

by Robert Ball

Background

The Insurance Services Office (ISO) incorporated new wording (copy attached) into the 2001 and subsequent editions of their Commercial General Liability (CGL) form. Inserted into the Insuring Agreement, it is commonly called the Montrose wording (Montrose), a reference to the closely-watched 1995 California Supreme Court decision (*Montrose Chemical Corp. versus Admiral Insurance Company*) to which it was a response.

More than seven years later, as litigation around it begins to surface⁽¹⁾, this wording is still widely misunderstood. Clarifying Montrose is critical: it directly impacts how a policy responds to some of the most complex liability losses an Insured can face – namely, losses involving Bodily Injury (BI) or Property Damage (PD) that continue over time (continuing losses)⁽²⁾.

Without a clear understanding of Montrose, it will be more difficult to determine whether policy limits adequately cover an insured's exposure to continuing losses. It will also be more difficult to determine if Excess placements will respond to a given loss immediately upon exhaustion of underlying placements, especially where Excess policies do not incorporate the Montrose wording.

Where Are We Going?

Exactly how any policy reacts to a given loss will vary depending on the facts of the case, the law by which the policy is interpreted, and the jurisdiction where the case is litigated. Accordingly, we cannot predict how any particular policy will respond to a specific loss.

We will, instead, concentrate on drawing attention to the issues raised by the Montrose wording, and on offering the broader perspective necessary to analyze its impact on particular situations.

To accomplish this, we will contrast the CGL with the Montrose wording included to policy forms that do not incorporate Montrose and to forms not even written on the same occurrence basis. Along the way, we will also clarify some common points of confusion about policy mechanics and terminology that pre-date Montrose.

How Will We Get There?

We are presenting our analysis in several parts:

- In this paper, we examine the wording's impact on Primary CGL programs.
- In a second paper, we will examine the differences between Montrose and other known occurrence or known loss wordings that have been appearing in recent years.
- In a final paper, we will examine the interplay between Primary programs incorporating Montrose and Excess programs, which often do not incorporate it and which may also be written using a different coverage trigger than the CGL.

⁽¹⁾ 'Transportation Insurance Co. vs. The Regency Roofing Cos. Inc.' (05-80830 - U.S. District Court, Southern District of Florida), one of the first cases to directly consider the impact of the wording, offers a glimpse into the complexities that can arise when trying to apply it to real losses.

⁽²⁾ The Montrose Wording has no impact on 'Personal and Advertising Injury' (PAAI), so we are ignoring PAAI here.

Our Starting Point (*The World Before Montrose*)

The Montrose wording establishes rules impacting access to, or the ‘triggering’ of, a policy. To evaluate the impact of these rules, we must start with a clear understanding of how policies were ‘triggered’ before they included this wording.

Most CGL policies are written on an ‘occurrence’ policy-form; that is, on a form commonly described as incorporating an occurrence trigger. This description is accurate in that no coverage can apply unless injury or damage results from an occurrence. It is, however, also an accurate description of the other basic casualty policy forms, since all occurrence-reported forms and most, if not all, claims-made forms also require a triggering occurrence⁽³⁾. In that sense, almost all casualty policies incorporate an occurrence coverage trigger and might also be viewed as occurrence policies.

What actually distinguishes the basic casualty forms from each other is the mechanism determining which policy periods respond to claims arising from occurrences. This mechanism constitutes a second trigger, a policy period trigger. In this respect, the three forms are triggered as follows:

Occurrence	by claims arising from BI or PD taking place during the period
Claims-Made	by claims made during the period ⁽⁴⁾⁽⁵⁾
Occurrence-Reported	by claims arising from occurrences reported to the Insurer during the period ⁽⁵⁾

Policy periods of occurrence policies are, then, actually triggered on an injury/damage basis. This is vital to understand when analyzing situations where injuries or damages arising from an occurrence take place over more than one policy period.

How Montrose Changed the CGL

Prior to Montrose, the CGL Insuring Agreement simply stated that the policy applied to BI or PD if that BI or PD took place during its policy-period and arose from an occurrence taking place within its coverage territory.

The Montrose wording inserts two important modifications into this Agreement, a Known BI/PD restriction and a Future BI/PD expansion.

Known BI /PD Restriction. Montrose excludes BI/PD taking place during a policy-period if that BI/PD is a “continuation, change, or resumption” of BI/PD of which, in whole or in part, any of a specified group of Insureds and employees was aware prior to policy inception.

⁽³⁾ Claims-made forms tend to use the term ‘loss’ but generally define it so it essentially equates to an ‘occurrence’.

⁽⁴⁾ Some claims-made forms trigger the policy period during which a claim is made against or received by the Insured, irrespective (subject to the policy’s loss/occurrence/claim notification requirements) of when reported to the Insurer; others only trigger when the claim is made against or reported to the Insurer, and some of these may exclude claims not reported to the Insurer during the same period as first made against or received by the Insured.

⁽⁵⁾ Claims-made and occurrence-reported policies usually incorporate a ‘retroactive’ restriction (excluding claims from occurrences/injuries/damages taking place before a specified ‘Retroactive Date’) that rarely if ever appears in occurrence policies.

