Known Injury or Damage

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In the CGL policy, an "occurrence" includes the possibility that the cause of bodily injury or property damage may exist or continue for a period of time. Does coverage cease for all subsequent CGL policies once the policyholder learns of the continuing injury or damage? The case of Montrose Chemical of California v Admiral Insurance Company examined this question and the Insurance Services Office, Inc., responded.

by Craig F. Stanovich, CPCU, CIC, AU
Austin & Stanovich Risk Managers, LLC

Beginning with the November 1988 "occurrence" Commercial General Liability Coverage Form (CG 00 01), the insuring agreement obligates an insurer to pay damages because of bodily injury and property damage (Coverage A) only if both of the following conditions are met:

- The bodily injury or property damage is *caused* by an occurrence that takes place in the coverage territory, and
- The bodily injury or property damage occurs *during the policy period*

Occurrence—Including Continuous or Repeated Exposure

While most of the above terms are defined in a commercial general liability (CGL) insurance policy (including coverage territory), a couple of observations about "occurrence" are important to understand. First, an occurrence contemplates both an "accident" as well as "continuous or repeated exposure to substantially the same harmful conditions." Provided the bodily injury or property damage was not *intended* by the insured, and bodily injury or property damage results, it will likely be considered an "occurrence." But an "occurrence" is broader than an unintentional act—it includes the possibility that the cause of bodily injury or property damage may exist or continue for a period of time.

An example of an "occurrence" that causes damage over time is a municipal swimming pool that springs a small leak, gradually causing structural property damage to the adjacent buildings. Even though damage to the buildings took place over a period of months, this event would likely be considered "an occurrence." The property damage to the buildings was caused by a continuous exposure to substantially the same harmful conditions: the slowing leaking water.

Occurrence Is Not the Trigger

Another important observation about "occurrence" is that the *bodily injury or property damage* must occur *during the policy period* to trigger the CGL coverage. A common misperception is that the "occurrence," or the cause of the bodily injury or property damage, is the CGL trigger. In short, if bodily injury or property damage takes place during the policy period, coverage is triggered on the "occurrence" CGL policy, regardless of when the occurrence took place.

When Does the Bodily Injury or Property Damage Occur?

For most CGL claims, the injury or damage takes place almost simultaneously with or immediately after the occurrence. For example, a mason drops a brick on a parked car, causing property damage to its windshield. The occurrence (dropping of the brick) causes property damage (the smashing of the windshield). Most people would

consider this a simple accident. There is little question as to when the property damage actually happened.

But what if the bodily injury or property damage does not happen quickly? What if it is the type of injury or damage that happens gradually, deteriorating or progressing over time?

CGL Trigger Theories

Asbestos and environmental litigation in the late 1970s and early 1980s forced several courts to take up this question. Several CGL "trigger" theories gradually evolved as a response. While not always easily distinguishable from one another, four trigger theories have emerged. What follows is a very brief description of each.

Exposure Trigger. First applied in asbestos-related injury claims, bodily injury was determined to have occurred beginning with the *first contact* the asbestos had with the injured party. Therefore, each CGL policy in effect during the exposure period (when the injured party had contact with asbestos) was triggered. Note that no actual injury has yet to take place—just exposure to an injurious substance.

Manifestation Trigger. This theory, which has some of its roots in first-party property claims, did not deem injury or damage to occur until the injury or damage *manifested* itself, meaning it was capable of being diagnosed for bodily injury or is able to be discovered for property damage. Only the CGL policy in effect at the time of manifestation or discovery is triggered.

Injury-in-Fact Trigger. Also first developed as a result of asbestos-related claims, this theory did not subscribe to the notion that mere exposure to asbestos fibers should trigger coverage. Instead, this theory held that a real but yet undiscovered injury can be proven, *after the fact*, to exist. The underlying assumption is that when the disease was diagnosed, it could also be determined, based on the progression of the disease, about when injury actually began to occur. Each CGL policy in effect during the retrospectively determined period of such injury is triggered under this approach.

Continuous Trigger. Initially referred to as the "triple trigger" theory, this idea is the broadest of theories and finds injury or damage occurs starting at exposure and ending at manifestation. All CGL policies in effect during exposure up through manifestation are triggered by this interpretation. Some courts have put a slightly different twist on this theory: CGL coverage is triggered as long as damage continues to occur, even after injury or damage has manifested itself or is or can be discovered.

Known and Continuous Injury or Damage

Is a CGL policy triggered when progressive injury or damage continues into the policy period even after the injury or damage has manifested itself and is discovered? Or does coverage cease for all subsequent CGL policies once the policyholder learns of the continuing injury or damage?

Montrose Chemical of California v Admiral Insurance Company

The California Supreme Court addressed two issues in this now infamous ruling. The first issue was the coverage trigger to apply to the CGL. The second issue was whether Montrose was barred from coverage based on California insurance regulations codifying the "known loss" or "loss-in-progress" doctrine.

A Brief Background. Montrose Chemical made pesticides (DDT) at its plant in California; Admiral Insurance wrote CGL coverage for Montrose Chemical from October 13, 1982, until March 20, 1986.

