 Cal. App. 4th 1810

The *Stonewall* case deals with a couple of the issues raised above. This case involved a property owner, Papworth, who filed litigation against the City for the ultimate condemnation of his property due to actions of the City over a significant time period, beginning somewhere around 1971 and continuing until the home's effective destruction in 1980. The jury awarded Papworth \$1,188,791.57 as damages for negligence and nuisance and \$1,881,946.70 as damages for inverse condemnation. Judgment was entered for \$1,881,946.70. Pending appeal, the underlying action was settled by payment of \$1,600,000. Of the \$1,600,000 settlement, \$350,000 was paid by the City, \$300,000 by The Jefferson Insurance Company of New York ("Jefferson") and \$950,000 by Stonewall Insurance Company ("Stonewall"). Other insurers of the City refused to contribute toward the settlement. The court addressed the following questions:

Question 1: How much of a judgment is the City entitled to recover from each primary insurer?

Question 2: In what proportions are the primary carriers to share in whatever payments any of them made or makes toward the \$1.6 million loss?

The *Stonewall* court concluded: "We find the answer to Question 1 in *Montrose*'s analysis: All primary carriers on the risk are liable to the City (up to the limits of their respective policies, less any applicable deductibles or retentions) for the full \$350,000. Inherent in *Montrose*'s conclusion that in cases involving a "continuing injury" trigger of coverage is the principle that damage was occurring throughout the period in question and that all carriers issuing primary policies for dates within that period are fully liable to the insured for the entire loss. Once an injury triggers coverage, ... the insurer must indemnify the insured for **"all sums"** which the

insured becomes obligated to pay, whether during the period of the policy issued by that insurer or after.”

Question 2 involves allocation among the primary carriers during the time of the risk. The *Stonewall* court resolved this question by stating that “because we must consider both principles of equity and principles of public policy, formulating a principle of allocation is no easy task. Equity indicates that all insurers whose policies covered the loss should participate in the cost of indemnifying the insured.” ...”Apportionment based upon the relative duration of each primary policy as compared with the overall period during which the “occurrences” “occurred” (the “time on the risk” method).” In this case, the court recognized that there may need to be exceptions to this allocation method and did not make it a mandatory rule to follow in future cases. The court addressed the “other insurance” clause that may appear in the policies in question. If that clause allows for a pro-rate allocation method, then that would dictate apportionment. The court also applied a “horizontal” exhaustion rule, which stated that all of the primary policies would respond, and only after the total exhaustion of the primary policies limits, could the excess liability policies be required to respond. The *Stonewall* decision also concluded that since the insured is entitled to payment of damages up to the limit of liability, any self-insured (or lack of insurance) is not calculated into this qualified time on the loss.

State of California v. Continental Insurance Company, et al., Case No. S170560

On August 9, 2012, the California Supreme Court issued a long-awaited unanimous decision, affirming that a policyholder is allowed to recover up to the total limits of all triggered policies over multiple policy years and may stack limits across the triggered policy periods.

For the background, we go right back to the Stringfellow Superfund Site. The State of California was held liable for remediation costs (as high as \$700 million) and sought to recover from its various liability insurers.

The Supreme Court has now ruled on each of the following points:

- Each insurer during the continuous loss has an obligation to pay the entire claim, even if only part of the damages occur during their specific policy period (“**all sums**”). The Supreme Court affirmed that once coverage for continuous damage is triggered, the insurer is required to pay for **all sums** up to the policy limits of liability. It rejected a pro-rata, time-on-the-risk approach. The Supreme Court noted that “It is often ‘virtually impossible’ for an insured to prove what specific damage occurred during each of the multiple consecutive policy periods in a progressive property damage case. If such evidence were required, an insured who had procured insurance coverage for each year during which a long-tail injury occurred likely would be unable to recover.”
- The insured can stack policy limits across the various policy periods, even when coverage is issued by the same insurance company. The Supreme Court affirmed the Court of Appeal’s ruling that a “no-stacking ruling” was erroneous and concluded that the insured was entitled to stack the limits of all triggered policies across all applicable policy periods.
- The court stated that an insurer can limit their exposure by including an anti-stacking provision in their policies



- If the policy contains a self-insured retention, then that SIR must be paid for each policy period

The Supreme Court reasoned that its “all-sums-with-stacking” rule has several advantages:

- It resolves, as equitably as possible, the question of insurance coverage in long-tail injury or damage
- It allows a fair distribution of coverage, paid in annualized premiums by the insured, and allows the insured to receive coverage up to each policy’s liability limits
- It allows recovery from the insurance policies by looking at the entire amount of damages, rather than requiring it to be broken into artificial periods of injury or damage

So, here’s what we are left with:

Many insured’s face long-tail injury or damage losses. Each insurance company providing a policy can be held responsible to pay up to their policy limits but can charge the insured any retention on the policy. There has been a long-standing argument from insurance adjusters on this issue. There is one more case that I did not address above and that is the Armstrong decision that allows the insured to “select” a particular policy to defend and pay damages. Should the insured tender to one carrier for defense and damages and notice only the other possible insurers? In light of this decision, that choice may be moot as it appears that the court will allow the insurers to distribute the claim proportionately, even among their own multiple policy periods. Watch how fast the adjusters use this decision to apply multiple deductibles and multiple retentions, even if notice was tendered to only one policy period.

We are likely going to see “clarification” in the insuring agreement regarding the issue of “all sums for which the insured is legally liable”. The current policies do not use this phrase and instead state: ***We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies.***

There may well be challenges at some future point on this distinction. Stay tuned.

The court left intact a horizontal application of insurance coverage, requiring the primary policies to contribute their full limits on a pro-rata allocation basis prior to attaching the excess liability policies. There is likely to be yet another long and costly battle among primary insurers vs. excess insurers on this issue.

In the absence of an anti-stacking endorsement, the insured is entitled to stack the policies. That is likely to be the next industry response: an anti-stacking provision that up until this decision, has been omitted from the vast majority of policies. All of these decisions should concern the insurance agent as well as the insurance buyer. From the insurance buyer’s perspective, they need to retain coverage information indefinitely. From the insurance agent’s perspective, filing claims on the insured’s behalf, explaining how a SIR may affect their coverage response as well as the applicability of limits of liability, just got a little more complicated.