Future BI/PD Expansion. Montrose confirms that a triggered policy is exposed to all future “continuation, change, or resumption” of the BI/PD that triggered it.

These modifications refer to BI/PD—not to occurrences. Since it is obvious that occurrences can cause multiple injuries/damages, we must assume the choice of words was intentional and therefore has significance. With that in mind, the Known BI/PD Restriction by itself appears to have the following impact:

- The policy is triggered by BI/PD that takes place during its policy-period *if* that BI/PD is not a continuation, change, or resumption of BI/PD of which any specified Insured or employee became aware prior to the policy’s Inception.
- If BI/PD that triggers a policy continues, changes, or resumes into a succeeding period, the succeeding policy is triggered by that continuation, change, or resumption *unless* a specified Insured/employee becomes aware of the BI/PD prior to the succeeding policy’s Inception.
- If a specified Insured/employee becomes aware of BI/PD resulting from an occurrence, that awareness should not prevent a succeeding policy from being triggered by *other* BI/PD arising from that occurrence (i.e., by BI/PD that is *not* a continuation, change, or resumption of the BI/PD of which the Insured/employee became aware).

When that impact is coupled with the impact of the Future BI/PD Expansion, a coverage overlap emerges:

- The overlap is with respect to BI/PD that continues through more than one policy-period before being discovered by a specified Insured/employee.
- Each policy up to and including the policy in effect when the BI/PD is discovered is triggered by the portion of the injury/damage that takes place during its period and by all subsequent continuation, change, or resumption of that injury/damage.
- The portion of such BI/PD taking place after the first renewal following the start of the BI/PD therefore triggers two policies/limits; the number of policies/limits triggered by the portion taking place after each succeeding renewal increases by one up to and including the last renewal preceding discovery.

To further complicate things, it also appears that different injuries/damages arising from the same occurrence might trigger different mixes of, and/or total numbers of, policies/limits.

- This is based on the assumption that not all injuries/damages arising from every given occurrence will be deemed a continuation, change, or resumption of other injuries/damages arising from that occurrence.
- If that assumption is correct, and if the different injuries/damages also begin taking place or are discovered at different times, they will trigger different sets of policies.

What Are the Practical Implications?

Again, exactly how any policy reacts to a given claim will vary depending on the facts of the case, the law by which the policy is interpreted, and the jurisdiction where the case is litigated. Therefore, it is impossible to make statements here that will be valid in all conceivable circumstances.

In many instances, however, the Montrose wording is likely to reduce the number of policies/limits available to continuing BI or PD. Because of that, in some instances it may also reduce the number of policies/limits available to the occurrences from which that BI or PD

arose. What it does not do, however, is definitively restrict occurrences or continuing BI/PD to only one policy/limit. Under a CGL with the Montrose wording, with respect to BI/PD:

- Single occurrences can still conceivably access multiple limits.
This is usually considered an advantage, although it also makes these occurrences subject to multiple deductibles/retentions.
- Single occurrences can still conceivably be subject to multiple deductibles/retentions.
This is usually considered a disadvantage, but one that might be an acceptable trade-off for allowing these occurrences to access multiple limits.
- It is still impossible to know in advance exactly how many occurrence policies will be triggered by a given occurrence.
- It is still impossible to know in advance exactly how much of any continuing BI/PD arising from a given occurrence will be assigned to each triggered policy.

The Bottom Line

The Montrose wording seems to partially mitigate uncertainty concerning how the CGL occurrence policy responds to continuing BI/PD but it remains difficult to predict exactly how many policy periods/limits of an occurrence program will be available to such BI/PD or exactly how such BI/PD will be allocated among the available policy-periods/limits.

Insureds still need to recognize and somehow accommodate this uncertainty when designing insurance programs. They also need to realize that it has impacts in terms of each policy's responsibility for handling and/or absorbing the costs of Defense, as well as Damages.

- Allocating cost and responsibility for handling Defense can be as complex and significant as allocating Damages. This may become more apparent when we focus on the interplay between Primary and Excess placements later in this series of papers.

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ISO CG 00 01 (10 01, 12 04, and 12 07 editions; © ISO Properties, Inc., 2000, 2003, 2006)
SECTION I – COVERAGES; COVERAGE A - BODILY INJURY AND PROPERTY DAMAGE LIABILITY
1 - INSURING AGREEMENT *Montrose Wording' highlighted*

- a. 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. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "bodily injury" or "property damage" to which this insurance does not apply. We may, at our discretion, investigate any "occurrence" and settle any claim or "suit" that may result. But:
- (1) The amount we will pay for damages is limited as described in Section III Limits Of Insurance; and
 - (2) Our right and duty to defend ends when we have used up the applicable limit of insurance in the payment of judgments or settlements under Coverages A or B or medical expenses under Coverage C.
- No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under Supplementary Payments - Coverages A and B.
- b. This insurance applies to "bodily injury" and "property damage" only if:
- (1) The "bodily injury" or "property damage" is caused by an "occurrence" that takes place in the "coverage territory";
 - (2) The "bodily injury" or "property damage" occurs during the policy period; and
 - (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 has begun to occur.
- e. Damages because of "bodily injury" include damages claimed by any person or organization for care, loss of services or death resulting at any time from the "bodily injury".