On August 31, 1982, 6 weeks prior to the first Admiral CGL policy, the Environmental Protection Agency (EPA) issued a potentially responsible party (PRP) letter to Montrose, notifying Montrose that it considered Montrose a potentially responsible party for the contamination of a state-licensed and approved hazardous disposal site known as the J.B. Stringfellow site. Related private lawsuits alleging damages for bodily injury followed, as did other public and private actions.

Montrose did not notify Admiral about the PRP letter until February 15, 1985, when it provided the PRP information along with other information to Admiral in preparation for the CGL policy renewal (Despite the PRP disclosure, Admiral did renew the CGL from 1985 to 1986.)

Admiral Sues. Montrose demanded defense for the above actions from all its CGL insurers, past and current. All insurers, except Admiral, agreed to defend the actions with reservations of rights. Admiral refused to defend and moved for summary judgment in 1989, contending that there existed no *possibility* of coverage under its CGL policies since:

1. The circumstances that trigger coverage had not occurred.
2. The *Stringfellow* case was uninsurable due to the California “known loss” or “loss-in-progress” rule.

The Trial. The trial court upheld Admiral’s position. The justices agreed the CGL policy in effect at the time the progressive damage is *first discovered* is the ONLY policy that is triggered. In other words, the trial court applied the “manifestation” trigger theory to the CGL policy. As respects the known loss or loss in progress, the trial court ruled that the Admiral policy was not obligated to respond as, prior to the commencement of Admiral’s policy, Montrose knew its liability for bodily injury or property damage was likely.

Montrose Appeals. The California Court of Appeals reversed the summary judgment and found for Montrose Chemical. The appellate court rejected the “manifestation” trigger theory, finding it did not fit with the CGL policy wording. As respects the “loss-in-progress” rule, the court of appeals found it did not bar coverage even though the damage or injury had occurred, as liability had not been established and was thus an insurable contingency, even if liability was inevitable.

On appeal, Admiral apparently raised for the first time the argument that coverage was barred under the CGL as Montrose Chemical *expected or intended* the injury or damage. The appellate court, according to the California Supreme Court’s opinion, declined to address this argument and also remanded Admiral’s defense of concealment of material facts.

Supreme Court of California. At Admiral’s request, the Supreme Court of California granted review of the California Court of Appeals' decision. Taking pains to distinguish third-party from first-party insurance, the supreme court provided a detailed review of the other “trigger” theories. In concluding that the “manifestation” trigger would convert an occurrence-based CGL policy into a claims-made CGL policy, the unanimous court found the “continuous trigger” theory best matched the CGL policy wording.

Writing for the majority (concurring opinions were also filed), Chief Justice Lucas found bodily injury or property damage that is continuous or progressively deteriorating throughout successive policy periods is potentially covered by *all policies* in effect during the periods injury or damage *continued* to occur.

Known Loss or Loss-in-Progress. Although Montrose knew of the potentially responsible party letter prior to the Admiral policy, the court ruled that the letter did no more than put Montrose on notice of the government's position and begin the government's proceedings that could result in liability. But the PRP letter did not, in itself, create liability. Montrose was ruled to have defense coverage under its CGL policies.

The Montrose Conclusion. A CGL loss is not a loss until legal liability has been established. Since the PRP letter did not finalize liability, although it was likely (but not certain) that Montrose would have liability, the so-called known loss or loss-in-progress rule was inapplicable to this claim and did not apply.

If Admiral had initially argued the PRP letter established that injury or damage was expected or intended by Montrose and therefore not an occurrence, might the outcome have been different? But that was not what Admiral argued at the summary judgment trial level. Instead, Admiral chose to rely solely on the manifestation trigger and known loss or loss-in progress rule per California insurance regulations.

A Firestorm of Controversy

Many insurance industry commentators reacted strongly to this California ruling. Some viewed this ruling a violation of a fundamental principle of insurance: the principle of fortuity. Yet, the legal arguments presented by Admiral contended the PRP served on Montrose was evidence of a known loss, or at least a loss in progress. What appears to have been overlooked is that the CGL does not require payment of bodily injury or property damage claims if legal liability is likely; legal liability of an insured must be established. Therefore, this claim was simply not a loss—either known or in progress.

An interesting concurring opinion was entered by Justice Baxter, who agreed that the statutory "loss-in-progress" rule did *not* eliminate Admiral's duty to defend Montrose. However, Justice Baxter expressed concern that the application of the court's theory may allow the purchase of liability insurance for a completed tort up to the moment a final judgment is imposed. Instead, he concluded that it is the event or events (the occurrence) that must remain contingent or unknown, not the actual liability arising from those events

Judge Baxter went on to say he did agree that the "loss-in-progress" rule did not preclude liability coverage for future or unknown harm, even if the insured knew that some harm may already have arisen. In the Montrose claim, any new harm that may have continued into the Admiral policy period was insurable.

ISO Responds

In their January 1999 Circular, Insurance Services Office, Inc. (ISO), announced that the Montrose case, along with other court decisions, rendered the known loss rule inapplicable to the CGL. It was ISO's position that insurance was not intended to apply to liability arising out of any injury or damage that was *known* to have occurred *prior* to a policy's effective date. Apparently, the likelihood of an insured's liability for such continuing known injury or damage was not to be considered. CGL coverage was not to apply (even for defense), despite the fact that the insured may have no liability and therefore no CGL loss. Thus, the known loss or loss-in-progress rule was transformed to a known injury or damage rule.

Known Injury or Damage. The known injury or damage change to the CGL was introduced by ISO as a "mandatory" endorsement to be added to the 1998 CGL policy (and any prior editions being used at the time). The known injury or damage

wording was incorporated into the 2001 edition of the CGL as part of the Coverage A insuring agreement.

This new wording adds a third condition to the Coverage A—Bodily Injury and Property Damage Liability insuring agreement. It qualifies the CGL coverage trigger for continuous or progressively deteriorating injury or damage. More specifically, not only must bodily injury or property damage be caused by an occurrence and take place during the policy period, certain insureds must not know, *prior to the policy period*, the injury or damage has occurred or is occurring. Such knowledge will eliminate all coverage under the CGL for injury or damage that continues into or resumes during the policy period.

In the beginning of this article, we asked "Is a CGL policy triggered when progressive injury or damage continues into the policy period even after the injury or damage has manifested itself and is discovered?" With the known injury or damage wording, the answer is now very clear: coverage ceases for all subsequent CGL policies once certain insureds learn of any continuing injury or damage.

Who Must Know? This restriction or qualification of the CGL coverage trigger applies only if the continuing injury or damage is known by certain insureds. The "certain" insureds are those included in Who Is An Insured—Section II, paragraph 1, and include:

- Named insured individuals (sole proprietors) and their spouses with respect to conduct of the business
- Partners of a named insured partnership or members of a named insured joint venture and their respective spouses with respect to conduct of the business
- Members and managers of a named insured limited liability company
- Executive officers, directors, and stockholders
- Trustees of a named insured trust

In addition, any employee who is authorized by the named insured to give or receive notice of a claim or occurrence is listed as one of the insureds whose knowledge will nullify coverage. Such a person or persons could range from a corporate risk manager to an administrative assistant so long as the employee is authorized to "give or receive" notice of a claim or occurrence. Note that this restriction does not apply to any employee, only employees authorized to give or receive notice of a claim or occurrence.

How Is "Known" Determined? The CGL attempts to clarify this question by stating that bodily injury or property damage is deemed to be "known" when a listed insured:

1. Reports all or part of bodily injury or property damage under a previous policy, either the current insurer's policy or another insurer's policy; or
2. Receives a demand or claim for damages due to 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.

Applies Only to Known Injury or Damage. The known injury or damage wording does not superimpose the "manifestation trigger" theory on the CGL. Provided the listed insureds *do not know* of the continuing or progressive injury or damage, all of the CGL policies in effect during such injury or damage will be triggered—presuming

a “continuous trigger” theory is applied in the court with jurisdiction over the coverage dispute.

Resumption or Continuation. ISO’s intent is not necessarily to require the insurer with a CGL policy in force to be the only insurer to respond to the claim when the injury or damage is discovered. It is their intent, however, that subsequent policies will not be triggered after a listed insured becomes aware of the injury or damage.

In fact, the insurers whose CGL policies are triggered are responsible (subject to policy terms, conditions, and limits) not only for the continuous injury or damage that becomes known during their policy period, but are also responsible for any continuation, change, or resumption of that bodily injury or property damage, even if the injury or damage takes place *after* the policy period. This last modification is made necessary to avoid a gap in coverage that may exist for policyholders who have purchased continuous CGL coverage.

For example, suppose the leaking municipally owned pool previously mentioned continues to leak after the initial property damage was discovered and repaired. The insurer providing the CGL policy in effect at the time the damage continued would deny coverage because the property damage was known to have begun to occur during a prior policy period.

ISO’s solution is that the insurer or insurers responsible for the property damage caused by the first leak should also be responsible for all of the damage caused by the same occurrence—a resumption of the property damage—even though the resulting damage took place after the policy expired. It is instructive to note that ISO viewed the known injury or damage wording change as neutral; it is intended to neither broaden nor restrict coverage.

Conclusion

The *Montrose Chemical* decision and ISO’s resulting change to the CGL policy’s Coverage A insuring agreement is a significant change in the occurrence-based CGL “trigger.” An otherwise covered CGL claim may not be covered even if the injury or damage occurs during the policy period and is caused by an occurrence. Another consideration is introduced that must be fully understood in order to provide policyholders with accurate coverage advice and fair claim handling.

Craig F. Stanovich is co-founder and principal of Austin & Stanovich Risk Managers, LLC, a risk management and insurance advisory consulting firm specializing in all aspects of commercial insurance and risk management, providing risk management and insurance solutions, not insurance sales. Services include fee based "rent-a-risk manager" outsourcing, expert witness and litigation support and technical/educational support to insurance companies, agents and brokers. Email at cstanovich@austinstanovich.com. Website www.austinstanovich.com.

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